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 XXXIV.

VICTORIA, B. C.
PRINTED BY THE COLONIST PRINTING AND PUBLISHING COMPANY, Limited.
1925.

conclusions. Then it was contended that in any case the assessment of damages was not permissible by reason of the frailty and indefiniteness of the pleadings as to damages. I cannot see that there is any point in this contention. It is fundamental in pleading that damages need not in their nature be specifically set forth save where special damage is claimed, and that is not the present case. Finally, it was forcefully presented upon the part of the defence that the *quantum* of damages as allowed was in error and calculated upon an erroneous basis, that is, the plaintiffs had elected to sue in British Columbia, that the scale of damages must necessarily be that of the *lex fori* not the *lex loci contractus*. Upon a study of the authorities cited and an examination of others I have no hesitation in coming to the conclusion that the damages were rightly assessed in conformity with the existent law in the State of California, one of the United States of America, where the contract was made and where it was to be performed. The learned trial judge had the advantage of evidence, indicating great skill and learning from legal experts of the State of California, addressed to this point and I cannot see that there is any material variance in that testimony; in truth it is in unison in all material features necessary to be considered in this case, and it is plainly evident that the procedure adopted in making the sales of the rejected hops was in due conformity with the law of California and that the computation made of the damages, following credits given for the moneys realized at the sales, was in strict conformity with the law of California. In passing, it may be said that, according to our jurisprudence it rather affronts one that the vendors of the hops under the contract could, as was done, become themselves the purchasers and at such small prices, but nothing can be effectively based upon this. The laws of the State of California are sovereign in this matter of the assessment of damages, and it is idle to contend otherwise. *Allen* v. *Kemble* (1848), 6 Moore, P.C. 314 is an authority which clearly demonstrates that in the present case the liability is to be governed by the *lex loci contractus,* and this decision is, of course, absolutely binding upon this Court. There The Right Hon. T. Pemberton Leigh, delivering the judgment of their

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.
THE HON. MALCOLM ALEXANDER MACDONALD.

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, - - - Carbioo
HIS HON. HUGH ST. QUINTIN CAYLEY, - - - - - Vancouver
HIS HON. HENRY DWIGHT RUGGLES, - - - - Vancouver
HIS HON. JOHN CHARLES McINTOSH, - - - - - Nanaimo

ATTORNEY-GENERAL:

THE HON. ALEXANDER MALCOLM MANSON, K.C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

H

I

J

K

L

M

TABLE OF CASES CITED

A

F

G

I

J

K

L

M

N

S

T

U

V

W

Y

Z

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

WINSLOW MARINE RAILWAY AND SHIPPING COMPANY v. THE PACIFICO.

MARTIN, LO. J.A.

1924 Feb. 28.

Admiralty law—Allowance of interest on claim ex contractu.

In the Admiralty Court, in an action to recover for work done and material supplied, the Court will allow interest from the time of rendering of the bill after completion, in the absence of legal excuse for non-payment.

WINSLOW MARINE RAILWAY AND SHIPPING CO. v. THE PACIFICO

ACTION to recover for work done and material supplied and for interest from time of rendering of bill. Tried by MARTIN, Lo. J.A. at Victoria on the 3rd, 4th and 10th of January, 1924.

Mayers, for plaintiff.
Hossie, and *Lett,* for defendant.

28th February, 1924.

MARTIN, Lo. J.A.: At the close of the hearing I said that subject to the objection to my jurisdiction and the question of interest, I was prepared to give judgment for the plaintiff's claim in full.

Judgment

As to the objection to the jurisdiction, my impression at the time was that it was not supported by the authorities cited, and I remain of that opinion.

MARTIN, LO. J.A.

1924

Feb. 28.

WINSLOW MARINE RAILWAY AND SHIPPING CO. v. THE PACIFICO

As to the interest: the plaintiff claims it from the time it rendered its bill on the 27th of March last for the work and labour done and materials supplied. It is beyond serious question that the ancient practice of the Admiralty Court in allowing interest upon claims arising *ex delicto* still prevails, *e.g.*, in collision cases from the time when the injury occurred, a practice which is based upon the civil law and which Lord Esher, M.R. commended in *The Gertrude* (1888), 13 P.D. 105 at p. 108, as "more just than the common law rule," and as not being in any way disapproved of by Lord Selborne, L.C. in the House of Lords in *The Khedive; Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Company* (1882), 7 App. Cas. 795 at p. 803, in the following language:

> "It does not appear to have been the general course of the Court that those decrees should contain any direction as to interest; and I think it more probable that the principle on which interest was computed under them is that mentioned by Mr. Sedgwick in his book on Damages (chapter 15, pp. 373 and 385-7), where he treats of the power of a jury to allow interest, as in the nature of damages, for the detention of money or property improperly withheld, or to punish negligent, tortious, or fraudulent conduct; the destruction of or injury to property involving the loss of any profit which might have been made by its use or employment."

And in *The Gertrude, supra,* the rule as to interest was applied to a case which before the Judicature Act could not have been tried in Admiralty, but only in one of the Common Law Courts; that case was one of damage to cargo by stranding, and *The Baron Aberdare* in the same report was one of negligence by a dock company in mooring. It is instructive to note that in *Smith* v. *Kirby* (1875), 1 Q.B.D. 131, the King's Bench Division, affirming Lush, J., followed the Admiralty rule and allowed interest from the date of collision. In *The Khedive, supra,* Lord Bramwell, p. 823, agreed that the matter must be decided by the Admiralty practice, saying:

Judgment

> "It is not a question of principle; it is not a question of reason; it is a question of what was the law of the Court of Admiralty; because undoubtedly what was the law formerly is the law still, for the Judicature Act has not changed the law in that respect."

No authority has been cited to shew that with respect to interest any change has been effected by the Judicature Act; the earlier case of *The Jones Brothers* (1877), 37 L.T. 164, is only a decision as to the date upon which interest upon judg-

ments and costs taxed should begin to run and does not touch the question at Bar. Moreover, the *Jones* case was one of salvage, which claim arises neither *ex contractu* nor *ex delicto,* and therefore it never was the practice in Admiralty to allow interest upon salvage awards.

The question, then, is narrowed down to the right to interest upon a claim *ex contractu.* Reliance is placed by the plaintiff upon the following observations of Sir Robert Phillimore in *The Northumbria* (1869), L.R. 3 A. & E. 6, a case arising out of a collision, at p. 10:

"But it appears to me quite a sufficient answer to these authorities to say, that the Admiralty, in the exercise of an equitable jurisdiction, has proceeded upon another and a different principle from that on which the common law authorities appear to be founded. The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee when payment was not made, *ex mora* of the obligor; and that, whether the obligation arose *ex contractu* or *ex delicto.* The American common law has been more liberal than the English; Mr. Sedgwick, in his work on damages (4th Ed.), p. 443, remarks: 'There is considerable conflict and contradiction between the English and American cases on this subject. But as a general thing, it may be said that while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the Courts of the United States, on the other hand, have shewn themselves more liberally disposed, making the allowance of interest more nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim.'"

And he points out, p. 11, that the Chancery Courts followed the Admiralty rule as to interest, citing, *e.g.,* Wood, V.-C., in *Straker* v. *Hartland* (1865), 34 L.J., Ch. 122, wherein he said: Judgment

"'It was quite clear that justice required that a debt which was due, but the payment of which was delayed, should carry interest.'"

In view of the positive statement of so learned a judge in Admiralty law as Sir Robert Phillimore that his Court had adopted the just principle of the civil law "that interest was always due to the obligee when payment was not made, *ex mora* of the obligor; and that, whether the obligation arose *ex contractu* or *ex delicto,*" I do not feel at liberty to refuse the claim of the plaintiff herein to interest after it made a formal demand for payment by presenting its bill after due completion of the work under the contract. To say that interest could not be awarded in such circumstances by other Courts is only another illustration of the more equitable rules that are established in

MARTIN, LO. J.A.
1924
Feb. 28.

WINSLOW MARINE RAILWAY AND SHIPPING CO. v. THE PACIFICO

this Court in several respects: Lord Chancellor Herschell, *e.g.*, in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* (1893), A.C. 429, said, p. 440, that claims for interest in the Common Law Courts were kept within limits which were "too narrow for the purposes of justice."

In the ascertainment of the exact date from which interest is to run herein, I direct counsel's attention to the final words in the letter of defendant's attorney, dated 21st February, 1923, with leave to speak to the point, if necessary.

The plaintiff is entitled to judgment for the full amount of its claim and costs.

Judgment for plaintiff.

MARTIN, LO. J.A.
1924
Feb. 27.

OSTROM v. THE MIYAKO.

Admiralty law—Action for seaman's wages—Desertion by seaman—Forfeiture of wages—Wages payable less than $200—Canada Shipping Act, R.S.C. 1906, Cap. 113, Sec. 191—Dismissal of action.

OSTROM v. THE MIYAKO

A seaman was employed for four months from the 4th of July at $150 a month. On the 25th of October he left under circumstances held to be desertion. *Held*, under the authorities, notwithstanding that he had nearly completed his contract, the Court was bound to give effect to the law that his wages were forfeited from the 4th of October, the date of commencement of his last month's service.

There was owing him up to October 4th a balance of $134, for which he also sued.

Held, this being under the sum of $200, the action in this Court must be dismissed under section 191 of the Canada Shipping Act, R.S.C. 1906, Cap. 113, and, under the general rule (132) in that behalf, with costs.

Statement

ACTION for seaman's wages tried by MARTIN, Lo. J.A. at Vancouver on the 5th of February, 1924. The defendant ship was chartered to one Anderson for four months from July 4th, 1923, to be employed as a fish carrier. Anderson hired the plaintiff as engineer for the four months at $150 per month and board. The ship was employed carrying fish between Steveston and Seattle. The crew consisted of Anderson, who

was master, and the plaintiff, who was engineer. The plaintiff served on board the ship until October 25th, 1923, when he left under circumstances which the judge held to be desertion. On November 26th, 1923, the plaintiff commenced this action *in rem* against the ship claiming $471.64 for wages to date of issue of writ and $57.70 for moneys alleged to be paid out by him for provisions. He also claimed wages up to the time of final settlement thereof pursuant to the Merchant Shipping Act, 1894 (57 & 58 Vict.), Cap. 60. Plaintiff claimed he had been hired for four months at $5 per day and that ship had sailed when he was absent on leave. The claim as to provisions was dismissed at the trial. The defendant admitted there was due to the plaintiff up to October 4th a balance of $134, but contended that, as he had not completed the month from October 4th to November 4th, he was not entitled to any wages after October 4th and accordingly there was nothing more due to him and that the Court had no jurisdiction.

Statement

Ginn, for plaintiff.
S. A. Smith, for defendant.

27th February, 1924.

MARTIN, LO. J.A.: This is a question of seaman's wages, and I find upon the facts adduced that the contract was that the plaintiff should be paid the sum of $150 a month during the fishing season, which was understood to last for a period of four months beginning on the 4th of July, the date of the hiring.

It is admitted that there was a balance of $134 due the plaintiff on the 4th of October, but the difficulty arises from the fact that on the early morning of the 25th of October, as I am constrained to find, the plaintiff deliberately deserted his ship without any lawful justification or excuse. In such circumstances, it was submitted that whatever might be said of the amount due on the 4th of October, it was clear he had forfeited his wages from that day up to the time of desertion. I experienced some reluctance, bearing in mind the favourable inclination this Court, as a matter of history, has always had towards the interests of mariners, to give effect to this strict construction, seeing that he had so nearly completed his contract, *i.e.,* at the end of the third day of the next month, and there-

Judgment

MARTIN, LO. J.A.

1924

Feb. 27.

OSTROM v. THE MIYAKO

fore requested counsel to furnish me with further authorities upon the point.

After carefully considering them I find it is that there is no legal escape from the result that, upon the facts, the wages here must be deemed to be forfeited from the time of the last monthly payment which the contract contemplated. The authorities in general are to be found chiefly collected in Maclachlan on Merchant Shipping, 6th Ed., 178; Macdonell on Master and Servant, 2nd Ed., 619(*l*); Halsbury's Laws of England, Vol. 20, p. 85; and Vol. 26, p. 49, and I refer particularly to *Taylor* v. *Laird* (1856), 1 H. & N. 266; *Button* v. *Thompson* (1869), L.R. 4 C.P. 330; *Saunders* v. *Whittle* (1876), 33 L.T. 816; *Roberts* v. *Tartar* (1908), 13 B.C. 474, and *Selig* v. *Arenburg* (1917), 51 N.S.R. 198.

Seeing then that at best the plaintiff can only recover $134, objection is taken that the action must be dismissed for want of jurisdiction, the wages recovered being "under the sum of $200," as required by section 191 of the Canada Shipping Act, R.S.C. 1906, Cap. 113, and the decision of this Court in *Cowan* v. *The St. Alice* (1915), 21 B.C. 540 (followed in *Kouame* v. *Steamship Maplecourt and Owners* (1921), 21 Ex. C.R. 226) is relied upon, and as the objection is precisely sustained by that decision, the only order that can be made is that the action be dismissed, with costs to follow the event, according to the general rule (132) in that behalf, there being no circumstances, I think, which would justify me in departing from said general rule, and seeing that the law on the jurisdictional point has been settled for over eight years.

Judgment

This result may seem a hardship, but the longer I sit upon this Bench the more I am convinced that the only real justice is strict justice for all concerned, and here, for example, that the plaintiff was hired not by the defendant owner but by one who chartered the vessel from the owner and has not paid the charter-money, so for that reason I am informed by counsel the owner resists the plaintiff's claim so as to reduce his own loss as much as possible.

Action dismissed.

B.C. ESTATES LIMITED v. COLDICUTT.

MURPHY, J. (At Chambers)

1924

May 21.

B.C. ESTATES LTD. v. COLDICUTT

Practice—Application for judgment under Order XIV.—Filing affidavits for the defence—Service on opposite party not necessary.

Upon the filing of affidavits for the defence on an application for speedy judgment under Order XIV. notice of such filing must be given to the opposite party but the service of copies is not necessary. Copies must be furnished on demand of the opposite party but must be paid for.

APPLICATION for speedy judgment under Order XIV. On the hearing objection was taken to the filing of affidavits without serving copies on the opposite party. Heard by MURPHY, J. at Chambers in Vancouver on the 15th of April, 1924. Statement

Mayers, for plaintiff.
J. E. Bird, for defendant.

21st May, 1924.

MURPHY, J.: Although this matter has been disposed of on other grounds, I promised to hand down a ruling settling whether affidavits filed to shew a defence on applications for speedy judgment should be served on the opposite party or not. Apparently, our rules do not compel such service. Enquiry shews that in the past at times such service has been made but not always. I have conferred with such of my brother judges as I conveniently could. As a result, I rule that in the future the English practice is to be followed. On the filing of such affidavits the party doing so is to give notice of such filing to the opposite side but is not to be compelled to serve copies. If the other side demands copies they are to be furnished but the party making the demand is to pay for such copies. Judgment

COURT OF APPEAL

1922

June 29.

REX v. WONG O SANG

REX v. WONG O SANG.

Criminal law—Charge of murder—Jury disagree—Discharged—New jury empanelled—Criminal Code, Sec. 960—Three jurymen on first trial empanelled on second trial—New trial.

On a trial on a charge of murder the jury disagreed and were discharged; a new jury was selected from the same panel for the second trial and the accused was found guilty and sentenced to be hanged. Three jurymen who served on the first trial were selected and served as jurymen on the second trial. On appeal by way of case stated:—

Held, as contrary to the ordinary acceptation of the words "new jury" and to the spirit of section 960 of the Criminal Code. The verdict and conviction were set aside and a new trial ordered.

Held
v. J. H. Gallant
3 C.C.C. 49

APPEAL by way of case stated from the decision of MURPHY, J., and the verdict of a jury, on a charge of murder. The accused was found guilty and sentenced to be hanged. The case stated was as follows:

"The above named defendant was directed to be indicted at the Nanaimo Spring Assize, 1922, for that at China Town in the County of Nanaimo, Province of British Columbia, on the 13th day of November, 1921, he, Wong O Sang, did unlawfully kill and murder Wing Chong.

"On the application of Wong O Sang and with the consent of the Honourable the Attorney-General on the 31st of March, 1922, I ordered that the trial of the above named Wong O Sang on said charge should be proceeded with in the Supreme Court of British Columbia Oyer and Terminer and General Gaol Delivery then being held at the Court House, in the City of Vancouver, at which I presided.

Statement

"On the 26th and 27th of April, 1922, Wong O Sang was tried before a jury selected out of a panel of forty-three petit jurors returned by the sheriff for service at such Assize sitting. The jury on this trial disagreed and the prisoner was remanded to gaol.

"On the 15th of May, in the same Assize, on motion of *A. B. Macdonald, K.C.*, of counsel for the Crown, the prisoner was again placed in the dock and was again tried by a jury selected out of the same panel as the first jury, three members of the latter jury having also served on the first jury. Before any jurors were sworn counsel for Wong O Sang objected that members of the first jury should not serve on the second jury. I overruled this objection. Wong O Sang was convicted on this second trial, and sentenced to be hanged on the 28th of July, 1922.

"The opinion of the Court of Appeal is asked as to whether or not the second jury which convicted the prisoner should have been a new jury selected from the same panel as the first jury excluding the twelve jurors who served on the first jury, and was I right after objection taken in

permitting three of the jurors who served on the first jury to be selected and returned on the second jury, and if not, has there been a mis-trial?"

COURT OF APPEAL

1922

June 29.

The appeal was argued at Victoria on the 29th of June, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

REX v. WONG O SANG

J. A. Russell, for accused: The accused was tried on a charge of murder and the jury disagreed. There was a second trial and three of the men who served on the jury at the first trial also served on the second trial when accused was found guilty. The question is whether the jury on the second trial was a "new jury" under section 960 of the Code. *Rex* v. *Gaffin* (1904), 8 Can. Cr. Cas. 194 is the only case near it but is not in point: see also *Reg.* v. *Sullivan* (1838), 8 L.J., M.C. 3. It is contrary to the intention of the Act that a man sitting on the first jury should be allowed to sit on the second one.

Argument

A. B. Macdonald, K.C., for the Crown: Under section 960 a "new jury" means "another jury." All rights to which the prisoner is entitled are preserved in section 935 of the Code. Under that section he can always object to a juryman for cause. This case is the same as *Rex* v. *Gaffin* (1904), 8 Can. Cr. Cas. 194.

Russell, in reply.

MACDONALD, C.J.A.: I think the conviction and sentence should be set aside. The statute requires that where the jury disagree a new jury shall be called. My interpretation of that is that a new jury means what the words import. As I put it to Mr. *Macdonald*: Suppose the twelve men who had disagreed had been called and sworn on the second jury, could it be said that that was a new jury, either within the ordinary acceptation of the term, or having regard to the purpose for which the new jury was to be called, namely, because the other jurymen, not being able to come to a conclusion, fresh men should be called who should consider the matter *de novo* and come to their own conclusion? It is contrary to the ordinary acceptation of the words "new jury," and contrary to the spirit of the Act calling for a new jury. There are no cases to which we have been referred, but we have to exercise our own judg-

MACDONALD, C.J.A.

COURT OF APPEAL

1922

June 29.

REX v. WONG O SANG

ment on the construction of the statute. There does not seem to me to be any doubt of what that construction should be.

I would set aside the verdict and conviction and order a new trial.

MARTIN, J.A.

MARTIN, J.A.: To my mind it is unthinkable, quite apart from our statute, that when a prisoner is put upon a "new trial" under section 960 of the Code, which trial is to take place before "a new jury to be empanelled," that in such new jury there should be included either wholly or partially jurors who had sought to complete the preceding trial but had failed to do so by disagreement. *Rex* v. *Gaffin* (1904), 8 Can. Cr. Cas. 194, shews that the word "empanelled" does not mean a new panel, but "selecting a new jury from the thirty-six jurors already summoned," and though the exact point before us was not therein considered, yet the principle is involved in the reasoning. In the case at Bar three of the former jurors were included in the new jury "empanelled" despite the accused's objection, and in the absence of any authority cited to support such an inclusion, which is contrary to the spirit of a new trial, I think the objection should be upheld and a new trial ordered.

GALLIHER, J.A.

GALLIHER, J.A.: As we have not been referred to any authority in this matter, we have to form our own views with regard to the interpretation of the statute, and the common-sense view of the matter as well. The words are specific in the section of the Code that there shall be a new jury.

It is clear to my mind at all events, in the absence of any authority to the contrary, that the section means exactly what it says, and you cannot import those who have already passed upon the matter into a second jury.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: Counsel on both sides are unable to assist the Court with any decisions upon the point. Not being assisted by any authority, it would seem reasonable to construe the words "new jury" as meaning an entirely new jury that is completely new in personnel. As a matter of fact, disagreements of jurors may be said to be of modern growth. For many years, almost from time immemorial, the jury was under

compulsion to find a verdict; it was almost misconduct on the part of the jury not to bring in a verdict. In England, today, a disagreement is almost unheard of, the sworn duty is to bring in a verdict according to the evidence. Now the three jurors upon the first jury presumptively did not discharge their full duty yet they may have been desirous of so doing but were overborne; we cannot tell, juries give no reasons and they are not compelled to give reasons.

I am not imputing any dereliction of duty against the three gentlemen who served on the first and second jury, on account of the first jury not bringing in a verdict, it may well be that the fault was not theirs; but in my opinion they were not qualified to serve as jurors upon the second trial; the jury could only be a "new jury" within the meaning of the enactment when there was an absolutely new personnel. It follows, in my opinion, that the conviction must be set aside; and I think it a proper case to direct that a new trial be had.

MCPHILLIPS, J.A.

EBERTS, J.A.: I can quite believe that a new jury means an absolutely different jury from the one that tried the prisoner for the first time.

I do not know that we cannot take judicial notice of what appears in the London newspapers as to great trials. Only a short time ago, in the trial of Major Armstrong, who was hanged recently for the murder of his wife, the foreman of the jury, the very same day that they brought in the verdict, was interviewed by a reporter and his story was reported in the newspaper. The judge has taken that up and he may be tried for contempt of Court. That might apply to this case. There were three men that were in the jury at the first trial, and it is just within the bounds of possibility that they had said what their views were. The counsel for the prisoner took the point before the second jury was sworn. The learned counsel for the Crown says that under the circumstances he was not affected, because he could at a later date of the proceedings have taken his 20 challenges. Look at the position he would be placed in. The Courts would stand aside everybody except those who were in the first trial. He would have had to take his 20 challenges

EBERTS, J.A.

COURT OF APPEAL

1922

June 29.

REX v. WONG O SANG

EBERTS, J.A.

out of 43 jurors. There would be no doubt, under the circumstances, the jury could not be called and the Crown would have to go on the taling. This is an objectionable thing, and I cannot see that in the circumstances only 43 jurors should have been called.

Under the circumstances, I take the view of my brothers and say no interpretation has been brought to us as to the construction of the words "new jury," and I therefore believe that the prisoner was not properly tried and that he should have a new trial.

New trial ordered.

Solicitor for appellant: *J. A. Russell.*
Solicitor for respondent: *A. B. Macdonald.*

REX v. CHOW TONG.

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

1924

April 15.

REX v. CHOW TONG

Criminal law—Conviction under The Opium and Narcotic Drug Act—Hard labour improperly imposed—Deportation after service of sentence—Habeas corpus—Can. Stats. 1922, Cap. 36, Sec. 10B.

A warrant of deportation regular on its face, having issued after the prisoner had served his sentence on a conviction under The Opium and Narcotic Drug Act, the Court on an application in *habeas corpus* proceedings can only inquire into the truth of the statements made in the warrant, and cannot interfere by reason of the unlawful imposition of hard labour by the sentence and conviction.

Statement

APPLICATION for a writ of *habeas corpus*. On the 7th of October, 1922, the applicant pleaded guilty to having opium in his possession and was convicted and sentenced at Prince George to six months' imprisonment with hard labour and payment of a fine of $200 and in default of payment thereof to six months' imprisonment with hard labour, pursuant to subsection (2) of section 5A of The Opium and Narcotic Drug Act. Deportation proceedings were taken and at the termina-

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

1924

April 15.

REX v. CHOW TONG

tion of his imprisonment he was handed over to the Canadian immigration authorities for deportation. It was admitted by counsel for the immigration department that there was no authority for the imposition of hard labour and it was not in dispute that the applicant was an alien. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 15th of April, 1924.

Stuart Henderson, for the application.
Elmore Meredith, contra.

HUNTER, C.J.B.C.: The prisoner was convicted under The Opium and Narcotic Drug Act and sentenced to six months' imprisonment with hard labour and to pay a fine of $200, and to a further three months in default. He has served the sentence and is now in the hands of the immigration authorities awaiting deportation under the deputy minister's warrant.

It is urged by Mr. *Henderson* that the sentence and conviction were unlawful as they imposed hard labour. So they were, if that was the case, but the Court has no power to interfere on that account at this stage of the proceedings, the deputy minister's warrant having intervened. The warrant is valid on the face of it and the Court cannot now for any useful purpose review the proceedings leading up to the conviction apart from any difficulty arising from the fact that the *certiorari* has been taken away. The essential jurisdictional facts are recited in the warrant and the only thing now left to the accused is the right under the Act of 56 Geo. III., to have the truth of those facts examined into, but if the inquiry shewed that the fact of conviction on the date alleged and that the prisoner is an alien were truly stated he could gain nothing in the end.

Judgment

The application must be dismissed.

Application dismissed.

COURT OF APPEAL

1924

March 12.

REX v. McCOY AND BROWN

REX v. McCOY AND BROWN.

Criminal law—Witness required on criminal prosecution—Recognizance—Failure to appear—Endorsement on recognizance of magistrate's certificate—Transmission to proper officer—No order required—Criminal Code, Secs. 576 and 1099—Criminal rule 6.

M. entered into a recognizance as principal and B. as surety that he would appear as a witness on a criminal prosecution. He failed to appear and the magistrate, after certifying on the back of the recognizance M.'s non-appearance at the hearing, forwarded it to the clerk of the County Court within the jurisdiction. An application by the Crown to a judge of the Supreme Court for an order estreating said recognizance was refused. Application was then made to a judge of the County Court for the same order which was granted.

Held, on appeal from both orders, affirming the order of MORRISON, J. and reversing the order of CAYLEY, Co. J. (McPHILLIPS, J.A. dissenting), that the estreating of a recognizance may be carried out under the provisions of section 1099 of the Criminal Code itself and any further necessary proceedings follow under the subsequent sections of the statute without the requirement of any order from the Courts.

Held, further, that as this case was in the magistrate's Court and the County Court Judge's Criminal Court, rule 6 of the Criminal rules does not apply as section 576 of the Criminal Code under which it was passed deals with the powers of the Supreme Court judges to make rules for their own Court only.

Statement

APPEAL by the Crown from an order of MORRISON, J. of the 7th of January, 1924, dismissing an application for an order estreating the recognizance entered into by Frank McCoy, principal, in the sum of $1,000, and Andrew Brown as surety in the sum of $1,000, dated the 25th of September, 1923, for the appearance of Frank McCoy as a witness in the case of *Rex* v. *Lew King* in the Police Court at Vancouver, and appeal by Brown, the surety, heard at the same time from an order of CAYLEY, Co. J. of the 31st of January, granting an order that the said recognizance be estreated and that a writ of *fieri facias* and *capias* do issue returnable before said Court for the sum of $1,000. Frank McCoy being required as a witness on the criminal prosecution of one Lew King on a charge of selling opium without lawful authority, entered into said recognizance with Andrew Brown as surety, the condition of the recogni-

zance being that he would appear as a witness on the prosecution of the said Lew King on the 1st of October, 1923. He did not appear and was in default as appeared by the endorsement on the recognizance signed by the deputy police magistrate. An application to the Supreme Court for an order estreating the recognizance was dismissed by MORRISON, J. on the 7th of January, 1924, and on the same day notice was given of a motion to be made in the County Court for the same order which was granted by CAYLEY, Co. J. on the 31st of January, 1924.

Statement

The appeals were argued together at Vancouver on the 12th of March, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

J. Ross, for Brown.
Wood, for the Crown.

MACDONALD, C.J.A.: The case, it seems to me, turns upon the construction of section 1099 of the Criminal Code. That provides how bail bonds, under which the makers have defaulted, are to be dealt with. The list is to be made up and sent to the registrar of the County Court. The registrar of the County Court shall subsequently proceed to enforce the bond. There is no provision there in regard to formal estreat of the bail. That is done by the section itself when the bond has been sent to the registrar of the County Court for the purpose of enforcing it. We are referred to rule 6 of the Criminal Rules which were passed under section 576 of the Code. That section deals with the powers of the Supreme Court judges to make rules for their own Court, not for other Courts. It reads as follows:

MACDONALD, C.J.A.

"Every superior Court of criminal jurisdiction may at any time, with the concurrence of a majority of the judges thereof present at any meeting held for the purpose, make rules of Court, [that is the Supreme Court] not inconsistent with any statute of Canada, which shall apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any matter of a criminal nature, or resulting from or incidental to any such matter."

Now, the statute is dealing with Rules of Court, criminal rules relating to matters before the Supreme Court. This present matter was not before the Supreme Court at all. Then

COURT OF APPEAL

1924

March 12.

REX v. MCCOY AND BROWN

MACDONALD, C.J.A.

if we turn to rule 6 we find that the judges made a rule to provide that bail shall not be estreated without an order of a judge. If the matter was in the Supreme Court that rule would be applicable. This case was in the magistrate's Court and in the County Court Judge's Criminal Court, and now it comes up for enforcement of the bail bond. It seems that no order of a judge is necessary at all, and that Mr. Justice MORRISON was quite right in refusing to make an order. He had no power to make an order. The learned County Court judge was wrong in making an order, because no order was necessary, and no power was given to him to make an order. The County Court was without jurisdiction in this sense. I do not mean the County Court might not make an order under section 1110, but it had no jurisdiction to make an order of that kind at this stage of the proceedings.

The result is that the order of the County Court judge is rescinded and no other order made. It is without jurisdiction.

MARTIN, J.A.

MARTIN, J.A.: That is my view. By section 1097 the recognizance is directed to be transmitted to the proper officer appointed by law to receive the same; and the authorized officer in this Province is, as section 1099 reads:

"In the Province of British Columbia, such proper officer shall be the clerk of the County Court having jurisdiction. . . . ."

Then once the recognizance is in his custody, the proceedings take that direction which the subsequent sections of the statute contemplate and provide for, without any interference from any other tribunal whatever; and the powers that might be exercisable later on under section 1110 when the writ of *fieri facias* is returnable, can not be anticipated by the County Court judge or any other judge attempting to forestall the matter by making any order whatever at this stage. I agree with what the Chief Justice has said; the rules must be regarded as restricted to the Court which made them, as the statute provides, and if not so restricted they would be without jurisdiction, because they are inconsistent with the main statute; therefore an order having been made by the County Court judge, which is based on no authority whatever, the principle of the decision in *The Leonor* case ((1916), 3 P. Cas. 91;

(1917), 3 W.W.R. 861), and many other cases therein cited, shews there is in law no order to appeal from because it is an absolute nullity. All that appears is that a document has been drawn up which bears the semblance of an order, but having no foundation in law, nothing can stand upon it, but this Court can make an order getting rid of it, which the appellant is entitled to because it prejudices him, in the circumstances, as it stands, and therefore it should be set aside.

McPHILLIPS, J.A.: I may say I have come to the conclusion that there was jurisdiction to make the order. The jurisdiction is in the County Court to pass upon matters of bail and whether it should be estreated. The Parliament of Canada had that in mind when enacting the Criminal Code. Section 576 says:

"Every superior Court of criminal jurisdiction may at any time, with the concurrence of a majority of the judges thereof present at any meeting held for the purpose, make rules of Court, not inconsistent with any statute of Canada, which shall apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any matter of a criminal nature, or resulting from or incidental to any such matter."

The learned judges in promulgating the rules were not making rules only applicable and enforceable in the Supreme Court but in the County Court as well.

The Parliament of Canada appreciated that the Provinces differed as to names and jurisdictions of Courts, and specially named in British Columbia the County Court, but Parliament does not provide that the rules should be made by judges of the County Court. It was provided that rules should be made by the judges of the Supreme Court, and subsection (*b*) of section 576 states that those rules may be "for regulating in criminal matters the pleading, practice and procedure in the Court, including the subjects of *mandamus, certiorari, habeas corpus,* prohibition, *quo warranto,* bail and costs."

McPHILLIPS, J.A.

When we find that the bail bond is to go to the County Court it is reasonable to assume that the bail bond comes within the jurisdiction of the County Court, and that a judge of the Supreme Court would not interpose or do anything in the matter unless there are apt words giving jurisdiction. I fail to see those apt words. Section 1099 says that:

"In the Province of British Columbia, such proper officer shall be the

COURT OF APPEAL

1924

March 12.

REX v. MCCOY AND BROWN

clerk of the County Court having jurisdiction at the place where such recognizance is taken, and such recognizance shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such County Court."

Shall be enforced according to the practice of what? Of that Court. I do not see how the practice of the Supreme Court could be applied. Then when you turn to *Rex* v. *Harvie* (1913), 18 B.C. 5, a judgment of this Court, the case seems to me, with deference to any contrary opinion, to support the very matter we have before us. In the present case the officer in charge of the collection of this recognizance was not satisfied that the clerk's list was in itself sufficient, but applied to the judge for an order. The same course was followed in another case in England. It was there contended that the making of this order was mere surplusage. IRVING, J.A., said at p. 9:

MCPHILLIPS, J.A.

"On the question of jurisdiction, I think the statutory provision in subsection 2 of section 1099, directing the County Court to enforce and collect the recognizance in the same manner as any other fines in the same Court would give the person aggrieved an appeal to this Court under the Provincial Court of Appeal Act from any order made by a judge of the County Court; but as the order of the 26th of July, 1912, was made in the County Court Judge's Criminal Court, the appellant's proper course is either to apply to the County Court judge himself to discharge the order as improvidently made, or to have it quashed on *certiorari* proceedings. No jurisdiction has been given to this Court to deal with an order by a judge of the Criminal Court."

I may say I associate myself entirely and completely with what the learned judge there said. Here we have criminal rules passed in 1906. For eighteen years they have been the rules which have obtained in this Province, and I suppose hundreds of like cases, if not thousands, have been dealt with under them. It would appear that Mr. Justice MORRISON was applied to by Mr. *Wood* in the present case to make an order, and Mr. Justice MORRISON rightly, in my opinion, held that it was a matter for the consideration of a judge of the County Court.

In my opinion there was jurisdiction to make the order, and there is the right of appeal therefrom and the appeal should be heard.

EBERTS, J.A.

EBERTS, J.A.: I am in accord with the remarks of the Chief Justice in this matter.

Solicitors for the surety: *Fleishman & Ross.*
Solicitor for the Crown: *H. S. Wood.*

E. CLEMENS HORST AND DAISY B. HORST, TRUSTEES v. LIVESLEY *ET AL.*

AND

E. CLEMENS HORST COMPANY v. LIVESLEY *ET AL.*

MCDONALD, J.

1923

May 28.

COURT OF APPEAL

1924

March 4.

HORST v. LIVESLEY

Sales — Contracts made in California — Breach by purchaser — Damages— Basis of—Lex loci contractus.

The plaintiffs in each action sold to the defendants under separate written Contracts certain quantities of hops to be grown on their ranches in the Wheatland and Tehama hop districts in California during the years 1920, 1921 and 1922. The contracts which were made in California were duly carried out for the first two years, but after the defendants had made certain payments for the 1922 crops before delivery in accordance with the contracts, they refused to accept delivery of the hops when tendered and made no further payments. The plaintiffs then treated the defendants' repudiation of the contracts as definite and resold the hops at auction pursuant to the Civil Code of California and brought actions in British Columbia for damages for non-acceptance of the goods or in the alternative for breach of contract. It was held by the trial judge that the damages recoverable in an action for breach of contract made abroad will be determined by the proper law of the contract, that is to say, the law which the parties intended should govern their rights and liabilities, *i.e.*, the law of California.

Held, on appeal, affirming the decision of MCDONALD, J., that the right to damages for breach of contract is a substantive right and not a question of procedure. The rate of damages to be recovered for breach of contract is a part of the right to which the injured party is entitled and is totally distinct from the remedy provided for enforcing it. The *lex loci* where the contract was made and broken therefore prevails and the damages in each case is the amount by which the contract price exceeds the amount realized on the auction sale.

APPEAL by defendants from the decision of MCDONALD, J. in two actions tried together at Vancouver on the 11th to the 23rd of May, 1923, the first being brought by E. Clemens Horst Company against the defendants for damages for non-acceptance of 600,000 pounds of hops purchased by the defendants from the plaintiffs under written contract of the 2nd of February, 1920, which the defendants wrongfully refused to accept and pay for, and in the alternative damages for breach of said contract. The second action was brought by E. Clemens Horst and Daisy B. Horst, trustees, against the same defendants for

Statement

MCDONALD, J.

1923

May 28.

COURT OF APPEAL

1924

March 4.

HORST v. LIVESLEY

damages for non-acceptance of 200,000 pounds of hops purchased by the defendants from the plaintiffs under a written contract of the 27th of December, 1919, which the defendants wrongfully refused to accept and pay for, and in the alternative for damages for breach of said contract. The facts relevant to the issue are set out fully in the judgments of the trial judge.

Davis, K.C., and *Reid, K.C.,* for plaintiffs.

Mayers, and *E. K. DeBeck,* for defendants.

28th May, 1923.

MCDONALD, J.: By an agreement in writing, dated at San Francisco, December 27th, 1919, in which the plaintiffs were described as "trustees," the plaintiffs agreed to sell to the defendants 200,000 lbs. (net) of hops from the crops of each of the years, 1920, 1921 and 1922 at the price of 50 cents per lb. for 1920, 45 cents for 1921 and 40 cents for 1922 crop;

"quality to average equal to or better than prime hops of the year and of the Tehama, California hop district; hops to be grown by sellers on their ranch known as the Horst Children's Ranch, about two miles north of Tehama, State of California. Time of delivery at seller's option, September to November, both inclusive during or following the harvest of each year's crop."

It was provided that the buyers should advance to the sellers on account of purchase price "approximately one-eighth of each year's purchase price, each three months, beginning November 1st, 1919, balance each year net cash on delivery." There was a further clause to the effect that the sale should be severable as to each bale except in case of buyer's default. By the agreement the sellers mortgaged to the buyers

"the said crop of hops growing and to be grown on the said above described premises for the seasons 1920, 1921 and 1922 with the right to remove the same in case of seller's default as security for the repayment by said sellers to said buyer of all advances made by said buyers to said seller and for the faithful performance by said seller of all obligations arising out of this contract in favour of the buyer and for legal costs and a reasonable attorney's fee in case of foreclosing of such mortgage lien."

At the time of entering into the contract, the vendors were not, as a matter of fact, trustees but contemplated becoming trustees for their children of the lands upon which the hops were to be grown.

During the year 1920 hops advanced in price to 75c. to $1.00

MCDONALD, J.

1923

May 28.

COURT OF APPEAL

1924

March 4.

HORST v. LIVESLEY

a pound and deliveries of the 1920 crop were duly made and accepted. In 1921 prices dropped considerably below the contract price and, after some negotiations, a compromise was reached, the effect of which virtually was that the purchasers by paying a considerable sum of money were relieved from their obligations to accept. Prices continued to fall and before the 1922 season opened the purchaser endeavoured to arrange with the vendors to curtail production during the season, but no agreement was arranged and production went on as usual for reasons which Mr. Horst fully explains.

In October, 1922, the crop was ready for inspection, which inspection, under the terms of the contract, was to take place at the plaintiff's ranch. Instead of sending one, two or three inspectors, as was the usual practice under such contracts, the defendant sent ten inspectors to inspect the crop. The hops were tendered for inspection in bales; "tryings" were taken from each bale and samples from each tenth bale in each 100 bale lot, with the result that the inspectors accepted only 8 bales or approximately 1,600 lbs. out of the 200,000 lbs. tendered. Mr. Rundlitt was in charge of the inspection and he, as well as the defendant Livesley and one other of the inspectors, stated in evidence that the instructions given to the inspectors by Livesley were that they should make a careful inspection and that where any doubt existed, as to whether hops tendered were of the quality required by the contract, such doubt should be solved in favour of the plaintiffs. Such a high degree of commercial morality may be quite prevalent in the United States, but it prevails here to such a small degree that one must accept these statements, at least with the proverbial "grain of salt." In any event, the hops were subjected to a most rigid inspection, and I have no doubt that the purpose of sending so large a number of inspectors was that the defendants would be supported by an army of witnesses if litigation should result later as a result of their wholesale rejections of the hops tendered. I lay no stress on the fact that the inspectors were accompanied by an attorney-at-law, as the plaintiff's representative also had an attorney with him at the time of the inspection, the parties, at that time, being at arm's length and suit having been brought

MCDONALD, J.

MCDONALD, J.
1923
May 28.
COURT OF APPEAL
1924
March 4.
HORST v. LIVESLEY

by the plaintiffs to enforce payment of an advance, as to which the defendants were in default.

From each bale from which the inspectors took samples, the plaintiff's agents took another sample. The defendants produced in Court the samples which they had taken from the rejected bales and the plaintiffs produced the samples taken not only from the rejected but also from the accepted bales, of which latter, as stated, there were only eight.

At this point, it may be mentioned that, on February 2nd, 1920, E. Clemens Horst Company, a body corporate, entered into a contract with the same defendants for the sale of 400,000 lbs. (net) of hops of the crop of 1920; 600,000 of the crop 1921; 600,000 of the crop 1922 at 42c. per pound; "quality to average equal to or better than prime hops of the year and of the Wheatland, California hop district. Hops to be grown on seller's ranch near Wheatland, California." To inspect all these hops in 1922 similar methods were adopted by the defendants, with the result that about 50 per cent. of the hops tendered were accepted and an action was also brought in reference to that contract. The two actions were tried together and, in so far as the quality of the hops in question is concerned, the evidence may now be dealt with in its application to both cases.

MCDONALD, J.

A great deal of time was taken up at the trial with evidence as to the quality of the hops called for by these contracts. Speaking generally, defendant's witnesses contended that the words "of the year and of the Wheatland (or Tehama) hop district" were of virtually no effect; that a prime hop was a prime hop whenever and wherever produced, subject to this only, that hops do not improve with age and it was, therefore, important to designate the year of production. The plaintiffs contended that inasmuch as hops depend very largely for their quality upon the district in which they are produced and inasmuch as the British Columbia hop is the best hop produced and the Tehama hop probably the worst, a prime hop of Tehama would not be expected to possess the same richness and attractive colour as, for instance, an Oregon hop. In the final result and in view of the conclusion which I have reached, as to the quality of the hops tendered, I am satisfied that a great deal of this discussion

is immaterial. As the trial developed, it became practically common ground that if a hop, wherever grown, was not picked before maturity but was then cleanly picked, well-dried and well-cured, it was a "prime" hop of the district where grown. The same perfection of cleanliness in picking would not be required as in the case of a choice hop or a fancy hop, but nevertheless the hops must be cleanly picked. Much discussion also took place and much evidence was offered, as to whether there were five grades recognized in the trade—fancy, choice, prime, medium and common, or only four grades, *viz.*, choice, prime, medium and common, and, if it were necessary to find the fact, I should have no hesitation in finding that there is known to the trade, as contended for by the plaintiffs, a grade known as "fancy."

The inspectors were called as witnesses and, as was to be expected, they contended, speaking generally, that the hops were immature, not cleanly picked, ill-dried and ill-cured. They were supported by a hop dealer from Salem, Oregon, where the defendants reside, and by Mr. Nelson, a brewer of New Westminster. Aside from the interest which those inspectors would naturally have in sustaining their own judgments previously expressed, the one outstanding weakness in the evidence offered by the defendants was that, speaking generally, their witnesses were accustomed to dealing with British Columbia or Oregon hops, which are of a finer quality and command a higher price than those produced in the Sacramento Valley. It is true that two of the defendants' witnesses, George Dorcas and his brother Charles, are accustomed to dealing in California hops, but the evidence of George Dorcas is weakened not only by the unsatisfactory impression which he made during his cross-examination but by the fact that he took an active part in assisting the defendants to prepare their case and to procure evidence; and he cannot, therefore, be looked upon entirely as an independent witness.

The plaintiffs, on the other hand, produced a large number of independent witnesses from California who were accustomed to growing and dealing in California hops and particularly hops grown in the Wheatland and Tehama districts. I accept the evidence of these witnesses and of Messrs. Traeger and Erb,

MCDONALD, J.

1923

May 28.

COURT OF APPEAL

1924

March 4.

HORST v. LIVESLEY

brew masters of long experience in Vancouver and Victoria (notwithstanding the fact that they are accustomed to using British Columbia hops), and find, as a fact, that the hops in question in each action were fully matured, cleanly picked, well dried and well cured, and were prime hops within the meaning of the contract and ought to have been accepted by the defendants.

The defendants contended that the plaintiffs had no right to use a machine for picking the hops but that they ought to be hand-picked; and much time was spent during the trial on the discussion of this matter. I am satisfied, on the evidence, that the hops were more cleanly and more satisfactorily picked with the machine as improved in 1922 than could have been attained by hand-picking. As a matter of fact the defendants knew before they entered into the contracts, and throughout the whole period in question, that the plaintiffs had picked by machine for several years; in fact, Mr. Horst was the inventor of the only hop-picking machine on the market.

Upon the question of whether or not the hops were mature or immature when picked, I accept the evidence of Mr. Horst that the real test of maturity or immaturity is the colour of the seeds and that the seeds in the samples produced shewed that they were mature. I can see no advantage to be gained by analyzing the evidence of the various witnesses except to say that I ignore entirely the evidence of the witness Worley. I formed an impression in favour of the plaintiffs as to the quality of the hops during the progress of the trial and my reading of the transcript of evidence has only served to confirm that impression.

MCDONALD, J.

With regard to the Tehama contract, two matters remain for discussion. The first arises in respect of the plaintiffs having been described as trustees and having sued as such. During the trial the plaintiffs applied for and obtained an amendment, the result of which is that they sue in their personal capacity. It is common ground that the rights and obligations of the parties under both contracts depend upon the law of the State of California, where the contracts were made. Expert evidence was given by lawyers from California and it seems clear, on

that evidence, that, inasmuch as the plaintiffs were the owners of the property described in the Tehama contract when the contract was entered into and did not declare themselves trustees for many months afterwards, the chattel mortgage contained in the contract being valid under California law, in favour of the defendants as against the plaintiffs' children, who were merely volunteers, the plaintiffs are personally liable to the defendants under the contract and are entitled personally to enforce the same.

This contract contains a further clause to the effect that bales should average about 185 to 195 lbs. gross weight, the tare to be 5 lbs. per bale, that is, 180 to 190 lbs. net. The total number of bales tendered to make up 200,000 lbs. in 1922 averaged in weight 178 lbs. net, and it is contended that this tender did not satisfy the contract. I have no hesitation in holding otherwise and particularly in view of the fact that no evidence was offered to the effect that the actual precise weight of a bale was a material element. I would say that in the large number of bales offered, an average weight of 178 lbs. would satisfy a contract that the bales should average about 180 to 190 lbs.

Upon the question of damages there is room for considerable doubt. The plaintiffs allege that by reason of the defendants' breach of the contract the plaintiffs have suffered damages amounting in the Tehama action to $47,756, and in the Wheatland action to $83,938.85. In the succeeding paragraph in each case the plaintiffs shew that these amounts are arrived at as a result of applying the provisions of the California Civil Code, which provides that in case of a buyer's wrongful refusal to accept, the goods shall be sold by auction and the damages shall be the amount by which the contract price shall exceed the amount realized on such sale. It is contended by the defendants that notwithstanding this provision of the California Civil Code the law to be applied is that contained in our Sale of Goods Act, the remedy to be applied being governed by the *lex fori*. There is much to be said in favour of this argument, but I think, as a judge of first instance, I ought, notwithstanding the lack of a direct decision in our Courts, to accept the state-

MCDONALD, J.

1923

May 28.

COURT OF APPEAL

1924

March 4.

HORST v. LIVESLEY

ment set out in Halsbury's Laws of England, Vol. 6, p. 248, par. 368, and hold that the damages recoverable in an action for breach of contract made abroad will be determined by the proper law of the contract, that is to say, the law which the parties intended should govern their rights and liabilities (in this case the law of California), supported as such statement is by the opinion expressed in Dicey's Conflict of Laws, 3rd Ed., 646.

There will be judgment accordingly for the plaintiffs in this action for $47,756 and costs.

E. CLEMENS HORST COMPANY v. LIVESLEY.

28th May, 1923.

MCDONALD, J.: This action was tried together with that of E. Clemens Horst and Daisy B. Horst, trustees, plaintiffs, against Thomas A. Livesley and John J. Roberts, co-partners doing business under the firm name and style of T. A. Livesley & Co., in which judgment has been handed down today.

Only one point of importance arises which has not been dealt with in that judgment.

The contract in this case contained the following paragraph:

"Subject to loss by fire, or acts of God or other extraordinary causes beyond seller's control, seller agrees in case of inability to fill from the above-named crop of hops, to be grown on the above ranch, the full quantity hereby sold, then seller will make up the deficiency from the other crops of equal quality to that herein sold, and buyer agrees to accept such substitution."

MCDONALD, J.

Evidence was given for the plaintiff that in the month of June a hot north wind struck the valley where these hops were growing and, though it was not realized until harvest time, that serious damage had been done, the quantity produced was as a fact seriously reduced by reason thereof. It is suggested that this was an after-thought, inasmuch as the plaintiff, late in July, expressed the belief that he would produce the full amount contracted for. I cannot see, however, why this evidence should be rejected. Mr. Horst impressed me very much when giving his evidence. He has sworn to this fact and it is not directly contradicted and I accept it as true; but, even if I am wrong in this finding of fact, I am satisfied, after reading the paragraph in question many times, that the real meaning of it is, that the

seller agreed to substitute in case of inability to fill the contract, subject to three exceptions, *viz.*, loss by fire, acts of God or other extraordinary causes beyond the seller's control. In the latter cases, the seller was not bound to substitute nor was the buyer bound to accept substituted hops.

The plaintiff was, therefore, justified in tendering, as it did, 306 bales of the Durst hops to make up the quantity contracted for, the Durst hops being of equal quality to those agreed to be sold, and the plaintiff having been unable to produce on his ranch the full quantity of 600,000 lbs. in 1922.

There will be judgment for the plaintiff in this action for $83,938.85 and costs.

From these decisions the defendants appealed. The appeal was argued at Victoria on the 21st to the 25th of January, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers (*E. K. DeBeck*, with him), for appellants: There are three matters we complain of (1) the measure of damages; (2) substituted hops; (3) the quality of the hops in general. The first two years of both contracts were carried out. The action only applies to 1922. On the measure of damages we say the law of the *lex fori* applies and would be governed by sections 63 and 64 of the Sale of Goods Act. On the proper measure of damages see Dicey on Conflict of Laws, 3rd Ed., 761; *Don* v. *Lippmann* (1837), 5 Cl. & F. 1 at p. 13; *De la Vega* v. *Vianna* (1830), 1 B. & Ad. 284. When the Legislature has laid down the measure of damages it prevails: see Dicey on Conflict of Laws, 3rd Ed., 644; *Hay* v. *Allen* (1922), 30 B.C. 481; 64 S.C.R. 76 at pp. 83 and 85; Halsbury's Laws of England, Vol. 6, p. 248, par. 368; p. 305, par. 450. It is part of the procedure of the *lex fori*: see *Doran* v. *O'Reilly* (1816), 3 Price 250; *Baschet* v. *London Illustrated Standard Company* (1900), 1 Ch. 73. Assuming he is entitled to estimate damages by Californian law he has not proved that by that law he can buy in his own property: see *Habenicht* v. *Lissak* (1888), 19 Pac. 260; *Gibbs* v. *Ranard* (1890), 25 Pac. 63 at p. 64; *Rayfield* v. *Van Meter* (1898), 52 Pac. 666 at p. 667; *Eads* v. *Kessler*

Argument

MCDONALD, J.
1923
May 28.
COURT OF APPEAL
1924
March 4.
HORST v. LIVESLEY

(1898), 53 Pac. 656; *Matteson* v. *Equitable Min. & Mill Co.* (1904), 77 Pac. 144; *Pabst Brewing Co.* v. *E. Clemens Horst Co.* (1916), 229 Fed. 913 at p. 916. When he buys his own hops for 1 cent and immediately sells for 14 cents the Court will scrutinize the proceeding carefully: see *Wright* v. *Doe dem. Tatham* (1837), 7 A. & E. 313. On the clause in the contract as to substitution a wrong interpretation was put upon it by the Court below. It was only in the event of one of the three unusual occurrences (as set out in the agreement) arising that substitution could be resorted to, but they did not arise so they were not entitled to substitute. On the last point we say these were not "prime" hops. We say the grades are (1) choice, (2) prime, (3) medium, (4) common, but the learned judge accepted the evidence of the plaintiffs that there are five grades, "fancy" being the first grade ahead of "choice." The quality of primeness is not attained until the hops are baled, and the process from the beginning must be carefully carried out. First, the hops must be matured, then they must be properly picked, properly dried, properly cured and properly baled. None of the evidence sets up any standard of grade of these hops.

Argument

Davis, K.C., for respondent: First, on the measure of damages, the law of California applies as it is the law contemplated by the parties when they made the contract. The cases referred to by appellants are all cases on foreign judgments and do not apply here. By the law of California the measure of damages is the difference between the price of the goods sold at auction and the contract price and the vendor is entitled to buy in at the auction. As to proof of foreign law see Phipson on Evidence, 6th Ed., 389. Interest is payable by the law where the contract is made: see *The Queen* v. *The Grand Trunk Railway Company* (1890), 2 Ex. C.R. 132 at p. 140; *Scandinavian American National Bank* v. *Kneeland* (1914), 24 Man. L.R. 168 at p. 182; *Cooper* v. *The Earl Waldegrave* (1840), 2 Beav. 282; Westlake's Private International Law, 6th Ed., 305; *Gibbs* v. *Fremont* (1853), 22 L.J., Ex. 302; *In re Commercial Bank of South Australia* (1887), 36 Ch. D. 522 at pp. 523, 525 and 526; *Fergusson* v. *Fyffe* (1841), 8 Cl. & F. 121 at

p. 139; *Stuart & Stuart, Ltd.* v. *Boswell* (1916), 50 N.S.R. 16 at p. 19. The Legislature may have power to fix the damages on outside contracts but it has not done so. The Act only applies and is presumed only to apply to matters that arise within the territorial jurisdiction and not to contracts made outside the Province: see *Cope* v. *Doherty* (1858), 2 De G. & J. 614 at p. 623; *The General Iron Screw Collier Company* v. *Schurmanns* (1860), 29 L.J., Ch. 877; *Canadian Pacific Railway Company* v. *Parent* (1917), A.C. 195 at p. 205. It will be presumed the Act only applies to matters arising within the jurisdiction unless it clearly appears it was otherwise intended: see *Simonson* v. *C.N.R.* (1914), 24 Man. L.R. 267 at pp. 280 and 287; *Tomalin* v. *S. Pearson & Son, Limited* (1909), 2 K.B. 61. If they wanted the Act to apply to matters outside the Province they would say so: see *The Amalia* (1863), 32 L.J., Adm. 191 at p. 192. In any case there is no necessity of pleading special damages: see *Brown* v. *Hope* (1912), 17 B.C. 220. On the question of substitution "hot winds" are not uncommon in California and the shortage of the crop was due to this and does not come within the exceptions set out in the statute. It does not come within "act of God": see *Bailey* v. *Cates* (1904), 11 B.C. 62; 35 S.C.R. 293 at p. 294; *Garfield* v. *City of Toronto* (1895), 22 A.R. 128; *Nitro-Phosphate and Odam's Chemical Manure Company* v. *London and St. Katharine Docks Company* (1878), 9 Ch. D. 503. On the question of delivery see *New Zealand Shipping Company* v. *Societe des Ateliers et Chantiers de France* (1919), A.C. 1.

Argument

Reid, K.C., on the same side: As to the quality of the hops there was much conflicting evidence but the learned judge found on the evidence that on the whole they were prime hops up to contract grade. This is a question of fact and all we have to shew is that there was evidence upon which he could make this finding.

Mayers, in reply, referred to *Hydraulic Engineering Company* v. *McHaffie* (1878), 4 Q.B.D. 670 at pp. 674 and 676; *Hall* v. *Burgess* (1855), 71 Mass. 12; *Ayer* v. *Tilden* (1860), 81 Mass. 178 at p. 183; Leake on Contracts, 7th Ed., 642;

MCDONALD, J.

1923

May 28.

Montreal Trust Co. v. *South Shore Lumber Co.* (1923), 33 B.C. 144; *Gauthier* v. *The King* (1918), 56 S.C.R. 176.

Cur. adv. vult.

4th March, 1924.

COURT OF APPEAL

1924

March 4.

HORST v. LIVESLEY

MACDONALD, C.J.A.: The only point upon which I was doubtful at the close of the argument, was that of the measure of damages. If the damages are to be measured by the law of California, where the contract was entered into and broken, then the measure of damages is that which has been clearly proven by the legal gentlemen called to give evidence of that law, and is that applied by the learned judge in the Court below. But it was argued by Mr. *Mayers,* on behalf of the appellant, that the action having been brought in British Columbia the measure of damages should be ascertained by the law of British Columbia. He submitted that the rule to be applied is that contained in section 64 of the Sale of Goods Act, Cap. 203, R.S.B.C. 1911.

I have come to the conclusion that the learned judge was right. I think the right to damages for breach of a contract is a substantive right and not a question of procedure governed by the *lex fori.* The principal cases on the subject are ones arising under negotiable instruments, and Mr. *Mayers,* in his very exhaustive and able argument for the appellant, drew this distinction between those cases and the case at Bar. He argued that damages given in lieu of interest when the interest-bearing period has expired, arise out of the instrument itself; in other words, out of the contract of the parties, whereas he contended that the damages for breach of the contract in question in this action do not arise out of the contract itself, but are given by law for the tort committed by the defendant in failing to perform his contract. In my opinion, there is no such distinction.

MACDONALD, C.J.A.

Two cases were referred to by Mr. *Mayers,* which if good law would give colour to his submission that damages must be ascertained in accordance with the law of the forum. They are *Barringer* v. *King* (1855), 71 Mass. 9 at p. 12, in which the Chief Justice said:

"This is not interest, but damages; and the rule of damages is that of the Court where the action is brought,"

and *Ayer* v. *Tilden* (1860), 81 Mass. 178, in which the same view was expressed. Mr. Justice Story in his book on the Conflict of Laws, 8th Ed., p. 395, refers to those cases, and intimates that they have been repudiated by the decision in *Ex parte Heidelback,* 2 Low. 526. I think they are inconsistent with the main current of the American authorities. For instance, in *Consequa* v. *Willings* (1816), Pet. C.C. 225, Washington, J. is quoted in Halsbury's Laws of England, Vol. 6, p. 248, as having said:

"The rate of damages to be recovered for a breach of contract is a part of the right to which the injured party is entitled, and it is totally distinct from the remedy provided for enforcing it. In the former case the *lex loci* where the contract was made and broken is to prevail, in the latter the *lex loci* of the forum where the remedy is provided."

The English authorities are somewhat meagre on the point, but in *Cooper* v. *The Earl Waldegrave* (1840), 2 Beav. 282, Lord Langdale, M.R. at p. 284 said:

"It would seem that cases of this description have frequently come under the consideration of Courts in other countries, and more particularly in America; and that it has been held in such cases, the mode of payment and the consequences of non-payment are to be governed by the law of the country in which the payment was contracted to be made. It is singular, that no case has been found in which the point has been directly determined in the English tribunals; but the cases which have been cited shew that the Courts in England have decided upon principles which do not in any degree conflict with the principles upon which the Courts in other countries have proceeded."

In this case the bill though made in France was payable in England, and the learned Master of the Rolls stated his understanding of the law as follows:

"As to contracts merely personal, I apprehend it to be a general rule, that questions relating to the validity and to the interpretation of a contract are to be governed by the law of the country where the contract was made, and that if a remedy for non-performance of a contract is sought in another country, the mode of suing and the time within which the action must be brought are to be governed by the law of the country in which the action is brought."

In *The Queen* v. *The Grand Trunk Railway Company* (1890), 2 Ex. C.R. 132, Burbidge, J. held that damages for non-payment of a bond, there in question, which was payable in London, ought to be given in accordance with English law.

In *Allen* v. *Hay* (1922), 64 S.C.R. 76, the latest case on the subject, it appeared that the defendant gave, without con-

MCDONALD, J.
1923
May 28.
COURT OF APPEAL
1924
March 4.
HORST v. LIVESLEY

sideration, a promissory note to a bank in the State of Washington. The note was used by the banker to make a false appearance of assets, but was shewn only to the bank commissioner or inspector, a public official, who had power to close the bank if not satisfied with its solvency. It was not shewn that the creditors, customers, or shareholders of the bank knew anything about the note, and the commissioner who subsequently closed the bank, and sued on the note, made it perfectly clear in his evidence that had he known the true character of the transaction, it would not have influenced his conduct in the slightest. That is to say, he would not have closed the bank earlier than he did. It was admitted that if the case had to be decided in accordance with our law, the plaintiff must fail, but evidence was given that under the law of the State of Washington, the plaintiff could recover on the note, though he had suffered no loss and had in no way changed his position by reason of the fraud.

This case illustrates the distinction which Mr. *Mayers* wished us to draw between recovery on the instrument itself and recovery for a breach of it. But as I have already said, I do not regard this distinction as real, since the recovery of damages in lieu of interest, though the instrument carries, by agreement, no interest, is not distinguishable in principle from the recovery of damages for non-performance of the contract in question here. In neither case are the damages recoverable under the instrument, but only because the law of the land gives the complaining party the right thereto.

MACDONALD, C.J.A.

It was further argued on behalf of the appellant, that where the measure of damages to be applied to a breach of contract is fixed by statute, then that measure must be applied in all cases in our Courts. The Sale of Goods Act provides a rule of damages applicable to cases in which the law of British Columbia is the law to be applied to their ascertainment. It is only, therefore, where the damages are to be measured according to the law of this Province that the statute has application.

I would therefore dismiss the appeal.

MARTIN, J.A.: In my opinion the learned judge appealed from has reached the right conclusion, and therefore this appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: At the close of the argument in this appeal, the only point I had any doubt upon was as to the proper amount of damages to be assessed. If they are to be assessed in accordance with the *lex loci contractus,* then the evidence of both experts as to that would warrant the judgment below.

Though I was at first inclined to view the damages as outside the contract though flowing from a breach thereof, after reading and re-reading the numerous cases cited and others, and carefully considering same, and while I find some conflict in the decisions, I have finally come to the conclusion that the better view is that damages are here a substantive right, and as such must be assessed by us on the principle applicable in the *lex loci* and not in the *lex fori.*

I would dismiss the appeal.

MCPHILLIPS, J.A.: These appeals are from judgments of MCDONALD, J., that learned judge having found for the respondents in the two actions for the respective sums of $83,938.85 and $47,756. The evidence is exceedingly voluminous and was led upon the part of the respondents (the plaintiffs in the actions) to establish that the appellants had wrongfully refused to accept the hops called for under the contract sued upon. The defences in the main were that the respondents offered to accept all the hops which conformed to the contract description and that the plaintiffs refused to deliver the hops which the defendants offered to accept; that the plaintiffs were not justified upon the facts in not tendering other than prime hops grown in the year 1922 upon the Wheatland Ranch and that the plaintiffs on their part committed a breach of contract in re-selling any or all of the hops covered by the contract. Upon an analysis of the evidence, it would seem to me clear to demonstration that the learned judge arrived at the right conclusion. There is overwhelming evidence and no doubt can be cast upon its credibility that the plaintiffs upon their part carried out the terms of the contract and produced ready for delivery hops called for by the contract and that the defendants wrongfully refused to accept the same, bringing about breaches of contract which entitled the plaintiffs to an

MCDONALD, J.

1923

May 28.

COURT OF APPEAL

1924

March 4.

HORST v. LIVESLEY

assessment of damages consequent upon those breaches. I do not consider the case one where it is necessary to array and contrast the rival and contending evidence, as the learned judge had before him ample evidence upon which he could reasonably come to the conclusion which he did. I content myself by saying that this Court had addressed to it elaborate and able arguments from both sides and nothing would seem to have been overlooked, and a careful scrutiny of the evidence convinces me that there can be but one conclusion and that is that not only did the learned judge not go wrong but that he incontrovertibly went right in finding, as he did, for the plaintiffs. It therefore followed that damages became assessable in legal sequence and the damages were assessed. It was strenuously argued by the learned counsel for the appellants that there was wrongful reception of evidence relative to contracts and transactions between the plaintiffs and third parties. I cannot see that any error in law of this nature occurred at the trial. The evidence adduced would seem to have been relevant evidence, considering the nature of the enquiry and as determinative of the prevailing conditions then existent and of the values and market prices of hops in the varying grades. It was further pressed that the grades and classification of the hops were not adhered to in conformity with the terms of the contract, and that there was no right of substitution of other hops within the terms of the contract. These points are of considerable nicety and received consideration at the hands of experts called upon both sides, and I cannot, upon full consideration of the evidence, notwithstanding the very able, exhaustive, and analytical argument of Mr. *Mayers,* the learned counsel for the defendants, come to any other conclusion than that arrived at by the learned trial judge, supported as it is by a large volume of valuable expert testimony. The case is not one which admits of the Court of Appeal differing from the learned trial judge (*Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402), as he had before him evidence complete in its nature justifying the conclusion at which he arrived. That there was rival and contending evidence is not sufficient and would not warrant the displacement of the learned trial judge's

MCPHILLIPS, J.A.

conclusions. Then it was contended that in any case the assessment of damages was not permissible by reason of the frailty and indefiniteness of the pleadings as to damages. I cannot see that there is any point in this contention. It is fundamental in pleading that damages need not in their nature be specifically set forth save where special damage is claimed, and that is not the present case. Finally, it was forcefully presented upon the part of the defence that the *quantum* of damages as allowed was in error and calculated upon an erroneous basis, that is, the plaintiffs had elected to sue in British Columbia, that the scale of damages must necessarily be that of the *lex fori* not the *lex loci contractus*. Upon a study of the authorities cited and an examination of others I have no hesitation in coming to the conclusion that the damages were rightly assessed in conformity with the existent law in the State of California, one of the United States of America, where the contract was made and where it was to be performed. The learned trial judge had the advantage of evidence, indicating great skill and learning from legal experts of the State of California, addressed to this point and I cannot see that there is any material variance in that testimony; in truth it is in unison in all material features necessary to be considered in this case, and it is plainly evident that the procedure adopted in making the sales of the rejected hops was in due conformity with the law of California and that the computation made of the damages, following credits given for the moneys realized at the sales, was in strict conformity with the law of California. In passing, it may be said that, according to our jurisprudence it rather affronts one that the vendors of the hops under the contract could, as was done, become themselves the purchasers and at such small prices, but nothing can be effectively based upon this. The laws of the State of California are sovereign in this matter of the assessment of damages, and it is idle to contend otherwise. *Allen* v. *Kemble* (1848), 6 Moore, P.C. 314 is an authority which clearly demonstrates that in the present case the liability is to be governed by the *lex loci contractus,* and this decision is, of course, absolutely binding upon this Court. There The Right Hon. T. Pemberton Leigh, delivering the judgment of their

MCDONALD, J.
1923
May 28.
COURT OF APPEAL
1924
March 4.
HORST v. LIVESLEY

Lordships of the Privy Council, said (the case was one of a bill of exchange drawn in one country and payable in another, here we have the case of a contract made in California to be carried out in California) at pp. 321-22:

"If this contract of the drawer be broken by the drawee, either by non-acceptance, or non-payment, the drawer is liable for payment of the Bill, not where the Bill was to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he contracted may allow. In every case of a Bill drawn in one country upon a drawee in another, the intention and the agreement are, that the Bill shall be paid in the country upon which it is drawn. But it is admitted, that if this payment be not so made, the drawer is liable, according to the laws of the country where the Bill was drawn, and not of the country upon which the Bill was drawn."

Then we have *Gibbs* v. *Fremont* (1853), 22 L.J., Ex. 302. There it was held:

"In an action against the drawer of a bill of exchange not bearing interest, which has been dishonoured by non-acceptance, if the jury find the plaintiff entitled to interest by way of damages, the measure of damages is the rate of interest at the place where the bill was drawn."

And in passing it might be noticed that the case was one based upon bills of exchange drawn at Los Angeles, Upper California, and the bills were presented at Washington, D.C., the defendant then being at Washington, but were dishonoured. The rate of interest at Washington was 6 per cent. and in California 25 per cent. See Alderson, B. at p. 304.

MCPHILLIPS, J.A.

It is, therefore, clear that in the case of a bill of exchange where the bill is drawn in one country and payable in another the drawer is liable, on the dishonour of the bill, to pay interest according to the current rate of interest in the country where the bill was drawn, *a fortiori* in the present case, where the contract was made in California to be performed in California. There can be no question but that the defendants are liable according to the *lex loci contractus*. In further support of this view I would refer to the language of Turner, L.J. in delivering the judgment of their Lordships of the Privy Council in *The Peninsular and Oriental Steam Navigation Company* v. *Shand* (1863), 3 Moore, P.C. (N.S.) 272 at pp. 290-1.

In *The Queen* v. *The Grand Trunk Railway Company* (1890), 2 Ex. C.R. 132, Burbidge, J. at p. 140 said:

"With reference to the amount of damages, I think that the contention

of the defendants that the Court should have regard to the rules in force at the place where the bond was payable, must prevail."

MCDONALD, J.

1923

May 28.

COURT OF APPEAL

1924

March 4.

HORST v. LIVESLEY

In *Scandinavian American National Bank* v. *Kneeland* (1914), 24 Man. L.R. 168 at p. 182, Cameron, J.A. said:

"This contract was made in the State of Minnesota and was to be performed there. That being so, the rights and obligations of the parties are to be determined in accordance with the laws of Minnesota which must be taken to be the laws by which the parties intended the contract to be governed."

In *In re Commercial Bank of South Australia* (1887), 36 Ch. D. 522 North, J. reviewed the controlling cases, among others *Allen* v. *Kemble* and *Gibbs* v. *Fremont* above referred to, and at p. 526 said:

"Those cases, therefore, shew clearly that the liability to damages is to be measured according to the law of the country where the contract which is broken was entered into."

The learned judge proceeded rightly in applying the *lex loci contractus* and the assessment of damages would appear to be in complete conformity with the law of the State of California and the damages have been rightly computed. I am clear upon it that the judgments should not be disturbed. In this connection, I would refer to the governing principle upon questions of fact in the Court of Appeal as defined by Lord Lindley in *Coghlan* v. *Cumberland, supra,* and what Lord Buckmaster said in *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96:

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

MCPHILLIPS, J.A.

In *McIlwee* v. *Foley Bros.* (1919), 1 W.W.R. 403 at p. 407 Lord Buckmaster said:

"The learned judge before whom the matter was heard was at full liberty, having considered the evidence on both sides, to decide that he would trust and accept *in toto* the evidence given by one witness, and had this been the only matter for consideration there would be no ground for this appeal. It is unnecessary to repeat the warnings frequently given by learned judges, both here and in Canada, against displacing conclusions of disputed fact determined by a tribunal before whom the witnesses have been heard and by whom their testimony has been weighed and judged, and did the question depend solely on the decision between rival evidence the case would be free from difficulty."

There is no difficulty here. Upon the questions of fact it is

MCDONALD, J.
1923
May 28.
COURT OF APPEAL
1924
March 4.
HORST v. LIVESLEY

purely a matter of "rival evidence," and as to the question of law that would appear to be beyond question, *i.e.*, the *lex loci contractus* governs. It would, therefore, appear to conclusively follow that the appeals should stand dismissed and that is my opinion.

Appeals dismissed.

Solicitors for appellants: *Dickie & DeBeck.*

Solicitors for respondents: *Reid, Wallbridge, Douglas & Gibson.*

COURT OF APPEAL
1924
March 4.
WALTON v. BOARD OF SCHOOL TRUSTEES OF VANCOUVER

WALTON v. THE BOARD OF SCHOOL TRUSTEES OF VANCOUVER AND THOMAS.

Negligence—Damages — School sports — Shooting competition — Defective rifle—Backfire—Injury to pupil resulting in loss of eye—Education authority—Liability.

The Board of School Trustees of Vancouver having declared the 23rd of May, 1922, a holiday, decided to have a programme of sports at each of the schools. The arranging and supervision of the sports were left entirely in the hands of the principals. The defendant Thomas, principal of one of the schools, decided to have a shooting contest in the basement of the school and asked the pupils to provide the rifles. On the evening before the contest Thomas, who examined rifles during the Great War, examined and oiled the rifles. The boys paid for their ammunition and at the contest the rifles were cleaned every three shots. The plaintiff's boy, twelve years old, had to wait for over an hour for his shots and he had difficulty in getting the gun to go off. His third shot on the second attempt to fire, went off and backfired, a particle hitting him in the eye the result of which was that a few days later his eye had to be taken out. It appeared from the evidence that the rifle (a 22 calibre) had a loose bolt and an enlarged chamber. In an action for damages for negligence the jury gave a verdict against the School Board but dismissed the action as against Thomas.

Held, on appeal, affirming the decision of GREGORY, J., that the trustees were responsible for the holding of the competition; that it is not a question of their power to authorize this form of sport but of their authority to prevent it, or if allowed, to surround it with proper safeguards.

Held, further, that there was no inconsistency in the verdict by exonerating Thomas as the negligence of the Trustees as found by the jury was in not providing proper safeguards and not the negligence attributed to Thomas.

APPEAL by defendant School Board from the decision of GREGORY, J. of the 29th of June, 1923, and the verdict of a jury in an action for damages for the negligence of the defendants resulting in the plaintiff's son losing an eye. The son, Bruce Walton, twelve years old, attended a public school in Vancouver at which the defendant Thomas was principal. The 23rd of May, 1922, being a holiday it was decided by the School Board to have a programme of sports at the different schools the regulation and conduct of the sports being left entirely in the hands of the principal of each school. The boys wanted a shooting contest, targets belonging to the school cadets being in the basement of the school. Thomas announced on the 22nd of May that there would be a shooting contest and asked the boys to bring what rifles they could for use in the contest. This was done by Thomas without the knowledge or authority of the School Trustees. The rifle in question, a 22 calibre, was brought by a boy and was examined and oiled by Thomas on the evening of the 22nd. He had been at the front in the Great War for a considerable period and had acquired a knowledge of rifles. At the contest the boy Walton wanted to use this rifle and he waited over an hour while other boys used it. He put in a cartridge and tried twice before it went off. He then put in a second cartridge but it did not go off at all so he took the cartridge out and put in another and on the second attempt it went off but it backfired and a particle struck him in the eye. The shooting was in charge of Thomas and the rifles were cleaned and oiled from time to time as the shooting was going on. There did not appear to be anything seriously wrong with the boy's eye at the time but a few days later the eye became inflamed and getting worse it eventually had to be taken out. The verdict of the jury was as follows:

Statement

"Verdict for the plaintiff for $2,000 against the School Board of Vancouver. We condemn the practice of the use of firearms in the public schools of Vancouver without efficient inspection and supervision thereof."

Judgment was given against the School Board in accordance

COURT OF APPEAL

1924

March 4.

with the verdict and the action was dismissed as against Thomas.

The appeal was argued at Victoria on the 11th and 14th of January, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

WALTON v. BOARD OF SCHOOL TRUSTEES OF VANCOUVER

McCrossan, for appellant: It is claimed the rifle was defective in two respects, *i.e.,* that there was a loose bolt which created a tendency to backfire and the chamber was enlarged causing the cartridges to jam. There is also claimed lack of supervision and inspection. Thomas's competency is not questioned but it is said he was negligent. Thomas was not authorized to have a shooting contest nor was the Board aware of its being held. We say: (1) It was beyond the scope of Thomas's authority; and (2) it was beyond the powers of the School Board: see rule 16 of School Rules and Regulations. The shooting was purely voluntary and the parents gave their consent. The pupils bought their own shells and the rifle was cleaned every three shots. There is nothing in the enlarged chamber as the evidence is that if the bolt is tight there can be no backfire and it would take a technical man to discover an enlarged chamber. The principle is we are liable for what we know but not for what we do not know of: see *MacCarthy* v. *Young* (1861), 6 H. & N. 329; *Blackmore* v. *B. & E. Railway Co.* (1858), 8 El. & Bl. 1035; *Coughlin* v. *Gillison* (1899), 1 Q.B. 145; *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371 at p. 375; Halsbury's Laws of England, Vol. 21, p. 375; *Longmeid* v. *Holliday* (1851), 6 Ex. 761. There is no greater liability in the case of a child: see *Latham* v. *R. Johnson & Nephew, Limited* (1913), 1 K.B. 398 at p. 407; *Langridge* v. *Levy* (1837), 2 M. & W. 519 at p. 530. The plaintiff is in no better position than a gratuitous passenger on a vehicle: see *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115; *Nightingale* v. *Union Colliery Co.* (1904), 35 S.C.R. 65. On burden of proof where it is sought to make the principal liable for agent's negligence see *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526; Halsbury's Laws of England, Vol. 21, p. 439, par. 750. The onus is on the plaintiff to shew the act is within the scope of his authority: see *Beard* v. *London General Omnibus Company* (1900), 2 Q.B. 530. Assuming Thomas had authority

Argument

he could not delegate his authority to the boys: see *Gwilliam* v. *Twist* (1895), 2 Q.B. 84. This is the case of a borrowed article; he had no authority to borrow. The shooting was contrary to by-law No. 947: *Poulton* v. *London and South Western Railway Co.* (1867), L.R. 2 Q.B. 534; *Ormiston* v. *Great Western Railway Company* (1917), 1 K.B. 598. Lastly, the verdict is incompatible as the jury having discharged Thomas from liability they cannot find the Board of Trustees liable as the case is entirely founded on Thomas's action.

Mayers, for respondent: In answer to the last point raised we say that there was a lack of system on the part of the School Board itself. There was a lack of system of organizing and carrying out the sports. If a tort is committed by an agent a jury may find either principal or agent responsible. There were an enlarged chamber and a defective bolt in the rifle. The shell would not fit properly hence the trouble. The case is in no way analagous to the cases cited but is a relation between the Board and the students: see *Ching* v. *Surrey County Council* (1910), 1 K.B. 736. The duties of the Board cover not only school work but all matters in which the scholars are interested: see *Shrimpton* v. *Hertfordshire County Council* (1911), 104 L.T. 145; *Smith* v. *Martin and Kingston-upon-Hull Corporation* (1911), 2 K.B. 775; *Thompson* v. *Columbia Coast Mission* (1914), 20 B.C. 115. They left the whole matter in Thomas's hands. The accident itself shews the rifle was defective. There is a duty on the defendants to see it was safe: see *Dominion Natural Gas Co.* v. *Collins* (1909), 79 L.J., P.C. 13 at p. 17; *Glasgow Corporation* v. *Taylor* (1922), 1 A.C. 44 at p. 61; *Cooke* v. *Midland Great Western Railway of Ireland* (1909), A.C. 229.

Argument

McCrossan, in reply.

Cur. adv. vult.

4th March, 1924.

MACDONALD, C.J.A.: The jury found the School Board liable on the ground that they had not provided efficient supervision of the shooting competition in question, and efficient inspection of the rifle which caused the injury to the infant plaintiff. The want of such supervision and inspection is distinctly pleaded

MACDONALD, C.J.A.

COURT OF APPEAL

1924

March 4.

WALTON v. BOARD OF SCHOOL TRUSTEES OF VANCOUVER

in the statement of claim, but there is no allegation in the statement of defence to the effect that the Trustees had a proper system of supervision and inspection, or appointed a competent person to perform those duties. The competition was in charge of the defendant Thomas, the principal of the school, and if the question had been raised by the pleadings and depended for its decision on the evidence of Thomas, I should find it difficult to conclude that the Trustees had been guilty of negligence in this respect. Not being so raised, the defendants neither cross-examined Thomas on the question of his qualifications, nor lead other evidence on the point. They ignored it, as they had a right to do, and I am afraid I must pursue the same course.

I think it must be taken that the Trustees are responsible for the holding of the competition. Similar competitions had been held annually for several years prior to the one in question, and the Trustees do not deny that they were aware of these. They authorized the holding of the school sports; they granted the holiday for that purpose. Their counsel, Mr. *McCrossan,* contended that they had no power to authorize the holding of a shooting competition on the school premises; that it was *ultra vires* of their power under the Schools Act. But in my view of the case it is not a question of their power to authorize this form of sport, but of their authority to prevent it, or if allowed, to surround it with proper safeguards. It was the opinion of the jury that they had failed to provide those safeguards.

MACDONALD, C.J.A.

Counsel attached importance to the fact that the verdict is against the Trustees only, while defendant Thomas has been exonerated by the jury. I see nothing inconsistent in this. Thomas may, in the eyes of the jury, have been merely unskilful not negligent. The negligence of the Trustees as found by the jury was of another kind than that attributed in the statement of claim to Thomas. It was negligent in not providing safeguards. The Trustees, like any other corporation, might protect themselves in doing a lawful act by appointing persons skilled in the matter in hand to superintend the carrying of it out. This the defendants failed to prove that they had done; they seem to have taken no trouble at all to see that the children attending these sports should be safeguarded against

injury. It cannot, I think, be doubted that school boards have a duty to see that school premises are not used in a manner dangerous to the children under their jurisdiction. The jury have found that the competition in question was a dangerous one if not properly supervised, therefore, when the Trustees authorized the holding of the school sports, including this competition, it was clearly enough their duty to take the precautions suggested by the jury. I do not say that the Trustees were wrong in permitting target practice at the school—I am not called upon to decide that question—it is enough to say that if they do authorize or permit such a practice, the duty to supervise it properly must be held to rest upon them, and a breach of that duty will subject them to damages.

MACDONALD, C.J.A.

I would dismiss the appeal.

MARTIN, J.A.: This appeal should, I think, be dismissed. The chief point for the appellant, strongly urged, and upon which I had a doubt, was as to the jurisdiction of the School Trustees to authorize the sports or recreations in question, but after a close consideration of section 45 of the Public Schools Act, I am of opinion that subsections (*a*), (*c*) and (*d*) are sufficient to cover the facts of the present case.

MARTIN, J.A.

GALLIHER, J.A.: I am, though I must say not without doubt, acceding to the conclusions reached by my learned brothers in this case.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal brings up a question of some nicety but, in my opinion, the verdict of the jury, imposing liability upon the School Board, is sustainable in law. The facts well demonstrate that, at a time which would have been during usual instructional work, the Board admitted of, in fact arranged for, the carrying on of sports and other recreation relative to the patriotic celebration of Empire Day and amongst other ways of doing this a competitive rifle practice was engaged in by some of the scholars of the Florence Nightingale School in the City of Vancouver on May 23rd, 1922. The necessary permit for this observance, instead of usual school work, was obtained from the superintendent of education upon

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

March 4.

WALTON v. BOARD OF SCHOOL TRUSTEES OF VANCOUVER

the application of the municipal inspector of the Vancouver schools. The shooting-gallery was in the basement and the shooting took place under the direction of the principal of the school, one Thomas, but he had to attend to some ice-cream booths and other things at the same time. There was, as the evidence well shews, no proper system of control that would ensure reasonable safety to the boys at the rifle practice and competition carried on in the shooting-gallery, and it may well be that the jury not only believed that there was no proper system but that the principal was incompetent. The finding of the jury was in these terms: [already set out in statement].

Ample evidence supports this finding. The action was one brought by the father of Bruce Carlyle Walton for damages, the young boy, only twelve years of age, suffering the loss of his right eye consequent upon some metal penetrating the eye owing to having had placed in his hands a defective rifle and owing to a defective chamber bringing about a blow back in firing, the rifle being patently defective, not being in a sound condition for the purposes of shooting. There was evidence as well that the ammunition was defective. Three rifles were in use by the scholars, the one young Walton was given being a rifle which the principal borrowed and it was in general use that day, and had given trouble owing to its non-ejection of the shells after firing, and this was its condition before being handed to young Walton to use. The evidence shews that Thomas made no proper inspection of the rifle; further, Thomas did not properly guide or direct the shooting and observe the shooting as it proceeded; if he had done so he would have become aware of the defective nature of the rifle. He practically left the young boys to their own devices in the carrying on of this dangerous work, resulting in this irreparable damage to young Walton. The defence is that there was competent supervision; further, that in view of the facts and the happening, no supervision would have obviated the accident. This cannot be said effectively upon the evidence and the jury found to the contrary. That the shooting-gallery practice was well known to the Board cannot be gainsaid, it was shewn that it had gone on for four years. To contend that it was not known

MCPHILLIPS, J.A.

officially is a profitless contention. The particular defect in the rifle was an enlarged chamber and defective bolt, discernible if there had been competent inspection. Thomas attempted to shew that he had made proper inspection of the rifle, but in that he failed in my opinion. One piece of evidence elicited by the learned counsel for the Board from Thomas under cross-examination vividly brings out the lack of proper inspection and want of competency of Thomas:

"Do you suggest that this enlargement of the chamber was not there on the morning of the 23rd? I mean I do not suggest that it was not there.

"When you examined that on the night before you did not notice any enlargement of the chamber? I examined it from the muzzle end."

Comment is hardly necessary to point to the gross carelessness here apparent. This further question was put by the learned counsel for the Board:

"And you have heard evidence that an unduly large chamber greatly increases the danger of a blow back. Do you agree with that? I agree with that."

The evidence shews that the mechanism of the rifle would not eject the shell after firing, and this was going on before young Walton did his shooting. The shells had to be taken out by hand, and at the time young Walton was using the rifle and at the time of the accident he had to hand the rifle to a boy behind him who knocked the shell out with a ramrod. The shooting-gallery or rifle-range was put in the school by the Board. Sports Day (the 23rd of May), the day upon which the accident took place, was a well recognized and approved sports day for years, set aside by the Board. There is express evidence that it had obtained for four or five years. Thomas, in his discovery evidence, was asked the following questions and gave the answer here set forth to the questions as put:

MCPHILLIPS, J.A.

"And in the event of the 23rd of May not having been approved as Sports Day classes would have been held? The ordinary school.

"These sports which were held were in lieu of the ordinary school."

The powers and duties of the Board are defined by sections 45 and 129A of the Public Schools Act (Cap. 206, R.S.B.C. 1911, as amended), and 129A in particular sets forth:

"Maintain an advanced course in physical training, including gymnastic exercises or cadet instruction, or both, and the entire cost of all necessary equipment and of maintenance shall be defrayed by the Board of School Trustees."

COURT OF APPEAL

1924

March 4.

WALTON v. BOARD OF SCHOOL TRUSTEES OF VANCOUVER

In the present case there was the lack of proper equipment. The rifle provided was a borrowed one, defective, and there was no proper inspection and no proper supervision of the shooting. In *Ching* v. *Surrey County Council* (1910), 1 K.B. 736 the Court of Appeal held that there was liability where a pupil fell while playing in the playground attached to the school through his foot being caught in a hole existing in the asphalt pavement of the playground and in consequence sustained injury. When the Public Schools Act of British Columbia is looked at and compared with the Imperial Act, I think it can be said that this is an authority which can be usefully and effectively applied to the present case. The Earl of Halsbury in the *Ching* case said at p. 741:

"It seems to me obvious that any one charged with that duty was bound to take care that the playground where the boys were expected to play, it being intended for the purposes of their recreation, should be in such a condition that they should not be exposed to unnecessary danger while playing there."

And Fletcher Moulton, L.J. (afterwards Lord Moulton) said at p. 743:

"They are not merely permitted or invited to come to the school, but directed to do so, and I think that, as members of the public, if they are injured by neglect of a statutory duty with regard to a place where they are expected to play, they are entitled to make those upon whom the statute has imposed the duty responsible for injuries sustained by them through breach of such duty."

MCPHILLIPS, J.A.

Here a defective rifle was placed in the hands of this very young boy and by a parity of reasoning there must be liability. I would refer to *Shrimpton* v. *Hertfordshire County Council* (1911), 104 L.T. 145. The head-note succinctly and correctly sets forth the judgment of the House of Lords and reads as follows:

"A person who provides anything for the use of another is bound to provide a thing reasonably safe for the purpose for which it is intended, even though the person using it uses it only by the permission or consent of the person providing it and has no legal claim to the use of it.

"Therefore, where an education authority, in pursuance of their statutory powers, provided a vehicle to convey certain children, who lived at a distance, to and from their school, and a child who lived nearer to the school, and was not one of those for whom the vehicle was provided, was conveyed in it with the consent of the education authority, and, while getting out of it, fell and was injured in consequence of there being no second person in addition to the driver to help the children to get in and out:

"*Held* (reversing the judgment of the Court below), that there was evidence of negligence on the part of the education authority, and that they were liable for the injury so caused to the child."

In *Smith* v. *Martin and Kingston-upon-Hull Corporation* (1911), 2 K.B. 775 it was held in the Court of Appeal that there was liability upon the corporation, the learned trial judge having directed a judgment to be entered for the corporation. The girl in that case, being a pupil at the school, was directed by the teacher during school hours to poke the fire and draw out the damper of a stove in the teachers' common room and while doing this her pinafore caught fire and she was severely burned. [The learned judge here quoted the judgment of Farwell, L.J., beginning with the paragraph at the bottom of p. 784 and ending at p. 786 and continued].

Dominion National Gas Co. v. *Collins* (1909), 79 L.J., P.C. 13 would appear to me to be in point in the consideration of the present case, and it is to be observed that the railway company was absolved from liability by the learned trial judge upon the answer of the jury (as Thomas has been absolved here by the jury) and the plaintiffs there acquiesced in the decision absolving the railway company and here the plaintiff likewise has acquiesced in the decision absolving Thomas. The gas company, however, appealed, as the Board here appeals, and the gas company's appeal was resisted as the Board's appeal is here resisted. Their Lordships of the Privy Council, upon the appeal, maintained the judgment against the gas company, and similarly I am of the opinion that in the present case the judgment against the Board should be maintained. Lord Dunedin in delivering the judgment of their Lordships at pp. 16 to 17 said: [The learned judge after quoting the judgment from the beginning of the second paragraph in column one on p.16 to the end of the first paragraph in column one on p. 17 continued].

MCPHILLIPS, J.A.

In the present case there was initial negligence in placing in the hands of this very young boy a dangerous weapon, then being in a defective condition, and here, as in the case in the Privy Council, there was negligence of the Board's servant (Thomas) in failing to properly inspect the rifle "and see that it was in good order" when young Walton was handed it. The case of *Jackson* v. *London County Council and Chappell* (1912),

COURT OF APPEAL

1924

March 4.

WALTON v. BOARD OF SCHOOL TRUSTEES OF VANCOUVER

28 T.L.R. 359 is much in point. The head-note reads as follows:

"A contractor, who was to carry out certain repairs at a public elementary school, left a quantity of rough stuff composed of sand and lime in a truck in a corner of the school playground. The headmaster of the school gave instructions to the school caretaker to have the stuff removed, as he considered it was dangerous, and the caretaker telephoned to the contractor asking him to remove it. The stuff, however, was not removed. When the boys came out of school the stuff was left unguarded, and one of the boys threw a portion of the stuff at the plaintiff, who was also a scholar at the school, injuring his eye. In an action by the plaintiff against the education authority and the contractor for damages,

"*Held*, that there was evidence upon which the jury could find that both the education authority and the contractor had been guilty of negligence."

It is to be observed that the schoolmaster was not sued in that case. Chappell was the contractor. The Court of Appeal without calling upon counsel for the plaintiff dismissed the appeal. [The learned judge here quoted the judgment of Vaughan Williams, L.J., at pp. 359-60 and continued].

The head-note in *Morris* v. *Carnarvon County Council* (1910), 1 K.B. 159 well explains the effect of the judgment there given, and there, as here, a dangerous thing was present. There it was a door, here it was a rifle, and there, as here, the child was invited to use the dangerous article and the liability was one at common law. Mr. Justice Phillimore (now Lord Phillimore) at p. 167 said:

MCPHILLIPS, J.A.

"But I am of opinion that there is a good cause of action in this case against the defendants wholly outside the statute, a liability which attaches to them not as an education authority, but as the owners of premises which are dangerous and upon which they have invited the plaintiff to come. There is a duty upon persons who invite others on to their premises to take care that the premises are not in a dangerous condition; and if that be true of what I may call their static condition, where the danger arises from the position of things as they stand without anything being moved, *a fortiori* is there a duty upon the owners to take care when they invite others to deal with something movable upon the premises the moving or dealing with which may be productive of mischief. Here this child, being on the school premises by invitation, is directed to use a swing door which happens to be dangerous for so young a child to use, and damage happens in consequence. For that damage I am of opinion that the defendants are responsible. I agree that the appeal should be dismissed."

I would refer to the language of Lord Shaw of Dunfermline in *Glasgow Corporation* v. *Taylor* (1922), 1 A.C. 44 at pp. 61-63.

COURT OF APPEAL

1924

March 4.

WALTON v. BOARD OF SCHOOL TRUSTEES OF VANCOUVER

In the present case a dangerous rifle was put into the hands of this young boy. The defective nature was not "familiar nor obvious." Further, the boy was too young in any case to comprehend possible danger. There is nothing in the point strenuously argued that the jury having absolved Thomas from liability that it must mean that the Board is absolved. That in no way follows; the jury were at perfect liberty to do this. In my opinion, the authorities support the imposition of liability upon the Board when all the facts and circumstances of the present case are taken into account.

I would therefore dismiss the appeal.

MCPHILLIPS, J.A.

EBERTS, J.A. would dismiss the appeal.

EBERTS, J.A.

Appeal dismissed.

Solicitor for appellant: *J. B. Williams.*
Solicitor for respondent: *G. Housser.*

MOODY v. MOODY.

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

1924

May 9.

MOODY v. MOODY

Divorce — Alimony in arrears — Reduced circumstances of respondent — Application to reduce arrears and monthly allowance.

The claim of a wife upon obtaining a divorce, to alimony is paramount to that of a second wife or any children had by her, and the liability of the husband to maintain her can not be prejudiced by the existence of a second family.

That the earning power of the respondent in a divorce action had fallen off to a considerable extent is ground for a reasonable reduction in the monthly allowance but not for a reduction in the arrears of alimony.

Statement

APPLICATION by the respondent in a divorce action to cancel or reduce the arrears of alimony and the monthly allowance. The decree absolute was made in January, 1918, when he was ordered to pay $60 per week. Shortly afterwards he married the co-respondent by whom he had children. When he was divorced his income was rated at $15,000 per annum

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

1924

May 9.

MOODY v. MOODY

but his income gradually decreased, his income during the last year averaging $300 per month. The alimony was about $6,000 in arrears. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 9th of April, 1924.

J. W. de B. Farris, K.C., and *McQueen*, for the application. *A. S. Johnston, contra.*

9th May, 1924.

HUNTER, C.J.B.C.: Application by the respondent Moody, a dentist, to cancel or reduce the arrears of alimony and the monthly allowance.

His wife obtained a decree absolute in January, 1918, when he was ordered to pay $60 a week. A few days after she obtained the decree absolute Moody married the co-respondent and they have since had children.

The petitioner is now applying for an order for the payment of arrears which amount to over $6,000. It was owing to frequent promises by Moody to pay up that the petitioner consented to forego taking proceedings until at length she issued a *fi. fa.* on November 1st, 1923, which was returned *nolla bona.*

I apprehend that there is no doubt that the claim of the first wife is paramount to that of No. 2 or any children had by her and that his liability to maintain her is not to be prejudiced by the predicament into which he has got himself by raising a new family.

Judgment

That the monthly allowance must be reduced owing to his altered circumstances is admitted. When the order for alimony was made he was in receipt of an income of over $15,000 a year, which became diminished to such an extent that during last year he did not average $300 a month. In July, 1923, he made a bankruptcy assignment and it would appear from affidavits filed in his behalf that he is not physically able to work as much as he used to and that he is not likely to average more than $300 a month hereafter. It also appears that the office furniture and professional paraphernalia are now vested in a company known as "Painless Moody Limited" with 10,000 one dollar shares of which the bulk is held by Mrs. Moody the second.

The petitioner's solicitor put in a newspaper account of an entertainment under date of April 14th last, part of which reads as follows:

"Dr. and Mrs. T. Glendon Moody entertained at a delightful dance on Saturday evening at their home on 16th Ave. West. The spacious rooms were artistically decorated with bowls of daffodils and golden tulips and delightful music was provided for the dancers."

On the one hand, therefore, the picture presented is that of impecuniosity and illness, and on the other daffodils and dancing. I suspect the truth lies about mid-way. I think there is no doubt his earning capacity has fallen off considerably, but not to the extent alleged.

It is not necessary for me to consider whether I have the power to cancel the arrears in whole or in part, as even if I have the power I think that I ought not to do so. It was open to Moody to have applied for a reduction of the monthly allowance before the arrears had accumulated to such an extent, but it seems to me that notwithstanding his promises he cared nothing about it.

Judgment

There will be an order fixing, until further ordered, the future allowance at $75 per month and a further monthly payment of $25 in respect of the arrears. Liberty to apply. Costs to the petitioner.

Order accordingly.

COURT OF APPEAL

1924

June 4.

CHANNELL LIMITED AND CHANNELL CHEMICAL COMPANY v. ROMBOUGH *ET AL.*

Practice—Appeal to Supreme Court—Application to Court of Appeal for leave—Can. Stats. 1920, Cap. 32, Secs. 35 to 43 inclusive.

CHANNELL v. ROMBOUGH

An action for infringement of a trade-mark is a private matter between the plaintiffs and defendants and that the plaintiffs have half a dozen suits for infringements in as many Provinces does not make the matter of public importance. An application for leave to appeal to the Supreme Court was refused.

MOTION for leave to appeal to the Supreme Court of Canada. The action was for damages for wrongfully imitating the plaintiffs' trade-mark for a polish called "O'Cedar." The defendants manufacture a similar article under the name of "Cedarbrite" and the plaintiffs claim it is an infringement on their trade-mark. The plaintiffs spend in advertising in Canada in the neighbourhood of $75,000 a year and claim this infringement affects their business to the extent of over $10,000 per annum. The action was dismissed and the judgment of the trial judge was sustained by the Court of Appeal.

Statement

The motion was heard at Victoria on the 4th of June, 1924, by MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, J.J.A.

A. H. MacNeill, K.C., for the motion, referred to *Doane* v. *Thomas* (1922), 31 B.C. 457 at p. 458; *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234; *Seibel* v. *Dwyer Elevator Co., Ltd.* (1923), 3 W.W.R. 909.

Argument

J. E. Bird, contra.: There is no proof of the amount involved, it could therefore only be in the case of special circumstances that leave would be given. There is no ground here for leave to appeal. The application should be made before the time for leave expires. For leave for security see *Esdaile* v. *Payne* (1889), 40 Ch. D. 520.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would refuse leave to appeal. In the first place, on the merits, I am in very grave doubt as to

whether this is a case of public importance at all; it is a private matter between the plaintiffs and defendants. The fact, if it be such, that plaintiffs may have half a dozen suits for infringement in as many Provinces does not make it a matter of public importance.

Further than that, owing to the extraordinary situation which arises in this case on account of the way the statute is drawn with regard to leave to appeal, an appellant has to come here asserting that the amount involved is not more than $2,000. It is claimed in these proceedings that it is a great deal more than that. True, Mr. *MacNeill* has offered to admit, for the purpose of this application, that the amount is not that much, but the pleadings shew otherwise. On application to the Supreme Court complete justice in all phases of the case can be done.

MACDONALD, C.J.A.

MARTIN, J.A.: I think leave should not be given in this case in view of our decision in *Doane* v. *Thomas* (1922), 31 B.C. 457, and that of the Supreme Court in *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234, on which we founded ours. The case at Bar I regard as one in which there is at least grave doubt in support of the propriety of our giving leave. And such being the case, I note, as I said in the *Doane* case, that the Supreme Court of Canada in the *Girard* case went so far as to express its regret that the Court below had given leave. Therefore, I think it is safer to leave this matter for the Supreme Court itself to say whether or no it should come before it.

I only wish to add this: that the case of *Seibel* v. *Dwyer Elevator Co., Ltd.* (1923), 17 Sask. L.R. 603; 3 W.W.R. 909, before the Saskatchewan Court of Appeal, is an unsatisfactory decision because it was given in apparent ignorance not only of the decision of this Court a year before in *Doane's* case, but of the decision of the Supreme Court in *Girard's* case, which is the leading authority. Therefore, with all due respect, I am not able to give weighty consideration to the *Seibel* case.

MARTIN, J.A.

GALLIHER, J.A.: In the exercise of my discretion I would grant the leave. I do not take quite the same view as my learned brother the Chief Justice as to it not being of a public

GALLIHER, J.A.

COURT OF APPEAL

1924

June 4.

CHANNELL v. ROMBOUGH

GALLIHER, J.A.

nature; my view is rather the other way. Registered patents and registered trade-marks are very often protection to the public as much as they are protection of the parties that have obtained registration. For instance, a special article may have reached an excellence of manufacture under that name, the public are buying or assuming that they are buying the article they are asking for, and they may be buying a close imitation and be deceived in that. In that respect I think it is of a public nature and affecting the public, as I view it, with all deference. Therefore, my view would be that under these circumstances I would grant leave.

MCPHILLIPS, J.A.: In refusing leave to appeal this Court is subject to the review of the Supreme Court of Canada. Therefore, when refusing leave attention must be given to the principle which the Supreme Court of Canada has laid down. As my learned brother MARTIN states, the Court in Ontario granted leave to appeal in a recent case and the Supreme Court of Canada expressed the view that it was not a proper case for the granting of leave and that leave should not have been granted.

It seems to me Parliament has constituted this Court a sovereign Court, if I may use the term, to grant leave to appeal; and if we think it a proper case for granting leave there is no review. If the Court refuses leave, necessary attention must be paid to the principle that the Supreme Court of Canada has declared to be the true and right principle. Now what is that principle? How has it been enunciated? In *Doane* v. *Thomas,* a judgment of this Court (31 B.C. 457), my brother MARTIN referred to *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234, and *Lake Erie and Detroit River Rway. Co.* v. *Marsh* (1904), 35 S.C.R. 197. The Supreme Court of Canada in the *Girard* case reiterated the principle enunciated by Mr. Justice Nesbitt in the *Lake Erie* case; and the principle that Mr. Justice Nesbitt refers to is this, at p. 200 of that report:

MCPHILLIPS, J.A.

"Where, however, the case involves matter of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of Provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted."

Now, as to public interest, whilst this may be of very great interest to this corporation (making the cedar mops and these other articles) I cannot see any matters of public interest.

"Some important question of law." There is no important question of law here. It would seem to me that the only word we had to consider was one of well-known meaning, "cedar," a word descriptive in its nature, and this point was up in other cases in the Supreme Court of Canada and in the Privy Council.

"The construction of Imperial or Dominion statutes." Well, the Act that we have to consider has been construed many times; I do not think there is any question of that nature. And as remarked by Lord Macnaghten there is no definition of essentials in the Canadian Act, but the Courts in Canada nevertheless have followed the English, although in England there is a definition.

MCPHILLIPS, J.A.

Then as to "a conflict of Provincial or Dominion authority." There is nothing of that kind; the question is one of the statute law of the Dominion. I do not see that there is anything doubtful or ambiguous in this statute. The statute has been under review many times and there have been appeals to the Supreme Court and the Privy Council. Finally, there is no debatable question of law applicable to the whole Dominion requiring decision. I cannot see my way clear to approve the granting of leave.

Leave refused, Galliher, J.A. dissenting.

COURT OF APPEAL

1924

June 4.

TAYLOR v. MACKINTOSH

TAYLOR v. MACKINTOSH.

Solicitor and client—Agreement to share in amount to be recovered by suit —Maintenance and champerty—Legal Professions Act, R.S.B.C. 1911, Cap. 136, Secs. 97-8—Introduction of criminal laws of England into British Columbia—Criminal Code, Sec. 11.

The plaintiff brought action to set aside an agreement she had entered into with her solicitor which was as follows: "In consideration of your prosecuting my claim against the British Columbia 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." The plaintiff recovered from the Railway Company $3,200. It was held by the trial judge the evidence disclosed that in the circumstances it was the solicitor's duty to advise the plaintiff to seek independent advice; that section 97 of the Legal Professions Act is *ultra vires* of the Provincial Legislature and that the amount claimed by the solicitor was not fair and reasonable within the meaning of section 98 of the said Act.

On appeal the decision of MORRISON, J. was affirmed (MCPHILLIPS, J.A. dissenting).

Per MACDONALD, C.J.A.: Champerty was recognized as a crime by the Parliament of Great Britain as late as 1879, and section 11 of the Criminal Code declaring that the criminal law of England as it existed on the 19th of November, 1858, in so far as it has not been repealed by any ordinance or Act of the Colony of British Columbia, or the Colony of Vancouver Island shall be the criminal law of the Province of British Columbia introduced the law of champerty as a crime into British Columbia, consequently section 97 of the Legal Professions Act allowing a barrister or solicitor to make an agreement with a client to be paid for his services by receiving a share of what might be recovered in an action is *ultra vires* of the Provincial Legislature as trenching upon or intended as a repeal of a provision of the criminal law.

Per MARTIN, J.A.: That the agreement has application only to the settlement of the claim by negotiation and consequently the plaintiff is entitled to a declaration that it is invalid and her rights are not subject to its terms.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 17th of January, 1924 (reported 33 B.C. 383), in an action to have an agreement between the plaintiff and defendant of the 6th of July, 1922, set aside. On the 3rd of July, 1922, the plaintiff with a friend who was a servant girl in the defendant's house were passengers on a car of the British

Columbia Electric Railway Company. Owing to a collision both girls suffered injuries. The girls walked home together (the plaintiff being a servant in the house adjoining that of the defendant) after the accident and they discussed the question of damages with the defendant and he at their solicitation took the matter up and on the 6th of July following both girls signed the following memorandum:

"To Messrs. Mackintosh & Crompton.

"In consideration of your prosecuting our claims against the 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.

"Ellen Taylor
"Alice M. Mayoh."

An offer by the company of $300 for each was refused and Mr. Mackintosh brought action for both girls. The cases were tried together, Mr. *A. H. MacNeill, K.C.*, having been retained by Mr. Mackintosh to act as senior counsel for the plaintiffs. Each of the plaintiffs recovered $3,200, and costs. Miss Mayoh raised no question as to the agreement but Miss Taylor brought this action to set it aside on the grounds that she was persuaded by the defendant that she could not recover over $500 or $600, that she was in a highly nervous condition at the time as the result of the accident; that she received no independent advice; that the agreement was in violation of the laws against champerty introduced into British Columbia by section 11 of the Criminal Code, 1906, and section 97 of the Legal Professions Act was and is *ultra vires* of the Provincial Legislature. The sums due the plaintiff from the B.C. Electric Railway Company were by order paid into Court and after judgment was delivered said moneys were by order of the trial judge paid out to plaintiff's solicitor.

The appeal was argued at Vancouver on the 18th, 19th and 20th of March, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Bray (*Richmond*, with him), for appellant: The learned judge below said: first, the statute was *ultra vires;* second, the contract was induced by undue influence of the solicitor. The pleadings do not challenge the statute and undue influence is not pleaded. In the first place the proper procedure was not

Argument

COURT OF APPEAL

1924

June 4.

TAYLOR v. MACKINTOSH

taken in the Court below to decide as to the constitutionality of the Act: see section 9 of the Constitutional Questions Determination Act. Next, we say sections 97 and 98 of the Legal Professions Act are *intra vires*. These sections were first passed in Manitoba and were passed here in 1901, having been in force for 23 years. The criminal law of England as it existed on the 19th of November, 1858, has the force of law here. Under section 11 of the Criminal Code we say, first, that champerty as a crime had ceased to exist in 1858. There have been no prosecutions within living memory: see Halsbury's Laws of England, Vol. 9, p. 500, par. 995; *Thomson* v. *Wishart* (1910), 16 Can. Cr. Cas. 446; Stephen's History of the Criminal Law of England, 17th Ed., Vol. 3, p. 234. The law coming to this Province in 1858 was the living law only. Sections 97 and 98 do not conflict with Dominion law as there is no Dominion law on the question: see *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96; *Attorney-General* v. *Bradlaugh* (1885), 14 Q.B.D. 667; *Brophy* v. *Attorney-General of Manitoba* (1895), A.C. 202; *Union Colliery Company of British Columbia* v. *Bryden* (1899), A.C. 580; *Cunningham* v. *Tomey Homma* (1903), A.C. 151; *Blouin* v. *Corporation of Quebec* (1880), 7 Q.L.R. 18 at p. 22; Stephen's Digest of the Criminal Law, 6th Ed., 400; Russell on Crimes, 8th Ed., Vol. 1, p. 556 (foot-note *f*). For the definition of champerty see English and Empire Digest, Vol. 1, p. 70, par. 581; *Mills* v. *Rodgers* (1900), 18 N.Z.L.R. 291. As to encroaching on the Dominion field see *Regina* v. *Wason* (1890), 17 A.R. 221 at p. 230; Clement's Canadian Constitution, 3rd Ed., pp. 468 and 482; *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (1894), A.C. 189 at pp. 198 and 201. There is no evidence of undue influence.

Argument

Mayers (*Geo. A. Grant,* with him), for respondent: The judgment below is on two distinct points: (1) Sections 97 and 98 of the Legal Professions Act are *ultra vires;* and (2) the contract between solicitor and client was unfair and unreasonable. The appellant says the Dominion is not in this field but if maintenance existed in England in November, 1858, it is a

crime in British Columbia today. That maintenance and champerty are criminal offences see *Briggs* v. *Fleutot* (1904), 10 B.C. 309 at p. 320, and on appeal *sub nom. Giegerich* v. *Fleutot,* 35 S.C.R. 327; *Moloche* v. *Deguire* (1903), 34 S.C.R. 24 at p. 37; *Hopkins* v. *Smith* (1901), 1 O.L.R. 659 at p. 661; *Neville* v. *London "Express" Newspaper, Limited* (1919), A.C. 368 at p. 379; *Wild* v. *Simpson* (1919), 2 K.B. 544 at p. 550; *Thomson* v. *Wishart* (1910), 19 Man. L.R. 340 at p. 348; *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186 at p. 208; *Anderson* v. *Radcliffe* (1858), 1 El. Bl. & El. 806. The next point is, assuming the Act valid, there was fraud and undue influence. She should have had independent advice: see *Liles* v. *Terry* (1895), 65 L.J., Q.B. 34 at pp. 35-6; *Lloyd* v. *Coote & Ball* (1915), 1 K.B. 242 at p. 247; *Re Hoggart's Settlement* (1912), 56 Sol. Jo. 415; *Rhodes* v. *Bate* (1865), 1 Chy. App. 252 at p. 256; *McPherson* v. *Watt* (1877), 3 App. Cas. 254 at p. 271. On the constitutional question when it is merely a failure of a condition it can be waived: see *Township of Cornwall* v. *Ottawa and New York Rway. Co.* (1916), 52 S.C.R. 466 at 497. The judge's hand is stayed only when no notice is given and proper notice was given for this Court so this Court can deal with it: see *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672.

Argument

Bray, in reply: There was never waiver of notice. All the respondent's cases on maintenance and champerty are civil cases. Ordinance No. 70 of 1867 (R.L.B.C. 1871, p. 214) brings this case precisely within *Thomson* v. *Wishart* (1910), 19 Man. L.R. 340.

Cur. adv. vult.

4th June, 1924.

MACDONALD, C.J.A.: Had the Provincial Legislature the power to pass an Act abolishing or modifying the offence of champerty? This the Legislature of British Columbia attempted to do when it inserted in the Legal Professions Act, Cap. 136 of the Revised Statutes of British Columbia, authority to barristers and solicitors to contract to be paid a portion of the fruits of litigation in return for their services.

MACDONALD, C.J.A.

It was contended that champerty was merely a civil wrong,

COURT OF APPEAL

1924

June 4.

TAYLOR v. MACKINTOSH

and that legislation in respect of it fell within the powers assigned to the Provinces by the B.N.A. Act. Champerty is a common law offence. The statutes passed respecting it in England merely supplemented the common law. There are several of these which I need not notice in detail since they have been referred to in many reported cases and in the text-books, wherein the criminal character of champerty has been clearly and repeatedly recognized. It was also recognized by the Parliament of Great Britain as late as 1879.

The Civil Procedure Acts Repeal Act of that year repealed certain portions of 31 Eliz., Cap. 5, an Act relating to Common Informers and their activities respecting champerty, except that part of the Act dealing with the criminal aspect thereof. At the time of the passing of this statute, champerty was an indictable misdeameanour, and it is therefore clear that in its criminal character it had not become obsolete in 1879. Moreover, all the text-books down to the latest editions of Stephen's Commentaries on the Laws of England, and Russell on Crimes, recognize this aspect of the law of champerty. Champerty is referred to in the text-books as an aggravated species of maintenance. There is unquestionably two aspects of the law: the one civil, the other criminal. It may be alleged as a defence to an action and it furnishes grounds for an action for damages, but it is also a crime.

MACDONALD, C.J.A.

It was argued that the Legislature had power to deal with it as a civil wrong, but that argument ignores the divided jurisdiction of Dominion and Province; the one competent to deal with criminal law, the other with civil rights. It would indeed be a strange anomaly if the Legislature could make that legal civilly which is a crime. The Legislature, I think, cannot grant to the wrong-doer the right to recover the fruits of his offence against the criminal law. It is against public policy to allow bargains to be made for a share in the fruits of litigation. The evils attendant upon agreements of this character are referred to by Chancellor Boyd, in *Re Solicitor* (1907), 14 O.L.R. 464 at p. 466, where he quotes with approval some observations made, by a "great American lawyer," at a bar meeting, deploring the "fatal and pernicious" change in American law brought

about by just such an Act as the one now attacked, in which he said:

"'How . . . . can the Courts put full faith in the sincerity of our labours as aids to them in the administration of justice, if they have reason to suspect us of having bargained for a share of the result?'"

The learned Chancellor then proceeds to say:

"Things have gone from bad to worse on this downward grade, for now the 'American Ambulance-Chaser' has become a visible factor in so called professional life. His function is to hustle after injured sufferers, with shameless solicitation, to coach witnesses, interview jurymen, compass in any way a favourable verdict and enjoy some generous share of the spoils."

In the same report is contained a quotation from Lord Russell of Killowen, in his charge to the jury in *Ladd* v. *London Road Car Company* (1900), 110 L.T.Jo. 80, in which his Lordship said (p. 467):

"'In reference to the subject of speculative actions generally, I think it right to say on the part of the profession and the class of persons who are litigants in such cases, that it is perfectly consistent with the highest honour to take up a speculative action in this sense, *viz.*, that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a *bona fide* cause of action, it was consistent with the honour of the profession that the solicitor should take up the action. It would be an evil thing if there were no solicitors to take up such cases, because there was in this country no machinery by which the wrongs of the humbler classes could be vindicated. Law was an expensive luxury, and justice would very often not be done if there were no professional men to take up their cases and take the chances of ultimate payment; but this was on the supposition that the solicitor had honestly satisfied himself by careful inquiry that an honest case existed."

MACDONALD, C.J.A.

This, as I understand it, is not a plea in favour of champertous agreements. It is simply a justification of the lawyer who takes a doubtful case believing it to be just and takes his chances of obtaining his costs from his client should he succeed. It merely indicates what was contended before us to be the modern tendency of Courts to modify the offence of maintenance, not champerty, by taking into account the relationship of parties, the motives of the person who supplied the assistance and the good faith with which it had been supplied. But while that is true of maintenance, it is by no means true of champerty. There is no charity in champerty. A champertous agreement is a selfish bargain for a share of the proceeds and generally for a share much larger than could be taxed. It is one thing to take up the just cause of a poor man and to take the chances

COURT OF APPEAL

1924

June 4.

TAYLOR v. MACKINTOSH

of success, coupled with the assurance in that event of being paid the costs of the action, and another to make a champertous bargain for something beyond that. The statutes relating to maintenance contain exceptions in favour of solicitors, but there is not, nor could there be, any such exceptions in cases of champerty.

The contention that the criminal law with regard to champerty has become obsolete cannot be maintained in view of the very numerous cases in which it has been referred to, as still in force both in England and Canada. There are many modern decisions, including decisions of the highest Courts, affirming, *obiter* it is true, but nevertheless with authority, the criminal character of champerty. As an example, I would refer to *Neville* v. *London "Express" Newspaper, Limited* (1919), A.C. 368 at pp. 378-9, in which Lord Finlay quotes as law Hawkins's Pleas of the Crown, 8th Ed., wherein he said:

> "But also that they [maintainors] may be indicted as offenders against public justice, and adjudged thereupon to such fine and imprisonment as shall be agreeable to the circumstances of the offence."

None of their Lordships doubted that the law is still in force in England at this day. That this law was introduced into Canada, along with the general body of the criminal laws, there can, I think, be no doubt. It was introduced into most of the Provinces, including British Columbia, before Confederation.

In *Meloche* v. *Deguire* (1903), 34 S.C.R. 24, dealing with the offence of champerty at p. 38, the Chief Justice said:

MACDONALD, C.J.A.

> "It was contended by the respondents at the argument, as it had been in the Courts below, that champerty does not form any part of the criminal law of the Province of Quebec, as introduced therein by the Imperial Act of 1774. I cannot treat that contention as a serious one. It has never been doubted anywhere that the law on this point is the same in that Province as it is all over Canada, and the respondents have been obliged to concede that their contention was entirely a novel one."

Again, in *Briggs* v. *Fleutot* (1904), 10 B.C. 309, the Full Court was of opinion that the criminal law of England with respect to champerty was in force in this Province. That case was affirmed in the Supreme Court of Canada, *sub nom. Giegerich* v. *Fleutot,* 35 S.C.R. 327.

I think it only fair to the appellant to say, that in my opinion, he has acted in this case in perfect good faith; the

statute under which he justifies the bargain made with the respondent has been in force in this Province for upwards of 20 years, and no doubt has been acted upon in some cases by solicitors. The question of the power of the Province to pass it is one which appears never to have been raised before. No doubt he considered that his client's case was just and that her lack of funds to commence and carry on the action should not prevent her from obtaining justice. Therefore, what I have said with respect to the evils of champerty is not intended to be levelled at the appellant personally, but against the practice in general. His case is a hard one; he has advanced his own money for disbursements, amounting to a considerable sum. We cannot order the re-payment of this money by the respondent, but in the circumstances of the case, as I stated at the close of the argument, I think the respondent might well consider whether she ought to retain money which in equity does not belong to her.

MACDONALD, C.J.A.

Since writing the above, my brother MARTIN has raised the question as to whether the written agreement goes further than to authorize a settlement out of Court and a division of anything recovered in that way. He reasons that as nothing was so recovered, the agreement was exhausted before this action was brought and that therefore the action should have been dismissed. The point was not argued by counsel before us and I therefore feel some difficulty in founding a judgment upon it, particularly, as I think that there is much to be said on each side of the question. The agreement is ambiguous; the term "settlement" is capable of more than one meaning; it also speaks of "prosecuting" the claim and of the amount "recovered." The agreement has, I think, been construed by the parties as shewn by their subsequent conduct, and as the question as presented to the Court is an important one, I think I should dispose of it in its broad aspect.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This is an action by a client against her solicitor to have "declared null and void" a written agreement made between them on the 5th of July, 1922, as follows:

COURT OF APPEAL

1924

June 4.

TAYLOR v. MACKINTOSH

"To Messrs. Mackintosh & Crompton.

"In consideration of your prosecuting our claims 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 plaintiff (and her friend, the other signatory) had been injured, three days before, while travelling as a passenger on the B.C. Electric Railway, and the plaintiff had that same night or next morning retained the defendant to at least make a demand upon the company for compensation, so on the 4th he wrote to the company offering to accept $150 in full settlement of the plaintiff's claim but got no reply to his letter, and after further discussion with the plaintiff and the other claimant said agreement was signed on the 6th, as I read the evidence, though it is dated the 5th. At the time it was signed the plaintiff is very positive that she agreed to do so only upon the express stipulation that the matter was to be settled out of Court, and though the defendant denies this, the learned judge below has so found in her favour, *viz.*, that she signed "on the understanding that a trial would be obviated," and upon the evidence it would be legally impossible to disturb that finding, the result of which is that the agreement could apply only to negotiations for a settlement and moneys recovered thereunder and not to proceedings taken in Court. This is the case that the plaintiff sets up in her statement of claim alleging that the "agreement had reference to an amicable adjustment of the claim . . . . as set forth in the preceding paragraph," *i.e.*, "in settling the matter without the necessity of a Court action." It is further alleged that upon failure to arrive at an amicable settlement a writ was issued (on 30th July, 1923), upon the assurance of the defendant that such issuance would probably bring about a settlement, but it did not, and ultimately judgment was given in plaintiff's favour for $3,200 and costs; and that though "in the light of the changed circumstances" the plaintiff, after the action was begun, requested the defendant to give her a copy of or let her peruse the said agreement he refused to do so; and also that the agreement was entered into at a time when as the result of the accident the plaintiff was

MARTIN, J.A.

incapable of understanding its purport; and, finally, that it is void as being champertous.

The defence is in substance a reliance upon the written agreement and the retainer of the defendant "upon the terms" thereof. No case or prayer is made to reform the said agreement or add anything to its terms (even if that were permissible), but after the said statement of its adoption "in terms," there follows, preceded by the word "whereby," an inadmissible and improper argument placing a construction upon the agreement, which argument has no place in a pleading and should have been struck out before the trial as it ought to be disregarded now. The defence also alleges that the agreement was made with the "full understanding" that it was to include a Court action if necessary, and that the action was begun in pursuance of it; the other allegations of the plaintiff are denied.

I have recited these issues because it is necessary that they should be clearly understood owing to the position the matter has got into. It will be noticed that since the defendant persists in justifying his actions and asserting his rights by and under the agreement the only course open to the plaintiff in order to reap the fruits of her judgment is to get rid of it, which can only be done by resorting to the Court to set it aside. Neither she nor the defendant sets up any other subsequent agreement, and during the trial the said respective positions were maintained, the defendant, *e.g.*, saying on cross-examination, "certainly I am entitled to fifty per cent by reason of exhibit 1" (the agreement). The case, therefore, stands here and below upon the sole agreement that is set up, and upon it alone a decision must be given in answer to the plaintiff's prayer to be relieved therefrom.

MARTIN, J.A.

In his argument before us the respondent's counsel took the position, as I noted his submission, that on its face "the agreement does not authorize the solicitor to sue and then settle, but to settle without suit," and that I think is the true interpretation of it. The authorization in it is sole and express, *viz.*, "we authorize you to effect a settlement of which you may retain one half the amount recovered": this recovery by settlement

COURT OF APPEAL

1924

June 4.

TAYLOR v. MACKINTOSH

excludes recovery by the only other possible way, *i.e.*, by a lawsuit, which is directly opposed to a settlement. The defendant, I gather from his evidence, thought that "prosecution certainly implies suit," but that is only one meaning of the word in its legal sense because it is just as much attributable to a pressing of claims without suit, and that fact is, indeed, recognized in par. 4 of the defence where it is alleged that after several visits the defendant "was retained to settle or prosecute the plaintiff's claim," which retainer is stated in the next paragraph to be "upon the terms of [the] written memorandum" in question, thus placing the dual interpretation upon it. In Mozley and Whiteley's Law Dictionary, 3rd Ed., p. 262, the three ordinary legal uses of the word are well defined, thus:

"PROSECUTION. 1. The proceeding with, or following up, any matter in hand.

"2. The proceeding with any suit or action at law. By a caprice of language, a person instituting civil proceedings is said to prosecute his action or suit; but a person instituting criminal proceedings is said to prosecute the party accused.

"3. The party by whom criminal proceedings are instituted; thus we say, such a course was adopted by the prosecution. etc."

A late illustration of my own employment of it in the primary sense is to be found in *Lee Sheck Yew* v. *Attorney-General of British Columbia* [(1923), 33 B.C. 109 at p. 121]; (1924), 1 W.W.R. 753 at p. 762, citing *Re Ullee*: *The Nawab Nazim of Bengal's Infants* (1885), 53 L.T. 711, wherein the report states that "the Nawab, in 1870, came to England for the purpose of prosecuting certain claims against the British Government." If the defendant intended that his authority to prosecute the claim should extend to the prosecution of a suit therefor it is unfortunate that he did not say so in the clear language that one would expect, and as used in, *e.g.*, *Bently* v. *Hastings* (1845), 8 Ir. L.R. 166, wherein Mr. Justice Jackson (p. 177) points out the distinction between to "prosecute the suit with effect" and to prosecute it simply: In *Colley* v. *Hart* (1890), 44 Ch. D. 179, the expression considered was "with due diligence commences and prosecutes an action." If the expression had been simply "prosecute the claim," the defendant's construction would have been more plausible, but here the instruction to prosecute is restricted by

MARTIN, J.A.

the subsequent words "to effect a settlement." But even should there be any doubt about the meaning (though I can find none) it should be resolved against the defendant, who drew and proffered the document to the plaintiff for signature; she cannot be blamed if she understood it in the way which fairly supports her construction of it. Therefore in this view also, quite apart from the effect of the said conclusive finding of fact, I am of the opinion that the agreement has application only to the settlement of the claim by negotiation, and consequently the plaintiff is entitled to a declaration that it is invalid and her rights, whatever they may be under her judgment, are not subject to its terms.

No further direction or judgment should, in my opinion, be given, because nothing else is properly before us; once this agreement is removed the relation, as it now appears, between the parties as to the bringing of the action is, and was, the ordinary one existing between solicitor and client.

MARTIN, J.A.

If there was any subsequent retainer or arrangement between the parties than that which the defendant has relied upon it is unfortunate that it was not set up alternatively, but his whole case depends upon his assertion of his retainer "upon the terms" of said agreement, and upon that agreement I am quite unable, after very careful consideration, to see how his case can be supported on the pleadings or the evidence.

Such being my view of the matter it is unnecessary to consider the other questions raised, because if I am right in my view of the inapplicability of the agreement to the action which was brought, the question of its alleged invalidity, upon grounds of public policy or otherwise, becomes irrelevant.

It follows that the appeal should be dismissed.

McPHILLIPS, J.A.: This appeal, in my opinion, should succeed and the action be dismissed, leaving the question of the agreement between the solicitor (the defendant) and client (the plaintiff) to be determined under the provisions of the Legal Professions Act (Cap. 136, R.S.B.C. 1911, sections 97 to 100 inclusive).

MCPHILLIPS, J.A.

The action brought was to set aside the agreement as between

COURT OF APPEAL

1924

June 4.

TAYLOR v. MACKINTOSH

the solicitor and client as being obtained by undue influence and later by amendment, the agreement was attacked upon the ground that it was in its nature champertous and was not supportable under section 97 of the Legal Professions Act (first enacted in 1901, Cap. 4, Sec. 1, Statutes of B.C.), as the enactment was *ultra vires* of the Legislature of the Province of British Columbia. The judgment taken out and entered which is under appeal, in part reads as follows (the amendment made in the statement of claim is set forth in the judgment):

"And the statement of claim having been amended, pursuant to leave granted by the said Mr. Justice MORRISON, by the insertion of the following, as paragraph 11 thereof:

"'11. The said agreement was entered into in violation of the laws against champerty introduced into British Columbia by section 11 of the Criminal Code, R.S.C. 1906, chapter 146, and amending Acts, and section 97 of the Legal Professions Act, R.S.B.C. 1911, chapter 136, and amending Acts, was and is *ultra vires* of the Provincial Legislature': And judgment having been reserved and the action coming on this day for judgment, this Court doth declare and adjudge that the agreement bearing date 5th of July, 1922, and made between the plaintiff and defendant on or about the 6th day of July, 1922, Exhibit 1 in this action, is null and void and that the same ought to be set aside, and doth order and adjudge the same accordingly; And this Court doth further order and adjudge that the plaintiff recover against the defendant her costs of this action forthwith, after taxation thereof."

MCPHILLIPS, J.A.

I am clear upon it that there was no undue influence practised by the solicitor or any false representations made which would entitle the agreement being set aside. I would say in passing that upon all the facts the agreement would not appear to be other than "fair and reasonable" (see section 98, Cap. 136, R.S.B.C. 1911). Apparently the plaintiff was willing to come to a settlement without suit at something in the neighbourhood of $600, and admittedly then the solicitor would have been entitled to $300, but it became necessary to bring an action, and in the end the plaintiff was awarded $3,200, and recovered the same and further, not only did the plaintiff receive the whole $3,200, but received the taxed costs, and disbursements of the solicitor, and still retains the same, and no portion of these costs or disbursements has been paid by the plaintiff to the defendant. It is at once apparent that the plaintiff cannot be said to have established any meritorious position; in truth, the case would well warrant some trenchant observations. That the

client should put into her pocket the solicitor's fees and disbursements and persist in retaining the same in view of all that the solicitor has done for her, is a matter that must be considered in weighing her testimony and as to the value attachable to it. This outstanding feature is present—the client would have accepted $600 in settlement for the personal injuries received, but with the services of the solicitor is successful in getting $3,200, and now not only retains the whole sum recovered, namely, the $3,200, but all the solicitor's taxed costs as well and disbursements of approximately $500, so it was stated at this Bar. In the main the argument upon this appeal was devoted to establishing upon the part of the learned counsel for the respondent that the learned trial judge's judgment was supportable upon the ground that the agreement was champertous and that section 97 of the Legal Professions Act (R.S.B.C. 1911, Cap. 136) was *ultra vires*. In considering this point, I would call attention to the governing statute law as applicable to British Columbia. Section 2 of the English Law Act (Cap. 75, R.S.B.C. 1911) reads as follows:

"2. The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, shall be in force in all parts of British Columbia: Provided, however, that the said laws shall be held to be modified and altered by all legislation having the force of law in the Province of British Columbia, or in any former Colony comprised within the geographical limits thereof."

MCPHILLIPS, J.A.

This legislation was the existent legislation at the time British Columbia entered Confederation, being covered by legislation in similar terms (see R.L. 1871, No. 70, Sec. 2; R.S. Can., Sch. A; C.S.B.C. 1888, Cap. 69; R.S.B.C. 1897, Cap. 115).

Then we have section 11 of the Criminal Code of Canada, Cap. 146, R.S.C. 1906, which reads as follows:

"1. The criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-eight, in so far as it has not been repealed by any ordinance or Act—still having the force of law—of the Colony of British Columbia, or the Colony of Vancouver Island, passed before the union of the said colonies, or of the colony of British Columbia passed since such union, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the Province of British Columbia."

COURT OF APPEAL

1924

June 4.

TAYLOR v. MACKINTOSH

It is clear, therefore, that the criminal laws of England as of the 19th of November, 1858, were not adopted as a whole, but "so far as the same are not from local circumstances inapplicable" (see section 2, Cap. 75, R.S.B.C. 1911), and under the Dominion legislation we have the further provision "still having the force of law" (see section 11, Cap. 146, R.S.C. 1906).

It may well be said that no criminal laws of England not having the force of law on the 19th of November, 1858, were introduced, but it may be further said (whether having the force of law in England or not) they would not be introduced into British Columbia save "in so far as the same are not from local circumstances inapplicable" (see section 2, Cap. 75, R.S.B.C. 1911). Now, what were the local circumstances in British Columbia? A new country as compared with an old country, an undeveloped country as compared with a highly developed country, a country of vast natural resources calling for capital and the hand of man, a country calling for venturesome spirits and those willing to venture and speculate, entirely dissimilar to England. It is therefore most pertinent to examine into the question as to whether it can reasonably be said that the laws of England relative to maintenance and champerty (if it could be said that on the 19th of November, 1858, such laws had the force of law) were introduced into British Columbia. I have no hesitation in saying, and make bold to say, that any such laws were entirely inapplicable in view of the local circumstances existent in British Columbia. (See *Uniacke* v. *Dickson* (1848), 2 N.S.R. 287, Halliburton, C.J. at pp. 289, 290, 292, 294; Hill, J. 299, 300, 301, 302).

MCPHILLIPS, J.A.

The very question here requiring decision was passed upon by the Manitoba Court of Appeal in *Thomson* v. *Wishart* (1910), 19 Man. L.R. 340 (Perdue, J.A.), and as I am so completely of the same opinion as the learned Chief Justice of Manitoba as he now is (Perdue, C.J.M.) I propose to quote at some length what that very eminent judge said in review of the law, and it was in that Court held that maintenance and champerty had become obsolete as crimes in England in 1870, and likewise, in my opinion, obsolete in 1858, and any such

laws were not introduced into Manitoba, neither were they, in my opinion, introduced into British Columbia. The learned judge at pp. 346-49 said [after quoting from the judgment as stated the learned judge continued]:

The Legal Professions Act as we have it with the impugned section 97 has been in force in this Province for 23 years. When challenged in Manitoba, similar legislation was in force for 20 years, now in force in Manitoba 34 years. It is somewhat a late date to attack the legislation. The Federal Government in neither case chose to exercise the power of disallowance, the reason being, no doubt, that apart from all other considerations the legislation in no way trenched upon criminal law, but was *intra vires* legislation having relation to property and civil rights, a matter clearly within the powers of the Provincial Legislatures. Further, the legislation has relation to matters of contract with solicitors, officers of the Court, and care is taken that in all contracts made there may be revision thereof by the Court and the contract must be "fair and reasonable" (section 98, Cap. 136, R.S.B.C. 1911). It is apparent that every safeguard has been taken to protect those contracting with solicitors. By way of some analogy I would refer to the Queen's Counsel case which went from Ontario to the Privy Council. There Lord Watson said, at p. 21, *Attorney-General of Canada* v. *Attorney-General of Ontario* ((1897), 67 L.J.P.C. 17):

MCPHILLIPS, J.A.

"On the other hand, the enactments of section 92 (14) confer upon the Provincial Legislature, in wide and general terms, power to regulate the constitution and organization of all Courts of law in the Province, civil or criminal. It is no doubt true that, with two exceptions—these being the Courts of Probate in Nova Scotia and New Brunswick—the appointment of the judges of the Superior, District, and County Courts in each Province is committed to the Governor-General of Canada by section 96, subject to the condition that until the laws of the Provinces are made uniform these judges must be selected from the Bar of the Province in which the appointment is made; and by section 100 the right to fix the salaries, allowances, and pensions of these judges, except in the case of the Courts of Probate in Nova Scotia and New Brunswick, is vested in the Parliament of Canada, upon which there is also imposed the duty of providing the salaries, allowances, and pensions so fixed. But in all other respects the Courts of each Province, including the judges and the officials of the Court, together with those persons who practise before them, are subject to the jurisdiction and control of the Provincial Legis-

COURT OF APPEAL

1924

June 4.

TAYLOR v. MACKINTOSH

lature; that Legislature, and no other, has the right to prescribe rules for the qualifications and admission of practitioners, whether they be pleaders or solicitors. Their Lordships, in these circumstances, do not entertain any doubt that the Parliament of Ontario had ample authority to give the Lieutenant-Governor power to confer precedence by patent upon such members of the Bar of the Province as he may think fit to select."

I might perhaps be pardoned if I mention as a matter of history, that which may be in its nature extrajudicial, yet I think it is permissible. When the impugned legislation was introduced into the Provincial Parliament, I was a member thereof, and I strenuously opposed the legislation. It was introduced by the Attorney-General of the day (the Honourable Joseph Martin) but I received little if any support. In truth, the Benchers of the Law Society made no move in the matter, and with only one or two notable exceptions amongst the Bar, there was a very general desire that the legislation should pass and it did pass and it has remained on the statute book without complaint until now, some 23 years. I was then, and am still, strongly opposed to this legislation upon grounds of ethical propriety. I would like to refer to what the very great and eminent judge (so lately taken from us) Lord Sterndale, M.R. said in *In re Wigzell, Ex parte Hart* (1921), 2 K.B. 835 at pp. 851-2, dealing with honesty and ethical propriety:

MCPHILLIPS, J.A.

"I entirely agree with what was said by Atkin, L.J. in *In re Thellusson* (1919), 2 K.B. 735, 764, that 'while one may agree that opinions as to rules of honesty differ, yet the difficulty of recognizing honesty when she appears, affords no adequate reason for discarding her altogether.' But that unexceptionable principle does not seem to give much help when one has to apply it to a particular case, since the last words of the learned Lord Justice must then be read in this way: 'the difficulty of recognizing honesty when, in my opinion, she appears, affords no adequate reason for discarding her altogether,' because the question whether the principle of honesty directing the conduct of the Court has appeared or not must depend upon the individual opinions of the judges who have at that moment to give the decision of the Court. I notice that Salter, J., in his judgment, which seems to me to be one of extremely good sound sense and sound law, says this: 'Legal rights can be determined with precision by authority, but questions of ethical propriety have always been, and will always be, the subject of honest difference among honest men.' I do not know that I go quite so far as the learned judge in saying that legal rights can always be determined with precision by authority. There are no doubt rules to which you can resort, but in practice we have seen that absolute unanimity is not always obtained, even when you are dealing with legal or equitable rights. But when you once enter on the field in which there

is no standard to be applied except that which each person thinks is the one of honesty and right the difficulty of course becomes enormously increased. To repeat Salter, J.'s words: 'Questions of ethical propriety have always been, and will always be, the subject of honest differences among honest men.'"

My view is that legal practitioners would be well advised to refrain, even if it be permissible in law, from entering into such contracts, but that cannot dispose of the question. The question to be determined is: Is the contract supportable by the statute? That only can be if the statute is *intra vires;* in my opinion, it is *intra vires.* There can ensue no injury to the litigating public, as even if they make a contract with the solicitor it is subject to review and a judge of the Supreme Court is entitled to pass upon it as to whether it is fair and reasonable, and he may modify the contract and he may cancel it, and may direct that the costs be taxed in the usual way, *i.e.,* admitting of complete justice being done. Here in the result so far it has been a travesty of justice, the client has walked away with all of the fruits of the litigation and as well with all the solicitor's costs, and not only that, but with approximately $500 of cash paid out by the solicitor in carrying on the litigation. Assuredly, the saying "truth is stranger than fiction" is present here.

MCPHILLIPS, J.A.

I would allow the appeal.

Appeal dismissed,
McPhillips, J.A. dissenting.

Solicitors for appellant: *Lane, Wood & Company.*
Solicitor for respondent: *Harold E. Landman.*

COURT OF APPEAL

1924

June 4.

HADDOCK v. NORGAN

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 agreed with the owner of a property to construct a house thereon and obtained an option from him for a certain period to purchase land and buildings for $4,200. On the house nearing completion and before the expiration of the option the defendant, who employed 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 his broker acting under his instructions, obtained the key to the house and installed defendant's parents with furniture three days later. Defendant then decided not to complete the purchase and buying another house moved his parents into it two days later. It was held by the trial judge that the plaintiff was entitled to specific performance.

Held, on appeal, affirming the decision of MCDONALD, J. (33 B.C. 237), that the taking of possession of the house constituted an act of part performance of the agreement which precludes the defendant from setting up the Statute of Frauds and opens the door to parol evidence of the agreement. The evidence discloses that the defendant decided to purchase the property for $5,150, his broker was duly authorized to make the contract of purchase upon his behalf and the contract was made. The plaintiff is entitled to a decree for specific performance.

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 10th of December, 1923 (reported 33 B.C. 237) in an action for specific performance of an agreement for the purchase of a plot of land with dwelling in Vancouver or in the alternative for damages suffered by reason of the defendant's occupation of the premises. The facts are that the plaintiff contracted with the owner of the land in question to construct a dwelling-house thereon and obtained from the owner an option for a certain period to purchase the land and house for $4,200. On the house nearing completion and while the option was still in force the defendant wanting a house for his parents who were coming to Vancouver, consulted one West, a broker, who shewed him the house in question. He decided to take the house, agreed to purchase at $5,150 and paid $100 on account

to the broker acting for the vendor and it was arranged the parties should meet at the office of the defendant's solicitor on the same afternoon to complete the purchase. The defendant did not turn up at the afternoon meeting but his broker West acting under his instructions got the key of the house, and three days later installed the defendant's parents in the house with their furniture. After his parents had been in the house for two days he removed them to another house and decided he would not complete the purchase. It was held by the trial judge that the plaintiff was entitled to specific performance.

Statement

The appeal was argued at Vancouver on the 14th of March, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Dorrell (*Donald Smith,* with him), for appellant: We plead the Statute of Frauds and deny part performance. Unless they can shew part performance they have no case. First, West was never authorized to do more than locate the house. Secondly, there was no agreement because Norgan made a deposit on certain conditions, *i.e.,* reserving the right to inspect the house. There never was a *consensus ad idem*: *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597 at p. 601; *Preston* v. *Luck* (1884), 27 Ch. D. 497 at p. 502; *Colonial Investment Co. of Winnipeg, Man.* v. *Borland* (1911), 1 W.W.R. 171 at p. 184. The agent had no authority: see *Thuman* v. *Best* (1907), 97 L.T. 239; *Elk Lumber Co.* v. *Crow's Nest Pass Coal Co.* (1907), 39 S.C.R. 169 at p. 173; *Vale of Neath Colliery Co.* v. *Furness* (1876), 45 L.J., Ch. 276; *Chadburn* v. *Moore* (1892), 67 L.T. 257. We say there was never any appointment to complete made: see *Pole* v. *Leask* (1863), 8 L.T. 645 at p. 649.

Argument

J. A. MacInnes (*E. A. Burnett,* with him), for respondent: This case is entirely a question of fact. The learned trial judge has concluded on the evidence that there was a contract and that we are entitled to specific performance. We submit that this Court must accept the findings of the trial judge.

Dorrell, in reply, referred to *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Coventry* v. *Annable* (1912), 2 W.W.R. 816 at p. 825.

Cur. adv. vult.

COURT OF APPEAL

1924

June 4.

HADDOCK v. NORGAN

4th June, 1924.

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

I agree with the trial judge that the defendant's evidence is not to be relied on. The evidence at pages 13, 14, 15, 16, 67, 68, 69, 80 and at other pages, amply sustains the conclusion of the learned judge on the facts. The law applicable to these facts has been well settled.

MARTIN, J.A.

MARTIN, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal brings up the question whether there was a complete contract for the sale and purchase of a house and lot in the City of Vancouver? Admittedly the contract was a verbal one save that there was an interim receipt having all the essential requirements of a memorandum of sale of land, and of the terms of the verbal contract, which was signed by the plaintiff but not by the defendant. Agents acted on behalf of the vendor and purchaser in bringing about the contract. The plaintiff, the vendor, brought the action claiming specific performance.

The learned trial judge found in favour of the plaintiff, and judgment went for specific performance, holding that the defendant as purchaser was under the obligation to perform the contract because of there being sufficient evidence to establish part performance upon the part of the defendant, possession having been taken of the premises, and that possession was referable to, and could only be referable to the existent verbal contract. The facts disclose that the defendant was desirous of, in fact anxious, to purchase a house and lot in the City of Vancouver as a place of residence for his parents, who at the time of the making of the contract were resident in an apartment-house in the City of Vancouver. The defendant was, it would appear, a man engaged in business, and had little time to devote to the search of a desirable place of residence for his parents, and one, West, a real-estate broker, acted for him in the matter, and one Knowles, also a real-estate broker, was acting in a similar capacity for the plaintiff, and the transaction was carried out by these two agents. West had shewn the property in question to the defendant, but the price first asked

was not satisfactory, it was eventually agreed between West and the defendant that if the property could be got for $5,150, the defendant would purchase the property, and the defendant gave West $100 to make a deposit in case a purchase could be effected at that price and a deposit was made, Knowles acting for the plaintiff, agreeing to accept $5,150 as the purchase price. Later the defendant's parents moved their furniture into the house situate upon the property agreed to be purchased, and the evidence disclosed that the defendant was present when this was done. Some two or three days elapsed after this taking of possession of the premises when the defendant stated that possession would be given up and the furniture would be moved out, as the defendant had had the house inspected by a builder who had made an adverse report thereon.

It is clear that there was no agreement that the house should be subject to building inspection and the defendant was insisting upon something which was not a term of the contract. Upon this point the defendant said, under examination by his own counsel:

"Well, I will put up a deposit of $100. I am not sure whether I told him [West] that I would put up a $100 subject to inspection, but that is what I had in mind when I put up the $100."

It is clear that no such condition formed a part of the contract come to.

Then as to the taking of possession of the house, the defendant under examination by his own counsel said, dealing with the keys of the house which West got and gave to his father:

MCPHILLIPS, J.A.

"The keys were handed to my father any way.

"Do you know anything about the furniture being taken in? I was there.

"THE COURT: When was that? On Monday afternoon."

Possession was retained until Wednesday when the furniture was taken out again and the learned trial judge held upon facts led at the trial, that damage to the extent of $250 was done to the house "by reason of the rough and careless manner in which the furniture was moved about and by the carelessness of the occupants." Under cross-examination, defendant said:

"You gave West a $100 cheque after you had inspected the house in question? Yes, sir.

"At that time the price had been agreed on for $5,150? Yes.

"When you gave him the $100, you knew he was going to make a deposit on this house? Yes.

COURT OF APPEAL

1924

June 4.

HADDOCK v. NORGAN

"And he had given instructions to make a deposit on this house? He had my instructions to make a deposit on that house, yes."

"You agreed with West to buy the house? Yes.

"And you paid $100 deposit? Correct."

I have referred to some of the evidence to indicate that unquestionably the defendant had decided to buy the property at $5,150 and that West was duly authorized to make the contract of purchase upon his behalf which contract was made. I may say that I am in entire agreement with the judgment of the learned trial judge in decreeing specific performance.

It would appear that the title to the land was not in the plaintiff, but in one Noran, however, nothing really turns upon this as no exception was taken to this—no repudiation (see *Halkett* v. *Dudley* (*Earl*) (1907), 1 Ch. 590 at p. 596, and *Procter* v. *Pugh* (1921), 2 Ch. 256 at pp. 267, 268), and the plaintiff was in a position to obtain an effective conveyance of the land to the defendant and a conveyance thereof free from all encumbrances was duly executed by Noran to the defendant, and was produced and filed at the trial of the action, together with a certificate of encumbrance from the registrar of the Land Registry office, shewing good title in Noran, free from all encumbrances. It is evident that the evidence discloses in the most positive terms that the plaintiff can obtain an indefeasible title to the land upon payment of the purchase price, and the $100 paid has been credited upon the purchase price, leaving $5,050 still due and payable.

MCPHILLIPS, J.A.

The learned trial judge has in his reasons for judgment referred to several of the controlling cases upon what shall be deemed sufficient part performance as admittedly here without part performance there would be no contract capable of being enforced. In addition to these references, I would refer to the following cases which in my opinion are particularly forceful upon the particular facts of the present case: *Hohler* v. *Aston* (1920), 2 Ch. 420, a judgment of Mr. Justice Sargant (as he then was, now Lord Justice) is peculiarly in point as that was a case of somewhat close analogy to the present case. The point was pressed, as here, that the taking of possession by the defendant's father was not the taking of possession by the

defendant, counsel at p. 424 in argument taking the point in these terms:

"The cases have not gone so far as to shew that a taking of possession by a person not a party to the contract is enough to take the case out of the statute."

Nevertheless, Mr. Justice Sargant held "that the entering into possession by R. and her husband, was a part performance of the contract which took the case out of the Statute of Frauds," and in the present case upon the facts we have I am of the like opinion, *i.e.*, that the taking of possession by the defendant's father was a part performance of the contract sued upon in this action, and takes the case out of the Statute of Frauds. Mr. Justice Sargant at pp. 424-5, said:

"This is a curious case, and one very near the border line, and I hope that in the conclusion which I am coming to I am not led away by my sympathy with the plaintiffs. On the whole, I have come to the conclusion that the plaintiffs are entitled to the relief which they claim . . . . I think that . . . . there was a distinct verbal agreement enforceable, apart from any defence which could be set up under the Statute of Frauds. . . . . Then as regards the Statute of Frauds, I think that the possession taken by Mr. and Mrs. Rollo was a possession taken obviously and unequivocally in pursuance of the contract. So that the question of the enforceability or unenforceability of the contract in consequence of the Statute of Frauds is completely got over."

The present case upon its facts admits of like reasoning. *Brough* v. *Nettleton* (1921), 2 Ch. 25, a judgment of Mr. Justice P. O. Lawrence, was a case of a verbal lease with an option of purchase of the house and on the faith of the parol agreement possession was taken and rent was regularly paid and the option was in writing exercised. Objection was made and refusal to sell on the ground that no agreement existed, that it was only a yearly tenancy and alternatively the Statute of Frauds was relied upon. It was held that the possession taken was an act of part performance which enabled evidence being given of all the terms of the parol agreement and entitled specific performance of the agreement, including the option to purchase.

MCPHILLIPS, J.A.

I am of the opinion that the present case upon its particular facts also warrants the same conclusion. There is considerable analogy also in the *Brough* case, with the present case, and I would refer to the argument of counsel for the defendant.

COURT OF APPEAL

1924

June 4.

HADDOCK v. NORGAN

Nevertheless, as we have seen, specific performance was decreed. The taking of possession in the *Brough* case was the act of the plaintiff, here it was the defendant, but that difference of circumstance in no way affects the application of the governing principle. At p. 28, Mr. Justice P. O. Lawrence said:

"In these circumstances I am clearly of opinion that the taking of possession of the house by the plaintiff constituted an act of part performance of the agreement and that the defendant is precluded from setting up the statute. The effect of the removal of the barrier set up by the statute in my judgment is to open the door to parol evidence of the whole agreement, including the term as to the option to purchase. That being so, I should have thought that the case was clear, and that there could be no doubt that the plaintiff was entitled to the relief he claims."

The learned judge continues and at p. 29, said:

"Now I have already held that in this case parol evidence is admissible to prove the whole agreement between the parties including the term as to the option and that the plaintiff is entitled to enforce the verbal agreement so established, because it has been in part performed by him. In these circumstances the parties are in my opinion placed in precisely the same position as if the whole agreement had been reduced into writing and signed by the defendant."

MCPHILLIPS, J.A.

There can be, in my opinion, but one conclusion upon the facts and the authorities in the present case and that view the learned trial judge arrived at, namely, that the case was one in which specific performance could properly be decreed. In that conclusion I agree. The judgment should be affirmed and the appeal dismissed.

Appeal dismissed.

Solicitor for appellant: *Donald Smith.*
Solicitor for respondent: *A. N. Daykin.*

McBRIDE v. MUNICIPALITY OF SOUTH VANCOUVER
TAIT v. MUNICIPALITY OF SOUTH VANCOUVER

COURT OF APPEAL

1924

June 26.

McBRIDE v. SOUTH VANCOUVER

TAIT v. SOUTH VANCOUVER

Taxation — Lands used for agricultural purposes — Court of Revision — Application of section 219(3)(c) — Power to apply the section — B.C. Stats. 1914, Cap. 52; 1919, Cap. 63, Sec. 219(3)(c); 1921, Cap. 44, Sec. 9; 1921 (Second Session), Cap. 37, Sec. 13.

Section 219(3)(c) of the Municipal Act as enacted by section 7 of the Municipal Act Amendment Act, 1919, and amended by section 13 of the Municipal Act Amendment Act, 1921 (Second Session), provides that the powers, *inter alia*, of the Court of Revision shall be: "to fix in any case in which the Court deems it advisable so to do the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes: Provided, however, that there shall be no appeal from the Court of Revision in respect of any decision under this clause."

The plaintiffs' lands were assessed at $500 per acre. They appealed claiming their properties were valued beyond their actual value but they did not invoke the provisions of said section 219(3)(c). The Court of Revision of its own volition fixed the value of the lands as agricultural lands at $500. An appeal to the Supreme Court was dismissed on the ground that under section 219(3)(c) there was no appeal.

Held, on appeal, affirming the decision of MACDONALD, J. (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that as Parliament gave the Court of Revision power to invoke section 219(3)(c) of the Municipal Act "in any case in which the Court deems it advisable so to do" in all appeals brought before it, the Court has power to apply this section and no request for its application is necessary.

APPEALS by McBride and Tait (the two actions having been tried together) from an order of MACDONALD, J. of the 5th of March, 1923, dismissing an appeal from the Court of Revision. The lands in question were assessed at $500 per acre by the assessor. The appellants appealed claiming the actual value of the lands was less than $500 per acre. They did not invoke section 219 (3) (c) of the Municipal Act as amended in 1919 under which the Court of Revision can deal with the lands on a basis of its agricultural value, but the Court of Revision

Statement

COURT OF APPEAL

1924

June 26.

McBRIDE v. SOUTH VANCOUVER

TAIT v. SOUTH VANCOUVER

assessed the lands as agricultural lands under said section and fixed its value as such at $500 per acre. An appeal to the Supreme Court was dismissed the Court holding that the Court of Revision could, if they saw fit, assess the property under section 219 (3) (*c*) although the owners did not invoke the section on their appeal and that there was therefore no appeal.

The appeal was argued at Victoria on the 16th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Alfred Bull, for appellants: McBride was always successful before in reducing the assessment to $250 per acre, but this year he is assessed at $500. We say first, the Court of Revision misconceived section 219 (3) (*c*) as its application involves a reduction from the actual value: see *Shannon* v. *Corporation of Point Grey* (1921), 30 B.C. 136; (1922), 63 S.C.R. 557 at pp. 564-6. We simply ask for a reduction; they do not reduce, and add a tag on their decision that it is agricultural in order to stop an appeal: see *Board of Education* v. *Rice* (1911), A.C. 179 at p. 182. That the section implies a reduction in the actual value see *Rex* v. *Board of Education* (1910), 2 K.B. 165. This is a mistake in law for which an appeal lies: see *The Queen* v. *Vestry of St. Pancras* (1890), 24 Q.B.D. 371; *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (1906), A.C. 535. There was not a proper exercise of their discretion: see *Brown* v. *Columbian Company Limited* (1923), 32 B.C. 425. The surrounding circumstances shew bad faith on the part of the Court of Revision as they brought in section 219 (3) (*c*) merely to prevent an appeal. They had no business to touch this section unless asked to do so by the owners. That they cannot make a finding of this nature to preclude our appeal see *Great West Saddlery Co.* v. *Regem* (1921), 2 A.C. 91. A taxation Act is subject to strict interpretation: see *Montreal Trust Co.* v. *South Shore Lumber Co.* (1923), 33 B.C. 144; *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (1906), A.C. 535 at p. 538.

Argument

D. Donaghy, for respondent: It is admitted the lands have

no value except for agriculture. The lands are worth $1,000 an acre. Under section 219 (3) (*c*) both lands and improvements are assessed. There is no procedure whereby an owner must give notice to invoke section 219 (3) (*c*). The section expressly says the Court of Revision can assess under the section if they see fit to do so. It is the duty of the Court to make the assessment fair and equitable and they should assess these lands as farm lands whether they are asked to do so or not.

Bull, in reply: They have the right to assess improvements but they must do so separately.

Cur. adv. vult.

26th June, 1924.

MACDONALD, C.J.A.: The facts are not really in dispute. The appellant is the owner of a parcel of land in the municipality of South Vancouver, exceeding in area three acres. The land is used entirely for agricultural or horticultural purposes.

The Municipal Act provides that lands and improvements shall be assessed separately, and confers upon the municipal council the power to exempt improvements in whole or in part from taxation. We were told by respondent's counsel that it is the settled policy of the respondent municipality not to assess improvements of the character of those on the lands in question. In other words, the municipality disobeys the directions of the Municipal Act in this respect. The only improvements upon the land in question consist of clearing, dyking, draining and cultivation.

MACDONALD, C.J.A.

In assessing the lands the assessor following out his instructions, assessed the land only exclusively of these improvements and fixed its value at the sum of $500 per acre. Both counsel agree that the improvements are worth $600 per acre. For the past ten years the appellant has complained of the assessment of this land and on appeal to the Courts has succeeded in having it reduced, the last reduction was to the sum of $250 per acre.

The Municipal Act contains a section recently enacted, I think in 1919, giving power to the Court of Revision to fix the assessment of parcels of land containing upwards of three acres, used solely for agricultural or horticultural purposes, at a figure

COURT OF APPEAL

1924

June 26.

MCBRIDE v. SOUTH VANCOUVER

TAIT v. SOUTH VANCOUVER

representing the value for such purposes irrespective of the value of the land for any other purpose.

The assessment appealed from was made by the assessor at $500 per acre for the land alone, which is double what the Supreme Court reduced it to on prior appeals. The section above referred to relating to fixing value as agricultural land does not affect the assessor, he must assess the land at its actual value according to the said Act, which fixes actual value as the basis of assessment. It is the Court of Revision alone which may apply the agricultural valuation. The appellant, therefore, appealed from the assessor's valuation, claiming that the actual value of the land was less than $500 per acre. He did not invoke the section above referred to by asking the Court of Revision to fix the agricultural value. That could only be done by the Court of Revision, and the appellants' counsel contended that it could do it only at the request of the landowner; in other words, it was open to the landowner to stand upon the actual value of the land and claim that on that basis it was over-assessed, or if he chose to invoke the section, then at his request the Court of Revision might fix the value as agricultural lands. In the present case the owner appealed from the assessor's valuation, and said that that valuation was beyond the actual value of the land. Nevertheless, the Court of Revision pretended, against the wish of the landowner, to fix its value as agricultural land, which they did at the assessed value of $500 per acre. The object of this, appellant's counsel submitted, was to deprive the appellant of the right of appeal. In my opinion the section in question was intended to be beneficial to the landowner. It probably was inserted in the Act in consequence of a recent boom in city and suburban lots. Vast acreages of land were surveyed into lots, and after the boom had subsided these lots being worthless for any purpose other than for agriculture or horticulture, were yet assessed so high as to destroy much of their value. The Legislature, doubtless had in mind the reversion of these lands to agriculture, and therefore inserted the section in question in the Municipal Act. Hence the owner of lands of three acres or upwards was given the choice as to whether he would submit to the assessment of

MACDONALD, C.J.A.

the lands at actual value or would apply to the Court of Revision for the relief contemplated by the section. If he stood upon the assessment and said that that was above the actual value of the land and should be unsuccessful in the Court of Revision, the Act gave him an appeal to the Courts. If, on the other hand, he sought the application of the section, this being an acceptance of the benefit which the Court of Revision in its discretion might give him, then the statute said that he should have no appeal and must abide by the decision of the Court of Revision.

Taking advantage of the circumstances above recited, the Court of Revision, probably having in mind that the Courts had consistently reduced the assessment of the land in question year after year, to a figure much below that confirmed by the Court of Revision, the Court of Revision took the matter into its own hands and in effect said: "We prefer to deal with this appeal to us as an application to exercise the powers given us under the said section; we decline to reduce the assessment and think, having accomplished this result, that we have deprived the appellant of his right of appeal to the Courts." Whether the Court of Revision did this fraudulently or under a misconception of their powers to force the application of this section upon an unwilling landowner, although the Court had decided to confer no benefit upon him at all, I am not called upon to decide, because apart altogether from the want of *bona fides,* if any, involved, I think on a proper construction of the section itself, and in the light of the circumstances to which I have adverted, the Court of Revision had no power to invoke that section, except with the consent of the landowner. In other words, the landowner was entitled to stand on the general rule and say: "My land has been over-assessed on the basis of actual value; I ask nothing but an assessment at its actual value, and my appeal stands or falls on that basis and on that basis alone." Actual value is the highest value at which land can be assessed and if the Court of Revision thought it was worth the assessed value for any purpose it should have simply dismissed the appeal.

It was contended that the section as amended in 1921 gives

COURT OF APPEAL

1924

June 26.

MCBRIDE v. SOUTH VANCOUVER

TAIT v. SOUTH VANCOUVER

the Court of Revision power of its own motion to deal with any lands as it sees fit, that is to say, it may raise the assessment or lower the assessment, or treat the land as within the said section or not. The section gives the Court of Revision power

"to fix, in any case in which the Court deems it advisable so to do, the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes: Provided, however, that there shall be no appeal from the Court of Revision in respect of any decision under this clause."

The words "in any case in which the Court deems it advisable so to do" were inserted in 1921 because of the decision of the Supreme Court of Canada in *Corporation of Point Grey* v. *Shannon* (1922), 63 S.C.R. 557. That Court held that the section as originally framed made it obligatory upon the Court of Revision, when requested to do so, to exercise the powers given by the section in favour of those who could prove that they came within its provisions. The opposite contention was that it was discretionary with the Court of Revision. The Legislature amended the section by making it discretionary with the Court of Revision. That, in my opinion, was the object and is the only effect of the amendment of 1921.

MACDONALD, C.J.A.

Looking at the question from another standpoint, what is the inference to be drawn from the section either as originally drafted or as amended? It was, as I have said, solely in the interest of the landowner; its object is perfectly apparent. The fact that the right of appeal was taken away in case of the fixing of the value under it, gives additional force to the construction which I would put upon it. If a landowner claims the benefit of the section, then he is to abide by the decision of the Court of Revision. If he does not claim the benefit of the section, his right of appeal remains; in the latter case, the parties are at arm's length, in the former, a benefit is requested, but subject to there being no appeal from the decision.

There is another feature of this case which may be noticed, though it does not affect the construction of the Act. The Municipality, as already said, has neglected to assess improvements, notwithstanding that they are required to do so; they assess the land only excluding all improvements such as the

ones I have already mentioned. When the appellant's appeal came before the Court of Revision, it relied upon evidence of sales in the neighbourhood, made some years ago. Two or three instances of the sale of land at approximately $1,000 per acre were given. This evidence appears to have been accepted by the Court of Revision, notwithstanding that great changes in values may have occurred within the last three or four years, and notwithstanding that a judge of the Supreme Court had, during those years, and after those sales had been called to his attention, reduced the assessment to $250 per acre. The agreed value of the improvements is $600, therefore, if the lands and the improvements, which admittedly were the same as the improvements on the land in question, were sold at $1,000 an acre, the value of the land must necessarily be not more than $400 per acre, a circumstance which the Court of Revision has entirely overlooked, so that in any case if there be an appeal, and if the Municipality cannot rely upon the section referred to, this Court should rectify it by reducing the assessment to at least $400. In view, however, of the prior assessments, which I think we must accept, as based upon the value at the time they were considered by the judge of the Supreme Court, and having regard to the fact that no increase of value has been shewn or suggested since that time, I ought to reduce the assessment to $250 per acre, holding as I do, that the said section has no application to Mr. McBride's appeal to the Court of Revision. In reality the Court of Revision ignored the appeal and took no evidence of the actual value of the land, which was the only question before it. I therefore would reduce the assessment to its old figure, there being no evidence before us of its actual value apart from improvements.

MACDONALD, C.J.A.

Mr. *Donaghy,* counsel for the respondent, submitted on the question of *bona fides* that since the improvements were worth $600 per acre, the fixing of the value as agricultural land, which would include land and improvements, at $500 could be no injustice. But this argument overlooks the fact that improvements in that municipality were not assessed at all against other landowners. To sustain the action of the Court of Revision on the ground that lands and improvements were

COURT OF APPEAL

1924

June 26.

MCBRIDE v. SOUTH VANCOUVER

worth $500 at least, would be to discriminate against the appellant. It would be to apply a rule of value to his land which had not been applied to those of the rate-payers, except to that of Tait, whose appeal depends on the results of this one.

TAIT v. MUNICIPALITY OF SOUTH VANCOUVER

TAIT v. SOUTH VANCOUVER

This appeal involves essentially the same facts as McBride's. I will refer to only one thing which while appearing to differ, does not really do so. In Tait's notice of appeal to the Court of Revision, he refers to his land as agricultural land; a careful reading shews that he does not invoke the section recited in the other case, but appeals solely against the assessment of actual value.

MACDONALD, C.J.A.

This appeal should also be allowed, and the assessment reduced to that of the year prior to the assessment appealed from.

Both appellants should have the costs here and in the Supreme Court.

MARTIN, J.A.: These appeals raise the question of the meaning to be given to subsection (3) (*c*) of section 219 of the Municipal Act, Cap. 52 of 1914, as amended by section 13 of Cap. 37, 1921 (Second Session), since the decision of this Court and the Supreme Court of Canada in *Shannon* v. *Corporation of Point Grey* (1921), 30 B.C. 136; and 3 W.W.R. 442 and 549; and (1922), 63 S.C.R. 557; 2 W.W.R. 625. The amended section now reads: [already set out in the head-note and in the judgment of MACDONALD, C.J.A.].

MARTIN, J.A.

The words in the first two lines, "in any case in which the Court deems it advisable so to do," have been added since the said Supreme Court decision, which held that as the section then stood the duty of the Court of Revision to fix the assessment in the special way therein provided, was imperative. In that case the assessed owner had claimed the benefit of the section upon his appeal to the Court of Revision, but that Court had wrongly rejected it on the ground that the exercise of its power was discretionary. The present appeal raises a distinct

question, but the appellant submits that the former decision is based upon the view that the section is a remedial one for the sole benefit of the owner and hence it can be invoked by him alone. While it is true that in the judgments of my brother McPHILLIPS and myself we said that the Court of Revision has a duty to exercise for the benefit of the owner, yet that is very far from saying that such a duty is exclusive of the additional duty it clearly has to the public at large, and I find I guarded myself from a narrow interpretation by saying [30 B.C. 143]:

"We have here a tribunal directed by the Legislature in the most imperative and precise way to sit and perform certain most important, indeed vital, functions in municipal life, not only concerning the particular individuals assessed but the public at large."

My brother McPHILLIPS also pointed out the public policy of the Legislature in enabling the Court of Revision to deal with lands of this class on a special basis because in real-estate booms [30 B.C. 145]

" 'Lands are subdivided into blocks and city lots at such absurd distances from any reasonable use as business or residential sites, that large areas which should rightly be put to agricultural purposes are, in many cases, lying idle to the detriment of the locality and the Province at large. It is evident that the Legislature by way of inducement to cultivate these lands, made it possible to have the assessment based upon the agricultural value, not upon the city or town-lot value, which may be, as it often is, a most fictitious value.' "

In the judgments in the Supreme Court there is nothing in conflict with this view, Mr. Justice Mignault referring (p. 638, (1922), 2 W.W.R.) simply to the principle which governs a duty to one who is entitled to a benefit, while Mr. Justice Brodeur merely points out (p. 635) that the Legislature had "the evident intention of encouraging agriculture," which is conceded. MARTIN, J.A.

It may also be added to our common knowledge of what my brother so accurately depicts of a notorious evil in boom real-estate transactions, that the effect of too many purely speculative subdivisions in certain undesirable localities (*e.g.*, those low lying and remote, and only of use to exploit a gullible public) is to deprive the land so locked up of any value at all for sale even as town lots or blocks, with the result that unless some special power is given to treat the subdivided land in gross

COURT OF APPEAL

1924

June 26.

McBRIDE v. SOUTH VANCOUVER

TAIT v. SOUTH VANCOUVER

as "agricultural or horticultural" areas or blocks, despite its subdivision into small parcels, it has no market value, and as in the present times of post-bellum depression no one will pay taxes on it in such a state, it eventually falls into the unwilling ownership of the municipality, thereby adding to the public charge. The result of this is that the value of the said areas for "agricultural or horticultural purposes" may in certain cases be greater than their value (if any) for "any other purpose or purposes," and Chief Justice Davies pointed out, at p. 627 of the *Shannon* case, the difference between the new section and the "somewhat indefinite" former section of the Act of 1917, Cap. 45, Sec. 46 (223A) under which the Court of Revision had the power to "reduce" but not to "increase" the assessed value of agricultural or horticultural lands, whereas the new section gives the power to "fix" that assessment "without regard to its value for any other purpose," and Mr. Justice Mignault at p. 637 also remarks upon this important enlargement of powers. I have drawn attention to this feature of the appeal because it was apparently assumed at the Bar that under the new section the powers of the Court of Revision were still confined to reduction as they were under the old one of 1917.

MARTIN, J.A.

I do not regard the amendment as being designed merely to change the imperative duty of the Court of Revision into a discretionary one in favour of landowners alone: to achieve that limited object the employment of direct language would be expected, but the comprehensive expression adopted by the Legislature, "to fix in any case in which the Court deems it advisable so to do," imports to my mind, the exercise *ex mero motu* of wide powers in the public as well as private interest, nor do I regard the original subsection as being restricted to the invocation of private interests, and there is no procedure directed by which an owner can invoke the Court, because, as will be noted later, such an invocation is not "a ground of complaint" against "an error or omission" under section 216, which the Court can "confirm . . . . or alter" upon appeal. It was submitted by Mr. *Donaghy* that the amendment was wide enough to empower the Court of Revision *ex mero motu* to fix assessments upon any block which it might think advisable" to

treat specially under subsection (*c*) in the general discharge of its wide powers of "investigation" and "revision" of the roll "whether complained against or not" under section 219, which powers have been noted in the *Shannon* case, *supra*. It may well be that such is the case, and as no procedure is laid down for the exercise of those powers of "fixing" in any case, private or public, the ordinary rules of natural justice appropriate to the proceedings would doubtless be adopted as they were in the case at Bar: as Chief Justice Davies said in the *Shannon* case, *supra*, p. 627:

"The Court had to find first that the land was held in blocks . . . . and when they had so found was to fix the value. . . . . No language could be used more clearly expressing the meaning of the Legislature."

But it is not necessary to go that far at present, because in this case an appeal had been taken and the question of ascertaining "a fair and equitable assessment" (see 219 (3) (*b*)) had in fact been brought by the owners before the Court and in such case at least I think the learned judge below was right in holding that the Court had jurisdiction. It must be conceded that the letter of the statute is sufficient to support that view, and there is nothing in the spirit of the Act to conflict with it. On the contrary, the powers employed according to the letter would be very beneficial to the public interest and enable the Court to deal practically, broadly, and equitably with a class of land which it had been impossible to deal with because of subdivision. No injustice has been caused by resorting to it in the cases at Bar because the value of the land, apart from improvements is clearly shewn by recent transactions to be at least $400, if not $500 per acre, the land being rich, highly cultivated bottom land in steady demand for intensive market gardening, but if the Court of Revision had jurisdiction to fix the assessment in this case at least, as I do not doubt it had, then it is not open to us to review the amount it has so "fixed" as the value, because the provision in subsection (*c*) bars any appeal to us from its decision.

MARTIN, J.A.

But should I be wrong in this view I have not overlooked the fact that on behalf of the respondent, Mr. *Donaghy* submits that in fixing said special assessment the Court of Revision should regard each area of land "held in blocks" as a complete

COURT OF APPEAL

1924

June 26.

McBRIDE v. SOUTH VANCOUVER

TAIT v. SOUTH VANCOUVER

small holding (for farming or market gardening or fruit raising or similar purposes as the case may be) including its improvements, like one small farm, the whole land with its improvements being included as a going concern, so to speak. I think this is the correct view to take of the special operation of this section for a special purpose, because it is something quite apart from the ordinary assessment by the assessor which is directed to be made under section 211 (1) and the proceedings under (*c*) are not an appeal from or a "ground of complaint" against him or his roll under section 216 in any sense, because he had no jurisdiction in the matter, but they are the exercise of a distinct and additional power originating in the Court itself, which power may be exercised either at the invocation of an owner for his own benefit, or *ex mero motu* for the benefit of the public or a private owner as the case may be. This view is fortified by the fact that a distinction is drawn in the preceding section (*b*) which directs the Court "to investigate the roll and assessments thereunder" and adjudicate upon the "actual value of each parcel of land . . . . and improvements," and also between improved and wild land in subsection (*g*), whereas in (*c*) the distinctive expression is "land . . . . held in blocks of three or more acres and used solely for agricultural or horticultural purposes." In my opinion "used" must mean in actual use at the time of the "fixing," and *ex necessitate* that involves improvement to an appreciable degree because wild land is not being "used" for the special purposes designated by the statute, which alone entitles these blocks to special consideration thereunder; in short, I regard subsection (*c*) as a thing apart from the rest of the statute, creating a special and exclusive way of dealing with a special situation.

MARTIN, J.A.

It follows therefore, that from any point of view the decision of the Court of Revision was proper in the circumstances and the appeals should be dismissed. I need only add that no ground has been shewn for imputing illegal motives to the Court in the discharge of its duties: in my opinion it *bona fide* exercised them in that "fair and equitable manner" to all concerned which the statute contemplates, and therefore no Court

should interfere with it: *In Re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274; (1915) A.C. 345.

GALLIHER, J.A. agreed with MACDONALD, C.J.A.

MCPHILLIPS, J.A.: In my opinion MACDONALD, J. arrived at correct conclusions in respect of the valuations of the lands called in question under both appeals. His conclusions were arrived at as is apparent after a most careful consideration of the evidence, and further, the learned judge in my opinion rightly construed the statute law bearing upon the right of appeal to the Court of Revision and the powers of the Court of Revision.

The learned counsel for the appellants Mr. *Alfred Bull,* in his very able argument directed it in the main to the unauthorized (in effect, according to his contention, illegal procedure of the Court of Revision) application of section 219 (3) (*c*) of the Municipal Act (Cap. 52, B.C. Stats. 1914) and doing nothing more, that in truth the Court of Revision did not in fact find the value of the land as it was without evidence to do so, but merely utilized section 219 (3) (*c*) as a device to preclude an appeal from its refusal to reduce the assessment and in so doing the Court of Revision acted fraudulently. Upon a careful review of the evidence I fail to see that the contention so strenuously advanced at this Bar is at all supportable. I find that there was evidence ample in its nature to entitle the Court of Revision and the learned judge to arrive at their respective conclusions. Further, I see nothing from which I could rightly infer that the Court of Revision proceeded in any way fraudulently but on the contrary, it seems to me, was actuated by a proper sense of its duty and in all that it did proceeded upon a proper conception of its duty and in no way illegally. Therefore, following along the premise, as I find it, there was evidence before the Court of Revision and likewise before the learned judge in the Court below, entitling the finding of the values of the land in correct conformity with the provisions of the Municipal Act, and that being the case it is incumbent upon the appellants to discharge the onus resting

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

June 26.

McBRIDE v. SOUTH VANCOUVER

TAIT v. SOUTH VANCOUVER

upon them to demonstrate that the findings are wrong or that there was a want of jurisdiction in the procedure or course adopted, and the latter contention was the one most strongly pressed. This submission now calls for some consideration.

It was held in *Corporation of Point Grey* v. *Shannon* (1922), 63 S.C.R. 557; (1922), 2 W.W.R. 625 that section 219 (3) (*c*) of the Municipal Act as it then stood was in its nature mandatory and the Court of Revision was under compulsion when invoked to apply its provisions, *i.e.*, that it was remedial in form and when invoked the Court of Revision had no discretion. Since then by an amending Act (1921) the following words have been introduced: "To fix, in any case in which the Court deems it advisable so to do . . . ." thereby creating a discretion, exercisable by the Court of Revision as against a statutory mandate theretofore existing. Section 219 (3) (*c*) as at present existent reads as follows: [already set out in the head-note and in the judgment of MACDONALD, C.J.A.]

Now it is contended that as the appeal to the Court of Revision had relation to "actual value" only (see section 207 (1)) that there was no power in the Court of Revision to invoke section 219 (3) (*c*) of its own volition not being invoked by the appellants. I must confess with every deference to the argument advanced that I am not impressed by this view.

MCPHILLIPS, J.A.

The jurisdictional right in the Court of Revision to me appears to be unquestionable. Section 219 is in form a code setting forth the powers and the extent of the powers of the Court of Revision, therefore, it follows, that if the Court of Revision, acting in the exercise of the powers conferred, invokes or calls up one of those powers, where can there be found any inhibition in their due exercise? I can find nothing that admits of the contention made that under the state of circumstances existent in the present case, the exercise of the powers under section 219 (3) (*c*) is not at all times permissible. To indicate the policy of the Act and the powers conferred upon the Court of Revision, it may in passing be noted that section 219 (3) (*b*) reads in part:

> "To investigate the said roll and the various assessments therein made, whether complained against or not, and so adjudicate upon the same that the same shall be fair and equitable and fairly represent the actual value

of each parcel of land and actual value of the land and improvements within the municipality. . . . ."

It therefore follows that in my opinion the appeal would fail in respect of land assessed under section 219 (3) (*c*), *i.e.*, "used solely for agricultural or horticultural purposes," as in such cases no appeal lies.

This conclusion entirely meets any of the exceptions taken to the fixing of values as against land solely in use for agricultural purposes. Upon a considered review of the whole subject-matter of these appeals, I cannot persuade myself that the appellants are in any way entitled to succeed in respect to any of the assessments complained of, which was the opinion I formed upon the argument. I therefore am unhesitatingly of the view that the appeals fail and should be dismissed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The point in issue is whether or not the respondent was at liberty to invoke section 219 (3) (*c*) and the proper construction of that section. The cardinal rule for the construction of an Act is that it should be construed according to the intention of the Parliament which passed it, but to ascertain that intention the tribunal must be governed by the words used. It is true that in cases of ambiguity, in order to obtain a proper understanding of these words, it is right to inquire into the subject-matter, the object in view and the history of legislation on the point involved. But if the words are clear and explicit they must be given their ordinary and natural meaning. See *Attorney-General* v. *Noyes* (1881), 8 Q.B.D. 125 at p. 138, where Jessel, M.R. says:

MACDONALD, J.A.

"It is the duty of judges in all cases to give fair and full effect to Acts of Parliament without regard to the particular consequences in the special case, and not to indulge in conjecture as to what the Legislature would have done if a particular case had been presented to their notice. We first of all have to see what the Act of Parliament says, and then apply it to the case, and I do not think it is a fair criticism on an Act of Parliament to say that the result will be unfair, or that it will result in making people pay duty who ought not to pay duty."

Applying these well-known canons of construction to section 219, subsection (3) (*c*), it is clear that Parliament gave the Court of Revision power to invoke this section, "in any case in which the Court [*i.e.*, the Court of Revision] deems it advis-

COURT OF APPEAL

1924

June 26.

McBRIDE v. SOUTH VANCOUVER

TAIT v. SOUTH VANCOUVER

MACDONALD, J.A.

able so to do." In the case of appeals brought before it, it is left to the Court itself to apply this section, and no request for its application is necessary. Indeed, there is no procedure outlined in the Act for making application to be brought under it. That in itself is not conclusive, but it throws some light on the untrammelled right of the Court of Revision to resort to it.

It is suggested that the duty of the Court of Revision was to decide the appeal lodged with them, *viz.*, whether or not the lands were assessed at their actual value and to either confirm, reduce or if need be, raise the assessment; in other words, dispose of the explicit complaint lodged by the appellants and not as alleged, not only refuse to deal with the particular complaint, but instead resort to another section *ex mero motu* under which no appeal is allowed. But we must give effect to the words of the statute "without regard to the particular consequences in the special case." It was also argued that it was an act of bad faith on the part of the Court of Revision to invoke this section and that by reason thereof, its decision is void. Apart from the fact that without good grounds bad faith should not be imputed to public bodies, it cannot be said that a course of procedure adopted pursuant to statutory authority must necessarily be conceived in bad faith.

I would dismiss the appeals.

Appeals dismissed,
Macdonald, C.J.A. and Galliher, J.A. dissenting.

Solicitors for appellants: *Tupper, Bull & Tupper.*
Solicitor for respondent: *D. Donaghy.*

DOCKENDORFF v. JOHNSTON AND STOLLIDAY.

COURT OF APPEAL

1924

June 4.

DOCKENDORFF v. JOHNSTON

Practice—Appeal—Evidence—Judge's notes—Uncertainty of supplementary notes—Duty of appellant.

Where solicitors expect to appeal it is their duty to have the evidence taken in the Court below so that it can be brought before the Court of Appeal.

C. W. Stancliffe & Co. v. *City of Vancouver* (1912), 18 B.C. 629 followed.

APPEAL by plaintiff from the decision of GRANT, Co. J. of the 18th of February, 1924, in an action to recover $1,000, damages sustained owing to the negligence of the defendant Johnston. On the 21st of October, 1923, the plaintiff was walking east on 10th Avenue in the City of Vancouver and in attempting to cross Kingsway at the intersection of said streets, he was run down by a motor-car the property of the defendant Stolliday and driven by the defendant Johnston. The plaintiff was badly bruised and sustained internal injuries. On the hearing of the appeal on the 31st of March 1924, the respondents moved that the appeal be dismissed on the ground that the appeal book did not contain sufficient notes of the evidence upon which the judgment below was founded, the appeal book only containing extracts from the examination for discovery of the defendant Johnston. The hearing of the appeal was adjourned to give appellant's counsel an opportunity to obtain supplementary notes of the evidence from the trial judge. Upon the further hearing of the appeal counsel for the appellant submitted certain notes of the evidence taken at the trial by the trial judge.

Statement

The appeal was argued at Vancouver on the 31st of March and the 7th of April, 1924, before MARTIN, MCPHILLIPS and EBERTS, JJ.A.

H. I. Bird, for appellant: All the necessary evidence is set out in the findings of fact made by the trial judge in his reasons for judgment. Applications were made to strike out the discovery evidence and dismissed. This evidence is therefore

Argument

COURT OF APPEAL

1924

June 4.

DOCKENDORFF v. JOHNSTON

before the Court and the judge's notes now submitted are sufficient to prove the defendant Johnston was guilty of negligence in running the plaintiff down.

Abbott, for respondents: The notes now before us do not properly disclose the evidence that was submitted below. This case is substantially the same as *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629; and *Robertson* v. *Latta* (1915), 21 B.C. 597: see also *Macdonald* v. *Methodist Church* (1897), 5 B.C. 521; *Ex parte Firth* (1882), 19 Ch. D. 419.

Argument

Bird, in reply.

Cur. adv. vult.

On the 4th of June, 1924, the judgment of the Court was delivered by

MARTIN, J.A.: In this case my brother MCPHILLIPS and I are of the opinion (counsel having agreed to take the judgment of the majority of the Court), that the appeal should be dismissed.

While we appreciate the fact that the appeal is not free from doubt, yet we are placed in a position of some embarrassment by the evidence coming before us in such a scanty way, no official stenographer having been present below and the supplementary evidence which the learned judge has completed to the best of his power not being in that state which we would like. We wish in such circumstances to again draw attention to the two judgments of this Court in *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629, and *Robertson* v. *Latta* (1915), 21 B.C. 597; in the first of which the Court unanimously pointed out and laid down the rule that "where solicitors expect to appeal it is their business to have the evidence taken, so that the evidence can be brought before this Court." That rule, founded on that laid down in 1882 by the English Court of Appeal in *Ex parte Firth* (1882), 19 Ch. D. 419, has been noted in the practice books and has remained a permanent warning for the guidance of the profession ever since.

Judgment

Such being the situation, while we feel that Mr. *Bird* put his case to the best advantage before us, nevertheless he was under

COURT OF APPEAL

1924

June 4.

DOCKENDORFF v. JOHNSTON

the disadvantage of incomplete evidence, and we can only come to the conclusion that in all the circumstances we would not be justified in saying that the learned judge's view of the facts is clearly wrong, hence, the only question involved being one of fact, the appeal should be dismissed.

Appeal dismissed.

Solicitor of appellant: *H. I. Bird.*

Solicitor for respondents: *J. L. G. Abbott.*

[IN BANKRUPTCY.]

COURT OF APPEAL

1924

June 24.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. MONKA

CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED v. MONKA.

Landlord and tenant—Lease—Acceleration clause—Assignment for benefit of creditors—Landlord's preferential claim for acceleration rent—Costs—Can. Stats. 1919, Cap. 36, Secs. 9, 51 and 52(2); 1923, Cap. 31, Secs. 11 and 31—B.C. Stats. 1923, Cap. 30, Sec. 2.

In October, 1923, the defendant leased a store premises to M. who paid the monthly rent to the end of December, 1923. The lease contained a clause, *inter alia*, "that in case the lessee makes an assignment for the benefit of his creditors the lease shall cease and be void and the term hereby created expire and be at an end and the current month's rent and three months' additional rent shall thereupon immediately become due and payable," etc. M. made an assignment under the Bankruptcy Act in January, 1924, and on the 22nd of January the plaintiff Association was appointed trustee under said Act. The trustee paid the rent for the month of January and vacated the premises on the 31st of January after notifying the lessor. An application by the lessor by way of appeal from the disallowance by the trustee of $975 (being three months' additional rent) as a preferred claim was granted.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. that notwithstanding the clause in the lease as to acceleration rent, under section 2 of the Landlord and Tenant Act Amendment Act, 1923, the landlord is only entitled to rent for the time the premises are occupied by the trustee.

Statement

APPEAL by the Canadian Credit Men's Association trustee in Bankruptcy for Joseph Morris from the order of HUNTER,

COURT OF APPEAL

1924

June 24.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION *v.* MONKA

C.J.B.C., of the 8th of April, 1924, whereby he ordered that the claim of Jacob Monka for the sum of $975 as a preferred or privileged creditor of the said Joseph Morris be allowed in the administration of the estate of the said Joseph Morris (in bankruptcy). The solicitors agreed to the following statement of facts for use on this appeal:

"1. On the 19th of October, 1923, an indenture of lease was entered into between the creditor, Jacob Monka, as lessor, and the debtor, Joseph Morris, as lessee, whereby the creditor demised unto the debtor the premises known as the westerly half of the ground floor of the three story and basement brick building situate on lot A, re-subdivision of lots 13, 14 and 15, in block 3, O.G.T., said store being known as No. 37 Hastings Street, West, in the City of Vancouver, B.C.

"2. The said lease contained the following covenant or agreement on the part of the debtor as lessee:

" 'That in case the lessees shall become insolvent or bankrupt or make an assignment for the benefit of creditors, or being an incorporated company if proceedings be begun to wind up the company, or in case of the non-payment of rent at the times herein provided, or in case the said premises or any part thereof become vacant and unoccupied for the period of 30 days or be used by any other person or persons, or for any other purpose than as provided, without the written consent of the lessors, this lease shall, at the option of the lessors, cease and be void, and the term hereby created expire and be at an end, anything hereinbefore to the contrary notwithstanding, and the then current month's rent and three months' additional rent shall thereupon immediately become due and payable, and the lessors may re-enter and take possession of the premises as though the lessees or their servants or other occupant or occupants of said premises were holding over after the expiration of the said term, and the said term shall be forfeited and void.'

Statement

"3. On the 7th of January, 1924, an assignment under the Bankruptcy Act executed by the said lessee, Joseph Morris, was received and filed by the official receiver, and one Small entered into possession of the leased premises as custodian.

"4. On the said 7th of January, 1924, the debtor had paid only two instalments of rent, *viz.*, the rent for the months of November and December, 1923.

"5. On the 22nd of January, 1924, The Canadian Credit Men's Trust Association Limited was appointed trustee under the provisions of the Bankruptcy Act, and the said trustee retained possession of the said premises until on or about the 31st of January, 1924, when the trustee notified the creditor that he had vacated the premises demised in the said lease and refused responsibility for any further rent after that date.

"6. The trustee has paid to the creditor the rent for the month of January, 1924.

"7. The creditor has made a further claim as a preferred or privileged creditor in the further sum of $975 as and for rent which accrued due

under and by reason of said covenant or agreement set forth in paragraph 2 hereof while the trustee was in possession of the said premises.

"8. The trustee has disallowed the said claim on the following grounds:

"'That your claim to the above amount as a preference is contrary to the provisions of the Bankruptcy Act.'"

The appeal was argued at Victoria on the 24th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Griffin, for appellant: The words in the lease are swept away by section 2 of the Landlord and Tenant Act Amendment Act, 1923. As to a claim for accelerated rent see *In re Hoskins et al.* (1877), 1 A.R. 379 at p. 383; *Baker* v. *Atkinson* (1886), 11 Ont. 735 at p. 752; *Langley* v. *Meir* (1898), 25 A.R. 372 at p. 381; *Alderson* v. *Watson* (1916), 35 O.L.R. 564 at pp. 569-70; *McKinnon* v. *Cohen* (1914), 26 W.L.R. 828; *Cristall* v. *Loney and MacKinnon* (1916), 9 W.W.R. 1205.

E. J. Grant, for respondent: On the question of fraud see section 51 of the Act of 1919, where the rights of the landlord are rendered paramount. Section 52(2) gives us a distinct right to claim accelerated rent. The clause in the lease says the three months' rent "shall immediately come due": see *Kennedy* v. *MacDonell* (1901), 1 O.L.R. 250. On the interpretation of the statute see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., pp. 345-7. As to rights of landlord against a trustee in bankruptcy see *Ex parte Dressler. In re Solomon* (1878), 9 Ch. D. 252.

Argument

Griffin, in reply:

MACDONALD, C.J.A.: I think we understand the point clearly. The appeal should be allowed.

Mr. *Grant*: I would like your Lordships to reserve judgment and examine the old Creditors Assignment Act.

MACDONALD, C.J.A.: We do not need to do that in this case, because we have the statute before us, which seems to us to be clear upon the point. It does shew the appropriateness of the language used, that is "rent accruing due" as applied to the case. As that is so, you cannot argue that this was not applicable. Now on the whole case we think that the true consideration is as stated, and that where the lease is of the

MACDONALD, C.J.A.

COURT OF APPEAL

1924

June 24.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. MONKA

character here, the landlord is entitled only to rent for the time occupied by the trustee, and as that has been paid, that ends the whole case.

Mr. *Grant*: Well then, under the peculiar circumstances of this section, I would submit there should be no costs against the respondent.

MACDONALD, C.J.A.: Unfortunately the Legislature has not allowed us any discretion in this matter, except for a good cause.

Mr. *Grant*: I would submit that this is a good cause, in that this is the first time this matter has been before the Court for discussion.

MACDONALD, C.J.A.: That is not good cause.

Mr. *Grant*: There have been many cases in which the respondent and appellant come into Court to get the opinion of the Court under sections of an Act which have not yet been construed there, and many cases in which the costs have not been given to either party.

MACDONALD, C.J.A.: Not under the rule that costs follow the event.

MACDONALD, C.J.A.

Mr. *Grant*: I submit until the Court construed that section there was a certain amount of ambiguity about it and it is to decide a point of public importance.

MACDONALD, C.J.A.: "Good cause" depends upon the conduct of the parties, not upon the construction of a statute.

Mr. *Grant*: There is no suggestion that we have misconducted this.

MACDONALD, C.J.A.: Oh no. If your opponents had brought you into Court, for instance, had insisted upon a technical right for which they got one dollar damages, there might be good cause for depriving them of the costs.

Mr. *Grant*: Well, we had to come in here and defend the order of the Chief Justice, which was in our favour.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: You had the defendant coming to this Court. If it was not decided in the defendant's favour the defendant would have had to pay the costs.

MACDONALD, C.J.A.: The appeal is allowed and of course the usual consequences follow, with costs.

Appeal allowed.

Solicitors for appellant: *Griffin, Montgomery & Smith.*
Solicitor for respondent: *Whitley Murray.*

COURT OF APPEAL

1924

June 24.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION *v.* MONKA

GOUDY v. MERCER.

COURT OF APPEAL

1924

June 16.

GOUDY *v.* MERCER

Negligence—Driving automobile—Finding of jury—Question of fact—Duty of Appellate Court.

The plaintiff's father while driving a horse and cart with the plaintiff sitting beside him, across a bridge between 7 and 8 o'clock in the evening in February was run into from behind by the defendant driving an automobile that had full headlights. The cart was smashed and the plaintiff injured. Questions were submitted to a special jury who answered the first question only, *i.e.*, that the defendant was not guilty of negligence, and the action was dismissed.

Held, on appeal, reversing the decision of MCDONALD, J. and directing a new trial (MARTIN, J.A. dissenting), that assuming the story of the defendant and his witnesses was correct that the cart did not have a lantern and that the cart was driven with one wheel on the sidewalk to the right of the road, the defendant driving an automobile with perfect lights set straight ahead with a minimum radius of 20 feet and running down the plaintiff cannot escape the charge of recklessly and negligently driving without taking heed of what he was doing or where he was going.

APPEAL by plaintiff from the decision of MCDONALD, J. and the verdict of a special jury of the 19th of February, 1924, in an action for damages for personal injuries sustained owing to the defendant's negligence. The plaintiff's father drove his horse and cart from his farm near New Westminster to Lulu Island to visit his son who was working there on a farm. In the evening he started for home taking his son with him. The cart was two-wheeled with one seat, the son sitting on the left-hand side holding a lighted lantern at his left and the father

Statement

COURT OF APPEAL

1924

June 16.

GOUDY v. MERCER

Statement

driving on the right. Between 7 and 8 p.m. they drove on the bridge crossing the North Arm of the Fraser from the south keeping close to the sidewalk on the east side. When they had proceeded about 60 yards on the bridge, the defendant in a Ford car (two men in the front seat and two women behind) coming up from behind and from the left with full lights on struck the left wheel of the cart breaking off the wheel, left shaft, and cross-bar. The horse ran away, the father fell over in front of the car and the son fell to the ground and was jammed between the cart and the car. The son was rendered unconscious and received serious injuries to his back and shoulder. The learned trial judge, on the finding of the jury that the defendant was not guilty of negligence, dismissed the action.

The appeal was argued at Victoria on the 12th, 13th and 16th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Cantelon, for appellant: The son was an invitee. The defendant, with full lights deliberately ran into the cart. He must have seen it if he was looking. There is a by-law requiring a red light, but the son being a passenger it does not apply to him. On the question of assessment of damages see *Yorkshire Guarantee Corporation* v. *Fulbrook & Innes* (1902), 9 B.C. 270; *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53; *Winterbotham, Gurney & Co.* v. *Sibthorp and Cox* (1918), 1 K.B. 625.

Argument

Mayers, for respondent: The plaintiff's story was entirely discredited at the trial. As to the jury's verdict in only answering the first question, *i.e.*, that the defendant was not guilty of negligence see *Mitchell* v. *Rat Portage Lumber Co. Ltd.* (1911), 1 W.W.R. 78; *Smith* v. *South Vancouver and Corporation of Richmond* (1923), 31 B.C. 481. The jury is not bound to believe the evidence of any witness: see *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263 at pp. 267-8; *Windsor Hotel Co.* v. *Odell* (1907), 39 S.C.R. 336 at p. 338.

Cantelon, in reply, referred to *Smith* v. *C.N.R.* (1924), 1

W.W.R. 527; *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134.

COURT OF APPEAL

1924

June 16.

GOUDY v. MERCER

MACDONALD, C.J.A.: The case is a peculiar one. The plaintiff and his father were driving in a cart over the Lulu Island Bridge, between 7 and 8 o'clock on an October evening. The defendant was driving a Ford car, and followed them, either on the same side of the road-way, or on the opposite side. In my view of the case it does not make much difference whether they were following behind or whether they cut across in the manner which the plaintiff suggests. The evidence shews that even without the headlights on the car a person could see at least a distance of 200 feet ahead; that is, with the bridge lights then lighted, a person could see that distance, in fact the evidence shews that one of the parties saw the bridgetender catch the horse, which had become detached from the cart, at a distance of at least 200 feet away. I attach very little importance to the conflict of evidence, as to whether the defendant was driving on the other side of the road, or coming behind; in either case there was no excuse, in my opinion, for running down the cart. I think that the argument addressed to us with regard to the lantern was a piece of special pleading, but was not an argument which to my mind has any weight at all. It is based upon the supposition of a "frame up"—a fraudulent scheme—a manufacturing of evidence to make out the plaintiff's case. It was suggested that he had no lantern at all, that the story of the father, that he hid the lantern in the bushes before he went to Livingstone's place and then picked it up coming home, is a lie. Mr. *Mayers* scouts the evidence that plaintiff was carrying a lantern on the cart and that when he was struck it was thrown over the bridge into the river, or to the foreshore below; also that the defendant was driving on the left-hand side of the street and crossed over; that is what Russell, of the Commercial Hotel said, that he (the defendant) had admitted that he had been talking to the people behind—all that is characterized as pure fiction.

MACDONALD, C.J.A.

Now whilst I do not believe for a moment that this evidence was fiction, yet, for the purposes of my judgment it may be so

COURT OF APPEAL

1924

June 16.

GOUDY v. MERCER

regarded. But I think it is a fiction that the driver of the cart was driving on the sidewalk. I think young Mercer's own evidence puts an end to that. But even if the cart were being driven on the sidewalk, I think that would make no difference in the result.

Visualize what took place that night, these men driving close to the sidewalk, or with one wheel up on the sidewalk. We have, coming behind, to take the defendant's own story, an automobile with perfect lights set straight ahead, which at the very minimum would shew a light ahead of a radius of at least 20 feet, so if he was driving near to the sidewalk, as was said, he would take within the radius of those lights the whole sidewalk. Nevertheless the defendant ran this man down. These facts cannot be disputed. I am taking them from the defendant's own evidence, and giving him the benefit of every doubt. How can he escape the charge of, I do not say wilfully, but recklessly and negligently driving, without taking heed of what he was doing, or where he was going?

MACDONALD, C.J.A.

Now when the jury came to the conclusion that the defendant had not been negligent, I can only say that they have come to a conclusion that no reasonable men could come to, and their verdict should be set aside. The judgment is set aside and a new trial ordered.

MARTIN, J.A.: The view I take of this appeal, with all due respect to contrary opinions, is that it is one eminently of the character which should be determined by a jury, because it contains some suspicious and unsatisfactory evidence which a jury is specially qualified to investigate and arrive at a satisfactory conclusion upon. Take, for example, the question of the lantern. While it must be conceded that it is not of very great consequence to the plaintiff, yet we find that four witnesses said that this lantern that the son of the plaintiff says was burning, and the father confirms that, though he could not see very well at the exact moment of the impact, because he was sitting at the son's right, take that very important fact, for example, we find no less than four witnesses, equally credible, say that at the crucial time the lantern was not burning.

MARTIN, J.A.

Now who can propose to set aside the judgment of the jury in such a case as that? Of course it is impossible to do so, and the only way is by finding it is not true, that nevertheless, despite that, that the defendant must have been so lacking in alertness that he ran the plaintiff and his father down in a negligent manner. Now the answer to that is this, that once you have established in such a crucial matter as the lantern that the plaintiff is not worthy of credence, the rest of the case is simple, and the rest is, as a matter of fact, what this man is doing. With all respect to the very forceful and able manner with which Mr. *Cantelon* has presented this case, nevertheless, if I had been sitting in the box with the rest of the jury, I would come to the conclusion that this case was one that could not succeed, because it does not explain the inference that the jury was entitled to draw on this evidence from the statement of Mercer, from the evidence as to the darkness on that bridge—that as a matter of fact this man had been driving on the sidewalk for some appreciable time, as he, in fact, admitted that he had. Now if the jury, so to speak, is to be deprived of the right to say that they believe that he had been upon the sidewalk for some considerable time, I fail to appreciate why this should be.

MARTIN, J.A.

It is a difficult case; it is one of the most difficult cases in regard to the inference of facts which may be drawn on both sides which has come before us for some time, and therefore I have no difficulty in following the rule that in such circumstances the proper tribunal to decide and draw inferences from such conflicting facts is a jury.

Therefore I do not feel justified in adopting the course that my learned brothers have seen fit to adopt.

GALLIHER, J.A.: For the purpose of my judgment I can assume there was no lantern and that the plaintiff was driving, as they say he was, on the sidewalk, and still find that the judgment must be set aside.

GALLIHER, J.A.

The crucial point, in my view, is this: that assuming what I have said, could the plaintiffs in this case have been seen by those in the automobile if they had been exercising due care?

COURT OF APPEAL

1924

June 16.

GOUDY v. MERCER

GALLIHER, J.A.

I find that answered satisfactorily in the evidence of the defendants themselves. If that is so, then to my mind, with all due respect for contrary opinions, there should be only one conclusion to this, and that is that there must be a new trial. They may or may not find that they had this lantern; they may or may not find they were driving on the sidewalk. As to this there is a conflict of evidence; as to that the jury might have found as they evidently have found. But on the other hand there is the evidence of the defendants themselves, to my mind most crucial, that if they had been looking they could have seen that cart at a distance of 50 feet, and that is the distance specified by counsel and answered by the defendant Mercer himself.

On the other point raised by Mr. *Mayers* as to the form of the verdict, I agree with the submission of Mr. *Cantelon,* that if that includes the finding of contributory negligence, there is no evidence to support such finding and the jury was perverse in making such a finding.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal must be allowed. I have always given great consideration to the findings of juries and, if I may say so, I am a believer in the jury system, and think that the jurisprudence of our country would suffer very seriously and the sentiments of our people as to right and wrong would change if we did away with this means of determining questions of fact. The Court of Appeal cannot shrink, though, from discharging its full duty (*Coghlan* v. *Cumberland* (1908), 1 Ch. 704). The Court of Appeal may in a proper case enter judgment for either party, notwithstanding the findings of the jury (*McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, Duff, J., at p. 53). But I am not unmindful of what Lord Loreburn said—that verdicts of juries should not be too lightly overthrown (*Kleinwort, Sons and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696), and unquestionably verdicts reasonably found should be supported.

Now in this particular case it would certainly not be in accordance with the duty resting upon the Court of Appeal to

set aside the verdict, if it could be supported upon any reasonable grounds. I, however, fail to appreciate how the jury could at all reasonably come to the conclusion it did. If the case for the plaintiff was one of fiction, then it might be understandable, but it is one of concrete fact, and it seems to me to be reasonable and clear. Even taking the defendant's case and accepting it in all its particularity, and in many points I believe it was frail and not in accordance with fact, a case is made out of driving the cart, by the father of the plaintiff, on the sidewalk of the bridge, which was a very unusual thing, of course, to do, making it difficult for others to see him. Yet, the admission in the defence which stands out in the most positive form is that even then the cart was to the extent of eighteen inches upon the roadway, that is, the left wheel and more was on the roadway. Nevertheless, with the car well under control, driving at the rate of 6 or 7 miles an hour, carrying headlights—with evidence that really there was visibility for perhaps 200 feet—but narrow it right down to 50 feet and with a side radius of light of 10 feet each side of the motor-car, how is it conceivable that this cart, which was undoubtedly there, even on the defendant's story, was not seen by the defendant? If it was not seen, the only possible conclusion is that the defendant was not looking, because if he had looked he would have undoubtedly seen the cart ahead of him. The only conclusion must be that there was inattention, looking away, and not observing what he should have been observing; especially travelling upon a bridge with a powerful engine at his hand, he was not as vigilant as the law requires. That seems to me the only conclusion in the case: That the defendant, upon his own shewing, was guilty of negligence and was guilty of actionable wrong from which he cannot escape. If there was negligence upon the part of the father of the plaintiff, the driver of the cart, that would not affect the plaintiff. *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134, deals with the case of one sitting by the side of the driver of a vehicle, shewing that in such circumstances there is no negligence attributable to the passenger. (Also see *Smith* v. *C.N.R.* (1924), 1 W.W.R. 527.)

MCPHILLIPS, J.A.

The verdict upon the facts cannot be said to be other than

COURT OF APPEAL

1924

June 16.

GOUDY v. MERCER

perverse. I do not further dwell upon the facts—it is not good practice to do so when, as here, there will be a new trial.

I would allow the appeal.

Appeal allowed and new trial ordered, Martin, J.A. dissenting.

Solicitor for appellant: *W. A. Cantelon.*

Solicitors for respondent: *McQuarrie & Cassady.*

COURT OF APPEAL

1924

June 4.

IN RE SUCCESSION DUTY ACT AND ESTATE OF J. C. SPROULE, DECEASED

IN RE SUCCESSION DUTY ACT AND ESTATE OF J. C. SPROULE, DECEASED.

Succession duty — Property in British Columbia and Manitoba — Action against executrix on accommodation promissory notes of deceased— Value of claim against principal debtor subject to taxation.

J. C. Sproule, deceased, who died in September, 1922, domiciled in Vancouver, left his wife executrix and sole beneficiary under his will. The estate consisted of $42,600 in land and a mortgage in Manitoba, 61 shares in the Commercial Loan & Trust Company, Winnipeg, valued at $2,287.50 and $15,350 land in British Columbia. The debts were $376.50 funeral expenses and a mortgage debt in British Columbia of $5,000. After the executrix had applied for probate and filed affidavit of value and relationship the Commercial Loan & Trust Company, aforesaid, brought action against her in British Columbia on two promissory notes made by deceased for the accommodation of one W. H. Sproule in Manitoba aggregating with interest $3,886.58. It was held below that the property liable to duty was the land in British Columbia and the 61 shares in the above company from which should be deducted the funeral expenses, the claim of the Commercial Loan & Trust Company and the mortgage debt in British Columbia, the order further providing that the time for payment of duty on the sum claimed by the Commercial Loan & Trust Co. be postponed until it be finally decided the claim cannot be maintained.

Held, on appeal, varying the order of MORRISON, J. that assuming the claim of the Commercial Loan & Trust Company succeed, there is an asset in the claim for the amount involved against W. H. Sproule the principal debtor which is subject to taxation and the order should contain a term directing payment of duty upon $3,886.58 should it be determined the respondent be not liable on the promissory notes, and a further term that she should pay duty upon her claim against W. H.

Sproule, if necessary by the determination of the Trust Company's claim. Further, the date of payment should be postponed to a time certain.

COURT OF APPEAL

1924

June 4.

IN RE SUCCESSION DUTY ACT AND ESTATE OF J. C. SPROULE, DECEASED

APPEAL by the Minister of Finance of British Columbia from the decision of MORRISON, J. of the 14th of December, 1923, determining the property liable for succession duty, the values thereof, the deduction to be made and the assessment duty payable on the estate of J. C. Sproule, deceased, who died on the 18th of September, 1922, domiciled in the city of Vancouver. His wife was executrix and sole beneficiary under his will. The estate consisted of $42,600 land and mortgage in Manitoba, 61 shares in the Commercial Loan & Trust Company of Winnipeg, valued at $2,287.50 and land in British Columbia $15,350. The debts were funeral expenses $376.50 and mortgage in British Columbia $5,000. After the executrix had applied for probate and filed affidavit of value and relationship the Commercial Loan & Trust Company aforesaid brought action against her in British Columbia on two promissory notes that were given by deceased for the accommodation of one W. H. Sproule, aggregating with interest $3,886.58. It was determined in the Court below that the property liable to duty consisted of the lots in British Columbia valued at $15,350 and the 61 shares in the Commercial Loan & Trust Company (treated as a British Columbia asset) valued at $2,287.50; that there be deducted therefrom funeral expenses $376.50, the Commercial Loan & Trust Company claim $3,886.58 and the mortgage debt of $5,000 and that the duty payable on balance is $209.35. The Minister of Finance appealed on the ground that the British Columbia assets were not subject to the deduction of the funeral expenses and the claim of the Commercial Loan & Trust Company items referred to in ascertaining the succession duty payable.

Statement

The appeal was argued at Vancouver on the 21st of March, 1924, before MACDONALD, C.J.A., MARTIN, and MCPHILLIPS, JJ.A.

Killam, for appellant: The debt to the Commercial Loan & Trust Company is a debt incurred in Manitoba where the bulk

Argument

COURT OF APPEAL

1924

June 4.

IN RE SUCCESSION DUTY ACT AND ESTATE OF J. C. SPROULE, DECEASED

Argument

of the estate is, and should not be charged against the British Columbia estate. The duty should be changed from $209.35 to $316.33. The only personal property here is the 61 shares in the Manitoba Company but in Manitoba there is a $15,000 mortgage. This asset in Manitoba should share the burden of the debts.

Mayers, for respondent: A debt anywhere is a debt due. She was sued here on the two notes after applying for probate. The law referred to only applies to cases where there are disputes between beneficiaries and does not apply to succession duty.

Killam, in reply:

Cur. adv. vult.

4th June, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The order appealed from has been wrongly conceived in respect of the only matter in dispute. It appears that a claim was made upon the respondent by a trust company on certain promissory notes made by the deceased for the accommodation of one, W. H. Sproule. This indebtedness of the estate is not admitted and the order appealed from places it at the sum of $3,886.58 and deducts it from the gross estate as being a debt. The order then postpones the payment of the duty upon it until after the dispute has been ended. If the debt be disallowed, the executrix is then to pay duty on that sum, if allowed, then the order makes no further provision for any payment of duty.

This disposal of the matter overlooks the fact that the executrix, should she be held liable to pay the debt to the trust company, would have a claim of equal amount against the principal debtor, W. H. Sproule, which under the order appealed from would escape succession duty, notwithstanding that it was part of the assets of the estate. That asset may be good or it may not, but *prima facie,* it is an asset of face value. It may be necessary in the end to value this asset should it come into existence as a result of the allowance of the trust company's claim. There is nothing before us fixing its value, and therefore if we were to deal with it, it would have to be taken as of its face value.

In these circumstances, I think the learned judge was right in postponing the final settlement of the respondent's liability in this connection for succession duty, but his order fixes no definite date and leaves the matter entirely in the air. I think, therefore, the last paragraph thereof should be struck out and there should be substituted therefor, an order postponing the date of payment to a time certain, which may be fixed before the final order is settled. It should also contain a term directing payment of duty upon the sum of $3,886.58, should it be determined that the respondent is not liable therefor to the trust company; then a further term that she should pay duty upon her claim against W. H. Sproule, should that course become necessary by reason of the determination of the trust company's claim against her. That claim like any other, if not of its face value, may be valued, and when such value, if any, is ascertained, duty should be paid upon it.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree with my brothers in the disposition of this appeal.

MARTIN, J.A.

MCPHILLIPS, J.A.: I concur in the judgment of my brother the Chief Justice.

MCPHILLIPS, J.A.

Appeal allowed.

Solicitors for appellant: *Killam & Beck.*
Solicitors for respondent: *Mayers, Stockton & Smith.*

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

1924

May 7.

WRANGELL v. THE STEEL SCIENTIST

WRANGELL v. THE STEEL SCIENTIST

Admiralty law—Practice—Security for costs—Rule 134—Delay in application.

Under Admiralty rule 134, in a case where the plaintiff is resident out of the jurisdiction and its ship is a foreign one, security for costs may be ordered, even at an advanced stage of the action and though the delay in applying therefor is unaccounted for, in the absence of any prejudice to the other side occasioned by such delay. Scope of rule 134 considered, with regard to the practice of the Court.

Statement

APPLICATION by defendant for an order for security for costs. Heard by MARTIN, Lo. J.A. at Chambers in Victoria on the 6th of May, 1924.

A. D. Crease, for the application.
Harold B. Robertson, K.C., contra.

7th May, 1924.

MARTIN, Lo. J.A.: This is an application by the defendant for security for costs on the ground that the plaintiff Company is resident out of the jurisdiction and its ship, the "Augvald" is a foreign one, of Norwegian registry. Objection is taken that the application is made too late, the defendant ship having been arrested on the 3rd of December last, the pleadings closed early in February and (though a date for trial has not yet been applied for) an agreement reached, prior to the demand for security, that the case should be tried on the 19th instant, if that date was convenient to the Court.

Judgment

Admiralty rule 134, promulgated in 1892, provides that:

"If any plaintiff (other than a seaman suing for his wages or for the loss of his clothes and effects in a collision), or any defendant making a counterclaim, is not resident in the district in which the action is instituted, the judge may, on the application of the adverse party, order him to give bail for costs."

In the Quebec District of this Court, in *Down & Co.* v. *S.S. Lake Simcoe* (1905), 9 Ex. C.R. 361, my late esteemed brother Routhier, made an order for security after the defendant had, as here, taken several steps in the action, but gave no reasons for so doing, which is unfortunate because the argument of both

counsel proceeded upon the erroneous assumption that rule 228 governed the matter, thus:

"In all cases not provided for by these rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed."

But this rule is excluded by its own terms from any application to this "case" because it can only be invoked in "cases not provided for by these Rules," and the "case" is, in fact, entirely provided for by said rule 134 above recited.

While it would not be right for me to assume that my brother Routhier was unaware of rule 134, even though both counsel overlooked it, yet I am left in doubt as to whether or not he did, in fact, consider it in giving his judgment as thus noted in the report:

"*Per curiam*: The plaintiffs will give security for costs within thirty days from the date hereof to the amount of $5,000; costs of motion to follow the event."

I have therefore deemed it proper to consider carefully that rule, the subject being of importance and counsel having argued it very fully.

It is beyond dispute that, upon the face of it, the rule is very wide in its terms and if not subject to restriction in its application by the practice of this Court it would justify me in ordering security now because the sole condition for the exercise of my unfettered judicial discretion is that the plaintiff "is not resident in the district in which the action is instituted," which condition admittedly exists herein. No decision upon the scope of the rule has been cited, and it is proper to determine at the outset how it is to be regarded, and as I do so, it is not intended to be a declaration of the former practice of the Court at the time (1892) as set out in the reports, or otherwise, but as a definition of the powers conferred, *ad hoc,* by the new "General Rules and Orders" of 1892, to be in force in Canada, after approval by the Governor-General in Council and by Her Majesty in Council (*vide* rule 229) under the Colonial Courts of Admiralty Act, 1890, and the Admiralty Act, 1891 (Canada). I am confirmed in this opinion by the recent decision of their Lordships of the Privy Council in *Dominion Trust Company* v. *New York Life Insurance Co.* (1918), 3

Judgment

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

1924

May 7.

WRANGELL v. THE STEEL SCIENTIST

W.W.R. 850; (1919), A.C. 254, wherein it was held that our Supreme Court consolidation rule 656, reading as follows:

"Causes, matters, or appeals may be consolidated by order of the Court or judge in such manner as to the Court or judge may seem meet."

is an "absolute" one, and "leaves the matter so far as *ultra vires* is concerned entirely in the hands of the judge," and therefore though the consolidating order might have been perhaps "ill judged," nevertheless it should not be interfered with because there was "proper material before the Court upon which a judgment on the facts could be given": their Lordships pointed out that the corresponding English rule "differs essentially" from our rule because it added the words:

"to be exercised 'in the manner in use before the commencement of the principal Act,' thereby introducing a reference to the course of previous decisions."

This indication is important because the Court of Appeal below (1916), 23 B.C. 343) was equally divided on the construction of our rule, my brother MCPHILLIPS and myself taking the view that it was controlled by the former practice which we thought, erroneously as it turned out, had not been affected by the change in language—*Cf.* pp. 372-4. In the absence of any like indication in rule 134 that it is to be restricted by the former practice I do not feel justified in regarding it as any less "absolute" than the said consolidating rule 656, and I am fortified in this opinion by the fact that our excellent Admiralty rules are, as a whole, of a character which is at once simple, comprehensive, and elastic, so as to meet the conditions of a Court which in dealing with maritime affairs wisely does so in a broad way having regard to quickly varying circumstances which are often not so subject to control as are affairs upon the land, and hence is not prone to lay down intractable rules of practice, which might result in injustice in the future in circumstances which could not be foreseen: that at least is the practice I have followed in this Court for over a quarter of a century, and, if I may say so, it has been justified by experience.

Judgment

In deference to the careful argument of plaintiff's counsel, I have closely considered the decision of Dr. Lushington in *The Volant* (1842), 1 W. Rob. 383. That was a case of an action

and cross-action wherein security for costs was ordered after the act on petition, under the old practice, had been concluded and signed by the respective proctors, and both of them had been assigned to bring their proofs into Court, the proceeding being, therefore, at a stage very similar to these before us. Objection was taken that the application should have been made earlier and the Court said (p. 384):

"According to the practice of other Courts, it is, I apprehend, the usual course that applications of this kind should be made in the earliest stage of the proceedings, and, in ordinary cases, I should be disposed to enforce the observance of the same rule in the proceedings in this Court. There is, however, this peculiarity in the present case, that the owner of the Beatitude is resident abroad, and the original action was entered by another person in his name and without his privity or concurrence. If I had been aware of this circumstance at the time, I should have directed security for the costs to be given in the first instance; and as I am now informed that the bail which has been given, will not be liable for the costs for which this application is made, I shall direct security to be given for the same, before I allow the suit to proceed—the amount of that security I fix at £80."

It is to be observed, first, that the learned judge did not go so far as to recognize such a rule of practice as was contended for, but only that he "should be disposed to enforce" one; second, that he was dealing with a case, obviously, of two British ships (not a foreign one with foreign owner as here) and therefore they would presumably be within the jurisdiction to answer their presumably British owners' liabilities; and third, that the controlling circumstance of his decision must have been that the owner was resident abroad, because he could not, obviously, upon any principle of justice be dealt with *in poenam* because some other person had "without his privity or concurrence" wrongfully made use of his name to institute proceedings: the report does not suggest that the defendant (*The Volant*) did not know *ab initio* that the owner of the Beatitude was resident abroad, nevertheless the belated order for security was made despite that knowledge. I do not find the report a satisfactory one, apart from a decided difference in the facts: in some respects it is opposed to both the parties before me, and at most it is an expression of an opinion that applications of the kind should be made "in the earliest stage of the proceedings," with which I agree as a general rule, but I do not regard it as a decision (even apart from the said special effect of our rule

Judgment

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

1924

May 7.

WRANGELL v. THE STEEL SCIENTIST

134) that would prevent me from exercising my discretion in this case at least. A situation, *e.g.*, is conceivable wherein a defendant might reasonably not wish to apply for security under circumstances existing at the beginning of the action, but an alteration in them would lead to an application being advisable. Though in this case there has been delay which is not accounted for, and can only be conjectured, yet in the absence of any prejudice thereby occasioned to the other side I do not feel justified in refusing the application, and so an order will issue for security to be given for $1,200 within a time to be spoken to, if counsel cannot agree thereupon.

Judgment

I need only add that in view of the opinion I formed of the matter it is not necessary for me to discuss the other cases cited to me of decisions in other Courts, though they have received my attention, particularly *Re Smith*: *Bain* v. *Bain* (1896), 75 L.T. 46; *Wood* v. *The Queen* (1876), 7 S.C.R. 631, and *Boston Rubber Shoe Co.* v. *Boston Rubber Company of Montreal* (1901), 7 Ex. C.R. 47.

As to costs: ordinarily, the application being successful, after the refusal of the demand, I should have given them to the defendant in any event, but because of the delay I think the proper order is to make them in the cause, as was done in the case of the *Lake Simcoe*.

Application granted.

REX v. WESSELL

COURT OF APPEAL

1924

April 7.

REX v. WESSELL

Criminal law—Unlawful sale of liquor—Conviction—Stipendiary magistrate in same county acting as prosecuting counsel—Validity of conviction—B.C. Stats. 1914, Cap. 52, Sec. 399 (1).

Section 399 (1) of the Municipal Act, B.C. Stats. 1914, Cap. 52, provides that "no police or stipendiary magistrate shall act as solicitor, agent, or counsel in any cause, matter, prosecution, or proceeding of a criminal nature nor shall such magistrate act as aforesaid in any cause which by law may be investigated or tried before a magistrate or a justice of the peace."

Upon the conviction of an accused by a stipendiary magistrate in the County of Cariboo for an unlawful sale of liquor, an application for a writ of *habeas corpus* on the ground that another stipendiary magistrate of the same county, who was a qualified barrister and solicitor, acted as prosecuting counsel on the trial, was refused.

Held, on appeal, reversing the decision of MORRISON, J. that the objection is fundamental in its nature, the magistrate being as much prohibited from hearing the case in such circumstances as is the counsel-magistrate from appearing in it. There was a trial without jurisdiction and the conviction is quashed.

APPEAL by defendant from the order of MORRISON, J. of the 22nd of February, 1924 (reported 33 B.C. 375) refusing an application for a writ of *habeas corpus*. The accused was convicted by a stipendiary magistrate for the County of Cariboo for the unlawful sale of liquor. One John M. McLean, who is a stipendiary magistrate for the same county and a duly-qualified barrister and solicitor acted as prosecuting counsel on the trial. Objection was taken that his so acting was a breach of section 399 (1) of the Municipal Act, B.C. Stats. 1914, Cap. 52, rendering the conviction invalid. Statement

The appeal was argued at Vancouver on the 7th of April, 1924, before MARTIN, MCPHILLIPS and EBERTS, JJ.A.

Sloan, for appellant: There is first the question of bias and secondly the breach of the statutory prohibition in section 399 (1) of the Municipal Act. As to bias the Court should infer there was a reasonable apprehension of unconscious bias: see *Allinson* v. *General Council of Medical Education and* Argument

COURT OF APPEAL

1924

April 7.

REX v. WESSELL

Registration (1894), 1 Q.B. 750 at p. 758; *Reg.* v. *Huggins* (1895), 1 Q.B. 563 at p. 565; *Reg.* v. *Justices of Great Yarmouth* (1882), 8 Q.B.D. 525 at p. 527; *Reg.* v. *Henley* (1892), 1 Q.B. 504; *Reg.* v. *Steele* (1895), 26 Ont. 540 at p. 549; *Rex* v. *Woodroof* (1912), 6 D.L.R. 300. As to the effect of the statutory prohibition in the Municipal Act see *Kimpton* v. *McKay* (1895), 4 B.C. 196; *Rex* v. *Ferguson* (1922), 31 B.C. 100 at p. 104; *R.* (*Cahill*) v. *Justices of Dublin Co.* (1920), 2 I.R. 230; *Rex* v. *Sussex Justices* (1924), 1 K.B. 256.

Argument

K. G. Macdonald, for respondent: There is no ground on which bias can be inferred: see *Ex parte Peck* (1908), 15 Can. Cr. Cas. 133. The prosecuting counsel is a stipendiary magistrate but he is a duly-qualified barrister and solicitor and as such is entitled to appear as counsel. The cases cited on this question do not apply. Section 399 (1) of the Municipal Act imposes a penalty but 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.

Sloan, in reply.

The judgment of the Court was delivered by

MARTIN, J.A.: This is an appeal from an order of Mr. Justice MORRISON refusing a writ of *habeas corpus* to the appellant who was convicted at Prince George, B.C., by Mr. G. Milburn, a stipendiary magistrate for the County of Cariboo, on the 28th of January last for unlawfully selling liquor at Giscome in said county and sentenced to imprisonment for six months.

Judgment

It is objected that the conviction is invalid and should be quashed because at the trial the prosecuting counsel, Mr. John M. McLean, was also a stipendiary magistrate for the said county, and reliance is placed upon section 399 (1) of Cap. 52 of the Municipal Act, B.C. Stats. 1914, which declares that:

"399. (1) No police or stipendiary magistrate shall act as solicitor, agent, or counsel in any cause, matter, prosecution, or proceeding of a criminal nature, nor shall such magistrate act as aforesaid in any case which by law may be investigated or tried before a magistrate or a justice of the peace."

This prosecution is obviously "of a criminal nature" (which

is a much wider expression than "a crime"), and it would appear that, for reasons which may easily be imagined, the Legislature was careful, as a matter of public policy, to guard persons accused against even the suspicion of the influence of a brother magistrate extending from the Bar to the Bench, which influence, however unintentional, might well be great, *e.g.*, in the case of a presiding magistrate who was not a member of the legal profession. The objection is fundamental in its nature because, in effect, the magistrate is just as much prohibited from hearing a case in such circumstances as is the counsel-magistrate from appearing in it, and therefore there is no jurisdiction to try an accused until this statutory barrier to a legal trial is removed. There is nothing in the other sections of the Act to which we have been referred to limit this view of the public policy evidenced by the prohibition contained in the section, and therefore since there has been a trial without jurisdiction, in the essential meaning of that expression, though the situation is novel and peculiar, the appeal should be allowed and the conviction quashed.

Judgment

Appeal allowed.

Solicitor for appellant: *G. M. Sloan.*
Solicitors for respondent: *Macdonald & Lawrence.*

COURT OF APPEAL

1924

June 4.

WRIGHT v. LEE BAK BONG

WRIGHT AND WOLFENDEN v. LEE BAK BONG.

Rent—Action to recover sum overdue—Garnishee—Money paid in—Application for speedy judgment after dispute note entered—Judgment for plaintiff in absence of defendant—Jurisdiction—Irregularities—County Court Rules, 1914, Order I., r. 3; Order IX., r 11; Order XXIII., rr. 14 and 15—Note of judgment by clerk of the Court.

In an action in the County Court to recover rent overdue under a covenant contained in a lease, the registrar at the instance of the plaintiff on the issue of the summons issued a garnishee order upon the service of which the moneys due were paid into Court. A dispute note was entered and the plaintiff after service of notice applied for and obtained speedy judgment including an order for payment out the defendant not attending on the application. The defendant appealed on the ground that there was no jurisdiction as the plaint did not disclose the description and the residence or place of business of the plaintiff or of the defendant.

Held, on appeal, affirming the decision of SWANSON, Co. J., that the objections raised do not constitute a bar to the jurisdiction but are irregularities which should have been disposed of upon terms in the Court below. It is too late to raise them after judgment and the appeal should be dismissed.

Per MACDONALD, C.J.A.: Upon the clerk of the Court making a note of the decision rendered that note is the judgment. Clerks should take note of this and be careful to see that they always make proper notes of decisions given.

APPEAL by defendant from the decision of SWANSON, Co. J., of the 22nd of November, 1923, in an action to recover $500 balance owing for rent due under a covenant contained in a lease of lots 1 and 2, block 17; and lots 3 and 4, block 1, in the City of Armstrong, B.C., given by the plaintiffs as executors and trustees in possession of said lots, to the defendant. On the issue of the summons the registrar on the application of the plaintiff issued a garnishee order on the Bank of Hamilton and the amount claimed was paid into Court. A dispute note was duly filed and two days later on the 16th of November, 1923, the plaintiff served notice of motion to enter final judgment for the amount claimed. On the return of the motion on the 22nd of November an order was made for speedy judgment

Statement

and for payment out to the plaintiff of the money paid into Court. A memo. appeared in the judge's note-book as follows: "Nov. 22, 1923. Order made for speedy judgment for plaintiff and order payment out money paid in by Bank of Hamilton, Armstrong. Money not to be paid out for one week." Formal judgment was entered by the registrar on the 27th of November, and notice of appeal was filed on the 10th of December, 1923.

The appeal was argued at Vancouver on the 28th and 31st of March, 1924, before MACDONALD, C.J.A., MARTIN, and MCPHILLIPS, JJ.A.

Statement

Mellish, for appellant.

Pepler, for respondent, raised the preliminary objection that this was an iterlocutory judgment and the appeal was out of time. An order was made granting speedy judgment on the 22nd of November, 1923, and notice of appeal was given on the 10th of December following. The time was up on the 7th of December. The next point is that the notice of appeal should have been given for the January sittings under section 19 of the Court of Appeal Act. Order IX., r. 10 of the County Court Rules is the same as Order XIV., r. 1 of the Supreme Court Rules; the order is therefore interlocutory: see *Standard Discount Co.* v. *La Grange* (1877), 3 C.P.D. 67; *Salaman* v. *Warner* (1891), 1 Q.B. 734; *Chilliwack Evaporating & Packing Co.* v. *Chung* (1917), 25 B.C. 90; (1918), 1 W.W.R. 870.

Argument

Mellish: One clear day's notice of this preliminary objection was not given and he should not be heard.

MACDONALD, C.J.A.: The Clerk of the Court makes a note of the decision rendered and that note is the judgment. Clerks should take note of this and be careful to see that they always make proper notes of decisions given.

MACDONALD, C.J.A.

Mellish, on the merits: The first objection I have is that the plaint does not disclose the description and the residence or place of business of the plaintiffs and the description, residence or place of business of the defendant. This is required by Order III., r. 1 of the County Court Rules. Secondly the plaint does not state for whom the plaintiffs are executors and

Argument

COURT OF APPEAL

1924

June 4.

WRIGHT v. LEE BAK BONG

trustees: see Order I., r. 5 of the County Court Rules and Annual Practice, 1924, pp. 154-5; Chitty's Forms, 15th Ed., 685. Thirdly, there was no proof that they were executors and trustees. Before an executor can obtain judgment he must prove he is an executor: see *Denny v. Sayward* (1895), 4 B.C. 212; *Paxton* v. *Baird* (1893), 1 Q.B. 139 at p. 141.

Pepler: The action is within section 30 of the County Courts Act and the objections raised are only matters of irregularity and may be amended: see Order XXIII., rr. 14 and 15. They were not raised in the Court below and cannot be raised now: see *Taylor* v. *Blair* (1789), 3 Term Rep. 452; *Mayor, &c., of London* v. *Cox* (1867), L.R. 2 H.L. 239 at p. 283; Annual

Argument

Practice, 1924, p. 165. There is no material that would justify the Court's interference: see *Union Bank of Canada* v. *Anchor Investment Co.* (1911), 16 B.C. 347; as to place of business of a party see *Smith* v. *Dobbins* (1877), 37 L.T. 777; *Great West Land Co.* v. *Powell* (1919), 2 W.W.R. 78; see also *American Plumbing Co.* v. *Wood* (1884), 3 Man. L.R. 42; Annual Practice, 1924, p. 1528.

Cur. adv. vult.

4th June, 1924.

MACDONALD, C.J.A.

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

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from a judgment of the County judge of Yale, dated 27th November, 1923, by which judgment was entered for the plaintiffs pursuant to notice of motion, dated 16th November, for speedy judgment, after dispute note entered under that part (b) of Order IX. relating to "Speedy Judgment." The notice was duly served upon the defendant but owing to an oversight he was not represented upon the return of the motion and the order directing final judgment to be entered was made in his absence, on the 22nd of November, under rule 10 of Order IX., and judgment was entered pursuant thereto on the 27th of November. He now appeals from the judgment upon several grounds, one based upon lack of jurisdiction and the others upon irregularities.

It is unfortunate that the useful provision of part (c) "Trial and Judgment" of said Order IX., r. 27, giving power to the

judge in cases where a party "does not appear at the trial" to reopen a verdict or judgment, does not extend to a speedy judgment under the preceding part (b), for that would have afforded a cheap and expeditious way of settling all the questions raised before us. But there is the general provision contained in rules 14-15 of Order XXIII., declaring that "non-compliance with any of these rules, or with any rule of practice for the time being in force shall not render any proceedings void unless the Court shall so direct," and that "applications to set aside proceedings for irregularity may be made to the judge on notice to the opposite party" if made within a reasonable time and upon stating "the several objections intended to be insisted upon."

And it is to be noted that the preceding rule 13, declares that "no practice shall prevail in any Court which shall be inconsistent with these rules," etc.

Now, while I have no doubt that under these rules the proper practice in cases of irregularity would be to move the judge to set aside the impeached proceeding (which would include a speedy judgment), yet where the jurisdiction of the judge to entertain the proceeding at all is attacked, which is not an irregularity but something fundamental, I apprehend that it would be proper, in cases not provided for by the rules, for an aggrieved party to appeal to us where an appeal lies by statute, as here, the present judgment for $500 being within the prescribed amount.

MARTIN, J.A.

It is, then, necessary to see if any such question of jurisdiction is raised on this appeal. The objection is thus set out in the notice of appeal:

"5. That the learned judge had no jurisdiction to give judgment in this action because the plaint or particulars of claim did not disclose the description and the residence or place of business of the plaintiffs' and the description and residence or place of business of the defendant as required by rule 3, of Order I., of the County Court Rules."

Now that clearly is not an objection to the jurisdiction to be exercised under Order IX., r. 10, *supra,* as a perusal of it shews, but an antecedent objection to the regularity of the issuance of the plaint with its accompanying particulars as required by Order I., rr. 3-5, but Order XXIII., r. 14, already

COURT OF APPEAL

1924

June 4.

WRIGHT v. LEE BAK BONG

cited expressly declares that unless the Court shall so direct non-compliance will not create avoidance. I cannot bring myself to regard the requirements for speedy judgment (set out in r. 10) as constituting, in the case of non-observance of each or every of them, a bar to the jurisdiction of the judge to entertain the application at all, and after carefully considering all the objections I can only reach the conclusion that, as regards their application under said rule, they are not more than irregularities which, if material, could have been cured, subject to proper terms, if the usual application to the judge in chambers, under Order XXXIII., r. 15, had been made, upon which

MARTIN, J.A.

he could have "amended or otherwise dealt with" the proceedings as he might "think fit"; and also bear in mind section 177 of the Act which declares that

> "No order, verdict, or judgment or other proceeding made concerning any of the matters aforesaid shall be quashed or vacated for want of form."

It follows, therefore, that in my opinion, on the facts, this appeal has been misconceived and being unauthorized by the practice should not "prevail in any Court" as declared by said r. 13, and so it should be dismissed.

McPHILLIPS, J.A.: This appeal, in my opinion, must stand dismissed.

The exceptions taken are all in their nature irregularities and the practice cases all shew that a party cannot refrain from raising and insisting upon these irregularities until after judgment is signed and then have the judgment set aside upon any such grounds—it is then too late. The case is not one of the defendant being entitled to be let in to defend *ex debito*

MCPHILLIPS, J.A.

justitiæ. Here we have the extraordinary situation of the defendant setting up the alleged irregularities in the dispute note—in effect pleading over. It is idle to proceed in this way. The defendant was at least called upon to attend upon the return of the application for a speedy judgment and there and then raise the questions as to irregularities. Although I am inclined to think that even then it would be too late, but to ignore the motion made and not attend was fatal and it is idle now to contend that the judgment should be set aside upon grounds of irregularity only. It is quite unnecessary to in

detail refer to the practice cases which demonstrate the futility of the course pursued by the defendant. I will content myself by referring only to *Charles P. Kinnell & Co.* v. *Harding, Wace & Co.* (1918), 1 K.B. 405, judgment of Swinfen-Eady, L.J., at pp. 410-11, which well indicates the course the defendant was called upon to pursue. It follows that my opinion is that the appeal fails.

Appeal dismissed.

Solicitor for appellant: *A. J. B. Mellish.*
Solicitor for respondents: *R. R. Perry.*

KEANE v. CANADIAN PACIFIC RAILWAY COMPANY.

Contract—Supplying of railway ties—Royalties—Penalty for trespass—Seizure of ties—Payment by defendant of royalty and penalty to secure release—Right to do so under contract—"Government and all other dues"—Scope of.

The plaintiff contracted to supply the defendant Company with 70,000 ties and put up a mill on the Rock Creek mineral claim in Yale District for the purpose of manufacturing the ties. He took 65,763 feet of timber off the mineral claim and delivered from 1,200 to 1,500 ties at the Rock Creek station. The ties were seized by the forest branch of the department of lands claiming $652.04 as royalty and penalty dues (87 cents per M. as royalty and $4 per M. as penalty for wilful trespass on a mineral claim). The defendant paid the sum demanded and deducted the amount from the plaintiff's tie account. An action to recover $320.26 on the ground that said sum was wrongfully paid without his consent to the forest branch of the department of lands was dismissed.

Held, on appeal, affirming the decision of BROWN, Co. J., that as the contract contained the terms that Government and all other dues shall be paid by the contractor and that the company reserves the right to retain Government dues from contractor until clearance has been furnished, the money paid by the defendant to furnish the clearance must be regarded as paid on behalf of the plaintiff to fulfil his contract and therefore chargeable against him.

The expression "Government and all other dues" includes all sums which

COURT OF APPEAL

1924

June 4.

KEANE v. CANADIAN PACIFIC RY. CO.

would become due to the Crown for timber cut in pursuance of the statute and regulations or in violation of them, for stumpage, royalty, penalty or otherwise.

APPEAL by plaintiff from the decision of BROWN, Co. J., of the 30th of October, 1923, in an action to recover $320.26 alleged to have been wrongfully paid by the defendant to the forest branch of the department of lands of this Province. The plaintiff had entered into a contract to furnish the defendant with 70,000 ties and he put up a mill on what was known as the Rock Creek mineral claim (lot 2527) in the Osoyoos Division of Yale District and proceeded to manufacture ties and lumber. He took off this mineral claim 65,763 feet of lumber and in the fall of 1921 had delivered to the defendant at Rock Creek station from 1,200 to 1,500 ties. The forest branch of the department of lands then claimed $652.04 royalty and penalty dues. The plaintiff denied indebtedness for $320.26 of that sum which is the amount claimed in the action. Eighty-seven cents per M. was claimed as royalty and $4 per M. as a penalty for wilful trespass on the said mineral claim. The ties were seized and offered for sale by the forest branch and the defendant paid the sum demanded and deducted same from the tie account of the plaintiff. The plaintiff claims the money was wrongfully paid on the grounds, first, that he was not a trespasser on the mineral claim; and secondly, even if he was, the procedure followed by the forest branch was not in accordance with the provisions of the Forest Act. That having seized the logs under section 63 of the Forest Act there was no authority to relinquish the logs on payment of the royalty and the amount of the penalty for trespass. The trial judge dismissed the action.

Statement

The appeal was argued at Vancouver on the 21st of March, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Cur. adv. vult.

Mayers, for appellant.

Killam, for respondent.

16th June, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal substantially for the reasons given by the learned County Court judge.

MARTIN, J.A.: In his plaint of the 4th of September, 1922, the plaintiff sets up his cause of action as being founded on the facts that

"some time between the 29th day of June, 1921, and the date hereof the defendant had $353.70 belonging to the plaintiff and wrongfully without the consent of the plaintiff and against his expressed instructions and wishes paid $320.26 of this said sum to the forest branch of the department of lands for the Province of British Columbia . . . . in respect of timber royalty and trespass penalties for timber taken and cut by the plaintiff from the Rock Creek mineral claim,"

which wrongful payment the plaintiff disavows and "claims payment by the defendant of the said sum of $320.26 of the plaintiff's money."

It is strange that he asks only for judgment for the amount of $320.26 and not for the sum of $353.70, which he avers the defendant owed him at the time of the bringing of the action.

To succeed upon said averments the plaintiff must prove that the defendant did owe him on the date of the plaint the sum he now claims, and to establish that fact he sets up a contract, dated 27th December, 1920, by which he agreed to deliver certain ties to the defendant at a certain price, and I think that there is sufficient evidence, though of a loose kind, to prove that he did deliver an indefinite number of logs to the defendant, and I am prepared to infer from the evidence, oral and documentary, that the defendant had received under the contract logs of a value at least as great as the sum he claims. But the contract contains the following terms and conditions:

MARTIN, J.A.

"(3.) Government and all other dues shall be paid by the contractor."

"(18). When required, satisfactory evidence must be furnished as to the land upon which the material has been cut and that the contractor has the legal right to cut and dispose of same and that it is free from liens and attachments. The Company reserves the right to retain Government dues from contractor until clearance has been furnished."

The logs so delivered were seized at Rock Creek station on or before 29th September, 1921, by the Crown for alleged infraction of the Forest Act (Cap. 17 of 1912 and amendments) before due delivery (at Midway or Grand Forks) under the contract (as I gather from plaintiff's letter, Ex. 8), and to free them from the seizure so as to permit of delivery, the defendant paid the dues claimed by the Crown which thereupon

COURT OF APPEAL

1924

June 4.

KEANE v. CANADIAN PACIFIC RY. CO.

released the logs from seizure and the defendant now, at least has them in its possession.

The present position is twofold in its aspect: *viz.*, either the plaintiff has not "furnished a clearance" of the logs from Government dues under said clauses, in which case he cannot recover because he has not delivered them free from encumbrances as provided by the contract; or, if he elects to take the position that the clearance has in effect been obtained by the action of the defendant, then if he approbates its benefits he cannot reprobate its obligations; and hence the money paid by the defendant to furnish the clearance must be regarded as paid on behalf of the plaintiff to fulfil his contract, and therefore chargeable against him thereunder. In both aspects the validity or extent of the Crown's demand does not now come into consideration as against the defendant, because if the plaintiff wishes to contest those questions and obtain a "clearance" for what he thinks is the correct amount due the Crown, he must do so by some proceeding against the Crown which will result in his obtaining that clearance of the logs which he is obliged to "furnish" to the defendant before he is entitled to payment therefor under the contract. He cannot in equity be permitted to invoke the benefit of the defendant's action, even if voluntary, to save his logs by "clearing" them without reimbursing the defendant for its outlay which obtained that benefit for him: if he asks for judgment under his contract he must shew that he has performed it on his part, and there is no evidence that the company has waived its rights thereunder.

MARTIN, J.A.

I need only add that I think the expression "Government and all other dues" includes all sums which would become due to the Crown for timber cut in pursuance of the statute and regulations, or in violation of them, for stumpage, royalty, penalty or otherwise.

Taking this view of the matter, it is unnecessary to consider its other aspects, and it follows that the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the judgment under appeal is sustainable upon the line of reasoning of his

Honour Judge BROWN, the learned trial judge. The question in the main, is one of fact and whilst it was strenuously argued that there had been no delivery of the ties in question by the plaintiff (appellant) to the defendant (respondent), I cannot so hold upon the facts. Further, that point would not appear to have been taken in the pleadings. The whole case and the course of the trial as it develops itself to me was based upon the contention of the plaintiff that the Crown was not entitled to legally exact the Royalties and enforce the penalties, *i.e.*, that the ties in question were rightly cut by the plaintiff; that he was not a trespasser and that the defendant could not deduct from the plaintiff the amount paid to the Crown to bring about the release of the ties. If there was no delivery of these ties to the defendant, then it would follow that the plaintiff could not sue for the contract price thereof. It is clear that the matter of inquiry was based and must now be based upon whether under the terms of the contract between the plaintiff and defendant the defendant was rightly entitled to pay the amount in question, *viz.*, $320.26 to obtain the release of the ties from seizure by the Crown under the Forest Act and the Timber Royalty Act. The whole matter is somewhat simple, when it is viewed stripped of all unnecessary complexity. The plaintiff upon the facts and according to the express finding of the learned trial judge was a trespasser upon the lands of the Crown in cutting and taking off the ties and were the matter one between subject and subject what would be the position? The plaintiff would be liable in damages for the act of trespass and would be disentitled to the ties. Here we have it clearly demonstrated that there was trespass, but following the statute law, the Crown has elected to impose certain Royalties and penalties permissible of being exacted and the plaintiff paying these is entitled to the ties. The Crown was under no compulsion really to adopt this course, as I view it, but having done so the question is, can the plaintiff be heard to complain in view of the contract existent between the plaintiff and defendant? I think not. The question of whether there was delivery of the ties by the plaintiff to the defendant cannot be effectively set up upon the facts. Further, in passing let me

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

June 4.

KEANE v. CANADIAN PACIFIC RY. CO.

say if the ties in question were not delivered the purchase price thereof could not be claimed and the plaintiff would on that contention recover nothing. Proceeding then upon the undoubted facts the ties in question were illegally cut from off lands of the Crown and being delivered to the defendant by the plaintiff in pursuance of the contract the defendant is met with this claim of the Crown: Was the defendant entitled under the circumstances to discharge by payment the claim made by the Crown? In my opinion the defendant was so entitled and rightly made the payment and must be credited with the payment in the accounts between the parties. Paragraph 18 of the contract reads as follows: [already set out in the judgment of MARTIN, J.A.].

MCPHILLIPS, J.A.

Having arrived at this stage in the inquiry, it would seem to me that the case resolves itself into a very simple one indeed. The plaintiff made delivery of ties to the defendant which had been illegally cut, yet seeks payment therefor freed and discharged from the claim of the Crown. This is an impossible contention. Further, the express terms of the contract admit of the defendant retaining "Government dues" and as the amount sued for is the exact sum exacted by the Crown, the action necessarily failed in the Court below, and in my opinion should fail here. I am therefore clearly of the view that the learned trial judge arrived at the right conclusion in dismissing the action. I would affirm the judgment of the Court below and dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *C. F. R. Pincott.*
Solicitor for respondent: *James O'Shea.*

ISITT AND ISITT v. HAMMOND AND NATIONAL RESOURCES SECURITY COMPANY LIMITED

COURT OF APPEAL

1924

June 4.

ISITT v. HAMMOND

Discovery — Action for specific performance—Practice—Sale of land—Plaintiff trustee for company—Affidavit of documents by company—Further and better affidavit of documents by plaintiff—Joint and several affidavit sufficient.

In an action for specific performance of an agreement for the sale of land an order was made that an affidavit of documents be filed on behalf of a company incorporated to take over the lands in question, the evidence disclosing that the plaintiff acted as trustee for the company in respect of said lands.

The plaintiff's affidavit of documents contained an item "Pleadings and proceedings in an action in the Supreme Court of British Columbia between the plaintiffs and the Grand Trunk Pacific Railway Company as defendant being No. 1, 2315/1915."

Held, that a further and better affidavit of documents must be made by the plaintiffs in respect of this item.

Taylor v. *Batten* (1878), 4 Q.B.D. 85 applied.

APPEAL by defendant, the National Resources Security Company Limited from an order of MORRISON, J. of the 1st of February, 1924, dismissing an application by said defendant Company for an order that the plaintiffs file further and better affidavits of documents and that they produce on their respective examinations for discovery herein pursuant to an order of the Court of the 11th of January, 1924, all documents mentioned therein and for an order that an affidavit of documents be filed on behalf of The London & Fort George Land Company Limited a company incorporated in England and that said company produce on the said examinations for discovery all documents disclosed in said affidavit and that all proceedings herein be stayed in the meantime. The action is for specific performance of an agreement of the 15th of November, 1913, between the plaintiff Frank Isitt and the defendants for the sale by the plaintiff and purchase by the defendants of certain lands described as lot 2,400, group 1, District of Cariboo (except 18 acres of railway right of way) containing 228.69 acres at $600 per acre or in the alternative for breach of the agreement. It

Statement

COURT OF APPEAL

1924

June 4.

ISITT v. HAMMOND

Statement

appeared in said agreement that under agreement of even date therewith Frank Isitt agreed to purchase from Margaret C. Hammond the lands above described for $73,500 (half in cash and the balance in two equal instalments in six and twelve months respectively) and in consideration of Isitt having agreed to so purchase the defendants entered into the agreement upon which this action is brought. One of the defences to the action is that subsequent to the agreement sued on Frank Isitt sold all the lands in question which precluded his right of action, and it was further found that The London & Fort George Land Company Limited was incorporated to acquire and take over lands described as lot 2,400, Fort George, Cariboo District. A request for further and better affidavits was refused by the plaintiffs' solicitor.

The appeal was argued at Vancouver on the 26th and 27th of March, 1924, before MACDONALD, C.J.A., MARTIN, and MCPHILLIPS, JJ.A.

Argument

Savage, for appellant: Isitt is a trustee for The London & Fort George Land Company Limited. We say he sold to the Company and that relieves us. We are entitled to any documents disclosing their relationship: see Bray on Discovery, 228; *Taylor* v. *Batten* (1878), 4 Q.B.D. 85. We are entitled to affidavit of discovery as a matter of right: see Ross on Discovery, Can. Ed., 159. If the plaintiffs join in a joint affidavit they must deal with the documents any one of them have: see *Fendall* v. *O'Connell* (1885), 29 Ch. D. 899. Isitt being trustee for the Land Company we are entitled to same discovery as in case of the Company being a party: see *Willis & Co.* v. *Baddeley* (1892), 2 Q.B. 324. There must be a document of trusteeship that should be produced.

Alfred Bull, for respondents: Mrs. Hammond sold to Isitt for $73,500 in three instalments. Mrs. Hammond wanting her money sold her agreement to Mrs. Isitt. The Company was then found to have taken over these lands. Isitt is a contracting party: see Leake on Contracts, 7th Ed., 345. He has power to bring the action under Supreme Court rule 130. On application for further discovery there is wide discretion: see Annual

Practice, 1924, p. 517; *Cory* v. *Cory* (1923), 1 Ch. 90; see also *Bank of B.C.* v. *Oppenheimer* (1900), 7 B.C. 104; *United Motor Co. Ltd.* v. *Regina* (1915), 8 W.W.R. 185; *Henderson* v. *Mercantile Trust Co.* (1922), 52 O.L.R. 198. There was no demand for further and better affidavits of documents.

Savage, in reply: We are entitled to the memorandum of association of the Company for which Isitt is trustee: see *Few* v. *Guppy* (1830-36), 13 Beav. 457.

Cur. adv. vult.

4th June, 1924.

MACDONALD, C.J.A.: The appellant contends that The London & Fort George Land Company Limited are the real plaintiffs, and therefore ought to make discovery. They contend further, that certain documents and correspondence mentioned in the affidavit of documents made by the plaintiffs, should be more clearly identified. They also complain of the affidavit on the ground that it was a joint and several one, whereas they claim that affidavits should have been made by each of the plaintiffs separately.

As to the first contention: it is admitted in Mr. *Bull's* letter of the 24th of January, 1924, that the plaintiff, Frank Isitt, is trustee in this matter for the Land Company. I therefore think that the action should be stayed until the Land Company has made discovery.

MACDONALD, C.J.A.

I think also, that a further and better affidavit of documents must be made by the plaintiffs in respect of item 129 of the affidavit filed, and of the Lennie & Clark correspondence, in accordance with the rules laid down in *Taylor* v. *Batten* (1878), 4 Q.B.D. 85.

The objection to the affidavit on the ground that it was a joint and several one must be overruled. There is a clear distinction between this case and *Fendall* v. *O'Connell* (1885), 29 Ch. D. 899. There the affidavit was joint, not joint and several, here each of the plaintiffs has sworn that they have not, nor have either of them, in their possession, etc., and severally that each of them has not, nor has he or she in his or her possession or power, etc. I think that is the effect of the joint and several oath.

COURT OF APPEAL

1924

June 4.

The appellant should have the costs of the appeal, except as to the stay, and of the application below. The respondents should have the costs applicable to the motion for a stay here and below, both to be in the cause in any event.

ISITT v. HAMMOND

MARTIN, J.A.

MARTIN, J.A.: Though the tendency is not to widen discovery, as the Court of Appeal pointed out in *In re Wills' Trade-marks* (1892), 3 Ch. 201, 208, yet I agree that in the circumstances this appeal should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. agreed in allowing the appeal.

Appeal allowed.

Solicitors for appellant: *Savage & Roberts.*
Solicitors for respondent: *Tupper, Bull & Tupper.*

MACDONALD, J.

1924

May 2.

MAHLER v. BARKER.

Vendor and purchaser—Real property—Memorandum of contract—Specific performance—Vendor's name not disclosed—Contract by agent—Agent not liable—Statute of Frauds—29 Car. II., Cap. 3, Sec. 4.

MAHLER v. BARKER

Where a contract for the sale of land to which section 4 of the Statute of Frauds applies, has been made by an agent in such terms as not to render the agent liable as one of the contracting parties, the principal can sue on it only if his name appears in the memorandum or such description of him that his identity cannot fairly be disputed.

The connection of the plaintiff with the memorandum containing the offer of purchase, as vendor of the property cannot be established by oral evidence.

Statement

ACTION for specific performance of an agreement for sale of an apartment-house in the City of Vancouver. The plaintiff left the property in the hands of Turner, Meakin & Co., real estate agents, for sale. The defendant called on the said firm to inquire as to another property but it not being available one Smith an employee in the office interested the defendant in the

MACDONALD, J.

1924

May 2.

MAHLER v. BARKER

property in question. Defendant inspected the property and on the same evening Smith says he agreed to purchase it on the terms afterwards outlined in a letter. Smith then saw the plaintiff's wife who was authorized to act for him in his absence, and she agreed to the terms set out in the letter. He then went to the defendant's house with the letter, which was addressed to his own firm, and after some demur on the part of the defendant and his wife, defendant signed it. But according to the evidence of the defendant and his wife it was signed conditional upon his wife, after inspection, approving of the sale. Smith denied there was any condition attached to the offer contained in the letter. Smith did not ask for or receive any deposit on account of the purchase price. On defendant's wife inspecting the property she decided they did not want it, and so instructed Smith. The defendant raised the objection that the letter in question did not comply with the Statute of Frauds on the ground that the parties to the agreement were not sufficiently described. Tried by MACDONALD, J. at Vancouver on the 21st of March, 1924.

Statement

Arnold, and *J. A. MacInnes,* for plaintiff.
Harper, for defendant.

2nd May, 1924.

MACDONALD, J.: Plaintiff seeks specific performance of an alleged agreement of sale of certain house property owned by the plaintiff in the City of Vancouver. This property consisted of an apartment-house divided into four suites. Plaintiff, being temporarily forced to reside in the State of Washington, placed the property in the hands of Messrs. Turner, Meakin & Co., real estate agents, for sale.

Judgment

Defendant was the owner of a house and lot in another part of the city, which his family occupied as their home. He became interested in another piece of property, referred to in an advertisement of such real estate agents, and made inquiries at their office with a view of purchase. He explained to F. C. Smith, an employee of such agents, that he was desirous of disposing of his own property and had available, to assist in purchase or exchange, an amount of $1,000 in cash. He was then out of work and anxious to obtain property that might

MACDONALD, J.

1924

May 2.

MAHLER v. BARKER

bring in some revenue to supplement his precarious earnings. He was not in good health and apparently doubtful as to his ability to obtain a living for his family in the future. I think I am right in concluding that his physical and mental condition were the same then, as at the trial. If so, he was so affected that, to my mind, he was not well equipped to successfully carry on negotiations for purchase, nor to complete an exchange of properties, when called upon to deal with a keen real-estate agent. Smith explained to him that it was not likely that the property he sought to buy or exchange was available, but eventually induced him, on the 27th of November, to inspect the property of the plaintiff. Defendant, in such inspection, was not accompanied by his wife who, beyond question, was the more competent of the two, to determine whether the property was suitable for their purposes. The result was, that, on the evening of such inspection, the defendant met Smith in his office. They differ materially as to what took place on that occasion. Smith says that the defendant verbally offered to purchase the property on certain terms, which were afterwards outlined in a letter signed by him. While the defendant says Smith had such a letter prepared for his signature but that he refused to sign it. On the 28th of November, Smith, on behalf of his firm, addressed a letter to Mrs. Mahler, who was authorized to act for the plaintiff, outlining the terms of an offer and obtained an acceptance from her agreeing to pay a commission of $200. According to his account of the transaction, he prepared a letter, addressed to his firm, setting forth terms similar to the other letter and intended to have it signed by the defendant. He also provided for a commission to be payable, of $100, thus intending to receive commission from both vendor and purchaser. His firm were thus, as agents of both parties, in the anomalous position of striving on one hand to make a sale for the vendor to the purchaser upon the best terms possible and having the difficult task of advising and assisting the purchaser in acquiring the same property to the best advantage. Armed with the acceptance of the plaintiff, Smith took the proposed letter to the defendant's house for his signature. He refused to sign at first, but subsequently, after

Judgment

an interview with his wife, he was induced by Smith to sign the letter, containing an offer for purchase and exchange. The parties differ materially, as to what took place at this time. It is asserted by the defendant, and his statement was supported by his wife, that the letter was only signed conditionally. They both state that it was to be held, as it were, in escrow, by Smith, and not to become a binding document until Mrs. Barker had seen the premises and was satisfied to complete the transaction. Smith, on the contrary, says that there was no condition attached to the offer contained in the letter, and that it was intended to be immediately operative, so that, in other words, the sale was completed, except for the usual adjustments which would take place and formal documents be prepared and executed. He did not, however, ask for nor receive even a cash deposit from defendant, as one might expect under the circumstances, if his account of the occurrence were accepted.

It was quite apparent that, upon inspection of the premises, Mrs. Barker, although she may not have so definitely expressed herself, at the time, was not satisfied and, within a reasonable time, notified Smith to that effect. Defendant asked for the return of the letter, containing his offer of purchase, but Smith did not comply with the request and apparently, without deeming it necessary to communicate with the plaintiff, or his wife, intimated that, if the defendant persisted in his refusal to complete the transaction, further steps would be taken in the matter. It is not, however, necessary to determine whether the letter containing the offer by the defendant was delivered to Smith unconditionally or in escrow, if the contention of the defendant prevails that, in any event, the Statute of Frauds has not been complied with.

Judgment

It is contended, on behalf of the defendant, that the letter signed by him, dated 28th November, addressed to Turner, Meakin & Co., does not comply with the Statute of Frauds, even though the defendant was aware, as to who was the vendor and that he, through his wife, was satisfied with the terms contained in defendant's letter.

While one of the grounds, as to the insufficiency of the letter, within the statute is, that it does not contain all the terms of

MACDONALD, J.

1924

May 2.

MAHLER v. BARKER

the proposed contract, still, the more important objection is that the parties to the agreement are not sufficiently described.

In *Potter* v. *Duffield* (1874), L.R. 18 Eq. 4 at p. 7 Sir George Jessel, M.R., in quoting from the judgment of Sir John Taylor Coleridge, in the case of *Williams* v. *Byrnes* (1863), 1 Moore, P.C. (N.S.) 154 at p. 195 says:

"'The words [that is to say, the words of the statute] require a written note of a bargain or contract, the statute clearly making no distinction between these two words. This language cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing; and a bargain or contract cannot so appear unless the parties to it are specified, either nominally or by description or reference.'"

He then adds:

"I take that to mean that the statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed. The counsel for the plaintiff contends that you may describe one of the parties as the vendor of the estate; but the statute cannot mean that. It requires the parties to be described in such a manner as there can be no fair or reasonable dispute as to the person who is selling or buying."

Here, while the plaintiff, as the other party to the contract, is not mentioned in the letter, it is asserted that the letter containing the offer is addressed to his agents and is a compliance with the statute. I am referred, in support of this proposition, to Halsbury's Laws of England, Vol. 7, p. 371, par. 765, as follows:

"It is sufficient if the memorandum contains the names of both of the parties entering into the contract, though one of them may be an agent for an undisclosed principal."

Judgment

Further, that even if the plaintiff had been unknown to the defendant, as vendor, such letter would have sufficed to fulfil the statutory requirements. *Filby* v. *Hounsell* (1896), 2 Ch. 737, also *Morris* v. *Wilson* (1859), 5 Jur. (N.S.) 168, are cited in support of this statement of the law. I think the defendant was well aware that the parties to whom his letter was addressed were simply agents but it may not have been clearly stated as to who was actually the owner of the property. In view of the discussion of *Filby* v. *Hounsell, supra,* in *Lovesy* v. *Palmer* (1916), 2 Ch. 233, I think the statement of the law in this connection (above quoted) should not be accepted in too broad a sense but should be qualified, so as to apply only to a memorandum which creates a contract binding upon the agent. Younger, J. in the case just mentioned says (pp. 243-4):

"I have looked for, but I have been unable to find, any other case where it has even been suggested that an unnamed principal can sue or be sued on a contract to which the statute applies where he is not himself sufficiently described in the memorandum, except in a case where by the memorandum the agent is himself liable on the contract. And I should not expect to find any such authority, because it appears clear that, unless the agent is liable on the contract, you can on the hypothesis have no memorandum of any agreement at all. And the case cited in the argument of *Filby* v. *Hounsell* (1896), 2 Ch. 737, namely, *Morris* v. *Wilson* [(1859)], 5 Jur. (N.S.) 168, as justifying the view there contended for and ultimately adopted is to my mind quite consistent with what I have said, because I think it may very well have been that Wood, V.C. was there of opinion that the agent had made himself personally liable.

"Further, if it was in fact decided in *Filby* v. *Hounsell* (1896), 2 Ch. 737 that there could within the statute be a sufficient memorandum of an agreement where the principal was not named and the agent was not bound, then I do not think that the decision can stand with the other authorities, such as *Rossiter* v. *Miller* [(1878)], 3 App. Cas. 1124 and *Jarrett* v. *Hunter* [(1886)], 34 Ch. D. 182 or with the statute as I read it."

Here the agents did not render themselves liable to sell the property to the defendant. They did not purport in writing to complete a sale by execution and delivery to defendant of any document.

The connection of the plaintiff with the letter containing the offer of purchase, as vendor of the property, could only be established by oral evidence. This, in the words of Sir Geo. Jessel, in *Potter* v. *Duffield, supra,* is "exactly what the Act says shall not be decided by parol evidence." He emphasized this position as follows (p. 8):

Judgment

"I should be thrown on parol evidence to decide who sold the estate, who was the party to the contract, the Act requiring that fact to be in writing."

I do not think that the letter of the agents to Mrs. Mahler, under date of the 28th of November, 1923, outlining the offer of the defendant, even though accepted by the wife, on behalf of the plaintiff, alters the situation to the benefit of the plaintiff. The connection between this letter and one of same date containing the offer is not indicated in writing.

"The name of the person with whom the contract was to be made does not appear in the instrument, nor on any other paper connected with it, and capable of being considered as completing with it a note or memorandum of the transaction":

Sir John T. Coleridge in *Williams* v. *Byrnes, supra,* at p. 195.

The Statute of Frauds has thus not been complied with.

MACDONALD, J.

1924

May 2.

MAHLER v. BARKER

In dismissing the action, I think it well to observe that if I had come to a conclusion that defendant had unconditionally executed a contract which complied with the Statute of Frauds, I proposed to direct argument as to whether the facts in this case did not warrant an application of Lord Cairns's Act. In that event, if I had exercised a discretion and directed a reference, as to the damages, if any, suffered by the plaintiff, in preference to granting specific performance of the agreement, which included the exchange of the homes of the parties, I would have pursued a like course to that adopted by Boyd, C. in *Gough* v. *Bench* (1884), 6 Ont. 699 under somewhat similar circumstances.

The action is dismissed with costs.

Action dismissed.

COURT OF APPEAL

1924

June 4.

REX v. BERDINO

REX *EX REL.* WARD v. BERDINO.

Criminal law—Intoxicating liquor—Unlawful sale—Evidence of—Duties of so-called "stool-pigeons" discussed—B.C. Stats. 1921, Cap. 30, Sec. 26.

Three police officers in plain clothes stationed themselves at night in a motor-car at the curb in front of a house suspected of containing liquor for sale. The accused walking along the sidewalk came to a point between the motor-car and the house when he was asked by one of the officers whether he could get a bottle of whisky for them. He turned to go towards the house when one of the officers started to follow him but to this he objected. He then went to the house and rapped at a window through which a bottle of whisky was handed to him by a woman. He took it to the officers and received $4 for it which he subsequently paid to the woman. An appeal from a conviction to the Supreme Court for the unlawful sale of liquor was dismissed.

Held, on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that the appeal should be dismissed as it is impossible to say that there was no evidence to support the view that the magistrate took in holding that there had been a sale by the accused to the police officers.

Statement

APPEAL by the accused from the decision of MORRISON, J.

COURT OF APPEAL

1924

June 4.

REX v. BERDINO

of the 23rd of January, 1924, dismissing an appeal by way of case stated from the decision of the deputy police magistrate at Vancouver convicting the accused of unlawfully selling liquor to police officers contrary to section 26 of the Government Liquor Act (B.C. Stats. 1921, Cap. 30), and sentencing him to six months in Oakalla Gaol. On the 9th of August, 1923, at 11.55 p.m. accused was walking on Union Street, Vancouver, to his residence which was next door to 551 Union Street. Immediately in front of 551 Union Street was an automobile at the curb in which were seated A. D. Ramsay and two other police officers. When accused reached a point between the automobile and 551 Union Street the officers engaged him in conversation and told him they wanted a bottle of whisky and asked him if he could get one for them. Accused then started for 551 Union Street and when one of the officers followed him accused objected to his following, when he proceeded alone to house 551. A bottle of whisky was handed to him from a window by a woman who was aroused by his knocking. Accused then returned with the bottle of whisky and on giving it to A. D. Ramsay received $4 for it. He then returned and paid the woman in the house the $4. Accused appeared to be known by the occupant of the house No. 551. It was contended that the accused merely acted as agent for the police officer and that he did not make a sale. The question put by the deputy police magistrate was as follows:

Statement

"Was I right in holding that the accused had made an illegal sale of intoxicating liquor to the police officer A. D. Ramsay?"

The appeal was argued at Vancouver on the 5th of March, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS, JJ.A.

J. E. Bird, for appellant: The accused in this case merely acted for Ramsay the officer. He made no profit but paid the whisky vendor the $4 that Ramsay handed him: see *Rex* v. *Bogeotas* (1912), 18 B.C. 123; 22 Can. Cr. Cas. 113; *O'Sullivan* v. *Michus* (1914), 23 Can. Cr. Cas. 169. Whether the money was paid before or after he got the bottle makes no difference: see *Reg.* v. *Mullins* (1848), 3 Cox, C.C. 526; *Rex* v. *Bickley* (1909), 73 J.P. 239; *Carter* v. *Long & Bisby*

Argument

COURT OF APPEAL

1924

June 4.

REX v. BERDINO

Argument

(1896), 26 S.C.R. 430; *De Laval Separator Co.* v. *Walworth* (1908), 13 B.C. 295 at p. 296; *Rex* v. *Donihee* (1921), 36 Can. Cr. Cas. 293; *Pasquier* v. *Neale* (1902), 2 K.B. 287.

Orr, for respondent: The cases referred to are all *bona fide* cases of innocence. This man broke the law in selling and he broke the law in buying. As to the police officer being an accomplice see *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128; (1922), 2 W.W.R. 30. He is doing a prohibitive act. If he pays $4 for the bottle it is his bottle until he gets the $4 from the officer.

Bird, in reply.

Cur. adv. vult.

4th June, 1924.

MACDONALD, C.J.A.

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

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from a judgment of Mr. Justice MORRISON in the Supreme Court, whereby he affirmed the conviction of the appellant by the deputy police magistrate of Vancouver for unlawfully selling intoxicating liquor to one A. D. Ramsay on the 9th of August last. From the somewhat meagre facts as stated by the convicting magistrate it appears that three police officers (presumably in plain clothes), including Ramsay, stationed themselves at night in a motor-car at the curb in front of a house, No. 551 Union Street, Vancouver, and about midnight when the accused, who lived next door, in walking in the direction of his own house, came to where the police officers were stationed, he and some of them became engaged in conversation and they asked him if he could get a bottle of whisky for them, whereupon he (not knowing who they were) went to said house No. 551 and, after knocking at a window, got a bottle of whisky through it from a woman and took it to one of the officers and got $4 from him in return; in going from the car to the house for the whisky one of the officers began to follow the accused but the latter objected. The accused was well known to the occupant of No. 551 and had frequently been therein, and he "paid" (as the case puts it), at a time not specified, to the occupant the $4 that he had received from the policeman, but the case is strangely silent upon the

point as to the time and circumstances wherein he "paid" said $4, or the interest, if any, the accused had in the transaction either as a partner of, or an agent for said occupant or otherwise.

Certain decisions, none of which is binding on us, were cited in support of the submission that the said facts disclose in law no offence because the only inference to be drawn from them is that the accused was acting as agent for the police officers, but after carefully considering all of said decisions I find they differ materially from the facts before us, even assuming they are sound in law. Two of them in County Courts, *Rex* v. *Bogeotas* (1912), 18 B.C. 123, and *O'Sullivan* v. *Michus* (1914), 23 Can. Cr. Cas. 169, are cases where beer was lawfully sold in licensed premises to a waiter from unlicensed premises who was given money by guests in the latter premises to procure it for them, which he did, and it was held that in such circumstances the waiter was the agent of the guests: *Rex* v. *Davis* (1912), 4 O.W.N. 358, is a similar case; and in *Rex* v. *Donihee* (1921), 36 Can. Cr. Cas. 293, the accused was expressly asked by the informant "to buy a bottle for me" and given $5 for that purpose. But it is to be observed that in the case of *Pasquier* v. *Neale* (1902), 2 K.B. 287, the King's Bench Division, composed of Lord Alverstone, C.J., Darling and Channell, JJ. refused to set aside the conviction of a restaurant-keeper for selling wine without a licence, the charge being founded on the facts that a waiter in the accused's restaurant had supplied a guest with a pint of claret which he had procured for the guest from nearby licensed premises in which the accused was a partner, and it was strongly argued that the only inference that the magistrate could draw from the facts was that the waiter must be regarded as the agent of the guest, but the Court unanimously refused to take so narrow a view of the whole facts and the duty of the magistrate thereupon, saying, *per* the Chief Justice (pp. 289-90):

MARTIN, J.A.

"The learned magistrate has drawn the inference of fact that there had been a sale of the wine to Finnigan by the appellant's servant at 16, Gerrard Street, and the only question for us is whether there was any evidence to justify the inference so drawn. It is impossible for us to say that a magistrate is not at liberty to draw inferences of fact unless they can be conclusively proved to be true inferences. Was there not ample evidence here on which the particular inference could properly be drawn?

COURT OF APPEAL

1924

June 4.

REX v. BERDINO

On one side it is said boldly that the appellant's servant, in procuring the wine, was acting as the agent of the customer; while on the other side it is contended that a man, who has a licence to sell wine at one particular place, by keeping a restaurant without a wine licence at another place promotes very effectively the sale of his own wines. It is obvious that, if it is proved that the waiter is buying for the customer, the charge of selling wine without a licence cannot be supported; nothing could be simpler. But it is said that the magistrate must necessarily take that view of the facts; and I cannot assent to that contention. It is impossible to say that there was no evidence to support the view which the magistrate took."

Likewise, in the case at Bar I agree with my brother the Chief Justice that on the facts before us we would not be justified in reversing the judgment of the learned judge appealed from and thereby setting aside the conviction which he affirmed, because in my opinion, to use the Lord Chief Justice's words, "it is impossible to say that there was no evidence to support the view which the magistrate took" in holding that there had been a sale by the accused to the police officers whatever his undisclosed business relations may have been with the woman from whom he actually got the whisky through the window.

It is opportune to repeat here the observations I made recently in *In re Government Liquor Act and Rainier Bottling Works,* 31st January, 1924 (now in the press*), upon the light in which clandestine operations of this kind are open to be regarded:

MARTIN, J.A.

"I will only repeat, to make this clear once more, that when people engage in such very exceptional and suspicious circumstaces 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."

In cases of this nature the Court will not allow itself to be hoodwinked by the accused's observations of sham business formalities into regarding extraordinary spurious transactions as ordinary genuine ones, and I entertain no doubt that both the learned judge and the magistrate below took the correct view of this particular transaction in the light of all the circumstances.

It further appears that this conviction was brought about

* 33 B.C. 443.

because the police had reason to suspect that the law was being violated in the house in question, and so laid the trap outlined in the case stated to stop such violations and to secure the conviction of those concerned therein, and as something was said during the argument about the employment of "stool-pigeons," so-called, this is an opportune time to make some observations thereon in the public interest, because the law and practice in that behalf continue to be persistently and harmfully misrepresented in various quarters, which misrepresentation has tended to hamper and impede police officers, magistrates, and others in the discharge of their duty to see that the law is enforced according to long-established legal precedent and usage. By the loose term "stool-pigeon" I believe is popularly meant a person known in the law as a police spy or agent provocateur, either specially or regularly employed by the police to assist them in the detection of crime in a variety of ways as decoys or ostensible confederates, by laying traps to apprehend criminals, though such traps are also constantly laid by the regular members of the police force in general or those attached to particular branches thereof for special service.

To any one at all familiar with the history of our criminal jurisprudence the suggestion that such special agents have not been employed from legal time immemorial will come as a surprise, for the contrary is notorious, and unless special means were employed to secure convictions in special classes of cases the law could not be enforced and would become a mischievous laughing stock or dead letter. Without attempting to enumerate even the ordinary classes of cases in which such means are necessarily resorted to I shall mention, by way of illustration merely, those connected with offences against the safety of the State, the noxious drugs traffic, the liquor traffic, "knocking down" fares on railways, stealing in the mails, and sexual offences against young persons and others, and one has only to pick up, at hazard, almost any volume of the English or Canadian criminal reports to find illustrations of such traps being laid and convictions obtained thereon as a matter of course. Among said offences those connected with the unlawful sale of liquor and drugs are particularly hard to suppress because of

MARTIN, J.A.

COURT OF APPEAL

1924

June 4.

REX v. BERDINO

the facilities the traffic offers for making large and speedy profits and the extent to which they are notoriously carried on reaches even to quarters which ought to be above suspicion yet from which the lawbreakers receive active support or sympathy, hence special means must necessarily be invoked to combat an evil of such wide and sinister ramifications.

Instances of the practice of laying police traps can be multiplied indefinitely, but I think it sufficient to cite only a few modern and recent cases, and I shall begin (and it is a striking coincidence) by referring to one cited by the appellant herein, *viz., Pasquier* v. *Neale, supra,* wherein a conviction for unlawfully selling wine was obtained by means of the evidence of an agent provocateur ("stool-pigeon," as some would stigmatize him) in the shape of "an excise officer named Finnigan," who induced the unsuspecting waiter to serve him with the claret which led to his master's conviction.

In *Rex* v. *Bickley* (1909), 73 J.P. 239, a woman spy had been employed by the police to secure by pretences a conviction for supplying noxious things with unlawful intent and the Court of Criminal Appeal held, as correctly reported in the head-note, that

"A police spy or agent provocateur is not an accomplice, and the practice that a jury should not act on the uncorroborated evidence of an accomplice does not apply to the case of such a person."

MARTIN, J.A.

In *Henry* v. *Heuser* (1910), 6 Cr. App. R. 76, the accused was convicted of gross indecency by means of a trap laid by the police, who employed a young man for the purpose, who went with the suspected person into a lane where police officers were hidden pursuant to an arranged plan, and an appeal was taken to the Court of Appeal, composed of Lord Alverstone, C.J., Mr. Justice Pickford and Mr. Justice Avory, on the point as to whether the police who planned the trap should be regarded as accomplices and hence corroboration of their testimony would be necessary, but the Court held:

"There is no ground for saying that when the police have information that an offence is likely to be committed, and go to the place for the purpose of detecting it, they thereby become accomplices merely because they assent to the informer going there too, for the purpose of entrapping the offender."

In *Rex* v. *Mortimer* (1910), 80 L.J., K.B. 76, a conviction

for unlawfully using a house for betting purposes had been obtained by a trap laid by the police by means of a letter written by a fictitious person, and in delivering the judgment of the Court of Criminal Appeal upholding the conviction, Lord Alverstone, C.J., at pp. 77-8, said:

"I do not like police traps any more than does anybody else; but at the same time there are some offences the commission of which cannot be found out in any other ways, and unlawful acts done in consequence of the trap are none the less unlawful."

A striking case is *Rex* v. *Chandler* (1913), 1 K.B. 125; 77 J.P. 80, before the Court of Criminal Appeal, composed of Lord Alverstone, C.J., Channell and Avory, JJ., wherein the appellant had been convicted of shopbreaking upon the evidence of a servant of the owner of the shop, who had, by arrangement with the owner, enabled the appellant to make duplicate keys by means of which he entered the shop, whereupon he "was arrested by police officers who had been keeping watch nearby," they having been informed by the servant of the arrangement that he had made with the appellant to commit the offence upon that night. It is instructive to note that the Court in giving judgment (J.P. 80), said that the appellant, according to his own statement, had been defying Scotland Yard for fourteen years; fortunately for society at large his criminal depredations were at last brought to an end by the trap the police successfully set for him.

The most recent illustrations of the practice I shall quote is *Rex* v. *Annie Woodham* (1924), 68 Sol. Jo. 283, wherein a fortune teller was convicted at Richmond Police Court on the evidence of two women, members of the Women's Police Patrol attached to Bow-street police station, who detailed the circumstances shewing the successful trap they laid for the suspected accused on two different occasions upon which they paid her money for having their fortunes told, for which two offences she was fined the sum of £40 or two months' imprisonment on each conviction.

Such being the law and practice in regard to this long established and unfortunately necessary system for the protection of the law-abiding people of the land, it only remains for the Courts to see, in cases which come before them, that in its operation

COURT OF APPEAL

1924

June 4.

there shall be no abuse, and in justice to all concerned I feel it right to say that no case of abuse has yet reached this the highest Court of the Province.

It follows that the appeal should be dismissed.

REX v. BERDINO

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: In my opinion this appeal must succeed. With great respect to the learned judge from whose decision the appeal is taken, the necessary and compellable answer to the question put in the case stated is an answer in the negative.

The case is in exceedingly small compass and easy of understanding. The facts are undisputed. The accused is asked by the police officer (Ramsay), who is in plain clothes, to get him a bottle of whisky, the intention being upon the part of the police officer to bring about an infraction of the law, *i.e.*, an illegal sale under the Government Liquor Act, and as to this phase of the matter I will later have some observations to make. Upon these facts, what was the relation the accused bore to the police officer? Can there be a shadow of a doubt but that he was the agent of the police officer to purchase the bottle of whisky? That the accused in first instance paid the purchase price out of his own money does not change the situation one iota. It is admitted that the accused did pay the purchase price, $4, to the lady from whom he got the bottle of whisky, but for whom did he act in obtaining the bottle of whisky? Unquestionably for the police officer not for himself; the accused did not want the whisky, he was commissioned to get the whisky, did so, and at once made delivery of it to the police officer and received $4 from the police officer, the exact sum he had paid to the lady from whom he had there and then obtained it to the knowledge and within the sight of the police officer. Yet it is contended that the transaction was a sale by the accused to the police officer. With great respect to any contrary opinion, can there be any doubt about this transaction? I fail to see how there can be. The purchase of the bottle of whisky was a purchase by the police officer through his selected agent or intermediary, and it is idle to contend to the contrary. The accused acted only upon the express request of the police officer to get him a bottle of whisky, the police officer was the

propelling cause, and the buyer in the transaction, the lady being the seller. The accused merely carried out the request made and without reward. How is it possible to contrive out of this transaction two sales when palpably there was but the one sale? There can be but one answer and that is there was but one sale and the accused was neither the buyer nor seller in the transaction; he was the agent of the police officer and carried out the request made of him within the eyesight of the police officer, yet that police officer presumes to say that the act of the accused in obtaining the bottle of whisky was a purchase of a bottle of whisky by the accused for himself and then a re-sale to him, the police officer, *i.e.*, two sales took place upon the admitted state of facts. All I can say is that there is not a scintilla of evidence supporting any such contention nor does the case stated so state the facts. The case stated is clear to demonstration that there was but one transaction, one sale, and with this so apparent how futile it is to contend otherwise. I do not know that it could be said here that the accused (the agent) concealed or did not disclose his principal and did not contract merely as agent (*Heald* v. *Kenworthy* (1855), 10 Ex. 739; 24 L.J., Ex. 76; 102 R.R. 800; *Irvine* v. *Watson* (1880), 5 Q.B.D. 414; 49 L.J., Q.B. 531; 42 L.T. 800), but were it the case and had the purchase price for the bottle of whisky ($4) not been paid, whilst the accused would in law be liable to the seller, it would have been within the option of the seller on discovering the principal, the police officer in the present case, to sue either the principal or agent. But can there be any doubt in the present case? It is impossible for any Court to listen to the contention of the prosecution that upon this case stated there was a sale to and a purchase of the bottle of whisky by the accused followed by a further transaction of a sale of the bottle of whisky to the police officer. It has been said, and I still endeavour to believe it, although happenings of this kind tend to shatter the belief, that in the Crown resides infallible justice. What has happened here? The name of the Crown has been used to perpetrate that which cannot be otherwise described than a travesty of justice. It is not a matter that can in my opinion be passed over, it calls for stern

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

June 4.

REX v. BERDINO

rebuke. This comes of committing the honour of the Crown to the tender mercies of a private prosecutor or the action of a municipal authority. The attempt here to build up a contract of sale to the accused of the bottle of whisky and then a sale from the accused to the police officer because the accused made payment of the $4 to the lady, being his own money, is purile in its nature and is without force. It is admitted law that a person sending another to a shop to buy goods without giving him the money to pay for them gives to him the necessary incidental power of pledging his credit (Story on Agency, p. 77; *Saunders* v. *Dence* (1885), 52 L.T. 644; *Rosenbaum* v. *Belson* (1900), 2 Ch. 267; 69 L.J., Ch. 569; 82 L.T. 658). It is also well known and admitted law that the principal is bound to remunerate the agent and to reimburse him for all proper expenditure and to indemnify him against liabilities properly incurred in the course of the agency, and in the present case when the police officer gave the accused the $4, the purchase price of the bottle of whisky, he was only doing that which the law required him to do. It was not the creation of a contract of sale of the bottle of whisky by the accused to the police officer, it was reimbursing him for his proper expenditure in fulfilling the request made to him to get a bottle of whisky.

MCPHILLIPS, J.A.

It is to be noticed that in the present case police officers masquerade in plain clothes and instigate a young man to perpetrate an offence with the severe punishment attached thereto of six months in the common gaol.

We have officers of the law, police officers, posing in the guise of ordinary citizens who ingratiate themselves with the passer-by, the accused, and prevail upon him, as they think, to transgress the law, but he does not really do so. It is perilous indeed, to "outrage public opinion," and the present case is close to the line if it is not really over the line, as I make bold to believe it is. It cannot be other than reprehensible and drags the name of the Crown into the dust to have happenings of this kind.

The police officers, as it would appear in the present case, played the part of "stool-pigeons," persons employed as decoys. "A band of rooking officials with cloke bagges full of Citations and

Processes, to be serv'd by a corporalty of griffinlike Promooters and Apparitors":

Milton, Reformation in England.

"He was much rooked by gamesters, and fell acquainted with that unsanctified crew to his ruine":

Aubrey, Lives Sir J. Denham.

"His hand having been transfixed to a table, only because it innocently concealed a card, with which he merely meant to 'rook the pigeon' he was then playing against":

John Bee, Essay on Samuel Foote.

"Rookers and sharpers work their several ends upon such as they make a prey of":

Kennet, tr. of Erasmus's Praise of Folly, p. 76. (Davies).

The part played by the police officers, I have no doubt, was a very distasteful and disagreeable job for them, but they were no doubt instructed by some authority to proceed in this way. Methods of this kind can only in the end "outrage public opinion." Justice has been said to be "the quality of being just; just conduct." Can it be said that the conduct of the police officers here was just conduct? The answer must be No. In very early times justice was depicted in striking words:

"This was the trouthe that the kynge leodogan was a noble knyght and kepte well justice and right":

Merlin (E.E.T.S.) iii, 466.

Justice has always been interpreted as the nearest possible approximation to the vindication of right. Here we have incitation to break the law, then the cruel application of the rod decoyed into getting a bottle of whisky for experts in the detection of crime. The act is cited as a sale of liquor in contravention of the law and the accused so worked upon must languish in gaol associated with criminals for the period of six months with the very probable result or risk at least of driving the accused to a life of crime. Can such methods be approved? I think not. I, at least, will not refrain from expressing my disapproval.

MCPHILLIPS, J.A.

I can well believe that the accused in this case was overwhelmed with surprise to be dragged into the magistrate's Court in this manner, he surely thought that at least the people who suggested and requested him to do an act of seeming kindness to them would not be his accusers, but it would seem to be the case. It reminds one of the saying:

COURT OF APPEAL

1924

June 4.

REX v. BERDINO

"Thou hast appointed *justices of peace*, to call poor men before them about matters they were not able to answer":

Shakes. 2 Hen. VI., iv., 7.45.

There is little in the present case that resembles the thought expressed in the following:

"Earthly powers doth then show likest God's, when mercy seasons Justice":

Shakes. M. of V. iv. 1.197.

Here we have police officers inducing the accused to do that which would, in their opinion, bring about the contravention of the statute law and impose against the accused a punishment of six months in gaol without the option of a fine or any possible reduction or mitigation of the punishment. That which was done here, in my opinion, was not an infraction of the Act, but if it could be said to in any manner partake of an infraction there would be the technical offence and punishment would follow, the magistrate or judge powerless to mitigate the iron heel of the law. This consideration gives one need for grave thought and careful introspection, and calls for the application of the well-known principle set forth at p. 436, of Broom's Legal Maxims, 8th Ed.:

MCPHILLIPS, J.A.

"'The principle,' remarked Lord Abinger, 'adopted by Lord Tenterden (see *Proctor* v. *Mainwaring* [(1819)], 3 B. & Ald. 145), that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject, and I hope will always remain so.'"

I have no hesitation in coming to the conclusion, for the foregoing reasons, that the appeal should be allowed, the conviction quashed and set aside.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Bird, Macdonald, Bird & Collins.*

Solicitors for respondent: *McKay & Orr.*

EVANS, COLEMAN & EVANS LIMITED, *ET AL.* v. THE ROMAN PRINCE.

MARTIN, LO. J.A.

1924

May 13.

EVANS, COLEMAN & EVANS v. THE ROMAN PRINCE

Admiralty law — Practice — Amendment of proceedings — Adding party plaintiff—Failure to amend in accordance with order—Circumstances negativing election to abandon amendment—Amendment of judgment and prior proceedings allowed.

In the course of trial in the Admiralty Court plaintiff was allowed to amend by adding a party plaintiff, but failed to formally amend pursuant to the order and entered the formal judgment with only the original plaintiff named therein, and proceeded to assess damages before the registrar.

Held, in the circumstances (set out in the judgment) plaintiff had not elected to abandon the order for amendment and should be allowed to have the judgment and prior proceedings amended in accordance therewith.

MOTION to amend judgment by adding a name as party plaintiff. Heard by MARTIN, Lo. J.A. at Vancouver on the 11th of April, 1924. Statement

Hossie, for plaintiff.
Griffin, for defendant.

13th May, 1924.

MARTIN, Lo. J.A.: This is a motion to amend the judgment herein after it has been duly entered by adding the name of the Evans, Coleman Wharf Company Limited to the style of cause as a party plaintiff. The fact is that during the course of the trial a motion was made by plaintiff to amend the proceedings by adding the Wharf Company as a plaintiff with its consent, and after a lengthy argument the amendment was allowed on the 13th of July last, as clearly appears by my notes and by the registrar's record. No terms were imposed upon the plaintiff other than it was to pay such costs as I might decide in my discretion would be just in the circumstances, as to which many authorities were cited; the plaintiff accepted this position and I reserved judgment after argument thereupon and the case proceeded and was decided by me upon the proper assumption that the Wharf Company was a party plaintiff. In the brief note of my judgment, which I handed down on the Judgment

MARTIN, L.O. J.A.

1924

May 13.

EVANS, COLEMAN & EVANS v. THE ROMAN PRINCE

27th of November, 1923, in advance of my reasons for judgment, I used, as ordinarily and informally in such case, an abbreviated style of cause omitting the added plaintiff, and later, when the formal order was drawn up, by some strange oversight or misapprehension of the said amending order of the 13th of July last, the name of the added plaintiff was omitted. It is now sought to rectify this slip and error by amending the judgment so that it shall contain the names of both plaintiffs. In opposition to the motion it is objected that by failing to formally amend the proceedings pursuant to the order which it is conceded was made, and by taking out and entering the formal judgment, with only the original plaintiff named therein, and by proceeding thereunder to assess the damages before the registrar the plaintiff has evidenced its election to abandon the said amending order and therefore the present motion should not be granted. In answer to this objection, the plaintiff's counsel says that he had no intention whatever of abandoning the order which he accepted at the trial, and that the error he fell into was occasioned by an erroneous note in his brief made at the trial that the whole question of amendment was reserved and not only the costs thereof; that he was confirmed in his error by misapprehending my said advance note of judgment; and that the proceedings before the registrar were simply to ascertain the amount of the damages and had no reference to the liability of any party therefor, which was a question for the Court and could not be referred, and hence no prejudice to the defendant has been occasioned by the said slip or error.

Judgment

In all the unusual circumstances I would not be justified, I think, in coming to the conclusion that there has been an election by plaintiff to abandon the order it obtained and accepted after strong opposition: abandonment is always a question of intention and after the reasonable explanation given by counsel for the omission of the name in the judgment and the prior failure to actually make the amendment ordered at the trial, I see no good reason for refusing to amend the style of cause in the judgment to shew its true state, because as it now stands it does not represent the judgment I intended to deliver, in that one of the parties to it has been excluded from the proceedings after I

MARTIN, LO. J.A.

1924

May 13.

EVANS, COLEMAN & EVANS v. THE ROMAN PRINCE

ordered that it should be included, hence in a very important particular, *viz.*, as to the parties before it, the judgment of the Court is misrepresented upon its own records. Such being the position of the matter there can be no question about my jurisdiction to make the judgment conform to the true position of affairs in which it was pronounced, which I consequently order to be done, and leave is also given, as prayed, to make such other amendments in the prior proceedings as may be necessary.

The costs of and occasioned by this motion shall be costs to the defendant and set off against those due to the plaintiffs.

In connection with my observations during the argument as to the wide and absolute nature of the powers given by our Admiralty Rules 29-32 over the interests of "Parties," I deem it desirable to refer to my judgment of the 7th inst., in this Court, in *Wrangell* v. *The Steel Scientist* [*ante*, p. 114], wherein the decision of the Privy Council in *Dominion Trust Company* v. *New York Life Insurance Co.* (1918), 3 W.W.R. 850; (1919), A.C. 254, is considered, and it fortifies me in the view I have taken of the effect of the sweeping language employed in the rules under which I made the amendment.

Judgment

Motion granted.

EVANS, COLEMAN & EVANS LIMITED *ET AL.* v. THE ROMAN PRINCE. (No. 2).

MARTIN, LO. J.A.

1924

May 14.

EVANS, COLEMAN & EVANS v. THE ROMAN PRINCE

Costs—Admiralty—Costs of amendment at trial adding party plaintiff—Costs of trial following event—Question as to there being a "separate issue."

It was held that the costs of and consequent upon an amendment, made upon motion by plaintiff (who succeeded in the action) in the course of trial in the Admiralty Court, adding a party plaintiff, should, in the circumstances of the case, be paid by plaintiff to defendant in any event, being set off against the costs due by the defendant. Cases reviewed.

It was held, that the costs of the trial should follow the event, the defendant's contention, that the dispute as to the propriety of employing only two tugs instead of three should be regarded as a separate issue of

MARTIN, LO. J.A.

1924

which defendant should get the costs, being rejected. *The Ophelia* (1914), P. 46, distinguished; *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1919), 26 B.C. 560, referred to.

May 14.

EVANS, COLEMAN & EVANS *v.* THE ROMAN PRINCE

MOTION to settle certain questions of costs reserved under a judgment for the plaintiffs. Heard by MARTIN, Lo. J.A. at Vancouver on the 11th of April, 1924.

Hossie, for plaintiff.
Griffin, for defendant.

14th May, 1924.

MARTIN, Lo. J.A.: This is a motion to settle certain questions of costs reserved under the judgment for the plaintiffs herein of the 27th of November last.

First, as to the amendment granted on the 13th of July during the hearing, adding The Evans, Coleman Wharf Company Limited as plaintiff, I have carefully considered this question in the light of the special circumstances of the case, which must always govern the exercise of a proper discretion, since it is impossible to formulate any general rule which could adequately cover or anticipate those ever-varying circumstances which should determine the application of a milder or stricter order for costs. Many cases have been cited by counsel and referred to by me, and the matter was recently considered by my brothers and myself in the Court of Appeal in *Farquharson* v. *Canadian Pacific Ry. Co.* (1922), 3 W.W.R. 537; 31 B.C. 338, wherein the decision of the learned trial judge was set aside because a wrong principle had been applied, and we noted also that even if there had been no such error the imposition of milder terms was open to his discretion, as in *E. M. Bowden's Patents Syndicate Limited* v. *Herbert Smith & Co.* (1904), 2 Ch. 86 at pp. 92 and 122; 73 L.J., Ch. 522, 776; and I note that in *Performing Right Society* v. *London Theatre of Varieties* (1922), 2 K.B. 433, leave was given to add the publishers as necessary co-plaintiffs to maintain a copyright action even after the case had been appealed and argued, upon the terms as to costs that "all the defendants' costs of action thrown away by the fact that up to the moment of amendment the action was not maintainable, should be the defendants in any event" (pp. 460-1). In

Statement

Long v. *Crossley* (1879), 13 Ch. D. 388 at p. 391 a similar amendment was allowed at the trial, "the plaintiffs paying the consequent costs" of it and of the adjournment of the trial which became necessary. A striking case in Admiralty is *The Duke of Buccleuch* (1892), P. 201, wherein leave was given to add a necessary plaintiff, even after an appeal to the House of Lords, in order to correct a mistake and enable a claim for damages to be assessed upon payment of the costs of the application, pp. 210 and 211-2. That is an informative case also, upon the trial, judgment and assessment of damages in Admiralty, and the following instructive observations below occur on pp. 209-10:

"The practice in the Admiralty Court goes far to shew that a decree at the hearing was never considered final in the sense that a person could not be introduced afterwards as a party to the suit for the purpose of getting assessed and receiving damages. In the case of *The Ilos* [(1856)], Sw. 100, where an action was brought, not by the registered owner, but a person having a bill of sale (whether taken after or before the collision does not appear), Dr. Lushington, when the matter was before the registrar and merchants, refused to dismiss the defendant on the ground of want of title in the plaintiff, ordered the reference to proceed, and added, that if there was any doubt who was entitled to receive the amount of compensation, after it had been assessed, he should direct the amount to be paid into the registry, and throw upon the party claiming it the onus of establishing his ownership.

"In *The Minna* (1868), L.R. 2 A. & E. 97, Sir Robert Phillimore approved and followed the case of *The Ilos* (1856), Sw. 100.

"It is said by Mr. Barnes, that in both these cases the plaintiffs on the record had, or might have had, beneficial rights; but that does not appear to me to meet the point that the Court of Admiralty considered the decree of the judge as leaving still open the question of the title of the plaintiffs as owners of ship or cargo."

Judgment

And see Lord Esher's remarks on p. 211. It is to be noted that the new plaintiff was added (pp. 210, 212), not substituted as erroneously stated in the head-note.

I am of opinion that in the circumstances of this case the proper order to make is that the costs of and consequent upon the amendment should be paid by the plaintiff to the defendant in any event, being set off against those due by the defendant.

Second, as to the costs of the trial, I have come to the conclusion that they should follow the event, as in general accordance with rule 132, and do not deem it "fit" to make any other order. I have given full and careful consideration to Mr.

MARTIN, LO. J.A.

1924

May 14.

EVANS, COLEMAN & EVANS v. THE ROMAN PRINCE

Judgment

Griffin's submission that the dispute as to the propriety of employing only two tugs instead of three should be regarded as a separate issue, of which the defendant should get the costs, and he relied particularly upon *The Ophelia* (1914), P. 46. But in that case there were two quite distinct issues, the first being a question of faulty navigation, and the second, compulsory pilotage, which if established would have exonerated the defendant ship from liability even if negligent, as pointed out by Lord Parker at p. 51. But in the case at Bar the issue was faulty navigation only (apart from title) in the continuous execution of one manœuvre, and in the determination of that question, in the circumstances herein, the proper employment of one or more tugs was really no more a separate issue than, *e.g.*, the proper employment of a hawser, of an anchor, or of the steering gear to make allowance for wind or tide. This view is consistent with the principle of the decision of the British Columbia Court of Appeal in *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1919), [26 B.C. 560]; 1 W.W.R. 783, wherein the observations I made, on p. 786, are in point and cover the present question upon lines identical in principle with *The Ophelia* case.

As to the remaining questions of admissions, and costs of the two plaintiffs, I see no good reason, in the circumstances, for excluding them from the general rule; the names of the two plaintiffs are, in pursuance of my judgment of yesterday, upon the record and should have been upon it when the formal judgment was entered, and I think that no sound reason has been advanced for the removal of either of them from said record, even if this were the proper occasion to do so and in the absence of a substantive motion to that effect, and in view of the appeal which has been taken from said judgment. The costs of this motion will be in the cause.

REX v. SHERIDAN.

MURPHY, J. (At Chambers)

1924

May 19.

REX v. SHERIDAN

Criminal law—Sale of medicine containing acetanilide—Not registered as licentiate under Pharmacy Act—Provisions of The Proprietary or Patent Medicine Act complied with—R.S.B.C. 1911, Cap. 178, Sec. 23—B.C. Stats. 1915, Cap. 59, Sec. 87—Can. Stats. 1908, Cap. 56, Sec. 14; 1919, Cap. 66, Sec. 5(1).

Vendors of proprietary or patent medicines registered and put up in compliance with The Proprietary or Patent Medicine Act and containing any of the substances set out in Schedules A and B of the Pharmacy Act are not subject to the provisions of section 23 of the Pharmacy Act if they have complied with all the provisions of The Proprietary or Patent Medicine Act.

The Proprietary or Patent Medicine Act is *in pari materia* with section 23 of the Pharmacy Act. The Dominion Act lays down conditions under which acetanilide can be sold. Applying said section 23 to the same facts, both legislative bodies are legislating about the same thing and with the same object, *i.e.*, the protection of the public. The Provincial legislation is therefore inoperative.

APPEAL by way of case stated from the stipendiary magistrate at Vancouver under section 87 of the Summary Convictions Act, B.C. Stats. 1915, Cap. 59. The accused was charged with selling acetanilide not being registered as a licentiate of pharmacy under the Pharmacy Act, R.S.B.C. 1911, Cap. 178, and amending Acts. Counsel for the accused admitted (1) that accused sold the tablets produced; (2) that he was not registered as a licentiate of pharmacy under the Pharmacy Act. Counsel for the complainant admitted: (1) that accused sold the tablets produced in the same state as when he purchased them; (2) that accused purchased the tablets from a company holding a licence granted under The Proprietary or Patent Medicine Act, Can. Stats. 1908, Cap. 56, and amending Acts; (3) that accused complied with the provisions of The Proprietary or Patent Medicine Act; (4) that the tablets comply with the provisions of The Proprietary or Patent Medicine Act. It was found in the evidence: (1) that the tablets sold the accused each contained 1.94 grains of acetanilide; (2) that the box containing the tablets had written on it "Watkins headache tablets, acetanilide, two grains to

Statement

MURPHY, J. (At Chambers)

1924

May 19.

REX v. SHERIDAN

tablet." On the above facts and admissions the charge was dismissed on the ground that the accused was entitled to the protection afforded by section 14 of The Proprietary or Patent Medicine Act. The following questions were submitted to the Court:

"1. Are the provisions of section 23 of the Pharmacy Act, being R.S.B.C. 1911, Cap. 178, and amending Acts, applicable to persons vending proprietary or patent medicines registered under and put up in compliance with the said The Proprietary or Patent Medicine Act, being chapter 56 of the Acts of the Dominion of Canada for 1908 and amending Acts, where such proprietary and patent medicines contain any of the substances set out in Schedules A and B of said Pharmacy Act and when the accused vendors have complied with all the provisions of The Proprietary or Patent Medicine Act?

Statement

"2. Is it necessary for a person selling a proprietary or patent medicine containing acetanilide put up in compliance with the provisions of the said The Proprietary or Patent Medicine Act to have the qualifications required by section 23 of the Pharmacy Act if he has complied with all the provisions of The Proprietary or Patent Medicine Act?"

Heard by MURPHY, J. at Chambers in Vancouver on the 13th of May, 1924.

Reid, K.C., for the Crown.
J. E. Bird, for defendant.

19th May, 1924.

MURPHY, J.: I would answer the first question in the affirmative. The concluding sentence of section 5, subsection 1, of The Proprietary or Patent Medicine Act Amendment Act, Cap. 66, Can. Stats. 1919, reads:

"Such licence shall permit the sale of such medicine in Canada during the term of such licence."

The facts stated shew a licence was in existence in reference to the particular patent medicine in question. I cannot accede to the argument that the word "permit" merely implies the placing of this medicine on the footing of an ordinary article of commerce subject to any regulations a Province might enact. The language seems to me to plainly indicate that once the licence is granted the Dominion Parliament authorizes sale throughout Canada. If so, admittedly, the Province cannot cut down such right. If I am wrong in this, then I think the Dominion Act is *in pari materia* with section 23 of the Pharmacy Act, R.S.B.C. 1911, Cap. 178. The "pith and marrow"

Judgment

of the Dominion Act with respect to the sale of patent medicines is the prescribing certain conditions and limitations for the protection of the public: *Rex* v. *Warne Drug Co. Ltd.* (1917), 37 D.L.R. 788 at p. 789. Applied to the facts here, that means the Dominion Parliament has laid down the conditions under which acetanilide can be sold. Applying section 23 of the Pharmacy Act (R.S.B.C. 1911, Cap. 178) to the same facts, it is clear, I think, that both legislative bodies are legislating about the same thing and with the same object, *i.e.*, the protection of the public. Admittedly if this is so, the Provincial legislation is inoperative. For the same reasons, I would answer the second question in the negative. As this disposes of the case stated, I am not required to answer the third question.

Judgment

Conviction quashed.

Varied [1925] S.C.R. 45 — Affmd [1926] A.C. 140

Apld COURT OF APPEAL [1932] S.C.

IN RE TAXATION ACT AND ANDERSON LOGGING COMPANY.

Taxation—Income—Company dealing in timber licences, leases and timber lands—Agreement for sale of tract of timber—Large payment on purchase price—Liability to tax—B.C. Stats. 1921 (Second Session), Cap. 48, Sec. 36.

The Anderson Logging Company was incorporated with powers, *inter alia*, to stake, lease, record, sell and deal in timber licences, timber leases and timber lands and to cut and buy and sell timber and carry on a general business as loggers and dealers in logs and timber. In 1917 the Company sold certain timber under agreement whereby the purchase price was paid by instalments based on the timber cut. The agreement was carried out until the year 1920 when the conditions thereof were varied whereby the Company agreed to accelerate the payment of the purchase-money by a payment of $80,000 at once with balance in instalments. This sum was included in the profits for the year and by resolution declared available for dividends. The profits for the year which included this sum were assessed as income and the assessment was affirmed by the Revision Court judge.

Held, on appeal, affirming the decision of the Revision Court judge, that the Company's business is buying and selling timber, moreover, the profits on the sale of the timber in question were treated as profits available for dividends and they have thereby designated the character

COURT OF APPEAL

1924

June 4.

IN RE TAXATION ACT AND ANDERSON LOGGING CO.

of the accretion in their assets which precludes them from escaping taxation.

APPEAL by the Anderson Logging Company from the decision of the judge of the Court of Revision and Appeal of the 31st of October, 1923, on appeal from an amended assessment made on the 1922 roll in respect of income shewing a tax of $13,094.66. The Company was incorporated in 1907, its objects being to stake, lease, record, sell and deal in timber licences and cut, buy and sell timber and carry on a general business as loggers and dealers in logs and timber. In 1917 the Company sold certain timber under an agreement whereby the purchase price was payable in instalments based on the timber cut. This was carried out until 1920 when the conditions were varied whereby the Company agreed to accelerate the sale by a payment of $80,000 at once and the balance in instalments. This was treated as income and was included in the amended assessment of 1922. The Company appealed on the grounds that the profits derived from the sale of capital assets should not have been assessed as income as it is not "income" within the meaning of the Act and even if these moneys are income they are not taxable in the year for which they are assessed.

Statement

The appeal was argued at Vancouver on the 6th of March, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Craig, K.C., for appellant: The point is whether the money in respect of which we were assessed is income or whether it can be looked upon as profits derived on a pure sale of the Company's assets. The Company had power to buy and sell lands and timber. That the Company had power to sell licences has no bearing on the question because in fact that was not the Company's business. They sold their entire assets for a certain sum. *In re Taxation Act and The All Red Line, Ltd.* (1920), 28 B.C. 86 is the same case as this exactly. We are going out of business which does not produce income, it is carrying on business that produces income: see *Cross* v. *Imperial Continental Gas Association* (1923), 2 Ch. 553 at pp. 564-5. These are profits that are not income. There is $13,000 involved in

Argument

this case. On the question of whether gain is income or an appreciation of capital see Plaxton and Varcoe's Dominion Income Tax Law, 1921, 154-5; *Californian Copper Syndicate (Limited and Reduced)* v. *Inland Revenue* (1904), 6 F. 894. In any event this profit was not assessable in 1922 which is confined to the profits of 1921. The property in question was sold and paid for in 1920.

Killam, for respondent: They got these timber limits and nursed them along for such a sale as this. They did a very small business and each year they had a loss on the work done. They are acquiring and selling logging and timber properties; this is their business, and this is what they did. *In re Taxation Act and The All Red Line, Ltd.* (1920), 28 B.C. 86 is totally different, as they were not dealing in ships there, they were operating them: see *Stevens* v. *Hudson's Bay Company* (1909), 101 L.T. 96 at p. 98; *Scottish Union and National Insurance Co.* v. *Inland Revenue* (1889), 16 R. 461 at pp. 472 and 474; *Scottish Investment Trust Co., Limited* v. *Inland Revenue* (1893), 21 R. 262 at p. 266; *The Assets Co., Limited* v. *Inland Revenue* (1897), 24 R. 578; *Mersey Docks* v. *Lucas* (1883), 8 App. Cas. 891; *Commissioner of Taxes* v. *Melbourne Trusts, Lim.* (1914), 84 L.J., P.C. 21 at p. 25; B.C. Stats. 1921 (Second Session), Cap. 48, Secs. 36 (1) and (2). Argument

Craig, in reply: Under the present statutes there would be no assessment for the 1920 income.

Cur. adv. vult.

4th June, 1924.

MACDONALD, C.J.A.: Two questions are involved in this appeal. Appellants contend that what is sought to be assessed as income is in reality capital. They also contend that if it is income, it was not assessable in the year 1922, the year of assessment. MACDONALD, C.J.A.

The statute under which the assessment was made is the Income and Personal Property Taxation Act, Cap. 48, B.C. Stats. 1921 (Second Session), Sec. 36. Under this statute income of 1921 is assessable and payable in 1922. If, therefore, the income in question was income of 1921, it was rightly assessed in 1922.

COURT OF APPEAL

1924

June 4.

IN RE TAXATION ACT AND ANDERSON LOGGING CO.

MACDONALD, C.J.A.

The appellant was incorporated, *inter alia,* with powers to buy and sell timber. It bought the tract of timber in question and re-sold it at a profit, and it is that profit which is assessed as income. It is, I think, clear that a company whose business it is to buy timber for re-sale, cannot escape taxation by treating each purchase as capital and the increased selling price as an accretion to capital. Such a ruling would reduce the income tax law to a farce. Now, whether the business of the appellants is that of speculating in timber lands or not, is a question of fact. They took power to do it and they have, as the Court below has pointed out, treated the profits on the sale of the timber in question as profits and available for dividends. They themselves have designated the character of the accretion to their wealth by declaring it available for dividends.

That this profit was income of 1921 the appellant itself has by its books and proceedings declared. It was therefore properly assessed and made payable in 1922.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with the reasons for judgment of my brother the Chief Justice, and agree with the proposed disposition of the appeal.

Appeal dismissed.

Solicitor for appellant: *James H. Lawson.*
Solicitor for respondent: *J. W. Dixie.*

HOWARD v. MUNICIPALITY OF SOUTH VANCOUVER.

MCDONALD, J.

1924

June 6.

HOWARD v. SOUTH VANCOUVER

Negligence — Damages — Drain — Faulty construction by municipality — Notice of accident—Reasonable excuse for want of—B.C. Stats. 1914, Cap. 52, Sec. 486.

Section 486 of the Municipal Act provides, *inter alia*, "that a municipality shall in no case be liable for damages in any such action [stated in section 484] unless notice in writing setting forth the time, place and manner in which such damage has been sustained, shall be left and filed with the municipal clerk within two calendar months from the date on which such damage was sustained. The want of notice required by this section shall not be a bar to the maintenance of an action if the Court or judge before whom such action is tried or in case of appeal, the Court of Appeal is of opinion there is reasonable excuse for the want of notice and that the defendant has not thereby been prejudiced in his defence."

In an action for damages for injuries sustained by the plaintiff for falling into a drain a jury found the accident was due to the negligent construction of the drain by the defendant Municipality, but the plaintiff had not given the notice required by said section 486 of the Municipal Act. The evidence disclosed that the plaintiff was deaf and dumb and the only other member of his household, *i.e.*, his wife, could neither read nor write, not even knowing the letters. Further the injuries sustained did not appear to be serious until after two months had expired.

Held, that in the circumstances there was reasonable excuse for failure to give the notice required under section 486 and the plaintiff was entitled to bring his action.

ACTION for damages for injuries sustained by the plaintiff in falling into a drain constructed by the defendant Municipality. The jury found that the accident was due to the faulty construction of the drain but it appeared on the evidence that the plaintiff did not give notice in writing setting forth the time, place and manner in which the damage was sustained within two months as required by section 486 of the Municipal Act. Judgment was reserved on the question of whether there was reasonable excuse for want of notice. Tried by MCDONALD, J. at Vancouver on the 27th of May, 1924. Statement

Bray, and *Richmond*, for plaintiff.

D. Donaghy, for defendant.

MCDONALD, J.

1924

June 6.

HOWARD v. SOUTH VANCOUVER

6th June, 1924.

McDONALD, J.: In this action the plaintiff sues for damages sustained by reason of his having fallen into a drain which the jury have found to have been negligently constructed by the defendant Municipality.

By section 486 of the Municipal Act, it is provided that in any such action the municipality shall not be liable unless notice in writing setting forth the time, place and manner in which the damage has been sustained has been left and filed with the municipal clerk within two calendar months from and after the date upon which such damage was sustained; but it is provided further that the want or insufficiency of the notice shall not be a bar to the maintenance of the action if the Court is of opinion that there was a reasonable excuse for the want or insufficiency of the notice and that the defendant has not been thereby prejudiced in its defence. I reserved for consideration the question of whether or not there was a reasonabl excuse in the present case for the failure to give the written notice. It is not seriously contended that the defendant was prejudiced in its defence, and I have no difficulty in finding that it was not so prejudiced because, immediately after the accident, the defendant, through various of its officers and councillors knew of the accident and investigated the circumstances surrounding the same. Having so found I adopt, with respect, the language of Mr. Justice Anglin in *O'Connor* v. *City of Hamilton* (1904), 8 O.L.R. 391 at p. 396, where that learned judge says, in dealing with a similar statute in Ontario:

Judgment

> "I do not hesitate to say that where there has been no prejudice to the defendants I shall strive to find in the circumstances something, however slight, which may serve as a reasonable excuse."

From a perusal of the Ontario cases one is forced to the conclusion that every case must be dealt with by itself. It has been fairly well established that certain things, as for instance, ignorance of the law, are not reasonable excuses, but it is more difficult to lay down any rule as to what are reasonable excuses. In the present case, the plaintiff is deaf and dumb and, unfortunately for him, the only other member of his household, *viz.*, his wife, can neither read nor write; in fact she does not know the letters of the alphabet. The injuries

MCDONALD, J.

1924

June 6.

HOWARD v. SOUTH VANCOUVER

sustained by the plaintiff appeared at first not to be serious and while he discussed the accident with some of the officers of the Municipality and in fact wrote some sort of unintelligible note to some one at the municipal hall, he really did not consider that he was seriously injured until after the period during which the notice ought to have been given had elapsed.

Under these circumstances, while I feel that the case is very close to the line, I think I ought to hold that there was a reasonable excuse for the failure to give the notice, and there will be judgment for the plaintiff.

Judgment

Judgment for plaintiff.

REX v. PERRO.

COURT OF APPEAL

1924

June 16.

REX v. PERRO

Criminal law—Intoxicating liquors—Sale of beer—Summary conviction—Appeal—Application to amend charge—Appeal from refusal—B.C. Stats. 1921, Cap. 30, Sec. 46; 1922, Cap. 45, Sec. 7.

An accused was convicted and sentenced to one month's imprisonment with hard labour on a charge of selling "a liquid known or described as beer." On appeal to the County Court the Crown moved to amend the charge by adding after the word "beer" the words "which is liquor within the meaning of the Government Liquor Act." This was refused for want of jurisdiction on the ground that the proposed amendment describes a different article from the beer as originally contemplated under section 46 of the said Act and therefore is a different offence.

Held, on appeal, reversing the decision of CAYLEY, Co. J. (MCPHILLIPS, J.A. dissenting), that there is only one offence contemplated by the Act the object of the section being merely to add a penalty to the original offence.

Rex v. *Smith* (1923), 32 B.C. 241 followed.

Per MARTIN, J.A.: This is an appeal from the decision of the judge dismissing an appeal by the accused from a conviction by the police magistrate under the Provincial Summary Convictions Act. That Act makes no provision for questions being reserved by the County judge when an appeal is taken from his judgment under section 6(4) (*f*) of the Court of Appeal Act which gives an appeal to this Court as of right and is subject to our ordinary jurisdiction. The questions submitted should be disregarded and the hearing of the appeal proceeded with in the ordinary way upon the points of law raised.

Disted
In re The Wages Recovery Act
Seymour v Morgan
(1939) 1 W.W.R. 317.
47 M.R. 19

COURT OF APPEAL

1924

June 16.

REX v. PERRO

Statement

APPEAL by way of case stated from the decision of CAYLEY, Co. J. of the 13th of December, 1923 (reported, 33 B.C. 189), on a motion by the Crown to amend a charge for selling a "liquid known and described as beer" made on an appeal from a conviction by the police magistrate at Vancouver wherein the accused was convicted for unlawfully selling a liquid known or described as beer to H. McLeod contrary to the provisions of section 46 of the Government Liquor Act. Crown counsel asked leave to amend the charge by the addition after the word "beer" of the words "which is liquor within the meaning of the Government Liquor Act contrary to section 46 of the Government Liquor Act, chapter 30, B.C. Stats. 1921, and section 7 of the Government Liquor Act Amendment Act, 1922, being chapter 45, B.C. Stats. 1922." Permission to so amend was refused and the accused then pleaded guilty to the charge. Crown counsel then asked leave to call evidence to shew what quality or strength the beer was but this was refused except to shew that the accused should be fined the maximum fine. The questions submitted were as follows:

"1. Should I have allowed the amendment asked for by counsel for the Crown?

"2. Should I have allowed the Crown to call evidence to shew that the offence pleaded to was punishable by imprisonment under section 46 of the Government Liquor Act as amended by section 7, chapter 45, B.C. Stats. 1922?"

The appeal was argued at Vancouver on the 4th of March, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Argument

Orr, for appellant: We should have been allowed to put in evidence of the percentage of the beer in order to bring the case within the severer punishment. We should have been allowed to amend but if not we were at least entitled to give evidence of the strength of the beer: see *Rex* v. *Smith* (1923), 32 B.C. 172 and on appeal p. 241. The charge as originally laid was sufficient to sustain a sentence of imprisonment.

J. W. de B. Farris, K.C., for accused: There are two distinct offences: (a) a sale of beer of less than one per cent. for which the penalty is provided in section 63; and (b) when more than

one per cent. the penalty is provided by the 1922 amendment to section 46. The cases on these sections are *Rex* v. *Caskie* (1923), 2 W.W.R. 451; *Rex* v. *Goslett* (1923), 32 B.C. 216; *Rex* v. *Smith* (1923), 32 B.C. 172 and 241. The applications were properly refused.

Orr, in reply, referred to *Reg.* v. *Weir* (*No. 3.*) (1899), 3 Can. Cr. Cas. 262; *Rex* v. *Cohen* (1912), 19 Can. Cr. Cas. 428; *Rex* v. *Benson* (1908), 2 K.B. 270; *Rex* v. *Dunlap* (1914), 22 Can. Cr. Cas. 245; *Rex* v. *Nat Bell Liquors Ltd.* (1922), 2 A.C. 128; (1922), 2 W.W.R. 30 at p. 61.

Argument

Cur. adv. vult.

16th June, 1924.

MACDONALD, C.J.A.: The information charged that the respondent did unlawfully sell a liquid known or described as "beer." The respondent was convicted of the charge and sentenced to imprisonment by the magistrate. He thereupon appealed to the County Court. When the appeal came on for hearing counsel for the Crown asked leave to amend the charge by adding after the word "beer" the words "which is liquor within the meaning of the Government Liquor Act." This amendment was refused, the learned County Court judge giving as his reason for refusing it that the amendment involved an entirely new charge and that he had therefore no power to make the amendment. He came to this conclusion after hearing argument by Mr. *Farris,* counsel for the appellant, to the effect that the section ought to be construed as embracing two separate offences; one relating to the sale of a liquid described or labelled "beer," whether intoxicating or not; the other to the sale of a liquid described as "beer" which is intoxicating. He contended that a person would be guilty of an offence against this section if he sold a liquid labelled beer containing no alcohol, and would be subject to a fine for doing so, but not to imprisonment. He construed the section also as providing for imprisonment in the case of selling a liquid described as "beer" which was intoxicating. I cannot agree with that construction of the section. I think we must follow our own decision in *Rex* v. *Smith* (1923), 32 B.C. 241, the *ratio decidendi* of

MACDONALD, C.J.A.

COURT OF APPEAL

1924

June 16.

REX v. PERRO

which is applicable. The object of the section is, I think, perfectly clear. It was to impose a penalty upon those who should sell intoxicating beer.

There is only one offence contemplated by the Act. Therefore, when the learned judge based his decision upon the ground that the section embraced two distinct offences, and that the sentence could not be sustained except on an amended charge, and without trial on the original charge, reduced the sentence, he made a mistake in law.

MACDONALD, C.J.A.

As the trial in the County Court is a trial *de novo,* and as the trial and appeal are governed by Provincial law, which by section 6 of the Court of Appeal Act, gives an appeal on a point of law, we ought to order a new trial, so as to permit of the re-hearing in the County Court. The judgment, therefore, should be set aside and a new trial ordered.

MARTIN, J.A.: This appeal wrongly comes before us in the shape of questions reserved on a case stated by Judge CAYLEY of the County Court of Vancouver on an appeal from his judgment dismissing an appeal by the accused from a conviction by the police magistrate for the City of Vancouver under the Provincial Summary Convictions Act, B.C. Stats. 1915, Cap. 59, but that Act makes no provision for questions being reserved by the County judge when an appeal like this is taken from his judgment under section 6 (4) (*f*) of the Court of Appeal Act, which gives an appeal to this Court as of right

MARTIN, J.A.

"From . . . . any point of law taken or raised on an appeal to the County Court under the Summary Convictions Act."

When such an appeal comes before us it is, as we have more than once decided, subject to our ordinary jurisdiction and is a "re-hearing" pursuant to such of our appellate rules 865 *et seq.,* as may be applicable to cases of a *quasi*-criminal matter as this is, and, in particular, one of said rules is 868, which gives us, where necessary, the power to

"draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. . . . ."

I make these observations because the present innovation upon our practice is a bad precedent and if allowed to go without remark might easily result in the misleading and harmful belief

that our powers could be curtailed or narrowed because the learned judge below erroneously adopted a procedure by questions reserved which, while appropriate to other statutes, is unauthorized by the statute under which he acted, having apparently, I say so with due respect, confused his powers with those conferred upon a justice of the peace to state a case to the Supreme Court under section 87 *et seq.*, from which an appeal also lies to us under section 6 (4) (*e*). And I also observe that in his formal judgment he assumes to give leave to appeal to us, which is a matter not open for his consideration.

I shall, therefore, disregard the questions and proceed to hear the appeal in the ordinary way upon the two points of law which were admittedly raised below and are restated in the notice of appeal.

The first point is as to whether or no there are two distinct offences under section 46 of the Government Liquor Act, B.C. Stats. 1921, Cap. 30, as amended, and I am of opinion that were it not for the judgment of the majority of this Court in *Rex* v. *Smith* (1923), 32 B.C. 241 the argument advanced by Mr. *Farris* that the subsection 46 (2), added by Cap. 45, Sec. 7, of 1922, discloses two distinct offences should prevail, but after a close examination of that decision (which, of course, it is my duty to loyally give effect to, despite the dissent of one of my brothers as well as my own) I am constrained to regard the amendment as merely adding a penalty and not creating a new offence; that, I apprehend, must follow from what the Chief Justice said at p. 243:

MARTIN, J.A.

"What the Legislature manifestly intended was to impose a new penalty for the selling or dealing in the liquid mentioned in the said section 46; the context clearly indicates this, and therefore, I think the appeal should be dismissed."

And at pp. 245-6, Mr. Justice GALLIHER said:

"Where we find that the amendment itself provides a penalty for the particular offence named in section 46 the words 'liquid which is liquor within the meaning of this Act' have, I think, reference to a liquid containing more than one per centum of alcohol by weight."

Such being the case I can only regard the whole amended section as dealing with one offence to which different penalties are attached in different circumstances.

Then as to the second point, *viz.*, that the learned County

COURT OF APPEAL

1924

June 16.

REX v. PERRO

judge should have allowed the application to amend the charge which the Crown, respondent, made when the appeal was opened before him, by adding after the word "beer" the words "which is liquor within the meaning of the Government Liquor Act, contrary," etc. As I understand his reasons the learned judge was disposed to allow the amendment but thought that he had not the "right" to do so (by which I assume he means "jurisdiction"), being of the opinion that the "amendment charged another offence altogether" (as the formal judgment recites) against the respondent, which opinion as to this effect of the added subsection is, as has been seen, erroneous, it being simply the addition of a new penalty in certain circumstances.

After a careful consideration of the whole Summary Convictions Act and many authorities thereupon, I am of opinion that the learned judge had the power to make such an amendment as was applied for: the appellant does not submit that his powers extend to that degree which would result in the conversion of the original charge into a new and distinct one. The trial before him was a trial *de novo,* as clearly appears by sections 77, 78 and 80, and has been so regarded in this Province for many years, *Cf. Re Kwong Wo* (1893), 2 B.C. 336, wherein Chief Justice BEGBIE, sitting as a County Court judge on an appeal under the Summary Convictions Act, 1889, Cap. 26, said at p. 340:

MARTIN, J.A.

"I am . . . . to try the case *de novo,* on the merits, as if the information were now brought first to be tried before myself."

And the same view has been taken by the Full Court of Nova Scotia in *Reg.* v. *McNutt* (1900), 4 Can. Cr. Cas. 392, holding, p. 398, that the judgment of the County judge must be "that which commends itself to his judgment as a just one, without regard to the findings below."

I agree with the opinion expressed by Mr. Justice Meagher in *Reg.* v. *Hawbolt* (1900), 4 Can. Cr. Cas. 229, 237, upon the corresponding section 883 of the Criminal Code, that "more comprehensive language could not have been used to shew the jurisdiction of the County Court to deal with the matter of this appeal . . . .," and I think that the sweeping power to make "such order in the matter as the Court thinks just" is ample to include the making of all amendments which do not pre-

judice the accused, and this view is supported by section 97, which recognizes amendments in appeal by declaring that

"No conviction or order made on summary conviction which has been affirmed, or affirmed and amended in appeal shall be quashed for want of form, or be removed by *certiorari* into the Supreme Court. . . . ."

Moreover, sections 62-3-4, remove a large number of objections to the sufficiency of any "information, complaint, warrant, conviction or other proceeding" and section 62 (2) empowers the justice (whose powers the County judge in appeal possesses, section 80) to order full particulars "to be furnished by the prosecutor" to the accused "if satisfied that it is necessary for a fair trial to do so," including the "means by which the offence was committed, and by 63 (4), to adjourn the hearing to attain that object "upon such terms as he thinks fit." The ordering of particulars to supply a deficiency in the information is in essence and in effect the amendment thereof by means of a supplemental document instead of a manual alteration. What was applied for herein was in reality leave to supplement the information by stating with full particularity "the means by which the offence was committed," because it was capable of being "committed in different modes" (section 64) with penalties appropriate to such difference. There is much in the case of *Rex* v. *Tally* (1915), 8 Alta. L.R. 454; 7 W.W.R. 1178, to confirm me in the view I have taken, particularly the observations of Mr. Justice Beck (p. 455) on section 724 of the Criminal Code, the language he quotes therefrom being the same as section 63 (1) of our Summary Convictions Act. This case is quite distinct from *Rex* v. *Boomer* (1907), 15 O.L.R. 321; 13 Can. Cr. Cas. 98, wherein no offence was proved before the justice; and the decision in *Rex* v. *Dunlap* (1914), 22 Can. Cr. Cas. 245 does not, with all due respect, commend itself to me.

MARTIN, J.A.

The order that this Court ought to make is, I think, that, the judgment appealed from should be set aside and a new trial proceeded with before the learned judge appealed from: I understand from his reasons and the formal judgment that he only refused the amendment because he thought he had not power to grant it.

COURT OF APPEAL

1924

June 16.

REX v. PERRO

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: In my opinion the appeal fails upon both grounds, without deciding (as it is in the present case unnecessary) whether there is the power to make an amendment in the abstract. It was not a proper case for amendment, as the offence charged was a distinct offence and that which was proposed would have been the laying of another and distinct offence. The Crown remained at liberty to take such further course as might be advised, that course though could not be by way of appeal.

In my opinion CAYLEY, Co. J. rightly refused leave to call evidence which could only be relevant to a charge where the information had relation to selling liquor within the meaning of the Government Liquor Act. I am clearly of the opinion that in the purview of the Act there are two offences and the lesser offence was the one the defendant was called upon to plead to, and to which he did plead, and a fine, as provided by the statute, and which was imposed, was the only permissible penalty. The offence as laid and to which the plea of guilty was entered does not admit of the imposition of imprisonment. The offence upon which the conviction was made is a new and purely statutory offence, not intrinsically evil, and whilst there may be an offence under the Act which will admit of the imposition of imprisonment, in fact imprisonment without the option of a fine, it is incumbent upon the Court, in my opinion, and CAYLEY, Co. J. so held, to lean towards the safeguarding of the liberty of the subject.

It would be contrary to all precedent to proceed upon an information for the lesser offence and then upon appeal obtain an amendment setting up another and distinct offence, and then call evidence for the first time to support and establish that other and distinct offence. That would not be proceeding by amendment, but laying in appeal a different and distinct offence to which the defendant had not theretofore been called upon to plead. Such procedure could not be looked upon with approval by any Court. Further it is not warranted by any authority cited or known to me. In this connection I would refer to Broom's Legal Maxims, 8th Ed., p. 127:

"The judges will bend and conform their legal reason to the words of the Act, and will rather construe them literally, than strain their meaning

beyond the obvious intention of Parliament (T. Raym. 355, 356, *per* Ld. Brougham, *Leith* v. *Irvine* [(1883)], 1 Myl. & K. [277 at p.] 289)."

And at p. 436:

"'The principle,' remarked Lord Abinger, 'adopted by Lord Tenterden (see *Proctor* v. *Mainwaring* [(1819)], 3 B. & Ald. 145), that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject, and I hope will always remain so.'"

MCPHILLIPS, J.A.

Applying this well-known principle, the present case is one that calls for the affirmation of the judgment under appeal, therefore being satisfied that CAYLEY, Co. J. arrived at the right conclusion, the appeal, in my opinion, should be dismissed.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McKay, Orr & Vaughan.*
Solicitors for respondent: *Farris & Co.*

REX v. LOUIE CHUE.

Criminal law—Summary conviction—Opium and Narcotic Drug Act, 1923—Information—Two distinct offences—Habeas corpus—Can. Stats. 1923, Cap. 22, Sec. 4(d)—Criminal Code, Sec. 710(3).

An accused was convicted for having "in his possession without lawful authority a narcotic drug, to wit: morphine contrary to section 4(*d*) of The Opium and Narcotic Drug Act, 1923." The information shewed that accused was called on to plead to an offence (a) having the drug in his possession without lawful authority, *e.g.*, without the written order or prescription of a duly authorized and practising physician, etc., as provided by section 5 of said Act; and (b) having it in his possession without first having obtained a licence from the minister.

Held, on *habeas corpus* that ingredients of two distinct offences had been mixed up together in the charge as laid in the information which is contrary to the settled principles of criminal procedure and in violation of section 710(3) of the Criminal Code. The prisoner was therefore entitled to his discharge.

Rex v. *Ferraro* (1924), 33 B.C. 491 distinguished.

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

1924

June 12.

REX v. LOUIE CHUE

Statement

APPLICATION for a writ of *habeas corpus*. The prisoner was convicted for having "in his possession without lawful authority a narcotic drug, to wit: morphine contrary to section 4 (*d*) of The Opium and Narcotic Drug Act, 1923." It appeared from the information that the prisoner was called to plead to an offence composed of two offences: (1) having the drug in his possession without lawful authority; (2) having it in his possession without first having obtained a licence from the minister. Heard by HUNTER, C.J.B.C. at Chambers in Vancouver on the 10th of June, 1924.

Mellish, for the accused.
Craig, K.C., for the Crown.

12th June, 1924.

HUNTER, C.J.B.C.: *Habeas corpus* proceedings to test the legality of a narcotic drug conviction. The commitment produced recited that the prisoner was charged "that he unlawfully did have in his possession without lawful authority a narcotic drug, to wit: morphine without first having obtained a licence from the minister contrary to section 4 (*d*) of The Opium and Narcotic Drug Act, 1923." Mr. *Craig,* for the Crown, having properly enough obtained a *certiorari,* put in a conviction stating that the prisoner was convicted for having "in his possession, without lawful authority, a narcotic drug, to wit: morphine contrary to section 4 (*d*) of The Opium and Narcotic Drug Act, 1923." The conviction, however, does not truly state what took place. The information shews that the prisoner was called on to plead to an offence compounded of two distinct offences: 1st, having the drug in his possession without lawful authority, *e.g.,* without the written order or prescription of a duly authorized and practising physician, etc., as provided by section 5 of the Act, and, 2nd, having it in his possession without first having obtained a licence from the minister. It is true that the latter part of the subsection mentions only "manufacturing, selling, giving away or distributing without first obtaining a licence from the minister," but none the less ingredients of two distinct offences have been mixed up together in the charge as laid in the information. This is not

Judgment

only contrary to the settled principles of criminal procedure but is in violation of subsection (3) of section 710 of the Code, which enacts as follows:

"Every complaint shall be for one matter of complaint only and not for two or more matters of complaint and every information shall be for one offence only and not for two or more offences."

The provisions of sections 710, 725 and 1124 are not applicable to a case of this kind and the case is obviously different from such a case as *Rex* v. *Ferraro* (1924), 33 B.C. 491. In that case the charge was for selling or keeping for sale contrary to section 26 of the Provincial Liquor Act and it was argued that selling and keeping for sale were two distinct offences and that therefore the rule had been violated. In reality it was not so, as the offence struck at by the section consists in the unlawful dealing with liquor and it is a mere detail or a variation in the manner of the offence as to whether the liquor is sold or kept for sale and such variations may appropriately be dealt with under the curative provisions which may be applicable thereto and in fact the Liquor Act specifically provides that several offences may be charged in the one information if the proceedings state the time and place of each offence. The prisoner will be discharged and there will be the usual protection order.

Judgment

Application granted.

MACDONALD, J.

1924

June 26.

SPORLE v. GREAT NORTHERN RAILWAY COMPANY.

Revs'd
35 B.C.R. 232

Railway—Negligence—Damages—Shipping of polo ponies from Portland to New Westminster—Injury to ponies before unloading—Special contract—Restriction of liability—Validity of contract—R.S.C. 1906, Cap. 37, Secs. 284(7), 340.

SPORLE v. GREAT NORTHERN RAILWAY CO.

The plaintiff delivered to the defendant Company at Portland, Oregon, four valuable polo ponies for carriage to New Westminster, B.C., under a special contract by which the Company's liability was not to exceed $150. The horses were carried by the Railway Company to New Westminster but prior to unloading they were badly injured through negligence for which the Company was responsible, the damages amounting to $3,000. In an action for the full amount of the damages suffered:—

Held, that as the defendant Company had failed to prove that the special contract was authorized or approved by order or regulation of the Board of Railway Commissioners as required by section 340 of the Railway Act the special contract is of no avail and the plaintiff is entitled to the full amount of damages suffered.

ACTION for damages for negligence. The plaintiff sent four valuable polo ponies to Portland, Oregon, for exhibition purposes. On the return journey and prior to their unloading, the ponies were badly injured through negligence for which the defendant Company was responsible, the plaintiff claiming $3,000 damages. The further necessary facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 2nd of June, 1924.

Statement

J. M. Macdonald, and *Laird,* for plaintiff.
A. H. MacNeill, K.C., for defendant.

26th June, 1924.

MACDONALD, J.: Plaintiff, being the owner of four valuable, well-bred polo ponies, shipped them from New Westminster, B.C., to Portland, Oregon, by the defendant Railway Company for exhibition purposes. He then re-shipped them by defendant Railway from Portland to this Province. Upon their arrival in the railway yards of the defendant at New Westminster, and while still in its possession, prior to unload-

Judgment

ing, they were badly injured, through negligence for which the defendant is answerable. The damages suffered by plaintiff would be at least $3,000. Defendant would, as a common carrier, be liable for this amount, unless it be relieved wholly or partially by special contract.

"Apart from statute a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability":

Viscount Haldane, L.C. in *Grand Trunk Railway Company of Canada* v. *Robinson* (1915), A.C. 740 at p. 744.

The onus rests upon the defendant of establishing such an effective contract, and in construing it, a strict interpretation should be applied, especially to any provisions, which are set up, as exempting the carrier from liability. In this connection, a portion of the judgment of Archibald, J. in *Alexander* v. *Canadian Pacific Ry. Co.* (1908), 33 Que. S.C. 438 at p. 441; 8 Can. Ry. Cas. 406 (affirmed on appeal (1909), 18 Que. K.B. 530) is appropriate:

"Starting from that principle, and applying the exemptions which the carrier stipulates, we find that they must be interpreted strictly against the carrier, because he is *prima facie* liable, and because he himself prepares the clause stipulating exemption, and must, consequently be bound by the strictest interpretation."

Judgment

Defendant, in support of its position, has proved a special contract, under date of the 12th of November, 1923. It states that the defendant has received from the plaintiff "subject to the classifications and tariffs in effect on the date of the issue of the agreement," the live-stock thereinafter described, in apparent good order. These valuable horses were by the terms of such contract shipped by him as "ordinary live-stock." I think, under these circumstances, without a lengthy discussion, the contract, coupled with the tariffs filed upon the trial, would, if statutory provisions do not control such a contract and the carriage of the horses, limit the liability of the defendant at common law, so that the plaintiff could only recover $150 for the injury, received by each of the horses. This would amount to $600, which has been paid into Court with the statement of defence.

While this contract was entered into, in the United States,

MACDONALD, J.

1924

June 26.

SPORLE v. GREAT NORTHERN RAILWAY CO.

still, the portion of the contract, requiring performance in Canada, became subject to the terms of the Dominion Railway Act (R.S.C. 1906, Cap. 37). Subsection 1(*c*) of section 284 of the Act provides that a railway company coming within its purview should "without delay and with due care and diligence receive carry and deliver" traffic brought to it for carriage. Subsection 7 of said section 284 provides that:

"7. Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant."

The words, "subject to this Act," in *Sutherland* v. *The Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139; 8 Can. Ry. Cas. 389, were considered, as naturally relating to section 340, which reads as follows:

"340. No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board."

It is assumed in this section that the Railway Company may enter into a contract restricting or limiting its liability with respect to the carriage of traffic. It does not specifically refer to such restriction or limitation being allowable, in a case of negligence, so as to destroy the effect of subsection 7 of 284, *supra*. Assuming, however, that section 340 applies, to any liability that might be incurred by the Railway Act; it is clear that the contract in order to afford relief against liability must have been "first authorized or approved" by order or regulation of the Board of Railway Commissioners. In the *Sutherland* case, *supra*, Osler, J.A. at p. 147, after referring to the effect of *Robertson* v. *Grand Trunk R.W. Co.* (1894), 21 A.R. 204; 24 S.C.R. 611, as deciding, under the Railway Act of 1903, that the railway company had power by contract to restrict, impair or limit its liability with reference to the amount of damages recoverable, even in the case of negligence, proceeds as follows:

Judgment

"We must take it that Parliament was aware that notwithstanding the provisions of sec. 246 of the Railway Act of 1888, this had been so held, and that they intended by sec. 340 of the present Act to qualify the rights

of the shipper and the railway company in this respect, and to declare that, unless authorized by the Board of Railway Commissioners, no contract, condition, declaration or notice limiting liability should be valid, but that if and to the extent to which such a class of contract was affirmed by the board it should stand good."

MACDONALD, J.

1924

June 26.

SPORLE v. GREAT NORTHERN RAILWAY CO.

It is contended that, on the strength of this statutory provision, the defendant cannot obtain even partial limitation of its liability, on the ground that no evidence has been adduced, proving that the contract or tariffs have been authorized or approved by the Board of Railway Commissioners. Defendant, in answer to this contention, submits that the tariffs shew the necessary authorization or approval, and that if they fail in this respect, such failure should have been pleaded by the plaintiff. There was no proof of authorization or approval given at the trial, such as enabled the Court to deal with an objection of like nature, in the *Sutherland* case. There, a certain order was proved, as having been made by the Board of Railway Commissioners, allowing the further use of a form of live-stock special contract, then in vogue by Canadian railway companies. Then, as to the necessity of the plaintiff pleading want of authorization or approval, I think this was an objection which he would not be required to set up before the trial. He had a right to assume, that the defendant in support of its contention of limited liability would produce evidence so as to bring such defence within the statute. I think the defendant has failed to supply proof in this respect and is not relieved from liability.

Judgment

Plaintiff is entitled to judgment for $3,000 damages with costs.

Judgment for plaintiff.

MACDONALD, J. (At Chambers)

1924

June 28.

IN RE ESTATE OF J. D. HELMCKEN, DECEASED

IN RE ESTATE OF J. D. HELMCKEN, DECEASED. HELMCKEN v. BULLEN.

Will—Life interest to wife—Division amongst children on death of wife—Children's interest during wife's life—Contingency.

A testator devised his estate to his wife during her life directing her to maintain, educate, and support their children out of the annual income. He then provided that after her decease his estate be devised to his brother "upon trust to pay and divide the same between and amongst such of my children as shall be living at the time of my decease in equal shares, and I direct that the share of any such child or children dying in the lifetime of my said wife leaving lawful issue him, her or them surviving shall enure to and go to the benefit of such issue and if more than one in equal shares so that such issue shall take only the share to which his, her or their parent would have taken if living at the time of the decease of my said wife."

Held, that the interest of the children does not vest in the lifetime of the widow but as to each of them is contingent upon him or her surviving the mother.

ORIGINATING SUMMONS taken out for the purpose of obtaining a judicial interpretation of the will of James Douglas Helmcken, deceased. Deceased made his will on the 27th of January, 1897, and died on the 2nd of April, 1919, being survived by his wife, all his children and certain grandchildren. Under his will he appointed his wife executrix and gave her a life interest in the estate with the provision that she should maintain, educate and support their children out of the annual income of the estate. The testator further provided that after the decease of his wife all his property be devised to his brother Harry Dallas Helmcken "upon trust to pay and divide the same between and amongst such of my children as shall be living at the time of my decease in equal shares." And a further direction as follows:

Statement

"I direct that the share of any such child or children dying in the lifetime of my said wife leaving lawful issue him, her or them surviving shall enure to and go to the benefit of such issue and if more than one in equal shares so that such issue shall take only the shares to which his, her or their parent would have taken if living at the time of the decease of my said wife."

The question for the Court was whether under the said will an interest became vested in the children of the testator during the life of their mother or whether the children only acquired a contingent interest in the property which became vested in them upon her decease. Heard by MACDONALD, J. at Chambers in Victoria on the 28th of May, 1924.

A. J. Helmcken, for executrix and trustee.
W. H. Bullock-Webster, for children of deceased.
J. Y. Copeman, for grandchildren of deceased.

28th June, 1924.

MACDONALD, J.: By his will, dated 27th January, 1897, the late James Douglas Helmcken disposed of his property, by giving his wife, Ethel Margaret Helmcken, a life interest therein with a provision that she should maintain, educate and support their children out of the annual income of the estate. Then the testator provided that from and after the decease of his wife all his property should be devised and bequeathed to his brother, Harry Dallas Helmcken, "upon trust to pay and divide the same between and amongst such of my children as shall be living at the time of my decease in equal shares."

A "direction" followed reading as follows:

"I direct that the share of any such child or children dying in the lifetime of my said wife leaving lawful issue him, her or them surviving shall enure to and go to the benefit of such issue and if more than one in equal shares so that such issue shall take only the share to which his, her or their parent would have taken if living at the time of the decease of my said wife."

Judgment

The testator died on the 2nd of April, 1919, without varying the terms of his will. A discussion having apparently arisen, the widow has felt warranted in applying to the Court to obtain its opinion as to the construction to be placed upon such portion of the will.

The question submitted for consideration is, whether under the will, an interest became vested in the children of the testator during the life of their mother or whether the children only acquired a contingent interest in the property which was dependent upon and only became vested in such of the children as should survive their mother.

MACDONALD, J. (At Chambers)

1924

June 28.

IN RE ESTATE OF J. D. HELMCKEN, DECEASED

In construing the will, the cardinal rule of principle to be kept in view is, that effect should, if possible, be given to the intention of the testator. The disposition by the testator to his brother in trust and naturally providing for distribution amongst his children, was clearly indicated. Was it intended, then, that this indication, as to the classes which should participate in the property was only to become effective after the decease of the widow? Did the fact that the trust only then arose and distribution was then to take place limit the rights of such class and prevent children obtaining a vested interest in the meantime?

Although the terms of the will are somewhat unusual, in providing for a life interest and after its termination then placing the property in trust, still, it is not unreasonable to conclude that the intention was, that in the meantime, and until the death of the widow, the property should, subject to the life interest, remain undisposed of. Lord Shand, in *Hickling* v. *Fair* (1899), A.C. 15 at pp. 26-7, refers to the construction to be placed on wills, and particularly as to an interest vesting in children after termination of a life interest, as follows:

"The general principles to be applied in the construction of the language used by the testator in the provision he has made are, I believe, the same in both countries, and the question is simply one of the meaning and legal effect of the language used.

Judgment

"After providing for the enjoyment by his daughters equally amongst them of the annual interest or profits of the capital sum, the settlement proceeds with the following clause, on which the decision of the case really turns, although no doubt, other parts of the deed may be referred to in so far as they throw light on the meaning of the testator. [His Lordship read the clause in question, and gave the facts, and continued:—]

"By that clause a life-rent is given by the testator to his daughters, and the fee to their issue. In the construction of provisions to that effect, of which innumerable cases, with much variety of expression, have occurred, there have been, as might be expected, certain general principles or rules adopted which have great weight in the determination of each particular case as it occurs, and which are of value as a guide or assistance to professional men in the framing of testamentary deeds.

"The cardinal rule or principle to be kept in view is, of course, that effect shall be given to the expressed intention of the testator; but in the consideration of the language used the principles to which I have referred are of much importance. Thus, as applicable to the settlement in question, it is clear by the law of Scotland that a provision to one in life-rent only, with a fee to children, vests the fee in the children as a class, so that each

child alive at the testator's death or born afterwards takes a transmissible interest at once, or, in other words, the vesting of the fee is not suspended till the death of the life-renter, with the result that vesting takes place only in such children or issue as survive that event. An express provision that survivors only of the life-renter shall take will, of course, receive effect; but if there be no such condition expressed, and no words used from which such a condition is clearly implied, the ordinary rule which favours vesting will take effect, with the desirable result that the persons, children, or other descendants called as "issue" who are made fiars may themselves make the fee available by way of provision for their own families or others, in case of their happening to predecease the life-renters.

"Another principle which it is of importance to bear in mind in the determination of this case is that, although the bequest may be dependent on a contingency, this will not necessarily prevent the vesting. The time at which the contingency happens in a bequest to a class does not determine the vesting in the individuals composing the class. If the contingency should apply to the individual and relate to his capacity to take, as, for example, a bequest left subject to the condition that the legatee should attain the age of twenty-one years, there can be no vesting till he or she shall reach that age; but where the contingency applies to a class, and not as a condition of the capacity of the legateee to take, the contingency is not to be imported into the constitution of the trust so as to suspend vesing till the death of the life-renter."

Lord Davey, in the same case, at p. 36, after referring to the fact that there is no difference in the law of England and that of Scotland, in the principles relating to the construction of wills, then mentions the Scotch case of *Taylor* v. *Graham* (1878), 3 App. Cas. 1287, where Lord Blackburn, at p. 1297, stated, as a principle, that:

"It is to be presumed that a testator intends the gift he gives to be vested subject to being divested, rather than to remain in suspense."

Judgment

While this case outlines general principles to be adopted, still, as to a presumption arising, the terms of the particular will under consideration must of course prevail, in determining whether it exists, or has been rebutted.

A number of other authorities have been cited relating to different constructions placed upon wills as to "vesting" or otherwise. I do not think any good purpose would be served by a discussion of these different cases.

If one can arrive at a conclusion as to the intention of the testator, then any presumption tending in a contrary direction, must of necessity, have been cast aside in coming to such conclusion. Then again, in endeavouring to determine the intention of the testator, I should consider whether there was

MACDONALD, J. (At Chambers)

1924

June 28.

IN RE ESTATE OF J. D. HELMCKEN, DECEASED

apparently in his mind a scheme of distribution of his property upon his death. If this be clearly indicated then the rule is "that if in a will there be found a consistent scheme provided by the testator for the distribution of his property, anything doubtful in the language which he had used must be construed so as to make it consistent with the general scheme of the will": Sir J. Stuart, V.C., in *Cradock* v. *Cradock* (1858), 4 Jur. (N.S.) 626 at p. 628.

In the first place when, in 1897, the testator decided by his will to dispose of his property upon his death, none of his children was of age. Then, after making his will, he did not vary it up to the time of his death, in 1919. What then was his "scheme" as to the distribution of his property, in the event of his wife surviving him? It is quite apparent that his intention was, that all the benefits that might accrue from his real and personal estate, were to enure, in that event to his widow during her lifetime, and that the children, until the death of the mother, should not receive any benefit from the estate. The usual course of devising and bequeathing the property to trustees, and then providing that the rents and profits should go to the widow during her life-time, was not pursued. On the contrary, while executors were appointed, still, the vesting of the property in his brother, as trustee, was not to occur until after the decease of the testator's wife. *Swan* v. *Bawden* (1842), 11 L.J., Ch. 156, was cited as strongly in support of the proposition, that the children of the testator obtained under the will a vested interest, as distinguished from a contingent interest. It does not, however, afford assistance, as the terms of the will in that case differ from the one here under consideration.

Judgment

As a general rule, where a party receives rents for life, and after his or her death, the property is to be divided amongst children, such children take a vested interest. Should this rule be applied where the gift by the testator to the children by the terms of the will only becomes operative, upon the death of the party receiving the life interest? In *Martin* v. *Holgate* (1866), L.R. 1 H.L. 175, a great number of authorities were cited upon the question of interests vesting under provisions

in a will. The Lord Chancellor, at p. 184, refers to his difficulty in coming to a conclusion, as follows:

"There has been a conflict of decisions on this question, and I do not hesitate to say that in the course of the argument, and even since, my mind has from time to time considerably fluctuated."

Lord Chelmsford, in the same connection, at p. 186, says:

"My Lords, the conflict of decisions on bequests to legatees answering certain descriptions, or upon certain contingencies, and in case of their death, to their children after them, where both they and their children die before the period of distribution or enjoyment, 'renders it most desirable (as the Master of the Rolls said in this case) that the question should be settled by some authoritative decision.' The opportunity is now afforded to your Lordships finally to determine which of the opposite constructions, put by learned judges on various occasions, upon clauses of this description, ought to be adopted.

"In considering this question it will be proper to adhere as closely as possible to the words of the will, and from them to gather the intention. We are not at liberty to conjecture what the testator would have said if a particular state of things had been presented to his mind, which, it is apparent from the language he has used, had not occurred to him, and for which, therefore, it cannot be supposed that he intended to make any provision."

While the question to be decided in that important case, is not exactly similar to the one here presented, still the judgment affords great assistance. It is clear that the learned Law Lords in their considered judgments, reversing the judgment of the Master of the Rolls, would have come to a different conclusion if the point to be decided had been, whether one of the nephews or nieces had a vested or a contingent interest in the estate. Lord Chelmsford, at p. 186, in discussing the terms of the will, after deciding that the word "issue" should be read as "children," says:

Judgment

"It is not to nephews and nieces absolutely, and in the event of their dying in the lifetime of the tenant for life, then to their children; but to such of the nephews and nieces as shall be living at the death of the tenant for life, and to the children of such of them as shall then be dead, leaving children. The shares which the children are to take could never have vested in their parents; because it is only in the event of the parents not having become entitled to them that they are given to the children."

Lord Westbury, at pp. 188-9, in a similar manner, refers to the terms of the will as follows:

"The testator bequeathes his residuary estate to his wife for life and then to such of his nephews and nieces as should be living at the death of the tenant for life. This form of gift is contingent, and vests in such only of the nephews and nieces as shall be living when the tenant for life dies.

MACDONALD, J. (At Chambers)

1924

June 28.

IN RE ESTATE OF J. D. HELMCKEN, DECEASED

Judgment

. . . . . It is by no means irrational to suppose that the testator intended to make the interest of the orphan issue vested and immediate, although he had made the interest of the parent contingent on surviving the tenant for life."

In this case, I think it is reasonable to conclude, that the testator intended, that the interest of the children should not vest in the lifetime of his widow; but, as to each of them, was contingent upon him or her surviving the mother. None of the children thus has a vested interest and the will plainly states that, if any of them die in the lifetime of their mother, leaving lawful issue, the share which such child or children would have taken, if living at the time of the death of his or her mother, enures to the benefit of such issue.

The only argument presented was, as to the rights possessed by the children of the testator. As all his children are still living, it does not become necessary to determine the nature of the share or interest that any of the grandchildren would possess should his or her parent die during the lifetime of the widow.

Costs of all parties should be paid out of the estate.

Order accordingly.

MCDONALD, J. (At Chambers)

1924

June 18.

RE SANTA SINGH

RE SANTA SINGH.

Habeas corpus—Order for deportation to United States—American officials refuse entry—Then held for deportation to India—Illegal detention—Can. Stats. 1914, Cap. 27, Secs. 23 and 33.

A native of India who was a British subject was admitted to Canada in 1907, where he remained until February, 1923, when he went to the United States. He returned in April, 1924, but more than a year having elapsed he was presumed to have lost his Canadian domicil, was arrested, fined, and an order for his deportation to whence he came was made by a Board of Inquiry under The Immigration Act. The United States authorities refused to allow his entry into the United States and without further order he was then held for deportation to India. On application for his release under *habeas corpus* proceedings:—

Held, that as an order was made by the Board of Inquiry for his deporta-

tion to the place whence he came (*i.e.*, United States) and he is held for deportation to India, he is illegally detained and entitled to his discharge.

Section 23 of The Immigration Act dealing with the Court's jurisdiction does not apply as no order or proceeding of the Board of Inquiry is being attacked.

APPLICATION for a writ of *habeas corpus*. Santa Singh was admitted into Canada in 1907, where he resided continuously until February, 1923, when owing to threats from fellow workmen he went to the United States where he remained until April, 1924. More than a year having elapsed he was arrested and fined, and later brought before a Board of Inquiry, when an order for deportation was issued. The Immigration officials of the United States refused to allow Santa Singh to enter the United States and he was then held for deportation to India. Heard by MCDONALD, J. at Chambers in Vancouver on the 12th of June, 1924.

Statement

Wood, for the application.
Elmore Meredith, contra.

18th June, 1924.

MCDONALD, J.: Application for a writ of *habeas corpus*. The applicant is a native of India and a British subject. He was duly admitted into Canada in 1907 and resided here continuously until February, 1923, when, his life being threatened by two of his fellow-workmen, he went to the United States and remained there until April, 1924. More than a year having elapsed he is thereby presumed to have lost his Canadian domicil and to have ceased to be a Canadian citizen for the purposes of The Immigration Act. When he returned to Canada, in April, 1924, he entered by stealth, was arrested and fined for his offence and was later brought before a Board of Inquiry. That Board considered the evidence and issued an order for deportation in the following words: [after setting out the order the learned judge continued].

Judgment

Such order, speaking generally, was in Form B provided for by the Act.

After the order was issued the applicant's solicitor interviewed

MCDONALD, J. (At Chambers)

1924

June 18.

RE SANTA SINGH

Judgment

Mr. Pickles, Chairman of the Board of Inquiry, and was informed by Mr. Pickles that the Immigration officials of the United States of America refused to allow Santa Singh to enter the United States, and that he was being held for deportation to India. Santa Singh claims that he is illegally detained and applies to the Court for his discharge. Mr. *Meredith,* counsel for the Immigration authorities, relies, in the first place, upon section 23 of the Act, which section has been considered many times by the Courts. It seems now to be well established that the Courts have no jurisdiction in such cases unless the Board of Inquiry acted without jurisdiction or was guilty of fraud. I have given the matter the best consideration I can, and it seems to me the question of the Court's jurisdiction does not arise in so far as section 23 is concerned, inasmuch as no order or proceeding of the Board is being attacked. I think the simple point is this: An order has been made by the Board of Inquiry for the applicant's deportation to the place whence he came to Canada, namely, the United States of America, and he is being held for deportation to India; he is, therefore, being illegally detained and is entitled to his discharge. I have had some doubt about the matter, but inasmuch as the liberty of a subject is in question I ought, as pointed out by MARTIN, J.A. in *Rex* v. *Fong Soon* (1919), 26 B.C. 450 at p. 456, to give the applicant the benefit of that doubt.

Application granted.

MACKENZIE v. PRINCE JOHN MINING COMPANY.

MCDONALD, J. (At Chambers)

1924

July 15.

Practice — Defendant company — Counterclaim — Action distinct from counterclaim—Company without assets—Security for costs—B.C. Stats. 1921, Cap. 10, Sec. 264.

In the case of an action against a company founded on a claim entirely separate and distinct from that set up in a counterclaim, if the company has no assets the plaintiff is entitled to security for costs of the counterclaim under section 264 of the Companies Act, 1921.

MACKENZIE v. PRINCE JOHN MINING CO.

APPLICATION by plaintiff for an order that the defendant Company furnish security for costs of the counterclaim on the ground that the Company has no assets. Heard by McDONALD, J. at Chambers in Victoria on the 9th of July, 1924.

Statement

W. J. Taylor, K.C., for the application.
Maclean, K.C., contra.

15th July, 1924.

McDONALD, J.: Plaintiff sues the defendant Company for a balance owing him on the purchase price of certain mineral claims and for moneys advanced for the use of the defendant. The defence sets up that by reason of negligence and misconduct of the plaintiff in his capacity of the defendant's manager no such moneys are owing. By the counterclaim many of these allegations are repeated and the defendant claims an accounting of moneys received by the plaintiff to the use of the defendant, and payment of the amount found to be due and damages.

Judgment

Plaintiff applies under section 264 of the Companies Act, 1921, for security for the costs of the counterclaim on the ground that the Company has no assets. The section in question has been held in England to apply to a company which is plaintiff by counterclaim as well as to a company which is plaintiff in an action: *Strong* v. *Carlyle Press* (1893), W.N. 51. Mr. *Maclean,* however, for the Company contends that under the decision in *Neck* v. *Taylor* (1893), 1 Q.B. 560, no security ought to be ordered here, inasmuch as the counterclaim arose out of the same transaction as the claim and was in substance, though not technically, pleaded as a defence. I do not think that case applies here, as the action is founded

MCDONALD, J. (At Chambers)

1924

July 15.

MACKENZIE v. PRINCE JOHN MINING CO.

on a claim entirely separate and distinct from that set up in the counterclaim, and it does not seem right that the defendant should escape its liability to provide security, merely by repeating in the counterclaim certain allegations contained in the defence.

Security fixed at $250.

Application granted.

MCDONALD, J. (At Chambers)

1924

July 29.

REX v. CHAN LUNG TOY.

Criminal law—Illegal sale of liquor—Conviction—Habeas corpus—Sale to Indian—Name of purchaser not disclosed—R.S.C. 1906, Cap. 81—B.C. Stats. 1921, Cap. 30, Sec. 26.

REX v. CHAN LUNG TOY

A conviction and the warrant of commitment thereunder for an offence under the Government Liquor Act will not be set aside because they do not contain the name of the person to whom the liquor was sold.

An Indian is punishable in the same manner as others, for offences against Provincial legislation when committed outside a reservation.

APPLICATION for a writ of *habeas corpus*. The prisoner was convicted before a justice of the peace at Prince Rupert for that he "the said Chan Lung Toy unlawfully did sell liquor contrary to section 26 of the Government Liquor Act." The grounds submitted for the discharge of the prisoner were: (1) That the conviction did not state to whom the liquor was sold; (2) that the justice of the peace had no jurisdiction to convict under said Act as the liquor was sold to an Indian and the offence is covered by the Indian Act, a Dominion statute. Heard by MCDONALD, J., at Chambers in Vancouver on the 29th of July, 1924.

Statement

Bray, for the accused.
Creagh, for the Crown.

MCDONALD, J.: I must dismiss the application in this matter. I think the case of *Rex* v. *Somers* (1923), 32 B.C. 553 and the Ontario case of *Rex* v. *Martin* (1917), 41 O.L.R. 79; 39 D.L.R. 635 meet the objections raised on behalf of the accused.

Judgment

Application dismissed.

BAYLEY v. LOVE.

MACDONALD, J.

1924

June 25.

BAYLEY v. LOVE

Negligence—Damages—Gun accidentally goes off—Plaintiff hit in foot—Careless handling of gun by defendant—Defective safety device.

The plaintiff and defendant on a duck-shooting expedition were about to have a meal prepared by the defendant. The plaintiff was approaching the spot where the meal was prepared when the defendant in aiming at a duck going overhead slipped in the mud and lost his hold on his gun. In attempting to recover it the gun went off hitting the plaintiff in the foot and severely injuring him. The defendant said that the gun which was a hammerless one with a safety device was at the time marked "safe." Afterwards upon the gun being submitted to a close inspection it was found that the safety device was defective, the safety being ineffective in respect to the left barrel. In an action for damages for negligence:—

Held, that in the circumstances the proper conclusion is that the discharge of the gun was without any fault on the part of the defendant and the action should be dismissed.

When a gun in the hands of a hunter explodes and injures his companion a presumption of negligence arises calling for an explanation on the part of the person using the gun and the onus is shifted to him.

ACTION for damages suffered by the plaintiff by reason of the defendant's negligence in handling his shot-gun so carelessly as to allow it to go off shooting the plaintiff in the foot. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 9th of June, 1924. Statement

Maitland, for plaintiff.
Murdock, and *Hossie*, for defendant.

25th June, 1924.

MACDONALD, J.: On the 1st of October, 1923, the plaintiff and defendant went together hunting at Hatzic Lake and, during the expedition, the plaintiff was accidentally shot in the foot by the defendant. They had been in the habit of shooting together in previous years and, on this occasion, the defendant supplied both guns, the one loaned to the plaintiff being a "Boswell" and the other, which the defendant was using, being a second-hand "Parker," recently purchased by him. Plaintiff alleges that the accident occurred through the defendant's negli- Judgment

MACDONALD, J.

1924

June 25.

BAYLEY v. LOVE

gence in handling his gun. Ordinarily the burden rests upon the party asserting negligence, to give satisfactory evidence of its existence and that it caused the injury complained of. It is contended, however, that in this case, the onus has shifted and that a presumption arises, as to negligence on the part of the defendant. I do not think as to presuming negligence "that the allegation of the plaintiff is equally consistent with the denial of the defendant," nor that the principle of law, as stated by Lord Halsbury, L.C. in *Wakelin* v. *London and South-western Railway Co.* (1886), 12 App. Cas. 41 and referred to in *McKenzie* v. *Chilliwack Corporation* (1912), 82 L.J., P.C. 22 at p. 24 is applicable. So I think a presumption of negligence arises.

"Trains do not run off the lines unless there is something wrong with the line, or the train, or the running of the train":

Carpue v. *London Railway Co.* (1844), 5 Q.B. 747, nor does a gun in the hands of a hunter ordinarily explode and injure his companion, without some intervening cause, calling for an explanation on the part of the person using the gun.

Before discussing the explanation which was offered by the defendant for the accident, I should consider the contention of the defendant, that the plaintiff in going shooting with the defendant was in a different position from that of the plaintiff in the case of *Stanley* v. *Powell* (1891), 1 Q.B. 86. In other words, that the plaintiff herein was not like a third party, having no connection with the shooting expedition. In Beven on Negligence, 3rd Ed., Vol. 1, the case of *Stanley* v. *Powell, supra,* is referred to at p. 569. It is stated that the verdict might not unreasonably have been given, on the basis of the plaintiff being a member of the shooting party and "exposing himself to all the risks"; against which no greater than ordinary precautions were necessary. The author then, in referring to the case, says that "it would be a useless labour to follow the judgment through its confused and inaccurate review of the cases. As far as can be surmised" he states that "the view presented therein is an amplification of a passage from Bacon's Abridgement" (Vol. 7, p. 706) as follows:

Judgment

"'If the circumstance which is specially pleaded in an action of tres-pass, do not make the act complained of lawful, and only make it excusable,

it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to shew not only that the act complained of was accidental, but likewise that it was not owing to neglect, or want of due caution'; with the gloss that by accidental 'I understand that the injury was unintentional.'"

Accepting this statement of the law, as being accurate and applicable, has the defendant then alleged and shewn, not only that the shooting was accidental, but that it is to be excused on the ground that it was not due to neglect or want of due caution on his part?

Speaking generally, the measure of care against accident which should be taken to avoid responsibility, is that which "a person of ordinary prudence and caution would use, if his own interests were to be affected and the whole risk his own": see *The Nitro-glycerine Case* (1872), 15 Wall. 524 at p. 538. Further, in Comyns's Digest, 5th Ed., 1822, Vol. 2, p. 272, note (*d*), it is stated that:

"Where one man has been the occasion of damage to another, in order to constitute such damage an injury, it is essential that some degree of blame be imputable to the party producing it."

After referring to the terms "inevitable necessity, unavoidable accident, and their equivalents," the following statement appears:

"So anxious is the law to preserve unimpaired the rights of personal safety and of property, that it regards not those acts only which through design invade them to be injurious, but likewise all others, that without the concurrence of evil disposition, through carelessness and neglect, infringe them; characterizing a man's conduct, as negligent and careless, if by any extraordinary degree of circumspection, greater than is usually practised in the ordinary affairs of life, he might have guarded against the accident."

Judgment

This proposition of law may be said, to have been particularly applied, as to the use of firearms, by the interjected remarks of Erle, C.J. during the argument in *Potter* v. *Faulkner* (1861), 1 B. & S. 800 at p. 805 as follows:

"The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons."

On this point, Vol. 12 of the A. & E. Encycl. of L., 2nd Ed., p. 518, says as follows:

"As firearms are extraordinarily dangerous, a person who handles such a weapon is bound to use extraordinary care to prevent injury to others, and is held to a strict accountability for a want of such care."

If the high standard of care, thus outlined, be required, and

MACDONALD, J.

1924

June 25.

BAYLEY v. LOVE

not the lesser one, referred to in Beven, *supra,* during a shooting expedition, that is, that in providing against probable risks "no greater than ordinary precaution were necessary," then has the defendant complied with such requirement? It is beyond question, that the discharge of the gun was accidental and without the concurrence of the will of the defendant, but was it unavoidable or did it arise from some cause not due to lack of care or fault on the part of the defendant? At the time of the accident, plaintiff was so engaged, in preparing for a slight repast, that he does not know how the accident occurred. He did not see the position of the defendant at the time or what he was doing. He states that the defendant afterwards told him that while he, the defendant, was sitting on a log, which they had appropriated for shooting purposes, he was about to light a match and while reaching down for that purpose, his gun partly slipped from his hand and then, through snatching or grabbing, it was discharged and injured the plaintiff. Defendant, however, in giving evidence, hesitated at first, but eventually stated that he had not so informed the plaintiff as to the accident. He said that the actual facts were, that the plaintiff was bringing in from the lake a duck that he had shot and that he, the defendant, while endeavouring to get a line upon another duck which was flying over, slipped in the mud and, in grasping the gun, it went off, doing the damage.

Judgment

The gun used by the defendant was a hammerless one, equipped with a safety device which required to be moved prior to its discharge. Safe practice in shooting would be, to only so adjust the gun just previous to its discharge. Whichever account be true, defendant says, and I have no reason to doubt his statement, that his gun, at the time of the accident, was marked "safe." That is, it could not, if the safety catch operated, be discharged without moving it. If so, in view of the fact that they were actually on the shooting ground, in my opinion, it was not careless for defendant to have his gun loaded, while it was either resting across his knees when he was sitting on the log, or while he was standing up, ready to shoot at any passing ducks. I think this is a proper conclusion, whether the plaintiff was sitting by the defendant on the log or was

coming in from the lake after having retrieved a duck, which he had previously shot. It is evident from the fact that the plaintiff was shot in the foot, that the discharge of the gun did not take place while the defendant had the gun pointed directly in front of him or at any game that was flying past. The gun, in order to be discharged, if the safety device operated properly, required not only that such device should be moved, but that force should be applied to the trigger for each barrel of the gun. It would seem beyond reasonable probability that, if the defendant grabbed his gun with his hands, as it was slipping from his hand, he would thus perform both the operations, necessary to discharge the gun. There is no evidence as to which barrel of the gun was discharged and caused the injury. In view of the fact, that there was no suggestion of an action on the part of the plaintiff, until long after the accident occurred, the lack of evidence in this respect, as well as want of information as to the appearance of the plaintiff's boot, which might shew whether the shot entered from the front or the rear, is not to be wondered at. There would be great excitement following the serious injury and the minds of all concerned would be centred upon necessary aid being afforded to the plaintiff. A short time before the trial, the gun was submitted to close inspection and resulted in a discovery that the safety device was defective. It was intended to render both barrels incapable of being discharged without a metal slide on the top of the gun, controlling the catch or device, being moved forward for that purpose. It was evident that such device was, as to the left barrel of the gun, ineffective, so that the gun might appear safe, as to both barrels, and still if force happened to be applied to the rear trigger of the gun, it would discharge the left barrel, even while the device indicated safety. I think this defect in the gun, while not the initial cause of the accident, contributed to it. Whether the gun slipped from the defendant's hands while he was on the log or in the act of shooting at a duck and was then clutched by him, it would not have been discharged, had it not been for the defective condition of the safety device. It was, at the time of the accident, in almost as dangerous a condition, as far as the left barrel was con-

Judgment

MACDONALD, J.

1924

June 25.

BAYLEY v. LOVE

Judgment

cerned, as an old-fashioned shot-gun would have been if at full cock, ready to be discharged by pulling the trigger. Was the defendant, then, to blame for the defective condition of his gun, which brought about the accident? He was conversant with firearms and had examined the article and tried it sufficiently, to satisfy himself that it would answer for the purposes intended. He considered it safe to take out shooting. It is contended that he should have discovered the defect. I think this is the pivotal point of the case. It is a matter of opinion, and different persons might very likely take a contrary view. While the defect could easily be discovered by a gunsmith, still, I do not think that there was a "lack of prudence and caution" on the part of defendant in not having detected this particular defect. It would only become evident by either taking that portion of the gun apart or might become noticeable if through continued discharge of the gun the safety device had become inoperative, as is probable upon the day of the accident. It is regrettable that the plaintiff has suffered so severely through the accident, and the defendant has shewn his sympathy to a friend of long standing in a substantial manner. I think, however, that, under the circumstances, my conclusion is a proper one and that the discharge of the gun was without any fault on the part of the defendant. He has shewn facts which relieve him from liability for the injury sustained by the plaintiff.

The action is dismissed with costs.

Action dismissed.

TOWNLEY v. THE CORPORATION OF THE CITY OF VANCOUVER.

MCDONALD, J.

1923

Oct. 1.

COURT OF APPEAL

1924

June 4.

TOWNLEY v. CITY OF VANCOUVER

Contract—Agreement to purchase land—Corporation a party—Price to be approved by city council—No price arrived at—Action for specific performance fails.

In July, 1920, the plaintiff wrote the city engineer of Vancouver proposing that the City should purchase a triangular portion of the three lots at the south-east corner of Hastings and Burrard Streets in order to widen Hastings Street so as to make a straight run from Hastings Street into Seaton Street, and in April, 1921, he renewed the offer by letter to the mayor. The city engineer then made a report upon which the City Council passed a resolution on the 1st of August, 1921, that the City purchase such portions of said lots as in the opinion of the city engineer is required for the purposes proposed and that the price paid be the sum agreed upon by the owner and finance committee subject to approval by the Council. The city engineer made a plan of the portion of the lots required and asked the finance committee to suggest a price. The finance committee passed a resolution referring the question of price to a special committee consisting of Alderman Tracy, the city comptroller, and assessment commissioner for report. The special committee made a report fixing the price at $21,500 of which the plaintiff received notice. On the 28th of November, 1921, the plaintiff wrote the city clerk asking him to advise the finance committee that the price submitted in the report of the special committee was accepted by him for all parties interested. The lots in question were sold for taxes on the 4th of December, 1920, and after due notice had been given the period for redemption expired on the 4th of December, 1921. An action for specific performance of an alleged agreement for sale of the lands in question was dismissed.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN, J.A. dissenting), that no enforceable contract had been established.

Per MCPHILLIPS, J.A.: The proposed purchase was a conditional one. The price which was an essential feature had under the resolution of the City Council to be arrived at in a particular way, *i.e.*, by agreement between the owner and the finance committee followed by the approval of the City Council. The price was never fixed, and with that condition unfulfilled there cannot be an enforceable contract.

APPEAL by plaintiff from the decision of MCDONALD, J. of the 1st of October, 1923, in an action by the plaintiff as administrator of J. D. Townley, deceased, for specific performance of an agreement for the sale by the plaintiff to the defendant

Statement

MCDONALD, J.

1923

Oct. 1.

COURT OF APPEAL

1924

June 4.

TOWNLEY v. CITY OF VANCOUVER

of the northern portions of lots 1, 2 and 3 of block 20, district lot 541, Vancouver district, or in the alternative the sum of $21,500 being the amount due from defendant to plaintiff under a resolution of the Municipal Council of the defendant of the 1st of August, 1921, and a report of the Council of the 21st of November, 1921. On the 31st of July, 1920, the plaintiff wrote the city engineer proposing the purchase by the City of the triangular portion of said lots facing on Hastings and Burrard Streets in order to remove the present jog at the corner and make a straight run from Hastings Street into Seaton Street. He pointed out that there was a considerable sum due for taxes on the lots and that no actual money would be required to carry the transaction into effect. The city engineer replied that the matter would be reported on at a meeting of the Council on the 17th of August. The plaintiff wrote the mayor on the 14th of April, 1921, renewing his offer as set out in his letter of the 31st of July and the engineer having made a report to the Council a resolution was passed by the City Council on the 1st of August, 1921 "that the City purchase such portions of lots 1, 2 and 3, block 20, district lot 541, as in the opinion of the city engineer is necessary to eliminate the jog at the corner of Burrard and Hastings Streets and that the price paid shall be the sum mutually agreed upon by the owner and the finance committee, subject to approval by this Council." The city clerk sent the plaintiff a copy of this resolution. The city engineer having made a plan of the portion of the lots required, the plaintiff, by letter of the 3rd of October, asked the finance committee to suggest a price for the land to be taken or submit the matter to a sub-committee with power to act and on the 5th of October the finance committee passed this resolution:

Statement

"Recommended that the matter of price of property to eliminate jog corner of Hastings and Burrard, T. O. Townley property to be referred to Alderman Tracy, city comptroller, and assessment commissioner, for report."

On the 21st of November the special committee reported to the City Council that the sum of $21,500 would be a reasonable price for the property to be taken to eliminate the jog at corner of Hastings and Burrard Streets. On the 28th of November the plaintiff wrote the city clerk requesting him to advise the

finance committee that the sum of $21,500 reported by the special committee as the value of the ground to be taken by the City was accepted by him as representing all the parties beneficially interested in the property. The three lots in question were sold for taxes on the 4th of December, 1920, of which the plaintiff was notified on the 13th of January, 1921, and the period for redemption of said lots expired on the 4th of December, 1921.

MCDONALD, J.
1923
Oct. 1.
COURT OF APPEAL
1924
June 4.
TOWNLEY v. CITY OF VANCOUVER

Mayers, for plaintiff.
McCrossan, for defendant.

1st October, 1923.

McDONALD, J.: With all deference, I cannot see how this action can succeed. It does not seem to me that the cases that have been cited have any application. It is simply a case of contract or no contract, so far as I can see, based on the offer made by the City, which is contained in Exhibit 13. That is an offer subject to two conditions, one, that the price, which is a material term in any contract to be entered into, must be agreed upon; the other term was that that price must be approved of by the City Council. It seems to me that, as part of the plaintiff's case for specific performance of the contract, he must prove those conditions have been complied with. He has not shewn that there was any contract, because the Council did nothing.

MCDONALD, J.

On the question of estoppel, I do not see how the plaintiff can succeed on the evidence disclosed. He says in his letter of December 9th, 1921, "These negotiations [to which he has referred] have not been brought to a conclusion by reason of the failure of the finance committee to fix a price." He knew throughout, that until the finance committee fixed a price he had no contract, but, either under stress of circumstances, or through bad judgment or for some other cause, he proceeded no further. I cannot see that there is any estoppel.

The action will be dismissed with costs.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 3rd and 4th of April, 1924, before MACDONALD, C.J.A., MARTIN, and McPHILLIPS, JJ.A.

MCDONALD, J.

1923

Oct. 1.

COURT OF APPEAL

1924

June 4.

TOWNLEY v. CITY OF VANCOUVER

Argument

Mayers, for appellant: It was found below that there was no contract and that as the plaintiff knew all the facts there could be no estoppel. My first contention is that when the resolution of the Council was communicated to the plaintiff a contract was concluded, and when plaintiff accepted the price fixed by the committee the City became owner of the property under the contract. If the price is indicated that is sufficient: see *P. Burns & Co., Ltd.* v. *Godson* (1918), 26 B.C. 46; *Greenock Steamship Company* v. *Maritime Insurance Company* (1903), 1 K.B. 367 at pp. 374-5; *Mentz, Decker & Co.* v. *Maritime Insurance Company* (1910), 1 K.B. 132 at p. 135; *Hewitt Brothers* v. *Wilson* (1915), 2 K.B. 739 at p. 744; *Hood* v. *West End Motor Car Packing Company* (1917), 2 K.B. 38, *note,* at p. 48; *Chartered Bank of India, Australia and China* v. *Pacific Marine Insurance Co.* (1923), 33 B.C. 91. There are cases on the sale of goods that apply: see *Clarke* v. *Westrope* (1856), 18 C.B. 765 at pp. 771 and 785; *Milnes* v. *Gery* (1807), 14 Ves. 400; *Hall* v. *Warren* (1804), 9 Ves. 605. In case of agreement to grant a lease see *Gourlay* v. *The Duke of Somerset* (1815), 19 Ves. 429 at p. 431. When in part performed by possession see *Gregory* v. *Mighell* (1811), 18 Ves. 328 at p. 333; *Dinham* v. *Bradford* (1869), 5 Chy. App. 519. The negotiations had at any rate reached the stage where the parties agreed to do everything necessary to carry the contract out: see *Sprague* v. *Booth* (1909), A.C. 576 at p. 580. Townley suggested to the City to appoint a committee to fix a price. This suggestion was adopted by the City and the committee fixed a price by report: see *Morse* v. *Merest* (1821), 6 Madd. 26 at p. 27; *Ferguson* v. *Ferguson* (1875), 44 L.J., Ch. 615. They create an obstacle by doing nothing: see *Briggs v. Newswander* (1902), 32 S.C.R. 405 at p. 412; *Brown* v. *Moore* (1921), 62 S.C.R. 487; *Meeker* v. *Nicola Valley Lumber Co.* (1917), 55 S.C.R. 494; *P. Burns & Co., Ltd.* v. *Godson* (1918), 26 B.C. 46 at p. 53; *Hoadly* v. *M'Laine* (1834), 10 Bing. 482 at p. 490; *Ashcroft* v. *Morrin* (1842), 4 Man. & G. 450. All I have to do is to link "a fair and moderate price" with "price to be agreed upon": see *Valpy* v. *Gibson* (1847), 4 C.B. 837 at p. 864; *Joyce* v. *Swann* (1864), 17 C.B. (N.S.)

84 at pp. 93 and 102; Benjamin on Sale, 6th Ed., 436; *Edwards* v. *The Grand Junction Railway Company* (1836), 1 Myl. & Cr. 650 at p. 672.

McCrossan, for respondent: There should be no question raised as to bad faith on the part of the City. Townley and the finance committee have first to come to terms and the City Council must then approve before there is a contract. The cases on sales of goods referred to have no application to sales of land: see Williams on Vendor and Purchaser, 3rd Ed., Vol. 1, p. 4, note (*m*). The Court will not enforce an agreement different from that arranged by the parties: see Fry on Specific Performance, 6th Ed., 164 *et seq.* It is not sufficient, even with the words "price to be agreed upon": see Halsbury's Laws of England, Vol. 25, pp. 291-2. The price is a material term and is of the essence of the contract: see *Milnes* v. *Gery* (1807), 14 Ves. 400; *Morgan* v. *Milman* (1853), 3 De G.M. & G. 24 at pp. 33-4; *Darbey* v. *Whitaker* (1857), 4 Drew. 134 at p. 140; *Tillett* v. *The Charing Cross Bridge Company* (1859), 26 Beav. 419 at p. 426; *Gregory* v. *Mighell* (1811), 18 Ves. 328 at p. 334; *Vickers* v. *Vickers* (1867), L.R. 4 Eq. 529 at pp. 535-6; *Earl of Darnley* v. *Proprietors, &c., of London, Chatham, and Dover Railway* (1867), L.R. 2 H.L. 43 at p. 62; *Firth* v. *Midland Railway Co.* (1875), L.R. 20 Eq. 100 at p. 112. The parties must be *ad idem* as to subject-matter and as to price: see *Douglas* v. *Baynes* (1908), A.C. 477 at p. 485. The case does not come within the Statute of Frauds: see *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311 at pp. 316, 320 and 323. He cannot ask specific performance as he cannot give title: see *District of North Vancouver* v. *Tracey* (1903), 34 S.C.R. 132 at pp. 139-140. There is no contract unless section 324 of the Vancouver Incorporation Act, 1921 (B.C. Stats. 1921, Second Session), is complied with. The contract must be sealed and signed by the mayor or city clerk: see *Mayor of Kidderminster* v. *Hardwick* (1873), L.R. 9 Ex. 13 at p. 18; *Hunt* v. *Wimbledon Local Board* (1878), 4 C.P.D. 48 at pp. 55 and 58; *Young & Co.* v. *Mayor, &c. of Royal Leamington Spa* (1883), 8 App. Cas. 517 at p. 528; *The Waterous Engine Works Company* v. *The Corporation of the*

Argument

MCDONALD, J.
1923
Oct. 1.
COURT OF APPEAL
1924
June 4.
TOWNLEY v. CITY OF VANCOUVER

Town of Palmerston (1892), 21 S.C.R. 556 at pp. 560-1; *John Mackay and Company* v. *Toronto City Corporation* (1920), A.C. 208 at pp. 214-5; *Manning* v. *Winnipeg* (1911), 21 Man. L.R. 203 at pp. 234, 247 and 253-4. The case of *P. Burns & Co., Ltd.* v. *Godson* (1918), 26 B.C. 46, and on appeal (1919), 58 S.C.R. 404 was decided on a different set of circumstances altogether; see also *Chartered Bank of India* v. *Pacific Marine Insurance Co.* (1923), 32 B.C. 60. It comes down to whether there was a mode definitely fixed for ascertaining the price. We submit that they got no further than negotiations.

Mayers, in reply: As to requirement of a seal, *District of North Vancouver* v. *Tracey* (1903), 34 S.C.R. 132, is an answer.

Cur. adv. vult.

4th June, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an action for specific performance of an agreement for the sale of land. In my opinion, no agreement has been proven. The appeal should, therefore, be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This is an important case and so I have examined with close attention all the authorities cited, and very many more.

The plaintiff on the 31st of July, 1920, offered by letter to sell to the defendant a triangular portion (set out on a tracing enclosed) of certain lots (on which a large sum was due for taxes, for which they were later sold on 4th December, 1920) at the corner of two of the main highways (Hastings and Burrard Streets) of Vancouver for the purpose of improving the traffic at that point, and renewed his offer on the 14th of April following, saying also:

> "In this particular case no money has to be found as the back taxes pay for the area taken. I may say that if there is any question of the price being excessive, I am perfectly willing to abide by the valuation of two persons—one named by me and one by the City. This question was first brought up by your city engineer shortly before the war and then dropped for obvious reasons. The property is too valuable and expensive to lie idle and I must do something at once to relieve the situation. Your engineer has all the data before him."

The matter was referred to the city engineer and on the 1st

of August, 1921, he forwarded his recommendation to the Council that:

"In view of the importance of acquiring this strip of property for the general benefit of traffic conditions as a whole, I would recommend that the resolution of Council, instructing your engineer to prepare a local improvement by-law, be withdrawn, and a recommendation along the lines for the acquiring of a triangular piece of land for the Dodson property, be substituted therefor."

This recommendation came before the Council the same evening and after consideration of it the following resolution was passed:

"That the City purchase such portion of lots 1, 2 and 3, block 20, D.L. 541, as in the opinion of the city engineer is necessary to eliminate the jog at the corner of Burrard and Hastings St., and that the price paid shall be the sum mutually agreed upon by the owner and the finance committee, subject to the approval of this Council."

This resolution was duly sent to the plaintiff by the city clerk, and after awaiting action thereunder by the finance committee, he wrote on the 3rd of October to that committee requesting action and concluded:

"In order that the matter be brought to a conclusion I would be pleased if your committee would suggest a price which is satisfactory or else refer the matter to a sub-committee with power to act."

On the 21st of November the special committee, to which the question of price had been referred by the Council on 10th October, reported to the Council as follows:

"With reference to the matter of price of property to eliminate the jog at the corner of Hastings and Burrard Sts., T. O. Townley property, which was referred to us for report, we beg to advise that we are of the opinion, in consideration of all the circumstances, that a price of $21,500 would be reasonable."

This report was referred by the Council to the finance committee for report.

On the 28th of the month the plaintiff wrote to the city clerk as follows:

"Will you kindly communicate to the finance committee at its next meeting that the sum of $21,500 reported by the sub-committee as the value of the portion of lots 1, 2 and 3, block 20, D.L. 541 necessary to eliminate the jog at the corner of Hastings and Burrard Streets is accepted by me as representing all the parties beneficially interested in said property."

After the 21st no further steps were taken by defendant to complete the sale, the Council merely passing, on 2nd December (two days before the time of redemption from the tax sale

MCDONALD, J.
1923
Oct. 1.
COURT OF APPEAL
1924
June 4.
TOWNLEY v. CITY OF VANCOUVER
MARTIN, J.A.

would expire) a resolution referring back to the special committee its said report (recommending $21,500 as the price) for "report at next meeting." The property was not redeemed from the tax sale, and the City in answer to the plaintiff's claim for specific performance, now repudiates any contract and claims to be the owner of the land under the tax sale since the 4th of December, 1921, when the time for redemption expired, it having bought in the property at the sale.

In support of the defence of no contract having been entered into a number of authorities were cited. The principal one (submitted as "really conclusive") being *Milnes* v. *Gery* (1807), 14 Ves. 400; 9 R.R. 307; a decision of the Master of the Rolls, Sir William Grant. It was there decided, and the decision has been often followed, that specific performance will not be granted where an agreement for sale provides that the price shall be ascertained by arbitrators, and it has not been so ascertained, because the Court will not interfere to substitute itself for the persons selected to fix the price, upon the ground that (p. 406):

> "The only agreement, into which the defendant entered, was to purchase at a price, to be ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price."

In that case the two arbitrators, appointed by the respective parties under the agreement, failed to agree upon a price and they also failed to agree "to choose a third person whose determination therein shall be final" to break the deadlock between them, so the procedure provided by the agreement to fix the price became wholly inoperative to attain that object. It will be seen that the case at Bar differs essentially from such a position. Here no arbitrators or others intervene and the parties are dealing face to face, the defendant corporation acting, as it must, by its own servants, *i.e.*, such officers and other persons as may be necessary to employ in the due exercise of its statutory powers, and the question is, what contract have the parties themselves made, if any?

It may well be doubted, with all possible respect to the Master of the Rolls, if he did not go too far even on the particular facts before him, and if the present case were not clearly distinguishable from his decision I should feel it the duty of

this Court of Appeal to review it, despite its age, because neither it, nor any other decision founded on it, is binding on this Court: *Pacific Lumber Agency* v. *Imperial Timber & Trading Co.* (1916), 23 B.C. 378, 380. Modern decisions emphasize my doubt by their disposition to restrict his decision rigorously to those facts. For example, in *Richardson* v. *Smith* (1870), 5 Chy. App. 648, Lord Chancellor Hatherley said, p. 651:

> "In this case an attempt is made to push the doctrine of *Milnes* v. *Gery*, which has already been certainly carried quite far enough, to an extent which would be utterly unwarrantable . . . ."

And he goes on to say, p. 653, that "it would be monstrous to push the doctrine" to cover a case where the vendor "in wrong of the purchaser" refused to name a valuer to ascertain the value of part of the estate contracted for such part not being "essential to the enjoyment of the whole," and then insisted that the agreement could not be enforced; and Lord Justice Giffard was of the same opinion and regarded the defendant vendor "as clearly attempting to take advantage of his own wrong." In *Gregory* v. *Mighell* (1811), 18 Ves. 328, the same Master of the Rolls limited the general scope of his decision in *Milnes* v. *Gery* in a striking way. That was a case where the all essential element of the rent to be paid under an agreement for a lease of 21 years was to be fixed by two arbitrators and an umpire, exactly as in the *Milnes* case, and though no steps were taken to fix it as provided in the agreement yet the Court undertook to do so and referred it to the Master for that purpose upon the ground that since the tenant had been in possession for eight years and had made expenditures to the presumed knowledge of the landlord the possession must be "referred to the agreement" and as it "was in part performed the Court must find some means of completing its execution." It is impossible, in my opinion, with all due deference, to reconcile the principle of this decision with the earlier one, and I regard it as an obvious attempt to escape therefrom. It decides, really, that even if the arbitrators have not fixed the price (or the rent—the same thing) yet if possession has been given the Court will then substitute itself for the arbitrators, though it would not do so before. One would have thought if the decision

MARTIN, J.A.

MCDONALD, J.
1923
Oct. 1.
COURT OF APPEAL
1924
June 4.
TOWNLEY v. CITY OF VANCOUVER

in *Milnes's* case be sound, that the Court would have declined at any stage to interject itself into the matter and come to the assistance of parties who had given and taken possession before so essential a matter as the price (or rent) had been fixed, and would have then refused to make a new agreement for them over the head of their own particular tribunal selected for that purpose, but which they had disregarded. To be consistent, the Court should have left them "to their remedy at law" for relief from a position into which they had entered with their eyes open—*Richardson* v. *Smith, supra,* 652—just as it did in that case and in the *Milnes* case and, *e.g.,* in *Blundell* v. *Brettargh* (1810), 17 Ves. 232; *Morgan* v. *Milman* (1853), 3 De G. M. & G. 24; *Tillett* v. *The Charing Cross Bridge Company* (1859), 26 Beav. 419; and *Vickers* v. *Vickers* (1867), L.R. 4 Eq. 529, in the last of which Vice-Chancellor Page Wood said "This particular case is one which tries the principle to the utmost." In *Tillett's* case the Master of the Rolls (Sir John Romilly), said that *Gregory* v. *Mighell* was "certainly a strong decision" (*i.e.,* in its departure from *Milnes* v. *Gery*) because "nothing could be more vague" than the way the all important matter of the rent was left unsettled, and he attempts to support it (p. 425) on the distinguishing statement by Sir William Grant in *Milnes* v. *Gery* that

MARTIN, J.A.

> "The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value are pointed out: there is nothing therefore, precluding the Court from adopting any means, adapted to that purpose."

And he adds: "It is upon that principle, undoubtedly, that the case of *Gregory* v. *Mighell* may be sustained and supported." With all possible respect, I am quite unable to adopt this view, because in both cases the same "particular means of ascertaining the value are pointed out." In *Tillett's* case specific performance was refused not on account of the price but "because the question is the same if the mode in which two houses are to be built is an essential part of the contract, and I think it is."

It is to be noted that in *Morse* v. *Merest* (1821), 6 Madd. 26, it was held that even though the price was stipulated to be fixed by "referees" yet if "the defendant refused to permit the referees to come upon the land, the Court had jurisdiction to

remove that impediment . . . "; and see Vice-Chancellor Stuart's judgment in *Richardson* v. *Smith, supra,* p. 649 (1).

In my opinion the case at Bar comes within the principle above cited (by Sir John Romilly) which the Court was careful to exclude from its decision in *Milnes* v. *Gery, i.e.,* it is "the case of an agreement to sell at a fair valuation," and this exception has been approved by the Court of Appeal in Chancery in *Morgan* v. *Milman, supra,* Lord Chancellor Cranworth saying, p. 34:

"It has been suggested that that was immaterial; that the Court may ascertain it, or that some other step may be taken different from that which the parties stipulated as the mode of ascertaining what the amount of the purchase-money should be. I confess that upon principle, as well as upon authority, the Court cannot here, as it appears to me, take upon itself to do that: if, indeed, there had been an agreement that the price should be that which was to be ascertained upon a fair valuation, then the Court might interfere."

And in *Wilks* v. *Davis* (1817), 3 Mer. 507, Lord Chancellor Eldon said, p. 509:

"It has been determined in the cases referred to, that, if one party agrees to sell, and another to purchase, at a price to be settled by arbitrators named by the parties, if no award has been made, the Court cannot decree respecting it. On the other hand, there are cases which determine that, if the parties are agreed as to a valuation, but have not appointed any persons to make the valuation, the Court will itself interfere, so as to ascertain the value, in order to direct a specific performance."

These authorities upon such an agreement have never been impugned, so far as I can discover, and in Dart on Vendors & Purchasers, 7th Ed., Vol. 1, pp. 242-3 the rule is well stated, upon a long list of authorities cited in the note, that

"A general agreement to sell 'at a fair valuation' may be enforced; and the Court will, if necessary, direct a reference to ascertain the price . . ."

And *Cf.* also Sugden on Vendors & Purchasers, 14th Ed., 287.

It being clear, then, that an agreement to sell at a fair valuation will be enforced, it remains to be determined if the one herein set up comes within that definition. The expression used by the Council in its alleged acceptance of plaintiff's offer to sell, by its resolution to "purchase," is that "the price paid shall be the sum mutually agreed upon by the owner and . . . this Council," as I construe the resolution.

Now if this were a similar executory contract relating to personal property, it cannot be seriously questioned that such an

MCDONALD, J.
1923
Oct. 1.
COURT OF APPEAL
1924
June 4.
TOWNLEY v. CITY OF VANCOUVER

agreement is regarded as one to purchase "at a reasonable price," which is the same as "a fair valuation": see *e.g.,* Smith's Mercantile Law, 11th Ed., Vol. 1, p. 670, and Benjamin on Sale, 6th Ed., 297, 298, quoting several leading cases particularly *Hoadly* v. *M'Laine* (1834), 4 M. & Sc. 340; 10 Bing. 482; 38 R.R. 510; and *Valpy* v. *Gibson* (1847), 4 C.B. 837; 72 R.R. 740. In the former case the defendant, on 15th May, 1832, gave the plaintiff a written order "to build a new, fashionable, and handsome landaulet . . . . (according to particulars) to be ready by the 1st of March, 1833," but mentioned no price, and the plaintiff accepted the order and built the carriage, which was of a very special kind, within the time agreed upon, and sent in his bill for £480 as the price thereof, but the defendant refused to accept delivery, whereupon the builder sued him for damages for non-acceptance, and after proving that "the landaulet was of such exquisite workmanship and so highly ornamented as to be cheap at the price demanded, the jury gave a verdict for the plaintiff with £200 damages," which the Court, upon appeal, refused unanimously to set aside, Chief Justice Tindal saying, pp. 487-8 (10 Bing.):

"It is clear that a contract for the sale of a commodity, in which the price is left uncertain, is, in law, a contract for what the goods shall be found to be reasonably worth, ...

"What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth."

MARTIN, J.A.

See also *Ashcroft* v. *Morrin* (1842), 6 Jur. 783; and *Joyce* v. *Swann* (1864), 17 C.B. (N.S.) 84; 142 R.R. 258, wherein Mr. Justice Williams said, p. 101:

"Indeed, it was not disputed, that, in the abstract, there may be a complete and binding bargain between the parties, notwithstanding the price remains to be adjusted and ascertained."

The general prinicple of executory contracts applicable to this case is neatly stated in Anson on Contracts, 15th Ed., pp. 118-9:

"The consideration may be executory, and then it is a promise given for a promise; or it may be executed, and then it is an act or forbearance given for a promise; or it may be past, and then it is a mere sentiment of gratitude or honour prompting a return for benefits received; in other words, it is no consideration at all.

"As to executory considerations, nothing remains to be added to what has been said already. It has been shewn that a promise on one side is good consideration for a promise on the other."

In *Logan* v. *Le Mesurier* (1847), 6 Moore, P.C. 116, the Privy Council (*per* Lord Brougham) spoke as follows upon various contracts and agreement of the parties as to the price and delivery thereunder, p. 132:

"Now, to constitute a sale which shall immediately pass the property, it is necessary that the thing sold should be certain, should be ascertained in the first instance, and that there should be a price, either ascertained or ascertainable. But the parties may buy or sell a given thing, nothing remaining to be done for ascertaining the specific thing itself, but the price to be afterwards ascertained in the manner fixed by the contract of sale, or upon a *quantum valeat*: or, they may agree that the sale shall be complete, and the property pass in the specific thing, chattel, or other goods, although the delivery of possession is postponed, and although something shall remain to be done by the seller before the delivery; or they may agree, that nothing remains to be done for ascertaining the thing sold, yet, that the sale shall not be complete, and the property shall not pass, before something is done to ascertain the amount of the price."

Nor has the principle been confined to contracts for sale of goods. It is equally well founded in contracts respecting a special and great class of property, ships, and extends to policies of insurance covering the matter of seaworthiness which is not only an "essential" element of maritime contracts but the foundation of the whole adventure. Thus, in *Greenock Steamship Company* v. *Maritime Insurance Company* (1903), 1 K.B. 367 it was held that a clause in the policy "'Held covered in case of any breach of warranty, deviation and/or any unprovided incidental risk or change of voyage, at a premium to be hereafter arranged'" extended to seaworthiness, though "undoubtedly the warranty of seaworthiness is far and away the most important of the few implied warranties which a shipowner enters into when he insures his ship" (p. 374) and the "reasonable" premium to charge to cover that added risk under said clause must be ascertained by the parties, the Court saying, p. 375:

MARTIN, J.A.

"If they cannot do it by agreement, they must have recourse to a Court of law. It is like the case of goods sold at a reasonable, though an unnamed, price. The sale is good, but the price has to be ascertained, either by agreement or at law. In the present case the parties ask the Court to fix this additional premium, and I am prepared to do it."

That decision was followed in *Mentz, Decker & Co.* v.

MCDONALD, J.
1923
Oct. 1.
COURT OF APPEAL
1924
June 4.
TOWNLEY v. CITY OF VANCOUVER

Maritime Insurance Company (1910), 1 K.B. 132, and *Hewitt Brothers* v. *Wilson* (1915), 2 K.B. 739; and the principle was applied by this Court, in a deviation case, in *Chartered Bank of India, Australia and China* v. *Pacific Marine Insurance Co.* [(1923), 33 B.C. 91]; (1924), 1 W.W.R. 114.

Why then should not the principle also cover sales of land? The only citation we were given to support the view that it should not is a note in Williams on Vendor and Purchaser, 3rd Ed., Vol. 1, p. 4 (*m*), which says "It is thought" (*i.e.*, by that author):

> "That the rule applying to the sale of goods, that in the absence of express agreement as to the price the law implies an agreement to buy at a reasonable price (*Hoadly* v. *McLaine* [(1834)], 10 Bing. 482, 487; *Joyce* v. *Swann* [(1864)], 17 C.B. N.S. 84, 102; stat. 56 & 57 Vict. c. 71, s. 8 (2), has no application to the sale of land. This rule appears to have been laid down with respect to commodities so regularly sold that the market or the usual price is easily ascertainable. With regard to land, the law of specific performance of contracts to sell it is founded on the principle that the advantage of the possession of a particular piece of land may be inestimable, and no amount of money may be assessable as an exact equivalent for it; *Adderley* v. *Dixon* [(1824)], 1 Sim. & S. 607, 610; *Falcke* v. *Gray* [(1859)], 4 Drew. 651, 657; *Hexter* v. *Pearce* (1900), 1 Ch. 341, 346; see below, Chap. XIX. s. 3. An express agreement to buy land at its fair value is, however, valid, and would, it seems, be specifically enforced; . . ."

MARTIN, J.A.

The learned author is, with all deference, in error, as the cases I have cited *supra* shew, in attempting to restrict the rule "to commodities so regularly sold that the market or the usual price is easily ascertainable," indeed the first, and leading, case he cites, *Hoadly* v. *M'Laine* disproves his submission because it was a special contract to build a very special carriage for which nearly a year was allowed, and was in truth a work of art, "of exquisite workmanship" as the report describes it, and would cost at least $6,000 today, and probably much more; and he has also overlooked the application of the rule to shipping contracts. Could it be seriously suggested that a contract with a sculptor or painter to execute an unique work of art at a price to be mutually agreed upon comes within the expression "commodities . . . regularly sold"? Unquestionably, a sculptor or painter could, after execution of the order (like a carriage builder), recover upon a *quantum valeat* the price of such "goods and chattels" as they are in the eye of the law—Anson

on Contracts, 15th Ed., 94; *Lee* v. *Griffin* (1861), 1 B. & S. 272, Blackburn, J., at p. 278 saying:

"I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel."

I have carefully examined the three cases the same author cites to support his submission respecting the existence of a different rule as regards contracts for lands, but there is nothing in them to support the alleged distinction. The first, *Adderley* v. *Dixon* (1824), 1 Sim. & S. 607, 610; 24 R.R. 254, affirms the contrary, the Vice-Chancellor declaring that as between real and personal contracts it is the remedy that differs, *viz.*:

"Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money-value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market-price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods."

MARTIN, J.A.

But he goes on to say that nevertheless in the case of sales of goods (p. 611) "where damages would not, by reason of the special circumstances be a complete remedy, equity would decree specific performance," and upon that ground he made such a decree in the case before him for a sale of debts of a bankrupt.

The second case, *Falcke* v. *Gray* (1859), 4 Drew. 651, 656-7, is to the same effect, the Vice-Chancellor saying:

"The first ground of defence is, that this being a bill for the specific performance of a contract for the purchase of chattels, this Court will not interfere. But I am of opinion that the Court will not refuse to interfere simply because the contract relates to chattels, and that if there were no other objection, the contract in this case is such a contract as the Court would specifically perform."

And after stating the principle of specific performance as to lands he goes on to say, on pp. 657-8:

MCDONALD, J.
1923
Oct. 1.
COURT OF APPEAL
1924
June 4.
TOWNLEY v. CITY OF VANCOUVER

"Now why should that principle apply less to chattels? If in a contract for chattels damages will be a sufficient compensation, the party is left to that remedy. Thus if a contract is for the purchase of a certain quantity of coals, stock, &c., this Court will not decree specific performance, because a person can go into the market and buy similar articles, and get damages for any difference in the price of the articles in a Court of Law. But if damages would not be a sufficient compensation, the principle, on which a Court of Equity decrees specific performance, is just as applicable to a contract for the sale and purchase of chattels, as to a contract for the sale and purchase of land.

"In the present case the contract is for the purchase of articles of unusual beauty, rarity and distinction, so that damages would not be an adequate compensation for non-performance; and I am of opinion that a contract for articles of such a description is such a contract as this Court will enforce; and, in the absence of all other objection, I should have no hesitation in decreeing specific performance."

The third case, *Hexter* v. *Pearce* (1900), 1 Ch. 341, even more strikingly, if possible, refutes the submission it is advanced to support, Mr. Justice Farwell saying, p. 346:

"The right to sue on a contract is the same in law and in equity, but the remedies differ . . . ."

And, finally, the learned author has strangely overlooked the declaration of the Master of the Rolls, expressly upon the point of contract price, in *Milnes* v. *Gery* itself, he there saying, p. 409:

"I do not know, that upon this point there can be any difference between decisions at law and in equity."

MARTIN, J.A.

The result of all these authorities is that, in my opinion, the principle of fixing the price by mutual agreement is the same in real and personal contracts, and so the present contract should be regarded as one to purchase at a fair valuation. In reaching this conclusion I have not overlooked the decision of the Privy Council in *Douglas* v. *Baynes* (1908), A.C. 477, relied on by the respondent, but it has not application because, as Lord Atkinson pointed out, both parties admitted that an "agreement was in fact entered into between them," which is what the respondent herein denies.

The other defences raised do not require special consideration here, other than to say, respecting the tax sale, that if there was, as I hold, a valid contract of purchase between the parties capable of being enforced, the fact that one of the parties to it, by wrongfully refusing to carry it out, though aware of the

necessity for expedition, subsequently acquired title to it by means of the expiration of the time to redeem under the tax sale at which it was the purchaser, presents no obstacle to the power of the Court to compel specific performance, since that party who has acquired possession of it unjustly as against the plaintiff can only be permitted to retain it justly. The defendant during the pendency of the matter had the final completion of the contract peculiarly within its own hands, the vendor being indebted to it for the taxes and having authorized it to pay itself out of the purchase price: if the tax purchaser had been a stranger to the contracting parties, the matter would assume, doubtless, a different aspect.

Finally, as regards the plaintiff being estopped by his letter of the 10th of December, 1921 (six days after the tax sale), to the defendant wherein he refers to the "negotiations not having been brought to a conclusion by reason of the failure of the finance committee to fix a price" and asks that the usual notice of non-redemption be "withheld . . . . until these negotiations have been concluded as the amount required for the redemption would come out of the purchase price," I entertain no doubt that there is no ground for an estoppel therein; the word "negotiations" is not apt to describe the right the plaintiff had actually in law acquired under the contract which had in fact been entered into, and his mistaken use of a word or of his exact legal position in a very embarrassing situation, could not deprive him of such right: the legal effect of the letter simply is that he was continuing to call upon the purchaser to complete its contract by taking final steps to ascertain and pay the fair price contracted for, and as it has not done so, it should be compelled to do so and a decree for specific performance should be granted directing that, failing an agreement upon a fair price, it should be referred to the registrar to fix one on behalf of the Court in the usual way.

MARTIN, J.A.

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

McPHILLIPS, J.A.: The learned trial judge, McDONALD, J., has held in the present case that it was not established that there was an enforceable contract.

MCPHILLIPS, J.A.

MCDONALD, J.

1923

Oct. 1.

COURT OF APPEAL

1924

June 4.

TOWNLEY v. CITY OF VANCOUVER

The learned judge gave the following oral reasons for judgment: [see *ante*, p. 203].

The exhibit referred to in the reasons for judgment reads as follows: [already set out in the judgment of MARTIN, J.A.].

It will be seen that the essential feature to constitute a complete contract was left unsettled, and left in a somewhat illusory way, *i.e.*, "that the price paid shall be the sum mutually agreed upon by the owner and the finance committee, subject to the approval of the Council." The plaintiff, a lawyer by profession, realized that the price had to be agreed upon and equally must have been impressed with the necessity that the price would be required to meet with the approval of the Council of the Corporation of the City of Vancouver.

On the 3rd of October, 1921, we find the plaintiff writing to the Finance Committee in the following terms: [already set out in the judgment of MARTIN, J.A.].

Eventually the question of price was referred by the Council to a special committee. The special committee in due course made the following report: [already set out in the judgment of MARTIN, J.A.].

The special committee was not clothed with any authority to fix the price and the Council did not approve or adopt the price of $21,500 which the special committee thought "would be reasonable." The situation, therefore, still remained "that the price paid shall be the sum mutually agreed upon by the owner and the finance committee subject to the approval of [the] Council."

MCPHILLIPS, J.A.

Now, admittedly there has been no mutual agreement as to price, and of course no approval of price by the Council. The question then is whether upon this state of facts the Court is possessed of the power and authority to fix and determine the price?

The learned counsel for the appellant, Mr. *Mayers*, in a very able argument, accompanied by reference to a large number of precedents, has in a most persuasive way, shewn how the law has been applied and how equitable principles have been invoked to bridge over the failure of the fixing or adjustment of price when there has been a sale the price only remaining to be deter-

mined. It is observable though, that the cases have relation to the sale of personal property, and whilst I see no good reason to apply one rule to sales of personalty and another to sales of realty, yet it would appear to be the case and this cannot be disregarded until we have a contrary view from the ultimate and final Court of Appeal, *i.e.*, the Supreme Court of Canada or the Privy Council.

Mr. Cyprian Williams in his admirable and monumental work (3rd Ed., Vol. 1) on Vendor and Purchaser, at p. 4, collects the authorities and in note (*m*) has this to say:

Milnes v. *Gery* [(1807)], 14 Ves. 400; *Elmore* v. *Kingscote* [(1826)], 5 B. & C. 583, 584; *Morgan* v. *Milman* [(1853)], 3 De G. M. & G. 24. It is thought that the rule applying to the sale of goods, that in the absence of express agreement as to the price the law implies an agreement to buy at a reasonable price (*Hoadly* v. *McLaine* [(1834)], 10 Bing. 482, 487; *Joyce* v. *Swann* [(1864)], 17 C.B. N.S. 84, 102; stat. 56 & 57 Vict. c. 71, s. 8 (2), has no application to the sale of land. This rule appears to have been laid down with respect to commodities so regularly sold that the market or the usual price is easily ascertainable. With regard to land, the law of specific performance of contracts to sell it is founded on the principle that the advantage of the possession of a particular piece of land my be inestimable, and no amount of money may be assessable as an exact equivalent for it; *Adderley* v. *Dixon* [(1824)], 1 Sim. & S. 607, 610; *Falcke* v. *Gray* [(1859)], 4 Drew. 651, 657; *Hexter* v. *Pearce* (1900), 1 Ch. 341, 346; see below, Chap. XIX. s. 3. An express agreement to buy land at its fair value is, however, valid, and would, it seems, be specifically enforced; Grant, M.R., *Milnes* v. *Gery* [(1807)], 14 Ves. 400, 407; Cranworth, C., *Morgan* v. *Milman* [(1853)], 3 De G. M. & G. 24, 34; Sug. V. & P. 287. And an agreement to buy at the fair value of the land may be inferred from the terms of the memorandum; see *Gregory* v. *Mighell*, 18 Ves. 328, 333, 334; *Gourlay* v. *Somerset* [(1815)], 19 Ves. 429, 431. But it is submitted that, if the memorandum do not specify the price or the means of ascertaining it, and contain no evidence of an intention to sell at a fair price, it is insufficient to prove a contract of sale. It is quite clear that, where the price is in fact agreed upon, it must be mentioned in the memorandum; *Elmore* v. *Kingscote, ubi sup.; Re Kharaskhoma, &c., Syndicate* (1897), 2 Ch. 451, 464, 467. Where the parties intend that a particular piece of land shall be the object of an agreement of sale between them, but have not determined whether the price shall be (1) a definite sum of money, or (2) a sum to be ascertained in some specified manner, or (3) a sum equivalent to the fair value of the land, it is thought that their agreement as to the sale rests incomplete, and does not amount to a contract legally enforceable."

MCPHILLIPS, J.A.

Further it cannot be here effectively said that there remains only the fixing of price, the price even if agreed upon by the

MCDONALD, J.

1923

Oct. 1.

COURT OF APPEAL

1924

June 4.

TOWNLEY v. CITY OF VANCOUVER

owner and the finance committee, is to be subject to the approval of the Council. How can this be accomplished? Would it be at all possible for the Court to proceed and fix the price and order payment thereof, and ignore the essentiality that the price meet with the approval of the Council? I would think not. The Council are within their satutory powers a legislative body, a deliberative body. The Court cannot invade that domain and legislate. The signification of approval of the Council can only be achieved in one way by the declaration of approval of the Council in meeting assembled. Some analogy of the situation may be found in *McKay* v. *Attorney-General of British Columbia* (1922), 1 W.W.R. 982, where it was held that an order in council was a necessary prerequisite to establish a contract binding upon the Crown. Here we have an inchoate condition of things, and it would appear to be that if the argument addressed on behalf of the appellant were acceded to it would be the making of a contract by the Court in terms different to those proposed by the City Council. The plaintiff had no doubt about the situation of matters or the terms proposed to him in respect of the purchase of the land. This is well indicated by his letter to the city treasurer and collector of date December 9th, 1921, which reads as follows:

MCPHILLIPS, J.A.

"The above lots were sold for taxes on the 4th December, 1920, and the time for redemption expired on the 4th December last. In the meantime negotiations have been pending for the purchase by the City of a triangular portion at the corner of Burrard and Hastings Streets to eliminate the jog at that point. These negotiations have not been brought to a conclusion by reason of the failure of the finance committee to fix a price. I would therefore suggest that the usual notice of non-redemption to the Land Registry office be withheld by you until these negotiations have been concluded as the amount required for the redemption would come out of the purchase price."

It will be observed that in this letter the plaintiff says: "These negotiations have not been brought to a conclusion by reason of the failure of the finance committee to fix a price." It cannot be successfully contended having regard to the letters and documents in evidence which have not assumed the complete and formal shape of executed and solemn agreements, that a contract has really been constituted between the parties. I would also refer to what Parker, J. (afterwards Lord Parker

of Waddington), said at pp. 288-9, in *Von Hatzfeldt-Wildenburg* v. *Alexander* (1912), 1 Ch. 284:

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire."

The proposed purchase in the present case was a conditional one, the price which was an essential and necessary feature to constitute a contract was to be arrived at in a particular way, and by that way only could it be fixed and then it had to be followed by the approval of the City Council. Applying the principles enunciated by Parker, J., the offer to purchase was a conditional one, not the expression of an agreement already come to. The condition is there the price has never been fixed. You cannot, with that condition existent and unfulfilled, hold that there is an enforceable contract, it would mean the ignoring of the condition. The Court is disentitled to do that and that is the determinative factor in this case.

MCPHILLIPS, J.A.

The irresistible conclusion in my opinion is, upon the facts of the present case, that no enforceable contract has been made out. There can be but one answer and that was rightly given by the learned trial judge when he held that it was a case of no contract. In that conclusion I agree. The fact that the land in question has, by operation of statute law, following the provisions of the City of Vancouver Incorporation Act, become vested in the Corporation, being sold for taxes and unredeemed, cannot advance matters in favour of the plaintiff. The plaintiff had his statutory right to redeem, failing doing so, and the City becoming possessed of the land, cannot affect the determination of the present case, and it may be remarked that counsel for the Corporation at this Bar frankly stated that the plaintiff

MCDONALD, J.
1923
Oct. 1.
COURT OF APPEAL
1924
June 4.
TOWNLEY v. CITY OF VANCOUVER

would even now be allowed to redeem upon payment of the taxes.

The judgment under appeal should be affirmed and the appeal dismissed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Mayers, Stockton & Smith.*
Solicitor for respondent: *J. B. Williams.*

COURT OF APPEAL
1924
June 4.
HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND

HANLEY v. THE CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND.

Insurance, fire—Oral agreement to protect property—Agency—Policy issued subsequent to fire.

The insurance on the plaintiff's property being about to expire, on the 15th of June, 1922, he interviewed T., a local agent, 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 and he agreed to act as local agent and from that time 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 27th of June he visited the premises to obtain the necessary particulars which he subsequently on the 4th of July embodied in an application form of the Commercial Union Assurance Co. having scratched out "Commercial Union" and inserted in lieu "Royal Exchange." The application was not signed by the plaintiff. T. deposited the application with the general agents in Victoria at noon on the 6th of July when he was advised a policy would issue in due course. There was no writing, protecting slip, or interim receipt. A promissory note was given for the premium which was not paid. The property was destroyed by fire on the evening of the 6th of July and a policy was issued by the Victoria agents subsequently to the fire. It was held by the trial judge that in the circumstances the policy was properly issued.

Held, on appeal, reversing the decision of MACDONALD, J. (MCPHILLIPS,

Refd to Freudenstein v. Portage la Prairie Mutual Ins. Co. (1938) 4 D.L.R. 674

J.A. dissenting) that on the 27th of June, when the contract was made between the plaintiff and the agent T., the agent did not represent the defendant Company, and assuming that after the 4th of July upon which date he was appointed an agent he had power to bind the defendant Company, he did not have power to bind the plaintiff. The minds of the parties were never *ad idem* and the action must be dismissed.

COURT OF APPEAL

1924

June 4.

HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND

APPEAL by defendant from the decision of MACDONALD, J. of the 25th of November, 1923 (reported, 33 B.C. 163) awarding the plaintiff $1,751, upon a policy of insurance of the 24th of June, 1922, upon buildings and their contents situate near Merville in the Courtenay District, Vancouver Island, which were destroyed by fire on the 7th of July, 1922. The plaintiff desiring insurance interviewed one Thomas (a local agent at Merville) on the 15th of June, 1922. At that time Thomas was local agent for four insurance companies but did not represent the defendant Company. About this time Douglas, Mackay & Co. of Victoria, general agents for the defendant Company desiring representation for their Company in the Courtenay District interviewed a Mr. Clinton of Cumberland with a view to his recommending an agent in Merville and on or about the 15th of June, 1922, Mr. Clinton interviewed Thomas as to acting as agent and Thomas agreed to do so. Although Thomas may have then considered himself defendant Company's agent he was not actually appointed until the 4th of July following when T. O. Mackay of Douglas, Mackay & Co. visited Merville. On the first interview (June 15th) Thomas assured the plaintiff his property would be covered but there was nothing to shew he had allotted the insurance to any particular company. On the 27th of June, Thomas visited the property and obtained the necessary particulars and on the 4th of July he outlined in detail in an application form of the Commercial Union Assurance Co. the property to be insured cash value, amount of insurance and premium and he scored out the words "Commercial Union" and inserted "Royal Exchange." Thomas's appointment as local agent was communicated to the head office by letter from Douglas, Mackay & Co. on the 4th of July. After Thomas had allotted the insurance to the defendant he took the application to the offices of

Statement

COURT OF APPEAL

1924

June 4.

HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND

the general agents in Victoria and at noon on the 6th of July he deposited it with a clerk in charge of the office who said a policy would issue in due course. The plaintiff gave a promissory note for the premium but it was never paid. On the evening of the 6th of July a fire destroyed the property insured. The further necessary facts are set out in the judgment of the trial judge (33 B.C. 163).

The appeal was argued at Vancouver on the 13th of March, 1924, before MACDONALD, C.J.A., MARTIN, and MCPHILLIPS, JJ.A.

Argument

Davis, K.C. (*J. H. Lawson,* with him), for appellant: There never was a completed contract of insurance before the fire. Thomas told Hanley he would be covered on the 27th of June, but he was not appointed to the defendant Company until the 4th of July: see *Giffard* v. *The Queen Insurance Company* (1869), 12 N.B.R. 433; *Mackie* v. *The European Assurance Society* (1869), 21 L.T. 102. There must be a contract proved.

Clearihue (*W. T. Straith,* with him), for respondent: A preliminary agreement verbally is sufficient to effect insurance: see *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 22 B.C. 197; *Ruggles* v. *American Cent. Ins. Co.* (1889), 21 N.E. 1000; *Michigan Pipe Co.* v. *North British & Mercantile Ins. Co.* (1893), 56 N.W. 849; *Howard Ins. Co.* v. *Owens* (1893), 21 S.W. 1037. In this case the insurance is valid having been written even after the fire: see *Roberts* v. *Security Company* (1897), 1 Q.B. 111; MacGillivray on Insurance Law, pp. 215-6; Joyce on Insurance, Vol. 1, p. 164, par. 105; *Hallock* v. *Insurance Co.* (1857), 26 N.J. Law 268 and on appeal (1858), 27 N.J. Law 645; *Harrington* v. *Mutual Life Ins. Co.* (1911), 131 N.W. 246 at p. 249; *Indiana Nat. Life Ins. Co.* v. *Maines* (1921), 230 S.W. 54; *Caldwell* v. *Stadacona Fire and Life Ins. Co.* (1883), 11 S.C.R. 212; *Grover & Grover, Limited* v. *Mathews* (1910), 2 K.B. 401; 79 L.J., K.B. 1025. As to a company's power to affirm or disallow a policy see *Millican* v. *Scottish Metropolitan Assurance Co. Ltd.* (1923), 2 W.W.R. 25 at p. 30; *American*

Bankers' Ins. Co. v. *Thomas* (1916), 154 Pac. 44 at p. 48; *Massachusetts Bonding & Ins. Co.* v. *Vance* (1918), 15 A.L.R. 981; 180 Pac. 693. That the tender was insufficient see marginal rule 257; *Dixon* v. *Clark* (1848), 5 C.B. 365 at p. 376. It is too late to say a contract is not existing: see *Roberts* v. *Security Company* (1897), 1 Q.B. 111 at p. 115. They are estopped as they appointed an adjuster: see *Mutchmor* v. *Waterloo Ins. Co.* (1902), 4 O.L.R. 606; *National Benefit Life and Property Assurance Co.* v. *McCoy* (1918), 57 S.C.R. 29. They had practically called for proof of loss; this estops them: see *Smith* v. *City of London Ins. Co.* (1887), 14 A.R. 328. The issue of the policy is a ratification of the agency: see *Abraham* v. *North German Ins. Co.* (1889), 40 Fed. 717; *M'Elroy* v. *British America Assur. Co.* (1899), 94 Fed. 990; *Murfitt* v. *Royal Insurance Company, Limited* (1922), 38 T.L.R. 334 at p. 336; *The Ottawa Agricultural Ins. Co.* v. *Sheridan* (1880), 5 S.C.R. 157. As to the authority of the clerk in charge in the Victoria office see *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716.

Argument

Lawson, in reply: In the case of *Roberts* v. *Security Company* (1897), 1 Q.B. 111, the contract was under seal but in this case it was not. In this case there was no contract of insurance at the time of the fire: see *Grover & Grover, Limited* v. *Mathews* (1910), 2 K.B. 401.

Cur. adv. vult.

4th June, 1924.

MACDONALD, C.J.A.: The judgment appealed from upholds a contract of fire insurance alleged to have come into existence under the following circumstances.

One, Thomas, was local agent of several fire insurance companies, and on the 27th of June, after inspection of the property of the plaintiff, proposed to be insured, promised that the plaintiff would be "covered" by insurance. No written application was signed but Thomas had made a memo. of the risks. On July 4th he was appointed local agent of defendant, still retaining his other agencies. This appointment he received from the general agent of defendant in Victoria. On the 5th of July he inserted the particulars of the risks in a form of

MACDONALD, C.J.A.

COURT OF APPEAL

1924

June 4.

HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND

application of the Commercial Union Assurance Company, one of his companies, striking out the name and inserting in its stead that of the defendant. He did this without reference to the plaintiff or to defendant's general agent. On the 6th of July he left the application at the office of the general agent. That night Thomas learned of the loss of plaintiff's property by fire, and next morning informed the general agent's office of it. This was the first intimation which the general agent had of the transaction between the plaintiff and Thomas. Nevertheless with knowledge of the loss the general agent issued the policy sued on.

It may be taken as settled law, at least so far as this Court is concerned, that a verbal promise to cover a risk may be binding. The authorities are referred to in the reasons for judgment of the trial judge. It may be conceded therefore, that on the 27th of June had Thomas been the agent of the defendant and as such had promised the plaintiff protection, a contract or interim contract of insurance by defendant would thereby have been effected. If the plaintiff's contention were given effect to a contract was effected between the plaintiff and defendant without the knowledge of either and without the consent of the plaintiff. If, as contended, it was left to Thomas to select the company which should undertake the risk, this can, at best,

MACDONALD, C.J.A.

mean nothing more than that Thomas should make the selection from amongst the companies which he then represented. Assuming that the agent Thomas, had, after the 4th of July, power to bind the defendant, yet I do not think he had power to bind the plaintiff. Therefore the minds of the parties were never *ad idem*.

But it was argued that by the issue of the policy defendant must be held to have ratified Thomas's agreement to cover. It is not defendant's ratification but the plaintiff's consent which is lacking.

Again, the proposition of law that a valid contract of fire insurance may be effected after the loss has occurred and has become known, has not been extended to contracts made by agents. The authorities referred to by the learned trial judge shew this to be so.

I would allow the appeal.

MARTIN, J.A.: This appeal should, I think, be allowed on the ground that there was no contract between the parties hereto. As I read the evidence, on the 27th of June Thomas undertook to cover the plaintiff's fire risk as and from that day in one of the three board companies (not including the defendant) that Thomas was then the agent for and received the amount of the premium therefor, $41.50, by plaintiff's note at 30 days. It was not till the 4th of July following that Thomas became the agent of the defendant Company and he then undertook to allot the outstanding risk of the 27th of June to it, upon the assumption that he could hold the application in abeyance: the plaintiff admits that he had not even known of the existence of the defendant Company till after the fire on the 6th of July following. It is submitted by the defendant that in these unusual circumstances there was no contract between the present parties, and that either the risk was covered when the contract was made on the 27th of June by one of the three board companies that were then contemplated and which Thomas represented, or that Thomas had failed to cover the plaintiff at all despite his statement to that effect, in which case he might be personally liable. This submission is, I think, correct in law and should be given effect to, with all due respect to the contrary opinion of the learned judge below who attached much importance to the case of *Mackie* v. *The European Assurance Society* (1869), 21 L.T. 102, but an examination of that case shews that the facts as found differed in essentials from those before us, the Court there finding that the contract had been kept open for a "whole" month during which the plaintiff could adopt it. The point here is that if the loss had occurred, say, on the 28th of June the plaintiff was insured in one of Thomas's board companies, or else Thomas had deceived him and he was not insured at all: that is, in a nutshell, the view I take of the real point, and no case has been cited that would, in my opinion, justify me in holding that the defendant became liable at a later date for the risk that the plaintiff and Thomas admit was assumed by some one on the 27th of June: I am unable to see upon what principle it can be held that Thomas had some power of suspension or postponement which would enable him to later

MARTIN, J.A.

COURT OF APPEAL

1924

June 4.

HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND

include in the contract of the 27th of June a company which was then excluded from it.

Taking this view I need only add that the learned judge below was of opinion that, apart from marine insurance, there could be no ratification by a principal of a contract to insure after knowledge of loss, in which he is supported by *Grover & Grover, Limited* v. *Mathews* (1910), 2 K.B. 401, and so it is unnecessary to consider the matter in its other aspects.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal, in my opinion, fails. It is clear upon a careful analysis of the evidence that no valid objections to liability can be claimed upon any non-disclosure, the principle of *uberrima fides* has been in no way contravened by the plaintiff (*London Assurance* v. *Mansel* (1879), 11 Ch. D. 363; 48 L.J., Ch. 331). The plaintiff held the land under agreement for sale, was the owner in equity and was in actual possession of the premises, living thereon. The plaintiff was, under the circumstances, rightly entitled to describe himself as the owner. Further, it is impossible to effectively contend upon the evidence that there was the concealment of any material fact within the knowledge of the plaintiff, and the defendant, through its agent, had equal knowledge with the plaintiff of the local conditions existent and must be presumed to have known the conditions. It would appear that the loss by fire was consequent upon bush fires in the neighbourhood, a risk that could be well anticipated in view of the local conditions which conditions were well known to the defendant through its agent who actually resided in the locality (*Rivaz* v. *Gerussi* (1880), 6 Q.B.D. 222; 50 L.J., Q.B. 176). There is some confusion in the evidence as to when Thomas the agent for the defendant was appointed and had authority to place insurance for the defendant in the district in which the property insured was situate. Without itemizing though the points of evidence, I may say that I am satisfied that there was authority in Thomas on behalf of the defendant to enter into contracts of insurance whereby loss from fire would be indemnified against, *i.e.*, in insurance parlance, was authorized on behalf of the defendant to enter into covering contracts of insurance that

would be immediately effective. That the application would later in due course go forward to the Vancouver Island general agents of the defendant at Victoria, to be followed by the issuance of a policy, is quite immaterial. It is clear that there was the authority in Thomas to solicit and effect insurance in conformity with known usage and custom. It would be impossible to carry on an insurance business under other conditions. The district agent must have and did have, the authority in the present case to place insurance, and that authority was unquestionably in Thomas on the 4th of July, 1922, but I am of the view that the authority may be said to have been existent at an earlier date in that Clinton had been authorized in the month of June to select an agent upon the request of the Vancouver Island general agents of the defendant, Douglas, Mackay & Co., and Clinton had selected Thomas. Upon this point the evidence of Mackay was "leaving it to Mr. Clinton to name or secure for me an agent for that district," so that the whole case must be viewed in this way, that when Thomas agreed to accept and cover the risk tendered to him on June 27th, 1922, by the plaintiff, he (Thomas) had in mind his selection by Clinton before that date to act for the defendant, and his idea was that he would allocate the insurance to the defendant (not at the moment making any allocation) his contractual obligation with the plaintiff being that he would allocate the insurance to what is known as a board company, he, however, would not appear to have done this, in fact, until the 4th of July, 1922.

MCPHILLIPS, J.A.

It is not questioned that the general agents had authority to appoint a district agent which Thomas was, and equally it is clear that Thomas being appointed he had authority to enter into contracts of insurance and to give all covering protection. What the general agents or the defendant itself could do was to advise cancellation, but in the interim there would be effective insurance. There is no necessity whatever for any writing being given, it can be wholly oral, and the act of the agent is binding upon the company. This Court had occasion to pass upon and consider the point in *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 22 B.C. 197. If there was any frailty in the contract of insurance entered into by

COURT OF APPEAL

1924

June 4.

HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND

Thomas and its binding effect on the defendant, the statement made by Pitts and sworn to by Thomas on the 6th of July, 1922, would assuredly complete the chain of responsibility.

Thomas came to Victoria and swears, and it is to be noted that this is not denied (Pitts was not called and he was apparently in charge of the Victoria office of the general agents in the absence of Mackay) that he gave Pitts three applications, Hanley's (the plaintiff's), Egan's and the Creamery for insurance and Pitts "thanked me [Thomas] for the applications and said that he would see that the policies were made out, that Mr. Mackay would be back in the morning." It is inconceivable that the person in charge of the office, and thereby held out as having authority, could be now said to be without authority, in truth there is no denial of authority coming from the defendant, and in any case, it can well be said he was held out as having authority in the matter. Thomas further states (and this was under cross-examination by counsel for the defendant, in answer to questions put) the following:

"Did he tell you that he would consult Mr. Mackay about it? No; he told me the policies would be made out.

"He told you the policies would be made out? As far as I remember, most decidedly.

"As from when? From the date of the applications.

"Did he tell you that? He did not mention those words, no.

MCPHILLIPS, J.A.

"Of course he did not. You walked out with the impression that everything was rosy? I walked out with the impression that the business would go through in the usual way.

"And after you had your conversation with Pitts in the afternoon of the 6th you felt quite happy that the policies would be written? On the afternoon of the 6th, the early afternoon of the 6th, yes, oh yes, absolutely.

"No anxiety whatever about it? Not when I left there, no. Not when I left."

The fire took place on the 6th of July, 1922, and before Thomas returned home he heard of it by a long distance telephone message from his wife in the early morning of the 7th of July, 1922. Thomas decided to go to the office of the general agents in the morning before taking his train and he met Mackay and told him of the fire losses and mentioned having left the applications, amongst others, the plaintiff's, with Pitts the previous day. The further cross-examination was as follows:

"And as you came down the stair you met Mackay? Yes.

"What conversation took place between you and Mackay there? I want conversation, nothing more. I probably said good morning, Mr. Mackay, have you seen this morning's paper?

"And what was in that morning's paper to cause you anxiety? Merville completely wiped out, or words to that effect, across the headline.

"Was there anything about Hanley? I think Hanley's name was mentioned, and my name mentioned.

"As being wiped out? As being reported loss.

"You mentioned the paper. What else did you talk about to Mackay? Well, I said the reason I came around to see you was about the application I put in yesterday; and I said, of course they are all right? And he said, Oh yes, they will have to stick, or have to stand. They are about the words that he told me.

"Are you quite sure that Mr. Mackay said exactly that, or isn't that just your impression? No, no, he said words just about like that.

THE COURT: Well, what did he do, he got the policies and initialed them, didn't he? Yes.

Mr. *Hossie*: And later you received a letter dated July 7th, enclosing the policies to you? Yes.

"The policies were not issued when you left here that morning to go up there, were they? I did not have them.

"And Mr. Mackay had not yet reached his office when you left? I told you we met him at the foot of the stairs."

Now it is attempted to be made out that Thomas and Mackay in some way in fraud of the defendant (not suggesting though that the plaintiff was in any way connected with it) wrote letters and completed the records in such a way as to represent to the Company a condition of things not really in accordance with the truth. When dealing with this matter I would refer to what the learned trial judge said in his reasons:

MCPHILLIPS, J.A.

"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.'"

It may be said at once that nothing of this kind could affect the plaintiff in his right of recovery, *i.e.*, if there was any fraud upon the part of the agents of the defendant they were not the agents of the plaintiff. So far as the material facts go, and these facts are available to support the case of the plaintiff, they establish that an effective contract of insurance was entered into before the loss occurred and the issuance of the policy after the loss was after all only the carrying out of that which had before the loss been agreed to. It was not essential that the policy should be written up, but in being written up it

COURT OF APPEAL

1924

June 4.

HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND

was representative of that agreed to anterior to the fire. I cannot see why the truth cannot be told after as well as before the fire, or why the writing should not follow evidencing the contract come to before the loss occurred.

The present case does not rest upon ratification. The contract of insurance, in my opinion, was previous to the loss effectively entered into and all that occurred afterwards in the way of issuing the policy was that which would ordinarily follow in legal sequence. The fault found with the general agents (and it is a significant fact that they still are the general agents of the defendant) by the defendant has relation to the issuance of the policy after the fire and the writing of letters dated the 4th of July—which were really written on the 7th of July, after the fire, the letters reading as follows: [After setting out the letters the learned judge continued].

In regard to these letters Mackay gave his explanation in his examination-in-chief being called as a witness for the defendant and it seems to me it is perfectly idle for the defendant to claim in the face of this evidence that there is no liability. Mackay is now dealing with the time of his return from Courtenay, after having seen Thomas and appointing him district agent: [After setting out the evidence dealing with the appointment of Thomas as district agent the learned judge continued]:

MCPHILLIPS, J.A.

This evidence is the evidence of Mackay the general agent of the defendant and was evidence led by the defendant itself at the trial. In the face of this evidence it would seem to me to be idle to attempt to dispute the appointment of Thomas as district agent or that he had authority to place insurance. It is to be recollected too that it is common ground that the general agents had undoubted authority to appoint agents. The following letter and account dated 7th July, 1922, from the general agents to Thomas relate to the Hanley insurance, the Hanley policy being No. 4276102:

"Enclosed please find Royal Exchange policies Nos. 4276101 and 4276102, covering applications received from you under date of July 4th.

"We also forward you a supply of application forms to be going on with, and a supply of envelopes. We will in due course, be mailing you a supply of letterheads, etc., but find that at the present time we are a bit short, but have taken this matter up with head office.

"Trusting that everything will be found to your entire satisfaction."

"June 27th To—Ryl. Exchange 4276102—K. M. Hanley $2,500—3 yrs..... $41.50
"July 4 Ryl. Exchange 4276101—Frank A. Egan, $2,200—3 yrs. 38.00
$79.50

"Douglas, Mackay & Co.
"Paid
"Aug. 1922
"*Per.* T. O. Mackay."

Then we have the letter written by Thomas to Douglas, Mackay & Co. on the 7th of July, after he had news of the fire, reading as follows:

"Victoria, B.C.
"Friday morning (7 a.m.) 7th July, 1922.

"I beg to confirm effecting insurance with your company—The Royal Exchange—as per date of applications, in the names of Frank A. Egan, and K. M. Hanley—both of Merville, B.C. and the Comox Creamery Association—Courtenay, B.C.—amounts and particulars as per applications."

It is to be noted that the defendant by its telegram of the 13th of July, 1922, indicates knowledge of the appointment of Thomas and does not dispute the authority to make the appointment, but requests that appointments in districts where there is bush fire hazard, shall be cancelled. The telegram reads as follows:

"Yours fourth instant don't underwrite anything Courtenay or other districts subject to bush fire hazard. Cancel any such appoints by telegram today."

Following this telegram the general agents telegraphed Thomas as follows:

"Do not bind Royal Exchange any further risks Courtenay or district until further notice."

Upon the facts there can be no question that Thomas was appointed in any case, and effectively appointed as agent under the admitted authority vested in the general agents on the 4th of July, 1922, if not before, consequent upon the request made by the general agents to Clinton to secure and select an agent which Clinton did, and Thomas was selected on or about the 27th of June, 1922. When the Hanley application for insurance was made Thomas was to allocate the insurance to a board company, which he delayed in doing and it was not done until the 4th of July, 1922, but being done then, then unquestionably there was an effective contract of insurance binding upon the defendant and the loss did not occur until the 7th of July,

COURT OF APPEAL

1924

June 4.

HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND

1922, during the currency of the contract of insurance and whilst the property of the plaintiff was covered. This being the situation, it is impossible in my opinion, to come to any other conclusion than that of there being liability upon the defendant for the fire loss.

Now it becomes necessary to turn to the decided cases relative to the authority of general agents and sub-agents in the business of insurance and it may be said generally, that the cases are upon the whole uniform in fire, life, and accident insurance.

Further, it may be said at this time that the law in England, the United States of America and Canada, as applied to insurance is upon general lines of agreement with respect to the authority that must be held to be existent in general agents and even sub-agents in the placing of insurance. Conditions are such that the placing of insurance is always a matter of urgency and to do business means there must be no delay. Insurance must be instanter or no business will be done, *i.e.,* there must at least be covering insurance. Here the plaintiff left it wholly in the hands of the agent (Thomas) to place the insurance, and allocate it to some board company. That there was delay in so doing cannot affect the matter, the plaintiff had committed that matter to the agent, there was nothing more to be done by the plaintiff, and on the 4th of July, if not before, the allocation was effectively made and that allocation was to the appellant company, a foreign company (foreign in the sense that it is a British company, not a British Columbia company).

MCPHILLIPS, J.A.

In this case it is clear to me that Thomas was acting within the scope of the authority the appellant held him out as possessing, and the general agents as well, and the Company is clearly bound and in support of this view, I would refer to *The Montreal Assurance Company* v. *McGillivray* (1859), 13 Moore, P.C. 87, the Right Hon. Sir John Coleridge, at p. 124 (also see *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; *Washington Fire & Marine Ins. Co.* v. *Chesebro* (1887), 35 Fed. 477; *National Bolivian Navigation Company* v. *Wilson* (1880), 5 App. Cas. 176 at p. 209; *Provincial Assurance Co.* v. *Roy* (1879), 10 R.L. 643; Stephens's Quebec Digest, 1882, Vol. 2, p. 400; *Pare* v. *Scottish Imperial*

Insurance Co. (1879), Stephens's Quebec Digest, 1882, Vol. 2, p. 410; *Duval* v. *Northern Assurance Co.* (1877), *ib.* 410).

Here we have the general agents acting through the district agent, Thomas, and later the general agents with a full knowledge of all the facts and of the loss, issue the policy. This unquestionably imposes liability upon the Company. It was not essential that a policy should issue but as we have seen it was issued (*Rossiter* v. *The Trafalgar Life Assurance Association* (1859), 27 Beav. 377 at pp. 380, 381, 384, 385; *Ætna Life Ins. Co.* v. *Green* (1875), 38 U.C. Q.B. 459; *Bridges* v. *Garrett* (1870), L.R. 5 C.P. 451 at p 454; *Wing* v. *Harvey* (1854), 5 De G.M. & G. 265 at pp. 267, 268, 269; *Penley* v. *The Beacon Assurance Company* (1859), 7 Gr. 130 at p. 136; *Patterson* v. *Royal Ins. Co.* (1867), 14 Gr. 169).

Then we have the additional features here of the appellant being a foreign company, and it has been held that in such cases that the agents must be regarded as the company itself, and knowledge in the agents is knowledge in the company, and after knowledge of all the facts and the loss the policy is issued this certainly must impose liability (*Campbell* v. *National Ins. Co.* (1874), 24 U.C.C.P. 133 at p. 144; *Moffatt* v. *Reliance Mutual Life Assurance Society* (1881), 45 U.C.Q.B. 561 at pp. 584-7; *Holdsworth* v. *Lancaster and Yorkshire Insurance Company* (1907), 23 T.L.R. 521).

MCPHILLIPS, J.A.

The case which seems to me is determinative of the present case is *Mackie* v. *The European Assurance Society* (1869), 21 L.T. 102. The case has features similar to the present case. There, there was insurance effected in a company different to that contemplated by the applicant, here, no company was selected by the plaintiff. I propose to here quote at some considerable length from the judgment of Vice-Chancellor Malins as the language used by that very eminent judge is peculiarly appropriate to the facts of the present case. At pp. 105 and 106 we find him saying: [After quoting from and including the words "It turns out that this office, presided over by a gentleman of high position," on p. 105, to the end of the judgment, the learned judge proceeded].

Now all that the Vice-Chancellor said may be rightly said to

COURT OF APPEAL

1924

June 4.

HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND

be exceedingly apposite to the facts of the present case and questions that were greatly debated here are set at rest in the above decision. Here it was strenuously contended that Thomas was not the agent for the appellant Company when the application was made for insurance and that there was no authority in Thomas to allocate the insurance to the appellant Company.

Without abandoning my view that Thomas had authority even on the 27th of June, when the application was made for insurance by the plaintiff, it cannot be gainsaid that Thomas was the authorized agent and entitled to effect insurance for the appellant Company on the 4th of July, and he then allocated the insurance applied for by the plaintiff to the appellant company. This is incontrovertibly established. Then how can it be said that there was not effective insurance commencing at least with the 4th of July and the fire did not take place until the 7th of July? It was pressed in the *Mackie* case, as here, that the plaintiff had in no way assented to the insurance with the appellant company, that his assent could only extend to other board companies, that Thomas at the time the insurance was applied for, represented. This I consider, with all deference to all contrary opinion, is a fallacy and is not the law. Thomas was to select the company—to be a board company. The plaintiff had to do nothing more.

MCPHILLIPS, J.A.

In the *Mackie* case the Vice-Chancellor in a very illuminative way put the point in these terms, indicating the error of law in the contention made: "It has been strenuously argued as a fatal objection that to constitute a contract there must be the consent of both parties to the same thing." That certainly was not necessary in the present case, it was a matter solely committed to Thomas to allocate the insurance to some board company and it was to be his (Thomas's) selection, and then the contract was complete. That was his duty and he performed it, it is true, tardily, but in time to give the plaintiff fire protection with the appellant Company. The Vice-Chancellor in positive terms in the *Mackie* case (and it can even be more effectively said in the present case) refused to give any effect to the objection that it was not the plaintiff's intention to insure in the European office. Likewise in the present case, there is no force in the contention

made that it was not the plaintiff's intention to insure with the appellant Company. The selection of the company was a matter committed to Thomas. The Vice-Chancellor it is to be noted makes use of this language (so long ago as 1869, and what strides have taken place since the carrying on of insurance business?):

"And 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. I am happy to be supported in this view by an authority cited for the plaintiffs, and on which the defendant's counsel have made no observation. It is *Wing* v. *Harvey* (*supra*). . . . . I argued for the office that the agent exceeded his authority, and that he could not bind the office unless expressly authorized. But Knight Bruce, L.J., asked how the plaintiff was to know the limits of the agent's authority; and I ask that question here, or how are the public to know them? I cannot imagine anything more fatal to the interests of insurance offices; and in mercy to this and other offices I think I should refuse to accede to such an argument, because it would lead to the annihilation of a great portion of insurance agencies . . . .; and both learned judges treated the knowledge of the agent as the knowledge of the office."

Here, in truth, Thomas had complete authority to contract on behalf of the appellant Company and did so, if not on the 27th of June, admittedly on the 4th of July: and further, the general agents on the 6th of July and before the fire, were apprised of the insurance placed with the appellant Company in favour of the plaintiff, and the statement made was that the policy would be written up and this has not been denied, and on the 7th of July, Mackay, one of the general agents is personally apprised of all the facts, and after all this and after knowledge of the fire, the policy is written up and delivered.

MCPHILLIPS, J.A.

I would particularly call attention to this language of the Vice-Chancellor in the *Mackie* case (pp. 105-6):

"So here I treat Waddell's acts as the acts of the office [likewise in the present case the acts of Thomas and the general agents were the acts of the appellant company]; if he miscarried, the office has a remedy against him, but if I held this policy vitiated, because in a manner of which the assured is ignorant the agent goes beyond his authority, no insurance effected through an agent would be safe. The agent binds the company, and they can repudiate if he exceeds his limit before the event happens, and afterwards it is too late to set up the defence. It is impossible that an office can escape liability on grounds so frivolous. Upon every ground I condemn this defence, which ought never to have been set up, and has done the plaintiff much injustice, as he relied on the insurance."

COURT OF APPEAL

1924

June 4.

HANLEY v. CORPORATION OF THE ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND

MCPHILLIPS, J.A.

The trenchant language of the Vice-Chancellor in the *Mackie* case provides an excellent precedent for me to make some deserved observations in the present case. I unhesitatingly condemn the defence here made, it is not only frivolous but is callous to a degree almost unthinkable when it is considered that the appellant Company is a powerful, long existent and well-known English company with a history traditional in its nature and in keeping with the high standard so universally maintained on this continent by English companies to be rudely and ruthlessly departed from in this case. Here we have the plaintiff a returned soldier, struggling along to rehabilitate himself after great sacrifice, having risked his life in the cause of King and country and incidentally preserving the appellant Company amongst the many other institutions of the Empire from annihilation only to have this class of specious defence ungenerously advanced, to what, to me, is an incontrovertible and just claim—a contract was made and it must be kept. I, of course, do not suggest for a moment that a returned soldier is entitled to any preferential treatment in this or any other Court, but it is a circumstance that the appellant Company put an agent in the field at Merville, the Soldier Settlement on Vancouver Island, and that agent undertook to accept risks upon its behalf, and later, the general agents recognized the contracts and stated that policies would be issued and policies were issued.

In the case of the policy issued to the plaintiff, there was full and complete knowledge of the facts. It is idle contention to later urge that no contractual obligation exists. To give effect to this class of defence would be the subversal of the well-recognized principles of law governing insurance contracts. Vice-Chancellor Malins was moved to say in the *Mackie* case (p. 106), treating of the defence there made:

> "Having raised these objections, fatal to the public and to the success of the office, and most unwisely taken, and frivolous and ridiculous in themselves, I fear I can only make a decree that they are bound to the terms of the policy, and must make reparation for all damage, with interest on the money. I should be glad if I could make them pay damages for the injury which this defence has caused the plaintiff; it could not have originated with the respectable directors or solicitors, but the miserable officials."

I have no hesitation in adopting the language of the Vice-

Chancellor and applying that language in the present case. The defence here made was certainly not made by the officials of the appellant Company in Victoria; it can only be assumed that the officials to blame are the officials at the head office for Canada at Montreal. I cannot believe, as Vice-Chancellor Malins could not believe in the *Mackie* case, that the defence has had the approval of the directors in England. If there was any such approval on the part of the directors, it could only have been given upon some incomplete knowledge or misunderstanding as to the facts.

The learned trial judge in a very careful judgment, has referred to a number of cases that bear directly upon the principles governing in fire insurance losses and in particular as affecting the present case, and I am entirely in agreement with the learned trial judge's reasons for judgment, save in respect to (a) his view as to the non-effectiveness of the policy which was issued after the fire loss had taken place. In my view the policy is a valid policy and the defendant is liable thereon, it issued in conformity with the application made and in pursuance of the contract of insurance entered into by Thomas, who was clothed with authority to bind the defendant, and (b) as to the apportionment of the loss. The apportionment, in my opinion, should be as claimed by the plaintiff, *viz.*:

MCPHILLIPS, J.A.

Loss on house 6/11 of $1,600	$ 872.73
Loss on barn	700.00
Loss on furniture	500.00
Interest on $2,072.73 from Nov. 1st, 1922, as awarded in judgment to Nov. 26th, 1923	111.11
	$2,183.84

The appeal, in my opinion, should be dismissed, and the cross-appeal allowed, the judgment as entered to be increased from the sum of $1,751 to $2,183.84.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *James H. Lawson.*
Solicitors for respondent: *Clearihue & Straith.*

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

1924

Aug. 16.

REX v. CHIN MOW.

Criminal law—Unlawful possession of opium—Conviction—Habeas corpus—Penalty—Right of election—Construction of statute—Consideration of decisions on similar Acts—Can. Stats. 1923, Cap. 22, Sec. 4.

REX v. CHIN MOW

A prisoner was convicted by a police magistrate for unlawful possession of opium and sentenced accordingly. Section 4 of The Opium and Narcotic Drug Act, 1923, provides that such an offender "shall be guilty of a criminal offence, and shall be liable (*a*) upon indictment, to imprisonment for any term not exceeding seven years and not less than six months . . . . . or (*b*) upon summary conviction, to imprisonment for any term not exceeding eighteen months and not less than six months," etc.

Held, on *habeas corpus* proceedings, that the accused was not entitled to elect in which manner he be tried.

The duty of a Court is to find out what an Act of Parliament means and not to embarrass itself with previous decisions on former Acts when the new Act is clear in its terms.

Statement

APPLICATION for a writ of *habeas corpus*. The prisoner was convicted by a police magistrate for having opium in his possession without lawful authority. The objection was raised that as the penalty clause in section 4 of The Opium and Narcotic Drug Act, 1923, provides that an offender "shall be liable (*a*) upon indictment, to imprisonment," etc., and "(*b*) upon summary conviction, to imprisonment," etc., he must be given the right to elect in which manner he shall be tried. Heard by HUNTER, C.J.B.C. at Chambers in Victoria on the 13th of August, 1924.

J. Ross, for the application.
Carter, D.A.-G., contra.

16th August, 1924.

Judgment

HUNTER, C.J.B.C.: *Habeas corpus* proceedings. Prisoner was convicted by a police magistrate for unlawful possession of opium and sentenced accordingly. The point raised in the prisoner's affidavit is that the applicant was not allowed to elect to be tried summarily or to go before a jury. Counsel argues that because it is enacted that the offender "shall be guilty of a

criminal offence, and shall be liable (*a*) upon indictment, to imprisonment," etc., and "(*b*) upon summary conviction, to imprisonment," etc., that the accused must be given an election. I do not think so.

The diligence of the learned counsel seems not to have found any decision on the question, but they have referred me to numerous cases on different sections of the Code. But the danger of straying away from consideration of the meaning of the statute itself by comparing it with decisions on other independent enactments has often been pointed out, *e.g.*, by Jessel, M.R., in *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103 at p. 112, and in *Ex parte Blaiberg, ib.* 254 at p. 258. I cannot, therefore, see the need for resort to anything else than the statute itself as there is no ambiguity. It appears to me that Parliament has in effect enacted that the offence may be prosecuted either by indictment or summarily, and it is therefore impossible to say that the accused may dictate the course to be taken by the prosecution.

Judgment

It may be that the accused was not informed at the outset that he was being proceeded against summarily. If so, whether that caused him any legal prejudice which could be remedied has not now to be decided, as there is no *certiorari* in aid and as the only document before me, besides the affidavit, is the copy of the commitment, which is valid on the face of it.

The application must be dismissed.

Application dismissed.

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

1924

Aug. 16.

REX v. VIENNET.

Criminal law — Habeas corpus — Summary conviction — Imprisonment— Appeal to County Court—After dismissal of appeal held under warrant of County Court—B.C. Stats. 1915, Cap. 59, Sec. 77 (1); 1921, Cap. 30.

REX v. VIENNET

Courts exercising limited penal jurisdiction are confined to such powers as are plainly conferred or necessarily implied.

Section 77 (1) of the Summary Convictions Act enacts that in case of the dismissal of the defendant's appeal and the affirmance of the conviction the Court shall order the appellant to be punished according to the conviction.

The defendant was convicted of a violation of the Government Liquor Act and sentenced to imprisonment. An appeal to the County Court was dismissed and the prisoner was then held under a warrant issued out of the County Court.

Held, on a *habeas corpus* application, that the warrant was issued without jurisdiction and the defendant could not be held under it.

Collette v. *The King* (1909), 16 Can. Cr. Cas. 281 applied.

Statement

APPLICATION for a writ of *habeas corpus*. The defendant was convicted for a violation of the Government Liquor Act by a police magistrate and sentenced to imprisonment. An appeal to the County Court was dismissed, and the prisoner was then held under a warrant of the County Court. Heard by HUNTER, C.J.B.C. at Chambers in Victoria on the 13th of August, 1924.

Sloan, for the application.
O'Halloran, contra.

16th August, 1924.

Judgment

HUNTER, C.J.B.C.: *Habeas corpus* proceedings. In this case the defendant was convicted of a violation of the Government Liquor Act by a police magistrate and sentenced to imprisonment. He appealed to the County Court but the learned judge dismissed the appeal and the prisoner is held under a warrant issued out of the County Court, and it is now argued that the warrant is void.

The argument, shortly stated, is that section 77, subsection (1), of the Summary Convictions Act enacts that when it

disposes of the appeal and affirms the conviction the Court "shall order and adjudge the appellant to be punished according to the conviction," etc., and that the Court has no power to do anything else except to issue process to enforce any order which it makes about the costs of the appeal and then only "if necessary."

This is the view taken by Cross, J., in *Collette* v. *The King* (1909), 16 Can. Cr. Cas. 281, on the identical language of the Criminal Code, and although the point may seem technical and in the end of no use to the applicant, I think it must be acceded to. Courts exercising limited penal jurisdiction are always confined to such powers as are plainly conferred or necessarily implied; if it were otherwise confusion and uncertainty would soon prevail.

Judgment

Now there can be only one valid conviction for any offence. Consequently, in the absence of some clear provision to the contrary, if it is affirmed, the process to enforce it must issue out of the Court which rendered it.

I therefore think that the prisoner is not lawfully held under the warrant returned.

Application granted.

COURT OF APPEAL

1924

Sept. 10.

RE DEWDNEY ELECTION. SMITH v. CATHERWOOD

RE DEWDNEY ELECTION. SMITH v. CATHERWOOD.

Elections — Provincial — Counterfoil — Left attached to ballot-paper — Absentee vote—Official stamp not on envelope—Marking of ballot-papers—Indelible pencil—Ink—B.C. Stats. 1920, Cap. 27; 1921, Cap. 17.

Upon appeal from the decision of a County Court judge on a statutory recount of the ballots cast at a Provincial election it was held:—

(1) That ballots to which the full counterfoil was left attached should be counted (MACDONALD, C.J.A. dissenting).

(2) That ballots to which a portion of the counterfoil was left attached should be counted.

(3) That the ballots of absentee voters enclosed in envelopes that were not marked with the official mark in two or more places across the line where the envelope is closed in accordance with section 106(3) of the Provincial Elections Act should be counted (MARTIN, J.A. dissenting).

The decision of HOWAY, Co. J., in the result, was affirmed.

Statement

APPEAL by Maxwell Smith a candidate in the Provincial election held on the 20th of June, 1924, in the Electoral District of Dewdney, B.C., from the decision of HOWAY, Co. J., on the recount held as to said election in New Westminster on the 29th of July, 1924. The final count of the returning officer at Mission on the 17th of July, 1924, was sustained by HOWAY, Co. J., the result of his recount being: J. A. Catherwood 1259 votes, and Maxwell Smith 1246 votes. The appellant submitted that eight ballots were wrongly accepted to which the full counterfoil was attached in each case containing the number of the ballot; that eight ballots were wrongly accepted upon which a portion of the counterfoil was attached to each; that four absentee votes were wrongly accepted as the envelopes in which they were enclosed were not marked with the official mark on the back by the deputy returning officer who accepted the ballot in each case. Objection was also taken to a number of ballots which, in addition to the cross, contained marks by which the voter might be identified.

The appeal was argued at Victoria on the 9th and 10th of

September, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

J. W. deB. Farris, K.C. (*Sloan,* with him), for appellant: Leaving the counterfoil attached to the ballot is fatal to the ballot as the number on the counterfoil would be identical with the list of signatures and the voter could be identified. This is a ground for rejecting the ballot under section 112(*c*) of the Act. The judgment of Osler, J. in *Re Stormont Provincial Election* (1908), 17 O.L.R. 171, is against me but the section of the Ontario Act with reference to rejection of ballots expressly provides that errors by the deputy returning officer shall not warrant rejection of a ballot-paper but there is no such provision in the British Columbia Act so that case does not apply here: see *In re Wentworth Election* (1905), 9 O.L.R. 201 at p. 204. He said the counterfoil is not part of the ballot but it is a means of identification when attached to it. Eight ballots have the entire counterfoil attached and there are eight on which a portion of the counterfoil is attached. The next point is that four envelopes in which absentee votes were enclosed did not contain the official stamp of the deputy receiving the ballot and they were allowed by the County judge. We say the official stamp is a condition precedent to their being counted. There are three ballots marked with indelible pencil and three with ink: see *Re South Oxford Provincial Election* (1914), 32 O.L.R. 1 at p. 2; *In re West Calgary Election. Bennett* v. *Shaw* (1922), 3 W.W.R. 167 at p. 168.

Argument

W. J. Taylor, K.C. (*R. H. Pooley,* with him), for respondent: We submit that the Act is directory and not imperative: see *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170 at p. 174; *In re West Calgary Bennett* v. *Shaw* (1922), 64 S.C.R. 235 at p. 250. Our Act is substantially the same as the English Act but differs considerably from the Dominion Act. As to what ballots should be rejected see *Woodward* v. *Sarsons* (1875), L.R. 10 C.P. 733 at p. 747; *Jenkins* v. *Brecken* (1883), 7 S.C.R. 247 at pp. 250-1 and 254; *Bothwell Election Case* (1884), 8 S.C.R. 676 at p. 696; *Phillips* v. *Goff* (1886), 17 Q.B.D. 805 at p. 814.

Farris, in reply.

COURT OF APPEAL

1924

Sept. 10.

RE DEWDNEY ELECTION. SMITH v. CATHERWOOD

MACDONALD, C.J.A.

MACDONALD, C.J.A.: When judgment was delivered yesterday I intimated that I should hand down reasons.

This is an appeal from a County judge under the provisions of the Provincial Elections Act, being chapter 27, of the statutes of 1920. The following classes of ballots were passed upon:

(1) Ballots from which counterfoil had not been detached by the officer taking the ballot as required by the said Act; (2) ballots to which a small part of the counterfoil remained attached; (3) absentee ballots which had been enclosed in envelopes upon which the presiding officer had failed to affix his official mark across the line where the envelope is closed as required by section 106, subsection (3), of the said Act.

There was another class of ballots passed upon on complaint that the crosses were not legal ones, or that there were marks upon the ballots from which the voter could be identified. The result of the consideration of these ballots was that the respondent, Mr. Smith, gained four votes. Upon this the Court was unanimous.

Dealing, therefore, with the three classes above enumerated, and starting with No. 1, we are asked by the appellant to reject these ballots on the ground that the counterfoil, being attached, the identity of the voter and the candidate for whom he had voted could be ascertained. The submission was founded upon this: that the counterfoils are numbered consecutively, and that that fact in connection with the other, that the voter must sign his name in a book before he can obtain his ballot, would enable one to identify him. Assuming the number on the counterfoil to be 20, upon examination of the book of signatures, it was contended, the twentieth name would be the name of the voter who had got the ballot with the counterfoil number 20 attached. It was contended by respondent's counsel that that would not necessarily follow in all cases, that a voter might sign the book and linger about without applying for his ballot until another voter had signed and obtained a ballot. This is no doubt true, but I think I should be paying little attention to the intent of the Legislature, as evidenced by its language, if I should allow ballots with the counterfoil and appropriate number attached to

be counted. It probably would, in nine cases out of ten, inevitably lead to the identification of the voter, which the Act intended to prevent. In this conclusion my learned brothers do not concur.

The second class, we are all agreed, was properly counted. Only a small portion of the counterfoil remained attached to the ballot. This happened in the tearing off of the counterfoil, the portion remaining furnishing no means of identifying the voter. On one of the ballots was the figure 8, but it was apparent that that figure was only one of the figures of the original number, the others having been torn off. We thought, therefore, that no identification could be made by reason of this figure.

The third class relates to absent voters' ballots. The sufficiency of these ballots depends on the construction to be put upon section 106, which requires the presiding officer to put his official mark on the back of the envelope as aforesaid, and section 110, which requires the returning officer who receives the envelope with the ballot to proceed as follows:

"(*c.*) He shall open each parcel taken from the ballot-boxes containing absent voters' ballots, and shall open each registered envelope or parcel received by him through the mail up to the time of the beginning of the final count, enclosing envelopes containing absent voters' ballots. After examining each affidavit and finding that the deponent is a voter whose name appears on the list of voters for the polling division named in the affidavit, and that no person has in fact voted as such voter in the poll held in the polling division, and after comparing the signature made by the voter on the affidavit with the signature of the voter in whose name he assumes to vote made on the original affidavit received by the Registrar of Voters in support of the voter's application for registration, and finding the signatures to be identical, and finding the envelope containing the ballot has not been tampered with, the returning officer shall open the envelope containing the ballot and shall put the ballot, without being opened, into a ballot-box. . . . ."

MACDONALD, C.J.A.

It was argued by appellant's counsel that by section 106 it was made a condition precedent to the right of the returning officer to enter upon the consideration of any ballot or envelope that the official mark should be upon it. The construction contended for appears to me to be too strict. I would regard the section as being directory. Very real safeguards are provided by the section already quoted against fraud and also against

COURT OF APPEAL

1924

Sept. 10.

RE DEWDNEY ELECTION. SMITH v. CATHERWOOD

tampering with the envelopes. At all events, the question is in the same category with that which has been decided by the majority of the Court in respect of class 1. The provision with regard to the removal of the counterfoil is similar to that with respect to the placing of the mark on the envelope, with this difference, that while I think the failure to detach the counterfoil would lead to the identification of the voter, the failure to put the official mark on the envelope may have no effect at all upon the secrecy or genuineness of the ballot, and while it might prevent tampering with the ballot, still I do not think that the Legislature intended that the omission of the marks alone should furnish grounds for the rejection of the ballot.

MACDONALD, C.J.A.

The net result was that the appeal stood dismissed.

MARTIN, J.A.: This is an appeal under section 125 of the Provincial Elections Act, B.C. Stats. 1920, Cap. 27, from the decision of the judge of the County Court of Westminster upon a recount of the votes cast in the recent election in the electoral district of Dewdney, and in pursuance of our duty in that behalf under subsection (5) of said section we proceeded to "recount the ballots or such of them as are the subject of appeal," with the result as a whole that the petitioner was unsuccessful in his application to disturb the general result of the recount below.

MARTIN, J.A

Many ballots were considered with, happily, an almost complete unanimity of view after a careful scrutiny of each ballot and regard being had in each case to all those innumerable major and minor variations on marking ballots which will occur owing to various causes, such as infirmity of any kind, differences in materials and facilities, and unfamiliarity (if not illiteracy) with writing materials, in even the sincere attempt to comply with the provisions of the Act for marking ballots by a cross, the chief difficulty arising under subsection (*c*) (relating to "Writing or mark by which voter could be identified") of section 112 respecting the rejection of ballots for the five causes therein specified. It would be impossible to accurately record the distinctions which guided us in our decision

upon each ballot, but there are three classes which can be governed by general principles.

First, the ballots that have the complete counterfoil attached. It was submitted that these should be rejected because the number on the counterfoil afforded a means of identification under section 92 (1), which directs that:

"92. (1.) The presiding officer shall require every person who tenders his vote to sign his name, address, and occupation in a book to be kept in the polling-booth for that purpose, and any person being so required who, unless unable to write, refuses to sign his name, address, and occupation shall not receive a ballot-paper or be allowed to vote."

The suggestion is that the number on the counterfoil given with the ballot-paper to the voter would coincide with the order of the signature of the voter in the book, and, therefore, the identity could be established merely by counting. This assumption pre-supposes that the signatures would necessarily be made in regular consecutive order corresponding with the ballot numbers as given out, but in the absence of any statutory direction to that effect (and which one would expect to find, if so intended) I am of opinion that it would be unsafe to make such an assumption having regard to the inevitable lack of order in voting that must obviously take place when many voters (or, indeed, only a few of dilatory disposition) are being attended to at or about the same time. These ballots, therefore, I think, should be allowed.

MARTIN, J.A.

Second, certain torn counterfoils attached to ballots which had no complete numbers on them; these should also, *a fortiori*, be allowed.

Third, as to certain absentee ballots under sections 106 and 110. In my opinion, the provisions of subsection (3) of section 106 that the presiding officer "shall securely close the envelope, and shall mark the same with the official mark in two or more places across the line where the envelope is closed," are clear conditions precedent to the exercise of the powers of the returning officer under section 110(*c*) in "finding that the envelope containing the ballot has not been tampered with," and thereafter opening the envelope and dealing with the ballot; in other words, the jurisdiction is only exercisable when envelopes of the kind specified and safeguarded by subsection (3)

COURT OF APPEAL

1924

Sept. 10.

RE DEWDNEY ELECTION. SMITH v. CATHERWOOD

come into the possession of the returning officer. I think it was the manifest intention of the Legislature in making this special departure in favour of absentee voters to surround with special safeguards a situation so exposed to corrupt practices, and, with all respect, I think to hold otherwise would not "promote the main object of the Legislature" but would "weaken the safeguards provided by [it] for securing fair and impartial" elections—to adopt the language of the Privy Council in *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170 at pp. 175 and 178. The ballots in question, therefore, which admittedly do not comply with the statute, should be rejected.

MARTIN, J.A.

I am unable to see any similarity in construction between these provisions and that in section 94 directing the presiding officer to remove the counterfoil, the adherence of which to the ballot-paper is innocuous.

The appeal, consequently, should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree in the dismissal of this appeal, being in agreement with my brother the Chief Justice that the absentee votes should be counted, and in agreement with my brother MARTIN that the ballots to which the full counterfoil was left attached should be counted.

Appeal dismissed.

Solicitor for appellant: *G. M. G. Sloan.*
Solicitor for respondent: *R. H. Pooley.*

REX v. LEE PARK.

COURT OF APPEAL

1924

Oct. 16.

REX v. LEE PARK

Criminal law—Conviction under The Opium and Narcotic Drug Act—Deportation—Order of magistrate against deportation—Made subsequent to conviction—Invalid—Can. Stats. 1922, Cap. 36, Sec. 5.

A Chinaman was convicted at Kingston, Ontario, under The Opium and Narcotic Drug Act, of having opium in his possession. After serving his sentence he was taken under warrant of the deputy minister of immigration to Vancouver and there held for deportation. On an application for a writ of *habeas corpus* it was disclosed that some days after the conviction and warrant had been signed the magistrate before whom the Chinaman had been tried, on application of counsel, made an order that he be not deported. The prisoner was discharged.

Held, on appeal, reversing the decision of MORRISON, J., that where at the time of a conviction under said Act the magistrate does not order that the accused be not deported after completion of his sentence, an order against deportation made subsequently is invalid, the magistrate being *functus officio*.

APPEAL from an order of MORRISON, J. of the 10th of October, 1923, directing that Lee Park be discharged from the custody of the controller of Chinese immigration at Vancouver. On the 6th of February, 1923, Lee Park was convicted by the police magistrate at Kingston, Ontario, for having opium in his possession and was fined $400 and costs or six months with hard labour. He served his sentence and under warrant of the deputy minister of immigration to the commissioner of immigration of the 12th of April, 1923, he was at the expiration of his sentence taken to the immigration building at Vancouver and there held for deportation. On the application for a writ of *habeas corpus* before MORRISON, J. on the 10th of October, 1923, an affidavit of the police magistrate at Kingston was read in which he stated that at a date subsequent to the conviction of Lee Park it was called to his attention that the effect of this conviction would be that Lee Park would be deported unless he made a finding to the contrary and some days later than the 6th of February, 1923, he endorsed on the papers an order that Lee Park was not to be deported. Upon Lee Park being discharged the Crown appealed.

Statement

COURT OF APPEAL

1924

Oct. 16.

REX v. LEE PARK

Argument

The appeal was argued at Vancouver on the 5th of March, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

E. Meredith, for appellant: The magistrate must make the order when he passes sentence. He cannot do it afterwards. When he has given sentence he is thereafter *functus officio.* When he made the order not to deport he did not call in the prisoner or hear counsel on the question: see *Re Joe Fong* (1923), 24 O.W.N. 39 at p. 41; *Glasier* v. *Rolls* (1889), 59 L.J., Ch. 63; *Jones* v. *Williams and Roberts* (1877), 41 J.P. 614. If he wants to suspend deportation he must do so at once.

Mellish, for respondent: Under section 5 of the 1922 amendment the magistrate may suspend deportation; the words are "unless the Court before whom he was tried shall otherwise order." Under this section the magistrate can suspend deportation at any time before he has served his sentence.

Meredith, in reply.

Cur. adv. vult.

16th October, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The Opium and Narcotic Drug Act declares that an alien convicted and sentenced to imprisonment shall, upon the termination of his imprisonment, be kept in custody and deported "unless the Court before whom he was tried shall otherwise order." The respondent is an alien and was convicted and sentenced to imprisonment, but no order was made at the time that he should not be deported. Some days after the conviction and warrant had been signed, the magistrate before whom he was tried, on application of his counsel, made an order that he was not to be deported.

I am unable to put a construction on the statute which would enable the trial Court to deal piecemeal with the respondent's offence. The words of the Act are imperative, that he "shall" be deported. This is a penalty imposed by the statute itself and can only be remitted by the intervention of the Court which tried the accused, and, as I read it, this can only be remitted at the time of the accused's trial, or before the trial is completed

by the signing of the warrant of commitment. When the magistrate did this he parted finally with the case.

The appeal should be allowed.

MARTIN, J.A.: This appeal raises a nice question upon the meaning of section 10B (as amended in 1922, Cap. 36) of The Opium and Narcotic Drug Act, as follows:

The appellant was convicted at Kingston, Ont., by James M. Farrell, police magistrate, on the 6th of February, 1923, for unlawfully having opium in his possession and sentenced to a fine of $400 and costs, and to be imprisoned for six months upon default of payment thereof.

In his statutory declaration before us, dated the 25th of July last, the said magistrate deposes:

"At a subsequent date it was called to my attention that the effect of this conviction would mean that Park was to be deported unless I made a finding to the contrary and some days later than February 6th, 1923, I endorsed on the papers the order that he was not to be deported."

It is submitted by the Crown, on appeal from an order for *habeas corpus* discharging the prisoner from the custody of the immigration authority at Vancouver, who held him for deportation after the term of his imprisonment had expired, that the magistrate had no power to make such an order, which could only be made at the time of conviction and sentence of which it formed part, and after he signed the conviction he became *functus officio,* and reliance is placed upon the recent decision of Mr. Justice Orde, in Chambers, in *Re Joe Fong* (1923), 53 O.L.R. 493, wherein that learned judge took, in substance, that view of said section in a case similar in certain respects, saying, p. 496:

MARTIN, J.A.

"My opinion, however, is that, having adjudicated upon the matter on the 18th September, 1922, he was thereafter *functus officio.* The failure to make an order is in fact part of the sentence; in other words, when the adjudication upon the conviction had been dealt with on the 18th September, the prisoner was in fact sentenced to pay a fine or in default to three months' imprisonment, and if he chose to suffer his sentence of imprisonment, there followed, as part of his conviction, the penalty of deportation, and the convicting magistrate had no power thereafter to alter it."

I have given the section, which is an important and new and very unusual one, corresponding consideration, with the result

COURT OF APPEAL

1924

Oct. 16.

REX v. LEE PARK

that I find myself, with every respect, unable to take that view of it. To my mind the power to avert deportation does not include the essential elements of a sentence, which is the judgment or declaration pronounced by the presiding judicial officer defining what the punishment shall be (within a statutory discretion, almost invariably) for violating the law in question, here, subsection (2) of section 5A of the Act. Then, that sentence having been pronounced, Parliament proceeds to declare that a certain consequence shall follow in case the convicted alien undergoes imprisonment, *viz.*, that he shall

"upon the termination of the imprisonment imposed by the Court upon such conviction, be kept in custody and deported in accordance with section forty-three of The Immigration Act unless the Court before whom he was tried shall otherwise order."

I find myself unable, after much reflection, to take the view that this power of mercy to avert what might in some circumstances be too harsh a punishment (and therefore Parliament in contemplation of them has provided this means of mitigation) is lost because it was not exercised at a time which is not fixed by the statute, as one might reasonably expect. There is, however, a limit of time placed upon its exercise, as I construe it, *viz.*, that it must be invoked before the alien has been actually taken into custody for the purpose of deportation—"shall . . . be kept in custody and deported," as the statute hath it—which language I should be disposed to read conjunctively as embracing the commencement and continuation of one indivisible executive act of deportation, which cannot be arrested once the convict has become caught in its net, *i.e.*, immediately upon his being taken into custody for that purpose, which is something quite distinct from his former custody in prison by the gaoler.

MARTIN, J.A.

But the point as to the sentence not including the deportation has really been concluded by the decision of this Court in *Rex* v. *Loo Len* [(1923), 33 B.C. 448]; (1924), 1 W.W.R. 733, wherein we decided that an appeal lies to us from an order of deportation made under said section 10B, because such an order is a civil proceeding and not criminal, as it would have been if the order of deportation formed part of the sentence, which was the opinion of half the members of the Bench in *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176;

1 W.W.R. 1365, thus leaving the Court as then constituted equally divided and the point still at large until it was settled by the majority decision in the said *Loo Len* case, wherein the *ratio* of the decision is clearly brought out in the reasons delivered.

Such being the case, no question of *functus officio* or alteration of the sentence (as to which *Cf.*, Stone's Justices' Manual, 56th Ed., 180) arises and it was, in my opinion, open to the justice at that state of the matter to entertain a substantive application for an order preventing deportation. But while he had the power it should have been exercised in the proper and usual way when the liberty of the subject is concerned, *i.e.*, after notice to the Crown, and I am wholly in accord with what Mr. Justice Orde said in the *Fong* case, *supra*, about the impropriety of orders being made in this secretive fashion contrary to all precedent. Nevertheless, however reprehensible the conduct of the magistrate may have been in the manner of exercising his jurisdiction, that impropriety should not deprive the convict of the benefit of the merciful statutory provision, and so I am constrained to hold that the order appealed from is justified in the circumstances, and therefore the appeal should be allowed.

MARTIN, J.A.

McPHILLIPS, J.A.: This appeal, in my opinion, must succeed. This Court has held in a number of cases now that it is too late, after the term of imprisonment has expired and the offence has been expiated, to raise any exception as to the validity of the conviction based upon the wrongful imposition of hard labour. The conviction is not capable of being now reviewed, the defendant cannot sleep upon his rights and at this late date ask that the conviction be quashed. The defendant is not now held in any way by the force of the conviction —the efficacy of the conviction is now at an end. The defendant is no longer under criminal sentence and not a criminal in any sense, having served the allotted period of imprisonment. The defendant stands purged of the offence. The situation, though, is this, that the magistrate not having at the time of the conviction made under The Opium and Narcotic Drug Act ordered that the defendant be not deported following upon his

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

Oct. 16.

REX v. LEE PARK

serving out his sentence, the order made at a later date was invalid, the magistrate being *functus officio*. Lee Park is now held for deportation following upon the direction of the minister of justice, being in the custody of the controller of immigration, to be deported in pursuance of The Opium and Narcotic Drug Act, and The Immigration Act.

There is no point in the contention made that no appeal lies to this Court where the defendant has been released from custody upon *habeas corpus*, as the proceedings are in their nature civil, not criminal. The defendant is not now held under or by virtue of any criminal conviction—no such conviction is extant. The defendant is held, as the commissioner of immigration has sworn, under a warrant issued by the deputy minister of immigration for deportation pursuant to The Opium and Narcotic Drug Act, and The Immigration Act. It follows, in my opinion, that the release under *habeas corpus*, with great respect to the learned judge so ordering, was in error and cannot be supported, and the direction made should be set aside and an order should go for the rearrest or recapture of Lee Park, to be then held for deportation, pursuant to the existent statutory mandate in that regard, Lee Park being, upon the facts, subject to deportation.

MCPHILLIPS, J.A.

Appeal allowed.

Solicitor for appellant: *Elmore Meredith.*
Solicitor for respondent: *A. J. B. Mellish.*

ALLISON v. STANDARD LUMBER COMPANY LIMITED.

COURT OF APPEAL

1924

Oct. 7.

ALLISON v. STANDARD LUMBER CO.

Master and servant—Contract of employment—Percentage of profits—Computed semi-annually—Finality of computation—Cause of action arising after issue of writ—Included in statement of claim—Traversed by Defence—Estoppel.

The plaintiff and defendant entered into an agreement whereby the defendant was to build and equip a general store which the plaintiff was to manage at a salary equivalent to 25 per cent. of the net profits arising from the business as computed semi-annually. The agreement was subject to the right of cancellation by either party upon giving 60 days' notice. The first computation was made in January, 1923, nearly twelve months after the agreement was entered into which was mutually satisfactory and $5,000 was credited to the plaintiff as his share of the profits. In the following May the plaintiff gave notice terminating the agreement, which ended the 23rd of July, 1923. The plaintiff was then given an agency by the defendant to sell logs on a commission. The plaintiff brought action for an accounting and in his statement of claim he included an allegation of the breach of the agency contract, the breach having taken place shortly after the issue of the writ. An objection to admission of evidence on that issue was sustained by the trial judge who further overruled the contention of plaintiff's counsel that the computation made in January was final and ordered the accounts to be taken over the whole period.

Held, on appeal, affirming the decision of MURPHY, J., that admission of evidence on the breach of the agency contract was properly excluded, and he was not estopped from raising the point at the trial even where he had traversed the allegation in his defence, provided there has been nothing in his conduct to estop him from so doing.

Held, further, reversing the decision of MURPHY, J., that the store contract was one of employment and the computation made in January, 1923, was final as to the period it covered and there should be an accounting for the period subsequent to that date only.

APPEAL by plaintiff from the decision of MURPHY, J. of the 18th of February, 1924, in an action to recover $7,000 for work done and services rendered. The plaintiff entered into a contract with the Smith Dollar Timber Company, Limited, a company subsequently absorbed by the defendant Company, on the 4th of February, 1922, whereby the Company was to advance the necessary funds for the purpose of acquiring a site and Statement

COURT OF APPEAL

1924

Oct. 7.

ALLISON v. STANDARD LUMBER CO.

Statement

erecting a building for a general store to be located at Seymour Inlet and the plaintiff was to arrange for the site, erect the building and do all things necessary for the purchase, installation and sale of a general stock of goods and merchandise, and was to purchase for the Company from time to time logs boomed in the inlet. The plaintiff was to receive 25 per cent. of the net profits of the enterprise and the agreement was to continue in force for one year when either party could terminate it upon giving 60 days' notice. The plaintiff took charge on the 4th of February, 1922, and in the early part of 1923 an account was taken of the operations up to the end of January, 1923, and the profits were estimated at slightly over $20,000. The plaintiff had received as part of his share $2,000 and then was given a cheque for $3,000 making up his share of the profits under the agreement. The plaintiff gave notice on the 23rd of May, 1923, that the contract should terminate on the 23rd of July, 1923. The plaintiff claimed that an account should be taken of the business of the Company from the 31st of January, 1923, until the 23rd of July, when the contract terminated. The plaintiff further claimed that towards the end of May the defendant verbally employed him to sell 10,839,160 feet of logs of the Company on a commission of 25 cents per thousand feet of logs sold and that he sold under this arrangement 2,380,000 feet for which he had not been paid his commission of $595. The plaintiff further alleged that on the 3rd of October the defendant by letter wrongfully terminated the contract in respect of the sale of logs for which he claimed damages. The writ was issued in this action on the 2nd of October, 1923. The defendant Company claimed that there should be an accounting in respect of the whole business of the Company from the 4th of February, 1922, until the 23rd of July, 1923, without consideration of the taking of accounts up to the 31st of January, 1923. It was held by the trial judge that there should be an accounting of the transaction from the beginning up to the termination of the contract and that with relation to the second contract for the sale of logs evidence should not be admitted as the cause of action arose after the writ was issued in the action, the question of costs being reserved.

The appeal was argued at Victoria on the 4th and 5th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Symes, for appellant: We are appealing, first, on the ground that accounts should only be taken from the 31st of January, 1923, and secondly, there was error in declining to admit evidence as to wrongfully terminating the contract on the sale of logs. The evidence shews the parties settled their accounts up to the 31st of January, 1923, when the plaintiff received a cheque for $3,000, being the balance due him on that date, and the accounts should be taken from that date until completion of the contract on the 23rd of July, 1923. As to the contract being repudiated after the issue of the writ he is estopped from raising this point now as it was not raised in the defence: see *Davis* v. *Reilly* (1898), 1 Q.B. 1; Bullen & Leake's Precedents of Pleadings, 7th Ed., 532; *Stirling and Co.* v. *North* (1913), 29 T.L.R. 216; *Pickard* v. *Sears* (1837), 6 A. & E. 469. Argument

Davis, K.C., for respondent: As to whether or not evidence can be given for a cause of action arising after the issue of the writ see *The Tottenham Local Board of Health* v. *The Lea Conservancy Board* (1886), 2 T.L.R. 410; *Humphries* v. *Humphries* (1910), 1 K.B. 796, and on appeal (1910), 2 K.B. 531. The cases cited by the appellant were where there was estoppel by record. There was no allowance for bad debts in the first taking of accounts.

Symes, in reply.

Cur. adv. vult.

7th October, 1924.

MACDONALD, C.J.A.: The relationship between the parties under the agreement is that of master and servant, not that of co-partners.

MACDONALD, C.J.A.

The defendant agreed to build and equip a general store, which the plaintiff agreed to manage at a salary. Included in the business to be carried on was that of buying logs. The defendant built and equipped the store and the plaintiff managed the business as agreed. It was a term of the agreement

COURT OF APPEAL

1924

Oct. 7.

ALLISON v. STANDARD LUMBER CO.

that the plaintiff should receive a salary equivalent to 25 per cent. of the net profits arising from the business as computed semi-annually. The contract was subject to a right of cancellation by either party upon giving 60 days' notice. No computation of profits was made until January, 1923, nearly 12 months after the agreement had been entered into. In January the parties made a computation which was mutually satisfactory, upon which the profits were ascertained to be $20,000, and $5,000 of this was thereupon credited to the plaintiff. In the following May, notice to determine the agreement was given by the plaintiff and it came to an end on the 23rd of July, 1923. The plaintiff was then given an agency to sell the logs on hand, upon commission. He includes in his statement of claim in this action, an allegation of the breach of this agency contract, and claims damages therefor, but the breach occurred after the commencement of this action. Objection was taken at the trial to the admission of the evidence upon this issue, and the learned judge ruled it out. I do not think we can interfere with that ruling.

On the main issue the defendant's counsel submitted that the parties must take the accounts over the whole period from the beginning to the 23rd of July, and disregard the account taken in January, and that the plaintiff's salary, if any, for the whole period should then be finally determined. Mr. *Symes*, counsel for the plaintiff, insisted that the computation made in January was final as to that period and cannot be reviewed. The learned judge held with the defendant, and ordered the account to be taken over the whole period. With this I am, with respect, unable to agree, and to this extent the appeal should be allowed.

MACDONALD, C.J.A.

If my recollection serves me, we were told by counsel that there would be a loss for the period between January and July. If this be so, I can see no object in taking an account for that period, since the plaintiff is not bound to make good the loss, but is only interested in the profits. But this may be spoken to if desired.

The result is that the appeal succeeds on the issue last mentioned, and fails on that of the rejection of evidence. The costs will be dealt with accordingly.

MARTIN, J.A.: Though I am not wholly without doubt, yet I do not feel justified in differing with the view taken by my brothers upon the construction of the contract.

As to the objection to certain evidence, the learned judge was right in rejecting that relating to a cause of action for an alleged breach of contract to sell logs on commission, which breach did not arise till after the writ was issued, and as this fact appears upon the face of the record itself (in the statement of claim) the appellant has in law put himself out of Court thereby, and I can see nothing in the defendant's pleadings or conduct that would estop it from raising this valid objection.

MARTIN, J.A.

GALLIHER, J.A.: I think the appeal must be dismissed as to the matter first dealt with by me.

The plaintiff at the time the writ of summons was issued had a cause of action for an accounting. On the day following the issue of the writ a separate cause of action accrued. In the statement of claim the plaintiff pleaded this second cause of action and the defendant in its defence traversed same.

When the case came up for hearing, Mr. *Davis,* acting as counsel for the defendant, raised the point that this second cause of action, which arose after the issue of the writ, could not be dealt with and that no evidence could be adduced respecting it, citing *Davis* v. *Reilly* (1897), 66 L.J., Q.B. 844. After considerable discussion, the learned trial judge accepted that view, and upon that authority and on others cited to us on appeal, I agree with him. I think the point can be taken at the trial and before judgment, where there is no estoppel.

GALLIHER, J.A.

Mr. *Symes,* for the appellant, took the point that Mr. *Davis* having pleaded to the allegations in the statement of claim without raising the point, was estopped from doing so at the trial, but I think this is sufficiently answered by Mr. *Davis* in stating that the plaintiff was not induced to change his attitude by any acts of the defendant.

In *Pickard* v. *Sears* (1837), 6 A. & E. 469 at p. 474, Lord Denman, C.J. says:

"But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things,

COURT OF APPEAL

1924

Oct. 7.

ALLISON v. STANDARD LUMBER CO.

and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

The facts here do not come within that rule. They may be a question of costs, but that has been reserved by the learned judge below. Even under the wide powers of amendment given to the Court, my own view is that we cannot amend so as to permit a second and independent cause of action, accruing after the writ issued, to be added in that action.

The other question is as to the period over which an account should be taken, and that depends on the construction of the agreement itself and the acts of the parties to it. What is complained of in the notice of appeal under this head is (a) that the trial judge should have ordered the accounts to be taken as from the 31st of January, 1923, and not from the beginning; (b) that he should have held that the settlement arrived at as of the last mentioned date was final and conclusive.

The clause for construction in the agreement is as follows:

"And it is hereby mutually agreed that the party of the second part shall receive a salary for his services under this agreement which shall amount to a sum equivalent to 25 per cent. of the net profits arising from said enterprise as computed semi-annually."

If the words "as computed semi-annually" were not present in this clause, I should find no difficulty in agreeing with the learned judge. As a matter of fact, the account which was taken between the parties was not a semi-annual account, but was one taken at the end of almost a year from the date of the agreement, nevertheless, if the account as taken was for determining the profits up to that date upon which salary could be fixed and paid, and it is clear that that was the intention of the parties, it remains only to determine in that regard whether such account was final and conclusive between the parties up to that date, or whether it was only approximate and liable to be opened up and changed at a later date. The account seems to me to be more than an approximate statement. It took considerable time to prepare, and all that suggests itself to me at the present time as lacking is, that there is no allowance for depreciation of plant or for bad debts. As to the former there was, as Mr. Smith, the defendant's witness, states, no depreciation up to the time the account was taken, and as to

GALLIHER, J.A.

the latter there is no evidence of any bad debts having been incurred then. With these two elements eliminated, and in view of the wording of the contract and the acts of the parties themselves, I have, with deference, come to the conclusion that the judgment of the learned judge below should be varied by fixing the date from which the accounts should be taken as of the 31st of January, 1923, and to that extent the appeal is allowed.

MCPHILLIPS, J.A.: This appeal raises points of considerable nicety—the construction of the contract is called for to determine the rights and liabilities of the parties to the contract. The contract is in the words and figures following: (It was stated at this Bar as well as in the Court below that the contract put in evidence, although stated to be with the Smith Dollar Timber Company Limited, was to be in all its terms deemed to be the contract as between the parties hereto, *i.e.*, as if the name of the defendant Company appeared where the Smith Dollar Timber Company Limited appears).

"MEMORANDUM OF AGREEMENT made this fourth day of February, A.D. 1922, between Smith Dollar Timber Company Limited of the City of Vancouver in the Province of British Columbia (hereinafter called the party of the first part) of the first part: and A. P. Allison of Powell River, in the said Province of British Columbia (hereinafter called the party of the second part) of the second part.

"WHEREAS the party of the first part proposes to acquire a site and erect a building for a general store to be located at Seymour Inlet. MCPHILLIPS, J.A.

"AND WHEREAS the party of the second part undertakes to arrange for the site and to erect the building and do all things necessary for the purchase, installation and sale of a general stock of goods, wares and merchandise and to purchase for the party of the first part from time to time logs boomed up in the water.

"NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the sum of One dollar ($1.00) and other good and valuable consideration (the receipt whereof is hereby acknowledged) the party of the first part agrees to furnish the funds necessary from time to time as and when required to carry out the intention of the parties as above set forth PROVIDED HOWEVER that the total amount of cash and credit advanced or furnished at any one time shall not exceed the sum of fifty thousand dollars ($50,000).

"The party of the second part agrees that he will devote his entire time and attention to the development and care of said enterprise and that he will render from time to time as required a statement or account shewing the condition of said business for any particular period.

COURT OF APPEAL

1924

Oct. 7.

ALLISON v. STANDARD LUMBER CO.

"AND IT IS HEREBY MUTUALLY AGREED that the party of the second part shall receive a salary for his services under this agreement which shall amount to a sum equivalent to twenty-five per cent. (25%) of the net profits arising from said enterprise as computed semi-annually.

"AND IT IS FURTHER MUTUALLY AGREED that this contract shall continue for one year from date unless sooner terminated by either party by giving sixty (60) days' notice in writing to the other of an intention so to do.

"IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written."

The contract, it will be observed, was to extend for one year, but it is common ground (and no point is taken on this) that the contract was continued and really was treated as from year to year, to be determined, of course, at any time as therein stipulated, and it was terminated by the plaintiff giving notice to that effect under date the 23rd of May, 1923. It followed that the contract came to an end on the 23rd of July, 1923.

It was contended throughout the trial that the adventure entered into was not profitable and that the plaintiff should, upon the taking of the accounts, be charged with all moneys received by him as salary, that is to say, that if upon the taking of the accounts it is shewn that no net profits were achieved then the moneys received and paid to the plaintiff as salary would be the moneys the plaintiff would be called upon to return to the defendant and be chargeable therewith. I do not so read the contract. It would seem to me that the provision as to arriving at what the salary of the plaintiff should be for devoting "his entire time and attention to the development and care of . . . : the enterprise" was in its nature a scale to determine the *quantum* of the salary that would be payable to the plaintiff. It is plain that the salary for the work and services of the plaintiff was to be arrived at by striking throughout the continuance of the contract the net profits as computed semi-annually. If, of course, there were no net profits, the plaintiff would naturally suffer. With great respect, I cannot agree with the interpretation put upon the contract by the learned trial judge. The oral reasons of the learned judge read as follows:

MCPHILLIPS, J.A.

"This contract is very unhappily worded, but it does seem to me it means net profits on the whole enterprise and I am going to so hold. Therefore, there will have to be an accounting of the transaction from the

beginning up to the date when this contract was terminated. Three hundred dollars will have to be allowed against the plaintiff on the evidence. These are all the directions I need give in view of what has occurred during the trial. There will be an account accordingly."

It would not appear to me to be at all reasonable to hold that the plaintiff by the terms of the contract, where he was to devote his whole time to the work, should be at the risk of earning nothing for his services, and further, be chargeable with any moneys received during the currency of the contract, such moneys being received as salary. The plaintiff, in my opinion, was to be subject to one risk only, and that was that if at the semi-annual periods no net profits were shewn to have been made then no salary could be claimed for the six months in which it was so shewn. This, in my view of the contract, would not admit of the taking of the accounts of the whole enterprise throughout the whole time of its continuance, and if upon the taking of such accounts for the whole period no net profits were shewn then the plaintiff would get nothing, and further, to the extent that he had received moneys on account of salary, should repay same to the defendant. That was not the contract. The adventure as a whole was the venture of the defendant, the plaintiff merely adventured in part, *i.e.*, by way of the risk of the semi-annual computations, *i.e.*, his salary for the six-months periods would in that manner be shewn, and if there were no net profits during any one of the six-months periods there would be no salary, but if there were he was entitled to his salary upon the basis of 25 per cent. of the net profits quite irrespective of whether in the end upon the whole venture the defendant in its enterprise made any net profits or met with disaster. The contract was continued in existence for practically three six-months periods and during the earliest period, as I read the evidence, a profit and loss account was made up and the net profits were shewn to have been $20,467.33 and the plaintiff received 25 per cent. of these declared net profits. Now it is attempted to be set up that the account so made up was not a binding account, but an interim one only, and that the plaintiff cannot rely thereon and justify thereunder for the moneys received by him. There was the duty cast upon the defendant to make the computation of the net

COURT OF APPEAL

1924

Oct. 7.

ALLISON v. STANDARD LUMBER CO.

profits semi-annually, and I cannot see by what line of reasoning it can be contended that a profit and loss account once prepared and declared can still be held to be of no binding effect. It would certainly be highly inconvenient for one who devoted his whole time to his work that he should not be able to be apprized of what he was actually earning or that he was earning nothing at all, which would appear to be now the contention of the defendant. I think the defendant must be held to be bound by the account of net profits made and the plaintiff held to be entitled to the moneys received and not called upon to return any of the moneys so received, if it should be shewn that during any of the subsequent periods no net profits were achieved. The account the plaintiff is entitled to to determine the salary payable to him is an account for the period elapsing after the account hereinbefore referred to, which shewed the net profits at that time to be $20,467.33. In arriving at the conclusion here expressed as to the legal effect of the contract I have endeavoured to follow the well-known rule that every contract shall have a reasonable construction according to the intention of the parties (*Per curiam, Pannell* v. *Mill* (1846), 3 C.B. 625). Further, even where the contract as expressed is futile the law will apply any term obviously intended by the parties, which is necessary to make the contract effectual: *Oriental S.S. Co.* v. *Tylor* (1893), 63 L.J., Q.B. 128 at p. 132; *Holford* v. *Acton Urban Council* (1898), 67 L.J., Ch. 636 at p. 639. The method in the contract here adopted to fix the salary of the plaintiff might be one adopted, say, in large department stores, or factories of the day, but it would be unthinkable to so construe it that the whole staff of employees should have to disgorge and give up all moneys received by way of salary if, when the contract was at an end, the business venture shewed no net profits throughout the whole period. It is unthinkable that that should have been the intention of the parties. Further, the contract does not so read. I cannot see wherein in any particular the view I have taken of the contract is in antagonism or does any violence to the language of the contract, and that the view here expressed is not fully supported by the words of

MCPHILLIPS, J.A.

the contract itself (*Per curiam, Ford* v. *Beech* (1848), 11 Q.B. 852, 866). Here we have not a venture of the plaintiff, but a venture of the defendant. As before pointed out, the risk the plaintiff took was the risk only that it might be determined at any semi-annual period, that no net profits had been earned, and it would then follow that the plaintiff had earned no salary for that period. This accentuates the need for the computation being made and that duty was imposed upon the defendant, but only discharged for the one period by the profit and loss account which shewed $20,467.33 as net profits. This computation to be made semi-annually was a highly reasonable one, as it would admit of the plaintiff continuing or not continuing in the employment. It is highly unreasonable that the defendant should refrain in making the computations at the required periods, and at a late date make them and then say to the plaintiff "the accounts shew no net profits, nothing is payable to you; further, you must refund all moneys received on account of salary." This revolts one and cannot be given effect to unless the contract be intractable in its terms. I do not find that it is, and I have no hesitancy in coming to a contrary conclusion.

In my opinion there is no ambiguity in the operative words of the contract, and it cannot be successfully contended that the plaintiff became a joint adventurer with the defendant in the whole enterprise, but if that could be said the adoption of the true rule of construction displaces any such contention, as in such case if the recitals are clear but the operative words ambiguous the recitals govern (*Ex parte Dawes. In re Moon* (1886), 17 Q.B.D. 275; 34 W.R. 752; 55 L.T. 114). Now, let us consider the recitals. They read as follows: [already set out].

MCPHILLIPS, J.A.

It is clear to demonstration that the enterprise was the enterprise of the defendant—it acquires the site and erects the building to be utilized as a general store at Seymour Inlet. The plaintiff, in the course of his employment, is to arrange for the site, to see to the erection of the building, purchase and install a general stock of goods and to purchase for the defendant logs boomed in the water. In view of the recitals, is it at

COURT OF APPEAL

1924

Oct. 7.

ALLISON v. STANDARD LUMBER CO.

all possible to say that the enterprise was other than the enterprise of the defendant? In my opinion it is impossible to successfully contend that the plaintiff was in any way a joint adventurer in the enterprise, the enterprise was totally and wholly the enterprise of the defendant. Further, we find it in the contract stipulated that all moneys called for to carry out the undertaking were to be provided by the defendant and not to exceed at any one time the sum of $50,000. Upon full consideration of the contract and of all the surrounding facts permissible of being looked at (*Shore* v. *Wilson* (1842), 9 Cl. & F. 355 at p. 565), the contract cannot be said to be other, so far as the plaintiff is concerned, than a contract of employment, his salary to be arrived at by a semi-annual computation of the net profits of the undertaking. In no way can it be said to involve the plaintiff in the venture itself. The risk undoubtedly taken by the plaintiff was the risk that if it should turn out that during any of the semi-annual periods upon computation being made no net profits were shewn then the plaintiff would for such period receive no salary. It is impossible to extend this risk to the whole enterprise and to eliminate all salary received by the plaintiff, and in particular salary based specifically upon a profit and loss account prepared, declared and made known to the plaintiff, upon which the plaintiff was entitled to govern his actions and to continue in the employment and not bring it to an end, which was a right he had and which he could have assuredly exercised earlier than he did if he had been apprized that there was failure to achieve any net profits.

MCPHILLIPS, J.A.

In the taking of the accounts, in my opinion, it is not open to the defendant to recede from the profit and loss account as declared up to the 31st of January, 1923, shewing net profits of $20,467.33, and the plaintiff will be entitled to have credited to him in the taking of the said accounts one quarter thereof, *viz.*, $5,116.83. Further, the taking of the accounts should not be upon the whole enterprise (the enterprise was the enterprise of the defendant, not the enterprise of the plaintiff), the accounts should be confined to the term of the continuance of the contract as between the plaintiff and defendant, *viz.*,

between the 4th of February and the 23rd of July, 1923, but in that the defendant did render an account up to the 31st of January, 1923, and the plaintiff acted thereon and received his proportion of the then declared net profits, the accounts necessary to be gone into will be those subsequent to the 31st of January, 1923, up to and inclusive of the 23rd of July, 1923.

With respect to the action for breach of the contract under which the defendant engaged the plaintiff to sell logs upon commission (another and different contract to the one we have been considering), it is evident that at the time of the issue of the writ herein no such cause of action had accrued, so that the learned judge was right in refusing to receive evidence referable thereto.

I would vary the judgment of the Court below to accord with the conclusions hereinbefore expressed. The appeal, therefore, in my opinion, should succeed in part.

Appeal allowed in part.

Solicitor for appellant: *A. Whealler.*
Solicitor for respondent: *Ghent Davis.*

COURT OF APPEAL

1924

Oct. 7.

BUSHBY v. TANNER

BUSHBY v. TANNER

Pleadings — No cause of action in statement of claim — Amendment on appeal—Change of whole character of action—Allowed with inclusion of amendment of indorsement on writ—Costs.

BUSHBY v. TANNER

An action founded on fraud was dismissed on the ground that no cause of action was shewn in the statement of claim. On appeal, after admitting that on the pleadings he could not succeed, counsel for the appellant applied for the first time for leave to amend so as to set up a new cause of action based on the same set of facts in order to shew that a certain release therein mentioned was obtained by fraudulent misrepresentation.

Held, MACDONALD, C.J.A. dissenting, that although the allowance of the amendment would unduly expand the indorsement on the writ which would necessitate an amendment thereof as the case was really disposed of below on a demurrer, in the unusual circumstances the application should not be refused but on terms that the appellant pay the costs of the action including those of and consequent upon the amendment with costs of the appeal.

APPEAL by plaintiff from the decision of GREGORY, J. of the 30th of April, 1924, dismissing an action for damages for fraudulent misrepresentation whereby the plaintiff was induced to enter into a guarantee with The Dominion Bank. The facts are that the defendant who was a money-lender had been lending money to one Rylands who had a poultry farm near Victoria and supplied poultry and milk to the Canadian Pacific Railway, Grand Trunk Pacific Railway and the Brittania Mining & Smelting Co. Limited. Rylands owed the defendant considerable sums and had assigned to him his trade accounts with the above companies to secure the debt. On the 1st of February, 1920, the defendant negotiated with The Dominion Bank with a view to the bank taking over Rylands's debt. The bank agreed to do this upon receiving an assignment of Rylands's trade accounts, provided the defendant would secure a responsible person to guarantee the bank against loss. The defendant then induced the plaintiff to guarantee the bank against loss promising he would have vested in the bank Rylands's trade accounts and that said accounts would be amply

Statement

sufficient to cover the debt. According to the arrangement the bank did take over Rylands's debt on the 24th of March, 1924. Previously, on the 7th of February, the plaintiff had advanced Rylands $10,000 to enable him to continue his business on the defendant's promise to repay him from the securities in the way of book debts that he held from Rylands provided Rylands did not repay him. The plaintiff claimed that the defendant obtained a release from this obligation by fraudulent misrepresentation.

The appeal was argued at Victoria on the 5th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C., for appellant: The judgment below was that the statement of claim did not disclose a cause of action. The facts are that Tanner wanted to get rid of this debt owing him and he induced Bushby to guarantee the bank against loss by fraudulent misrepresentation to Bushby as to the value of the accounts that Rylands held against his customers. The learned judge said the case came within Lord Tenterden's Act citing *Clydesdale Bank* v. *Paton* (1896), A.C. 381; *Banbury* v. *Bank of Montreal* (1918), A.C. 626. Leave to amend should have been given before the action was dismissed, and on the pleadings amended as proposed there is a good cause of action for the $10,000. Argument

Mayers, for respondent: This is a new cause of action altogether: see Yearly Practice, 1924, pp. 289 and 376; also marginal rule 228.

Davis, in reply.

Cur. adv. vult.

7th October, 1924.

MACDONALD, C.J.A.: The plaintiff in his pleadings founded his claim on fraud. At the opening of the trial the defendant moved to dismiss the action on the ground that the statement of claim disclosed no cause of action. After lengthy arguments the action was dismissed on the ground that the alleged false representations were as to credit and were not in writing as required by section 6 of the Statute of Frauds, Cap. 92, R.S.B.C. 1911. MACDONALD, C.J.A.

COURT OF APPEAL

1924

Oct. 7.

BUSHBY v. TANNER

No application was made to amend at the trial, but the plaintiff, instead of abandoning his groundless action, appealed from the judgment. On the hearing in this Court his counsel admitted that he could not succeed on the pleadings as they were. This was tantamount to an admission that the judgment appealed from was right, but he asked for leave to amend so as to set up a new cause of action.

The only circumstance urged in favour of this course was that paragraph 10 of the statement of claim set out certain facts which would be relevant to the new cause of action, all the rest of the statement of claim would be abandoned. No authority for such a course was cited to us and, indeed, I venture to say that no authority exists for such an extraordinary course. Had the amendment been asked for below and been refused, something might be urged in favour of overruling the discretion in that behalf of the trial judge, though I do not say so, but to allow a party to appeal when admittedly he had no grounds for appeal and on such appeal to reframe his action by substituting a new cause in place of the old causes of action, and allow the appeal which was brought without foundation and order a new trial on terms or otherwise, is, to my mind, contrary to all good practice.

MACDONALD, C.J.A.

Moreover, the plaintiff's charges originally were charges of fraud; he failed to prove them in the manner required by the statute; he is presumed to know the law, and knowing the law, he levelled charges of fraud against the defendant knowing that he could not prove them.

I would dismiss the appeal.

MARTIN, J.A.: It was frankly conceded by the appellant's counsel at the opening of the appeal that upon the allegations as now framed in the statement of claim no cause of action exists, as it is aimed at the proof of matters respecting a guarantee which are incapable of proof because of section 6 of the Statute of Frauds, Cap. 92, R.S.B.C. 1911. But he asks, for the first time, that an amendment be allowed based upon the same facts that appear in the claim but now redirected to shew that a certain release therein mentioned was obtained by fraud-

MARTIN, J.A.

ulent misrepresentations. To this, objection is taken in general that it ought not to be allowed in the circumstances and at this late stage, not having been asked for below, and in particular that to allow it would be to expand the claim unduly beyond the endorsement on the writ, which is as follows:

"The plaintiff's claim is for damages for fraudulent misrepresentation whereby the plaintiff was induced to enter into a guarantee with The Dominion Bank."

This question of undue expansion of the statement of claim was considered by the Full Court in *Oppenheimer* v. *Sperling* (1903), 10 B.C. 162, and it was there held that the statement of claim did not, in the circumstances, go beyond the scope of the endorsement. But here, I think, after carefully perusing the pleadings, that the statement of claim is an undue expansion of the endorsement in that it essentially "changes the whole character of the action," as was said in *Cave* v. *Crew* (1893), 62 L.J., Ch. 530, which is the leading case on the subject, and I approved it in the *Oppenheimer* case, *supra,* 168. That being the situation, the plaintiff cannot proceed unless the writ is amended, as it was in the *Cave* case, but even at this late stage I think, but after some hesitation, that in the unusual circumstances an amendment ought not to be refused, and especially so because the case was really disposed of below on a demurrer *ore tenus,* no evidence being taken, though because it was not asked for below the terms will, in these circumstances, necessarily be onerous, and they should be that the appellant do pay in any event the costs of the action up to this day, including those of and consequent upon the amendment, and also pay forthwith the costs of this appeal: in case of the amendment being accepted on these terms within one week, the judgment will be vacated pursuant to the amendment, which should be made within two weeks, otherwise the judgment will be affirmed and the appeal dismissed. I may add that in *King* v. *Wilson* (1904), 11 B.C. 109, the Full Court went to considerable length in the circumstances in allowing an amendment upon appeal, which had not been asked for below, though here the amendment is more radical because the writ itself has to be amended to meet the said undue expansion of the statement of claim, and for that reason I think the terms as to costs should

MARTIN, J.A.

COURT OF APPEAL

1924

Oct. 7.

BUSHBY v. TANNER

be correspondingly more onerous. An amendment at a late stage is a matter of discretion based upon convenience: see *Elton Cop Dyeing Co., Lim.* v. *Broadbent & Son, Lim.* (1919), 89 L.J., K.B. 186 at p. 189.

GALLIHER, J.A.: As the pleadings stand, I am satisfied the learned judge below came to the right conclusion. The only writing signed by the defendant is the letter of February 7th, 1920, and it is at most a contract to pay to the plaintiff out of the book debts of Joseph Rylands (which had been assigned to the defendant) such sums to the amount of $10,000, as could be realized by the defendant out of said book debts, in case Rylands does not repay the said sum of $10,000, to be advanced to the defendant by the plaintiff and which was the consideration of the contract. The pleadings as they stand do not raise that issue, and as to the other branch of the case, it is, in my opinion, covered by *Clydesdale Bank* v. *Paton* (1896), A.C. 381.

GALLIHER, J.A.

Mr. *Davis,* for the appellant, has asked us to amend the statement of claim by striking out lines 1 and 2 of paragraph 10 of the statement of claim, and also the last clause thereof. As I understand it, such an amendment would result in the plaintiff being permitted to continue his action as to a claim under the contract for the sum of $10,000. He has still that right, though he would have to commence proceedings anew, if amendment refused. The question is, should we allow such amendment? While I have some hesitation in acceding to this, under the circumstances of this case, I have decided to do so upon the terms set out in the judgment of my brother MARTIN, which I have had the advantage of reading.

MCPHILLIPS, J.A.: I have had the opportunity of reading the judgment of my brother MARTIN, and I am in complete accord with the reasons given, and cannot see the need or usefulness of adding anything thereto. I would allow the appeal, admitting of all proper amendments being made by the appellant upon the terms set forth by my brother MARTIN.

MCPHILLIPS, J.A.

Solicitors for appellant: *Harper & Sargent.*
Solicitors for respondent: *Moresby, O'Reilly & Lowe.*

CUMMINGS AND ELLIS v. O'FLYNN.

COURT OF APPEAL

1924

Oct. 7.

CUMMINGS v. O'FLYNN

Fraudulent preference—Mortgage—Depreciation in value of premises—Pressure by mortgagee—Transfer of other property to relative—Bona fides.

J., who owned a lot with dwelling in which he lived valued at $2,200, and mortgaged for $900, mortgaged three other lots that he owned to the plaintiff in January, 1914, for $600 with the usual covenant to pay. Interest and taxes were paid at first but later were allowed to fall into arrears the result of which was that the plaintiff was compelled to pay $76.19 to redeem the lots which were allowed by J. to be sold for taxes. In August, 1922, the plaintiff, through her solicitor, began to press J. for payment of said arrears the total sum then due being $800. On the 29th of September, 1922, J. conveyed the lot with his dwelling-house to his son for $1 and other considerations. The plaintiff obtained judgment in an action to set aside the conveyance from J. to his son as fraudulent.

Held, on appeal, affirming the decision of GRANT, Co. J., that the facts, coupled with the decided cases, warranted the trial judge in finding that the conveyance was a fraudulent preference.

APPEAL by defendant from the decision of GRANT, Co. J. of the 16th of January, 1924, in an action to set aside a conveyance of a house and lot as fraudulent. The conveyance was made by John O'Flynn to his son the defendant on the 29th of September, 1922, of lot 13, block 463, district lot 526, group 1, New Westminster, map 2300. Later in the fall of the same year (19th October) John O'Flynn died. The lot was worth, with house, about $2,200, and there was a mortgage of $900 upon it. The deceased had other properties, being lots 10, 11 and 12 in block 122, New Westminster, which were mortgaged to the plaintiff in 1914 for $600 and payable in three years. Interest and taxes he covenanted to pay and did pay for a time but subsequently both fell in arrear. In August, 1922, the plaintiff began to press O'Flynn for payment as the property securing the loan depreciated in value. By reason of non-payment of taxes the plaintiff had to pay $76.19 to redeem the lots as they were sold for taxes and the debt increased to $800. The learned judge below found the conveyance was fraudulent and set it aside.

Statement

COURT OF APPEAL

1924

Oct. 7.

CUMMINGS v. O'FLYNN

The appeal was argued at Victoria on the 6th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

E. A. Burnett, for appellant: The deed that is attached shews the consideration as $1 and other valuable consideration. Before the plaintiffs can succeed they must shew our security is inadequate: see *Clark* v. *Hamilton, etc., Society* (1884), 9 Ont. 177; *Anderson* v. *Serge* (1924), 1 W.W.R. 1260; Parker on Frauds on Creditors and Assignments, 14. The onus is on the plaintiff: see *Elliott* v. *Hunter* (1876), 24 Gr. 430.

J. E. Bird, for respondents: The evidence shews the defendant knew the security for the mortgage was insufficient and he then made this conveyance. This is a sufficient ground for setting it aside: see *Newlands Sawmills Ltd.* v. *Bateman* (1922), 31 B.C. 351; *Sun Life* v. *Elliott* (1900), 7 B.C. 189; 31 S.C.R. 91. The property mortgaged vested in the city in 1922 and the mortgagee had to redeem it. Further cases are *Koop* v. *Smith* (1914), 20 B.C. 372; (1915), 51 S.C.R. 554; *Imperial Bank of Canada* v. *Esakin* (1924), 2 W.W.R. 33.

Burnett, in reply: Knowledge of the insolvency of the grantor alone is not sufficient to set aside the conveyance: see *Hickerson* v. *Parrington* (1891), 18 A.R. 635; *Freeman* v. *Pope* (1870), 5 Chy. App. 538.

Cur. adv. vult.

7th October, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I can see no reason to interfere with the judgment of the learned trial judge.

MARTIN, J.A.

MARTIN, J.A.: After considering all the material to which we were referred, I find myself quite unable to say that the learned trial judge did not reach the right conclusion, and therefore the appeal should be dismissed.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: It is with considerable regret that I come to the conclusion that the appeal must be dismissed. I do not hesitate to say that I am satisfied that there was no fraud

in the sense of there being any moral turpitude, but it is clear enough that the facts, coupled with the decided cases, warranted the learned trial judge in finding, as he did, that the conveyance attacked was a fraudulent preference within the purview of the statute law (*Koop* v. *Smith* (1915), 51 S.C.R. 554; *Newlands Sawmills Ltd.* v. *Bateman* (1922), 31 B.C. 351).

Appeal dismissed.

Solicitors for appellant: *Daykin & Burnett.*
Solicitors for respondents: *Bird, Macdonald & Co.*

LEW v. WING LEE.

Execution—Stay pending appeal—Payment into Court of sum pending appeal—Payment into Court of sum covering judgment and costs—Judgment reversed on appeal—Application for payment out—Appeal to Supreme Court pending—Discretion—Appeal.

The plaintiff recovered judgment at the trial for $5,490, and costs. The defendant appealed and obtained an order staying execution upon paying into Court the amount of the judgment and costs which, with the security for costs of appeal, amounted in all to $6,700. The Court of Appeal set aside the judgment and ordered a new trial (see 33 B.C. 271). The plaintiff then appealed to the Supreme Court of Canada and the defendant applied to a judge for payment out of the moneys in Court. An order was made that $5,000 of the sum paid in remain in Court pending the disposition of the appeal, and that the balance of $1,700 (costs and security) be paid out to the defendant forthwith.

Held, on appeal by the defendant, on an equal division of the Court, that the appeal be dismissed, the Court being unanimous in dismissing the plaintiff's cross-appeal.

Per MACDONALD, C.J.A. and GALLIHER, J.A.: The money was paid into Court for the purpose of staying execution. This purpose was exhausted when the judgment was set aside. Whether the money is paid out or not has nothing to do with the appeal unless respondent is entitled to rely upon that money as security in the final result. Consideration of the cases shew he is not and there should be an order for payment out of the balance in Court.

Seaton v. *Burnand* (1899), 1 Q.B. 782 followed.

COURT OF APPEAL

1924

Oct. 7.

LEW v. WING LEE

Per MARTIN and MCPHILLIPS, JJ.A.: The defendant having obtained a benefit by special order to which he was not entitled in ordinary practice, by invoking the discretion of the trial judge the result of which was that he created and locked up a special fund to abide the final adjudication of the right thereto, it would be repellant to equitable principles of practice to hold that after having approbated the discretion of the Court below to safeguard him by special order during one stage of the litigation, he should now repudiate its consequences when it affords a like "special" discretionary safeguard to his adversary at a later stage. The appeal should be dismissed.

APPEAL by defendant from the order of HUNTER, C.J.B.C. of the 7th of April, 1924, on an application of the defendant for an order that two sums of $6,500 and $200 respectively paid into Court to the credit of the action by the defendant be paid out to the defendant. The facts are that the plaintiff recovered judgment against the defendant for $5,490 and costs on the 28th of June, 1923, and the defendant was granted a stay of execution upon paying into Court $6,500 pending an appeal to the Court of Appeal. The Court of Appeal ordered a new trial on the 8th of January, 1924 (see 33 B.C. 271). On the 3rd of March, 1924, the plaintiff deposited with the registrar $500 as security for defendant's costs of the plaintiff's appeal to the Supreme Court of Canada from the judgment of the Court of Appeal. On the 12th of March, 1924, the defendant moved for payment out of Court of said moneys pursuant to the judgment of the Court of Appeal, and on the 7th of April HUNTER, C.J.B.C. made an order that $5,000 of said moneys remain in Court to abide the further order of a judge after judgment is delivered by the Supreme Court of Canada but that the balance of $1,700 be paid out to the defendant forthwith.

Statement

The appeal was argued at Victoria on the 6th and 9th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Alfred Bull, for appellant: The obligation for which this money was paid into Court as security has disappeared as we were successful on the appeal. The case of *Seaton* v. *Burnand* (1899), 15 T.L.R. 342 is exactly the same and decides the matter; see also *Atherton* v. *British Nation Assurance Com-*

Argument

pany (1870), 5 Chy. App. 720; *The Bernisse and The Elve* (1920), P. 1 at p. 11; *Lindsay Petroleum Co.* v. *Hurd* (1870), 3 Ch. Ch. 16 at p. 21; *McLaren* v. *Caldwell* (1881), 9 Pr. 118; *Wilson* v. *Beatty*. *Re Donovan* (1883), 10 Pr. 71. This is not a question of discretion but one of absolute right. On the jurisdiction to make the order see *Foley* v. *Webster* (1892), 2 B.C. 251; *Jacobs* v. *Brett* (1875), L.R. 20 Eq. 1 at p. 6.

Mayers, for respondent: That this money should remain in Court pending the appeal see *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1918), 26 B.C. 414; *Hanna* v. *Costerton, ib.* 347; *King* v. *Duncan* (1881), 9 Pr. 61; *Canadian Land & Emigration Co.* v. *Dysart et al.* (1885), 11 Pr. 51; *Wilson* v. *Church* (1879), 11 Ch. D. 576; *Wilson* v. *Church* (No. 2) (1879), 12 Ch. D. 454; *Badische Anilin und Soda Fabrik* v. *Johnson* (1897), W.N. 8; *The Ratata* (1897), P. 118 at p. 131; *Re Airey; Airey* v. *Bower* (1885), 79 L.T. Jo. 95; Annual Practice, 1924, p. 1166. Argument

Bull, in reply: *Seaton* v. *Burnand* (1899), 15 T.L.R. 342 settles the matter.

Cur. adv. vult.

7th October, 1924.

MACDONALD, C.J.A.: The plaintiff recovered a judgment in the Supreme Court of British Columbia for the sum of $5,490 and costs. The defendant appealed to this Court, and in order to obtain a stay of execution pending the appeal, paid into Court, under an order, the amount of the judgment and costs together with security for the costs of the appeal. In the appeal the defendant succeeded in having the judgment set aside and a new trial ordered. The plaintiff then appealed to the Supreme Court of Canada, and the defendant applied to a judge for payment out to him of the moneys paid in as aforesaid. The order for payment in was as follows: MACDONALD, C.J.A.

"If the defendant on or before the 1st day of August, A.D. 1923, shall give security to the satisfaction of the deputy registrar at Nanaimo for $5,490 and costs, the stay will be granted pending the appeal [to the Court of Appeal]. Failing the giving of such security within the time mentioned execution may issue."

It is said that the order was made upon insufficient material,

COURT OF APPEAL

1924

Oct. 7.

LEW v. WING LEE

but the order was not appealed and therefore that objection is not now open.

This order disclosed the special purpose for which the money was paid in. Mr. *Mayers* contended that the learned judge had no jurisdiction to deal with the matter at all after the appeal had been taken to the Supreme Court of Canada and while pending there. He cited *Foley* v. *Webster* (1892,) 2 B.C. 251 as authority for this proposition. I think that that case is clearly distinguishable on the facts and also upon principle. What was sought there was to deprive the respondent of the security of registration of his judgment on the plea that as he had been given security for the judgment he should not have both. It was stated in the reasons for judgment that the Court could do nothing to the prejudice of either party in the action after the appeal was taken. I think the rule is that when an appeal has been launched to an Appellate Court the Court of first instance cannot make an order in the action which will hamper the Appellate Court or frustrate any order it may make. It is the appeal which is deemed to be in the Appeal Court not the action, and everything pertaining to or affecting the appeal is by the notice or the allowance of the security removed from the jurisdiction of the Court below into that of the Appellate Court. Now, in this case the money was paid in for the pur-

MACDONALD, C.J.A.

pose of a stay of execution in the lower Court. That purpose was exhausted when the judgment was set aside. Whether the money is paid out of Court or remains in Court has nothing to do with the appeal unless the respondent be entitled to rely upon that money as security in the final result; but when we consider the cases we find that he is not entitled to rely upon that security. In *Seaton* v. *Burnand* (1899), 15 T.L.R. 342 the facts were very similar to ours. The Court of Appeal, reversing Matthews, J., ordered the moneys which had been paid in for a stay of execution to be paid out to the party who had paid them in, notwithstanding that an appeal was pending to the House of Lords. This decision was not founded on special circumstances but upon the broad principle that when the special purpose for which the money was paid in had been satisfied the appellant was entitled to take out the security.

To the same effect, and on similar facts, the order in *Atherton* v. *British Nation Assurance Company* (1870), 5 Chy. App. 720, and in *The Bernisse and The Elve* (1920), P. 1, and also *Comitato, etc.* v. *Instone & Co.* (1922), W.N. 260. The same practice was followed in *Wilson* v. *Beatty*. *Re Donovan* (1883), 10 Pr. 71, a case cited by Mr. *Mayers*. The other cases cited by Mr. *Mayers* are clearly distinguishable. In all, or nearly all of them, there was a fund in question and, following the well-settled practice of the Courts to protect a fund pending the final determination of any dispute as to its distribution or ownership, the fund was not allowed to be paid out. In one of the cases so cited, where a fund was not in question, the learned judge refused the order because he thought the order for payment in contemplated that it should remain in Court until the final determination of the dispute, but the order here is not of that character.

MACDONALD, C.J.A.

The learned judge refused the application except as to $1,700. There should be an order for the payment out of the balance of the moneys to the defendant, with costs here and below.

I would dismiss the cross-appeal with costs.

MARTIN, J.A.: This matter has got into a very peculiar situation owing to the course adopted by the learned trial judge (of the Supreme Court of this Province), who made what he styles in his reasons for judgment a "special order," on the defendant's application to stay the execution of the judgment the plaintiff had recovered against him for $5,000 damages and costs. The learned judge stated in said reasons that upon the material before him he had no jurisdiction to grant a stay (and beyond question no proper case had been made out for it), nevertheless he proceeded to make the following order: [already set out in the judgment of MACDONALD, C.J.A.].

MARTIN, J.A.

But, with every respect, that was, in direct effect, granting the unauthorized stay and I confess myself unable to find or recall anything in the practice of the Court below which would justify such an order; the reason given by the learned judge for making it is that:

"Feeling, however, as I do, that the amount of the judgment is much

COURT OF APPEAL

1924

Oct. 7.

LEW v. WING LEE

greater than would have been rendered by a judge trying the case without a jury, I think it is a case for a special order."

Again, with every respect, I do not think that because the trial judge "feels" that the verdict is too large he is justified in resorting to "special orders" to prevent the plaintiff from realizing his judgment in the ordinary way, the question of an excessive verdict being one for this Court to decide in the same way as all other questions, and I am of opinion that there were no materials before the learned judge which would enable him to exercise a discretion to make such an order. I have thus set out precisely how the "special" order came to be made, because it created a corresponding "special" situation which must be clearly understood and borne in mind in the disposition of this appeal.

The defendant accepted and took the benefit of the said order by paying into Court the sum of $6,500 as and for the "security" to be approved by the deputy registrar and thereupon proceedings upon the execution were stayed pending an appeal to this Court, which resulted in its allowance on the 8th of January last and the consequent setting aside of the judgment below. The plaintiff, however, has appealed from our judgment to the Supreme Court of Canada and has given the proper security on the 4th of March last. On the 7th of April last the order appealed from was made below, in the same Supreme Court of this Province, by Chief Justice HUNTER, upon the application of the defendant, by which out of the sum of $6,700 paid into that Court under said first-mentioned order, the sum of $1,700, for costs and security therefor, was ordered to be paid out to the defendant, and the remaining sum of $5,000, for damages, was ordered to remain in Court "to abide the further order of a judge after the final adjudication of the appeal herein now being prosecuted by the plaintiff to the Supreme Court of Canada." The defendant now appeals to us to direct that the said sum of $5,000 be also paid out to him.

MARTIN, J.A.

Now, whatever might be said of the order appealed from in ordinary circumstances, I am of opinion that in the present "special" circumstances it was one which the learned judge appealed from could properly make in the exercise of his dis-

cretion, upon the sufficient materials before him, in the very special, indeed unprecedented, circumstances of the matter. What has, in substance, been done here is, in short, that the defendant has obtained a special, indeed an extraordinary benefit and advantage by said special order, to which he was not entitled by the ordinary practice, by invoking the discretion of the trial judge, the result of which was that he, in effect, as I regard it, created and locked up what was tantamount to a special fund to abide the final adjudication of the right thereto, and it would be repellant to equitable principles of practice to hold that after having approbated the discretion of a judge of the Court below to safeguard him by a special order during one stage of the litigation the defendant should now reprobate its consequences when it affords a like "special" discretionary safeguard to his adversary at a later stage. None of the cases cited has in it the special elements that are present here, which induce me to reach this conclusion, apart from what view might ordinarily be taken of the matter, and there is nothing in them that prevents me from taking the view that the appeal should be dismissed. The plaintiff's precautionary motion to quash and cross-appeal from the said order should likewise be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: The case of *Seaton* v. *Burnand* (1899), 15 T.L.R. 342, seems to me directly in point. This would dispose of the appeal in favour of the appellant, but Mr. *Mayers* raises the point that the Chief Justice below had no jurisdiction to make the order appealed from, as prior to the application for payment out an appeal had been perfected to the Sureme Court of Canada against the judgment of the Court of Appeal, granting a new trial. *Foley* v. *Webster* (1892), 2 B.C. 251, is not, as I view it, applicable to the facts here. Applications of this nature have frequently been made, and so far as I can find from the cases the question of jurisdiction has not been raised in any similar case.

GALLIHER, J.A.

The rights acquired by the plaintiff under the order for payment in have under judgment ceased, so that what is being asked for now does not affect the rights of the parties to be

COURT OF APPEAL

1924

Oct. 7.

LEW v. WING LEE

tried out in the Court appealed to, and the Court of first instance has, I think, and in fact I think it is, the proper Court to deal with these moneys.

I would allow the appeal and dismiss the cross-appeal.

MCPHILLIPS, J.A.: I concur in the judgment of my brother MARTIN.

The Court being equally divided the appeal was dismissed.

Solicitor for appellant: *A. Leighton.*
Solicitor for respondent: *F. S. Cunliffe.*

COURT OF APPEAL

1924

Oct. 7.

ROSE v. MOIR

ROSE v. MOIR

Municipal law—Councillors — Qualification — Owner of property — Holder under agreement for sale registered as charge—"Registered as owner" —Meaning of—B.C. Stats. 1914, Cap. 52; 1920, Cap. 63, Sec. 6.

A candidate for the office of councillor in a municipality was in possession of property within the municipality which he held under agreement for sale duly registered as a charge and upon which he had paid $1,460 of the purchase price at the time of his nomination. A petition to set aside his election on the ground that he did not possess the necessary property qualification was dismissed.

Held, on appeal, affirming the decision of MORRISON, J., on an equal division of the Court, that a purchaser under a registered agreement with the registered owner for the sale and purchase of land is an "owner" within the meaning of section 6 of the Municipal Act Amendment Act, 1920.

APPEAL by petitioner from the decision of MORRISON, J. of the 18th of February, 1924, dismissing his petition for a determination that John Moir was not duly elected for councillor of ward 2, District of North Vancouver, at the election held on the 19th of January, 1924. The petitioner a duly-qualified voter in North Vancouver complained that at the time Moir was declared elected he was not possessed of the necessary property

Statement

qualification in that he had not for the six months next preceding the day of nomination been registered in the land registry office as the owner of land, or land and improvements within the Municipality of the value of $250 above all judgments and charges. The only property in which Moir was interested was lots 5, 6 and 7, block 28, district lot 799, in North Vancouver, but his interest consisted only of a registered charge against the said lots in the way of an agreement for sale, he having paid prior to the date of his nomination all of the purchase price of $1,600 and interest less the sum of $140. Subsequently to the hearing of the petition Moir obtained a deed of the said lots and upon its registration a certificate of title was issued to him.

Statement

The appeal was argued at Victoria on the 9th and 10th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

F. A. McDiarmid, for appellant: It is admitted Moir had an agreement for sale of the three lots at the time of the election which was registered as a charge against the lots and the question is whether this interest is sufficient to bring him within the statute. He is not registered as "owner of land." He must have a fee-simple interest to the value required but he only has a charge. There is a broad distinction between "owner of land" and "owner of charge."

Mayers, for respondent: The definition of "owner" includes an equitable owner and the value of his interest exceeded the required amount. When you use the word "charge" you are importing into the matter the Land Registry Act. That the word "owner" should include his case see *Marshall* v. *Wawanesa Mutual Insurance Co.* (1924), 33 B.C. 404. The Land Registry Act should not be applied. In England a purchaser although he has no deed or conveyance, if in possession for 12 months is entitled to vote: see Rogers on Elections, 16th Ed., Vol. 1, pp. 48-9; *Sawers* v. *City of Toronto* (1901), 2 O.L.R. 717 at p. 719; *McDougall* v. *McMillan* (1875), 25 U.C.C.P. 75 at p. 92; *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321 at pp. 338 and 349.

Argument

McDiarmid, in reply.

Cur. adv. vult.

COURT OF APPEAL

1924

Oct. 7.

ROSE v. MOIR

7th October, 1924.

MACDONALD, C.J.A.: In 1919 the respondent purchased land for $1,600 and paid $600 down. He registered the agreement, entered into possession of the property and has occupied it ever since. He had before nomination day, paid all interest, taxes and the balance of the principal except the sum of $140, but had not obtained his deed. On this property he qualified for the office of councillor in the Municipality of the District of North Vancouver and was declared elected. The petitioner seeks to set the election aside on the ground that the councillor was not possessed of the property qualification required by law.

Section 6 of the Municipal Act Amendment Act, 1920, requires that the candidate shall be

"registered in the Land Registry office as owner of land or land and improvements within the municipality of the value, as assessed on the last assessment roll, of two hundred and fifty dollars or more over and above all registered judgments and charges."

MACDONALD, C.J.A.

It is conceded that the registered agreement is merely a charge, as defined by the Land Registry Act.

The language of the Act admits, I think, of no construction which would help the respondent. How can the owner of a registered charge be the owner of land of the value of $250 over and above all registered charges? The construction of the section contended for would, in my opinion, lead to an absurdity, and no inferences to be drawn from other sections of the statute will be allowed to displace the plain reading of the section. The draftsman of the Act no doubt did not foresee and therefore did not provide against such a situation as has arisen in this case. There is every reason why the statute should have qualified a person in the situation of the respondent, but I am unable to construe it as having done so.

I would allow the appeal.

MARTIN, J.A.: This appeal raises the question of the qualification of the respondent to hold the office of councillor of the Municipality of North Vancouver, to which he was elected on the 19th of January last. The qualification is set out in section 6, Cap. 63, of the Municipal Act Amendment Act, 1920, as follows:

MARTIN, J.A.

"6. Section 19 of said chapter 52 is hereby repealed, and the following is enacted in lieu thereof:—

"19. After the first municipal election, the persons qualified to be nominated and elected as and to hold the office of Councillors of any district municipality shall, save as otherwise provided in this Act, be such as are British subjects of the full age of twenty-one years who have been for the six months next preceding the day of nomination and are registered in the Land Registry office as owners of land or land and improvements within the municipality of the value, as assessed on the last assessment roll, of two hundred and fifty dollars or more over and above all registered judgments and charges, and such as are British subjects of the full age of twenty-one years and are homesteaders, lessees from the Crown, or pre-emptors who have resided within the municipality for the period of one year immediately preceding the day of nomination, and are assessed in respect of land and improvements within the municipality of the value, according to the last assessment roll, of five hundred dollars or more over and above all registered judgments and charges, and such as are British subjects of the full age of twenty-one years who are holders of lands within the municipality acquired by them by agreement to purchase under the 'Soldiers' Land Act,' or the 'Better Housing Act,' or the 'Soldiers' Settlement Act, 1917,' of the Dominion, or the 'Soldiers' Settlement Act, 1919,' of the Dominion, and have paid the sum of two hundred and fifty dollars or more upon the principal of the purchase price under such agreement to purchase."

It is submitted that the respondent has not been "registered in the Land Registry office as owner of land or land and improvements . . . . ." because, at the necessary time, his registered interest (in the otherwise sufficient property) was that of a purchaser under an agreement for sale from the registered owners, Robt. and Wm. Palliser, as appears by the certificate of encumbrance given by the registrar of titles, wherein the respondent's agreement is entered under the heading "Registered charges."

MARTIN, J.A.

By the Land Registry Act, 1921, Cap. 26, Sec. 2(1) it is provided that:

"'Owner' and 'registered owner' mean any person registered in the books of any Land Registry office as owner of land or of any charge on land, whether entitled thereto in his own right or in a representative capacity or otherwise."

And by the same section "charge" is thus defined:

"'Charge' means any estate less than the fee-simple, and shall include any equitable interest in land, and any encumbrance upon land, and any estate or interest registered as a charge under section 143."

After a careful consideration of the whole maze of sections in the many Municipal, Municipal Elections, and Land Registry

COURT OF APPEAL

1924

Oct. 7.

ROSE v. MOIR

Acts to which we have been referred, I can only come to the conclusion that the "dictionary" to the qualification in issue is to be found in the sections I have quoted, and I see no good reason for excluding it simply because it happens to refer to the impossible case of an owner being registered as such for "improvements" as well as land; that expression "land and improvements" is awkwardly inserted but may, in construction, fairly be attributable to the assessed value and should be confined to that connection. Then the expression we have to construe in the amended section 19, is not "registered owner" but "registered as owner" simply, and as it is in the records of the Land Registry office that we have to look for the "owner" who is entitled to be registered in that capacity, however varied, it must necessarily be, in the unfortunate absence of any other precise definition, such an "owner" as is defined by the Act authorizing his registration in that interest, and, I think, the combined effect of the definitions of "owner" and "charge," quoted *supra,* is sufficient to support the qualification of the respondent as owner under this part of the Act, though it might or would not under other parts to which we have been referred, *e.g.,* section 266 of the Municipal Act as enacted by section 9, Cap. 63, 1919, in the case of "Actions against Municipality."

It is conceded that if the respondent is to be deemed the "owner" under his "equitable interest" in his registered vendor and purchaser agreement, there are no "registered judgments or charges" thereupon which would still disqualify him, and so I think the judgment below in his favour should be affirmed. In so doing I foresee that in certain circumstances this view of the word "owner" might lead to practical difficulty, but that may still more be said of any view that may be taken of the various carelessly drawn and involved sections, and my view at least does substantial justice because the respondent has been in possession of the land under his agreement since its execution in August, 1919, and has been assessed for the taxes thereon and paid them since that date as well as all the interest, and the principal money, less $140.80, so if there be any doubt about the construction of the statute the judgment that he already has in his favour should, in the circumstances, not be set aside save for weightier reasons than are present here.

MARTIN, J.A.

GALLIHER, J.A.: I am unable to overcome the strict provisions governing the qualification necessary for a councillor, and agree with the Chief Justice.

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

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *McDiarmid & Shoebotham.*
Solicitor for respondent: *A. C. Sutton.*

BUSCOMBE v. HOLDEN.

Will—Proof of—Opposed by husband—Agreement between husband and wife before marriage—Evidenced by transfer of property—Evidence of execution of former will—Proof of agreement.

By her last will Mrs. Holden left to her mother a property which had been transferred to her by her husband immediately after their marriage. In an action to prove the will the husband opposing alleged that by verbal agreement made with his wife prior to their marriage it was agreed that while the title to the property was to be placed in her name by conveyance, she was to hold it 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 asked probate. It appeared from the evidence that the conveyance of the property to the wife was not completed for registration until the first will had been executed. It was held by the trial judge (33 B.C. 431) that the husband failed to establish the agreement upon which he relied and the last will should be accepted.

Held, on appeal, reversing the decision of McDONALD, J. (MACDONALD, C.J.A. and MACDONALD, J.A. dissenting), that the trial judge found the first will was drawn and executed as alleged, that Holden remained in possession of the property and throughout received the rents and profits and made the necessary disbursements. There is, then, if Holden's evidence is to be credited, a completely executed agreement, corroborated by the documents, continued possession and beneficial enjoyment, the breach of which he complains, that as it is a

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

fraud on the part of a person to whom land is conveyed as a trustee to deny the trust and claim the land herself, the Statute of Frauds will not prevent the proof of fraud and the agreement alleged should be given effect to.

APPEAL by defendant from the decision of MCDONALD, J. of the 22nd of February, 1924 (reported 33 B.C. 431) in an action to prove the will of Lillian Eltham Holden, deceased, of 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 hotel 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 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 as for some weeks previously she had been 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 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. Judgment was given for the plaintiff on the trial.

Statement

The appeal was argued at Victoria on the 17th and 18th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: The documents carry out the defendant's contention that the arrangement was that the survivor should have the "Pender Hotel property." The Buscombes knew of this arrangement and he included the "Pender Hotel" in his income-tax returns. Her first will was by reason of the arrangement irrevocable: see *Turner* v. *Turner* (1902), 4 O.L.R. 578; *Stone* v. *Hoskins* (1905), P. 194 at p. 196; *Olson* v. *Bieterilla* (1920), 28 B.C. 95; *Bligh* v. *Gallagher* (1921), 29 B.C. 241. In this case the effect was the same as a mutual will which renders her will irrevocable: see *Synge* v. *Synge* (1894), 1 Q.B. 466 at p. 471. As to corroboration see *Steele* v. *Regem* (1924), S.C.R. 1. This is a trust in which case the Statute of Frauds has no application. Putting the property in her name created a resulting trust: see *Central Trust and Safe Deposit Company* v. *Snider* (1916), 1 A.C. 266 at p. 271; *Rochefoucauld* v. *Boustead* (1897), 1 Ch. 196. The contract was completely executed on our part: see *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; *Surcome* v. *Pinniger* (1853), 3 De G.M. & G. 571; *McDonald* v. *McKinnon* (1878), 26 Gr. 12; *Halleran* v. *Moon* (1881), 28 Gr. 319; *Kinsey* v. *National Trust* (1904), 15 Man. L.R. 32 at p. 46; *Lincoln* v. *Wright* (1859), 4 De G. & J. 16; *Davies* v. *Otty* (1865), 35 Beav. 208; *Rex* v. *Steele* (1923), 33 B.C. 197; *Bligh* v. *Gallagher* (1921), 29 B.C. 241. The learned judge accepted all the material facts of the defendant's story. Argument

J. W. deB. Farris, K.C., for respondents: There is an affirmative finding of fact in our favour and appellant must shew the finding is wrong. His wife being dead, Holden's evidence must be looked upon with suspicion: see *McKinnon* v. *Shanks* (1916), 26 Man. L.R. 427; *Ledingham* v. *Skinner* (1915), 21 B.C. 41 at p. 45. There is no substantial corroboration of Holden's evidence in this case. The same law governs largely whether considering the Statute of Frauds or question of corroboration: see *Maddison* v. *Alderson* (1883), 52 L.J.,

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

Q.B. 737 at p. 742; *Humphreys* v. *Green* (1882), *ib.* 140; Halsbury's Laws of England, Vol. 16, pp. 396 and 403; *Bligh* v. *Gallagher* (1921), 29 B.C. 241. On the question of corroboration see *Thompson* v. *Coulter* (1903), 34 S.C.R. 261.

Mayers, in reply.

Cur. adv. vult.

7th October, 1924.

MACDONALD, C.J.A.: The learned trial judge has stated with sufficient accuracy the main facts of the case, and I shall therefore only deal with one or two matters which were strongly presented to us in argument.

If the defendant's own evidence be disregarded he cannot succeed in his opposition to the grant of letters probate to the plaintiff. Unless the agreement to make a will in his favour was made before the marriage or before the execution and delivery of the conveyance, there is no consideration for it disclosed in the evidence. The defendant made and delivered the conveyance before marriage; he handed it to the deceased on the evening of the wedding.

Much has been made of the fact that the affidavit of execution was not attached, but as between himself and deceased it was a good conveyance and not affected by the provisions of the Land Registry Act, in favour of third parties. It was a good deed *inter partes.* The question then is, was the agreement relied on in this case made before the delivery of the deed or before the marriage? A portion of the evidence of the defendant upon this subject is quoted by the learned trial judge. The defendant on his examination for discovery did not say that the agreement was made before the marriage. The inference to be drawn from his evidence was rather that there was a discussion months after the marriage, which he now tries to construe into a contract on her part to make a will in his favour.

MACDONALD, C.J.A.

Looking therefore at the unsatisfactory statement of the defendant as seen in the variance of his testimony taken on discovery and that given at the trial on the crucial point, namely, the time of and the consideration for the alleged contract, I do not think I can say that the learned trial judge

was in error in refusing to give credence to the defendant's evidence. There was other evidence given on behalf of the defendant which the learned judge also disregarded as not entitled to credence. The exceptional circumstances of this case make it one peculiarly for the trial judge to decide.

It was argued that the documents and the sequence of their occurrence corroborate the defendant's evidence. The defendant executed the deed on the day of the wedding and handed it to the deceased. There was no affidavit of execution attached and it was argued that this fact corroborates the defendant, who claims that the affidavit was purposely withheld. I think it is just as consistent with reason that the omission of the affidavit occurred because the solicitor was not there to complete the registration formalities. There is nothing to shew that the deceased was aware of the omission of this affidavit. The deed was just as effectual *inter partes* as if registered. The deed was not retained by defendant but delivered and left in deceased's possession. On their return from the wedding trip, the husband and wife discussed their affairs and quite naturally this deed came up for consideration. The wife, perhaps, at the defendant's suggestion, offered to make a will in his favour. The will was then made and the formalities of registration complied with as one transaction, as one would expect. I think it would be extraordinary should the wife at the wedding have demanded that the deed should then be registered. What wife, on her wedding day, would think of such a thing, and what more natural than that the matter should come up after the return from the wedding trip. What more natural than the wife should say what *Sir Charles Tupper* swore she did say: "It is only natural [I should make this will] because everything I have I got from you." He was defendant's witness and gave her very words. These words do not import the acknowledgment of a legal obligation but express a motive of her own. These words are, I think, the most cogent evidence, coming from the deceased herself, against the pretence that the circumstances in which the documents came into existence and were dealt with furnish corroboration of defendant's story.

MACDONALD, C.J.A.

But, assuming that in law they amount to some corroboration,

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

that does not conclude the matter since, even with this evidence of circumstances, the learned judge did not credit defendant's evidence. It was argued that the finding is not precise enough but the conclusion is precise. Had the learned judge given weight to defendant's evidence he must have come to a conclusion the opposite of that to which he came.

I find it unnecessary to deal with the effect of the Statute of Frauds upon the transaction.

The fact that the husband collected the rents and profits and paid the outgoings without accounting to the wife was relied upon as further corroboration of his evidence, but having regard to the relationship of the parties I think that that was the natural thing. That he supplied her with all the money she needed is not in dispute. No proper inference can be drawn from this perfectly natural circumstance, that she was under contract to permit it. Moreover, Holden was an experienced business man and experienced also on litigation and, if his story be true, it is not a little strange that, being, as he says, suspicious of his fiancee and having a solicitor to draw the conveyance, he should not have followed the only course which would effectually have protected him and given her a life interest by deed.

MACDONALD, C.J.A.

MARTIN, J.A.: This is an appeal from a judgment in favour of the plaintiff, who as executor and trustee, propounds a will made by Mrs. Holden, the wife of the defendant, on the 14th of January, 1920. The defendant alleges, *inter alia,* that said will is invalid as having been obtained by fraud and made when the deceased was not of testamentary capacity. Upon this branch of the case the decision of the learned trial judge, upon very conflicting facts, is not questioned at this Bar, but the defendant sets up the existence of a prior will, dated the 2nd of December, 1911, leaving all the testator's property to him and made in such circumstances as to be irrevocable, as alleged in paragraph 4 of the counterclaim:

MARTIN, J.A.

"4. (a) In or about the month of August, 1911, the defendant [plaintiff by counterclaim], being the owner of that certain property situate in the City of Vancouver described as lot 7, block 33, D.L. 541, group 1, Vancouver District (hereinafter referred to as the Pender Hotel property), signified

to the deceased his intention to make a voluntary gift of the Pender Hotel property to the deceased in the event and upon condition that the deceased should survive him and that the plaintiff and the deceased should be husband and wife at the time of the plaintiff's death.

"(b) The plaintiff and the deceased endeavoured to give effect to the plaintiff's said intention by entering into the verbal agreement hereinafter mentioned, namely, the deceased agreed with the plaintiff that in consideration of the plaintiff delivering to the deceased a conveyance of the Pender Hotel property, thereby enabling the deceased to become the registered owner thereof, the deceased would at all times recognize and acknowledge the plaintiff as the owner thereof and in addition thereto would allow the plaintiff to have the sole possession, control, and beneficial enjoyment of the said property and would devise and leave said property to the plaintiff by her will, and the plaintiff also agreed.

"(c) Purusant to the terms of the said contract hereinbefore mentioned the deceased did on December 2nd, 1911, duly execute her last will and testament by which she appointed the plaintiff her sole executor and devised and bequeathed all of her property both real and personal to the plaintiff, and the plaintiff did on or about said date and in consideration of the making of the said will deliver to the deceased a conveyance of the said Pender Hotel property."

It is alleged that the second will is in breach of this agreement, and it is prayed that if it be admitted to probate that the executor thereof and defendant devisee (Mrs. Buscombe) thereunder be declared to be trustees of the plaintiff by counterclaim, and that such other relief may be given as may be necessary to protect his rights under the agreement.

It is to be noted that the date of the agreement is alleged to be "in or about the month of August, 1911," and the particulars furnished, after demand, say:

MARTIN, J.A.

"1. In answer to paragraph 1 [of the demand], the plaintiff's intention was expressed verbally at the City of Vancouver on or about August 1st, 1911, also on August 2nd, 1911, and on many occasions subsequent thereto, the exact dates of each and every such subsequent occasion being now unknown to the plaintiff.

"2. In answer to paragraph 2, the said agreement was arranged verbally in the City of Vancouver on or about August 1st, 1911, and confirmed on many occasions subsequent thereto, and was finally confirmed and agreed to on December 2nd, 1911."

The marriage had been fixed for the said 2nd of August, but owing to serious differences it had been broken off about two days before, but after a long interview in Holden's office on the 1st of August said differences were amicably adjusted, the agreement renewed and the ceremony performed on the 2nd. Holden was a man of means but his fiancee had none, and it

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

had been his original intention to give her, upon marriage, an absolute conveyance of the Pender Hotel in question, but he altered that intention in view of what had happened, and he says that the final arrangement come to at said interview, was that he would give her a deed thereto in incomplete state (*i.e.*, signed, but not acknowledged for registration) upon the night of the wedding and later would finally complete it when and as soon as she would execute a will of all her property in his favour, and upon the further condition that he was to continue to retain possession and sole enjoyment of all his beneficial interest in the property, *viz.*, the rents, issues and profits thereof as long as he lived and that she should not enjoy them unless she survived him. Upon the night of the wedding Holden gave the said incompleted deed to his wife, but retaining the certificate of title, and later, on the 1st or 2nd of December, after his wife had shewn him a will duly executed in his sole favour, he delivered to her a duly executed and completed deed in her favour accompanied by the certificate of title. Some time later the deed and certificate of title were in her box in Holden's vault and her title was registered on the 13th of May following. The will remained in her possession and though it has disappeared yet the learned trial judge has found that it was drawn and executed as alleged by Holden, and his finding on this point is not questioned, nor on the further point that Holden remained in possession of the property and "has throughout received the rents and profits (thereof) and made the necessary disbursements in connection with the maintenance and improvement of the building thereon." There is here, then, if Holden's evidence is to be credited, a completely executed agreement, the breach of which he complains of, and that such an agreement cannot be legally questioned is beyond serious controversy, it being a secret trust, *i.e.*, one not declared by the instrument: Godefroi on Trusts, 4th Ed., 156 *et seq.*, where the cases are collected, particularly *In re Duke of Marlborough* (1894), 2 Ch. 133, and see also *Surcome* v. *Pinniger* (1853), 3 De G.M. & G. 571, and the Canadian cases of, *e.g.*, *Kinsey* v. *National Trust* (1904), 15 Man. L.R. 32, and (in this Court), *Olson* v. *Bieterilla* (1920), 28 B.C. 95, and *Bligh*

MARTIN, J.A.

v. *Gallagher* (1921), 29 B.C. 241. While the agreement would, doubtless, have been carried into effect by documents of a different kind if professional assistance had been retained, yet the inartistic way that was employed is nevertheless legal and effective and not at all unusual when the laity undertake to do their own conveyancing, the popular idea as to the nullity of another will in such circumstances, or indeed the inability to make one at all, is well illustrated by Holden's answers to questions on the point, wherein he treated the will as a "reconveyance" and thought he was "protected absolutely" by the exchange of the documents stipulated for and never contemplated any breach of the agreement. There was, moreover, another potent reason, in the delicate circumstances, why this most private course was adopted between themselves alone, *viz.*, that the lady did not wish certain near relations to know of the reason which had led to the engagement being broken off and the property not being given to her absolutely as originally intended. The solicitor who at the meeting with them on 30th November, 1911, received instructions to complete the execution of the deed and draw her will solely and absolutely in her husband's favour, says that at the time she gave him such instructions "she said, turning to her husband, 'It is only natural, because everything I have I got from you.'" This statement is important, because while it does not, and would not be expected to, especially in the delicate circumstances aforesaid, disclose, quite unnecessarily to the solicitor what the whole agreement was, yet it does shew that she intended to do what was the "natural," *i.e.*, the reasonable and proper thing, in all the circumstances leading up to the will.

MARTIN, J.A.

The respondent's counsel urged upon us that Holden's clear and positive testimony at the trial in support of the making of the agreement the day before the marriage is inconsistent with his previous evidence upon discovery, and so I have examined with care all the evidence upon that point, as well as that quoted by the learned judge below, with the result that I see no reason to reject the trial evidence, not only because of its apparent credibility but because it is in accord with all the probabilities of the case and it is, moreover, the most "natural,"

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

i.e., just and reasonable, arrangement that could be expected in the very unusual circumstances of the case. One of the reasons why the evidence upon discovery is not so definite as that upon the trial is that the witness was all through it drawing a distinction, imaginery upon the facts, yet pardonable in a layman, between a "completed" or "settled" or "carried out" agreement or arrangement and a binding "bargain" *ab initio,* as his explanations at the trial shew clearly.

The main facts of Holden's testimony are accepted by the learned trial judge, with the exception of his account of the agreement, which he is held to have "failed to establish" because of his "various statements" thereupon "as well as the result of his cross-examination," and "the position taken by his solicitor upon his instructions." As to the first reason, there being no conflicting witnesses it is a matter of drawing inferences from the testimony of one deponent, which it is our duty to do upon our own view thereof, not being here assisted by any unfavourable expression as to demeanour or otherwise. As to the second, I am of opinion that the learned judge has, with every respect, taken an erroneous view of the construction of the letter of the 28th of June, 1923, to the opposite solicitor, that he relies on as well as its effect in law; it is as follows:

"Dear Sir:

"*In re* Holden v. Buscombe.

MARTIN, J.A.

"According to the document your clients are seeking to propound as the will of Mrs. William Holden that certain property known as the Pender Hotel purports to have been devised to Mrs. Buscombe. 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.

"Were it not for the pending probate action, the matter would not be of much practical importance because Mr. Holden is the sole beneficiary under the will of 1911 and could acquire the legal title through the will; however, in view of the dispute which may not be disposed of for some considerable time, it is essential that the title be passed to Mr. Holden at the present time. We assume this can be effected with the consent of Mrs. Buscombe, and we therefore request you to obtain this consent at an early date. There are certain rentals now overdue and these may be lost to Mr. Holden unless the matter is put in proper shape at once.

"Please let us hear from you."

This letter was written nine days after the action was begun, for the purpose indicated, and how such a letter, even if it completely misconceived and misstated the defendant's rights, could limit them, in the absence of any prejudice being occasioned to the other side, I am unable to conceive. When Holden was asked about it, improperly in my opinion, he could, as was to be expected, say nothing informative about it. As I read it (though it is valueless and irrelevant in any event) it avers, in substance, that Mrs. Holden was a trustee for her husband "who was and is the sole beneficial owner," which, strictly speaking, is very probably a correct technical definition of the situation (though it is a nice point and I do not speak finally) because the agreement was that Holden should solely enjoy till his death the beneficial interest in the property and the wife's interest was only contingent upon his death in her lifetime, which contingency never arose owing to her prior death. But at best, in such argumentative circumstances, no importance should be attached to such a letter, and as a striking illustration of how dangerous, as well as unwarranted, it would be to deprive the client of his rights thereby, I cite the case of *Synge* v. *Synge* (1894), 1 Q.B. 466, wherein an ante-nuptial promise was under consideration, and a letter was finaly held by the Court of Appeal to establish the plaintiff's contract though it had been regarded by her trustee and rejected by the Court below as being insufficient to do so.

MARTIN, J.A.

In coming to the conclusion that the agreement set up by the appellant has been established I have not omitted consideration of the many matters in that connection that have been brought to our attention, but I have deemed it necessary to deal specially herein with the main aspects of it that the learned judge below based his judgment upon. As to corroboration, it is abundantly to be found in the documents, *i.e.*, the "circumstances" and the continued possession and beneficial enjoyment. See Mr. Justice Killam's language in *Thompson* v. *Coulter* (1903), 34 S.C.R. 261, cited by me in *Dominion Trust Co.* v. *Inglis* (1921), 29 B.C. 213, *q.v.*, and also *Rex* v. *Steele* [(1923), 33 B.C. 197]; (1924), 1 W.W.R. 1146, affirmed by the Supreme Court.

Such being my opinion upon the counterclaim, it is only

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

necessary to mention briefly another aspect of it, which was not submitted to us, so that I may not be deemed to have overlooked it, *viz.*, that whatever view may be taken about any uncertainty in Holden's evidence as to the agreement being discussed in all its terms "on or about August 1st," can there be any reasonable doubt that in the confirmatory discussions mentioned in the particulars which unquestionably, to my mind, took place shortly after the marriage and before the execution of the completed reciprocal documents, all the terms were considered and agreed upon?

MARTIN, J.A.

Our judgment should be that the appeal should be allowed, and the judgment below varied by allowing the counterclaim and declaring the defendants thereto, *i.e.*, the executor and female beneficiary under the second will, to be trustees for Holden: the question of costs I should like to hear spoken to.

GALLIHER, J.A.: This case was disposed of by the learned judge below entirely on findings of fact. With the exception of one such finding, I am quite clear that this Court would not be justified in reversing him. That finding is dealt with very shortly by the learned judge in the last paragraph of his reasons for judgment [33 B.C. 431 at p. 439] and is in these words:

"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."

GALLIHER, J.A.

I think this finding merits careful analysis. In 1911 the defendant William Holden, who was then possessed of a very considerable property, became affianced to Lillian Eltham Buscombe, a daughter of Maria Eltham Buscombe, and a stepdaughter of her husband, Henry Arthur Buscombe, defendants by counterclaim in this action. Up until a few days before the time set for the marriage, there seems to have been no dissatisfaction between the affianced parties and during that time Holden had expressed his intention of conveying to his future wife a piece of property known as the Pender Hotel as an

absolute gift upon her marriage with him. This property is situated in the City of Vancouver and is now valued at from $35,000 to $40,000. A few days before the marriage was to take place, Holden became dissatisfied, as he states, with his future wife, owing to her fondness for a man named McMillan, and the engagement was broken off, but at the solicitation of his fiancee, and after a long talk with her, the engagement was renewed and a verbal agreement was arrived at between them whereby Holden was to execute a conveyance of the Pender Hotel property to be handed to his wife on the night of their marriage, but not complete for registration purposes until she had executed a will in his favour of all her real and personal property, and that during his lifetime he was to have the control of the property and be in receipt of the rents and profits of same, and if he predeceased her then the property was to belong to her absolutely. This was in 1911 and the marriage took place as arranged, the conveyance incomplete as to registration was handed to his wife and some four months later she made a will in her husband's favour and the conveyance was completed and was registered at a later date. In January, 1920, Mrs. Holden made another will, in which she devised this Pender Hotel property to her mother, Mrs. Buscombe, and appointed her stepfather, H. A. Buscombe, executor and trustee. Mrs. Holden died on the 25th of April, 1923. Probate of this latter will was applied for and it is being contested by Holden. It was contested on several grounds, but as I intimated before, this is the only ground (if at all) upon which we might be justified in reversing the findings of the learned trial judge. The defendants by counterclaim specifically deny the alleged agreement and plead the Statute of Frauds, Cap. 92, R.S.B.C. 1911, Sec. 4.

It is well settled that the Courts will not allow the Statute of Frauds to be made an instrument of fraud, so that if the agreement alleged by Holden can be held to have been proved it would be a fraud upon him to dispose of the property by will as was done, and the Statute of Frauds would be no bar to giving oral evidence to prove the agreement: *Rochefoucauld* v. *Boustead* (1897), 1 Ch. 196 at p. 206; *Maddison* v. *Alder-*

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

son (1883), 8 App. Cas. 467. The Lord Chancellor, the Earl of Selborne, at p. 476, lays down a principle which I think is applicable here, in the following words:

"But it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement."

There is here the conveyance of the property in question from Holden to his wife, signed but not completed, and handed to her on the evening of her marriage; some months later there is the meeting of Holden and his wife with *Sir Charles Hibbert Tupper,* the making of the will of Mrs. Holden in favour of her husband by *Sir Charles,* who at the same time completed the conveyance. This will is not before us, but *Sir Charles* has given his evidence as to the nature of same and conversation which occurred at the time. The reasonable inference is that this will was executed in accordance with an agreement, otherwise it might be revoked the next day, and Holden in not completing the deed until the will was executed, is a circumstance favouring that view.

GALLIHER, J.A.

It seems to me we have in this, in the words of the Lord Chancellor, "equities resulting from *res gestæ* subsequent to and arising out of the contract," the connection of which with the alleged contract does not depend upon mere parol testimony but is reasonably to be inferred from the *res gestæ* themselves. The evidence I have referred to above as to the consultation with *Sir Charles* is in these words:

"She said she wanted to leave everything to her husband and make him the sole executor, and then I said, 'That is a very simple will to draw.' She said, turning to her husband, 'It is only natural, because everything I have I got from you.'"

It was submitted that the words "It is only natural," etc., are not consistent with a prior agreement to execute a will in favour of her husband. Strictly construed, and by themselves,

that is perhaps true, but when one considers all the circumstances, I think we should not confine ourselves to a too strict application of the words used and say the words could have no reference to any prior agreement. Mrs. Holden was not speaking with any studied exactness and might very well have had in mind a prior agreement.

There is, moreover, another circumstance which (though not sufficient in itself) throws some light on the matter. I refer to the fact that Holden still continued to manage the property, obtaining tenants, having leases signed (by the wife, it is true, as she was the registered owner), making improvements, and accounting to nobody. I am not placing undue weight upon this, as it might so occur on account of their relationship as man and wife, but it is after all a circumstance which I think is of considerable weight.

GALLIHER, J.A.

On the whole, I am of opinion that Holden has proved his agreement and that the appeal should be allowed.

The relief claimed by the counterclaim is in the alternative and as the question of costs will have to be spoken to, it might be as well to leave the form of judgment open until then.

McPHILLIPS, J.A.: In my opinion the appeal should succeed. Upon a careful study of the evidence, which I do not attempt to set forth in detail, it is abundantly clear that the circumstances attendant upon, leading up to and finally culminating in marriage between the defendant Holden and his wife established that in consideration of the marriage mutual contracts were made, irrevocable in their nature. Holden was a man of very considerable means and it was his intention, in consideration of marriage, to convey outright to his intended wife, the Pender Hotel property, but hearing certain things the engagement was broken. One element of the things that he had learned led him to think that his wife would be subject to influences that would not make for the security of property in his wife's name. However, Holden and his fiancee had a meeting in a few days' time after the breaking of the engagement and he was prevailed upon by the entreaties of his fiancee to renew the engagement, his fiancee being naturally anxious

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

that her relatives and friends should not be apprised of any disagreement. It was then specifically agreed upon that there should be a conveyance executed of the Pender Hotel property to his fiancee, but that it would be left in incomplete form as to the acknowledgment thereon, *i.e.*, notarial acknowledgment necessary for registration purposes, and that this would be done before the wedding took place, and this was done immediately before the ceremony of the marriage took place. A condition mutually agreed to was that later, after the marriage, the acknowledgment would be completed, his wife to, at the same time or coincident thereto, to execute a will of all her property to Holden, her husband, that is, the agreement come to was to be and would operate as an irrevocable contract whereby in case his wife predeceased him, Holden, the husband, would again become the owner of the Pender Hotel property. There was in all that took place the creation of a trust in the property in favour of Holden, the husband, and that in the interim of time Holden was to retain the actual possession of the property and remain as before the agreement was come to the beneficial owner to the extent of being entitled to the rents and profits arising therefrom, the wife, of course, in case she outlived the husband, to become the absolute owner of the property, but not otherwise. Later a solicitor was consulted and the husband and wife carried out their respective engagements, *i.e.*, the husband then only delivered to his wife the conveyance of the property in complete form duly acknowledged and capable of immediate registration in the Land Registry office, the husband (Holden) being first shewn a will duly executed by his wife whereby the husband (Holden) was constituted the wife's sole devisee, which was in conformity with the agreement come to previous to the marriage and in consideration of the marriage. All that took place in the most complete manner accentuates and wholly corroborates the defendant in his account of the contract entered into by mutual agreement on the eve of the marriage, to be completely executed after the marriage. There can be no question that what took place worked the creation of an irrevocable contract incapable of being altered or receded from by either of the parties. A mutual agreement only could

MCPHILLIPS, J.A.

effectuate any release of the otherwise absolute and incontestable agreement come to, and which had taken on the form after the marriage of an executed contract based upon the highest form of consideration, namely, marriage. As to the irrevocability of the will made in conformity with the agreement and the enforceability of the agreement, I would refer to *Turner* v. *Turner* (1902), 4 O.L.R. 578. That was a case where a testator devised his estate to his wife absolutely upon condition that she should make a will providing for two of his children. Having complied with the condition, it was held that the wife could not revoke the will. Boyd, C. said:

"The widow takes a fee simple, having complied with the condition as to making a will in favour of the children, but would have no power to revoke the will; and the judgment should contain a declaration that the will is irrevocable."

In *Stone* v. *Hoskins* (1905), P. 194, Sir Gorell Barnes, President, quoted the judgment of Lord Camden in *Dufour* v. *Pereira* [(1769)], 1 Dick. 419, and at p. 197 the quotation there made in part reads as follows:

"'Though a will is always revocable, and the last must always be the testator's will; yet a man may so bind his assets by agreement that his will shall be a trustee for performance of his agreement.' . . . . 'These cases are common, and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke it. This Court does not set aside the will; but makes the devisee heir or executor trustee to perform the contract.'"

MCPHILLIPS, J.A.

Bligh v. *Gallagher* (1921), 29 B.C. 241, was a case where "An aged woman was taken into the plaintiff's home and cared for until her death in consideration of a small payment per month and a promise to make a will leaving all her property to the plaintiff with certain small exceptions. The will was made in accordance with the promise, but was later revoked and another will made in favour of her sons. An action for specific performance of the contract was dismissed.

"*Held*, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the promise of deceased to make the will was an enforceable contract, the actual making of the first will, and certain statements by deceased to others as to her promise or intention and the circumstances of the case were sufficiently corroborative of the promise testified to by the plaintiff."

Then we have the case of *Central Trust and Safe Deposit Company* v. *Snider* (1916), 1 A.C. 266. There Lord Parker of Waddington said, at pp. 271-2:

"In their Lordships' opinion Meredith, C.J. put the matter on a surer ground. There being no question of setting the transaction aside, the

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

only point to be determined is whether, by virtue of the testator's promise to settle the property given in the letter of May 9, 1900, for valuable consideration, the defendant Mabel Carleton became entitled in equity to any and what interest. The learned Chief Justice refers to the case of *Freemoult* v. *Dedire* (1718), 1 P. Wms. 428, as having decided that a covenant to settle lands makes the covenantor but a trustee for the parties who would be interested if the covenant were performed, and to a passage in Lewin on Trusts, 12th Ed., pp. 160-161, where it is stated that if a person agrees for valuable consideration to settle a specific estate he becomes a trustee of it for the intended objects, and all the consequences of a trust will follow. *Freemoult* v. *Dedire* (1718), 1 P. Wms. 428 was undoubtedly a sound decision and there is little fault to find in the statement in Lewin on Trusts as to the general equitable principle. But it must be remembered that this principle is but the logical consequence of the power of a Court of Equity to grant, and its practice in granting, specific performance of a contract to convey or settle real estate. It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would in a Court of Equity be enforced specifically.

"If for some reason equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all. Their Lordships had to consider this point in the case of *Howard* v. *Miller* (1915), A.C. 318, in connection with the law as to the registration of titles in the Province of British Columbia, and came to the conclusion that, though the purchaser of real estate might before conveyance have an equitable interest capable of registration, such interest was in every case commensurate only with what would be decreed to him by a Court of Equity in specifically performing the contract, and could only be defined by reference to the relief which the Court would give by way of specific performance."

MCPHILLIPS, J.A.

This language of Lord Parker aptly puts the point for consideration in the present case in very terse terms and approves the statement of law in Lewin on Trusts, 12th Ed., pp. 160-61, where it is stated that

"if a person agrees for valuable consideration to settle a specific estate, he thereby becomes a trustee of it for the intended objects, and all the consequences of a trust will follow."

Here the consideration was marriage, the highest form of consideration, and the trust will follow the property to the devisee of the late Mrs. Holden in the language of Lord Camden already quoted:

"'This Court does not set aside the will; but makes the devisee heir or executor trustee to perform the contract.'"

The Statute of Frauds has no application (*Rochefoucauld* v. *Boustead* (1897), 1 Ch. 196, Lindley, L.J., at p. 206). The present case is one within the language of the Earl of Selborne, L.C. in *Maddison* v. *Alderson* (1883), 8 App. Cas. 467. At p. 475 the Lord Chancellor said:

"There is nothing in the statute [Statute of Frauds] to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences."

Here we have the "acts done" and admittedly they are referable to the contract made, *i.e.*, that the property would be devised to Holden, the husband, by the wife, and she executed the contract which surely evidences the trust, and that trust must be carried out and be impressed upon the property and as against the subsequent devisee by the later will. This is not the case of an innocent purchaser or purchasers for valuable consideration without notice of the trust, and at p. 476, we have the Lord Chancellor saying:

"The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded."

This language is exceedingly apposite to the facts of the present case (see also at pp. 477, 478). There was unquestionably, in any case, part performance in all that was done sufficient to take the case out of the Statute of Frauds (*Surcome* v. *Pinniger* (1853), 3 De G.M. & G. 571). Upon the question of corroboration and part performance, where one of the parties to the contract is dead, I would refer to *McDonald* v. *McKinnon* (1878), 26 Gr. 12 (also see *Halleran* v. *Moon* (1881), 28 Gr. 319 at p. 322; *Lincoln* v. *Wright* (1859), 4 De G. & J. 16; *Dominion Trust Co.* v. *Inglis* (1921), 29 B.C. 213, see MARTIN, J.A. at pp. 221-2). One well-understood test known to lawyers and given effect to by eminent judges, as the precedents shew, is to scan the conduct of the parties after the making of the alleged contract to discover what the contract come to was. Can there be any doubt in the present case? Everything points to the truthfulness of the account given by the defendant Holden of the agreement come to between himself and his wife, and Mrs. Holden after the marriage carried out her portion of the

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

contract, as Holden did upon his part; that is, we have that done which was intended to be done and done at a time early in point of time following the marriage. This makes it incontrovertible in my opinion. The contract is incontestable in its nature and must be upheld and given effect to. Further, upon all the surrounding facts, that which was agreed to was what would naturally be expected to be the contract come to. All the probabilities are in favour of the account given by Holden, and we have the course of conduct of Mrs. Holden following the marriage—her execution of the will in favour of her husband and allowing her husband to be in receipt of the rents and profits of the property—all being referable to the contract deposed to by her husband and inconsistent with any contention that Mrs. Holden had become the absolute owner of the property, not impressed with any trust in favour of her husband. Unquestionably, had the husband (Holden) predeceased his wife, then and in that event the property would have become vested absolutely in the wife, freed of any trust; as it is, the wife has predeceased the husband, the situation therefore is that the devise of the Pender Hotel property to other than the defendant is invalid and of no effect, and cannot be allowed to prevail over the irrevocable contract which, in my opinion, has been fully and completely established. The devisee of the property, Maria Eltham Buscombe, the mother of the late Mrs. Holden, the devisee under the later will of Mrs. Holden (defendant by counterclaim) should be declared to be the trustee of the property for Holden (plaintiff by counterclaim), and all proper directions should be made which will admit of Holden becoming upon the books of the Land Registry office the absolute owner of the property, *viz.*, lot 7, block 33, district lot 541, group 1, Vancouver District, or such other declaration as will effectuate the terms of the contract and vest the Pender Hotel property in Holden (*Howard* v. *Miller, supra*). It follows that, in my opinion, the appeal should be allowed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: In August, 1911, the appellant immediately preceding his marriage to Lillian Eltham Buscombe, since deceased, a stepdaughter of the defendant by counterclaim,

MACDONALD, J.A.

Henry Arthur Buscombe, handed to her a conveyance of what has been styled the Pender Hotel property duly executed but not acknowledged for registration purposes. On or about the 30th of November, 1911, Mrs. Holden executed a will devising all her property to the appellant and at or about the same time the conveyance was completed by his acknowledgment. The appellant contends that an oral agreement was entered into between him and Mrs. Holden shortly before the marriage by which he was to make out this deed, place the property in her name, he, however, to retain the rents and profits, while she, on her part, was to execute a will leaving to him her personal property and the Pender Hotel property so conveyed as aforesaid. The acknowledgment of the deed, it is claimed, was purposely delayed until the execution of the will. On the 14th of January, 1920, Mrs. Holden executed another will, devising the Pender Hotel property to her mother, Maria Eltham Buscombe, appointing Henry Arthur Buscombe, the defendant by counterclaim, her executor. This will was attacked at the trial on the ground of the incompetency of the testatrix, but the learned trial judge's finding against that contention was not questioned on this appeal.

Appellant contends, however, that the oral agreement above referred to was established, or should be held to be proven, and that Mrs. Holden could not in law by the later will render this nugatory.

MACDONALD, J.A.

The first question to decide is whether or not such an oral agreement was, in fact, entered into as alleged or at all. The learned trial judge found that the appellant "failed to establish the agreement upon which he relies." He also sets out, in his judgment, Mr. Holden's version of the alleged agreement as given on his examination for discovery and in evidence at the trial. Mr. Holden was the only witness who could testify on this point, and the learned trial judge was right in subjecting his testimony to that close scrutiny which the Courts require where the estate of a deceased person is involved. The quotations fairly taken by the learned trial judge from appellant's examination for discovery gives a very hazy conception of a concluded arrangement of any kind, in fact it appears there-

COURT OF APPEAL

1924

Oct. 7.

BUSCOMBE v. HOLDEN

from that the appellant "can't say definitely," to quote his own words, whether or not an agreement was reached. He is not clear either in his evidence on discovery as to the time the discussion took place from which the agreement is to be inferred. Had appellant's evidence on discovery been tendered in the same form at the trial it could hardly be contended that, accepting that evidence, the agreement was established. At the trial, however, he was more explicit. He testified that they "came to an agreement" before the wedding, and that agreement in effect was that he

"was to make out this deed with the exception of notarying them—that it was to be handed to her on the night of the wedding and 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."

His Lordship, the trial judge, after stating that he reached a conclusion upon the facts, goes on to say that [33 B.C. 431 at p. 439]:

"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 . . . . . I am satisfied that he has failed to establish the agreement upon which he relies."

I have referred in detail to the findings at the trial because it was urged by Mr. *Mayers* that upon the true construction of his judgment the learned trial judge merely meant to set out the evidence bearing upon the alleged contract, accept that evidence as true, and then wrongly drew the inference that it did not disclose a contract. If I accepted that interpretation of the reasons for judgment different principles would apply, as this Court would be free to draw a different inference from the evidence and find that a concluded contract is disclosed. I cannot, however, accept this interpretation of the learned trial judge's reasons for judgment. There is a clear finding of fact, not that the evidence, as set out, was accepted but rather that *ex facie* it should not be accepted, particularly in view of the various statements made by the appellant and the result of his cross-examination. It is quite true that all the circumstances, the execution of the deed, unacknowledged until the will was made, the receipt of rents and profits by the appellant in the meantime, might well be referable to such an agreement as

MACDONALD, J.A.

alleged but not conclusively so. It is equally conceivable that the appellant, a man reputedly wealthy, should make his proposed wife a wedding gift of this nature; and also quite conceivable that she should will it back to him for his full enjoyment should she predecease him and afterwards change her mind and devise it to her mother. In any event there is a finding of fact by the learned trial judge, and well known principles should be applied. See *The Village of Granby* v. *Menard* (1900), 31 S.C.R. 14, where Mr. Justice Gwynne, at p. 16, says:

"In a case like the present where the trial judge, who has heard all the witnesses give their evidence before him and who has thus had an opportunity which no Court of Appeal can have of estimating the credibility of the several witnesses and the value of all their evidence, has rendered his judgment, no judge sitting in review of, or in appeal from that judgment, upon matters of fact, ought to reverse that judgment, unless it be shewn to be clearly wrong upon the evidence so taken."

MACDONALD, J.A.

I would, therefore, not disturb the finding of the learned trial judge and having reached this conclusion, the appeal fails without the necessity of considering the questions of law argued before us.

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

Solicitors for appellant: *Mayers, Stockton & Smith.*
Solicitor for respondent: *G. S. Wismer.*

MACDONALD, J.

1924

Nov. 24.

REX v. PAYETTE.

Criminal law—Murder—Conviction—Accused sentenced to be hanged—"Fit case for appeal"—Application to trial judge for certificate—Grounds—Criminal Code, Sec. 1013(b).

REX. v. PAYETTE

On an application to the trial judge on behalf of accused who was convicted of murder and sentenced to be hanged, for a certificate that "it was a fit case for appeal" under section 1013(*b*) of the Criminal Code, it was submitted that the certificate should be granted on the grounds that the jury erred in not finding (a) that accused was insane within the statute; (b) that he was in such a state of drunkenness at the time of the killing as to be incapable of forming an intention to commit the crime.

Held, that from the wording of the statute before a trial judge gives a certificate he should have an opinion or belief of the fitness of the appeal upon the questions of fact or mixed questions of law and fact. The questions raised are essentially for a jury to decide and in such circumstances the certificate should be refused.

Accused was charged with having murdered his wife at Notch Hill in the County of Yale and Province of British Columbia. There was no direct evidence shewn by the proceedings at the trial that the place known as "Notch Hill" was within the County of Yale or the Province of British Columbia or that accused's wife was killed in such county.

Held, that after a verdict, such an omission in the evidence is not a ground for appeal.

Statement

MOTION to the trial judge by a prisoner convicted of murder and sentenced to be hanged, for a certificate that "it is a fit case for appeal" under the provisions of subsection (*b*) of section 1013 of the Criminal Code. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. at Vancouver on the 9th of October, 1924.

A. D. Macintyre, for accused.
Archibald, for the Crown.

24th November, 1924.

Judgment

MACDONALD, J.: William Joseph Payette was, on the 9th of October, 1924, found guilty at the Kamloops Assizes, of the murder of his wife and was sentenced to be hanged on the 25th of January, 1925.

Counsel for Payette applied to me, as the trial judge,

under the provisions of subsection (*b*) of section 1013, of the Criminal Code, for a certificate that "it is a fit case for appeal." I requested that the grounds upon which the application was based should be outlined in writing. I did not feel disposed to consider the matter upon verbal statements.

With the consent of the Crown a further notice has been filed, and attached thereto is a summary of various reasons advanced, for granting such a certificate.

Counsel submitted that, as far as questions of fact alone were concerned, the certificate should be granted upon the ground, that the jury erred in not finding that Payette was insane within the statute, or, in the alternative, finding that he was in such a state of drunkenness, at the time of the killing, as to be incapable of forming an intention to commit the crime of which he was charged.

This subsection is only invoked where questions of fact alone or mixed questions of law and fact are involved. Aside from the two grounds mentioned, the reasons, presented for consideration, almost entirely deal with questions of misdirection, non-direction and other matters of like nature involving questions of law.

No authorities have been cited that might assist a trial judge, in determining upon what basis he is to proceed in granting or refusing the certificate. It seems to me, however, that from the wording of the statute, he must surely, before giving a certificate, have an opinion or belief of the fitness of the appeal, upon the questions of fact or mixed questions of law and fact. The burden of responsibility would thus appear to be greater than if he were asked to grant leave to appeal.

Judgment

Since the application was first launched, I have had an opportunity of reading the shorthand notes of the proceedings of the trial. Their perusal has not affected the opinion I entertained at the outset, that the case was one essentially for a jury to decide. I endeavoured to make that position clear in my charge to the jury. I feel that, under the circumstances, I should refuse the certificate under said subsection (*b*), that "it is a fit case for appeal." Refusal is discretionary and not a finality: see Sibley on Criminal Appeal and Evidence, p. 28.

MACDONALD, J.

1924

Nov. 24.

REX v. PAYETTE

Judgment

In thus refusing the certificate, I wish to draw attention to a matter which was not taken as a ground for appeal. I should add that, in any event, it was not of a nature which would have affected my decision.

Payette was charged with having murdered his wife at "Notch Hill," in the County of Yale, and Province of British Columbia. It was stated to be a station on the C.P.R., 20 miles from Salmon Arm. Charles Newman of that place, a justice of the peace (presumably for British Columbia, but not so stated), was at the scene of the killing of Mrs. Payette, and caused the arrest of Payette after viewing the dead body. Dr. Archibald, who knew the deceased, performed a *post mortem* examination on her body at the City of Kamloops. Many of the witnesses continually referred to "Notch Hill," and the jury doubtless had knowledge of a place of that name east of Kamloops, but there is no direct evidence shewn, by the proceedings at the trial, that the place known as "Notch Hill" in the evidence was within the County of Yale or the Province of British Columbia, or that Mrs. Payette was killed in such County.

I do not think, however, that after a verdict and under the provisions of the Criminal Code, such an omission in the evidence gives a ground for appeal in a superior Court. On this point see Lord Ellenborough in *Rex* v. *Johnson* (1805), 6 East 583 at p. 598, where he quotes with approval a portion of the judgment of Lord Mansfield, in the case of *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161 at p. 172, as follows:

"'In every case to repel the jurisdiction of the King's Courts you must shew a more proper and sufficient jurisdiction; for if there be no other mode of trial, that alone will give the King's Courts a jurisdiction.'"

Then again at p. 601, in referring to the presumption in favour of the jurisdiction of a superior Court, he says:

"Nothing shall be intended to be out of its jurisdiction which is not alleged and shewn to be so."

Lord Hardwicke is then quoted as follows, at p. 601:

"'The rule of law is, that in a plea to jurisdiction, like a plea in abatement, where it is to a Court of general jurisdiction, you must also shew where the jurisdiction vests, as well as negatively that it is not there.'"

I thought it only fair to mention this matter, so that all parties concerned might be aware of the situation.

Certificate refused.

BODY v. BODY.

MCDONALD, J.

1924

Nov. 17.

BODY v. BODY

Husband and wife—Detinue—Action to recover real property—For the recovery of furniture and an accounting—R.S.B.C. 1911, Cap. 152, Sec. 12.

Husband and wife with their joint savings and moneys borrowed from the wife's brother purchased a home on 14th Avenue in Vancouver in May, 1916. They sold this property at a considerable profit and purchased a house on Quebec Street in October, 1920. Both properties were in the plaintiff's name until January, 1922, when the Quebec Street property (in which the family resided, including the wife's mother, sister and her husband) was transferred to the wife's name. In January, 1924, the husband was ejected from the house. The husband brought action against the wife for a declaration that his wife held the Quebec Street property as trustee for him, for the return of certain furniture and for an accounting in relation to a joint bank account kept by them. On the trial the husband did not set up any trust but stated that when he made the conveyance to his wife in 1922, he did so on her undertaking that the members of her family would vacate the home and this was never carried out.

Held, that although the plaintiff's evidence of the facts should be accepted he cannot succeed as to the house as there was no amendment of the pleadings asked for or granted and even if there had been the only claim he could set up would be that he had made a conveyance for a consideration that had failed and his action would be either for specific performance or damages; further, his action for the recovery of the furniture is precluded by section 12 of the Married Women's Property Act.

ACTION by a husband for a declaration that his wife held certain lands for him as trustee; that certain moneys withdrawn from their joint account by her be returned and for the return of certain furniture that belongs to him. The facts are set out in the head-note and reasons for judgment. Statement

Eyre, and *J. H. L. Morgan*, for plaintiff.
J. W. deB. Farris, K.C., and *Sloan*, for defendant.

17th November, 1924.

MCDONALD, J.: I have retained judgment in this matter hoping that the parties would reach a settlement, but now understand that no settlement can be reached. The plaintiff is the Judgment

MCDONALD, J.

1924

Nov. 17.

BODY
v.
BODY

husband of the defendant and, on 10th December, 1923, issued a writ against her claiming a declaration that his wife held certain lands as trustee for him and also claiming certain moneys of the plaintiff withdrawn by the defendant from their joint bank account. At the trial, I allowed the plaintiff to amend his writ by adding a claim for the return to him of certain furniture later referred to in the statement of claim delivered in this action. The statement of claim sets up that plaintiff, on or about 15th January, 1922, being the registered owner of certain lands in the Municipality of South Vancouver, known throughout the action as the Quebec Street property,

"arranged with the defendant that he should execute a conveyance of the above described property to the defendant which said conveyance was to be held by the defendant unregistered and to be returned to the plaintiff on demand but the defendant, without the consent or knowledge of the plaintiff, immediately afterwards registered the said transfer and the property now stands in the name of the defendant,"

and the statement of claim further contains a claim for an accounting and for payment of such amount as shall be found owing by the defendant to the plaintiff.

The parties were married in 1913 and lived together as man and wife in the City of Vancouver until January, 1924, when the plaintiff was ejected from the house in question by his wife and her mother.

Judgment

During their married life, the defendant acted as banker for the family, the bank account containing the joint savings of husband and wife being kept in a joint account until April, 1921, when the defendant transferred the balance then in the bank to her own name. With the plaintiff and defendant lived the defendant's mother and sister and the sister's husband, so that whatever other complaints the plaintiff has, he cannot complain that he has not had sufficient opportunity to become acquainted with his wife's family. With the joint savings, and with some moneys borrowed from the defendant's brother and brother-in-law, a home was purchased about May, 1916, on 14th Avenue in the City of Vancouver, and this was afterwards sold at a considerable profit and the property in question in this action was purchased in October, 1920. The 14th Avenue house, as well as the Quebec Street house, remained in

the name of the plaintiff until 10th January, 1922, when the Quebec Street house, in which the family then resided, was conveyed by the plaintiff to the defendant. In December, 1923, the defendant granted to her mother a lease of the Quebec Street house, and in January, 1924, as above stated, the plaintiff was ejected from the house. It is said that he was guilty of certain misconduct in that he was addicted to the use of liquor. This is probably true, but it is also true that his addiction to liquor did not prevent him from contributing to the family fund something like $11,000, even though some two and a half years of his married life were spent in the Army, during which time his wife received his separation allowance, as well as a considerable proportion of his pay.

On the trial, the plaintiff did not set up any trust, as alleged in the statement of claim, but stated that when he made the conveyance to his wife in January, 1922, he did so on her undertaking that the members of her family would vacate the home, which undertaking she has never carried out. I accept the plaintiff's evidence in this regard, though it is contradicted by the defendant and her mother. I find myself, however, unable to give judgment for the plaintiff because, in the first place, no amendment has been asked for or allowed, and, in the second place, because, even if an amendment were allowed, the only claim that could be set up on this evidence would be that the plaintiff made the conveyance for a consideration which has failed. This, I think, is, as contended by Mr. *Farris,* an offer of an act for a promise, and the plaintiff's only cause of action in this regard would be an action either for specific performance of the defendant's promise to eject her family from the house or for damages for her failure to do so.

Judgment

As to the plaintiff's claim to recover the furniture in the house, of which he has been deprived the use, it seems to me he is again out of Court. In this connection, I should say I allowed the defendant to amend her defence so as to deny the allegations contained in paragraph 10 of the statement of claim. This I take to be an action *in detinue* and the husband, by virtue of section 12 of the Married Women's Property Act,

MCDONALD, J.

1924

Nov. 17.

BODY v. BODY

R.S.B.C. 1911, Cap. 152, is prevented from suing his wife for a tort.

I have no difficulty in reaching a conclusion on the facts that the furniture does belong to the husband for, as I recollect the evidence, it was not disputed that he purchased the same. Nevertheless, as stated, I think he cannot recover.

As to the claim for an accounting, as I understand the plaintiff's evidence, the only two items as to which he complains that the wife used his money, without authority, are an item of $125 which she took to pay her expenses to New York in connection with the business of the millinery firm by which she has been, and is employed, and an item of $660 which she paid through her mother to her brother on account of the debt owing by the plaintiff to said brother. These moneys, I think, the defendant had no right to use. There is, of course the difficulty that the plaintiff's and defendant's money were mingled but that is largely (and entirely since 7th April, 1921) the fault of the defendant. The plaintiff is entitled to judgment against defendant for these amounts, *viz.*, $660 and $125, or a total of $785.

Judgment

If I may say so, I regret that I feel unable to give the plaintiff further relief, for I think he has been badly used, but, as I understand the law, this is all the relief to which he is entitled.

BRITISH COLUMBIA TELEPHONE COMPANY v. THE SHIP ARABIEN.

MARTIN, LO. J.A.
1924
Nov. 29.

BRITISH COLUMBIA TELEPHONE Co. v. THE SHIP ARABIEN

Admiralty law — Action for damages — Negligence in dropping anchor — Burden of proof—Conflict of evidence.

In an action for damages for injury caused by the defendant ship to the plaintiff's telephone cable at North Vancouver such damage being alleged to be due to the negligent manœuvres of the ship in dropping her port anchor when berthing at Wallace's new pier, as those in charge knew or should have known that it would foul the said cable, the evidence submitted included a number of charts, plans, documents and a large body of evidence technical and otherwise which upon the pivotal point of where the anchor was actually dropped is sharply in conflict.

Held, that the onus is on the plaintiff and as in the particular circumstances the onus of establishing negligence has not been discharged, the action should be dismissed.

ACTION to recover damages for injury to the plaintiff's telephone cable at the foot of Lonsdale Avenue, North Vancouver, owing to the negligent dropping of the port anchor of the defendant ship when berthing at Wallace's new pier. Tried by MARTIN, Lo. J.A. at Vancouver on the 2nd, 3rd and 4th of July, 1924. Statement

McPhillips, K.C., and *H. M. Smith*, for plaintiff.
Griffin, and *Sidney Smith*, for defendant.

29th November, 1924.

MARTIN, Lo. J.A.: This is an action to recover damages for injury caused by the defendant ship to the plaintiff's telephone cable at North Vancouver in the vicinity of the ferry slip at the foot of Lonsdale Avenue on the 19th of October, 1923, such damage being alleged to be due to the negligent manœuvre of the ship in dropping her port anchor when berthing at Wallace's new pier, which is 128 feet to the east of the east leg of the North Vancouver Ferry landing. Judgment

Several legal questions are raised and two questions of fact, which have engaged my prolonged consideration, owing to their nicety. I deal now with the questions of fact, and the first of

MARTIN, LO. J.A.

1924

Nov. 29.

BRITISH COLUMBIA TELEPHONE CO. v. THE SHIP ARABIEN

them is as to the propriety of the anchor being dropped at all, as a matter of good seamanship, in executing the said manœuvre. As to this I entertain no doubt what the answer should be, because the evidence greatly preponderates in favour of that course having been adopted as a prudent and seamanlike one in the circumstances, and I so find.

The second question is much more difficult, and it involves the consideration of the allegation of negligence as set out in the statement of claim and preliminary act, that those in charge of the Arabien let down her anchor in a place where they knew or should have known that it would foul the said cable. In seeking a satisfactory answer to this allegation I have found not a little difficulty, because it has necessitated the close consideration of a number of charts, plans, documents, etc., and a large body of evidence, technical and otherwise, which, upon the pivotal point of where the anchor was actually dropped, is sharply in conflict. I have not found it an easy matter to reach a conclusion which is entirely satisfactory, but after the most careful consideration I find myself unable to reach any other than that the onus of establishing negligence has not in the particular circumstances been discharged, despite the able presentation by Mr. *McPhillips* of the plaintiff's case. I do not think it would be profitable to attempt to review the voluminous evidence and set out the facts in detail, and the inferences therefrom, which have led me to this conclusion, and I am the more moved to refrain from so doing because the location of the cable has been moved since the accident and no public benefit would result therefrom.

Judgment

Such being my view of the absence of negligence upon the merits of the case in fact, it is not desirable that I should enter upon a consideration of the remaining questions in law, and therefore I pronounce judgment in favour of the defendant, and the dismissal of the action with costs following that event.

Action dismissed.

IN RE HOME BANK OF CANADA AND THE WINDING-UP ACT.

MACDONALD, J.

1924

Nov. 21.

Practice—Winding-up Act—Orders of another Province against contributories—Procedure to enforce—R.S.C. 1906, Cap. 144, Secs. 126 and 127.

IN RE HOME BANK OF CANADA AND WINDING-UP ACT

To enforce an order of the Court of another Province made under the Winding-up Act the registrar should, on production thereof, enter same without direction as an order of the Supreme Court of British Columbia and proceed upon same as an ordinary record of that Court.

MOTION by the liquidators of the Home Bank to have two orders against contributories in the Supreme Court of Ontario made orders of the Supreme Court of British Columbia. Heard by MACDONALD, J. at Victoria on the 21st of November, 1924.

Statement

D. M. Gordon, for the motion: This application is made to settle the practice in this Province under sections 126 and 127 of the Winding-up Act. We wish to issue execution in this Province, but the registrar considers it so novel a proceeding to issue process on anything but a record of the Court that he wishes a ruling from this Court. The point appears to be a new one in this Province. There are two Canadian decisions: *Re Dominion Cold Storage Co.* (1898), 18 Pr. 68; and *In the Matter of the Winding-up Act, and in the Matter of the Sovereign Bank of Canada, in Liquidation* (1915), 43 N.B.R. 519. The latter is based on winding-up rules in New Brunswick which have no parallel here. In the former, Rose, J. refused to follow the English practice, which requires a motion. The English statute is substantially the same as the above sections of the Winding-up Act. Besides the cases cited by Rose, J. see *In re Scottish Pacific Coast Mining Company* (1886), W.N. 63; and *Cf.* Masten and Fraser on Company Law, 2nd Ed., 872. The form of order asked for is to be found in Seton on Decrees, 7th Ed., Vol. 1, p. 194.

Argument

21st November, 1924.

MACDONALD, J.: No order will be made as a motion is not necessary. The proper practice is for the registrar without

Judgment

MACDONALD, J.
1924
Nov. 21.

any special order or direction to enter such orders, as orders of the Supreme Court of British Columbia, and to proceed upon same as ordinary records of that Court.

Order accordingly.

IN RE HOME BANK OF CANADA AND WINDING-UP ACT

MACDONALD, J.
(At Chambers)
1924
Oct. 13.

HARVEY v. SYLVIA COURT LIMITED.

Practice—Discovery—"Officer or servant"—Application to bailiff—Marginal rule 370(c).

In an action against a landlord for damages for illegal distress the bailiff (not being a party to the action) is not subject to examination for discovery.

HARVEY v. SYLVIA COURT LIMITED

Statement

APPLICATION by the plaintiff in an action for illegal distress, for an order for examination of the bailiff who had carried out the sale. The plaintiff had already examined the defendant Company's manager for discovery but was unable to obtain discovery as to the sale of the furniture. Heard by MACDONALD, J. at Chambers in Vancouver on the 13th of October, 1924.

Argument

J. A. MacInnes, for plaintiff: As the landlord's agent for a particular occasion the bailiff comes within the term "servant" and was examinable in regard to his acts on the particular occasion.

Gibson, for defendant: Inasmuch as he was engaged in an independent employment he was not a "servant" within the meaning of the rule.

13th October, 1924.

Judgment

MACDONALD, J.: A bailiff who has carried out the sale and made his returns to the landlord cannot be examined for discovery. It is clear he is not an officer of the defendant Corporation. Without deciding whether he comes within the term "servant," even if he were, his services were completed and he would be at most a "past servant." Marginal rule

370(2) makes provision for examination for discovery of "any officer or servant," that is, any officer or servant at the time of discovery; anyone who has been, but is not at the time of examination an "officer" of the corporation may, on order, be examined, but the rule being silent in regard to a "past servant" of the corporation, the result is that such a servant is not subject to examination. The application is dismissed.

MACDONALD, J. (At Chambers)
1924
Oct. 13.
HARVEY v. SYLVIA COURT LIMITED

Application dismissed.

BLAIR AND BLAIR v. DICE AND PEOPLES.

COURT OF APPEAL
1924
Oct. 7.
BLAIR v. DICE

Fraudulent conveyances — Agreement for sale to innocent purchaser — Necessary parties—Evidence—Hearsay—Res gestæ.

The plaintiffs, as execution creditors, brought action to set aside two conveyances of land from a husband to his wife and a subsequent conveyance of the same lots from the wife to her daughter. Prior to the sale to her daughter the wife agreed to sell the lots to W. and she assigned this agreement to the daughter, who obtained an order *nisi* for foreclosure but at the time of the trial of this action the agreement was still in force and W. in possession. The wife died shortly after the assignment of the agreement to her daughter. The legal representatives of the wife were not made parties nor was W. added.

Held, that as the wife had divested herself of all interest during her life her representatives were not necessary parties and as no relief was asked against W. he is not a necessary party, but the judgment below declaring the lands available for execution is subject to the prior rights of others not parties to the action.

A witness on the trial who at the time the impeached transactions were entered into had heard conversations between the husband and wife as to their manner of carrying on business and the passing of money between them, was not permitted to tell the arrangements between them as disclosed in the discussions heard.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that the evidence was properly excluded, it not being with respect to a specific agreement, and no foundation was laid for introducing the conversations as part of the *res gestæ*.

Per MARTIN and MCPHILLIPS, JJ.A.: That there should be a new trial

COURT OF APPEAL

1924

Oct. 7.

BLAIR v. DICE

as the testimony tendered was directed to the transaction in question and was admissible as part of the *res gestæ*.

The Court being equally divided the appeal was dismissed.

APPEAL by defendants from the decision of GREGORY, J. of the 5th of May, 1924, in an action by the execution creditors of the defendant W. C. Dice for a declaration that certain lands in Prince Rupert being 8 lots in range 2, Coast District, are the property of Dice and liable to satisfy their judgments, and to set aside a conveyance of the 4th of February, 1921, of six of the lots from Dice to his wife E. M. Dice, a second conveyance of the 21st of March, 1921, of the two remaining lots to his wife and a third conveyance of all the lots by the wife to her daughter Mrs. Nell J. Peoples. The plaintiff loaned W. C. Dice $4,000 which was secured by a promissory note made by W. C. Dice on the 8th of May, 1915, in favour of the plaintiff payable in one year. The plaintiff brought action on the note and recovered judgment for $4,511.08 on the 23rd of March, 1923. A writ of execution was returned *nulla bona*. The defence was that in fact all the money the defendant had for dealing in property was advanced to him by his wife, she having obtained by bequest large sums from the estates of her brother and her uncle. The properties in question had been sold by Mrs. Dice on the 24th of February, 1921, under agreement for sale to Messrs. Weatherly, McAdams and McMillan, but later the daughter Mrs. Peoples brought action for foreclosure the purchasers being in default in payments under the agreement for sale and she obtained judgment on the 3rd of April, 1924. Mrs. Dice died on the 8th of September, 1921. The plaintiff succeeded on the trial.

Statement

The appeal was argued at Victoria on the 10th and 11th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers (*Gillespie*, with him), for appellants: Since 1900 Dice was using his wife's money to try to make more. He conveyed to his wife and later she conveyed to the daughter after she had executed an agreement for sale to Weatherly *et al.* who were *bona fide* purchasers for value without any notice

Argument

and were not parties to these proceedings. We can shew this money was the wife's. This action cannot succeed: (1) The personal representation of the wife is not represented; (2) as the land is transferred to innocent third parties no action lies. We start with the point that Mrs. Dice had about $50,000. As to the assignee not being represented in the action see *Bertrand* v. *Hooker* (1895), 10 Man. L.R. 445. There was a *bona fide* sale to Weatherly *et al.*: see *Union Bank* v. *Barbour* (1898), 12 Man. L.R. 166 at p. 168; *The Komnick System Sandstone Brick Machinery Co.* v. *Morrison* (1920), 28 B.C. 207; *Stuart et al.* v. *Tremain et al.* (1882), 3 Ont. 190; *Tennant & Co.* v. *Gallow* (1894), 25 Ont. 56; *Masuret* v. *Stewart and Lampman* (1891), 22 Ont. 290; *Ross* v. *Dunn* (1889), 16 A.R. 552. Where the wife gives the money to her husband to invest he is presumed to act as trustee for the wife: see *Rich* v. *Cockell* (1804), 9 Ves. 369 at p. 375; *Mercier* v. *Mercier* (1903), 2 Ch. 98. On the question of acts of bankruptcy see *Bateman* v. *Bailey* (1794), 5 Term Rep. 512; *Rouch* v. *Great Western R. Co.* (1841), 1 Q.B. 51; *Ridley* v. *Gyde* (1832), 9 Bing. 349. As to fraudulent preference see *The Molson Bank* v. *Halter* (1890), 18 S.C.R. 88; *Stephens* v. *McArthur* (1891), 19 S.C.R. 446; *Gibbons* v. *McDonald* (1892), 20 S.C.R. 587; *Benallack* v. *Bank of British North America* (1905), 36 S.C.R. 120. The statute does not apply as against the equitable interest of a *bona fide* purchaser.

Argument

Craig, K.C., for respondents: The case depends largely on Dice's evidence and the judge did not believe him. He sold to Weatherly for $24,640 of which $6,000 was paid down and then swore to a valuation of $4,150. The sale to Weatherly does not defeat the action. *Tennant & Co.* v. *Gallow* (1894), 25 Ont. 56 does not apply as at the time the judgment below was given the Weatherly interest had ceased to exist: see *Best* v. *Dussessoye* (1920), 2 W.W.R. 275. Mrs. Dice or her representatives are not necessary parties: see *Bank of Montreal* v. *Black* (1894), 9 Man. L.R. 439; *Scott* v. *Burnham* (1872), 19 Gr. 234; *Beattie* v. *Wenger* (1897), 24 A.R. 72; *Weise* v. *Wardle* (1874), L.R. 19 Eq. 171; *Gallagher* v. *Beale* (1909), 14 B.C. 247. The Court should look on the evidence of rela-

COURT OF APPEAL

1924

Oct. 7.

BLAIR v. DICE

tives with suspicion: see *Koop* v. *Smith* (1915), 51 S.C.R. 554; *Union Bank* v. *Murdock* (1917), 28 Man. L.R. 229. That this rule particularly applies here see *Greene, Swift & Co.* v. *Lawrence* (1912), 2 W.W.R. 932.

Mayers, in reply: If the Weatherly agreement was a good contract the action is barred.

Cur. adv. vult.

7th October, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree with the reasons of my brother GALLIHER.

MARTIN, J.A.

MARTIN, J.A.: This is an action by certain execution creditors to have declared void as against all creditors two conveyances of land (dated 4th February, 1921) by the judgment debtor to his wife, and a subsequent conveyance of the same land (dated 25th July, 1921) from his wife to their daughter, Mrs. Peoples, who is a defendant, but not so the wife. Judgment was given below as above prayed and also declaring that the lands "are available for execution under the judgment of the plaintiffs against the defendant . . . . . and under the judgments of other judgment creditors of said defendant."

The case presents some unusual features and therefore I have carefully read and considered all the evidence and proceedings below, and the authorities cited, and many others.

Several grounds of appeal are advanced against the said judgment, the first being that the legal representative of the wife, who died 8th September, 1921, should be a party to the action. It will be noted that there are really two actions involved herein against two distinct persons upon two distinct transactions, *i.e.,* the first between the husband and the wife, and the second between the wife and the daughter, and different considerations would apply to them according to the facts established by the evidence. The matter is further complicated by the fact that on the 24th of February, 1921, the wife entered into a written agreement to sell the said lands to Weatherly *et al.* for $24,640, of which $6,000 were paid in cash, and the balance to be paid in four annual instalments terminating in 1925, but default has been made in the payment of the instal-

ments and a large sum was overdue at the commencement of this action on 26th April, 1923, but the purchasers were still in possession at the date of the trial, 1st of May last. This agreement was assigned by the wife to the daughter on 29th July, 1921, who sued to enforce the same for foreclosure and cancellation and forfeiture of payments upon default, and on the 3rd of April last she obtained a judgment to that effect fixing the 3rd of May last for payment of $16,915.80, and in default that foreclosure, forfeiture and cancellation would follow together with delivery of possession. There is no evidence before us to shew that default was made in the said payment, and on the 5th of May, when the argument below was held (after adjournment after the evidence was closed on the 1st) and the terms of the judgment were being discussed, the learned trial judge treated the purchasers, still in possession, as being still entitled under their agreement, though it was not, apparently, registered, doubtless in accordance with the principle of the decision of the Full Court in *Entwistle* v. *Lenz* (1908), 14 B.C. 51. But however that may be, at the time of the commencement of the action the agreement was in force, and as it is admittedly a *bona fide* one, the innocent purchasers' interest, whatever it may be, must be recognized and not curtailed. In the circumstances it is submitted by the respondent that the wife is not a necessary party, which submission can only be based upon the ground that she has no remaining interest in the subject-matter (having conveyed it to her said daughter), which again depends upon the circumstances of each case and in these at Bar I am of opinion that she has divested herself of any interest and need not be represented, and the two impeached transactions constituting no more than separate links in a chain. The daughter is a proper defendant because she stands wholly in her mother's shoes, who was grantor of the legal estate and assignor of the vendor's interest in the equitable one created by the agreement for sale to Weatherly, and the daughter therefore is alone interested in supporting those transactions.

MARTIN, J.A.

Second, it is objected that this action cannot be maintained because no relief can be given under the statutes owing to the said sale to Weatherly, which cannot be set aside, and *Union*

COURT OF APPEAL

1924

Oct. 7.

BLAIR v. DICE

Bank v. *Barbour* (1898), 12 Man. L.R. 166, wherein the leading cases are considered by Chief Justice Taylor, is relied on, and after examining them I think, if I may say so, that learned judge correctly expressed the law upon the facts and statute before him, but they differ in essentials from those before us, *viz.*, there the conveyance to the innocent purchaser was an absolute one (p. 168) for an expressed consideration of $950, and though over one-third of it was in fact still due yet it was held that the "[creditors] could not on the authorities call upon [the fraudulent grantee] to account for the money and no more can they call upon [the innocent purchaser] to do so" (p. 172). But here there is still a valuable interest in the vendor under the executory agreement which is available to creditors quite apart from that acquired by the equitable owner—*The Canadian Bank of Commerce* v. *The Royal Bank of Canada* (1921), 2 W.W.R. 462 at p. 464; 29 B.C. 407 at p. 411. And I am also of opinion that under section 5, Cap. 94, R.S.B.C. 1911 (the Fraudulent Preferences Act), the "money or other proceeds" of an invalid sale or disposal of any property real or personal" may now be followed, *i.e.*, "recovered" in the way provided by that section, *viz.*, by "any action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance," etc., "was made." Unfortunately the statement of claim does not ask for any relief of that kind or set up any facts to support it, but asks that the said conveyances be declared void as against creditors and also that the lands be "declared to be the property of the defendant," the judgment debtor, differing in this important respect from the *Union Bank* case, *supra,* and several other cases of a similar nature in Ontario. In the last-mentioned case no statute was invoked to support it, as here, because section 34, Cap. 7, R.S. Man. 1891, was, I assume, not considered to cover it, being regarded, presumably, as restricted to seizure and recovery by process of execution, no right being given to bring "any action" therefor, as our statute does, and as the later very similar Manitoba statute also does by section 49, Cap. 8, R.S. Man. 1902. In *Robertson* v. *Holland* (1888), 16 Ont.

MARTIN, J.A.

532, it was held that the Ontario statute, with a section very similar to ours, at that time only permitted an assignee for creditors to follow and recover moneys due on a *bona fide* sale, pp. 538, 540, 543, and therefore ordinary creditors could not do so. No amendment of the pleadings was asked to overcome this difficulty and unless one is applied for and granted I think the statute cannot be invoked to assist the plaintiffs.

Third, it is objected that the purchasers under the agreement should be made parties but as nothing has been alleged against them (as was done in the said *Union Bank* case) I do not think that is necessary. But the judgment the plaintiffs have taken and entered does, I think, go too far and prejudicially affects the purchasers' rights by declaring at large that the lands "are available for execution under the judgments" of the plaintiffs and other creditors, without any restriction being made to safeguard the purchasers' equitable ownership, and so I should like to hear counsel further upon this point.

Fourth, it is objected that certain evidence was wrongly excluded, particularly that of D. H. Rice of Vancouver, a real-estate dealer who testified that he knew both the defendant debtor, Dice, and his wife very well and had dealings with both of them, and that they were often together in his office in Vancouver at the time Dice was speculating in real estate, and he heard them discuss the matter of using Mrs. Dice's money and the investments Dice was making at that crucial time, and that "he had talks with Mr. and Mrs. Dice" about it, despite which he was not permitted to tell what were the arrangements between them as jointly communicated to him. I am unable to comprehend upon what principle this all-important testimony, which goes to the very root of the impeached conveyances and would throw, doubtless, much clear and badly needed light upon them, was rejected. If both parties were living and testified to the arrangement made, or declared by them to be in existence, in Rice's presence, he could be called to support or refute that testimony as a witness at first hand who had heard both parties to an agreement make or confirm it, and he remains just as much a competent witness if one or both of the parties should now be dead. The evidence tendered was necessarily directed

MARTIN, J.A.

COURT OF APPEAL

1924

Oct. 7.

BLAIR v. DICE

to the transaction in question, which is made the paramount issue in the action by paragraph 11 of Dice's defence, wherein he alleges that he purchased the property in question with the separate money of his wife, which he held in trust for her, and after the purchase he continued to hold the property in trust for her and ultimately made the impeached conveyances in satisfaction of the trust, and at the trial he gave evidence in support of that plea as he had done upon discovery, and though his evidence often leaves much to be desired, yet for that very reason the said rejected evidence of D. H. Rice is all the more to be desired, especially in support of the separate and distinct defence of the defendant Peoples who stands upon a different footing from Rice, and a much more favourable as well as stronger one.

At the time Mrs. Dice made this one visit to Vancouver, in 1906 or 1907, as D. H. Rice says, she had unquestionably sent a considerable sum of money to her husband and continued to do so "right along," as he says, during the ten years he was there, 1901-14, and as he says that his investments of her trust money were made pursuant to the said agreement entered into at Seattle before he went to Vancouver, they would necessarily cover, as he says they did, the impeached transactions and consequently declarations made by husband and wife in the presence of D. H. Rice, disclosing the arrangement between them would obviously affect the property in dispute as being part of the *res gestæ,* and are, in my opinion, of the first importance in deciding the main issues of fact against both defendants, and I think that justice cannot be done in this appeal, nor below, in their absence, and so there ought to be a new trial. I feel the more convinced upon this point because of the very strong view taken by the learned trial judge against the defendants which manifested itself, in my opinion, and with all respect, at a premature stage and doubtless led him to make the statements in his reasons for judgment which were particularly called to our attention, *viz.,* that "he could not accept the evidence of any of the witnesses for the defence," whereas two at least, Herman and Rice, are not impeached; and also that the defendant Peoples "does not pretend to say she went home

MARTIN, J.A.

to take care of her mother with the understanding that she should be remunerated for her services," whereas she plainly deposed to that fact twice—that her mother had "always from the very first" expressed her intention of seeing "that I was paid for my help."

There is also the fact that the assignment from Mrs. Dice to Mrs. Peoples of her interest under the Weatherly agreement for sale has not been attacked, nor has that transaction even been referred to in the statement of claim, though it is obviously of importance in deciding what is the proper judgment to make in the unusual circumstances: the plaintiff's judgment, also, is only for $4,511, while the balance of the purchase-money due by Weatherly is nearly four times that sum. The whole involved situation has caused me much difficulty in trying to find a solution, and the incomplete way in which the action has been launched prevents a satisfactory disposition thereof as it now stands. It does not appear clear why the judgment debtor was made a party; this objection was not raised but without any explanation such a course is contrary to the general rule laid down, *e.g., Bank of Montreal* v. *Black* (1894), 9 Man. L.R. 439, and *Gallagher* v. *Beale* (1909), 14 B.C. 247.

MARTIN, J.A.

This appeal must, however, in any event, be allowed for rejection of important evidence, and there should be a new trial, the costs of the former one abiding the event thereof.

I am prepared to entertain an application to amend, if such should be desired, even at this late hour.

GALLIHER, J.A.: This is an appeal from GREGORY, J. The facts are somewhat complicated, but as the learned judge has made specific findings, with which I am not disposed to disagree, I will not otherwise deal with them. Two objections remain to be dealt with: (a) Non-joinder of parties; (b) wrongful rejection of evidence.

GALLIHER, J.A.

The action is to set aside certain conveyances made by the defendant William Calvin Dice to his wife, Ellen M. Dice (since deceased), of certain lands and premises therein named and a certain other conveyance from the said Ellen M. Dice (in her lifetime) to her daughter, the defendant Nell Jeannette Peoples, of the same lands, as a fraud upon creditors.

COURT OF APPEAL

1924

Oct. 7.

BLAIR v. DICE

The plaintiffs sue on behalf of themselves and all other creditors of William Calvin Dice, and pray for judgment that the said lands and premises be declared to be the property of the defendant William Calvin Dice.

The judgment declares these conveyances void and the lands available for execution under the plaintiffs' judgment against the defendant William Calvin Dice, obtained March 7th, 1923, for $4,511.08, upon a certain promissory note given by the said Dice to the plaintiffs, dated 8th May, 1915, for $4,000, and interest at 10 per cent. per annum.

On February 24th, 1921, Ellen M. Dice entered into an agreement for sale of these lands to E. R. Weatherly *et al.*, and later by deed dated 25th July, 1921, conveyed these lands to the defendant Nell Jeannette Peoples, and on the 29th of July, 1921, assigned this agreement for sale to the defendant Peoples. The defendant Peoples brought an action for foreclosure under this agreement and on the 3rd of April, 1924, obtained an order *nisi* fixing the amount due under the agreement at $16,915.80, and setting the 3rd of May, 1924, as the date for payment of this amount, in default of which defendants Weatherly *et al.* were to stand debarred and foreclosed from all title and interest in the lands in the agreement mentioned.

GALLIHER, J.A.

It was objected, first, that the legal representatives of Ellen M. Dice should have been parties to this action, but this, I think, is not so. She had parted with all her interest in her lifetime and the only one who had an interest in defending the conveyances (subject, of course, to the rights of Weatherly *et al.*) was the defendant Peoples. See *Waise* v. *Wardle* (1874), L.R. 19 Eq. 171. It is objected, further, that Weatherly *et al.* should have been parties to the action.

It appears the agreement for sale was not registered when this action was begun and the plaintiffs had no knowledge of same, but even if they had, no relief is asked as against them and as they are not parties the judgment here cannot bind them, or affect their rights whatever they may be.

The judgment declares the lands available for execution, but that, of course, would be subject to the prior rights of other

parties not parties to the action. I cannot accede to this objection.

The only other question which I think I am called upon to discuss is as to whether there should be a new trial on the ground of rejection of evidence by the learned trial judge.

The evidence referred to is to be found in the appeal book (Rice, pp. 49 to 52 inclusive) and (Herman, pp. 57 to 58 inclusive). Under this head Mr. *Mayers* cited *Bateman* v. *Bailey* (1794), 5 Term Rep. 512; *Rouch* v. *Great Western R. Co.* (1841), 1 Q.B. 51; *Ridley* v. *Gyde* (1832), 9 Bing. 349. These are all bankruptcy cases and the evidence of declaration by the bankrupt was admitted as evidence of an act of bankruptcy. I cannot see that these cases have any bearing on the facts of this case.

From reading the evidence objected to, what was sought by Mr. *Gillespie* was to prove by third parties conversations between husband and wife not of an agreement between them (because Dice himself does not establish that), but of their manner of carrying on their business deals and the passing of money from one to the other. I can quite see if there was now some dispute between husband and wife as to what these relations were, a third party could give evidence as to conversations in the presence of all three, but any discussions of that kind affecting the interest of a party not present and particularly in the interest and not against the interest of the parties making them, should not be admitted in evidence, particularly, as I have said before, when they are not in respect of any agreement made at the time. If these conversations could be said to be a part of the *res gestæ* then, with a proper foundation laid, they would be admissible. I cannot deduce from the evidence that any such foundation was laid, the whole tenor of the questions, as I see it, being directed to conversations of general dealings and not as to conversations evidencing an agreement. Such conversations might be for the very purpose of fortifying a position which did not exist in fact. To admit such evidence would be, in my opinion, a dangerous procedure and would enable persons to establish contracts by simply relating incidents to third parties.

GALLIHER, J.A.

I would dismiss the appeal.

COURT OF APPEAL

1924

Oct. 7.

BLAIR v. DICE

McPHILLIPS, J.A.: I had the advantage of reading the judgment of my brother MARTIN, and being so completely of the same mind, I do not find it necessary to add anything. I would allow the appeal and a new trial should be had.

The Court being equally divided the appeal was dismissed.

Solicitor for appellants: *W. D. Gillespie.*
Solicitors for respondents: *Bourne & DesBrisay.*

MURPHY, J.

1924

Sept. 8.

SEATTLE BREWING AND MALTING CO. v. RAINIER BREWING COMPANY OF CANADA LIMITED.

Trade-marks — Name for beer—"Rainier"—Registration — Assignment of trade-mark—Validity—R.S.C. 1906, Cap. 71.

SEATTLE BREWING AND MALTING CO. v. RAINIER BREWING CO. OF CANADA

The plaintiff, having formerly carried on a brewing business in Seattle, adopted the name "Rainier" calling its production "Rainier beer" and obtained registration of the word as a trade-mark there but did not obtain registration in Canada until October, 1921. The manufacture of beer became illegal in the United States in 1919 and the plaintiff granted to H. the exclusive right to use the trade name "Rainier" as applied to beer in British Columbia which was followed in November, 1922, by an agreement between the plaintiff, H., and the Rainier Brewing Company Limited granting the exclusive right to use the word "Rainier" in connection with the sale and manufacture of beer in British Columbia, to the said company. The defendant incorporated by letters patent of the Dominion in August, 1923, and manufactured beer labelling its product in such manner as to be an infringement of the said trade-mark (if valid). In an action for infringement:—

Held, that the registration of a trade-mark under the Trade Mark and Design Act does not entitle the applicant to protection if he is not or does not propose to be engaged in business in Canada in the goods to which it is applicable, further, applicant must be the proprietor and when he has assigned the right to use a trade-mark and agreed not to use it, he cannot obtain registration thereof. The action should therefore be dismissed.

Statement

ACTION for infringement of a trade-mark, tried by MURPHY, J. at Vancouver on the 19th and 26th of June, 1924.

Davis, K.C. (*Ghent Davis,* with him), for plaintiff.
Mayers (*E. Meredith,* with him), for defendant.

8th September, 1924.

MURPHY, J.: The relevant facts are hardly in dispute. Plaintiff formerly carried on an extensive brewing business at Seattle, Washington. In connection with the manufacture of beer it adopted the name "Rainier," its beer product being known as "Rainier beer." It did a large export business to various countries, including British Columbia. It had early obtained registration of the word "Rainier" as a trade-mark in various countries, but not in Canada until October 11th, 1921.

As a result of legislation in the State of Washington, it was forced to cease brewing beer after December 31st, 1915, and admittedly has brewed no beer since January 1st, 1916. The fact that it arranged with another company to use the name "Rainier" in connection with beer brewed in California is, I think, irrelevant. Plaintiff and no one else is the party who registered "Rainier" as a trade-mark in Canada in October, 1921. In any event, as a result of Federal legislation the manufacture of beer in the United States became illegal after January 31st, 1919, and the California company had to cease brewing it.

On March 30th, 1921, plaintiff purported to grant to Louis Hemrich the exclusive right to use the trade-name "Rainier" as applied to beer in British Columbia for a period of 99 years, and agreed, should it become lawful for it to resume brewing in the United States, not to export to British Columbia any beer labelled "Rainier," though it reserved the right to export beer under other labels.

Judgment

Hemrich incorporated a company in British Columbia and this company manufactured beer, labelled it "Rainier," and sold it so labelled in British Columbia from July to October, 1921.

As stated, plaintiff registered in Canada "Rainier" as a trade-mark applicable to beer on October 11th, 1921. By a tripartite agreement between plaintiff, Hemrich, and Rainier Brewing Company, Limited (the company which Hemrich had incor-

MURPHY, J.

1924

Sept. 8.

SEATTLE BREWING AND MALTING CO. v. RAINIER BREWING CO. OF CANADA

porated in British Columbia), dated November 1st, 1922, the exclusive right to use in British Columbia the word "Rainier" in connection with beer was purported to be conferred on Rainier Brewing Company, Limited. Rainier Brewing Company, Limited, did use "Rainier" in connection with its beer product until it went into liquidation.

Defendant was subsequently incorporated by letters patent of the Dominion in August, 1923. It is manufacturing beer and selling it and is labelling its product in such a manner as would, in my opinion, be an infringement of plaintiff's trade-mark if such trade-mark is valid.

I think the only conclusion to be drawn is that plaintiff, when it registered its trade-mark, had no intention of engaging in brewing in British Columbia, nor indeed in Canada. Admittedly up to date it has not done so. It registered the trade-mark, in my opinion, that it might assign it, in so far as the Province of British Columbia was concerned, when so registered to Hemrich or his nominee. This intention it carried out within a month after registration was obtained.

In re Neuchatel Asphalte Company's Trade Mark (1913), 2 Ch. 291, decides that a trade-mark cannot be obtained under the English Act unless it is proposed to use such trade-mark in Great Britain in connection with the goods of the applicants for such trade-mark.

Judgment

It is argued that the facts here are distinguishable inasmuch as the applicants in the case cited had never sold goods in Great Britain bearing the mark desired to be registered, whereas admittedly plaintiff has done so. But the *Neuchatel* case, as I read it, rests on what it is proposed to do with the trade-mark once it is registered. On page 302, Lord Halsbury is quoted as follows:

> "'The Trade Mark Acts are not for copyright in marks, they are to protect trade marks. If you have no goods you are claiming only copyright, you are not claiming for the purpose of protecting your trade.'"

Then it is said the wording of the Canadian statute differs from that of the English Act. This is true, but on the vital questions of use and proprietorship I think the purport of the two Acts is the same. The English statute is to be found in 5 Edw. VII., Cap. 15. Section 3 defines "trade-mark":

"A 'trade mark' shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale."

The Canadian statute is R.S.C. 1906, Cap. 71. Section 5 reads:

"All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description, manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks."

If anything, the wording of the Canadian Act emphasizes the idea of use of the trade-mark for the purpose of distinguishing goods actually being manufactured, for it omits the phrase "proposed to be used" which occurs in the English section.

Judgment

Further, the applicant for registration of a trade-mark must be the proprietor (*In re Vulcan Trade-Mark* (1914), 15 Ex. C.R. 265; *Partlo* v. *Todd* (1888), 17 S.C.R. 196). How can plaintiff claim to have been the proprietor in Canada of "Rainier" as a trade-mark at the time of securing registration when it had long before not only parted with the right to use it in British Columbia, a Province of Canada, but expressly covenanted not to use it in British Columbia for a period of 99 years?

The action is dismissed with costs.

Action dismissed.

COURT OF APPEAL

1924

Oct. 7.

CAIRNS v. BROWN

CAIRNS AND WINTERBOTTOM v. BROWN.

Contract — Accord and satisfaction — Correspondence between parties — Effect of.

Where a mortgagee offers to accept a quit-claim deed from the mortgagor in discharge of his right of action on the covenant, the right of action is discharged only when the agreement to accept the quit-claim is accompanied by delivery thereof. There must be not only accord but satisfaction to discharge a cause of action.

APPEAL by defendant from the decision of MURPHY, J. of the 11th of April, 1924, in an action to recover moneys due under a covenant in a mortgage. The mortgage was for $1,100 dated the 7th of September, 1920, payable in three years and made by the defendant to the plaintiff Gertrude Winterbottom who assigned the mortgage to the plaintiff Caroline A. Cairns on the 15th of March, 1923. The defendant alleged there was accord and satisfaction. The property on which the mortgage was given was later transferred to Dr. Elliott as security for a debt owing to him. On the 6th of October, 1923, Mrs. Cairns's solicitor wrote the defendant's solicitor stating that the mortgage was overdue both as to principal and interest, that he had heard from Dr. Elliott that he did not intend to resist foreclosure, and that he was prepared to give a quit-claim deed of the property if Mrs. Brown would do the same. In answer to this letter defendant's solicitor replied: "I shall be glad if you will prepare the necessary quit-claim deed and send it to me for execution." This letter was followed by a letter dated the 12th of October, 1923, the plaintiff's solicitor enclosing a quit-claim deed with a request to have it executed by Mrs. Brown and returned to him. On the 18th of October, the plaintiff's solicitor wrote the defendant's solicitor saying that negotiations were off as to the proposed settlement as his client refused to accept a quit-claim deed and intended to enforce payment of the amount due under the covenant contained in the mortgage. The quit-claim deed was executed by Mrs. Brown after receipt by her solicitor of the letter of the

Statement

18th of October, 1923. Judgment was given for the plaintiff.

The appeal was argued at Victoria on the 24th and 25th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Hogg (Miss *McKay,* with him), for appellant: The defence is accord and satisfaction. We submit there was a concluded agreement between the parties whereby a quit-claim deed was to be accepted and the defendant was discharged from further obligation. There was no undue delay in getting the quit-claim deed signed, it being only 6 days after furnishing the deed that the plaintiff repudiated: see Leake on Contracts, 7th Ed., 659; *Sibree* v. *Tripp* (1846), 15 L.J., Ex. 318; *Morris* v. *Baron & Co.* (1917), 87 L.J., K.B. 145. As to accord and satisfaction see *Elton Cop Dyeing Co., Lim.* v. *Broadbent & Son, Lim.* (1919), 89 L.J., K.B. 186. In every case against us there was either breach or default: see *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124 at p. 1143; *Bonnewell* v. *Jenkins* (1878), 8 Ch. D. 70; Williams on Vendor and Purchaser, 3rd Ed., Vol. 1, p. 480.

Argument

J. E. Bird, for respondents: There are three letters but we submit that Mr. *Hogg's* letter in reply to mine does not create a binding contract as it is ambiguous and only amounts to an offer: see *Harvey* v. *Facey* (1893), A.C. 552; *Warner* v. *Willington* (1856), 3 Drew. 523. If the presumed acceptance is ambiguous there is no contract: see Leake on Contracts, 7th Ed., 660. Accord in itself is not sufficient; there must be accord and satisfaction to constitute a contract: see *Moon* v. *The Guardians of the Witney Union* (1837), 6 L.J., C.P. 305 at p. 312; *Massey, Surviving Executor of Ames, Deceased* v. *Johnson and another, Executors of Foyson, Deceased* (1847), 17 L.J., Ex. 182 at pp. 188-9; *Doe* v. *Cartwright* (1820), 3 B. & Ald. 326.

Miss *McKay,* in reply.

Cur. adv. vult.

7th October, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The question at issue turns on the

COURT OF APPEAL

1924

Oct. 7.

CAIRNS v. BROWN

meaning of the correspondence between the solicitors of the parties.

The plaintiff's solicitor, who had been instructed to take foreclosure proceedings, had a conversation with the defendant's solicitor, and as a result wrote him a letter asking whether or not defendant would sign a quit-claim deed of the property to the plaintiff, and if agreeable he would prepare the deed. The answer was: "I will be glad if you will prepare the necessary quit-claim deed and send it to me for execution." The deed was sent with a request to have it executed. A few days later the plaintiff's solicitor wrote withdrawing from the transaction. The day after this withdrawal, and with notice of the withdrawal, the defendant signed a quit-claim deed.

MACDONALD, C.J.A.

The learned trial judge held that there was an accord but no satisfaction. I think he was right. The offer was an offer to release the defendant in return for a quit-claim deed; it was not an offer of an agreement to release her. In this it differs from *Elton Cop Dyeing Co., Lim.* v. *Broadbent & Son, Lim.* (1919), 89 L.J., K.B. 186.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: This appeal depends upon the construction that is to be given to the letters before us. On the 6th of October, 1923, the plaintiffs' solicitor wrote to the defendant's solicitor, saying that the plaintiffs held a mortgage given by the defendant on certain lands and that the registered owner, Elliott, was willing to give a quit-claim deed thereof to the plaintiff to clear up the title and avoid the delay and expense of foreclosure proceedings if the defendant would also give a like quit-claim deed to the plaintiff of her interest, and concluded:

"I shall be pleased if you would advise me whether Mrs. Brown will execute a quit-claim deed if I prepare same, in which case I will also prepare one from Dr. Elliott and thus get the title cleared up without the delay and expense of foreclosure proceedings."

To this proposal of an arrangement for a complete settlement of the litigation and clearance of title in favour of the plaintiff the defendant's solicitor answered on the 11th of October:

"I duly received your letter of 6th October, and I shall be glad if you will prepare the necessary quit-claim deed, and send it to me for execution."

The following day the plaintiff's solicitors wrote thus:

"We beg to enclose herewith quit-claim deed, Minnie Holte Brown to Caroline Alma Cairns, which we would be glad if you would have executed and return to us."

On the receipt of this letter with inclosed deed, the defendant's solicitor treated the settlement as having been definitely agreed upon and proceeded to obtain with due diligence the execution of the said deed, but six days after received a letter from plaintiff's solicitor purporting to "withdraw from all negotiations to accept a quit-claim deed in satisfaction of the mortgage debt" in this matter. The learned judge below held that the letters "constituted at most an accord without satisfaction," and the defendant appeals from that judgment. With every respect, I can only reach the conclusion that an agreement had been entered into to settle the pending action between the three parties concerned and to extinguish the debt by vesting all interests in a "cleared" title in the plaintiff. I do not think that, in the circumstances, there is any ambiguity in the defendant's reply to the offer for settlement; to me it evinces an unequivocal acceptance of the proposal, and once that stage has been reached the matter has got irrevocably beyond "negotiations" and not one of the three parties concerned in the arrangement and settlement can frustrate it by refusing to implement it, either by refusing to accept the conveyance stipulated for, or otherwise. As was said by Baron Parke in *Sibree* v. *Tripp* (1846), 15 L.J., Ex. 318 at pp. 322-3: "Upon the whole instrument, therefore, it appears to me that the real meaning of the parties was, to put an end to the action. . . . .": the fact that the arrangement "takes away that litigation," as Baron Alderson puts it, p. 325, is a "further circumstance" in support of it. Here the case is even stronger because the plaintiff is seeking to repudiate a deed which she sent to the defendant for the express purpose of carrying out the agreement, in the performance of which it is conceded that the defendant was shewing all due diligence. This view is fortified by the decision of the Court of Appeal in *Bonnewell* v. *Jenkins* (1878), 8 Ch. D. 70, and I refer particularly to the judgment of Lord Justice Thesiger, wherein he says, p. 74:

MARTIN, J.A.

COURT OF APPEAL

1924

Oct. 7.

CAIRNS v. BROWN

MARTIN, J.A.

"The principle established by the authorities is, that a simple acceptance by letter of a written offer to purchase may constitute a contract to sell, although it refers to the preparation of a more formal contract."

If a contract to sell land may be thus "constituted," why not a contract to settle a threatened law suit and convey an equity of redemption? That an accord and satisfaction may be constituted by a promise to perform an agreement is the opinion of the Court of Appeal in *Elton Cop Dyeing Co., Lim.* v. *Broadbent & Son, Lim.* (1919), 89 L.J., K.B. 186, applying the decision of the House of Lords in *Morris* v. *Baron & Co.* (1917), 87 L.J., K.B. 145, and I think that is exactly what happened in the case at Bar, because the plaintiff's solicitors were endeavouring to get the defendant to agree to do the same thing that Elliott had agreed to do but only "providing" that the defendant would agree to do the same as he did: it was, in truth, a tripartite arrangement to prevent litigation and vest a clear title in the plaintiff and once all had agreed to do so the actual execution of the necessary instruments would follow as of course. In this special aspect of the matter the case is distinct from and stronger than any that has been cited, and as Warrington, L.J., said in the *Elton* case, *supra,* 189, the question always is: "What was the true construction and effect of the agreement, having regard to the circumstances under which it was made?" And Lord Justice Atkin said, p. 190:

"There is no doubt that there can be no discharge of a contract after breach, except by alleging an accord and satisfaction; but, at the same time, I think there can be no doubt but that the satisfaction may consist in accord between the parties. It may be treated by both parties as satisfaction. For that proposition, although there is authority which I will refer to, I should like to rely upon the passage in the third edition of Bullen and Leake's Precedents of Pleadings, 'Notes,' p. 478: 'A substituted agreement may be accepted in accord and satisfaction of an existing cause of action, the new promise only, and not the performance of it, being taken in satisfaction and discharge.' I imagine that proposition is not really disputed by counsel for the appellants."

It follows that in my opinion the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the learned trial judge, and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion this appeal should succeed. It would seem to me, with the greatest respect to the

learned trial judge, that the facts establish a contract which in law worked a complete accord and satisfaction. It is quite apparent, when the letters hereafter appearing are read, that the proposal made was that upon the defendant executing a quit-claim deed, she would be released from the covenants of the mortgage. The letter of the solicitor for the defendant, Mr. *Hogg,* well indicates that the proposal was accepted by his client and the promise made to execute the quit-claim deed—that must be the necessary inference of fact. It is unreasonable to suppose that a solicitor would, considering the frame of the letter of the solicitor for the plaintiffs, Mr. *R. M. Macdonald,* answer the letter in the terms he (Mr. *Hogg*) did without it being agreed to by his client, *i.e.,* the defendant had accepted the proposal made and would execute the deed. How idle otherwise to ask: "I shall be glad if you will prepare the necessary quit-claim deed and send it to me for execution."

The letters read as follows: [after quoting the letters which are sufficiently set out in the judgment of MARTIN, J.A., the learned judge continued].

It will be noticed that there was an interval of five days between the receipt of the proposal made that a quit-claim deed be given and the answer thereto (which admitted of time for consultation by Mr. *Hogg* with his client), accentuating the reasonable inference I have pointed out.

MCPHILLIPS, J.A.

When the quit-claim deed is perused, which was the exact deed executed by the defendant as prepared by the solicitor for the plaintiffs, we find this amongst the other recitals therein:

"And whereas the party of the second part [Caroline Alma Cairns, the assignee of the mortgage given by the defendant to Gertrude Watson] herein has agreed to release the party of the first part herein from the covenants contained in the said mortgage in consideration of her executing and delivering this quit claim."

It is clear that the proposal was made and it is also clear that it was accepted and the promise given to execute the necessary deed and the deed as forwarded was executed under date the 19th of October, 1923. But it is contended, and the contention was given effect to by the learned trial judge, that the execution of the deed was not effective in that the proposal made was withdrawn. In my opinion there was no power

COURT OF APPEAL

1924

Oct. 7.

CAIRNS v. BROWN

under the existent facts to withdraw from the agreement come to. It is idle to refer to what had passed as "negotiations"—that stage was long passed, an agreement had been effectively come to.

The letter of attempted withdrawal from the plaintiff's solicitors to the defendant's solicitor, dated the 18th of October, 1923, reads as follows:

"Our client has instructed us to withdraw from all negotiations to accept a quit-claim deed in satisfaction of the mortgage debt in this matter. Kindly, therefore, take no further steps towards obtaining such deed. Our instructions are to proceed upon the covenant in the mortgage against Mrs. Brown for principal and interest due upon the mortgage. Will you kindly advise us whether you will accept service of the writ, and oblige."

It was incumbent upon the plaintiffs to allow a reasonable time for the defendant to execute the deed, and the deed was executed within a reasonable time, *viz.*, within a week of the date of the letter forwarding the deed for execution. It will be noted that Mr. *Hogg* in his letter asks that the deed be sent to him "for execution," and the letter forwarding it sets forth "we beg to enclose herewith quit-claim deed Minnie Holte Brown to Caroline Alma Cairns, which we would be glad if you would have executed and return to us." The stage reached was beyond the "negotiation stage." The attempt is to recede from a concluded contract. All that remained to be done was that agreed to be done (the execution of the deed), and that was done on the 19th of October, 1923, the day before the commencement of the action. Here we have all the essentials of accord and satisfaction—the mutual agreement—the satisfaction, *i.e.*, the actual execution of the agreed upon deed. What took place amounts to a release from the covenants contained in the mortgage sued upon and furnishes an answer to the action here brought, and the action is not, in my opinion, upon the facts of the case, maintainable (*Boosey* v. *Wood* (1865), 3 H. & C. 484; *per* Maule, J., in *Gabriel* v. *Dresser* (1855), 15 C.B. 622 at p. 628; *Blake's Case* (1605), 3 Co. Rep. 342; *Steeds* v. *Steeds* (1889), 22 Q.B.D. 537; 58 L.J., Q.B. 302; *Blundell* v. *Macartney* (1793), 2 Ridg. Parl. Rep. 596; *Morris* v. *Baron and Company* (1918), A.C. 1; *Elton Cop Dyeing Co., Lim.* v. *Broadbent & Son, Lim.* (1919), 89 L.J., K.B. 186).

MCPHILLIPS, J.A.

I see no room for doubt whatever that what took place in the present case worked a complete accord and satisfaction. It would be inequitable and against natural justice that all that occurred here should be treated as of naught. It may well be that the defendant, upon the faith of what had been agreed to, in some manner altered her position, and to admit of the plaintiffs receding from the position taken and agreed to may work grave injustice. The principles of law must be applied in so far as possible to effectuate justice, not the working of injustice, which may well be the result if the judgment herein under appeal is upheld. I see no departure from the well-understood principles of law governing in the matter to hold that that which was done was effectively done, *i.e.*, there was a complete accord and satisfaction, and the execution of the quit-claim deed by the defendant before action brought furnishes a complete answer to the action upon the covenants as contained in the mortgage.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The respondents recovered judgment for $1,214.90 against the appellant on the personal covenant in a mortgage. The claim was resisted on the ground that there was an accord and satisfaction of the cause of action by reason of an alleged agreement between the parties whereby in consideration of a quit-claim deed being executed by the appellant, the latter was released from the covenant to pay. The learned trial judge found against this contention, holding in effect that there was not a concluded contract between the parties for a release in consideration of the execution of the quit-claim deed, and from that judgment this appeal is brought.

The alleged agreement is contained in four letters exchanged between the solicitors for the respective parties. Under date of October 6th, 1923, respondents' solicitors wrote to the appellant's solicitor, the material part of the letter being as follows:

"I shall be pleased if you would advise me whether Mrs. Brown will execute a quit-claim deed if I prepare same."

To this appellant's solicitor replied on October 11th, 1923, as follows:

"I duly received your letter of 6th October and I shall be glad if you will prepare the necessary quit-claim deed and send it to me for execution."

COURT OF APPEAL

1924

Oct. 7.

CAIRNS v. BROWN

On October 12th, 1923, respondents' solicitors replied in the following terms:

"We beg to enclose quit-claim deed Minnie Holte Brown to Caroline Alma Cairns which we would be glad if you would have executed and returned to us."

Then before receiving a reply to this letter, and before the quit-claim deed was executed, respondents' solicitors wrote on October 18th, as follows:

"Our client has instructed us to withdraw from all negotiations to accept a quit-claim deed in satisfaction of the mortgage debt in this matter. Kindly, therefore, take no further steps towards obtaining such deed."

This letter was delivered on the 18th of October, and the quit-claim was executed on the following day but not delivered or accepted.

Does this correspondence disclose a contract? I think not. It must be shewn that the respondents agreed to accept a quit claim in satisfaction of the cause of action. It is only

"an agreement to that effect, accompanied by the delivery or performance of what is so agreed upon, [that] discharges [the] right of action":

Leake on Contracts, 7th Ed., p. 659.

There was here an "accord" but not a "satisfaction." *i.e.*, simply a proposal which the parties might refuse or withdraw until the consideration to be given and accepted in satisfaction was fully executed.

MACDONALD, J.A.

The letter of October 6th does not contain an offer. It is merely an inquiry and a statement of intention if the inquiry should elicit a favourable response. The reply of October 11th does not advance the matter. The respondents are asked to send a quit-claim deed for execution, but no statement is made that it will be executed. The transaction was simply advanced a stage in order to be ready for closing should it be decided to do so. Then on the 12th, the quit claim is forwarded, remains in the possession of the appellant for six days without execution or a statement of intention to execute, and the respondents withdraw from the negotiations. It is clear that there never was any concluded agreement between the parties. It discloses a mere proposal, unaccepted before withdrawal. It follows that the appeal should be dismissed.

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

Solicitor for appellant: *J. P. Hogg.*
Solicitors for respondents: *Bird, Macdonald, Bird & Collins.*

Apld
Re Cranston
40 WWR 321

IN RE STIGINGS, DECEASED.

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

1924

Sept. 29.

IN RE STIGINGS, DECEASED.

Husband and wife — Wife's will — Insufficient provision for husband— Principles to be applied—B.C. Stats. 1920, Cap. 94.

There is no difference between the application of a widower and that of a widow under the provisions of the Testator's Family Maintenance Act, for an adequate provision out of the estate in question.

PETITION by Charles Stigings, widower of Julia Ann Stigings, deceased, under the Testator's Family Maintenance Act for such provision out of the estate of his said wife as the Court thinks adequate, just and equitable, in lieu of or in addition to the legacy of $500 left him by his wife's will. Husband and wife were married in September, 1920, aged 66 and 61 years respectively, and lived together at Hope Bay, Pender Island, until the wife's death on the 27th of January, 1921. At that time the husband had no estate whatever. The estate consisted of assets totalling $9,736.15, of which amount $2,500 represented a piece of real property on Pender Island and $1,000 the home property and furniture. There was no likelihood of a present sale of these assets at the date of the application. The balance of the estate consisted of a mortgage of $1,250 not yet due and cashable assets. The rest of the estate was left to two brothers in certain proportions save the home and furniture, etc., which were left to a nephew. Heard by HUNTER, C.J.B.C. at Chambers in Victoria on the 29th of September, 1924. Statement

R. A. Wootton, for the petitioner, referred to *Allardice* v. *Allardice* (1911), A.C. 730; *In re Livingston, Deceased* (1922), 31 B.C. 468; *In re Hall, Deceased* (1923), 33 B.C. 241; *Hoffman* v. *Hoffman* (1909), 29 N.Z.L.R. 425 at p. 429. Argument

Bullock-Webster, for the executor and beneficiaries.

HUNTER, C.J.B.C.: There being no children the husband, although naturally the first object of his wife's bounty, had not been properly provided for, and there is no difference between Judgment

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

1924

Sept. 29.

IN RE STIGINGS, DECEASED.

the application of a widower and that of a widow under the provisions of the Act. In view of the condition of the assets, the order will be that in addition to the $500 left by the will of the deceased the husband shall have the use and occupation rent free for the rest of his life of the home of the deceased, to the exclusion of all other persons save that the executor should be at liberty to enter thereon at all reasonable times for the purposes of his executorial duties, and the use for life of the furniture, goods, chattels, poultry, farming-stock, tools and effects, other than the clothing and jewellery of the deceased, situate in and about the home, as the same were left at the death of the deceased. The net income of the estate from the date of the order should be paid to the petitioner for the rest of his life, such payment not to exceed $25 per month, and to be paid as nearly as may be quarterly. Upon the death of the petitioner the estate should be distributed according to the terms of the will. The *caveat* filed in the Land Registry office is discharged and the costs as between solicitor and client of all parties out of the estate.

Judgment

Order accordingly.

REX v. TEN CHINAMEN.

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

1924

Nov. 13.
Dec. 17.

REX v. TEN CHINAMEN

Practice—Habeas corpus—Costs—Dominion—Retainer—R.S.B.C. 1911, Cap. 61, Sec. 1.

An application for a writ of *habeas corpus* without any proceedings in aid, in respect of a conviction under Dominion law is an independent civil proceeding and is therefore subject to the provisions of the Crown Costs Act and no costs can be given.

Where counsel appears for the Crown (Dominion) in police-court proceedings and afterwards without instructions appears in *habeas corpus* proceedings in respect to the same matter:—

Held, that as his retainer ceased with the conviction the Dominion Government was not a party to the subsequent proceedings and an application for costs failed.

Disapr v Re Christian 100 C.C.C.

APPLICATIONS for costs against the Crown on an application for *habeas corpus* without any proceedings in aid. The prisoners were ordered discharged on the ground that it was not stated in the commitment that the prisoners were of Chinese race or origin which was a jurisdictional fact necessary to conviction. Heard by HUNTER, C.J.B.C. at Chambers in Victoria on the 22nd of October and 12th December, 1924. Statement

Lowe, and *T. M. Miller*, for the applications.
Clearihue, for the Crown.

13th November, 1924.

HUNTER, C.J.B.C.: Costs were asked for against the Crown, but owing to the fact that the Court had to proceed with the trial of an action the question could not be argued, so that it was reserved with leave to hand in references.

The application was for a *habeas corpus* without any proceedings in aid, and the criminal jurisdiction of the Court was not invoked in the matter. All criminal proceedings were, therefore, past and closed, so that the application must be regarded in the circumstances as an independent civil proceeding. But, even so, the Crown in right of the Province is charged with the supervision of the enforcement of the criminal law, and for that purpose is represented by the Attorney-General for the Province Judgment

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

1924

Nov. 13.
Dec. 17.

or his nominee, who is bound to oppose applications to the Court for discharge by persons under sentence, when in his opinion they ought to be opposed. Therefore the Crown Costs Act applies and no costs can be given.

17th December, 1924.

REX v. TEN CHINAMEN

At the hearing of the *habeas corpus* application, I assumed that Mr. *Clearihue* was representing the Provincial Government, but as Mr. *Lowe* thought I was under a wrong impression on this point, I directed that the matter be mentioned again as the judgment has not yet been entered. Mr. *Lowe* now applies for costs against the Dominion Government on the ground that Mr. *Clearihue* appeared for that Government. It now transpires that Mr. *Clearihue,* having represented the Dominion Government in the police-court proceedings, assumed that it was his duty to represent it at the present proceedings, although he had no instructions to do so, but he did have instructions from the Provincial Government to do so. It is clear, however, that as Mr. *Clearihue* had not been specially instructed to appear for the Dominon Government at the present proceedings and as his retainer ceased with the conviction, the Dominion Government was not a party to these proceedings, and the application fails.

Judgment

Applications refused.

ASHDOWN v. NICKSON CONSTRUCTION COMPANY LIMITED.

MCDONALD, J.

1924

Oct. 3.

ASHDOWN v. NICKSON CONSTRUCTION CO.

Patents—Validity—Novelty—User prior to patent—Evidence of.

Where, prior to a certain patent, persons had to resort to a dangerous practice to do that which was the object of the patent, although not a determining factor it strengthens the conclusion that the invention is a new and useful one.

ACTION for an injunction and for damages for infringement of a patent of invention. Tried by McDONALD, J. at Vancouver on the 23rd to the 26th of September, 1924. Statement

A. H. MacNeill, K.C., and *Hulme,* for plaintiff.
F. R. Anderson, and *Keill,* for defendant.

3rd October, 1924.

McDONALD, J.: In this case, I have reached the conclusion, after the best consideration I can give the various questions involved, that the plaintiff should succeed.

The strongest point made by Mr. *Anderson* for the defence (and he did argue the point very forcibly and persuasively) was that the plaintiff's invention was not new, in as much as the same principle which he brought into play had been already invented and used by virtue of the Wylie & Rankin patents. The fallacy, however, in that contention I think is, that the use of a fixed block to effect the release of the sling, which was necessary in both those cases, is entirely done away with in the application of the plaintiff's patent. Such a fixed block has been in use in the stockyards and in every large barn in Canada and the United States for many years. If it had been feasible to use such a block in the operation of clearing lands and hauling logs to a pile, it at least seems reasonable that such a method would have been adopted, but we find that, up until the time when the plaintiff evolved his idea, every one engaged in land clearing had found it necessary to send a man to the top of the pile to release the sling, even though the performance Judgment

MCDONALD, J.

1924

Oct. 3.

ASHDOWN v. NICKSON CONSTRUCTION CO.

of such a duty was accompanied by the gravest risks. This, of course, is not a determining factor, but it does strengthen one's conclusion that the invention, by which the sling is automatically released by applying force to the haul-back without the interposition of any fixed block, was actually new and useful.

So far as Col. Markham and Forbes are concerned, it seems only necessary to say this: Col. Markham is a man of 84 years of age and his memory is so untrustworthy that he confessed himself utterly helpless, even with the model before him, to give the slightest idea as to how it operated. Forbes, I think, ought not to expect the Court to accept his statement that he was the inventor in the face of the document which he solemnly signed some 15 years ago, to the effect that the plaintiff was the inventor.

Judgment

So far as the White patent is concerned, there seems little doubt (indeed it is not seriously contested) that he has made certain improvements in the Ashdown patent. Section 9 of the Patent Act fixes his rights in such a case, but neither he nor anyone else can deprive the plaintiff of the fruits of his invention.

The defendant has infringed the plaintiff's patent in the clearing of 176 acres of land. I think $5 an acre is a reasonable charge therefor, and there will be judgment for the plaintiff for $880 and an injunction in the terms of the statement of claim.

Judgment for plaintiff.

FORD MOTOR COMPANY OF CANADA LIMITED AND COLONIAL MOTOR COMPANY v. UNION STEAMSHIP COMPANY.

MCDONALD, J.

1924

Oct. 22.

FORD MOTOR COMPANY OF CANADA v. UNION STEAMSHIP CO.

Carriers—Preliminary contract—Departure from in bill of lading—Fraud of shipper's representative—Endorsement on bill of lading—Effect of on consignee—Action for damages—Can. Stats. 1910, Cap. 61, Sec. 4(a).

An owner of goods having endorsed a bill of lading therefor to the buyer has thereby parted with all his right of an action for damages with respect thereto from the carrier, but the fact that the owner has paid the endorsee the amount of the damages suffered by the goods in transit, does not deprive the endorsee of his right of action against the carrier.

Where, by reason of the fraud of a person entrusted by an owner of goods with the duty of shipping them and obtaining a bill of lading therefor the bill of lading is not in accordance with the first arrangement for shipping made between the owner and the carrier, the Court in an action by the owner, named in the bill of lading as consignee, against a carrier will allow the carrier's prayer for rectification of the bill of lading to conform with the contract. But the endorsee for value of the bill of lading who had no notice of the preliminary contract is not bound thereby, his rights against the carrier being fixed by the terms of the bill of lading.

The Water-Carriage of Goods Act does not apply so as to render null and void a special contract deliberately made between a shipper and a carrier for the carriage of automobiles on deck, but a printed term in a bill of lading which provided that the carrier might carry animals or other cargo on deck at the risk of the shipper, owner, or consignee offends against and is void under section 4(*a*) of said Act.

ACTION by shipper and consignee by endorsement against a carrier for damages to goods *en route* from Vancouver to Australia and New Zealand. Tried by MCDONALD, J. at Vancouver on the 2nd of September, 1924. Statement

Mayers, and *Jamieson,* for plaintiffs.
Davis, K.C., and *Griffin,* for defendant.

22nd October, 1924.

MCDONALD, J.: The plaintiff, the Ford Motor Company of Canada, Limited (for brevity hereinafter called the Ford Judgment

MCDONALD, J.

1924

Oct. 22.

FORD MOTOR COMPANY OF CANADA v. UNION STEAMSHIP CO.

Company), manufactures automobiles at or near Walkerville, Ont. The plaintiff, the Colonial Motor Company (hereinafter called the Colonial Company) sells automobiles in New Zealand. The defendant Company operates a line of steamships from Vancouver to Australia and New Zealand.

In the latter part of the year 1918, the Ford Company, being desirous of shipping automobiles to New Zealand and Australia, got into touch with the Judson Freight Forwarding Company, represented in Detroit, Michigan, by one White, and, so far as the transactions in question in this action are concerned, represented in Chicago by one W. J. Riley. No definite arrangement was reached between the Judson Company and the Ford Company until January 9th, 1919, when an agreement was entered into whereby the Ford Company accepted the Judson Company's

"offer of space covering 160 motor cars for New Zealand and 40 for Australia on S.S. Waimarino out of Vancouver late January or early February—goods to be shipped from our [Ford's] factory not later than January 10th—rate applying on Australian shipments $45 per cubic ton and on New Zealand shipments $46 per cubic ton."

It was understood that these prices should include the Judson Company's handling charges, and that the Judson Company's Seattle office would make necessary arrangements to have a man in Vancouver to supervise the loading of the cargo on the Waimarino. At this time, the Judson Company had no contract for space to Auckland, New Zealand, on the Waimarino or any other vessel belonging to defendant Company, but it had, on 7th January, 1919, made an offer to James P. Robertson, the defendant Company's general freight representative at Chicago, Illinois, of $42.50 per ton upon 160 automobiles for Auckland, New Zealand, and had arranged with Mr. Robertson a definite contract covering 40 automobiles for Melbourne, Australia, to be forwarded on the Waimarino. Immediately upon arranging the contract with the Judson Company, the Ford Company began shipping cars, and the shipments were completed and inland bills of lading issued and forwarded to the Judson Company in Chicago on or before the 14th of January. Meanwhile Mr. Robertson was in communication with Mr. Irons, the defendant Company's manager at Vancouver, with

Judgment

regard to space for automobiles to Auckland, but had received no assurance that such would be available. On the 15th of January, Robertson, after an interview with Riley, telegraphed Mr. Irons to the following effect:

"Judson advises through error by shipper 100 autos Auckland put in transit to Vancouver and necessary book same February seaboard offer special rate forty-five dollars for your consideration."

Riley denies that any such conversation ever took place, but I accept Robertson's evidence as to this, one reason being that Riley, having contracted to sell space to Ford which he had not yet procured, was in a difficult position, and I find it more easy to believe that Riley made this misstatement to Robertson under the then existent circumstances than to believe that Robertson deliberately concocted the statement contained in his telegram to Irons.

Practically all the evidence was taken on commission, and I have not had the advantage of seeing the witnesses. There is direct conflict between Robertson and Riley, as to their various interviews, and I have reached my conclusions of fact in cases of conflict from a perusal of the correspondence which took place and the documents which were signed.

On the 16th of January, Irons replied to Robertson's telegram of the 15th as follows:

"Regarding Judson autos advise when shipped where from and measurements. See no prospects clear before March, April, May but can possibly take on deck Waimarino if here first week February and tranship at Sydney for Auckland. Advise if shippers prepared consider. Would like rate about forty-two fifty to Auckland on deck but prepared consider reasonable reduction if necessary."

Judgment

On 17th January, Riley and Robertson had an interview, following which Riley wrote a letter to Robertson purporting to confirm their conversation and enclosing particulars of the shipments, and stating that it would be agreeable to the Judson Company to accept booking on the Waimarino at the rate of $42.50 to Auckland. The letter states shipping dates from Walkerville were January 9th to the 11th, and closes with request that Robertson "will issue contract today." In passing, it may be said that this letter refers to Judson's contract, No. 1387. Mr. *Mayers,* counsel for the plaintiffs, made something of this point as shewing that Riley was right in his statement,

MCDONALD, J.

1924

Oct. 22.

FORD MOTOR COMPANY OF CANADA v. UNION STEAMSHIP CO.

that on the 17th of January a definite contract had been finally arranged between him and Robertson, otherwise Riley would not have given the contract a number. However, there is nothing in this point, as will appear from Riley's letter to Robertson of 7th January, which, on its face, is clearly only an offer, and which yet bears at the top the words, "Contract 1387."

Inasmuch as Riley's letter said nothing about "on deck shipment," Robertson could not issue any contract without confirmation from Irons, so on January 17th he telegraphed Irons as follows:

"Wire received, Judson offer firm one hundred autos—clearance Waimarino steamer option deck stowage—through rate forty-two fifty Auckland. . . . ."

and on 18th January, Irons telegraphed Robertson:

"Judson autos expect will be able to take on deck Waimarino but cannot guarantee at present. Meantime agreeable you book first available cargo steamer our option carriage on deck or below. . . . . Would like you personally see that no steamer name mentioned and terms of contract shewing on ladings that is to say our option on deck or below first available cargo steamer or steamers."

On or about 18th January, Riley left for New York. Robertson prepared his contract, No. 1907, exactly in the terms of the instructions contained in Iron's telegram. He telephoned some one in Riley's office on 20th January, and that person, whose name is not divulged, telegraphed Riley in New York as follows:

Judgment

"Robertson will arrange through lading at forty-two fifty on Ford automobiles New Zealand with shippers name omitted and claused on or below deck ships option *via* first available steamer direct or indirect. Answer."

In reply Riley telegraphed his Company on 20th January as follows:

"Secure contract from Robertson covering Ford automobiles and issue through Canadian Pacific ladings immediately. Endeavour to have clause on or below deck ships option omitted from ladings."

On receipt of this telegram some one in the Judson office received the contract 1907 from Robertson; it was signed in Riley's name by his assistant, Miss Peters, and, in the usual course of business, twenty through bills of lading were prepared in Judson's office covering 120 automobiles from Walkerville, Ont., to Vancouver, and thence to Auckland, New Zealand, the Judson Freight Forwarding Company being named as

shippers, and the Ford Company being named as consignees. Each bill of lading referred to Robertson contract No. 1907 and to Judson contract No. 1387, but contained, on its face, no mention of "shipment on or below deck, ship's option." It is admitted by Riley that the bills of lading ought to be in accordance with the terms of the contract. It seems to me quite clear from all that had taken place that Riley, through his assistants, fraudulently omitted the option clause from the bills of lading, and owing to the carelessness of Robertson, who had been expressly cautioned by Irons to see that the bills of lading were in accordance with the contract, succeeded in having these bills of lading signed and issued by one Kittermaster, the Chicago agent of the Canadian Pacific Railway Company. Riley, when being examined, indignantly protested against any such charge being made against him, but I have no hesitation in making the finding. His conduct throughout was not that of an honest man, and his assistant, Miss Peters, seems to have been well-trained in his methods of doing business. Riley attended with Miss Peters on her examination as a witness for the defendant, and, although her conduct on the examination led the commissioner to allow counsel, who had called her, to cross-examine her, she yet would not admit that she signed Riley's name to the contract 1907. Whatever may be said by counsel, as to whether or not it makes any difference who signed Riley's name to that contract, Riley and Miss Peters thought the matter of some importance. When a handwriting expert was called at the trial, and shewn certain admitted signatures made by Miss Peters, he had no hesitation in stating that the same hand wrote Riley's name to the contract 1907, and counsel did not cross-examine this witness. These various matters taken in addition to the telegrams which passed between Riley and his office, when he was in New York, have led me to conclude that, owing to Riley's fraud, the bills of lading, as issued, were not in accordance with the contract entered into between the Judson Company and the defendant and subject to other considerations, which must be dealt with, the prayer of the defendant, that the bills of lading ought to be rectified to accord with the contract, ought to be granted.

Judgment

MCDONALD, J.

1924

Oct. 22.

FORD MOTOR COMPANY OF CANADA v. UNION STEAMSHIP CO.

The motor-cars in question, on arrival in Vancouver, were shipped on the deck of the Waimarino and were damaged by sea-water. On receipt of the bills of lading, Irons at once took up with Robertson the question of the omission from the bills of lading of the option clause, and asked that Robertson get a letter from Riley correcting the error. Such a letter Robertson, naturally, was never able to obtain. The plaintiff, the Colonial Company, to whom the bills of lading had been endorsed by the Ford Company, made claim against the Ford Company, which Company paid them the full amount of their loss. Both Companies now join in this action to recover from the defendant the amount of that loss. It is contended, in the first place, that neither Company has any right to sue. As to the Ford Company, it is said that having endorsed the bills of lading to the Colonial Company, it thereby parted with the property in the goods and with all rights to claim damages in respect thereto. This contention, I think, is correct.

As to the Colonial Company, it is said that, even if it had a right of action, that right of action was lost when the Ford Company paid to it the damages which it had suffered. This contention, I think, is incorrect. Assuming for the moment that a right of action did lie in the Colonial Company against the defendant for damage suffered by the goods, that right of action is not taken away by the fact that the Ford Company or any other person voluntarily paid to the Colonial Company the amount of its loss. It seems to me contrary to principle that a wrong-doer may take advantage of a voluntary payment made by a stranger to the person wronged.

Judgment

As against the Ford Company, I think rectification of the bills of lading ought to be granted on the ground that they were obtained by the fraud of the Judson Company. It is not necessary in this case to go so far as to hold that the Judson Company was the agent of the Ford Company in arranging for the shipments and procuring the bills of lading. The Judson Company was entrusted with the goods to ship, to obtain bills of lading, and supervise the loading, and the Ford Company, the consignee named in the bill of lading, is bound by the acts of the person so entrusted: *Delaurier* v. *Wyllie* (1889), 17

R. 167; *Valieri* v. *Boyland* (1866), L.R. 1 C.P. 382. Even aside from these authorities, as pointed out by Mr. *Griffin,* counsel for the defendant, the pleadings of the plaintiff set up that the Ford Company shipped the goods, and the bills of lading upon which they relied shew that the Judson Forwarding Company shipped the goods. If these pleadings mean anything they mean that the Judson Company shipped on behalf of the Ford Company. If the Ford Company, therefore, were suing alone, I would, notwithstanding Mr. *Mayers's* forcible argument, dismiss the action, being prepared to hold that The Water-Carriage of Goods Act, Can. Stats. 1910, Cap. 61, would not apply to a special contract deliberately made by the parties for the carriage of automobiles on deck, so as to make such a contract null and void.

As to the Colonial Company, on the other hand, it was practically admitted by Mr. *Griffin,* in argument, that if the Colonial Company had any right of action at all it stood in a better position than the Ford Company. The Colonial Company was an endorsee for value of the bills of lading. It had no notice of the preliminary contract and is, in my opinion, not bound thereby. Its rights must, therefore, be fixed by the terms of the bills of lading. Each bill of lading contains, amongst numerous other clauses, written in small print on the back thereof, a term to the effect that the carrier has liberty to carry animals or other cargo on deck at the risk of the shipper, owner or consignee. This term, I think, offends against section 4(*a*) of The Water-Carriage of Goods Act, which provides in effect that where any bill of lading contains any clause, covenant or agreement whereby the owner of any ship is relieved from liability for loss or damage to goods arising from negligence, fault or failure in the proper stowage of goods, such clause, covenant or agreement shall be illegal, null and void and of no effect. It seems to me that a clause in the bill of lading which provides that the owner of the ship may stow on deck any sort of cargo, no matter how delicate or perishable, cannot stand and must be struck out. Having so held, it is not necessary to deal with Mr. *Mayers's* further argument that the clause in question also offended against the terms of section 4(*b*) of the Act.

Judgment

MCDONALD, J.

1924

Oct. 22.

FORD MOTOR COMPANY OF CANADA v. UNION STEAMSHIP CO.

In the result there will be judgment dismissing the action of the Ford Company with costs, and there will be a reference to the registrar to ascertain the amount of damages suffered by the Colonial Company and judgment for the Colonial Company for the amount so found, with costs. It seems obvious that nearly all the costs incurred would have been incurred had the plaintiff the Colonial Company alone sued. This will be a matter for the taxing officer to consider.

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

THE ATTORNEY-GENERAL OF CANADA AND THE CITY OF VANCOUVER v. GONZALVES.

Title to land—Sixty years' continuous possession—Evidence of occupation—Surveyor's plan and field notes—Evidence of aged Indian—Acceptance of—R.S.B.C. 1911, Cap. 145, Sec. 49.

In an action to recover possession of a plot of ground occupied by the defendant and containing about one-third of an acre in Stanley Park on the south side of the First Narrows entering Vancouver harbour it was disclosed that the ground now known as Stanley Park was made a military reserve prior to its survey by one Corporal Turner under instructions from the Imperial War Office in March, 1863, and was transferred to the Crown (Dominion) by Imperial despatch in 1884. In 1887 an order in council was passed authorizing the minister of militia to "hand over" the park to the City of Vancouver on terms to be arranged. The City from that date occupied the property as a park (except portions occupied by squatters) but it was not until 1908 that a lease was executed and delivered to the City. Corporal Turner's instructions as to his survey included a direction that his plan should shew "any clearances or huts or other occupations recently made." The plan as produced only shewed one building occupied by another native but nothing as to the plot of ground in question. The defendant claims that he and his predecessors in title were in continuous possession for more than 60 years prior to commencement of this action; that an Indian named Joe Silva had cleared the property and occupied a house on the plot from 1855 to 1874 when his father went into possession, and he succeeding his father in 1886 has occupied the premises ever since. The evidence of occupation prior to the 60 years was of one Trimble, a miner aged 83 years, and of three Indians aged 77, 80 and about 100 years respectively. The action was dismissed on the grounds that if such a clearance existed Turner's map would

have shewn it and the evidence of the miner and Indians did not satisfactorily prove that the defendant's predecessors in title were in possession 60 years prior to commencement of the action.

Held, on appeal, reversing the decision of MURPHY, J. (MACDONALD, C.J.A. dissenting), that Turner's map is not admissible in evidence and even if it were it does not prove anything of substance; further, considering the surrounding circumstances and the necessary period of time that had to be covered (*i.e.*, 60 years) the evidence adduced on the part of the defendant forms a reasonable basis upon which it can be said there has been 60 years of adverse possession against the Crown.

Per MCPHILLIPS, J.A.: The defendant was and is in actual possession of the land and the *onus probandi* is upon the Crown to make out its title. Title has been effectively proved by adverse possession for 20 years against the City of Vancouver and during the continuance of the term of the demise by the Crown to the City of Vancouver, the Crown cannot take steps to dispossess the defendant.

MURPHY, J.
1923
Dec. 11.
COURT OF APPEAL
1924
Oct. 7.
ATTORNEY-GENERAL OF CANADA *v.* GONZALVES

Reversed 1926 — L. D. L. R. 5

APPEAL by defendant from the decision of MURPHY, J. of the 11th of December, 1923, in an action to recover possession of a certain plot of ground containing about one-third of an acre in Stanley Park in the City of Vancouver which is now occupied by the defendant, for a declaration that the plaintiff is entitled to possession of the said property; that the defendant is a trespasser thereon and for an injunction restraining the defendant from continuing in possession thereof. The plaintiffs say that Stanley Park was a military reserve and on the 27th of March, 1884, was transferred to the Crown in the right of the Dominion, by the Imperial Government and the Crown (Dominion) leased Stanley Park to the City of Vancouver for 99 years on the 1st of November, 1908, renewable perpetually, and the City has been in actual possession, enjoyment and occupation of said park since the date of said lease. The defendant claims he has been in continuous possession and occupation of the premises for a period exceeding 20 years before the commencement of this action and himself and his predecessors in title in occupation and possession of said property for upwards of 60 years and has never been a trespasser thereon. The defendant claimed that one Joe Silva was in possession of the premises from 1855 until 1874 when the defendant's father Joe Gonzalves succeeded him in possession and remained there until 1886 when the defendant continued and has remained in possession up to the present time. The plaintiff filed field notes

Statement

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

Statement

of a survey of the east end of the park that was made by one Corporal Turner of the Royal Engineers in February and March, 1863, under instructions from Colonel R. C. Moody through the War Office that his plan should shew "any clearances or huts or other occupations recently made." These notes were filed in the office of the surveyor-general and on a plan subsequently completed from the notes the only structure shewn upon it was a house which had been owned and occupied by an Indian woman named Aunt Sally who died shortly before this action started at an age of over 100 years. Her house is not in question in this action. No other structure or occupation is marked on the map. The evidence for the defence to shew that predecessors in title of defendant had occupations on the lots in question prior to the 21st of April, 1863, was that of Tom Abraham (Indian claiming he was older than Aunt Sally), Celestine (an Indian woman 77 years old), Mrs. Emma Gonzalves (an Indian woman 80 years old), and Edward Trimble, a Cariboo miner, 83 years old. The Indians fixed the time by comparison with the date of the Cariboo gold rush which took place in the summer of 1858. The evidence of these witnesses and the further relevant facts are sufficiently set out in the judgment of the trial judge.

McCrossan, for plaintiffs.
Long, for defendant.

11th December, 1923.

MURPHY, J.: Apart from one point, the law applicable to all these cases seems to be clear; that is, that the defendant here must shew possession for 60 years, and they must shew that by metes and bounds, or as the term is *possessio pedis,* and also continuity of occupation, and identity of occupier. I think that is not open to discussion. And I think also that the law is that the onus is on the defendant to prove these requirements.

MURPHY, J.

Dealing first with the six cases, whose root of title is alleged to be either in Smith or in Silva: On the first point, as to whether it has been proven that that possession has existed for 60 years, the only evidence adduced to prove that, apart from the Indian testimony, is the evidence of Trimble. He does

say in sailing out on a vessel here in December, 1862, he saw three houses; and he says he came back in 1873. He visited the *locus* then and found three houses there, and he goes to the length of saying that these houses are in the same position as the houses that he saw in 1862 from the water. I cannot accept this as satisfying the onus which rests upon the defendant. Three Indians give evidence that those houses were there for a period that would constitute 60 years adverse possession. Now with regard to the Indian evidence, I must say it was unsatisfactory. I do not think the Indians intended at all to deceive the Court. Naturally they were very old people and could only fix dates by the Cariboo gold rush. They contradicted themselves—two of them at any rate, very materially, because they said those buildings were made of lumber and lumber from the mills here. They did not say they were from mills here, but it would be the only place where lumber could be obtained. It is possible that lumber might have been whipsawn, but I think no one would be justified in coming to the conclusion that one would whipsaw lumber to build houses in Stanley Park where cedar, which could be easily split, was available. As against that I have the map, and it seems to me that is evidence which, even if the onus were on the Crown, would conclude this case, on the point of 60 years' possession. That map was made under instructions to shew any occupancy, by this man Turner, and he does shew the occupancy of Aunt Sally and shews no other.

MURPHY, J.

I hold on that first point that the case is not made out; but if I am in error in that, it is absolutely impossible for me to say from this evidence that there has been any satisfactory proof, not alone of fences, but of any clearing that dates back 60 years. If there were any such extensive clearing as would justify the Court in decreeing that these people own this extensive piece of land, as shewn by the map, it would be a physical impossibility for a surveyor, such as Turner, to have failed to see it. Then I agree that it would not be necessary possibly to prove fencing, but some clear act of possession, such as clearing, must be proved. If there were no clearing, or only small parcels of clearing, I cannot say on this evidence where

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

those houses were at all, or where the clearings were, assuming they existed; and I think the onus is on the defendant to shew me the metes and bounds of the property they claim. They must shew *possessio pedis*, and I hold that they have not done so. On those two grounds I have to hold that the Crown is entitled to recover possession. If I were not going away from the city I would have written a judgment in this matter, but I will be away for so long that it would throw the case over the next session of the Court of Appeal, if it is going there.

I have perused the evidence and have drawn my conclusions from it, and I think it is in the interests of the litigants that I should decide now, so that they can go on with their appeal if they want to.

With regard to West and Cummings, the same thing applies. With regard to the 60 years' possession, that depends altogether on Indian testimony. Their location is not shewn on the Turner map. But even if the Indian testimony were credited, I have no evidence whatever as to any definite clearing having taken place or any definite fencing, and here again I have to be shewn the *locus* and extent of the *possessio pedis*. That has not been done. It is clear that the Manion house was not put up there until 1865; so far as he could be made the root of title the 60 years adverse possession is not shewn. The evidence shews that Johnson abandoned the particular house in which he lived. And because *possessio pedis* must be proven, and I hold that no clearing and no definite fencing has existed for 60 years, I must likewise hold that the Crown is entitled to recover those parcels of property.

MURPHY, J.

In my opinion the City, being the party interested in the subject-matter, was entitled to bring proceedings for a declaration as to title by virtue of the provisions of Order XXV., r. 5. See authorities cited in Yearly Practice, 1923, pages 549, 550.

As the City does not ask for costs, the point whether on the record it would be entitled to recover them need not be determined. This decision applies to all the squatter cases recently tried by me.

From this decision the defendant appealed. The appeal was

argued at Vancouver on the 7th to the 12th of March, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Mayers, for appellant: Joe Silva and Peter Smith built and established homes on the lots in question in the early sixties, and Silva sold to Joe Gonzalves, who was the father of the defendant, in 1874. Peter Smith lived until 1905 and his son followed him. The trial judge accepted the field notes of the Royal Engineer and discarded our evidence. The evidence of the Indians is timed by the Cariboo rush of 1858 and the commencement of the Hastings Sawmill in 1865 and Moodyville in 1867. The houses were first built with split cedar and whipsawn lumber and the witness Trimble saw the houses as far back as 1862. Corporal Turner's survey is dealt with in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1906), A.C. 552 at p. 557. As to acceptance of Turner's field notes see *Sturla* v. *Freccia* (1880), 5 App. Cas. 623 at p. 643; *Bidder* v. *Bridges* (1885), 54 L.T. 529; *Mercer* v. *Denne* (1904), 2 Ch. 534 at p. 544, and on appeal (1905), 2 Ch. 538 at p. 563. On the question of title by possession see *McConaghy* v. *Denmark* (1880), 4 S.C.R. 609 at pp. 632-3. An action cannot be brought by one who is not in a position to immediately re-enter. As a lease has been given to the City there is no right of re-entry: see Williams and Yates on Ejectment, 2nd Ed., p. 3; *O'Connor* v. *Foley* (1906), 1 I.R. 20 at pp. 25-6; *Ecclesiastical Commissioners for England* v. *Treemer* (1893), 1 Ch. 166 at p. 175; *Walter* v. *Yalden* (1902), 2 K.B. 304. His title is good as against the lessor until the termination of the lease: see *Ryan* v. *Clark* (1849), 14 Q.B. 65 at p. 73. Argument

McCrossan, for respondents: It was found by the trial judge that the evidence was not sufficient to make a case for the squatters. The surveyor's field notes should be accepted as evidence: (a) as a public document of an ancient survey; (b) as evidence of reputation; (c) as a private document made in the course of his duty that it was his duty to record. As to the first see Phipson on Evidence, 6th Ed., 355; Taylor on Evidence, 11th Ed., Vol. 2, p. 1199, par. 1767; *Rowe* v. *Brenton* (1828), 8

MURPHY, J.
1923
Dec. 11.
COURT OF APPEAL
1924
Oct. 7.
ATTORNEY-GENERAL OF CANADA v. GONZALVES

B. & C. 737 at p. 747; *Mayor, &c., of Manchester* v. *Lyons* (1882), 22 Ch. D. 287 at p. 299; *Daniel* v. *Wilkin* (1852), 7 Ex. 429; Roscoe's Evidence in Civil Actions, 19th Ed., Vol. 1, p. 175; *Smith* v. *Earl Brownlow* (1870), L.R. 9 Eq. 241; *Evans* v. *Merthyr Tydfil Urban Council* (1899), 1 Ch. 241; *Smith* v. *Lister* (1895), 72 L.T. 20. Maps are evidence of reputation if proved to be made by deceased persons of competent knowledge: see Phipson on Evidence, 6th Ed., 297; Taylor on Evidence, 11th Ed., Vol. 1, p. 427, par. 622; Halsbury's Laws of England, Vol. 13, p. 563, par. 770; *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 73 J.P. 477; *Giant's Causeway Company Limited* v. *Attorney-General* (1897), 118 L.T. Jo. 544; *Attorney-General* v. *Antrobus* (1905), 2 Ch. 188; *Vyner* v. *Wirral Rural District Council* (1909), 73 J.P. 242 at p. 243. A private survey under public authority duly recorded is admissible: see *Mellor* v. *Walmesley* (1905), 2 Ch. 164 at p. 168; *Doe dem. Patteshall* v. *Turford* (1832), 3 B. & Ad. 890; *Smith* v. *Blakey* (1867), L.R. 2 Q.B. 326 at p. 333; *Sturla* v. *Freccia* (1880), 5 App. Cas. 623 at p. 640; *The Irish Society* v. *The Bishop of Derry* (1845), 12 Cl. & F. 641. On the question of corroboration see *Callaway* v. *Platt* (1907), 17 Man. L.R. 485 at p. 492; *Harris* v. *Mudie* (1882), 7 A.R. 414 at p. 426; *Leigh* v. *Jack* (1879), 5 Ex. D. 264 at p. 268; *Robinson* v. *Osborne* (1912), 27 O.L.R. 248 at pp. 253 and 255; *Emmerson* v. *Maddison* (1906), A.C. 569 at p. 575. On limitation of actions see Lightwood on The Time Limit on Actions, pp. 140 and 152. On the nature of possession required to be proved see *Sherren* v. *Pearson* (1887), 14 S.C.R. 581 at pp. 585 and 594; *Wood* v. *LeBlanc* (1904), 34 S.C.R. 627 at p. 636; *Shepherdson* v. *McCullough* (1882), 46 U.C.Q.B. 573 at p. 602; *Attorney-General* v. *Ludgate* (1901), 8 B.C. 242 at p. 248; Armour on Real Property, 2nd Ed., pp. 473 and 574; *Kynoch, Limited* v. *Rowlands* (1912), 1 Ch. 527 at p. 533; *McIntyre* v. *Thompson* (1901), 1 O.L.R. 163 at p. 166. As to uninterrupted possession see *Hollins* v. *Verney* (1884), 13 Q.B.D. 304 at p. 309; *Coffin* v. *North American Land Co. et al.* (1891), 21 Ont. 80 at p. 86; *Griffith et al.* v. *Brown* (1880), 5 A.R. 303 at p. 307;

Argument

Donovan v. *Herbert* (1884), 4 Ont. 635 at p. 640; *Worssam* v. *Vandenbrande* (1868), 17 W.R. 53. On the question of exactness of proof of possession see *Bentley* v. *Peppard* (1903), 33 S.C.R. 444 at p. 445; *Cowley* v. *Simpson* (1914), 31 O.L.R. 200 at p. 216; *Doe dem. Des Barres* v. *White* (1842), 3 N.B.R. 595 at pp. 640-1. There must be strict proof of continuity of possession: see *Handley* v. *Archibald* (1899), 30 S.C.R. 130 at p. 137; *Agency Company* v. *Short* (1888), 13 App. Cas. 793 at p. 799. On the point that the Dominion has no *status* by reason of the lease to the City, we say first, the Dominion has not forfeited its right of possession or entry as the document of 1908 is a licence to the City: see Encyclopædia of the Laws of England, Vol. 12, p. 457; *Allen* v. *Woods* (1893), 68 L.T. 143; Halsbury's Laws of England, Vol. 18, p. 337, par. 770; *Heap* v. *Hartley* (1889), 42 Ch. D. 461 at p. 468; *Flynn* v. *Toronto Industrial Exhibition Association* (1905), 9 O.L.R. 582 at p. 585; *Provincial Bill Posting Company* v. *Low Moor Iron Company* (1909), 2 K.B. 344 at p. 349. Even if the licensee has not the lessor has a right of action for possession: see *Penner* v. *Winkler* (1905), 15 Man. L.R. 428 at pp. 432-3. In any event the City is not bound as its title did not arise until 1908: see *Maddison* v. *Emmerson* (1904), 34 S.C.R. 533 at pp. 556 and 562; and on appeal (1906), A.C. 569; *Doe Fitzgerald et al.* v. *Finn, &c.* (1844), 1 U.C.Q.B. 70; *Ouellet* v. *Jalbert* (1915), 27 D.L.R. 459.

Argument

Mayers, in reply: Evidence of reputation is admissible in proof of rights of public or general rights but not in relation to particular facts such as occupation: see Phipson's Law of Evidence, 6th Ed., 294 and 296; *Lord Dunraven* v. *Llewellyn* (1850), 15 Q.B. 791 at p. 810. The maps should not be accepted as evidence of particular facts: see *Reg.* v. *Berger* (1894), 1 Q.B. 823 at p. 827; *Attorney-General* v. *Horner (No. 2)* (1913), 2 Ch. 140 at pp. 154-5; *Fowke* v. *Berington* (1914), 2 Ch. 308 at p. 312; *Pipe* v. *Fulcher* (1858), 1 El. & El. 111 at p. 116. As to admissibility of field notes see *Polini* v. *Gray* (1879), 12 Ch. D. 411 at p. 426.

Cur. adv. vult.

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

7th October, 1924.

MACDONALD, C.J.A.: This is an action of ejectment. The land in question is part of a military reserve, the whole at present being known as Stanley Park, one of the parks of the City of Vancouver.

In 1887 an order in council was passed authorizing the minister of militia to "hand over" the park to the City of Vancouver on terms to be arranged by him. No lease was made at that time but the City occupied the property, except portions occupied by squatters, as a park. In 1906 another order in council was passed authorizing a lease to the City. This was amended by order of 1908, and a lease was duly executed and delivered to the City.

The defendant is the successor in occupation of a person who squatted upon land lying within the limits of the park, and in these proceedings he claims that he and his predecessors have had over 60 years of uninterrupted possession. The action was commenced on the 23rd of April, 1923, so that unless the defendant is able to shew possession from the 23rd of April, 1863, he must fail in this defence.

I shall now refer to the evidence of the witnesses who deposed to possession by the original squatter prior to that date. The first of these witnesses, Thomas Fisher, first saw the land in 1867. His evidence is of no value for the purpose of shewing possession of the original squatter prior to April, 1863. The evidence of Thomas Abraham, an Indian, goes to shew that the house which it is claimed was built on the land was made of sawn lumber got from either the Moodyville or Hastings saw-mill. Those mills were built in 1865 and 1867 respectively, and therefore Abraham's evidence does not prove 60 years' possession. Celestine, an Indian woman, says that the house was built by the original squatter after what is called the Cariboo gold rush was over. She says it was built of lumber got from the Moodyville mill. Emma Gonzalves says that the house was built after the gold rush; she says it was built originally of split cedar and afterwards rebuilt with lumber from one of the mills. She says such replacement took place 50 years ago, and that for 10 years previously the split-cedar

MACDONALD, C.J.A.

house was there. Giving full credence to this evidence, it merely shews that 60 years before the trial the house was there, built of split cedar. This does not shew 60 years' uninterrupted possession.

MURPHY, J.
1923
Dec. 11.

COURT OF APPEAL
1924
Oct. 7.

Edward Trimble was another witness, a white man. This witness does not clearly fix the date when he first saw the *locus in quo*. My interpretation of his evidence is that he left Victoria on 23rd December, 1862, for New Westminster on his way to the Cariboo. The vessel did not come into the harbour of what is now Vancouver, nor did it come within many miles of that port. The witness says he walked to Vancouver from New Westminster in the fall, which I take to mean the fall of 1863, presumably when returning from the Cariboo. His evidence, while not in terms quite as stated, is so, I think, by inference, but in any case it is so hazy and uncertain as to be worthless. Trimble was in Vancouver again in 1873, and on this occasion visited the locality of the house which unquestionably was then in being.

ATTORNEY-GENERAL OF CANADA *v.* GONZALVES

On the evidence before me I am unable to find satisfactory proof that the defendant's predecessors in occupation or the first of them had come upon the land 60 years prior to the issue of the writ, or that the evidence is at all satisfactory of the boundaries or location of the land claimed to have been in possession. The law requires that these matters should be made out with a good deal of strictness, and that the Court should be satisfied that the occupation was as claimed.

MACDONALD, C.J.A.

Mr. *Mayers* also contended that if he should fail in shewing possession against the Crown for the full period of 60 years, yet since, as he contended, the City is now the lessee and is in full possession subject only to the right of re-entry for military purposes reserved by the Crown, the defendant has acquired good title as against the City by reason of undisputed possession for the full period of 20 years, a right which he is entitled to set up against the City, whose action, he claims, this in reality is.

An action of ejectment is one to determine the right of the plaintiff to the immediate possession of the land. Mr. *Mayers* submits that the Crown is not entitled to immediate possession,

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

having parted with that right to the City. The judgment is to the effect that the Crown is entitled to the immediate possession of the land and that the defendant should deliver up possession thereof to the plaintiff.

The history of the City's rights appears by reference to the order in council of 1887, which authorizes the "handing over" as aforesaid of Stanley Park to the City and the subsequent orders and acts of the parties to the lease. Although, as above stated, no lease was then made, the City was allowed to take possession, and eventually obtained a lease.

It was argued by respondents' counsel that this lease is a mere licence, but while it savours of such, I think it must be regarded as, in substance, a demise subject to the conditions therein contained.

Again it was argued by appellant's counsel that even under the order of 1887, the possession given to the City pursuant thereto was in law a demise, but even if that was its true character, which I do not agree with, yet it would, I think, be a demise at will merely. But however this may be, the prior rights or privileges of the City were cancelled by the orders in council of 1906 and 1908, before the lease of 1908 was executed and delivered.

MACDONALD, C.J.A.

What, then, were the respective rights as amongst themselves, of the Crown, the City and the defendant in 1908? If I am right in my conclusion above stated, that on the 23rd of April, 1923, the Crown's title had not become barred, then of course it follows that at any time, at least up to the date of the lease or even after the date of the lease, where the conditions justified it, the Crown could enforce its right to possession against the defendant. The Crown certainly had a right to possession in 1908, when it cancelled the order of 1887. The cancellation of the order of 1887 must be regarded as an equivalent to a re-entry at that time, namely, in 1908. But apart from all that, the Crown never put the City in possession of the land now in dispute. That land was clearly in the possession of the defendant or his predecessors in occupation long before 1887. The Crown, therefore, having made the lease to the City was bound to deliver to it the possession of all land included within

its terms, and was therefore, in April, 1923, in position to bring an action for ejectment against the defendant for the purpose of performing its duty towards the City.

Therefore I think the second submission of Mr. *Mayers* fails. The appeal should be dismissed with costs.

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

MARTIN, J.A.: This is an appeal from a judgment declaring the plaintiffs' right to, and ejecting the defendant from, the possession of a small piece of property occupied by him in Stanley Park, Vancouver, consisting of a little more than one-third of an acre fronting on the main roadway through said park and running down to the foreshore of Coal Harbour, and shewn on Exhibit 7 as "parcel 2."

Among other defences the defendant alleges that he has, by himself and his predecessors in interest and title, been in continuous possession and enjoyment of the said parcel for a period of 60 years next before the commencement of the action on the 21st of April, 1923, and if this allegation can be established it is conceded he has acquired a good title to his holding under the Statute of Limitations, Cap. 145, R.S.B.C. 1911. In *Hamilton* v. *The King* (1917), 54 S.C.R. 331, it was said by Mr., now Chief Justice Anglin, p. 379, that

"Sixty years' adverse possession continuously held by one person, or by several persons successively claiming one under the other extinguishes the title of the Crown and as against the Crown establishes the title of the person, or the last of the persons, so in possession."

In the view I take of the case it will only be necessary to consider this defence because, with every respect for the judgment of the learned judge below, I am of opinion that it was sufficiently established in the circumstances, which are unusual in several respects, as hereinafter noted.

The general principle upon which questions of possession of this nature should be decided was laid down by the Privy Council in a suit arising in this Province in relation to "a patch" of "wild land" in the New Westminster district, *Kirby* v. *Cowderoy* (1912), A.C. 599; the question having arisen on the same Statute of Limitations, and their Lordships said, p. 603:

"On the general subject of possession, the language of Lord O'Hagan in *The Lord Advocate* v. *Lord Lovat* [(1880)], 5 App. Cas. 288—language

MURPHY, J.
1923
Dec. 11.
COURT OF APPEAL
1924
Oct. 7.
ATTORNEY-GENERAL OF CANADA v. GONZALVES

cited with approval by Lord Macnaghten in *Johnson* v. *O'Neill* (1911), A.C. 583—appears to be applicable to the present case. Possession 'must be considered in every case with reference to the peculiar circumstances . . . . the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession.' "

And this language has been adopted by the Supreme Court of Canada in *Tweedie* v. *The King* (1915), 52 S.C.R. 197 *per* Mr. Justice Anglin at p. 215, and he adds:

"This restriction upon the nature of the possession requisite must be borne in mind in considering the sufficiency of the case made out."

In the case at Bar the title set up is that of a squatter upon Crown lands upon what was then a military reserve (according to the judgment of the Privy Council in the Deadman's Island case, *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1906), A.C. 552; (1901), 8 B.C. 242; (1904), 11 B.C. 258), but is now Stanley Park, containing about 900 acres (8 B.C. 243), which is still very largely in its wild state, save for roads and a few recreation spaces, and at the locality in question it was, according to the evidence, a very thick and heavily wooded forest with very tall trees and dense underbrush down to the water's edge.

MARTIN, J.A.

In view of the admitted possession by the defendant "it was for the respondent to shew title," as the Chief Justice of Canada said in *Hamilton* v. *The King, supra,* p. 339, or as the present Chief Justice put it, at p. 374, the Crown properly assumed the burden cast upon it of proving its title, and there can be no serious question of defendant's continuous possession, within fences, of at least 37 years since the survey of 1886, and since Clendenning, acting for the plaintiff Corporation, cut a ten-foot trail through the *locus,* on substantially the site of what is now the said main roadway, in the year 1887, as his partner Boyd testifies: Clendenning says he was only a few hours in so doing as he had a gang of men with him, and the distance in dispute affected by his location of the road would, as scaled upon said Exhibit 7, be only about 450 feet; and in keeping his trail as close to the water as practicable and at the spot where he says he noticed one house on his right hand, in going east, he

kept said trail about 100 feet away from high-water mark, doubtless to avoid the house, which he did not examine, because as he says he "was not looking for fences or for houses." But far more than that, in 1874, Gonzalves says that he fenced the ground right back in the clearing to the green timber, and that the fence stood there till it was moved back as aforesaid by the surveyors in 1886, which constitutes a continuous fenced occupation of 49 years, with the parcel all cleared.

Beginning, then, with so long an occupation, the burden upon the plaintiffs is not a light one, and in his reasons for thinking that the plaintiffs have discharged that burden, the learned judge places great reliance, to the extent even of styling it as going to "conclude this case," upon the map of Lance-Corporal Turner, R.E., put in by the plaintiffs in support of their submission that no houses were in existence at the *locus* in 1863. Speaking further of said map, the learned judge goes on to say:

"That map was made under instructions to shew any occupancy, by this man Turner, and he does shew the occupancy of Aunt Sally and shews no other."

This unfortunately quite erroneous view (I speak with every respect) of the object, scope and effect of Turner's map, adopts the statements of the plaintiffs' counsel to that effect when he put it in evidence at the opening of the trial, as follows:

"Mr. *McCrossan*: This map I would draw your Lordship's attention to shews a view of the occupations [reading same]. There is only one hut, which we admit is the house of 'Aunt Sally' who died here shortly before these actions started, who was something over 100 years of age, and on that map there is no other occupation marked."

MARTIN, J.A.

This is a most important misconception about the situation of the house of "Aunt Sally," the local aboriginal matriarch, who died in 1922 (whose title was admitted), which I drew attention to when the matter came up during the argument before us, *viz.*, that her house though admittedly very ancient, is not shewn at all upon the plan, as it would be if current "occupations" were properly noted thereon, because her house is unquestionably situate near the Lumberman's Arch at the end of a cross road by the site of the old Indian village formerly called Wha Wha, anglice, "Why Why," yet the only house shewn upon the plan is that marked "Indian House," on Exhibit 9, situate to the west of Wha Wha a distance of three-

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

quarters of a mile at least. This strange misconception of the situation had to be admitted but no explanation of it was advanced despite its grave import.

But Corporal Turner did not in fact receive any instructions to note "occupations" on this military reserve. Those relied upon to support such a view are contained in the "memo. of Cptn. Parsons, R.E.," of the 26th of January, 1863, given him by Colonel Moody, but when examined carefully and properly understood they do not apply to this military reserve (now Stanley Park) at all, but to the other localities therein mentioned, which are quite distinct therefrom, *viz.*, the town reserve, the naval reserve, the Burnaby and Crease properties, and claims or surveys to the east up to "the village which has been laid out *en bloc*," not one of which relates to this reserve, in regard to which what Corporal Turner properly did was only to make a "survey of coast line round Coal Peninsula," as his endorsement correctly recites: and a comparison, *e.g.*, between his surveys of McCormack's claim and Brickmaker's claim and his coast-line survey of Coal Harbour will shew the very marked difference between the two classes of work that he was doing.

It follows that even if Turner's map is admissible in evidence (which I doubt in view of the weighty objections that were advanced against its admission), it in no way supports the plaintiffs' case. And furthermore, in any event, no practical

MARTIN, J.A.

reliance could be placed upon it, because the survey was made at the latest on the 17th to the 19th of March, 1863 (as shewn by the dates of the field notes, pp. 17-21), which is nearly five weeks before the 60 years began to run on the 21st of April of that year, and within that period the defendant's possession may well have begun to run; in other words, the map does not attempt at best to bridge this five weeks' gap in the evidence as it should to displace the defendant thereby, even if the fullest effect possible be given to it.

The fact that this greatly relied upon evidence of the principal witness for the plaintiffs has thus completely broken down greatly influences consideration of the adverse view that the learned judge took of the evidence of the Indian witnesses, because he very largely discredits them on the ground that

Turner's map was "against" their evidence, but if the evidence sought to be derived from that map had been shewn to him to be based on no foundation, I feel sure he would have viewed the evidence of the Indians in a very different light. He correctly says that three of them "gave evidence that these houses were there for a period that would constitute 60 years' adverse possession," which if credited would really "conclude this case," but he does not regard their evidence as satisfactory because though they did not intend to deceive the Court yet

"Naturally they were very old people and could only fix dates by the Cariboo gold rush. They contradicted themselves—two of them at any rate, very materially, because they said those buildings were made of lumber and lumber from the mills here. They did not say they were from mills here, but it would be the only place where lumber could be obtained. It is possible that lumber might have been whipsawn, but I think no one would be justified in coming to the conclusion that one would whipsaw lumber to build houses in Stanley Park where cedar, which could be easily split, was available."

And then he proceeds to offset "as against" their evidence that of Turner's map, as follows:

"As against that I have the map and it seems to me that is evidence which, even if the onus were on the Crown, would conclude this case, on the point of 60 years possession. That map was made under instructions to shew any occupancy, by this man Turner, and he does shew the occupancy of Aunt Sally and shews no other."

In the first place it is to be observed that while it is true that the evidence of the Indians would be fixed by the first great gold rush when the white men came into their midst, yet that gold rush occurred in 1858, and not two and three years later, in 1860-1, which were the years of the gold rush to Cariboo, hundreds of miles away, and this point is of importance because it throws back the ages and memory of several witnesses at least two years earlier than it has apparently been regarded below, though it is quite sufficient, in my opinion, however regarded.

MARTIN, J.A.

A brief record, from official reports, of the first great rush of the gold miners to the Fraser River (about twelve miles south of the lands in question) is to be found in the preface to Vol. 1 of Martin's Mining Cases (1903), pp. v.-vi., "noting the great rush of 1858 to that region," which rapidly assumed such proportions that it led to the speedy establishment of the new colony of British Columbia (as distinguished from "the old

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

Colony of Vancouver Island") out of "certain wild and unoccupied territories on the North-West Coast of North America," commonly known by the designation of "New Caledonia," as the "Act to provide for the Government of British Columbia" (21-22 Vict.) constituting the new colony, and passed on the 2nd of August, 1858, declares. The first detachment of Royal Engineers, to cope with the new conditions caused by the rush, arrived early in October of that year, and the Governor and judge took their oaths of office at Fort Langley on 19th November, thus officially inaugurating the first government of the new colony. The graphic circumstances of this first rush to the Fraser River, from California chiefly, are well detailed in Howay and Scholefield's standard work, "British Columbia: Historical," Vol. 1, p. 582, and Vol. II., Cap. 1; at page 41 of Vol. II. a despatch of the Governor is cited stating that, in said month of November over ten thousand persons were engaged in mining between Murderer's Bar and Fort Yale, on said river. It would obviously be this first influx of white miners, and in particular the advent of the soldiers for the first time, to their vicinity and hunting grounds that would indelibly impress itself upon the memory of the aboriginies: rushes two and three years later far away on the upper reaches of the river would not affect them to nearly the same degree, if at all, and the failure to distinguish between the two historical events has led to confusion and indefiniteness in examining witnesses' evidence accurately and drawing conclusions, though the exact truth is to the advantage of the defendant when clearly understood.

MARTIN, J.A.

After a specially careful examination of the evidence of the Indian witnesses (and speaking in the light of a judicial experience with witnesses of all kinds throughout this Province of more than 26 years), I know of no good reason in general for placing the testimony of our native Indians at all on a lower plane than that of others, and in particular I perceive none in this case for doubting the substantial accuracy of their testimony in all essentials. Indeed, in some respects it is remarkably and beyond expectation precise, one of them, *e.g.*, Abraham, a patriarch of over 100 years of age (being older than the said Aunt Sally, an admitted centenarian), who was a "big man"

at the time of the first gold rush in 1858, and living on the Inlet (Burrard), actually saw these three Portuguese fishermen (as they were primarily) (Joe Silva, Peter Smith and Joe Fernandez) arriving at that time, and in the way he describes—in a boat with sails and paddles from New Westminster—and they immediately went to live in the park and put up four houses, which he saw them building; and another aged witness, Emma Gonzalves, born on the same Inlet, gives the name of the Indian, Shuwthchalton (father-in-law of Portuguese Pete Smith), who built the first house and cut the shakes (*i.e.*, large shingles and boards of varying sizes split by hand from clear cedar timber) out of which the houses or cabins of the newcomers were first constructed. I say "first" advisedly, because an important misconception has arisen about the original construction of these houses owing to some uncertainty caused by the evidence of two of the Indian witnesses, Abraham and Celestine (aged 77): The former, doubtless because of his great age, was obviously at the end wearied and confused by the ordeal of a public trial, and by his evidence having to be interpreted (to which the Court alluded) and to the way the questions were put to him on this head, which left much to be desired in clarity and exactitude.

The point taken by plaintiffs is that the first saw mill in that vicinity was not built till 1865 (at Moodyville) and therefore if the houses were built of sawn lumber they could not have been built before that date. But the obvious explanation was supplied by the evidence of the said Emma Gonzalves, who, through the interpreter, in answer to the Court said:

MARTIN, J.A.

"THE COURT: Did they use any lumber in them at all to make doors or was it all split cedar? Yes, that was all made from primitive material, and it was after that they used lumber from the mills.

"How long after the houses were built—was the mill here when the houses were first built? No, no mill here then.

"Mr. *McCrossan*: All the other witnesses said the shacks were built of mill material.

"THE COURT: Sawn lumber.

"Mr. *McCrossan*: Sawn lumber. I don't know anything like that.

"Might they be right and you be wrong? That is the way I seen them as I am telling you."

And:

"You see when these primitive boards became ancient they tore them

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA *v.* GONZALVES

down and built another house of mill lumber right on the very same place.

"When did they build it of mill lumber, how many years afterwards? It is about 50 years since the Hastings has been here.

"What I mean—you don't understand—what I want to know is, how many years after they first put up these three shacks did they change them and rebuild them with mill lumber? You see they have been about like this 50 years and I think these Indian-made boards were there about 10 years.

"About 10 years?

"Mr. *Long*: That is, the mill lumber has been there about 50 years.

"THE COURT: No, she says the mill has been here about 50 years and 10 years after the original building the lumber was substituted.

"The Witness: The mill lumber was there 50 years and 10 years before that it was primitive made boards."

To one at all familiar with the rude architecture of our pioneers it is quite apparent that what happened is that the houses were at first built entirely of the material available on the spot according to the custom of the country, *i.e.*, cedar shakes of various sizes for roof and sides, but while clear shakes form the best possible material for wooden roofing, being water-tight and almost indestructible when built with a high pitch according to custom, they are not nearly so well adapted, in the larger sizes, as "boards" or slabs for the sides owing to shrinkage and difficulty in joining and tight fitting, etc., and so after the mills were started and sawn lumber became available for that purpose the squatters and others made use of it more or less, which they could readily do without expense, because one witness explains

MARTIN, J.A.

how ships loading lumber at the mills would throw overboard, into the Inlet, all that did not come up to the exacting requirements of those days, when very fine clear lumber was abundant, and this free supply, at their door so to speak, the local inhabitants made use of. This method of construction and reconstruction explains why different witnesses formed different opinions as to the varying stages of construction of the houses at various times—one witness would notice the shake roof (high-pitched), more than the low rough board sides, or *vice versa,* and come away with a different mental impression of the same things, though they all might be largely right, because if a house is composed of a roof of shakes, which is equal to half of its construction, and the sides are boards, a loose description would be expected. Trimble, *e.g.,* evidently was thus honestly affected

by this aspect of the matter in trying to describe exactly the state of the houses on his second visit in 1873. What he saw, manifestly, was shakes or a combination of shakes and rough mill lumber which, in the course of years, had got so much alike that he, very naturally, could not recall the exact distinction. I quite agree with the learned trial judge in the inference he draws from local conditions and customs that the sawn lumber in question had not been whipsawn by hand, and hence I have been at some pains to give what is, in my opinion, the true explanation of a difficulty which has no real existence when this Court takes that cognizance which it ought to take, and has taken, of the manners and customs of people, be they of poor and lowly or rich and high estate—*Vide, e.g., Welsh* v. *Kracovsky* (1919), 27 B.C. 170, on the modern application of the law of distress to apartment-houses, and in the celebrated case upon the Indian title of *Johnson* v. *M'Intosh* (1823), 21 U.S. 543, the Supreme Court of the United States took cognizance of the "character and habits of the people" (Indians) in arriving at its decision.

The use of shakes alone or in combination with sawn boards or logs has, from the earliest times, been general in various forms all over this Province, and in combination with rough lumber may frequently be seen today in many localities not only on Indian reserves but in white habitations—there are, *e.g.*, numerous recent as well as old examples of it in the outskirts of Victoria, and across the said Inlet (North side) at the Narrows, and even on Heather Street in Vancouver, may be seen several examples, almost a little colony of them. It seems, if I may say so, somewhat strange that though a view was taken of the land in question, and not only that but a sitting of the Court held there to take certain evidence, yet no attention was, so far as we are advised, directed to this important feature, though I should be surprised if some examples of such construction could not be found in that place or vicinity, on the south side of the Inlet, as well as the north, and the more so because Joe Gonzalves, father of the defendant, who in July, 1874, obtained the house and clearing from Joe Silva, the original squatter, testifies that the old house, occupied by Silva, was of

MURPHY, J.
1923
Dec. 11.
COURT OF APPEAL
1924
Oct. 7.
ATTORNEY-GENERAL OF CANADA v. GONZALVES

split cedar, and looked 15 years old, and that he lived in it that winter and built a new house in the spring of 1875, and Peter Smith, son of Portuguese Pete Smith (who died in 1905), born on the adjoining parcel, says that he saw split shakes of an old house when he was a boy, and Mary DeKosta, a daughter of said Portuguese Pete, also born there, confirms her brother and says she remembers the old house of her father and that it was "made out of old split cedar." In the face of this positive evidence, I find it quite impossible to reach any other conclusion than that the houses were originally built of shakes in 1860 at the latest. Such a conclusion is entirely in accord with the history of the architecture of the primitive times, and in Judge Howay and Scholefield's History, already cited, many valuable historical views of old buildings, public and private, in the Colony are to be found, shewing this type of construction in various forms. I refer, *e.g.*, to Vol. II., pp. 53 (Fort Langley), 71 (Lytton), 76 (Yale), 111, 116, 118, 122, 135, 257, 258, 261 (Chief Justice NEEDHAM on circuit in Cariboo in 1867 in the celebrated "Grouse Creek War" case—*Canadian Company* v. *Grouse Creek Flume Co.* (1867), 1 M.M.C. 3), 266, 272 (Cariboo Court House and Judge's Residence at Richfield), 591 (Nanaimo), 554 (Port Simpson), etc. Thus the apparent difficulty caused by the later use of mill lumber becomes a simple matter to understand and presents no real difficulty when the notorious customs of the people at large are borne in mind, as they ought to be, that justice may be done to all.

MARTIN, J.A.

The Indian witnesses, however, are far from lacking support from white witnesses in their account of the houses being built long before the first mill was built in 1865. Even DeBeck, called by the plaintiffs, admits that he saw two houses there in 1868, and that they "were old looking shacks" at that time, though Taffendale (a very unsatisfactory witness), also for the plaintiffs, saw only one in 1869. For the defence Fisher, in May, 1867, saw three shacks there which he describes as follows:

> "Now, taking those three shacks—those places that were occupied by those three men, from your recollection what did they look like? How old did the shacks look at that time? Well, I will tell you, I think by the look of those there shacks they must have been there five or six years, because they were all weather-beaten and the wharves looked as if they had been put up for some time, that they had there."

And Fisher had good reason to know the date, because he and some others buried a man there (near the Time Gun, Exhibit 7) who had dropped dead at Hastings Mill, while Fisher was awaiting the arrival of a ship to load lumber.

Then there is the evidence of Trimble, which, if credited, is of much consequence because he says he saw three houses at the *locus* on the 23rd of December, 1862, when he was returning to Victoria from Cariboo by Burrard Inlet, having walked over from New Westminster to what was afterwards Gastown, now, Vancouver, because the ice on the Fraser River prevented the steamer from reaching that customary port to and from Victoria. He says that in going out of the harbour from the south shore the steamer, the "Wilson G. Hunt," passed so near Deadman's Island and Brockton Point that he could see the houses, and there is no reason why he could not, as the distance is short and from the height of a steamer's deck there would be a clear view, and the steamer would doubtless be then proceeding slowly and taking the old customary channel inside Burnaby Shoal before the official change in navigation to the outside thereof was made in consequence of the "Clallam" disaster and the decision in *Bryce* v. *Canadian Pacific Ry. Co.* (1907), 13 B.C. 96; (1909), 15 B.C. 510; 13 Ex. C.R. 394. Any observant man would be likely to take note of the only habitations in a hitherto wild locality that he saw on that side of the Inlet, which must have come as a surprise to him, and I have no doubt, after carefully considering the evidence, though it is a little obscure at the beginning, that the year was '62 and not '63, as suggested during the argument: '62 was accepted at the trial both by judge and counsel as being the year he was speaking of—the only real uncertainty is as to when he went up country, not when he came "out" for Christmas, after exceptionally cold weather had set in. No reasonable doubt can exist as to the accuracy of his general observation upon that occasion, because he verified it eleven years later when he revisited the Inlet and went to the new settlement at Gastown and over to visit the same houses on Brockton Point on Dominion Day, 1873, that he saw there in '62, and gave further particulars about them and clearings, etc., which I see no reason for disbelieving in substance: his evi-

MARTIN, J.A.

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA *v.* GONZALVES

dence as a whole, despite certain minor discrepancies and failings, is as strong as could be expected having regard to his age and the lapse of time, as to which the language of the Privy Council in *Hordern* v. *Hordern* (1910), A.C. 465, is instructive, their Lordships saying, p. 470, about the evidence of witnesses as to a transaction of 23 years before:

"They gave what was manifestly the best account they could give after the lapse of so many years of what actually took place."

I shall not attempt to review in detail the evidence as to the actual extent of the clearing and fencing made by Joe Silva when he first took possession, and it would be impossible to do so because of the fact that since the survey of 1886 and the cutting of the said preliminary trail in 1887 and the subsequent construction of the main road upon that location the defendant has accepted that road as his northern boundary, which is one of the very unusual features of this case before mentioned, thus defining both the northern and southern limits of occupation by said road and the sea-shore, which at the western boundary of the defendant's claim is only a distance of about 100 feet from the road to high-water mark, as the scale on plaintiffs' Exhibit 7 shews. Gonzalves, it is to be noted, moved his fence back in 1886, to where it is now, at the time the surveyors came there to locate the road preceding the cutting of the trail, and Peter Smith's fences were moved back also.

MARTIN, J.A.

The second unusual feature is the very small extent of the area claimed by the respective squatters, the present defendants, being only a little more than one-third of an acre, which moderation in the claim is not only in itself commendable but is an evidence of good faith, and once it has been established that Silva did build a house there before April, 1863, it becomes, from the nature of the case, almost impossible to restrict his claim to smaller limits from the beginning, apart from Gonzalves's undoubted fencing 49 years ago: Silva must, at least, have had a well some distance from salt water and some sort of clearing and underbrush about his house, and the usual outbuildings, and not only that, but as a matter of safety and self-preservation he must have cut down the "very tall trees" (which means anything from 200 to 300 feet high in that vicinity)

near his house, because once the forest was cut into and its natural state altered, opening it to the wind, he literally lived in the shadow of death unless he cut down the tall trees that probably would fall on his house, and that he did so is not only that reasonable expectation of a "course of conduct" which *Kirby* v. *Cowderoy, supra,* says the Court should act on, but a matter of fact, because Gonzalves testifies to the prior clearing away of "all the tall timber," as he saw when he took possession as aforesaid in 1874. And it is to be noted by applying a scale to said Exhibit 7, that not one of the various parcels has a greater depth than 140 feet from the road to high-water mark; in other words, much less than the height of a very tall, or, even moderately tall, fir or cedar tree, thus establishing a clearing *ex necessitate.* I draw attention to this fact of the very small extent of these holdings because the learned judge refers to them as "extensive": the reason why they were so small is because the squatters were not tillers of the soil who required an extensive area, but fishermen, primarily, who derived their living from the sea in various ways.

The third unusual feature is that this clearing was originally, and indeed, barring the said road, still is, simply nothing more, relatively, than a small niche, so to speak, chopped into a primeval forest, which at the time and for many years after, till 1887, had no communication other than by water with civilization, and hence there would be little reason, in the earlier years at least, for erecting fences or taking other steps to define possession against trespassers or adverse claimants, but simply some sort of rough definition of their claims as between the squatters themselves. And when the fence was set back in 1886, and re-erected where it now unquestionably stands, along the south side of the present road, that established the boundary and made certain and definite since 49 years past, that which may have been uncertain and indefinite theretofore. The Ontario cases shew that even in the case of the occupation of surveyed wood lots, fencing is not essential as against private owners—*Cf. Heyland* v. *Scott* (1869), 19 U.C.C.P. 165 at p. 169; *Davis* v. *Henderson* (1869), 29 U.C.Q.B. 344; *Kay* v. *Wilson* (1877), 2 A.R. 133; and *Piper* v. *Stevenson* (1913),

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

MARTIN, J.A.

28 O.L.R. 379; not one of the many cases that have been cited to us resembles the present in this important respect, and hence the principles hereinbefore quoted governing possession "with reference to the peculiar circumstances" of the case have special force. And in approaching the consideration of this matter, I do so in the spirit set out for our guidance by the Supreme Court of our country, out of its wide knowledge of the conditions thereof, in the case of *Hamilton* v. *The King, supra,* one relating to a squatter's occupation of Ordnance lands in the City of Ottawa, wherein the Chief Justice, at pp. 339-40, said:

"The Crown permitted the defendants or their predecessors in title to remain in undisturbed possession for fifty-eight years before taking action in 1890 and took no steps to enforce the judgment then obtained during the ensuing twenty-four years. During this long lapse of time all parties concerned have died. The form of government of the country has been repeatedly changed, and the then newly founded and insignificant By-town has become a great city, the capital of the Dominion of Canada. Under these circumstances, I think the Courts need not hesitate to require the strictest proof of a claim to oust the defendants. Failing this, I think substantial as well as legal justice will have been done by leaving them undisturbed in the possession which they have so long held.

"This is a case in which we may recall what the Privy Council has said concerning the difference in the relation between the Crown and the subject in this and in older settled countries. Such long periods of time as those prescribed in the 'Nullum Tempus Act' seem to consort more with the slowly altering conditions in the latter, than with those in a country which has witnessed such phenomenal changes as Canada during the past century. Without encroaching on the functions of the Legislature we may endeavour to mitigate the hardships of a rigorous enforcement of rules which change of time and place render oppressive."

And in *Tweedie* v. *The King, supra,* Mr. Justice Anglin said, p. 219:

"From a continuous user of upwards of forty years (such as has been actually proved in this case) an earlier like user may readily be inferred. *Chad* v. *Tilsed* (1821), 2 Br. & B. 403 at p. 408."

And at pp. 220-1:

"The evidence adduced by the defendant in support of his possession is as satisfactory as could reasonably be expected, having regard to all the circumstances, and it should, in my opinion, be held that he has established title to the foreshore in question."

These observations are particularly appropriate to the present case, because the title set up by the defendant begins with an impregnable possession of 49 years, and goes back to the very beginnings of law and order in the old colony of British

Columbia, to its birth in fact, and whatever view the Courts may have taken as regards the encroachments of squatters upon private property or mere speculative squatters upon the public domain, in Western Canada at least, neither under the Hudson's Bay Company nor under the Crown direct, has the squatter as a settler upon public lands in the pioneer days of occupation been looked upon with disfavour, but on the contrary he has been favourably regarded by the powers that be as a settler who was assisting in the building up of the country though in an irregular manner at the start. The instructive history of the extensive and benevolent recognition of squatters' claims in Rupert's Land and the North-West Territories is set out in Martin's Hudson's Bay Company's Land Tenures (1898), pp. 65-9, 103-6, and I see no reason why the Crown or the Courts in this Province should regard these ancient pioneers of Stanley Park in a less favourable light than similar pioneers have been regarded in other parts of Canada. The long and conspicuous occupation by this defendant since the trail was cut through Stanley Park, of a piece of property fronting on what is the principal scenic road in the Canadian Pacific (over which innumerable persons have travelled, including myself, many scores of times) has been so public and notorious that it is difficult to believe it was contrary to the wishes of the Government.

Upon the consideration of all the evidence in the case I can only reach the conclusion that the defendant has established his said defence, wherever the onus of proof may rest, and therefore I would allow the appeal and dismiss the action.

McPHILLIPS, J.A.: This appeal has relation to the title to a very small area (0.354 acres) of land out of that very large area of land known as Stanley Park in the City of Vancouver. The title shewn is that originally the Crown (Imperial) was the owner owing to the area being set apart in Colonial times as a military reserve (1858) and transferred by the effect of Imperial Despatch (1884) to the Crown (Dominion). The City of Vancouver was authorized by the Crown Dominion by order in council (8th June, 1887) to use the military reserve

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

as a park. Later this order in council was cancelled and by order in council of the 31st of August, 1906, a lease was authorized of the military reserve, *i.e.*, Stanley Park, for 99 years (renewable) to certain commissioners appointed by the Governor in council and the City Council (Vancouver); this was followed by an order in council of the 13th of August, 1908, wherein the order in council of the 31st of August, 1906, was amended to provide for the leasing to the City of Vancouver of Stanley Park instead of to six commissioners. A lease followed in due course under date the 1st of November, 1908, for 99 years renewable perpetually to the City of Vancouver of Stanley Park, with power in the minister of militia and defence to resume possession of any portion of the park for any military purpose whenever required in his judgment, there being the further right to re-enter on breach of any of the covenants contained in the lease.

The action is one for the possession of land, and its commencement naturally imports that the defendant is in possession of the land claimed by the plaintiffs the 0.354 acres.

It must be admitted that in accordance with English law title to land is founded on possession, and that being the case it is all-important to scan the evidence carefully and give it its proper weight, bearing well in mind the existent conditions, the early settlement before and at or about the time of the Cariboo gold rush in 1858 (Bract. fo. 284a, 435b; Litt. s. 170; 3 Black. Comm. 180, 195; Holmes on the Common Law, pp. 244-246; P. & M. Hist. Eng. Law, ii. 46, 79).

MCPHILLIPS, J.A.

It must be conceded that the defendant, who is acknowledged to be in possession of the land, is entitled to remain in possession thereof against all except those who can shew a better title, and can prove that they or their predecessors had earlier possession of which they were wrongfully deprived (Bract. fo. b, 31a, 52a, 434b, 435a; *Doe d. Hughes* v. *Dyeball* (1829), M. & M. 346; *Doe dem. Smith and Payne* v. *Webber* (1834), 1 A. & E. 119; *Asher* v. *Whitlock* (1865), L.R. 1 Q.B. 1; *Perry* v. *Clissold* (1907), A.C. 73).

The evidence is absolutely silent upon the point of the plaintiffs having been at any time wrongly deprived of posses-

sion. It is admitted law that those who sue for the recovery of land of which another is in possession must recover on the strength of their own title and cannot found their claim on the weakness of the possessor's title (*Roe d. Haldane* v. *Harvey* (1769), 4 Burr. 2484, 2487; Cole on Ejectment, 287; *Danford* v. *McAnulty* (1883), 8 App. Cas. 456, 462). The defendant being in possession gives a good title as against all but rightful owners, whose claim though, as we have seen, must be founded on prior possession, but it must also be remembered that possession continually tends to bar the rights of all who even have such prior title (*Leach* v. *Jay* (1878), 9 Ch. D. 42 at p. 44). Here, as I have said, there is the entire absence of there having been earlier possession in either of the plaintiffs to the possession of the defendant; in truth, it would not appear that it would be possible to make out any earlier possession. Then, proceeding to another view of the matter, even if it were admitted that the Crown (Imperial) up to 1884 and the Crown (Dominion) from that time onwards could be said to be rightfully entitled to the land and no steps were taken to assert those rights within the period prescribed by statute, their remedies would be barred and their title extinguished (Stat. 3 & 4 Will. IV., c. 27, s. 34 (Imperial); Statute of Limitations, R.S.B.C. 1911, Cap. 145, Secs. 41, 49).

Therefore, if it can rightly be said that the defendant has shewn possession of the land for the prescribed period, and here that must be 60 years as against the Crown, that possession will give a good title thereto as against all the world (*Agency Company* v. *Short* (1888), 13 App. Cas. 793).

Notwithstanding, and with great respect to the judgment of the learned trial judge, I am clearly of the opinion that ample evidence was led and adduced at the trial upon which it can reasonably be found that title was acquired by the defendant to the land in question by continued possession adverse to and in derogation of that of the Crown. There being no express extinguishment of the Indian title in British Columbia, the question whether there was earlier possession in the Crown than that of the defendant and those under whom he is entitled to claim possession, is brought up somewhat graphically, and it

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

might reasonably be said that there could be no prior possession in the Crown to the possession shewn by the defendant. In any case, the evidence is ample in its terms to shew that there was adverse occupation of the land in question for the full period of 60 years and more, and there was that continuity of possession entitling the defendant to insist upon and to be admitted to be the owner of the land, the Crown being barred and the title in the Crown in the land (0.354 acres) extinguished. I would refer to the reasons for judgment of the learned trial judge, and in particular the following excerpt therefrom: [The learned judge quoted from the beginning of the second paragraph of the judgment of MURPHY, J., *ante* p. 362, down to the word "possession" in the sixth line on p. 364 and continued].

With great respect, I cannot agree with the learned trial judge's view as to the evidence of the witness Trimble, and the evidence of the Indian witnesses. It cannot be said that there is no evidence to establish title by prescription in the defendant; on the contrary, I am of the opinion, considering all the surrounding circumstances and the necessary period of time that had to be covered, namely, 60 years, that the evidence led and adduced at the trial upon the part of defendant forms a reasonable basis upon which it can be said there has been 60 years of adverse possession against the Crown. It is to be remembered that although the Crown is shewn to be the registered owner with an indefeasible title of the whole of Stanley Park, yet that title is no guarantee against any adverse possession (see Land Registry Act, B.C. Stats. 1921, Cap. 26, Sec. 37(1) (*j*), (2)).

MCPHILLIPS, J.A.

Here the *onus probandi* was on the Crown to make out its title, *i.e.*, the affirmative side of the question (see Phipson on Evidence, Chap. 4). A fact being asserted that fact has to be proved to enable success in the action. It was not necessary for the defendant here alleging the negative, to prove it in first instance. The affirmative in substance was upon the Crown, as admittedly the defendant was and is in the actual possession of the land, and, as we have seen, the person who is in possession of land has a title to the land which is good against all except

those who can shew a better title; that is, can prove that they or their predecessors had earlier possession of which they were wrongfully deprived. Now in the present case, if no evidence was offered, who would be unsuccessful in the action? In my opinion the plaintiffs would be, therefore the plaintiffs had to make out their case (*Amos* v. *Hughes* (1835), 1 M. & Rob. 464; Bract. Fo. 30b, 31; Cole on Ejectment, 287; Williams on Seisin, 7; Holmes on the Common Law, 244; P. & M. Hist. Eng. Law, 22, 40 *sq.*). Then even if prior title were shewn, that is not enough where there is adverse possession, as that possession may have been of such duration, *i.e.,* the period prescribed by statute that would result in barring and extinguishing the title, and that is the necessary inquiry in the present case. The fact that the Crown has shewn a registered indefeasible title, as we have seen, in no way establishes title to the land in question as against title by possession, and in so far as the present action is one for trespass the Crown is not entitled to have it assumed that the Crown is or ever was in possession of the land, *i.e.,* the Crown will not be deemed to be in possession for the purpose of maintaining an action of trespass which is founded on disturbance of the actual possession of the land (Gilb. Uses, 81 (185, 3rd Ed.); 2 Fonb. Eq., 12; *Harrison* v. *Blackburn* (1864), 17 C.B. (N.S.) 678. See *Anon.,* Cro. Eliz. 46; *Heelis* v. *Blain* (1864), 18 C.B. (N.S.) 90; *Hadfield's Case* (1873), L.R. 8 C.P. 306).

MCPHILLIPS, J.A.

By an Act of Geo. III. (Stat. 9 Geo. III., c. 16) the rights of the Crown in all lands and hereditaments are barred after the lapse of 60 years, and that statute law is in force in British Columbia by virtue of the Laws Declaratory Act (Cap. 133, R.S.B.C. 1911).

Now, as to the triangulation survey of the shore-line called the Turner survey, carried along the foreshore where the land in question is situate, I cannot give the weight to it that the learned trial judge has. Further, it is admitted that there would be a space of time of two or three months after the survey when the buildings said to be on the land could have been built, and there still would be the lapse of 60 years to accomplish title to the land by prescription.

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

The witness Fisher's evidence is valuable in that in 1867, fifty-six years before this action was commenced, buildings were upon the lands claimed by the defendant in this action, and the lands claimed in the three other actions, *viz.*, against Peter Smith, Mary DeKosta and Edward Long. The evidence of Fisher is in the clearest terms, and in 1867 the buildings in their appearance indicated that they had been up five or six years. I place little or no stress upon whether the buildings have been said to have been built of lumber, as there is no conclusive evidence that sawn lumber was not obtainable in 1863 or before; the fact that there were no mills then in the neighbourhood does not conclude the question, the lumber could have come from some other point. Further, there is some evidence that split cedar might have been taken for sawn lumber, and there is evidence that about ten years after the buildings were first erected the buildings were renewed or repaired with lumber which was then obtainable from local mills.

Abraham's evidence is clear enough to indicate that the claimed occupation and possession was at the time of the gold rush to Cariboo in 1858, which would give possession for more than the period of 60 years, and he (Abraham) says that there were at that time three or four houses at the point in question, upon the land here in question and in question in the other three actions, and other witnesses give evidence to the like effect.

MCPHILLIPS, J.A.

I will refer shortly to some of the points in Abraham's evidence. The witness is clear upon it that there were four houses upon the lands in question at the time of the Cariboo gold rush.

"And were those houses there at the time of the gold rush in Cariboo? Yes."

"A row of houses? Yes.

"Mr. *Long*: Ask him [the questions were put through an interpreter] if he remembers Peter Smith—old Peter Smith? Yes, he knows him.

"Ask him if he lived there at the time of the Cariboo gold rush? Yes."

"THE COURT: He [Abraham] may be misunderstanding you there; he told us yesterday there were four houses down here in which other than Indians were living."

"THE COURT: Ask him that.

"Mr. *McCrossan*: Were there any Portuguese living on the Inlet at that time [Cariboo gold rush]? That is where they lived."

Emma Gonzalves dealing with the lumber put into the houses said:

"There was an Indian man that would split the cedar logs for them and they used that to build their houses."

And further said:

"You see when these primitive boards became ancient they tore them down and built another house of mill lumber right on the very same place." "The mill lumber was there 50 years and ten years before that it was primitive made boards."

Trimble's evidence, in my opinion, is very complete and establishes the 60 years' possession. His evidence shews that the houses existed in 1862, three in all, the house of the defendant being one of them. Trimble was later on the ground in 1873 and saw the houses he spoke of seeing from the water in 1862, and he said the houses "looked as if they might be 10 or 12 years old, three in number," and he also spoke of fences, and speaking of the material in the houses said:

"They were all built out of split cedar that I could see. I didn't go near the other ones at all." "There is not much difference between sawn lumber and split." "As far as I can say they were built out of split cedar." "The whole three? Yes."

Trimble fixes the time he first saw the three houses as being on the 23rd of December, 1862, and that establishes that the buildings were existent more than 60 years before action.

Then there is the significant fact that when the roadway was made around the park in 1889, the defendant and the others in the immediate neighbourhood in adverse possession to the Crown, and the City of Vancouver, were not proceeded against as trespassers, all that took place was the moving back (towards the sea) of the fences. This roadway was built by the City of Vancouver and is still maintained by the City of Vancouver. It is clear that there has been 34 years of adverse possession as against the City of Vancouver of the land in question, therefore it would not appear that the City of Vancouver itself has any position enabling it to dispute the title of the defendant, as but 20 years are necessary to give title by prescription against the City of Vancouver. The Crown, however, is joined in the action, and the City of Vancouver attempts through the Crown to displace the title of the defendant.

I will later deal with the question as to whether the Crown is entitled to bring an action of this kind, having dispossessed itself of possession of Stanley Park to the City of Vancouver, and having executed a lease thereof to the City of Vancouver.

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

To now deal with the reasons for judgment of the learned trial judge and the value by him attributed to the testimony of the Indian witnesses, the learned judge said:

"Three Indians give evidence that these houses were there for a period that would constitute 60 years' adverse possession."

The evidence is not confined to the testimony of the Indians alone, there is notably the very informative evidence of Trimble, a very observant man, whose testimony is entitled to the highest weight. Further, with great respect, I differ entirely with the learned judge's view wherein he stated that the Indian evidence is unsatisfactory in its nature. To my mind it is conclusive. It must be remembered that it had to be given through interpreters, the salient and material facts are clearly sworn to, there was the occupation and continuity thereof establishing adverse possession for 60 years, no break whatever in the possession, and I do not see that the cross-examination of these very old witnesses in any way shook the undoubted value of this testimony so clearly given by the Indians. It will not do to say that the houses were built of sawn lumber when the positive testimony is to the contrary, and well maintained, but even on this point some sawn lumber might have been used, manufactured elsewhere than in Burrard Inlet. However, upon a careful reading of the evidence as a whole, I am satisfied that the houses were constructed and in occupation well within the 60-year period, and Trimble's evidence is corroborative of this fact, also corroborative of the material used in their construction. In cases of this character it must be expected that there will be seeming variances or inaccuracies in the testimony of aged witnesses, but I am satisfied that the testimony is ample and sufficient to bear out the claim of adverse possession for the requisite 60-year period. It is, indeed, a notorious fact, gleaned from all the evidence, that there was unbroken settlement and occupation of the areas in question throughout the whole period of time. The occupation once established at a time which would admit of a prescriptive title being claimed, with continuity of possession, the onus of displacement thereof unquestionably has not been discharged.

MCPHILLIPS, J.A.

I cannot place any weight upon the triangulation survey and

no occupation being shewn thereon, firstly, because in law I do not consider it admissible evidence. I will later refer to some of the authorities upon the point. Secondly, as before pointed out there was a period of time after the survey was made which would have admitted of the building of the houses and the claimed occupation (some three months of time), quite sufficient to construct the houses out of the material at hand, *viz.*, split cedar. That circumstance alone, even if the map could be said to be legal evidence, destroys its efficacy and renders it valueless as to the material point in issue in this action.

With great respect, I cannot follow the learned trial judge's observation when he says:

> "If there were any such extensive clearing as would justify the Court in deciding that these people own this extensive piece of land as shewn by the map, it would be a physical impossibility for a surveyor such as Turner, not to see it."

As we have seen, the occupation and construction of the houses could have been later in time to that of the Turner survey, *i.e.*, triangulation survey on the water front. Further, the area of land in question cannot be said to be extensive, as in this action all that is claimed is an area of 0.354 acres, a very small parcel indeed, and at the time of the survey the area was primeval forest, and occupation might pass unnoticed by a surveyor directing his attention primarily to the coast line. It is not essential at all to establish prescriptive title to prove fences, clearing and cultivation, and I cannot agree with the learned trial judge's conclusions as to this phase of the matter. Further, there is no requirement to establish precise metes and bounds (*Davis* v. *Henderson* (1869), 29 U.C.Q.B. 344 at p. 355). In any case no difficulty whatever arises in the present case, as the occupation and situation of the houses is clearly established by the testimony given and well brought home to the City of Vancouver when the fences were moved back, that is towards the sea, to admit of the road being constructed, which is today the western boundary of the land in question, and that road was built by the City of Vancouver in 1889, and the City of Vancouver removed the fences and reconstructed them, so it is apparent that there can be no difficulty in delineating the area, as the land in occupation at that time was the same land held

MURPHY, J.

1923

Dec. 11.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. GONZALVES

in adverse possession throughout the whole 60-year period. (Also see *Kay* v. *Wilson* (1877), 2 A.R. 133 at p. 144; *Piper* v. *Stevenson* (1913), 28 O.L.R. 379 at p. 387).

Now as to the admission of the Turner field notes, and map, under which it is claimed that occupation and adverse possession at the time thereof is displaced, and which the learned trial judge gave so much weight to, we have Lord Dunedin dealing with this evidence at pp. 557, 558, in *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1906), A.C. 552. He there said:

"First, there is the marking in Corporal Turner's field notes. Corporal Turner was under Colonel Moody, and was engaged in 1861-63 to survey the coast line at this place. Corporal Turner is still alive, and was examined, and he produced the field notes he made at the time. On these field notes Stanley Park is marked as 'military reserve.' Their Lordships must here remark that they think an entirely erroneous view of this evidence was pressed on the trial judge in argument and accepted by him. It being admitted that Corporal Turner had no power to make a reserve, it was contended that such evidence was secondary and inadmissible. This seems a misapprehension. The evidence is not evidence of the actual marking of the reserve; but it is perfectly good *valeat quantum* as serving to refresh Corporal Turner's recollection, and as shewing that a man then on the spot put down military reserve as the then existing designation of the land in question."

MCPHILLIPS, J.A.

It is, therefore, apparent that the field notes and map would not be evidence to establish the facts but useful to refresh the memory of a witness. In this case there is no evidence from Corporal Turner available, and, with great respect, in my opinion the learned judge erred in considering and giving effect to this insufficient evidence (*Bidder* v. *Bridges* (1885), 54 L.T. 529; *Mercer* v. *Denne* (1904), 2 Ch. 534 at p. 544; (1905), 2 Ch. 538 at pp. 563, 568).

Then as to the weight to be attached to the learned trial judge's opinion when he passes over and does not give effect to the Indian testimony, I would refer to what Collins, M.R. said in *In re Moulton—Grahame* v. *Moulton* (1906), 22 T.L.R. 380 at p. 384:

"On the other hand, the learned judge has reflected unfavourably on the evidence of the plaintiffs . . . . . We are aware of the great weight properly attributable to the opinion of the judge who has heard and seen the witnesses; but an appeal is a rehearing, and we cannot avoid the responsibility of forming a judgment on the matter for ourselves. . . . ."

After full review of the evidence, in the exercise of the responsibility that rests upon me in this appeal, I have no hesitation in stating that it has been sufficiently established that the houses were built and were in occupation, constituting adverse possession for the full period of 60 years as against the Crown, and there has been that continuous possession called for: see Gwynne, J., in *McConaghy* v. *Denmark* (1880), 4 S.C.R. 609 at pp. 632-3:

"Visible occupation by some person or persons (it matters not, whether in privity with each other in succession or not) to the exclusion of the true owners. . . . ."

Even were I in error as to the 60 years of adverse possession this action could not succeed, as it is beyond question that the 20 years only which is necessary to be established in this are made out, *i.e.*, adverse possession of 20 years against the City of Vancouver (Statute of Limitations, R.S.B.C. 1911, Cap. 145, Sec. 16), the Crown having demised the land to the City of Vancouver in 1887. In *O'Connor* v. *Foley* (1905), 1 I.R. 1 at p. 19, the Master of the Rolls said:

"That the statute [Statute of Limitations] should confer a title as against any other claimant to the leasehold interest is plain enough."

I am not deciding that, upon the cessation of the term, the Crown might not have the right, if so advised, to dispute title, if it is not finally maintained in this action that the title in the Crown has been displaced. (Also see *O'Connor* v. *Foley* (1906), 1 I.R. 20 at pp. 25, 26, 38, 39). It was held in *Ecclesiastical Commissioners for England* v. *Treemer* (1893), 1 Ch. 166, that:

MCPHILLIPS, J.A.

"A lease passing an estate . . . . prevents the grantor, and those claiming under him, from seeking to recover the lands till that lease had expired,"

and see Chitty, J., at pp. 170, 175 (*Walter* v. *Yalden* (1902), 2 K.B. 304).

In my view the whole case, therefore, resolves itself into this: title has been effectively proved by adverse possession for the 60-year period against the Crown; if, though, I should be in error in this, then assuredly title has been effectively proved by adverse possession for 20 years against the City of Vancouver, and during the continuance of the term of the demise by the Crown to the City of Vancouver, the Crown cannot take steps

MURPHY, J.
1923
Dec. 11.
COURT OF APPEAL
1924
Oct. 7.
ATTORNEY-GENERAL OF CANADA v. GONZALVES

to dispossess the defendant. In *Glenwood Lumber Company* v. *Phillips* (1904), A.C. 405 at p. 408, Lord Davey said:

"If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

And that is the situation in this case, the City of Vancouver so holds the land.

Upon the whole case I am of the opinion that the appeal should be allowed.

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

Solicitors for appellant: *McQuarrie & Cassady.*
Solicitor for respondents: *J. B. Williams.*

MCDONALD, J. (At Chambers)
1924
Nov. 8.
IN RE FOX AND THE CONSOLIDATED MINING AND SMELTING CO.

IN RE FOX AND THE CONSOLIDATED MINING AND SMELTING COMPANY OF CANADA, LIMITED.

Arbitration—Award—Application to send back—Ground that less allowed than to others in same position—Evidence—Arbitrator's affidavit—Examination upon.

Unless there is a mistake in law or fact evident on the face of an award or the arbitrator admits that he has made a mistake in law or fact or unless there has been fraud or corruption it will not be referred back to the arbitrator for reconsideration.

An arbitrator having made an award as to damages to claimant's lands through smoke from the defendant Company's smelter the claimant applied for an order that it be referred back on the ground that the arbitrator allowed a much larger sum to another claimant whose lands surrounded one of the present claimant's parcels of land.

Held, that this is not a ground that comes within the rule as many circumstances may be considered by the arbitrator such as, quality of land, its state of cultivation and fertility, and the application should be dismissed.

On an application that an award be sent back for rehearing by the arbitrator a question arose as to whether all the claimant's land (which consisted of two parcels) was taken into consideration by the arbitrator and an affidavit was obtained from the arbitrator in which he stated that both parcels of land were considered by him in making his award. An application by the claimant to examine the arbitrator on his affidavit was refused.

MCDONALD, J. (At Chambers)

1924

Nov. 8.

IN RE FOX AND THE CONSOLIDATED MINING AND SMELTING CO.

APPLICATION for an order that an award made by an arbitrator (FORIN, Co. J.) be referred back to the arbitrator for reconsideration upon the ground that there is a defect apparent on the face of the award, and that the same is bad for uncertainty and does not deal with all the property of the claimant. The facts are set out fully in the reasons for judgment. Heard by MCDONALD, J. at Chambers in Vancouver on the 4th of November, 1924.

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

8th November, 1924.

MCDONALD, J.: This is an application for an order that the award made by FORIN, Co. J. herein be referred back to the arbitrator for his reconsideration, upon the ground that there is a defect apparent on the face of the award, and "that the same is bad for uncertainty and does not deal with all the property" of the said Robert W. Fox. When the matter first came up for hearing, it was suggested that inasmuch as the claimant owned two pieces of land which, it was alleged, had been injured by smoke from defendant Company's smelter, one containing five acres, the other 36 acres, the arbitrator, in view of the small amount awarded, must have overlooked one of these parcels. I suggested that an affidavit might be obtained from the arbitrator to settle this question, and Mr. *Davis,* counsel for the Company, although not conceding that there was any right to require such an affidavit, yet thought that in the interests of justice he ought not to object. An affidavit has now been obtained from the learned arbitrator, and he states that he did consider both parcels of the claimant's land. The claimant's counsel now seeks to cross-examine the learned arbitrator upon that affidavit. Inasmuch as such an examination must be confined to the question of whether or not the affidavit is true in substance, I think no such cross-examination ought to be allowed. The arbitrator states that he did consider both parcels, and I think that is an end of the matter.

Judgment

The further ground is taken that as the arbitrator allowed a large sum of money to another claimant, Endersby, whose

MCDONALD, J. (At Chambers)

1924

Nov. 8.

IN RE FOX AND THE CONSOLIDATED MINING AND SMELTING CO.

lands surround one of the claimant's parcels, and only a small sum to the claimant, it is evident on the face of the award itself that the arbitrator must have made a mistake. Reliance was placed upon *Recher & Co.* v. *North British and Mercantile Insurance Company* (1915), 3 K.B. 277; *Mills* v. *The Master &c. of Society of Bowyers* (1856), 3 K. & J. 66 and *In re Dare Valley Railway Co.* (1868), L.R. 6 Eq. 429, as shewing that in a case like the present the award ought to be referred back. It seems to me that these cases do not apply. The facts are different in every case and in not any of them is there any suggestion made that the old rule referred to in *Dinn* v. *Blake* (1875), L.R. 10 C.P. 388 does not still prevail. That rule I understand to be that unless there is a mistake in law or fact evident on the face of the award itself or unless the arbitrator admits that he has made a mistake in law or fact or unless there has been fraud or corruption, or something of that nature, the award will not be referred back. In my opinion, it is not open to the claimant to contend that because the amount awarded to him was smaller in relation to the quantity of his land than the amount awarded to another claimant there is, therefore, a defect evident on the face of the award. Many circumstances may have been properly taken into consideration by the arbitrator of which we know nothing, as for instance, the quality of the land, its state of cultivation, fertility and the like. The application is accordingly dismissed with costs.

Judgment

Application dismissed.

MORRISON, J.

1924

Dec. 9.

CAULFIELD v. ARNOLD.

Solicitor and client—Retainer—Instructions to recover damages for injuries —Agreement that solicitor retain percentage of amount recovered— Damages recovered and solicitor paid as agreed—Action to recover.

CAULFIELD v. ARNOLD

The plaintiff gave the defendant a retainer which under her instructions was largely expended in trying to locate W. who in consequence of his having assaulted the plaintiff left the jurisdiction. Later the plaintiff and defendant entered into a written agreement whereby the plaintiff retained the defendant as her solicitor in all proceedings relative to W. and agreed to pay him 15 per cent. of the amount collected for the injuries sustained by her from W. up to the sum of $100,000 and 50 per cent. of any sum over that amount. W. returned to the juris-

diction and without action paid $100,000 in settlement of the plaintiff's claim. The defendant then received $15,000 pursuant to the agreement. In an action to recover back the $15,000:—

Held, that the money was not paid over under any mistake of fact or of law and that even if it had been paid under a mistake of law it could not be recovered back.

Held, further, that the ground of champerty is not available to the plaintiff in the circumstances of this case.

Taylor v. *Mackintosh* (1924), 33 B.C. 383 distinguished.

ACTION to recover certain moneys paid the defendant as a solicitor under an alleged champertous agreement. The facts are set out in the reasons for judgment. Tried by MORRISON, J. at Vancouver on the 26th of November, 1924.

Statement

J. A. Russell (*Nicholson,* with him), for plaintiff, referred to *Taylor* v. *Mackintosh* (1924), 33 B.C. 383.

Maitland (*Remnant,* with him), for defendant, referred to *Collins* v. *Blantern* (1767), 2 Wils. K.B. 341; 95 E.R. 847; *Smith* v. *Bromley* (1760), 2 Dougl. 696; 99 E.R. 441; Leake on Contracts, 7th Ed., 64.

Argument

9th December, 1924.

MORRISON, J.: The plaintiff describes herself in the record as being a "divorcee," but at the time of the matter complained of she had been twice through the form of a marriage ceremony and both men were surviving. The defendant is a solicitor of the Supreme Court of British Columbia.

The plaintiff, who was living apart from what I may call her lawful husband, Caulfield, had been living with another married man named Wood for some time and had received serious injuries at his hands, in respect of which she consulted the defendant, with whom previously she had had no acquaintance. A perfectly regular retainer was given the solicitor in March, 1923, which he expended largely in trying to locate Wood, who had in the meantime and in consequence of his assault on the plaintiff, left the jurisdiction. The defendant appears to have been giving sound advice to his client all along, as far as her material interests were concerned. The only complaint which apparently she had was his slowness in bringing Wood to time, and what she called the moderate amount which he considered the plaintiff could succeed in extracting from Wood if they found him, ranging from $50,000 to $75,000.

Judgment

MORRISON, J.

1924

Dec. 9.

CAULFIELD v. ARNOLD

She held out for $100,000 and there were negotiations to and fro between them and Wood's solicitor. Ultimately on the 10th of April, 1923, the following agreement was entered into between the parties:

"C. S. Arnold, Esq.,
"Barrister, etc.,
"Vancouver, B.C.

"Dear Sir:—I hereby retain you to act for me as my Solicitor in all proceedings, both civil and criminal, relative to Roland W. Wood, and hereby undertake and agree to pay to you Fifteen per cent. (15%) of the amount collected for the injuries sustained by me to the sum of $100,000, and Fifty per cent. (50%) of any sum over that amount.

"In consideration of your accepting this retainer, I undertake and agree that no settlement will be effected between the said Roland W. Wood and myself without your approval, and it is, of course, also understood that no settlement can be made by you with the said Roland W. Wood without obtaining my approval to the settlement thereof.

"Yours truly,
"E. C. BOYCE.
"C. S. ARNOLD."

Wood returned and paid the $100,000. The defendant received $15,000 pursuant to the agreement. Intimate illicit relations existed between the plaintiff and defendant practically during the whole period since the retainer until along in the spring of 1924, after which they separated and then this action was launched, for which there does not appear to me, from the evidence, to be any ground in fact or law. The money was not paid over under any mistake of fact or law nor under a mistake of any kind. If it had been paid under a mistake of law, broadly speaking, it need not be paid back. The ground of champerty is not available to the plaintiff in the circumstances of this case. It is immaterial for a determination of the present case whether the above agreement is illegal or legal, since this is not an action for its enforcement. Had the $15,000 not been paid over and the defendant were seeking to enforce the agreement, then the case of *Taylor* v. *Mackintosh* (1924), 33 B.C. 383 would be apposite and the defence of champerty would be considered. In its incidents that case was the reverse of the case at Bar. I find that at all times material to the issue herein the plaintiff acted freely and independently and was under no duress or undue influence or mental incapacity. The action is dismissed.

Judgment

Action dismissed.

CLEMENTS v. COUGHLAN: ANDERSON, THIRD PARTY.

HUNTER, C.J.B.C.

1924

Nov. 18.

CLEMENTS v. COUGHLAN

Commission—Sale and transfer of contract to build dry dock—Statutory subsidy included—Government consent to transfer—Member using his influence to obtain consent.

No one engaged in public business is allowed to have a beneficial interest which may conflict with his duty or which might unduly influence him in performing that duty.

A member of the Dominion Parliament who brought about the sale or transfer of a contract and subsidy authorized by statute for building a dry dock, it being his duty under agreement with the vendor to use his influence with the minister in charge to secure the Government's consent which was necessary to complete the sale, is not entitled to a commission for his services, his agreement with the vendor being void at common law on the ground of public policy.

ACTION to recover commission on account of a sale of the defendant's interest in a contract and subsidy for the building of a dry dock which was assigned by the defendant with the consent of the Dominion Government to the Wallace Ship Yards Company. The facts are set out in the reasons for judgment. Tried by HUNTER, C.J.B.C. at Vancouver on the 28th and 30th of May, 1924. Statement

W. J. Taylor, K.C., for plaintiff.
Mayers, for defendant.
O'Dell, for third party.

18th November, 1924.

HUNTER, C.J.B.C.: This is an action brought by the plaintiff to recover a commission on account of a so-called sale of the defendant's interest in a contract and subsidy authorized by statute for the building of a dry dock, which was assigned by the defendant with the consent of the Dominion Government to the Wallace Ship Yards Company. Judgment

I have had the advantage of full and careful written arguments by both the learned counsel, so that I think no angle of the matter has been overlooked.

The defendant wanted to get rid of the contract, and there

HUNTER, C.J.B.C.

1924

Nov. 18.

CLEMENTS v. COUGHLAN

can be no doubt that the plaintiff brought the parties together. Wallace, the president of the purchasing company, who appeared to be a straightforward witness and to have no interest in the matter, says so, and I accept his evidence. The plaintiff gave evidence that his remuneration was to be $5,000, arranged through Anderson, the third party. But it is unnecessary, in the circumstances, to decide whether the plaintiff has proved that the defendant agreed to pay him $5,000 or whether he could recover *quantum meruit* only, as it is impossible to find that the defendant agreed *simpliciter* to pay in the event of a sale as alleged, and as it was part of the agreement that the plaintiff should use his influence to secure the consent of the Government, without which the so-called sale could not take place. As to this the plaintiff himself says in discovery:

"I said [to Coughlan] 'It will be necessary to get to Ottawa as soon as you can. Wallace wants to start work and I think it would be good judgment to have the Honourable H. H. Stevens,' who was at that time a minister of the late Government, 'present at your meeting tomorrow morning.' He said, 'Will you see Stevens?' I said, 'Yes, I will undertake to see him.' I saw Mr. Stevens that afternoon and I said to Stevens—I am giving the whole story, Mr. *O'Dell.*

"Mr. *O'Dell*: Go ahead.

"The Witness: I said 'Look here, Harry, I have been about five weeks in trying to get Wallace and Coughlan together whereby Wallace will take over Coughlan's subsidy. They are about to sign up, and Wallace is going to build a floating dock at North Vancouver at his own works, but it is necessary to get the Government to consent to a transfer of the subsidy.' 'Now,' I said, 'I thought you would be pleased to know this and I wonder if you would come up to the meeting tomorrow morning in the Hotel Vancouver in J. J. Coughlan's room and at least say you will render what assistance you can in the transfer.' He said, 'Herb., I will be very glad to do that.'"

Judgment

The inference, therefore, from the plaintiff's own evidence is, that the plaintiff, being at the time a member of the House of Commons and one of the supporters of the Government, agreed for valuable consideration, at the request of the defendant, to use his influence with the minister in charge to secure the consent of the Government which was necessary to complete the sale, and this inference is confirmed by the allusions to "Herb.'s job" in the correspondence, which are difficult to understand on any other basis.

It is unnecessary to discuss whether such an agreement is

within the prohibition of the statute (Senate and House of Commons Act, R.S.C. 1906, Cap. 10), as in any event it is void at common law on the ground of public policy, the principle being that no one engaged in public business is allowed to have a beneficial interest which may conflict with his duty or which might unduly influence him in performing the duty.

It was not suggested that the transfer was injurious to the public interests; it may in fact have been highly advantageous, but that does not help the plaintiff, as the decisions are inexorable that it is immaterial.

The action must therefore be dismissed.

I have no discretion over the costs, as even under the more flexible English rule a defendant is entitled to avail himself of any defence allowable, and can not for that reason alone be deprived of his costs, even though the defence may be one which many would regard as shabby or dishonourable, such as a plea of the Gaming Acts in answer to an action to recover on a wager.

Judgment

The defendant by his counsel having raised the objection on which he succeeds in defeating the plaintiff's claim, it was unnecessary for him to have brought in the third party, and he must therefore pay his costs.

Action dismissed.

MORRISON, J.

1924

Dec. 12.

CAULFIELD v. ARNOLD (No. 2).

Contract — Promise of marriage — Plaintiff previously married — Divorce proceedings pending—Promise after hearing but before passage of bill of divorce—Immoral relations pending divorce—Public policy.

CAULFIELD v. ARNOLD

The plaintiff, a married woman, petitioned for divorce. The hearing took place in April, 1924, and the bill of divorce received the Royal assent on the 19th of July following. The defendant's promise of marriage, the breach of which is alleged, was made, as found by the Court, after the hearing of the petition but before the passage of the bill of divorce.

Held, that even assuming the plaintiff were properly entitled to a divorce, any promise of marriage to be performed contingently upon a divorce being obtained is against public policy and no action can be maintained thereon.

Statement

ACTION for breach of promise of marriage. The facts are set out fully in the reasons for judgment of the learned trial judge. Tried by MORRISON, J. at Vancouver on the 26th of November, 1924.

Argument

J. A. Russell (*Nicholson,* with him), for plaintiff, referred to *Prevost* v. *Wood* (1905), 21 T.L.R. 684; *Cooper* v. *Bower* (1908), 96 Pac. 59.

Maitland (*Remnant,* with him), for defendant, referred to *Spiers* v. *Hunt* (1908), 1 K.B. 720; *Wilson* v. *Carnley, ib.* 729; *Marlborough* (*Lily, Duchess of*) v. *Marlborough* (*Duke of*) (1901), 1 Ch. 165 at p. 171; *Cartwright* v. *Cartwright* (1853), 3 De G.M. & G. 982.

12th December, 1924.

Judgment

MORRISON, J.: The true function of a Court of civil jurisdiction is largely to determine the rights as between party litigants. When it comes to seeking the adjustment of their wrongs perhaps the tribunals having a different jurisdiction should be sought. This case, which I find difficult to take seriously, is very near the line. The Courts of Equity demand that parties seeking their aid must be clean at least as to their hands—*a fortiori* when the parties about whom there is nothing clean come into any Court for such relief as is now sought.

The plaintiff and defendant, whilst living in adultery during the late part of 1923 and the early part of 1924, became engaged to be married. As to which of them was the inducing cause it is somewhat difficult to determine. The plaintiff alleges she was so under the irresistible blandishments of the defendant that she succumbed. If the *vinculum* were, as counsel submitted, "pure love," then, if by consulting old dictionaries for a definition of that term one finds the directory legend "see lunacy," the terms would appear to be synonymous or at least interchangeable and difficulties might be encountered in seeking to enforce an agreement entered into whilst the parties were *non compos,* unless ratified during a lucid period. Having seen the parties, I would hesitate to conclude that the defendant exerted such powerful influence over the plaintiff that she fell into his net, unless it be explained on the theory advanced by naturalists who observe the fascination which a garter-snake has for a bird of paradise. The plaintiff seems to have swept the gamut of the Courts. She had a husband, Caulfield, with whom she had not lived for some years and who, as she says, she thought had divorced her. Under this alleged impression she went through the form of marriage with another man named Boyce, for which act she was charged with and found guilty of bigamy in Alberta. After that she became acquainted with a man named Wood, with whom she lived several years. She knew Wood was a married man. At the times material to the issues herein (and by process of elimination of husband and escorts) she was living with the defendant and a movement was set on foot by her along with the defendant to have Caulfield divorced effectually, this time by means of an Act of Parliament of Canada. The promise to marry was contingent upon the passage of this piece of special legislation. The hearing of her petition for a divorce took place before the Senate Committee charged with matters appertaining to divorce in April, 1924. The Bill passed the Senate and Commons, and on the 19th of July following it received the Royal assent. The point presenting any difficulty at all, turns on what took place during the period between those dates. If the promise, a breach of which is now alleged, was one first made before the date of the

MORRISON, J.

1924

Dec. 12.

CAULFIELD v. ARNOLD

hearing of the petition at Ottawa, then it was one which could not be enforced as being against public policy. This submission was, I think, conceded. But the plaintiff alleges that there was a new promise made after the hearing of the petition for divorce in April and before the passage of the bill of divorce in July. I find that the defendant expressed himself during that period as being desirous of marrying the plaintiff and that there was a promise to marry her, and that he committed a breach thereof. The letters read at the trial, written by the defendant to the plaintiff at that time, would, I make little doubt, be of service if the question of lunacy were really an issue. In my opinion, it is against public policy to allow an action to be maintained upon a promise to enter into a marriage which was made before the divorce was obtained in July, which divorce was necessary for the performance of such promise to marry. The plaintiff's counsel contends that the promise and breach having taken place between the hearing of the petition in April and the passage of the Act in July, the case is analagous to that of a petitioner in divorce proceedings in Court where a decree *nisi* is obtained. In England, as well as in British Columbia, it is only when the parties conduct themselves with propriety during the period of the proceedings that the Court would entertain the petition and grant a decree: *Prevost* v. *Wood* (1905), 21 T.L.R. 684. That case is sound authority against the maintenance of this action by the plaintiff, the history of whose career, which, if brought out before any tribunal having jurisdiction in divorce, would disentitle her to the relief sought. In any event, I do not think such analogy exists in the circumstances of the case at Bar. The hearing of the plaintiff's petition was before a select Committee of the Senate, which is one of the constituent parts of Parliament. Upon the report of this Committee a Bill is framed and submitted to Parliament pursuant to the established procedure governing the introduction and passing of Bills which may or may not become Acts of the Parliament. There is nothing happens in the nature of an intermediate decree or act equivalent in its character to a decree *nisi* of the Courts. The Senate Committee's findings take the form of a report to the

Judgment

Senate upon which a Bill is subsequently based if necessary. Assuming the plaintiff were properly entitled to a divorce, yet any promise of marriage to be performed contingently upon a divorce being obtained is against public policy, and no action can or should be maintained thereon. Darling, J. in *Prevost* v. *Wood, supra,* expounded the law on that point, quoting from a judgment of Lord Mansfield in the case of *Holman* v. *Johnson* (1775), 1 Cowp. 341 at p. 343, the following passage:

"The principle of public policy is this; *ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*"

Judgment

Neither the Courts of this Province nor that of England would grant a divorce to a petitioner such as the plaintiff at the time she applied if aware of all the facts which exist here. If not made aware of such facts, then the divorce she obtains is founded on deceit and immorality, and it would be against public policy to allow an action to be maintained in which such divorce was an essential element.

The action is dismissed, but inasmuch as the plaintiff and defendant are in *pari delicto* there will be no costs to either side.

Action dismissed.

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

CHARLTON v. THE BRITISH COLUMBIA SUGAR REFINING COMPANY LIMITED.

Master and servant—Injury to servant—Contract of employment—Forbearance to sue—Not voluntary contract of service—Acts out of employment—Management of picnic fund—Dismissal—R.S.B.C. 1911, Cap. 153, Sec. 2.

In consideration of an employee forbearing to sue for damages owing to an accident sustained in the course of his employment an employer agreed to give him employment for life.

Held, not to be a voluntary contract of service within section 2 of the Master and Servant Act and therefore enforceable even nine years after its date.

An employer may dismiss an employee for acts done by him outside his employment, but the question as to what will justify such dismissal is one of fact depending on the circumstances of each case. Where an employee in charge of a fund provided by the employer and employees jointly for an annual picnic, negligently, but without any intention to misappropriate, used some of the fund for his own purposes, and afterwards repaid it, the employer was not justified in dismissing him.

APPEAL by plaintiff from the decision of MACDONALD, J. of the 11th of January, 1924 (reported 33 B.C. 414) in an action for damages for alleged wrongful dismissal. In 1912 the plaintiff while in the employ of a company having the same name as the defendant was seriously injured by the fall of an elevator. The plaintiff states that in consideration of his refraining from taking proceedings to enforce a claim in respect of said injuries the Company agreed to employ him in such work as he was capable of performing for the rest of his life at a reasonable salary. The plaintiff explains that the terms of the agreement were not reduced to writing as he accepted the word of the late B. T. Rogers former president and managing director of the old company. The arrangement was arrived at orally between Mrs. Charlton (plaintiff's wife), the late B. T. Rogers and J. Fordham Johnston, the then secretary of the company and it was found that it was the intention that the relationship of master and servant should continue and that the

Statement

defendant's employment should continue for the balance of his life. The plaintiff, after recovery from his injuries, continued on at the same salary and was given light duties in the office, holding a clerical position until his dismissal. After the arrangement with the plaintiff the old company was dissolved and a new company incorporated under Dominion letters patent to take over the assets and assume the liabilities of the old company. The plaintiff continued in the employ of the new company. Mr. Johnston who was liquidator of the old company and president of the new one was well aware of the terms of the plaintiff's employment. The Company employed about 300 men and they were accustomed to have an annual picnic at Bowen Island and the expense thereof was obtained by subscription from the Company, its officials and employees. The plaintiff for some years had been secretary-treasurer of this annual picnic. In 1922 the picnic was held in August and the plaintiff, who received all the funds for expenses, failed to pay the bills promptly, and used some of the funds for his own purposes. Complaints were made to the committee of employees who looked after the picnic, and the committee were unable to get the plaintiff to pay up all the accounts until the following January. Mr. Johnston was away at this time, but on his return in February, 1923, he was informed of the facts and dismissed the plaintiff from the Company's employ. The plaintiff's explanation of the delay in paying the accounts was that at the time he was acting as treasurer for the picnic committee he won $1,250 in a football competition and being very hard up and owing several people money, he paid out moneys to the people he owed. He made a mistake in his accounts and paid out more money than he received in the football competition and was thus behind in his picnic funds, this being the cause of his delay in paying the picnic accounts but he saved and paid them in full in January, 1923.

Statement

The appeal was argued at Victoria on the 19th to the 24th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. E. Bird (*Kent,* with him), for appellant: The case of

Argument

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

Hitchin v. *B.C. Sugar Refinery Co.* (1913), 18 B.C. 397, arose by reason of the same accident. The picnic debts were all paid up before he was dismissed. I submit, that he was improperly discharged and if wrong in this the Company were bound to look after him for life under agreement arrived at after the accident in 1912. To bring him within the Criminal Code, intent to defraud must be shewn: see *Rex* v. *Morency* (1917), 30 Can. Cr. Cas. 395; Crankshaw's Criminal Code of Canada, 5th Ed., pp. 477-8. The plaintiff was not guilty of misconduct to his employers and in any case it was not misconduct that justified dismissal as the delay in paying the picnic accounts was due to a mistake in keeping his accounts and not deliberate. As to proper grounds for dismissal see Macdonell's Master and Servant, 2nd Ed., pp. 175 and 179; *Pearce* v. *Foster* (1886), 17 Q.B.D. 536 at p. 539; *Horton* v. *McMurtry* (1860), 5 H. & N. 667 at p. 676; *Parsons* v. *The London County Council* (1893), 9 T.L.R. 619. On the finding of the trial judge being reversed see *Pratt* v. *Idsardi* (1915), 21 B.C. 497. The misconduct must directly affect the master's business: see *Priestman* v. *Bradstreet* (1888), 15 Ont. 558; *Marshall* v. *Central Ontario R.W. Co.* (1897), 28 Ont. 241; *Bahme* v. *Great Northern Ry. Co.* (1916), 23 B.C. 484; *Clouston & Co., Limited* v. *Corry* (1906), A.C. 122 at p. 129. It must be conduct inconsistent with the express or implied conditions of service: see *Lacy* v. *Osbaldiston* (1837), 8 Car. & P. 80 at p. 86; *Connors* v. *McGregor* (1924), 2 W.W.R. 294. He gave up a claim for damages on the undertaking that he would be taken care of for life.

Argument

Stockton, for respondent: The evidence shews this was a wilful misappropriation of funds. The accounts should have been paid in August but were held off until January following. There is ample ground for dismissal: see *Federal Supply and Cold Storage Co.* v. *Angehrn & Piel* (1910), 80 L.J., P.C. 1. The trial judge has found against him: see *Pearce* v. *Foster* (1886), 17 Q.B.D. 536 at p. 539; *Lacy* v. *Osbaldiston* (1837), 8 Car. & P. 80; *Read* v. *Dunsmore* (1840), 9 Car. & P. 588. There were 300 men employed by the defendant Company and they knew of the plaintiff's action in misappropriating the

picnic funds. At most this was a yearly engagement ending in May of each year, and a verbal arrangement does not exceed a year.

Bird, in reply, referred to *Smith* v. *St. Paul & D.R. Co.* (1895), 62 N.W. 392; *Jessup* v. *Chicago & N.W. Ry. Co.* (1891), 48 N.W. 77; *Pennsylvania Co.* v. *Dolan* (1892), 32 N.E. 802; Labatt's Master and Servant, 2nd Ed., Vol. 1, pp. 413-5; *Wallis* v. *Day* (1837), 2 M. & W. 273; *Stretton* v. *Great Western and Brentford Railway Co.* (1870), 5 Chy. App. 751.

Cur. adv. vult.

7th October, 1924.

MACDONALD, C.J.A.: The defendant is incorporated under Dominion laws, and is the successor of a Provincial company of the same name.

The contract alleged by the plaintiff was made by the latter company but the breach was by the former, the defendant. I think, however, that there is sufficient evidence of a novation.

In 1912 plaintiff was severely injured while employed in the Company's factory and while in the hospital, sent his wife to interview the then president of the Company, Mr. Rogers. At the interview Mrs. Charlton says that Rogers, whose authority to bind the Company is admitted, agreed, in consideration of plaintiff giving up his claim for damages for injury, to pay the plaintiff $1,500 insurance money, the hospital and doctor's bills, wages until his return to work and further (and this is the point in the case) to "take care of him for life."

The plaintiff returned to work and was employed in light duties suitable to his condition and was paid his former monthly wage of $85, which was raised from time to time until it reached, at the time of his dismissal, $135.

First as to the agreement: was it an agreement to furnish employment to the plaintiff for life, or was it one to take care of him for life? Now, it is to be observed that the writ and statement of claim, before amendment, alleged only an agreement to furnish the plaintiff with employment for life, but in the course of the trial the plaintiff obtained an amendment

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

admitting alternative claims, alleging an agreement to pay him $85 per month during life and also that if he were capable he would be employed at wages commensurate with his services.

The learned trial judge came to the conclusion upon the evidence, which was that of the plaintiff's wife and Fordham Johnston, who was present at the interview between Mrs. Charlton and Rogers, and who is now the defendant's president, that the contract was one to furnish employment for life or during good behaviour. Johnston, in his evidence on discovery, made a statement quoted in the reasons for judgment, which on its face would corroborate Mrs. Charlton's story. At the trial, however, he qualified this statement by evidence that the agreement was that which the learned judge found it to be. These questions on discovery were not then relevant, and I draw the inference from the manner in which the answers were elicited, that Johnston was not conscious of their significance. No doubt what he had in mind was the plaintiff's then claim to be employed for life and he therefore assented to the use of the words "take care of him for life" in the sense of "employ him for life." There was at that time no question of taking care of the plaintiff for life, except in the sense of employing him.

Once it is established, then, that the contract contains a term of employment, I must consider the bearing of the Master and Servant Act, R.S.B.C. 1911, Cap. 153, Sec. 2, upon it. That section declares that no voluntary contract of service or indenture shall be binding upon either party for a longer period than nine years. The learned judge held that the contract here was not a voluntary contract of service. Whether he regarded it as not a voluntary one, or as not a contract of service he does not explain. I find it difficult to give a meaning to the word "voluntary" as applied to a contract.

MACDONALD, C.J.A.

It is necessary to go back to the origin of section 2 and to view it in its original setting. It was enacted by the Legislature of Upper Canada, 33 Geo. III., Cap. 65, Sec. 2. The first section of that Act prohibited slavery or "a bounden involuntary service for life." The second section relates to what is nearly akin to slavery, "voluntary service for life." That section renders the servant's contract to serve for a longer period

than nine years unenforceable, after that time. If the contract under consideration were one which bound the plaintiff to serve the defendant for life, then notwithstanding the exceptional consideration it would nevertheless fall within the purview of the statute. But it is not such a contract; the defendant in consideration of the plaintiff giving up his right of action for damages, agreed to furnish the plaintiff with employment for life or during good behaviour; it was optional with the plaintiff whether he would accept or continue in the employment or not. The contract, though in a sense a contract of service, is not the contract of service aimed at by the section as originally enacted, nor is there any reason to think that our Legislature in adopting the section intended it to have any other meaning than that which would apply to it in its original place.

I do not attach importance to the independent consideration. If in this contract the defendant has bound itself to employ the plaintiff and he had bound himself to serve the defendant for life, then, I think, the section would have been applicable to that contract, no matter what the consideration might have been. It is the servitude, not the consideration, with which the section is concerned. The civil law regards contracts to serve for life as contrary to public policy; the common law does not; but the Legislature, in the interest of public policy, stepped in and limited their inforceability.

The next question is, was the contract broken by the defendant? The defendant justifies its refusal to employ the plaintiff longer, on the ground of the plaintiff's alleged dishonesty. The plaintiff, like many another man, mixed a trust fund with his own money, which was very foolish of him, and in checking out his own, unintentionally, as he has sworn, encroached upon the trust fund. If this had happened with his employer's money it might be ground for dismissal, but I am not called upon to decide that question, since, I think, it occurred outside the employment. The authorities indicate that, in like circumstances, that act would not entitle the defendant to refuse performance of the contract on its part.

It was argued that the defendant had an interest in the trust fund, but, in my opinion, the defendant had no interest

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

qua employer; it had no interest distinct from that of any other subscriber who had paid his contribution to the committee which had charge of the picnic. The committee selected the plaintiff as its treasurer and if he committed a breach of trust it was a breach of the committee's trust, not of the defendant's.

One other question remains to be decided as a basis for the assessment of damages: Is defendant to pay wages should the plaintiff become incapable of working? I think not. The defendant was to furnish the plaintiff with the opportunity of earning wages, and is not obliged to pay unless the wages are earned.

MACDONALD, C.J.A.

The damages in this case have not been assessed, owing to the fact that the learned judge dismissed the plaintiff's action. They are difficult of ascertainment by an Appellate Court, but it may be that the parties can arrive at an agreement which will avoid the necessity of providing for this assessment. I would therefore defer dealing with this phase of the case until after counsel has had an opportunity of speaking to that branch of the appeal.

MARTIN, J.A.

MARTIN, J.A.: It was found by the learned trial judge that the contract between the plaintiff and defendant Company's predecessor, in settlement of the expected lawsuit, was that, in addition to the payment of certain insurance moneys and medical and hospital bills, the plaintiff was to continue in the Company's service and "that such employment was to continue for the balance of his life," which, the learned judge continues, "I do not think would be an unusual or unreasonable promise for a company to make, under the circumstances." I agree with that view of the duration of the contract, but its nature I regard differently, because, as I read the evidence, it was not merely a contract for such lighter clerical or other services as the injured servant was or would be able to perform in his crippled condition, as for which he would, of course, he paid at current rates, but one to "look after [him] for the rest of his life" in case he became wholly incapacitated for duty—in other words, to maintain him as a pensioner in that event, "subject to good behaviour and loyalty to the Company." That is just

the sort of special contract that one would expect to find in such sad circumstances, and if that is what the learned judge really means by "employment for the balance of his life," and I am inclined to think it is, I am at one with him. It cannot, I think, with all respect, be the fact that either of the parties to such an equitable settlement intended that if, *e.g.*, six months after its making the plaintiff became bedridden and unable to perform any duties at all that the Company would be relieved from any obligation toward one it had incapacitated: the whole circumstances, to my mind, repel such a shocking injustice, which is inconsistent with the honourable and, I believe, sincere intentions expressed by Mr. B. T. Rogers, the president of the Company, when he pledged his word to plaintiff's wife to carry out the arrangement when she asked him to put his offer in writing for her husband's acceptance.

This agreement, containing elements which obviously exclude it from the operation of section 2 of the Master and Servant Act, Cap. 153, R.S.B.C. 1911, was performed to the mutual satisfaction of the parties for eleven years, till the 9th of February, 1923, when the defendant dismissed the plaintiff because of alleged misconduct consisting of certain irregularities arising out of the way he performed voluntary duties as honorary secretary and treasurer of an employees' entertainment, being the fifth annual basket picnic of the defendant's employees, held in August, 1922, which picnic was under the sole control of a general committee of said employees and to which the defendant Company only made a donation.

MARTIN, J.A.

The question as to what is misconduct justifying dismissal is always a varying and often a difficult one, depending upon all the particular circumstances of the case. The learned judge took the view that the defendant was justified in taking that course here, and cites the leading and, upon us, binding decision of the Privy Council in *Clouston & Co., Limited* v. *Corry* (1906), A.C. 122, from which I make the following citations:

"Now the sufficiency of the justification depended upon the extent of misconduct. 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

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Certainly when the alleged misconduct consists of drunkenness there must be considerable difficulty in determining the extent of conditions of intoxication which will establish a justification for dismissal.

"There are cases which can be quoted in support of either side of the question involved, and between some of them it is apparently impossible to avoid a conflict."

In that case, it is to be noted, their Lordships were of opinion (p. 131) that the verdict of the jury justifying dismissal was erroneous.

Applying these guiding observations, I have carefully considered all the facts of this very unusual case (which in the main are not in dispute), with the result that I am unable, with every respect, to support the view taken below. It was urged upon us that what the plaintiff did was to commit a crime or its equivalent, but I entertain no doubt, as the result of my very long judicial experience, that no jury could be found to take such an opinion, the case at most being that of a man who, in the assumption of a voluntary duty in relation to a solitary and isolated festive occasion, temporarily mixed the committee's funds with his own bank account, and by a pardonable mistake, in endeavouring to honourably discharge completely his long standing obligations when he unexpectedly won what was to him a large prize of $1,250, and in the elated confusion caused by such a windfall, overdrew his bank account, thereby getting into financial difficulties and delays in finally passing his picnic accounts, in the course of which he made certain statements which, it is submitted, were not wholly truthful, and I think that they were objectionable on that account to some extent. But while reprehensible, they were, in the special circumstances, not of so grave a kind as to be visited by the shattering punishment that was inflicted on him with the professed object of securing a high standard of honour among the employees by making a harsh example of one whose afflictions at the hands of his master should have entitled him to special consideration and, at least, an opportunity to defend himself from so grave a charge, especially when he was not acting for the master in what he did. His conduct in the matter complained of must be viewed, in justice to him, as only one transaction in its

MARTIN, J.A.

inseparable and current stages and not as a succession of independent offences perpetrated with a persistently vicious mind. And it is most significant that all that those most concerned in the matter, *viz.*, the picnic committee, did about it, after his accounts had been finally sent in and balanced, was, at its meeting on January 16th, 1923, to make the following statement in its minutes:

"Mr. H. N. Charlton handed over the printing account which he had paid the previous day and declaring there was no other liability apologizing for his negligence but the committee made expressions that there could be no excuse for all the delay."

This simply treats his conduct as "negligence" and "no excuse for all the delay"—the word "all" is to be noted. Furthermore, and still more significant, it is to be observed that after the matter had been thus concluded domestically, so to speak, the committee not only took no action against the plaintiff, but in its letter of the next day to the defendant Company, thanking it for its donation and forwarding the balance sheet of the picnic, it made no complaint whatever about the picnic or its management or irregularities but on the contrary said:

"The Committee wish to thank you for your generous contributions which enabled everyone who attended to declare it the best held by the Refinery employees."

If the committee felt that any irregularities of its members had occurred which merited the condemnation of their employer, then, in all fairness and natural justice, was the proper time and manner to bring such offenders to its attention, and in the singular absence of any such "official" action it is impossible to resist the inference that some mischievous person has seized upon the occasion to advance his own interests and those of the Company at the expense of the plaintiff. MARTIN, J.A.

I refrain from attempting to review further, here, the lengthy evidence which has brought me to the conclusion that the dismissal cannot in law be justified. None of the cases relied upon below is, in my opinion, at all comparable to this one, which has peculiar features. In, *e.g., Priestman* v. *Bradstreet* (1888), 15 Ont. 558, the plaintiff, the manager of a commercial agency, and so passing upon the ratings of merchants, had been engaged in stock exchange speculations for many years, ruining himself thereby, and yet refused to discontinue practices so obviously

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

detrimental to the interests of his employers; and in *Pearce* v. *Foster* (1887), 17 Q.B.D. 536 the principal and confidential clerk of a large firm under a 10-year contract at a salary of £2,000 per annum, had also for many years been gambling "to an enormous amount" in a similar manner and had lost many hundreds of thousands of pounds. Lord Esher, M.R. said pp. 539-40:

"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. But if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master; and if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him."

MARTIN, J.A.

Lord Justice Lindley was of opinion, p. 542, that the plaintiff had "habitually conducted himself in such a manner as would injure the business of his employers if his conduct were known," and Lord Justice Lopes, p. 543, proceeded upon the ground that the plaintiff's "position is highly fiduciary." I have recited these views to shew how far apart such cases are from the present, which I regard not as one for example and punishment but for mercy and admonition.

I should like to hear counsel upon the way that the damages for breach of the contract should be assessed: at present I incline to the view that the case should go back to the learned judge below for that purpose.

GALLIHER, J.A.: I am not disposed to disagree with the learned trial judge on any of his findings of law or fact, except on the finding as to cause for dismissal, and upon that I feel obliged, with great respect, to do so.

GALLIHER, J.A.

I have read and considered the whole of the evidence with great care, and I find lacking in that evidence one feature which might have turned the scale with me. It is not shewn that the plaintiff checked out these picnic moneys which he had received so as to create an overdraft at his bank before he received the sum of some $1,250 in a lottery or drawing. This

could have been shewn by an examination of his bank account, but was not. The most that is shewn is that after he received the $1,250 he started paying his debts and as he says, inadvertently overdrew on his funds, including the picnic money. He had paid up everything before his dismissal, and while I cannot commend his carelessness or his lack of frankness with the other members of the committee, I think, after realizing the blunder he had made, he was fighting for time in which to make good and always with the honest intention of making good. The evidence is not clear enough to warrant me in thinking that he at the time knowingly diverted these picnic moneys from their legitimate channel, and considering the apparent good character of the man and that he made good as promptly as he could, the consequences of his error, I do not think there were good grounds for dismissal, even without considering the question as to how far his act could be held to be within grounds for dismissal.

It follows that the appeal should be allowed, and it now becomes a question as to what disposition should be made of the action.

GALLIHER, J.A.

After a full consideration of the evidence touching the points I am unable to say that the learned trial judge was wrong in concluding that the agreement was one by which suitable employment should be provided for the plaintiff during his lifetime, subject to good conduct and loyalty to the Company, and not as contended for by the plaintiff in the amendment made at the trial, my view being that the agreement was not for payment in any event or the treating of the plaintiff as a pensioner for life whether he worked or not, but one for employment only.

If the parties cannot agree on a settlement, there will have to be a new trial for the assessment of damages.

McPHILLIPS, J.A.: This appeal has relation to a rather unique situation and as to the liability, if any, in connection therewith. I do not refer to the evidence in all particulars, as the issue is somewhat narrowed after all. Following upon a most serious accident occurring in the works of the respondent

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

the appellant suffered what has been referred to as one hundred per cent. disability, indeed most serious injuries, whereby he may be said to be a cripple for the rest of his life. The appellant would appear to have been a faithful servant of the Company and, in my opinion, that situation extended throughout the whole period of review necessary in the examination of the facts pertinent to the action brought. There is no real conflict in the evidence when examined closely. The appellant when able returned to work under the contract made with the then president of the Company, Mr. B. T. Rogers, whereby the respondent was to provide for the appellant throughout his life, he, the appellant, releasing the respondent from liability for damages for personal injuries. It may be fairly said that if any such action had been brought a likely minimum of damages that would have been assessed would have been possibly $20,000. The final agreement, which, in my opinion, can reasonably be come to upon the evidence, is that the then president (Mr. B. T. Rogers) in 1912 agreed that the appellant giving up his claim for damages, *i.e.*, releasing the respondent from any liability in respect thereof, the respondent would pay to the appellant $1,500, the amount of insurance covering injuries to employees, the hospital and physician's accounts, with wages until his return to work again, but any work that would be done would be light in its character and was really to mitigate as much as possible throughout the life of the appellant the contract made by the respondent, and that means, that the appellant was to be cared for for the rest of his life, *i.e.*, became a pensioner upon the respondent. The salient and effective evidence establishing this legal position is demonstrated upon a perusal of that portion of the evidence of the present president of the respondent, who was at that time the secretary of the respondent, and it has been frankly admitted, as I read the evidence, by Mr. Fordham Johnston, the now president, that the change in incorporation is not relied upon as making any difference in what might be the legal position and as to liability at the time the agreement was come to with the appellant in 1912. That evidence is as follows, being evidence upon discovery, Mr. Fordham Johnston being under examination, and

MCPHILLIPS, J.A.

the interview was one between the wife of the appellant acting for the appellant and Mr. B. T. Rogers, the then president of the Company. [After setting out the evidence the learned judge continued].

Following this agreement come to the appellant returned to the works when able (in the very crippled condition he was then in and has continued in and will ever be in) and was given light employment and performed his work faithfully for over ten years, receiving at the commencement of return to work $85 a month, later increased to $135 a month. It would appear that the appellant acted as the secretary or manager of the annual summer outing of the employees of the respondent for some nine years, made the contracts for services and supplies and paid the accounts, being the treasurer of the funds collected, the respondent, as well as the employees, generally contributing thereto, the whole management being committed to a committee of the employees. This gratuitous work was done throughout that long time faithfully and all moneys were duly accounted for in 1922. The same gratuitous work was being done and it was as usual well done, save that the appellant by, as it must be admitted, some carelessness upon his part in the handling of the moneys for the summer outing unfortunately overdrew his bank account and was unable to pay the last of the accounts, in amount about $100, for some time. The circumstances that brought about this happening may be shortly stated as being the following: the appellant won $1,250 in one of the football competitions and was greatly elated in so doing, and struggling along, as he had been doing, with a wife and family he had got behind somewhat in his accounts. He immediately deposited the amount to his credit in the one bank account he had, where also the moneys for the summer outing were, and commenced to check out the moneys in payment of accounts owing by him, accounts due to tradesmen for the maintenance of himself and family, and was startled in the end to discover that he was out something like $100. This resulted in the delay of payment of accounts in the neighbourhood of $100, but although there was some delay they were eventually paid by the appellant. The minutes of the meeting of the picnic com-

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

mittee finally referring to the closing out of the accounts, held on January 16th, 1923, reads: [already set out in the judgment of MARTIN, J.A.].

And on January the 17th, 1923, the following is a copy from the minutes of the picnic committee, shewing that the whole matter of the picnic accounts was closed out without any reflection being made upon the appellant:

"B.C. Sugar Refining Co. Employees Social Committee.

"B.C. Sugar Refining Co. Ltd.

"Gentlemen,

"In presenting to you the Balance Sheet of the Fifth Annual Basket Picnic held at Seaside Park on Saturday, August 5th, 1922, the Committee wish to thank you for your generous contributions which enabled every one who attended to declare it the best held by the Refinery employees.

"Trusting we may continue to warrant your kindly support in our endeavour to promote these social gatherings amongst employees.

"On behalf of the Committee,

"Yours faithfully,

"D. D. Denman,

"Chairman.

"January 23rd, 1923.

"The Committee were then discharged."

However, this happening was seized upon by the respondent as being justification for the dismissal of the appellant and justification for refusal to carry out the contract, which I consider has been amply established, to take care of the appellant for the balance of his life. The appellant had for long years performed this onerous and responsible work in this extraneous matter of the summer outings and had always done the work well and for no reward and had handled throughout the time large sums of money, something in the neighbourhood of $1,000 a year and never a complaint, everything well done until this unfortunate occurrence. I cannot consider that there was any warrant to repudiate the contract or dismiss the appellant for anything that had happened; there was really no wilful or conscious act at all. The appellant was not an accountant and it is understandable that with all honesty upon the part of the appellant, the predicament in which the appellant found himself was occasioned by carelessness. No doubt, he should not have mixed his money with the summer outing money, but he had but the one bank account, and the appellant had done what many in high professional and business pursuits do at times

MCPHILLIPS, J.A.

in attending to charitable and other entertainments, with the risk of there being a deficit in the credit balance. Of course, in the myriad of cases, nothing has ever been known of the circumstances, those concerned being well able to immediately supply the deficiency. In this case it happened to be the case of a poor man and it took him some time to pay the amount, as it had to come out of his wages, but he did pay the moneys as quickly as possible, and all that the picnic committee really said was that there was inexcusable delay. The appellant undoubtedly had proceeded in a careless way, but I cannot and do not think in any dishonest way. It was unfortunate but it was an unconscious act and did not warrant being taken notice of in the drastic manner the respondent did. It rather impells one to think that the course adopted was an attempt to seize upon the incident as being ground to relieve itself from an onerous contract. There is not a scintilla of evidence that the appellant did not faithfully, during long years, perform all the services he was capable of, and I think that the conduct of the president, Mr. B. T. Rogers, in meeting the very unfortunate situation in the interests of the appellant was beyond praise, and for years it was loyally observed by both sides. The appellant gave faithful services and the respondent was considerate and reasonable with the appellant, increasing his wages at times, but at no time did the appellant receive by wages remuneration beyond the value of his services; on the contrary, similar services could not be obtained for the same money. What actuated the respondent in taking the stand it did rather passes my comprehension, and I certainly cannot commend or approve it. It may be that the respondent is not desirous of further continuing the appellant in its employ, but that does not end the matter, as, in my opinion, the appellant has to be cared for for life, and to refuse to avail itself of his services only means that the proper moneys for maintenance must be paid the appellant whether his services be availed of or not. It would, indeed, be a cruel thing if the appellant can be set adrift in this way and the respondent, upon the specious ground advanced, be allowed to rid itself of a contract made for good consideration, namely, the giving up of what was a

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

well-founded action for a pension that would enure throughout life to the appellant. The appellant had suffered frightful injuries whilst employed and in the discharge of his duties as an employee of the respondent upon the works of the Company, and the then president of the Company appreciated the position of matters and a reasonable contract was made, and it has been loyally lived up to by the appellant and for years also loyally adhered to by the respondent, now to be ruthlessly disregarded and the appellant thrust out into the world a cripple, classified as suffering with one hundred per cent. disability. Notwithstanding this disability though, we have seen that for long years the appellant has given faithful service to the respondent, services of value, and thus mitigated the damages that would fall upon the respondent if no services were rendered.

The respondent cannot, by the attempt made, classify the appellant as an employee *simpliciter* without the existence of the special contract—that is not the position of affairs. In my opinion the appellant was accorded the position of a pensioner to render such services throughout his life to the respondent that he might be able to render, but failing ability to render services that would be acceptable to the respondent, the obligation went on, *i.e.*, respondent must care for the appellant for life, and a breach of that contract entitled the appellant to an assessment of damages. It would certainly be a most deplorable thing upon the facts of the present case, where a substantial and well-founded cause of action was given up and released, that the respondent should be allowed to say at this late date that it is nothing more than the ordinary relationship of master and servant—at the highest a voluntary contract and the limited period fixed in the Master and Servant Act (Cap. 153, Sec. 2, R.S.B.C. 1911) applied. Any such contention is fallacious and untenable. It was not a "voluntary contract," as understood in law, it was a contract for services to be rendered for life, and as such is sustainable, and the consequence of the wrongful breach thereof is the assessment of damages for that period, which is capable of ascertainment by present well-known tables of computation, even if the case were to be viewed as one of master and servant. This is a view un-

MCPHILLIPS, J.A.

associated with the terms of the special contract, which, of course, I consider has been well established. The respondent was wholly wrong in dismissing the appellant, basing dismissal upon the occurrences that took place in connection with the summer outing. The question of law that arises has been dealt with in *Clouston & Co., Limited* v. *Corry* (1906), A.C. 122. There that very distinguished and eminent jurist, Lord James of Hereford, delivering the judgment of their Lordships of the Privy Council, at p. 129, said:

"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."

I unhesitatingly am of the opinion that there was no misconduct in the present case at all inconsistent with the fulfilment of the conditions of service and there was no justification for dismissal, and the learned judge, with great respect, went wrong in so holding. Further, of course, in my opinion, he went wrong in holding that the contract was not one to take care of him for life, *i.e.*, that the appellant was to be a pensioner for life to render, though, such services as he was able throughout his life in the way of mitigating the outlay the respondent would incur by such an agreement, and if the learned judge were to be held right in his holding that it was only employment for life, there was no justification for dismissal and damages upon this view for wrongful dismissal should be assessed.

MCPHILLIPS, J.A.

The case is one eminently, in my opinion, for settlement between the parties, and I would welcome the coming forward of the parties to the action agreeing upon the amount of damages to be allowed, say, for the period that has elapsed when the appellant has not been allowed to render the services he was faithfully and loyally rendering, with the statement that it is accepted that the correct view is that it was a contract to take care of the appellant for life, he, upon his part, to render such services as he may be capable of, and that the appellant will be reinstated in that position. Failing any such agreement being come to, then in my opinion there must be a new trial to

COURT OF APPEAL

1924

Oct. 7.

assess the damages for the breach of contract to care for the appellant for the rest of his life.

The appeal, therefore, in my opinion, succeeds.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

MACDONALD, J.A.: This is an appeal from the judgment of Mr. Justice W. A. MACDONALD dismissing appellant's claim for damages against the respondent for wrongful dismissal. The appellant was seriously injured in 1912 on respondent's premises through an elevator, which he had occasion to use, being precipitated to the bottom of the shaft. He was confined to the hospital for several months and whilst there his wife, on his behalf, obtained an interview with the late Mr. B. T. Rogers, at that time president of respondent Company, to lay before him their claim for damages and effect a settlement if possible. She testifies that, at this interview, Mr. Rogers, on behalf of the Company, agreed to pay $1,500 in cash, the proceeds of an insurance fund, all expenses, his salary while he was not able to work, and also to "take care of him for the rest of his life," adding "it would depend upon what condition he came back in, they would provide something suitable." Mr. Johnston, at that time secretary of the Company, was present at the interview. She reported this offer to the appellant and, after a fruitless attempt to have Mr. Rogers commit it to writing, decided to accept it. Mr. Johnston's version of the interview is as follows:

MACDONALD, J.A.

"The result of it [*i.e.*, the conversation] was he [Mr. Rogers] would give Mr. Charlton a position, some light work to do, if he was not able to do heavy work at the same salary he was receiving when he was injured, that is $85 a month, subject to good behaviour and loyalty to the Company."

Asked if this $85 a month was to be paid whether Mr. Charlton worked or not, he replied:

"Certainly not, no it was distinctly stated when he was well enough, he was to come down and we would provide him with light employment you see at that salary. Mr. Rogers also said he would pay all the doctor's bills and the hospital expenses and continue to pay him his salary until he was well enough to come down."

The appellant, after returning to work, discussed the contract with Mr. Johnston and was told by him that

"I was to be kept for the balance of my life; they told me they would always look after me and I would never want for anything."

The foregoing evidence was based on the statement of claim as originally filed. In the course of the trial an amendment was asked for by appellant and granted permitting the allegation that respondent agreed

"to pay to the plaintiff the sum of $85 per month for and during the period of his natural life such payments to be made whether the plaintiff was capable of rendering any services to the defendant or not,"

and that

"it was a further term of the agreement for settling the plaintiff's said claim for damages that if and when the plaintiff should sufficiently recover to be able to render any services to the defendant that the defendant would employ him in such light services as they required of him and as he was capable of performing and should pay him further remuneration commensurate with such services."

On resumption of the trial after amendment, appellant being asked whether under the arrangement he might "stay at home if it suited him and not work at all," replied, "No I did not." If, therefore, he was able to work he was obliged, under the agreement, to do so. Mr. Johnston questioned further about the arrangement said:

"He was to be given a little work, that is when he got the position at $85.00 a month, that being the wage he was receiving at the time of the accident, and he could have this position subject to good behaviour and loyalty to the Company."

He denies that he was to be looked after for the rest of his life, saying: "The understanding was that he was to be given a position." He denies that this arrangement was made as a settlement of appellant's potential claim for damages, though admitting that Mrs. Charlton opened the interview by saying that they did not wish to bring suit against the Company. It is reasonable to infer that the probability of suit, which might or might not be successful, was in the contemplation of all parties and formed the consideration. Finally, a portion of Mr. Johnston's examination for discovery was made part of the record, as follows:

MACDONALD, J.A.

"Mrs. Charlton came down and said Mr. Charlton did not wish to bring suit against the Company and asked what Mr. Rogers could do under those circumstances and he said that Mr. Charlton would be paid $1,500 by the Insurance Company, that the Company would pay all the hospital expenses, doctor's 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."

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

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?"

After this question is objected to, counsel continues:

"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 that should be so? Yes, subject to good behaviour and loyalty to the Company."

Does this evidence shew that appellant was to be looked after whether he worked or not, in other words, become a pensioner of the Company? Looking at all his evidence that is not what Mr. Johnston intended to convey. He was to be looked after by suitable employment only.

The appellant, on recovering, though partially incapacitated, resumed work at $85 a month, his salary being increased to $92.50 after five years, and gradually raised to $135 a month at the time of his dismissal.

I have referred to the evidence because it is argued that if the promised arrangement was one of guaranteeing employment at suitable work, thus establishing the relation of master and servant, then, by virtue of section 2 of the Master and Servant Act, R.S.B.C. 1911, Cap. 153, 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 from the day of the date of such contract,"

MACDONALD, J.A.

the appellant has no redress inasmuch as it was terminated by dismissal more than nine years after it was made. The learned trial judge found that under the arrangement agreed upon the relationship of master and servant was to continue and that "such employment was to continue for the balance of his life."

While free to draw another inference from the evidence, *viz.*, that appellant, to put it shortly, was to be looked after for the rest of his life, regardless of the relationship of master and servant, still, I would not disturb the finding of the learned judge, supported as it is by evidence. The parties had in contemplation, as the measure of compensation, an assurance that the relationship interrupted by the accident would be resumed as soon as appellant was able to work, with payment of salary, insurance

moneys and expenses in the meantime. That was in fact the appellant's conception of the arrangement. He was to be looked after for the rest of his life on resuming work, but the manner of doing so would be by providing him with suitable employment. It was realized that he would likely be permanently crippled, with its consequent handicap to securing employment elsewhere. The discussion, therefore, between Mrs. Charlton and the late B. T. Rogers was based on the assumption that appellant would be retained as an employee.

That being so, does section 2 of the Master and Servant Act bar plaintiff's claim? I think not. Whatever may be meant by a "voluntary contract of service," this is not such a contract. In any event, the section simply means that the parties thereto cannot demand performance for a longer period than nine years. It is suggested that in this case the respondent terminated the employment and that there is no redress. That is not the position. Assuming the dismissal was wrongful, the respondent committed a tortuous act *de hors* the contract of service. Further, it is not a termination of the contract of service as such. It is a breach of a special arrangement made between the parties in settlement of a damage claim. An agreement to settle a damage claim is not the "contract of service" referred to in section 2, nor is the distinction lost simply because that settlement took the form of guaranteeing employment. The contract of service within the meaning of section 2 began many years before the accident, and there was super-imposed upon that contract another one distinct and separate, *viz.*, that in consideration of foregoing a right of action a certain settlement was made. It is for the breach of this latter contract that complaint is made. Section 2 has no application.

MACDONALD, J.A.

Were the respondents justified in dismissing the appellant? Each case must be considered on its own merits. The quotation of the learned trial judge from the judgment of Lord Esher in *Pearce* v. *Foster* (1886), 17 Q.B.D. 536 at p. 539, epitomizes the law on the subject. The servant must not be guilty of conduct, either directly in relation to his work or outside his work altogether, which will interfere or may reasonably be regarded as likely to interfere with the due and proper perform-

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

MACDONALD, J.A.

ance of his duties to his master. Was appellant's conduct incompatible with the proper discharge of his duties? The employer can apply no other test. He must shew, to justify his own personal act of dismissal, that the conduct of appellant was detrimental or would likely prove detrimental to the Company's interests. The learned trial judge has fairly set out the facts on this point as far as dealt with. There is no doubt the appellant used trust moneys for the time being to pay his own debts. The money, about $900, was collected to defray the expenses of an employees' picnic, appellant being custodian. The Company were contributors to the fund but it was not Company money that he was handling. The transaction was apart from his work as an employee. That does not determine the matter in appellant's favour. It is only a circumstance to consider in applying the tests laid down. Appellant claims that he did not act with intentional dishonesty; in other words, innocently found himself in the position where a few accounts were left outstanding after the funds were exhausted. His explanation was that he had received a "windfall" of $1,250 from a "guessing contest," kept only one account and feeling that he had enough money to meet some personal debts, as well as the picnic accounts, paid out in respect to both indiscriminately until he suddenly realized that three of the picnic accounts, amounting to approximately $100, were still unpaid when his bank balance was exhausted. It is quite true that instead of frankly telling the committee, to whom he should account, the true facts he put them off, his purpose being to stave off investigation until he was able, from his own earnings, to pay the balance of the accounts. In the meantime, within four or five months after the picnic, he paid the outstanding accounts, the last one, amounting to $50, being paid by the Company, but at appellant's request deducted from his salary. The accounts were, therefore, paid before dismissal took place. His offence was that he should not have mixed trust moneys with his own funds, a practice which, although most unwise, is sometimes followed. He should not have concealed the true state of affairs from the committee. His side-stepping in this regard led him into evasive ways. The evidence does not shew,

however, that he ever intended to appropriate this money to his own use, nor is it a fair inference to draw therefrom.

On this state of facts, after the mischief was remedied, the president of the Company, without giving appellant an opportunity to offer explanation, defence or apology, summarily dismissed him. He was deprived of his means of livelihood and the full benefit of a settlement of what otherwise would be a substantial claim for damages. What he was deprived of was out of all proportion to the offence committed. It would be difficult, if not impossible, for a man so incapacitated to secure work elsewhere. These aspects are not in themselves conclusive. They are elements to be considered in weighing the question of respondent's justification, if any. Asked his reasons for dismissal, Mr. Johnston said:

"I considered it unsafe to continue him any longer in the employ of the Company."

And:

"As head of an organization employing a great many labourers I feel it my duty to insist upon the absolute honesty of all its employees and I didn't know to what extent the discipline and the morals of the rest of the organization would be affected if I had condoned what I considered his fault."

And again:

"If we allowed such a laxity of morals the workmen might go and help themselves to some sugar, something of that sort—put three or four pounds in their pockets when they went home and so on, and say this management is so easy we will just dodge them and never be found out and so nothing will happen, we won't lose our jobs."

MACDONALD, J.A.

Can it reasonably be said that appellant's failure to promptly pay the picnic accounts, under the circumstances disclosed, not a dishonest attempt to keep the money but simply a failure to pay promptly, would likely lead him, or others through his example, to pilfer from the Company or to not properly discharge his or their duties as employees? I think not. In my judgment the dismissal was not justified.

It was urged that in any event the claim fails because the original Company with whom the settlement agreement was made passed out of existence before the dismissal took place. In 1920 a new company with the same name, shareholders and personnel was formed under Dominion charter. To carry out the transfer or reorganization the old company, under Provincial

COURT OF APPEAL

1924

Oct. 7.

CHARLTON v. BRITISH COLUMBIA SUGAR REFINING CO.

charter, went into voluntary liquidation and an agreement was executed by which the new Company covenanted

"to assume and pay, satisfy and discharge all the debts, obligations and liabilities of the old company and to take over, abide by, perform, carry out and complete engagements, arrangements, contracts or other obligations of the old company."

The liabilities of the old company to the appellant were transferred to the new. After the new Company was formed, the appellant, seeing in the newspapers notices relating thereto, went to the secretary of the new Company, Mr. Adamson, and asked if the change would make any difference to him. Mr. Adamson replied in the negative. That their conversation had reference to his continued employment under the settlement agreement seems apparent, as they did not discuss any other matter, such as salary increase. We thus have by the assent of all parties a new contract substituted for the pre-existing contract and the objection fails.

MACDONALD, J.A.

Then it is said the Statute of Frauds bars appellant's claim as the agreement was not to be performed within the space of one year from the making thereof. The short answer is that in the case of contracts for an indefinite time, if they can be determined or can by possibility be performed within a year, the statute does not apply.

The appeal, therefore, should be allowed.

I may add, that I agree with the Chief Justice as to the basis upon which damages should be computed.

Appeal allowed.

Solicitors for appellant: *Bird, Macdonald, Bird & Collins.*
Solicitors for respondent: *Mayers, Stockton & Co.*

THE ATTORNEY-GENERAL OF CANADA AND THE CITY OF VANCOUVER v. CUMMINGS.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. CUMMINGS

Renewed 1926 – 1 D.L.R. 52

Title to land—Sixty years' continuous possession—Evidence of occupation—Surveyor's plan and field notes—Evidence of aged Indians—Acceptance of—R.S.B.C. 1911, Cap. 145, Sec. 49.

In an action to recover possession of a plot of ground occupied by the defendant and containing about one-third of an acre in Stanley Park on the south side of the First Narrows entering Vancouver harbour it was disclosed that the ground now known as Stanley Park was made a military reserve prior to its survey by one Corporal Turner under instructions from the Imperial War Office in March, 1863, and was transferred to the Crown (Dominion) by Imperial despatch in 1884. In 1887 an order in council was passed authorizing the minister of militia to "hand over" the park to the City of Vancouver on terms to be arranged. The City from that date occupied the property as a park (except portions occupied by squatters) but it was not until 1908 that a lease was executed and delivered to the City. Corporal Turner's instructions as to his survey included a direction that his plan should shew "any clearances or huts or other occupations recently made." The plan as produced only shewed one building occupied by another native but nothing as to the plot of ground in question. The defendant claims that he and his predecessors in title were in continuous possession for more than 60 years prior to the commencement of this action; that an Indian named Klah Chaw (who was a medicine-man and known as Dr. Johnson) had a clearance and dwelling on the plot in question prior to 1858. One Joe Manion came there in 1865, married Dr. Johnson's daughter and built a house adjoining where they lived for ten years when Manion went away and shortly afterwards his wife sold the property to Jim Cummings the defendant's father who lived there until his death when he was succeeded by the defendant who has continued to live on the premises up to the present time. The evidence of continuous occupation is clear from the time of Joe Manion's arrival in 1865. The evidence of Dr. Johnson's occupation prior to that is of Emma Gonzalves, an Indian woman of 80 years of age, who states Dr. Johnson was living there prior to the Cariboo gold rush in 1858. The action succeeded on the grounds that the Turner map precluded the defendant's case, and that *possessio pedis* had not been proven.

Held, on appeal, reversing the decision of MURPHY, J. (MACDONALD, C.J.A. dissenting), that Turner's map is not admissible in evidence and even if it were it does not prove anything of substance; further, considering the surrounding circumstances and the necessary period of time that had to be covered (*i.e.*, 60 years) the evidence adduced on the part of the defendant forms a reasonable basis upon which it can be said there has been 60 years of adverse possession against the Crown.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. CUMMINGS

Statement

APPEAL by defendant from the decision of MURPHY, J. of the 11th of December, 1923, in an action to recover possession of a certain plot of ground containing slightly over one-third of an acre (0.361 acres) situate on the channel side of the park and marked parcel 8 on plan No. L.C. 22 (A), filed in the office of the City Engineer of Vancouver and which parcel is now occupied by the defendant; for a declaration that the plaintiffs are entitled to possession of said property, and that the defendant is a trespasser thereon; and for an injunction restraining the defendant from continuing in possession thereof, or from molesting the plaintiff in its right in and to quiet enjoyment and possession of the said lands, property, and premises. The plaintiffs say that Stanley Park was a military reserve, that under instructions from the War Office to Colonel R. C. Moody, who was in charge at the Coast in the early sixties, one Corporal Turner was instructed by Colonel Moody to make a survey of the east end of Stanley Park, and that his plan of the survey should shew "any clearances or huts or other occupations recently made." That in accordance with these instructions Corporal Turner made a survey of the easterly portion of the park in March, 1863, and the field notes of his survey were filed in the office of the surveyor-general. That a plan subsequently made from the field notes shewed only one structure, a building owned by an Indian woman named Aunt Sally, who died shortly before the commencement of this action at the age of over 100 years, this building not being material to this action. On the 27th of March, 1884, Stanley Park was transferred by the Imperial Government to the Dominion and on the 1st of November, 1908, the Dominion leased the park to the City of Vancouver for 99 years. The defendant claims the evidence shews that an Indian named Klah Chaw lived and had a dwelling on the plot in question prior to 1858. Klah Chaw was an Indian medicine-man and was known as Dr. Johnson. A man named Joe Manion came there in 1865, married his daughter and built a house. After living together for about ten years Manion went to Gastown to live and shortly afterwards his wife sold the premises to one Jim Cummings, who was the father of

the defendant. The Cummings continued to live on the premises up to the present time. From the time of the arrival of Joe Manion in 1865, when he built a house, there is evidence of continuous occupation. The evidence of Klah Chaw (or Dr. Johnson) having a residence on this plot prior to 1865 is that of Emma Gonzalves, aged 80, who states Dr. Johnson was living there prior to the gold rush to Cariboo in 1858. The learned trial judge dismissed the action, holding that the Turner map was evidence which must conclude the case, and that *possessio pedis* had not been shewn for upwards of 60 years.

Statement

The appeal was argued at Vancouver on the 21st and 24th of March, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and EBERTS,* JJ.A.

N. R. Fisher, for appellant: There is no question as to continuous occupation of this plot since Joe Manion went there in 1865 and married Klah Chaw's (Dr. Johnson) daughter and built a house. It is submitted the evidence of Mrs. Gonzalves is clear that Dr. Johnson had his own house there prior to 1858 (prior to the Cariboo gold rush). His house was east of where Manion built but Manion's premises were part of the curtilage of Klah Chaw's house and was within the cleared area: see *Piper* v. *Stevenson* (1913), 28 O.L.R. 379; *Kirby* v. *Cowderoy* (1912), A.C. 599 at p. 603; *Tweedie* v. *The King* (1915), 52 S.C.R. 197; *McGibbon* v. *McGibbon* (1913), 46 N.S.R. 552. There is nothing to shew when the Crown's title commenced, and the map purported to have been made from Turner's field notes should not be accepted in evidence: see *McConaghy* v. *Denmark* (1880), 4 S.C.R. 609 at p. 618; *Reg.* v. *Berger* (1894), 1 Q.B. 823 at p. 827; *Bristow* v. *Cormican* (1878), 3 App. Cas. 641 at p. 667; *Hamilton* v. *The King* (1917), 54 S.C.R. 331 at pp. 363 to 365. When we shew actual possession for upwards of 20 years the burden is on them to shew we have not been there for 60 years. We come within the authorities shewn in Lightwood's Time Limit on Actions,

Argument

* EBERTS, J.A. died before judgment was delivered and the parties agreed to accept the decision of the remaining three justices.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. CUMMINGS

1909, p. 142; see also *The Attorney-General to the Prince of Wales* v. *St. Aubyn* (1811), Wightw. 167; *Attorney-General* v. *Parsons* (1836), 2 M. & W. 23; *The Queen* v. *Sinnott* (1868), 27 U.C.Q.B. 539 at p. 542; *Doe dem. Watt* v. *Morris* (1835), 2 Bing. N.C. 189; 132 E.R. 75; *Walsh* v. *Smith et al.* (1918), 52 N.S.R. 375 at p. 383. We have proved possession with fencing for over 40 years and that shifts the burden: see *Sturla* v. *Freccia* (1880), 5 App. Cas. 643. The planitiffs did not prove their title and their action should have been dismissed at the end of plaintiffs' case.

Johannson, on the same side: An Indian has the same rights as any British subject in regard to the acquisition of property: see *Sanderson* v. *Heap* (1909), 19 Man. L.R. 122 at p. 126; *Rex* v. *Hill* (1907), 15 O.L.R. 406 at p. 410; *Attorney-General for Canada* v. *Giroux* (1916), 53 S.C.R. 172.

McCrossan, for respondent: They must prove uninterrupted occupation for 60 years or they cannot succeed: see *Doe Fitzgerald et al.* v. *Finn, &c.* (1844), 1 U.C.Q.B. 70; *Maddison* v. *Emmerson* (1904), 34 S.C.R. 533 at pp. 556, 562 and 567 and on appeal (1906), A.C. 569; *Ouellet* v. *Jalbert* (1915), 43 N.B.R. 599; 27 D.L.R. 459. As to the remedy of the Crown for dispossession see Banning on Limitation of Actions, 3rd Ed., pp. 237-8; Yearly Practice, 1923, p. 4. That these lands were transferred to the Dominion by Imperial despatch on the 27th of March, 1884, see *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1906), A.C. 552 at p. 558; *Attorney-General* v. *Ludgate* (1901), 8 B.C. 242 and on appeal (1904), 11 B.C. 258. He says we have divested ourselves of the right to possession through the lease given the City but see *Vancouver Lumber Co.* v. *Corporation of Vancouver* (1910), 15 B.C. 432; also on appeal (1911), A.C. 711. We are in fact in possession for military purposes and that is sufficient to give us *status.* The City is entitled to use and occupation for certain purposes subject to certain conditions. On the question of a mere licence see Williams on Landlord and Tenant, 1922, pp. 11 and 12. In the cases he referred to there was no right of entry.

Argument

Fisher, in reply: Dr. Johnson's dwelling and clearing have

been in existence well over 60 years. The Manion house was built within the curtilage of Johnson's dwelling and the Crown is precluded by section 49 of the Statute of Limitations.

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. CUMMINGS

Cur. adv. vult.

7th October, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: In this appeal the same legal questions are involved as were dealt with by me in the *Attorney-General of Canada* v. *Gonzalves* [*ante,* p. 360]. The facts are not the same, but after a careful perusal of the evidence I have come to the conclusion that the defendant has failed to make out possession for 60 years prior to the commencement of the action. In fact, the evidence in this case is less satisfactory than that in the *Gonzalves* case.

The appeal should be dismissed with costs.

MARTIN, J.A.

MARTIN, J.A.: This case is, as to situation, apart from the other Stanley Park squatter cases before us, and relates to a small piece of land, 0.361 acres (parcel 8 on Exhibit 7) fronting on the main roadway along Burrard Inlet in said Park across the peninsula to the north-west of the parcels on Coal Harbour, the title to which had been considered in the judgment delivered this day in *Attorney-General of Canada* v. *Gonzalves* [*ante,* p. 360] in favour of the defendant, and the principles enunciated in that case are so applicable to the facts herein that they do not require restatement, but the facts differ in some respects, to be briefly noted.

It is admitted herein, as in said other cases, that the first sawmill on the Inlet was built in 1865, and similar reliance to a certain extent is placed on that fact, but it is not applicable in the same way because of the different origin of the defendant's possessory title of 60 years prior to the 21st of April, 1923.

It appears that James Cummings, the father of the defendant, acquired the parcel in question from the wife of one Joe Manion, who was an Indian woman, Takood, the daughter of an Indian shaman, or medicine-man, named Klah Chaw (called by the whites "Dr." Johnson), after Manion went to

COURT OF APPEAL

1924
Oct. 7.

ATTORNEY-GENERAL OF CANADA *v.* CUMMINGS

live at Gastown, on the south shore, leaving the woman in possession of their home with her two children by him, the house having been built by Manion for her out of lumber from the mill in 1865 or shortly thereafter; this sale occurred some ten years after the house was built and occupied, *i.e., circ.* 1875, and was made by Mrs. Manion about a month after Manion left, and though he had a hotel in Gastown he maintained relations with his family and supplied them with provisions, as her brother, Ambrose Johnson testifies (and Mrs. Capilano), as he does also to the arrangement for the transfer of the house to Cummings by his sister in the presence of himself and his father, Klah Chaw, in the house itself, which is still standing, and occupied by the defendant (who was born in it in 1883), where they were all staying together at the time, but after the sale they (*i.e.,* Indians) went away leaving Cummings and his wife in possession of the place, and since that time, 48 years ago, the defendant's father and herself have been in possession and the old house, as built by Manion in 1865, still stands as enlarged and is occupied by the defendant, being a continuous unquestionable possession of about 58 years upon the original site (which fact the Court below accepted), and this, upon the authorities cited in the *Gonzalves* case, constitutes a very strong case to shift the onus at least, if that were necessary.

MARTIN, J.A.

But, in addition to that, the evidence shews (to my mind beyond serious dispute) that the land upon which Manion built his house was part of the clearing and land in the possession of and occupied by his father-in-law, Klah Chaw, since a much earlier period, antedating the gold rush in 1858, upon which clearing he was living in a house built of shakes, as Emma Gonzalves testifies, and there can be no question here of any substantial error in its situation, because the shaman is a personage of the first, indeed, sinister consequence, among the Indians of this Coast, and no habitation would be better known by the natives than his.

Klah Chaw had there "a place," a clearing, of an appreciable extent, which would be sufficient to reasonably include all that is claimed here, having regard to the circumstances very similar to those in the *Gonzalves* case, but with the important

addition that Klah Chaw's old well, which some of the Indian witnesses identify and have drunk from, is still in existence and shewn on the plan put in by the plaintiffs as being close (20 feet) to defendant's southern boundary fence, where it meets the forest: as Indian Tommy, very reasonably says, Klah Chaw had a clearing there because he "could not build a house in the brushes (*i.e.*, the forest and underbrush) so they kept it clear there but not very big."

What happened obviously after Manion went over to Gastown is that Mrs. Manion's father and brother went to live with her, as the brother (Ambrose) describes, till she sold the property to Cummings, upon which the Indians all moved away, leaving the whites in possession of the old clearing, and thereafter Klah Chaw's old shake house fell into ruins, being no longer of use to the newcomers. I do not, in the special circumstances and relationship, regard this action of Klah Chaw's as being a general abandonment (which is always a question of intention) of his entire holding there, but as a relinquishment of it in favour of the Cummings, who had in effect taken over his daughter's interest; but even if the narrowest view be taken of his intentions that portion at least of his ancient possession which he had given to his daughter and son-in-law for a house and curtilage, including the well, with easements of light, access, etc., would enure to Cummings and to the defendant, and as the whole area claimed is so small it becomes almost an over-refinement to seek to define it minutely, particularly seeing that in the case of this parcel the plaintiffs have cut the original "occupation" off from the waterfront by building the main road between the old house and the seashore, thereby greatly reducing the value as well as the extent of the area, which, thus curtailed, has been fenced ever since the defendant can remember, since she was born there in 1883 as aforesaid.

MARTIN, J.A.

It is unnecessary, I think, to further discuss the evidence in detail, and I only add that Turner's map has also no application to this case, which indeed further established its irrelevance because there can be no question whatever that Klah Chaw's house was in existence years before as well as after Turner's

COURT OF APPEAL

1924

Oct. 7.

ATTORNEY-GENERAL OF CANADA v. CUMMINGS

coast-line survey was made, and yet that conspicuous "occupation" close to the shore-line he was following, is not shewn upon his map thereof.

The whole result is that the defendant's title by possession has, in my opinion, been substantially and reasonably established, and it follows that the appeal should be allowed, and the action dismissed.

Such being the result I have arrived at, it is not necessary to consider Klah Chaw's title, though I have not failed to be impressed by its obvious strength in circumstances which are quite unique, because he, a personage of the first consequence, was in undisturbed possession before and at the time law and order were established in British Columbia in 1858 (as set out in the *Gonzalves* case), but it is difficult to imagine a stronger position in law than that of the holder of a possessory title antedating the birth of the colony itself.

MARTIN, J.A.

McPHILLIPS, J.A.: I have had the advantage of reading the judgment of my brother MARTIN in this case, and I merely wish to state that I am in such complete agreement with what my brother has said that I feel nothing further can be usefully added. Unquestionably this case comes within the principles remarked upon and dealt with in the *Gonzalves* case.

MCPHILLIPS, J.A.

I would allow the appeal.

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

Solicitors for appellant: *Fisher & Johannson.*
Solicitor for respondents: *J. B. Williams.*

F. & F. HENDERSON v. NORTHWESTERN MUTUAL FIRE ASSOCIATION.

GRANT, CO. J.

1924

July 3.

COURT OF APPEAL

Nov. 6.

HENDERSON v. NORTHWESTERN MUTUAL FIRE ASSOCIATION

Insurance—Automobile—"Theft, robbery or pilferage"—Severable parts of locked car stolen—Wanton destruction by thief of machinery and equipment left—Evidence of intent to steal car—Criminal Code, Sec. 347, Subsec. 2.

The plaintiff insured his automobile in the defendant Company against certain hazards and perils including loss or damage caused by theft, robbery or pilferage. The car was locked at night and stored in a garage and on a night when so insured certain parties unknown broke into the garage and finding they could not take the car away owing to its being locked stole what fittings and material they could sever from the car and wantonly destroyed what they could not take including the slashing of the hood and tires. It was found by the trial judge that the car was stolen on the night in question within the meaning of section 347, subsection 2, of the Criminal Code; that the damage exceeded the amount of the policy and the plaintiff should recover the full amount of insurance.

Held, on appeal, affirming the decision of GRANT, Co. J., that there was evidence from which it could be inferred that the thief went to the garage intending to steal the car, and what was done was theft within the meaning of section 347, subsection 2, of the Code. The learned judge below having found there was theft and as there was evidence from which he might reasonably draw that inference his judgment should not be disturbed.

Per MCPHILLIPS, J.A.: "Pilferage" is a word which belongs to the genus "pillage" and taken in connection with the other words of the policy, includes within its scope the wanton destruction of property.

Refd to Alta U Drive Ltd. v. Jack Carter Ltd [1972] 4 WWR 578 (Alta SC) also 28 DLR (3d) 114

APPEAL by defendant from the decision of GRANT, Co. J., of the 3rd of July, 1924, in an action to enforce payment under a contract of insurance whereby the defendant insured the plaintiff's automobile against loss or damage, there being included in the hazards and perils covered by the contract the hazard and peril of loss and damage caused by theft, robbery or pilferage. The facts are set out fully in the judgment of the trial judge. Statement

H. C. Green, for plaintiff.

G. Roy Long, for defendant.

GRANT, CO. J.

3rd July, 1924.

1924

July 3.

COURT OF APPEAL

Nov. 6.

HENDERSON v. NORTH-WESTERN MUTUAL FIRE ASSOCIATION

GRANT, Co. J.: The Court finds the following facts herein: That the plaintiff was the owner of the car in question; that it was insured in the office of the defendant Company for one year from the 2nd of April, 1923, noon, until the 2nd of April, 1924, noon, against fire, theft or damage, the maximum liability being limited to $500 upon the body, machinery and equipment of the said car.

On the night of the 16-17th of February, 1924, the said plaintiff had the said car locked and stored in the garage of one of the members of the plaintiff in the said City of Vancouver, when some unknown person broke into and entered the said garage and committed theft, robbery or pilferage of or upon the body, machinery and equipment of the said car by reason of which the plaintiff suffered damage in excess of the amount for which the said plaintiff was insured, *viz.*, of $425, particulars of said loss or damage having been given to the defendant. That the said car was put into said garage by one of the owners on the afternoon or evening of February 16th and the ignition switch locked. The doors leading onto the alley were closed and fastened inside and the side door was closed, hasped and secured by a lock. On the morning of the 17th one of the plaintiffs noticed the said side door of the garage open, and went out to investigate, when he found the two

GRANT, CO. J.

doors leading onto the alley unfastened and wide open, the lock of the side door had been removed and has not since been found. Examination of the car shewed that much damage had been done to the car, including the destruction of the tires, the upholstery, the painting, the cutting of the wiring and top of the car. It also appeared in evidence that the battery of the car was run down very much, much lower that when it was put in the garage on the previous evening.

It also appeared in evidence that the floor of the garage is lower than the surface of the road on the alley, and that owing to the up-grade in going out of the garage to the alley the witness, Fred. Henderson, was not able to shove the said car up said grade onto the alley, and the said Henderson is not a small man nor a weakling. The extent of damage done to said car was clearly in excess of $500, probably fully $600.

At the trial, it was contended on the part of the defendant that the car was not stolen, that theft had not been committed, that it was a case of malicious injury to property and was not covered by the policy of insurance, and evidence was offered by experts to shew that the tires could not be cut in the manner in which they were cut but with a special knife, unless water was used and the knife used as a saw. This expert evidence was clearly disproven by a witness using an ordinary pocket knife upon an inflated tire then in Court, which cut the tire without any difficulty or by using water.

Upon a full consideration of the evidence, I cannot but conclude that the car in question was stolen on the night of February 16-17th from the plaintiff within the meaning of section 347 of the Criminal Code and subsection 2 thereof, and that the plaintiff is entitled to recover from the said defendant under the said policy of insurance the sum of $425.

There will be judgment in favour of the plaintiff against the said defendant in the sum of $425, and costs. There will also be an order for payment out to said plaintiff of the moneys paid into Court in this action by said defendant.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 4th of November, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

G. Roy Long, for appellant: Certain parts of the car were taken for which the Company paid, but the learned judge concluded the car was stolen under section 347, subsection 2, of the Criminal Code, and allowed for the malicious mutilation done the car. The car was not taken out of the garage, in fact, never moved. My contention is there was no robbery within said section: see *Hirshman* v. *Beal* (1916), 38 O.L.R. 40; 28 Can. Cr. Cas. 319.

Argument

H. C. Green, for respondent: The thief could not take the car as it was locked but he took all the parts he could separate from the machine. We are insured against a thief who in addition to what he took did over $310 worth of damage. As

GRANT, CO. J.

1924

July 3.

COURT OF APPEAL

Nov. 6.

HENDERSON v. NORTH-WESTERN MUTUAL FIRE ASSOCIATION

Argument

to proof of intent to steal and inference of such intent to be drawn from the evidence see *Reg.* v. *Gibbons* (1898), 1 Can. Cr. Cas. 340; *Rex* v. *Vanbuskirk, Poirier and Wilson* (1921), 57 D.L.R. 513. Theft is defined in section 347, subsection 2, of the Code; see also *Hirshman* v. *Beal* (1916), 38 O.L.R. 40; 28 Can. Cr. Cas. 319; Crankshaw's Criminal Code, 5th Ed., 436. On the English definition of larceny see *Rex* v. *Taylor* (1911), 1 K.B. 674; *Lapier's Case* (1784), 1 Leach, C.C. 320. As to what a policy of insurance covers see *Stanley* v. *Western Insurance Company* (1868), L.R. 3 Ex. 71; *Drumbolus* v. *Home Insurance Co.* (1916), 37 O.L.R. 465; *Thompson* v. *Montreal Insurance Company* (1850), 6 U.C.Q.B. 319; *Pelly* v. *Royal Exchange Assurance Company* (1757), 1 Burr. 341; 97 E.R. 342; *In re Etherington and the Lancashire and Yorkshire Accident Insurance Company* (1909), 1 K.B. 591; *Chartered Bank of India, Australia and China* v. *Pacific Marine Insurance Co.* (1923), 33 B.C. 91.

Long, in reply: It is an inference of law that a theft has taken place here. In fact this was merely an abortive attempt to steal a car at its best. As to the question of inference see *Dominion Trust Co.* v. *New York Life Ins. Co.* (1916), 23 B.C. 343.

Cur. adv. vult.

6th November, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): I think the appeal should be dismissed and the judgment of the learned County Court judge sustained. As I pointed out a moment ago to counsel, it comes down really in the final analysis to this. There is evidence of tampering with the lock; in fact, the lock switch was broken. There is evidence of an attempt to start by using the self-starter. There is evidence that the doors were opened in a way that would suggest that the intention of the person was to take the car away. Now, what is the inference to be drawn from all these circumstances? Is it not a fair inference that the thief went there intending to steal the car; that he tampered with the lock, and failing in that, attempted to use the self-starter and failed to do anything with that; that he opened the doors for the

purpose of taking the car out if he could get it started; that he then stole all the parts that he could carry away and, having been baulked in his principal object, to steal the car, he did this damage to cushions and the top and to the seat. I think that that is the fair inference from the evidence. I think when the learned judge drew that inference it cannot be said that he was wrong. It is an inference which, if I were considering the matter, in the first instance, I should draw.

The next question is, was what was done theft within the meaning of the Code? Section 347, subsection 2, reads as follows: "Theft is committed when the offender . . . . begins to cause it [the thing in question] to become moveable." Now, he has done something here to cause this car to become moveable. It was not necessary that he should move it, all that was necessary was that he should do something which could be said to be a beginning "to cause it to be moveable." Now, the tampering with the lock was doing something with the intention that the car should become moveable. The operating of the starting device was of the same character. This section goes much beyond the common law definition of theft, and it was probably intended to cover cases where the thief had done something intending to steal an article and had failed to carry it away. If it were not intended to cover such a case, I cannot see the object of it. So what the thief did in this case was to attempt to break the lock, to break the switch, and to use the self-starter for the purpose of causing the car to become moveable. Therefore, he was guilty of the theft of the car.

MACDONALD, C.J.A.

Then, there remains one other question. There is no doubt that plaintiff would be entitled to the loss caused by the taking of the parts which were taken. He would be entitled to be recouped for that and for the damage caused in severing the parts, but the damage here seems to have gone further. The thief apparently did not content himself with the damage done by detaching the parts from the car, but he slashed the cushions and tires and caused other damage, which indicated malicious mischief, but it was nevertheless done in the course of the theft of the car. The question is, does the insurance policy, which provides for loss or damage, cover that phase of the loss? I confess

GRANT, CO. J.

1924

July 3.

COURT OF APPEAL

Nov. 6.

I think the question open to conflicting views, but insurance policies, which are drawn by the Company itself, and which are capable of two constructions, ought to be given the popular construction, if reasonable. They ought to be held to mean what the ordinary business man obtaining insurance would reasonably think they mean. I think, on the whole circumstances of the case, the appeal fails.

HENDERSON v. NORTH-WESTERN MUTUAL FIRE ASSOCIATION

MARTIN, J.A.

MARTIN, J.A. (oral): The learned judge has found there was a theft of the car under section 347, subsection 2, of the Criminal Code, and as there was evidence from which he might reasonably draw that inference, his judgment ought not to be disturbed. Once there was the theft, then it was but a stort step to the conclusion that the damage was caused thereby. I share the opinion of the Chief Justice, it is not an easy thing to say what is meant by that expression "caused by theft," in the policy, but once you have the theft established, it seems to me to rather throw the onus the other way, and to require the Company to shew very clearly it was not caused by it. It is far from being easy, but I might, perhaps, illustrate it this way. Supposing this car, for example, had been actually taken away by the thief, and that the thief, after taking it away, should get drunk, we will say, and ignite the car and burn it up. Nevertheless, I should say, that was damage caused by the theft. Now, it seems to me to be impossible to draw a line between what we might call such criminal negligence, such conditions in the theft—between that and his exercise of his malicious feelings in the course of the theft; as, for example, if he drove off in a fit of anger and simply slashed the side-curtains and threw them away. The line is fine and it is not easy to draw it. I feel that I would not be justified in disturbing the conclusion the learned judge below reached on the facts before him and us.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I am of the like opinion that the appeal cannot succeed.

I will not go into detail as to the facts, as my brother the Chief Justice has done this. The facts are clear enough, and were it not for the Criminal Code, section 347, subsection 2,

there might be considerable doubt about whether this constituted theft. But it seems to me that Parliament has put in apt words all that is necessary to determine this case, and that what took place could be said to be theft within the purview of the Code. If I should be in error in this, I consider as well that liability under the policy of insurance is sustainable, within the meaning of the word "pilferage." When we have theft, robbery or pilferage, I am not impelled at all to believe that pilferage means some small pilfering. On the contrary, I am of the opinion that it is a word which belongs to the genus "pillage," taken in connection with the other words of the policy, and is distinct from "theft and robbery," also words set forth in the policy. Now, it seems to me that this word was used with the intention to cover the exact matter we have to consider here, that is, pilferage means the doing of something which is as here—ruin by depredations. The cutting and slashing of the tires and the destruction of the upholstery is, in my opinion, amply covered. The facts are that some things are taken away and some things are left wholly useless and damaged. In my opinion, therefore, upon that ground as well the appeal cannot succeed.

Then Mr. *Long* laid some stress upon the lack of proof of damages, and I cannot say that there was not something to be said in that regard, but still I do not think it is a matter about which there can be much debate now. There is a considerable latitude allowed to both judge and jury in assessing damages, and it has not been the practice in the Courts to hold that there has been a mis-trial when it cannot be said that there is a total absence of evidence, and I do not look upon the present case as one of that class.

MCPHILLIPS, J.A.

I would refer to the language of Lord Moulton in the case of *McHugh* v. *Union Bank of Canada* (1913), A.C. 299, where at p. 309 his Lordship says:

"Their Lordships are of opinion that the assessment of damages by the learned judge at the trial should stand. There was evidence on which the learned judge could come to the conclusion that by the negligent behaviour of the defendants' agent the mortgaged property had become deteriorated so that it realized less than it ought to have realized upon sale. The assessment of the damages suffered by the plaintiff in such a

GRANT, CO. J.

1924

July 3.

COURT OF APPEAL

Nov. 6.

HENDERSON v. NORTH-WESTERN MUTUAL FIRE ASSOCIATION

cause of action is often far from easy. The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to *quantum* of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck, J.'s assessment of the damages is erroneous, and they are therefore of opinion that it ought not to have been disturbed on appeal."

I think there was sufficient warant for the learned judge to find the amount of damages that he did find. It follows that my opinion is that the appeal should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A. (oral): In my opinion the learned trial judge drew the right inference from the facts: The intention was to steal the car, and the thief was simply thwarted in his design. It would be surprising if he went there simply to steal parts, or to do wanton damage, that he should attack the ignition switch and do other acts that were reasonably consistent only with an attempt to start the car. I think the reasonable inference is that his initial actions were for the purpose of getting the car under way, and that it was theft within the meaning of subsection 2 of section 347 of the Criminal Code. As there was, therefore, in law theft of the car and the policy covers damage caused by theft, it seems to me, even without resorting to a liberal construction, that the appeal fails.

Appeal dismissed.

Solicitor for appellant: *G. Roy Long.*
Solicitor for respondent: *H. C. Green.*

WATSON v. HOWARD.

COURT OF APPEAL

1924

Oct. 7.

WATSON v. HOWARD

Costs—Statute—Construction—Crown Costs Act—"Expressly authorizes" —Interpretation—R.S.B.C. 1911, Cap. 61—B.C. Stats. 1921 (Second Session), Cap. 15, Secs. 17 and 21(2).

An assistant fire marshal ordered the removal of a building under section 17 of the Fire Marshal Act. An appeal to the fire marshal was dismissed and an appeal was then taken to the County Court judge who set aside the order of the assistant fire marshal with costs.

Held, on appeal, affirming the decision of HOWAY, Co. J., that the Fire Marshal Act which was enacted subsequently to the Crown Costs Act, contemplates costs in the County Court by requiring the appellant to give security therefor.

Per MARTIN, J.A.: The Crown Costs Act provides that there shall be no costs for or against the Crown except under the provisions of a statute which "expressly authorizes" the Court, etc. The word "expressly" in construing such an enactment is satisfied by whatever is "necessarily or even naturally implied."

APPEAL by plaintiff from the order of MACDONALD, J. of the 26th of April, 1924, dismissing an application for a writ of prohibition to the judge of the County Court of Westminster. The facts are that the assistant fire marshal at New Westminster after inspection ordered the owner of the New Westminster Opera House to remove or destroy the building because its age and disrepair rendered it especially liable to fire. An appeal to the fire marshal was dismissed. An appeal was taken to the County Court judge (HOWAY, Co. J.) who allowed the appeal and allowed the appellant the costs (fixed at $50 and disbursements) the learned judge concluding that under section 21(2) of the Fire Marshal Act he had power to make an order for costs against the assistant fire marshal notwithstanding the Crown Costs Act. An application for a writ of prohibition directed to the County Court judge was dismissed.

Statement

The appeal was argued at Victoria on the 12th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

COURT OF APPEAL

1924

Oct. 7.

WATSON v. HOWARD

Argument

G. E. Martin, for appellant: The learned judge says he has power to grant costs under section 21(2) of the Fire Marshal Act and the whole question is as to the interpretation of the word "expressly" in the Crown Costs Act. My submission is that the Crown Costs Act applies: see *In re Land Registry Act and Scottish Temperance Life Assurance Co.* (1919), 26 B.C. 504. The Fire Marshal Act does not expressly give power to award costs: see *Chorlton* v. *Lings* (1868), L.R. 4 C.P. 374 at p. 387; *Canadian Credit Men's Trust Association* v. *Jang Bow Kee* (1922), 31 B.C. 40; *Rex* v. *Caskie* (1922), 3 W.W.R. 1109.

J. E. Bird, for respondent: There is clear jurisdiction for the judge to award costs: see *City of Vancouver* v. *Smith* (1921), 30 B.C. 311. If he has jurisdiction then this Court cannot further deal with it: see *Taylor* v. *Nicholls* (1876), 1 C.P.D. 242 at p. 244.

Cur. adv. vult.

7th October, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Under the Fire Marshal Act, Cap. 15, Sec. 17, B.C. Stats. 1921 (Second Session), J. H. Watson, the local assistant to J. A. Thomas, the fire marshal, made an order for the removal of a building belonging to Howard. An appeal was taken from him to the fire marshal, who dismissed it. Howard then appealed to the County Court. That Court set aside the order and gave costs to the appellant. It is the order as to costs that is now in question.

The fire marshal moved for prohibition and when the motion came on for hearing it was pointed out that while the fire marshal was the initiator of the prohibition proceedings, yet the order for costs was against the assistant only. Counsel thereupon agreed that the motion should proceed as if the proceedings had been properly initiated, whereupon the motion was heard and dismissed. It is from that order that this appeal is taken.

I think the order appealed from was properly made. The Crown Costs Act is not applicable. The Fire Marshal Act contemplates costs in the County Court by requiring the appellant to give security therefor. This statute is subsequent to

the Crown Costs Act and the requirement of security would be absurd unless it were intended that the Court might award costs. The Crown Costs Act declares that costs shall not be awarded either party unless they are expressly authorized by the special Act, but I think a reasonable not a technical construction should be applied where the circumstances, as here, demand it.

The appeal should be dismissed.

MARTIN, J.A.: This is an appeal by one Watson from an order of the County judge of New Westminster, directing him to pay certain costs arising out of an appeal brought by an owner of property under section 21 of Cap. 15, 1921 (Second Session), the Fire Marshal Act. The appellant, by virtue of section 7 of said Act, is a "local assistant" to the fire marshal, who by section 5 is directed to perform "such duties as may be assigned to him by the Attorney-General," and it is conceded that such marshal is an "officer, servant, or agent of and acting for the Crown" within section 2 of the Crown Costs Act, R.S.B.C. 1911, Cap. 61, and hence no order can be made directing him to

"pay or receive any costs in any cause, matter, or proceeding except under the provisions of a statute which expressly authorizes the Court or a judge to pronounce a judgment or to make an order or direction as to costs in favour of or against the Crown."

MARTIN, J.A.

By said section 7 it is declared that certain specified persons shall be "local assistants to the fire marshal and shall comply with and be subject to such provisions of this Act as respectively apply to them": the appellant is a local assistant because he is "chief of the fire department" of a municipality within subsection 1(*a*).

Section 5(2) declares that "the fire marshal and his staff shall be subject to the control of the superintendent" of insurance for the Province (section 2). Section 10 *et seq.* impose various public duties upon the local assistants in the "investigation of fires," and under section 18 every local assistant may exercise the like powers of a fire marshal in connection with the "Inspection of Fire Hazards" under sections 17-20, and it is out of an order made by the appellant under section 17 for

COURT OF APPEAL

1924

Oct. 7.

WATSON v. HOWARD

the removal or destruction of a building, that these proceedings and questions arose. Furthermore, by section 29 every person who "obstructs the fire marshal or a local assistant or other person in the execution of his duties under this Act" is "guilty of an offence" and liable to prosecution and a fine upon summary conviction, and by section 31 "every local assistant who refuses or neglects to comply with any requirement of this Act or of any regulation shall be guilty of an offence" and similarly liable to prosecution and penalty. And finally, by section 33, it is provided:

"For the purposes of Part I., the fire marshal shall issue a metal badge, bearing a serial number, to every local assistant and to every person authorized by a municipal council under section 19, and the person to whom it is issued shall wear and on request exhibit his badge whenever engaged in the performance of his duties under this Act. The badge shall be returned to the fire marshal as soon as the authority of the holder under this Act has ceased."

Part I. includes the acts of the appellant which were complained of, and after viewing the Act as a whole, I can only reach the conclusion that the local assistant in carrying out the duties imposed upon him by Act of Parliament, comes within the expression "any officer, servant or agent of and acting for the Crown" in the Crown Costs Act; he was, in effect, directly appointed by Act of Parliament, and, with all respect, I am unable to see why the fact that he was selected for such duties because he happened to be a member of an appropriate class of persons appointed by municipalities as their officers or servants, can make any difference, or detract from his distinct *status* or obligation as a Provincial officer or servant to perform Provincial duties; he is no more free from Provincial statutory obligations because he happens to be the servant of a municipal corporation than if he were the servant of any other corporation or individual: see *In re Land Registry Act and Scottish Temperance Life Assurance Co.* (1919), 26 B.C. 504, and *Rosebery Surprise Mining Co.* v. *Workmen's Compensation Board* (1920), 28 B.C. 284; *In re Gardiner and District Registrar of Titles* (1914), 19 B.C. 243, and *Cf. Callow* v. *Hick* (1923), [32 B.C. 71]; 2 W.W.R. 439.

MARTIN, J.A.

Then is there any statute which "expressly authorizes" the order against him? The word "expressly" in constructing

such an enactment is satisfied by whatever is "necessarily or even naturally implied," as Mr. Justice Willes said in *Chorlton* v. *Lings* (1868), L.R. 4 C.P. 374, 387, and Mr. Justice Byles said, p. 393:

"The word 'expressly' often means no more than plainly, clearly, or the like; as will appear on reference to any English dictionary."

It is submitted that the necessary implication is to be found in section 21 of the Act granting the "owner or occupier" of the affected property a right of appeal to the judge of the County Court of the district and providing that:

"(2) The owner or occupier shall file the petition with the registrar of the Court and give notice thereof in writing to the fire marshal, and shall within five days thereafter, or such extended time as the judge may allow, file with the registrar a bond or other security in the sum of fifty dollars to the satisfaction of the registrar as security for the payment of such costs as are awarded by the Court.

"(3) The judge shall hear and determine the matter of the appeal and shall be the absolute judge, as well of the facts as of the law, and shall make such order therein as seems meet to the judge, and his decision shall be final and not subject to any appeal."

MARTIN, J.A.

It is to be noted that in every appeal under this section the Crown is the respondent, which distinguishes the case from the decision in *Rex* v. *Volpatti* (1919), 1 W.W.R. 358, and therefore the awarding of costs must necessarily include the Crown, and unless the power of the Court included the disposition of the costs of the appeal, the provision as to security, one in favour of the Crown only, is useless and ineffective. It would be going a long way to hold that this careful provision in favour of the Crown was based upon no intention of the Legislature, and when it is followed by the power given to the judge to "hear and determine the matter" and "make such order therein as seems meet to him," I feel that there is so strong an indication of an express intention to confer a power to award costs against both parties to the appeal that I would not be justified in disturbing the view to that effect which was taken by the two learned judges below, and therefore this appeal should be dismissed.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: In my opinion the learned judge in the

COURT OF APPEAL

1924

Oct. 7.

WATSON v. HOWARD

Court below arrived at a proper conclusion and the judgment under appeal should be affirmed and the appeal dismissed.

Appeal dismissed.

Solicitors for appellant: *Martin & Sullivan.*
Solicitors for respondent: *Whiteside, Edmonds & Whiteside.*

SWANSON, CO. J.

1924

Oct. 3.

GOCH v. YOUSCHAK

GOCH v. YOUSCHAK.

Fires—Negligence—Clearing land—B.C. Forest Act—Permit—Failure to take reasonable precautions — Liability in damages — Doctrine of Rylands v. *Fletcher.*

Defendant who, under the Forest Act, B.C. Stats. 1912, Cap. 17, had obtained a fire permit for the purpose of clearing land, was held to have been negligent in not taking reasonable precautions, under the circumstances, to prevent the fire from spreading to plaintiff's lands, and to be liable for damage done thereon.

The question whether the doctrine of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, applies to the case of a bush fire in British Columbia, so that a person setting out a fire acts "at his peril" so as to make him liable, even in the absence of "negligence," if the fire gets beyond his control and damages adjoining land, discussed, and authorities reviewed, the Court expressing strong doubt of the application of the doctrine to a case such as that in question.

In discussing the question, the contention that liability was avoided by the fact that the fire was set out under statutory authority, was rejected, as the statutory provisions are permissive and not mandatory, applying *Canadian Pacific Railway* v. *Parke* (1899), 68 L.J., P.C. 89.

Statement

ACTION for damages to property by fire alleged to have spread to plaintiff's lands by negligence of defendant. Tried by SWANSON, Co. J. at Revelstoke on the 15th, 16th and 17th of September, 1924.

E. A. Boyle, for plaintiff.
Briggs, for defendant.

3rd October, 1924.

Judgment

SWANSON, Co. J.: The parties to this action are pioneering

farmers of Galician or Ruthenian extraction residing 4 miles south of Revelstoke.

Plaintiff claims damages $1,000, value of his log chute, two workmen's huts, tools and logging equipment in both huts, including stoves, beds, grindstone, etc., after abandoning $250 of his claim so as to bring this action within the Court's jurisdiction.

It is alleged by plaintiff that on May 12th, 1924, the defendant lighted or caused to be lighted or allowed to burn a fire on his premises, and carelessly and negligently allowed the said fire to escape and spread to the adjoining lands and to the property of the plaintiff, in the neighbourhood. The plaintiff alleges that this fire consumed certain of his property abovementioned, occasioning the damage alleged. Plaintiff also alleges that the damage suffered by him was caused by the failure of the defendant to observe every reasonable care and precaution to prevent such fire from spreading, as required by the Forest Act, 1912, Cap. 17, and amending Acts, and by the negligence of the defendant at common law.

There are two questions of fact, which call for decision. The case also involves some important principles of law:

As to the facts: (1) Is the fire which destroyed plaintiff's property attributable to defendant? (2) If so, was the defendant guilty of negligence?

Judgment

As to the law: If the fire is attributable to defendant, is he liable, whether he is guilty of negligence or not? Does defendant act "at his peril" in having a fire on his premises if it escapes and injures plaintiff, within the doctrine of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J., Ex. 161, or must negligence be brought home in any case to defendant? As to the origin of the fire, I may say that after most carefully reading and weighing all the evidence on both sides I have come to the conclusion that the defendant must be held responsible for the fire which did the damage alleged. It would make my judgment too lengthy to analyze the evidence in all its ramifications.

Defendant obtained a "fire permit" on May 5th, 1924, for the purpose of "clearing" land. He says that on Friday, May

SWANSON, CO. J.

1924

Oct. 3.

GOCH v. YOUSCHAK

9th, a small fire was set out by him on the cleared portion of his land. There were some furrows ploughed around this parcel of land as a fire guard, three or four furrows (some of the witnesses say), six furrows (defendant and his son say). Defendant and his wife and sons claim that this fire set out on Friday was dead out on Sunday. They suggest that the fire on Monday started on the Government road, in some slashing, and worked over onto defendant's place and thence eastward and southward. There is the suggestion thrown out by the defence that such fire may have been caused by some stranger passing along the Government road throwing a lighted cigarette into the slashing at the side of the Government road. I accept the evidence of Westerberg and of the fire warden McMahon as more reasonable on these points.

[The learned judge here discusses the evidence at some length.]

I think the evidence very clearly establishes the position taken by the fire warden, and I am obliged to hold as a fact that the fire which destroyed plaintiff's property is attributable to defendant.

It is submitted that even if the fire did originate on defendant's place, that at least was only one of the conspiring factors in the case, and that later on this fire joined with the fires from Piscatelli's place and Moran's place, and swept up the hillside, and did the damage complained of. I do not so hold as a fact. However, were it established as a fact from the evidence, this could not exculpate defendant from responsibility as being one of two or more joint tort-feasors. In such a case all parties (or each party) would be responsible for the full damages. See judgment of MACDONALD, J. in *Stevens* v. *Abbotsford Lumber Co.* (1923), 3 W.W.R. 349 at p. 355.

Judgment

The second branch of the case is the negligence (if any) of defendant. It was argued by Mr. *Boyle*, as counsel for plaintiff, that once the responsibility for the fire is fixed in the defendant, *ipso facto* the judgment must go in favour of the plaintiff, following the doctrine outlined by the House of Lords in *Rylands* v. *Fletcher*, *supra*, that the defendant acts "at his

peril" if the fire which he sets out gets beyond his control and injures plaintiff.

This view is the one apparently taken by HUNTER, C.J.B.C. in *Crewe* v. *Mottershaw* (1902), 9 B.C. 246. Ouseley, D.C.J., in the case of *Bettcher* v. *Turner* (1913), 25 W.L.R. 136, decided that this doctrine applies in the case of a prairie fire in Saskatchewan. His judgment is a very exhaustive resume of all the cases on the subject, including cases in Ontario, and the four Western Provinces, as well as the English cases.

Apparently the Courts of Upper Canada and of Ontario have declined to accept the doctrine that a settler who for the lawful purposes of husbandry sets out a fire to clear his bush land is acting "at his peril" if the fire gets beyond his control, whether he is guilty of negligence or not. See cases quoted: *Dean* v. *McCarty* (1846), 2 U.C.Q.B. 448; *Gillson* v. *North Grey Railway Co.* (1874), 35 U.C.Q.B. 475; *Furlong* v. *Carroll* (1882), 7 A.R. 145 at p. 161; *Hilliard* v. *Thurston* (1884), 9 A.R. 514 (see Beven on Negligence, 3rd Ed., Vol. 1, pp. 494, 495).

The Full Court of Manitoba was inclined to follow the Courts of Upper Canada in one of the earliest prairie fire cases which arose in Manitoba, in which I was solicitor for the plaintiff: *Booth* v. *Moffatt* (1896), 11 Man. L.R. 25 at p. 27. This decision was followed in *Owens* v. *Burgess, ib.* 75, and *Chaz* v. *Les Cisterciens Reformes* (1898), 12 Man. L.R. 330, and *Holliday* v. *Bussian* (1906), 16 Man. L.R. 437; 4 W.L.R. 577.

Judgment

The Chief Justice of Saskatchewan has held in *Moseley* v. *Ketchum* (1910), 3 Sask. L.R. 29; 12 W.L.R. 721, that the doctrine of *Rylands* v. *Fletcher* should be applied in cases of damage by fire in the prairies of Saskatchewan. The learned Chief Justice quotes with approval the judgment of Chief Justice HUNTER in *Crewe* v. *Mottershaw, supra.* If I may say so, with much respect, I have very much doubt as to whether the doctrine of *Rylands* v. *Fletcher* should be applied in a case like this in this Province. I had the same doubts in giving my judgment in *Derby* v. *Ellison* (1911), 18 W.L.R. 268, in which I dealt with these cases, my judgment being

SWANSON, CO. J.

1924

Oct. 7.

GOCH v. YOUSCHAK

affirmed by the Court of Appeal (reported (1912), 2 W.R.R. 99; 20 W.L.R. 794). See also judgment of CLEMENT, J. in *Gallon* v. *Ellison* (1914), 20 B.C. 504; 7 W.W.R. 920; 30 W.L.R. 334. The doctrine of *Rylands* v. *Fletcher* is not generally followed by American judicial authority. See the article in Canadian Bar Review, Vol. 1, p. 140, by Mr. V. C. McDonald.

It is argued that what was done here, setting out the fire May 9th (Friday) was done under statutory authority, *i.e.*, the fire "permit" issued pursuant to the Forest Act. Nevertheless, I think that the principle set out by the Privy Council in *Canadian Pacific Railway* v. *Parke* (1899), A.C. 535; 68 L.J., P.C. 89, should be followed in the case at Bar. Lord Watson, giving the judgment of the Board there, laid it down that the owner of land exercising statutory rights for the purpose of irrigating his own land, to divert under prescribed conditions unrecorded and unappropriated water from the natural channel of any stream, lake or river, adjacent to or passing through such land, is not entitled, where the language of the statute is permissive and not imperative, to use his water supply so as to damage adjacent land, and is liable to adjoining proprietors, even in the absence of negligence on his part, if injury is done to their land in the course of such irrigation.

In the case at Bar the provisions of the Forest Act as to the "permit" are permissive and not mandatory.

Judgment

In the bush fire case from New Zealand before the Privy Council, *Black* v. *Christchurch Finance Co.* (1894), A.C. 48; 63 L.J., P.C. 32, no reference is made in the judgment or in the argument to *Rylands* v. *Fletcher,* the case turning upon negligence, as to the form of the "fire permit." As to "warning" I refer to the remarks of MACDONALD, C.J.A. in *Attorney-General of British Columbia* v. *Robertson & Partners, Limited* (1924), 33 B.C. 325 at p. 328.

I am unable, however, to decide this case without expressing an opinion as to whether the doctrine of *Rylands* v. *Fletcher* applies to the case of a bush fire in British Columbia, as I am of opinion that the defendant has been guilty of negligence in this matter.

The season was admittedly a very dry one. There was abun-

dance of slashing and old burnt-over timber in and about defendant's place. In fact, as Mr. Irving put it in his evidence, the whole countryside was like a huge tinder-box. Under such circumstances, I think the defendant is liable, and especially in view of the fact that dry slashings were right on defendant's place within a few feet of the ploughed land encircling the place where the fire was set out admittedly by the defendant on Friday, May 9th, for the ostensible purpose of "clearing land," as his permit called for.

The fire after "burning out" (as it has been termed) on the portion cleared, was left (as I find) smouldering, and ready to be fanned by the wind into a fire highly dangerous at that season, and in that particular locality.

Defendant should, in the light of the grave danger to the neighbourhood, have taken the reasonable precautions which Westerberg outlined in his evidence. Had he done so, no fire, and consequently no damage, would have ensued. Westerberg said that dirt should have been shovelled onto the fire, and that it should have been killed off; and further he says that if defendant had his sons working, watching and putting out the fire, instead of working out at Irving's, there would have been no trouble. Defendant did not do that, nor did he have a man watching the fire throughout the day and night, as a prudent and careful man should have done if he had had a proper regard for his own and his neighbours' safety. McMahon says that with the exercise of reasonable care by defendant the fire would have been controlled. McMahon states that if there had been a man watching the fire, which he saw originally in defendant's place, it could have been prevented from spreading. He says that there was slashing near by the fire, and that had a man been there watching it he could have undoubtedly have prevented the fire from getting into the slashing. Once the fire got into the slashing it soon became beyond control. McMahon says, the chief precaution to be taken was to see that the fire did not get into the slashing. These reasonable precautions were not taken by defendant, and as I hold the defendant has been guilty of negligence, and is, therefore, legally responsible to plaintiff for the loss suffered by him through the defendant's fire escaping

Judgment

SWANSON, CO. J.

1924

Oct. 3.

GOCH v. YOUSCHAK

Judgment

from his control and damaging plaintiff. I may state that I had the benefit of a "view" of the lands in question, which was of great service to me.

As to the damage suffered: Plaintiff says he paid out $1,150 for the construction of the timber chute on the Forest Mills lands, on which he has a permit or lease for five years. The chute was two years old. Plaintiff had been using the chute for supplying logs to Mr. Sawyer. Fire also destroyed one barn, value $35, and a cabin or shack, value $35, also tools, dishes, bed, mattress, and everything suitable for use in camp, grindstone, hammers, etc., value $35. Plaintiff confines his claim to $1,000, the limit of this Court's jurisdiction. Defendant's son, Mike, says he does not think the chute was worth more than $300. No doubt both figures may be a little too extreme in the interest of the respective parties. If I allow $500 I think it will be allowing plaintiff what is about right.

There will be judgment for plaintiff for $500, and costs.

Judgment for plaintiff.

Revsd [1926] 4 D.L.R. Affm [1927] 3 W.W.R. 102

MARTIN, LO. J.A.

1924

Dec. 15.

THE WM. DONOVAN STEAMSHIP CO. v. THE S.S. HELLEN

THE WM. DONOVAN STEAMSHIP CO. (INC.) v. THE S.S. HELLEN.

Admiralty law—Collision—Damages—One ship passing another going same way—Both on wrong side of narrowing channel—When abreast heading for same point—Conflicting testimony.

The two vessels in question were heading down the north channel of the Chehalis River about 4.15 p.m. on the 10th of April when the S.S. "H." which was behind gave the signal to pass the S.S. "D." and was properly responded to. When the vessels were abreast (the "H." being to the port side of the "D.") both vessels were on the wrong (left or south) side of the channel and in heading for a narrowing part of the channel they both headed for the same buoy about one and one-quarter miles ahead, the weather at the same time becoming misty and just before reaching the buoy the two vessels came into collision.

Held, that in coming down the wrong side of the channel the ships had by common violation of article 25 created a situation not contemplated or provided for by the Articles; that it is impossible to attempt even to reconcile the conflicting body of testimony given in support of the respective contentions and in the circumstances the only appropriate decree is that both vessels are equally in fault and should bear the damage occasioned in like proportion.

ACTION for damages brought by the owners of the U.S. Motorship "Wm. Donovan" against the Norwegian S.S. "Hellen" arising out of a collision. The facts are set out in the reasons for judgment. Tried by MARTIN, Lo. J.A. at Vancouver on the 20th to the 22nd of August, 1924. Statement

Mayers, for plaintiff.
Griffin, and *Sidney Smith*, for defendant.

15th December, 1924.

MARTIN, Lo. J.A.: This is an action for damages brought by the owners of the U.S. Motorship "Wm. Donovan" (length 243 feet, twin screw, Malmgren, Master) against the Norwegian S.S. "Hellen" (length 413 feet, Ommundsen, Master) arising out of a collision between the two vessels near Point Chehalis, Gray's Harbour, State of Washington, U.S.A., on the 10th of April last at about 5.15 p.m. Judgment

MARTIN, LO. J.A.

1924

Dec. 15.

THE WM. DONOVAN STEAMSHIP CO. *v.* THE S.S. HELLEN

It appears that both vessels were going down the north channel of the Chehalis River out to sea, the Donovan preceding, and at about 4.15 the Hellen gave the proper signal to the Donovan, then about 6-7000 yards ahead, that she intended to pass her on the port bow, which signal was properly responded to, and the Hellen, which was going at a speed of about 8 knots over the ground, slightly faster than the Donovan, did overtake the Donovan at No. 2 red buoy upon rounding the spit, but the exact position of the vessel then is so much in dispute, though not very material, that all I am satisfied of is that at most the Hellen had not, in the meaning of Art. 18, "passed" the Donovan at any time before the collision, despite the fact that she had given the passing signal about 45 minutes before, and could have done so if she chose, which is one of the two outstanding and material peculiarities of this case; the other being that for some unexplained reason both ships were on the wrong side of the narrow channel, *i.e.,* the south instead of the north as required by Art. 25 (*Vide Bryce* v. *Canadian Pacific Ry. Co.* (1907-08), 13 B.C. 96, 446; (1909), 15 B.C. 510; 13 EX. C.R. 394; C.R. (1909) A.C. 490, 522), and though neither of the ships during the course of the trial attacked the other upon this breach of the regulations, probably because it was mutual, yet it has a very important bearing upon the solution of the difficult question which has arisen.

Judgment

At the time the vessels were at No. 6 red buoy their position was that they were practically abreast, the Hellen being within 40-50 feet of the buoy and the Donovan about 300 feet further out in the channel and running on courses practically parallel, and that situation was, beyond question, without danger to either ship; up to that time, no "crowding" had occurred on either side and none was even complained of. But there then arose the apprehension of danger because the channel at a short distance ahead, about three-quarters of a mile, at No. 3 can buoy, became greatly contracted, narrowing down to 1,200 feet from 2,200 at No. 6, and so continuing till No. 4 buoy (a 1¼ m. from No. 6), and greater caution would have to be observed, emphasized by the fact that the weather had become "misty,"

as the defendant says, or "hazy with rain," according to plaintiff, in their respective preliminary acts, to such an extent that the Donovan's officers assert that they could not see No. 4 buoy as she passed No. 6 buoy, and she had, on account of the haze, been on a course S.W. by W. ½ W. after passing can buoy No. 5, which was altered to W.S.W. about one-third of a mile after passing No. 6, when No. 4 was at east clearly seen, which course, if laid, would bring her clear to the north of No. 4 and of the Hellen, but from the Hellen in a more southerly position her officers assert that No. 4 could be plainly seen from No. 6, and so their ship was held persistently steady on a course for that buoy, but so as to clear it on her port side.

It will thus be seen that both vessels being on the wrong side of the rapidly narrowing channel were admittedly heading for the same point, the situation being complicated by the fact that while the Hellen had assumed the obligation of a passing ship she was not discharging it, and was pursuing a course which, if both ships maintained their speed, would bring her into dangerous proximity at least to the Donovan, if they both continued to keep to the wrong side of the channel, though by Art. 24 it was her duty to "keep out of the way of the overtaken vessel." On the other hand, the Donovan could not, in the circumstances of the constantly varying courses of the narrow channel properly insist on keeping her original "course" as well as her speed (which latter she was doing) within the true meaning of Art. 21 as regards the other technically, though not actually "passing vessel" under Art. 18, Rule VIII., even though she was placed in a position of uncertainty by her strange conduct; the truth is that by common violation of Art. 25 the ships had created a situation not contemplated for or provided for by the Articles.

Judgment

Each side attributes the collision to the other ship bearing down upon her suddenly almost immediately before No. 4 buoy was reached, the collision occurring almost abreast of it and about 280-350 feet to the north, and, after a careful study of the evidence, I find it is impossible to attempt even to reconcile the conflicting body of testimony given in support of the respective contentions, or to accept in entirety either of the irrecon-

MARTIN, LO. J.A.

1924

Dec. 15.

THE WM. DONOVAN STEAMSHIP CO. *v.* THE S.S. HELLEN

Judgment

cilable accounts of what occurred. The case is a very unusual and perplexing one, which has caused me corresponding consideration, with the result that the only conclusion that I can arrive at, satisfactory to myself at least, is that the collision was caused by the unseamanlike conduct of both vessels in misconceiving instead of promptly appreciating the dangerous position that had quickly come upon them at No. 6 buoy, primarily caused by their being on the wrong side of the channel, and the other circumstances above mentioned, and in not having promptly taken proper steps to avoid such danger, which there was ample time for both parties to take by, *e.g.*, slackening speed and sheering off adequately or otherwise as the circumstances might require, and it is incomprehensible to me why they were not so taken, instead of continuing to blunder along towards obvious danger till too late for extrication, the belated attempts to accomplish which, while not then open to criticism, unfortunately came too late. In such circumstances the only appropriate decree to make is that both vessels are equally in fault for the collision, and consequently should bear the damage thereby occasioned in like proportion, as well as the costs of this action.

COCHRANE, LADNER & REINHARD v. PHILLIPS.

SWANSON, CO. J.

1924

Aug. 1.

COCHRANE v. PHILLIPS

Solicitor's lien—Certificate of title held as security for debt—Handed over for registration of conveyance—Retention of lien on new certificate of title.

Equitable charge—Agreement to deposit certificate of title for security for debt—Later actual deposit—Statute of Frauds—Land Registry Act, B.C. Stats. 1921, Cap. 26, Secs. 34, 35.

Solicitors held a certificate of title of certain lands of R. as security for R.'s debt to them. R. conveyed the lands together with other lands for value to his daughter, the defendant. Her agent obtained from the solicitors the certificate of title, agreeing that on registration of the conveyance the new certificate of title should be handed to the solicitors to be held as security for R.'s debt. Defendant claimed that her agent was unauthorized to make such agreement, but, as found by the Court, she knew of R.'s debt and of the original certificate of title being held as security therefor. After a long delay defendant's agent, on being reminded of the agreement, handed to the solicitors the new certificate of title, which was in the name of defendant and embraced five separate parcels of land, whereas the original certificate had embraced only one.

Held, (1) The solicitors should be held to have been always in constructive possession of the new certificate and to have retained a solicitor's lien thereon.

(2) Under the agreement made when the solicitors handed over the original certificate of title and the implementing of that agreement by the later deposit with them of the new certificate of title, there had been created in their favour an equitable charge on the lands covered by the new certificate of title; the actual deposit took the agreement out of the Statute of Frauds on the doctrine of "part performance," even were the Statute of Frauds otherwise available.

(3) Sections 34 and 35 of the Land Registry Act, B.C. Stats. 1921, Cap. 26 (corresponding to sections 74 and 75 of the Land Registry Act, B.C. Stats. 1906, Cap. 23, dealt with in *Howard* v. *Miller* (1914), 84 L.J., P.C. 49; 20 B.C. 229; (1915), A.C. 318) had no application to defeat the solicitors' claim.

ACTION by solicitors for a declaration that they are entitled to hold a certain certificate of title as security for costs owing them, that they are entitled to an equitable mortgage on the lands covered by the certificate of title, and for enforcement of said mortgage. Tried by SWANSON, Co. J. at Vernon on the 25th of July, 1924.

Statement

30

SWANSON, CO. J.

1924

Aug. 1.

COCHRANE v. PHILLIPS

Falkner, for plaintiffs.

Fulton, K.C., and *H. C. DeBeck,* for defendant.

1st August, 1924.

SWANSON, Co. J.: The plaintiffs, a well-known firm of solicitors in Vernon, in this county, in their prayer for relief in the plaint herein, claim: (a) that a declaration be made that the plaintiffs are entitled to hold a certain certificate of title issued from the Land Registry office at Kamloops, B.C., and numbered 7338D, as security for certain bills of costs owing to them amounting to $1,271.44, on which at the trial they admit $64.39 as having been paid, leaving a balance owing of $1,207.05; (b) that the plaintiffs are entitled to an equitable lien over the lands covered by the said certificate; (c) that the plaintiffs are entitled to an equitable mortgage over the lands covered by the said certificate; (d) that the said mortgage be enforced by sale or foreclosure; (e) such other and further relief as to the Court may seem meet.

The action is not one *in personam,* but one *in rem* affecting the said certificate of title and the lands covered thereby.

The cause of action has been discussed by counsel under two separate headings: (1) Solicitors' lien on documents; (2) equitable mortgage. The second heading is the one stressed by Mr. *Falkner,* counsel for the plaintiffs.

Judgment

The plaintiffs' claim, as alleged in the plaint, and supported by evidence at the trial, is that prior to June 28th, 1917, the father of the defendant, one Reynolds, was indebted to the plaintiffs in the sum of $1,207.05 (after making deduction above referred to) in respect of certain services rendered him by plaintiffs as solicitors and counsel in important legal matters, inclusive of a Supreme Court action — *Turner* v. *Reynolds.* Bills of costs in respect to said matters were duly rendered. The plaintiffs at the time were in possession of a certain certificate of title No. 18647A covering certain lands of the said Reynolds, which certificate was held by the plaintiffs as security for the said indebtedness. Up to this point there can be no question that the plaintiffs were entitled to a solicitors' lien on the said certificate of title.

On May 29th, 1916, a verdict for $2,500 against Reynolds was recorded in favour of Turner (as shewn by the item for counsel fees on trial in the bill of costs). By a conveyance dated June 28th, 1917, Reynolds conveyed the lands covered by said certificate, together with other lands, to his daughter the defendant. The plaint alleges that this conveyance was without consideration, of which allegation there is no affirmative evidence. Mrs. Phillips (the defendant) says on the other hand that the conveyance was given to her by her father for value, some $6,000 having been expended by her in the matter.

In order to effect registration of this conveyance in the Land Registry office at Kamloops it was necessary to obtain the above certificate of title from the plaintiffs. Mrs. Phillips employed Mr. C. F. Costerton, a well known real-estate agent and notary public of many years' residence in Vernon, a former mayor of the city, as her agent in the matter of this conveyance from her father and to secure its registration. Mr. Cochrane and Mr. Costerton both testify that the clear and undoubted agreement between them at the time the said certificate of title was obtained from Mr. Cochrane by Mr. Costerton, as agent representing the defendant, was that on the registration of the new certificate of title in the Land Registry office at Kamloops the new certificate should be handed over to Mr. Cochrane on behalf of the plaintiffs, to be held by them as security for their account against Reynolds. The said Costerton did subsequently, but not until April, 1921, deliver the said new certificate to the plaintiffs, who now have possession of the same. Mr. Costerton says that he must have informed the defendant, immediately after getting possession of the original certificate, of his agreement with Mr. Cochrane, which latter fact the defendant denies. The defendant says that she gave Mr. Costerton no authority to make any such agreement with Mr. Cochrane, which she entirely repudiates. She claims that if any such agreement was made it is of no force or effect, as having been made without her authority or instructions. It is, I think, quite clear from the evidence of both Mr. Cochrane and Mr. Ladner that the defendant knew that the original certificate was being held as security for plaintiffs' costs against Mr. Reynolds, defendant's

Judgment

SWANSON, CO. J.

1924

Aug. 1.

COCHRANE v. PHILLIPS

father. She undoubtedly knew of the important legal matters which plaintiffs were conducting for her father, indeed, in many of them she acted as her father's agent, the unfortunate man being confined in the penitentiary at New Westminster. The defendant also knew that considerable costs were owing to plaintiffs by her father. This case is complicated by the fact that undoubtedly Mr. Costerton overlooked for a considerable period of time his agreement to deliver up to Mr. Cochrane the new certificate of title when same was issued by the Land Registry office. When the new certificate of title, No. 7338D, embracing five separate parcels of land (the original certificate, No. 18647A, embracing one) was issued, Mr. Costerton received the same from the registry office, but overlooked handing it over to Mr. Cochrane, as I hold as a fact that he did expressly agree with Mr. Cochrane to do. Instead of handing it over to plaintiffs this certificate was issued to effect registration of a certain mortgage for $1,100, effected by the defendant, which latter mortgage was paid off and a release filed in June, 1920. The certificate was then, about the latter date, forwarded by mail by Mr. Costerton direct to the defendant, he apparently still overlooking his engagement with Mr. Cochrane to hand it over to him. This certificate was retained by defendant for a short time, and was then taken back by defendant to Mr. Costerton to be kept for defendant in Mr. Costerton's office.

Judgment

After being kept in the latter place for a couple of months, the defendant took the certificate and placed it in the Canadian Bank of Commerce, Vernon, for safe-keeping. Later on in February, 1921, the defendant arranged with Mr. Costerton for another loan of $800 to enable her to purchase certain lands at Okanagan Landing from the Bank of Montreal. To enable Mr. Costerton to carry out the latter loan arrangements the defendant brought the certificate of title in question to Mr. Costerton. In April, 1921, Mr. Costerton displayed this certificate of title to Mr. Cochrane, who thereupon reminded Mr. Costerton of his original agreement to deliver up this certificate to the plaintiffs to be held as security for their account in question. Mr. Costerton then recalling to mind the agreement, as an honourable man felt obliged to leave the certificate in the

custody of Mr. Cochrane. The certificate was accordingly committed to the care of Mr. Cochrane, on behalf of the plaintiffs, in whose custody or control it remained and now remains. Mr. Costerton is not very clear as to the time he told defendant about his action in leaving this certificate with Mr. Cochrane. The defendant says that the first intimation whatever that she had of such a fact was in the letter from Mr. Costerton to her of December, 1923.

Mr. *Fulton,* as counsel for defendant, strongly stressed the point that Mr. Cochrane's letter of July, 1918, to the effect that a second mortgage was to be given by defendant to secure plaintiffs' account, is entirely at variance with the testimony given by Mr. Cochrane at the trial.

Notwithstanding this letter written thirteen months after the agreement was made between Mr. Costerton and Mr. Cochrane, I must accept the statement on oath of these two honourable and well-known gentlemen as to the actual happenings in April, 1917.

Mr. *Fulton,* in his very able argument, strongly urged that there could be no solicitors' lien on the new and substituted certificate; that having parted with the original certificate (the property of the client of the plaintiffs, Reynolds) and a new certificate having issued in the name, not of Reynolds, but of his daughter, the defendant, and covering not simply one, but five, separate parcels of land, the solicitors' lien has been lost, quoting Halsbury's Laws of England, Vol. 26, p. 819. Halsbury, at par. 1334 (Vol. 26), deals with three classes of solicitors' liens: (1) Passive or retaining lien; (2) common-law lien on property recovered or preserved; (3) statutory lien enforceable by charging order.

Judgment

In par. 1341 he deals with the "Discharge of Lien": (1) Solicitor receiving payment; no discharge by solicitor obtaining judgment or charging order; (2) solicitor parting with possession of documents, unless he has done so for a particular purpose, as, *e.g.,* where he sends a conveyance to be executed, or hands papers to an arbitrator to enable him to draw up his award, or where after dissolution of a firm a former partner takes away the deeds; (3) by waiver, where solicitor conducts

SWANSON, CO. J.

1924

Aug. 1.

COCHRANE v. PHILLIPS

himself in a manner inconsistent with the retention of his lien, but there is no waiver where a solicitor expressly reserves his lien (see cases in foot-note (*s*), p. 820).

In the case before me Mr. Cochrane did expressly reserve his right to lien. He parted with the original certificate on the express understanding with the defendant's agent (as I find as a fact) that the new certificate should be impressed with a lien or equitable charge. I think it would be most inequitable and against good conscience (always the supreme consideration to be guarded against in a Court of Equity) to decide that the defendant can now hold this certificate freed and discharged from all rights or liens of the plaintiffs. Defendant or her agent, I am satisfied, would never have obtained the original certificate but for this agreement. It would be a most unconscionable thing to permit defendant to get possession of the original certificate on this understanding, and then permit her to raise such a plea in answer to plaintiffs' claim and entirely defeat them of their just remedy in this action. The right to a solicitor's lien is one enjoyed at common law, being a right similar to that possessed by a craftsman who does work or repairs upon an article, *e.g.*, a waggon. Could it be said at common law that the owner of a waggon which had been repaired by a waggon-maker, and on which the latter had a lien for the amount of his account for services rendered, could destroy the workman's lien by taking his waggon away to put a new waggon-box on it, after having expressly promised to bring back the waggon to the waggon-maker's shop after he put the new waggon-box on it, and then refuse to deliver the waggon into the custody of the waggon-maker In contemplation of law the waggon-maker would be held to have always retained constructive possession. I would think that the plaintiffs should be held to have been always in constructive possession of the certificate in question, although the original certificate had in a legal sense been merged into the new certificate. However, the plaintiffs' counsel seems to prefer to build his case not upon a solicitor's lien but upon an equitable charge or mortgage created by the defendant through her agent, Mr. Costerton. It is objected, however, by Mr. *Fulton* that the

Judgment

arrangement being merely oral between Mr. Cochrane and Mr. Costerton, there can be no equitable charge created, and that in any event the Statute of Frauds stands in the way of its enforcement at law; that at best only an agreement to create an equitable charge was made, and that must be evidenced in writing, to satisfy the Statute of Frauds. That position, I think, would be permitting the Statute of Frauds to be invoked to perpetrate a fraud on the plaintiffs. In my opinion the Statute of Frauds should not be permitted to be used as an instrument of fraud. I can conceive of no stronger case than this, where a fraud would result in fact if such a defence were available. But I think there is a complete answer to that argument.

In this case the agreement of Mr. Costerton has in fact been implemented (true, indeed, at a somewhat belated hour), for in fact Mr. Costerton deposited with Mr. Cochrane's firm this certificate of title in April, 1921. The matter now rests not on a mere agreement to create an equitable charge, but there has been an actual deposit of the certificate, just as much as there would be if a man walked into a bank with his certificate of title and pledged it to secure an advance in money. Halsbury's Laws of England, Vol. 21, pp. 78, 79, par. 140, states:

"A good security in equity may be created by the deposit of the title deeds. . . . . A deposit of title deeds is regarded as an imperfect mortgage which the mortgagee is entitled to have perfected; or as a contract for a legal mortgage which gives to the party entitled all such rights as he would have had if the contract had been completed. . . . .

"A deposit of title deeds as a security for a debt, without writing, or by word of mouth, may create a charge upon the property notwithstanding the Statute of Frauds, since the delivery of the deeds is sufficient part performance of the implied agreement to give a security."

Judgment

Fisher on Mortgages, 6th Ed., par. 27, pp. 17-18, states:

"The doctrine appears to be founded on the doctrine of part performance of a contract taking it out of the statute [of Frauds], and consequently actual deposit as security for an actual debt or advance is a *sine qua non*. Unless there be actual deposit the alleged equitable mortgage must rest, if at all, on a written memorandum or other document signed by the mortgagor."

Fortunately we have in this case the "actual deposit" made of the certificate by Mr. Costerton in fulfilment of his agreement with Mr. Cochrane. There can, therefore, be no question

SWANSON, CO. J.

1924

Aug. 1.

COCHRANE v. PHILLIPS

that the Statute of Frauds has no application, as the doctrine of "part performance" takes such a contract or agreement out of the statute.

It is also contended by Mr. *Fulton* that the plaintiffs' claim must be defeated by the provisions of the Land Registry Act, B.C. Stats. 1906, Cap. 23, sections 74 and 75, [sections 34 and 35 of the present Act, 1921, Cap. 26]. In my opinion these sections have no application whatever to the case at Bar.

The case of *Fialkowski* v. *Fialkowski* (1911), 4 Alta. L.R. 10; 1 W.W.R. 216; 19 W.L.R. 644, has no application. That was a decision of Mr. Justice Scott (later Chief Justice of Alberta), whose recent death is a matter of deep regret to the Bench and Bar. That was a case of a stolen certificate of title, and concerned the conflicting rights of the real owner and of the bank, which advanced the money in good faith to the thief. The Privy Council have dealt with these two sections of our Act in *Howard* v. *Miller* (1914), 84 L.J., P.C. 49 at p. 52; 20 B.C. 229; 7 W.W.R. 627; 30 W.L.R. 112; (1915), A.C. 318. Lord Parker of Waddington, in giving the judgment of their Lordships of the Privy Council, reversing the Supreme Court of Canada (4 W.W.R. 1193) which affirmed the Court of Appeal (16 B.C. 48; 16 W.L.R. 246), affirming the judgment of MURPHY, J., deals with these two sections.

Judgment

"This section [75], in their Lordships' opinion, imposes a penalty on non-registration of an instrument by rendering such instrument inadmissible in evidence in certain cases, but has no further operation."

Section 74 [section 34 of the present Act, 1921, Cap. 26] in effect says that no "instruments" executed after June 30th, 1905, shall pass any estate or interest until same are registered in compliance with the Act. Equitable mortgages created by parol by deposit of title deeds cannot be registered under our Act. Section 74 [section 34 of the present Act, 1921, Cap. 26] cannot, in my opinion, be held applicable to such equitable charges. They are not created by "instruments" (clearly some form of written documents of title—see the definition of "instrument" in section 2 of the Land Registry Act) and as section 74 [section 34 of the present Act, 1921, Cap. 26] touches only such "instruments" it cannot be held to nullify the effect of such long

established rights under the English law (which is the law in that regard I hold applicable here) secured by equitable charges. No Act of Parliament can wipe out such clearly defined and well-ascertained equitable rights, known as "equitable charges or mortgages," without the clearest intention so expressed in the law. I am sure it would come as a shock to the profession and to the public for a Court to hold that in British Columbia there is no such thing as an equitable charge or mortgage created orally by deposit of title deeds which can be enforced in a Court of law. I do not propose to make any such revolutionary ruling in this Court. I have read with much interest the judgment of Mr. Justice Riddell in *Zimmerman* v. *Sproat* (1912), 26 O.L.R. 448; 5 D.L.R. 452 at p. 453, and think that some of the learned judge's words might well be applied in this case.

Judgment

I must, therefore, give effect to the plaintiffs' claim. There will be judgment for the plaintiffs in accordance with the terms set forth in the prayer in the plaint.

Should the defendant desire that plaintiffs' bills of costs be taxed, the same (unless the amount of the bills is agreed on between counsel) will be taxed forthwith before the registrar of the Court at Vernon.

Judgment for plaintiffs accordingly, with costs.

Judgment for plaintiffs.

MACDONALD, J.

1925

Jan. 14.

MATTICE v. MATTICE.

Trustee—Demise of—Executrix—Action to recover sums from estate—Evidence — Corroboration — Lapse of time — R.S.B.C. 1911, Cap. 78. Sec. 11.

MATTICE v. MATTICE

The plaintiff had managed his farm in Manitoba with the assistance of his son A. In 1905 he concluded to move to British Columbia, to which Province he proceeded and purchased fruit land for himself and A. leaving A. and the other members of his family in Manitoba where A. managed the farm, kept a bank account in his own name into which receipts for the sale of the farm's proceeds were deposited and from which farm expenditures were paid. Good crops and fair prices in Manitoba after the plaintiff had left enabled the farm there to pay off a large portion of liabilities. A died in 1921, his wife being executrix of his estate. In an action to recover from the executrix $2,305.94 as the balance due him from his son's estate:—

Held, that on the question of corroboration section 11 of the Evidence Act does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the fact sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence. The evidence of corroboration in this case far exceeds this standard and the plaintiff is entitled to recover $1,000 of the amount claimed.

Statement

ACTION to recover from the executrix of the estate of A. E. Mattice, deceased, the sum of $2,305.94. Deceased was the plaintiff's son and the claim is that in 1908 and 1909 he paid or caused to be paid to his son in trust certain sums, and at the time of his death the balance still due him was the above amount. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 17th of December, 1924.

W. E. Burns, for plaintiff.

R. S. Lennie, and *J. A. Clark,* for defendant.

14th January, 1925.

Judgment

MACDONALD, J.: The plaintiff, John Mattice, seeks to recover from Edith Lydia Mattice, as executrix of the estate of A. E.

Mattice, deceased, $2,305.94. He alleges that, in 1908 and 1909, he paid, or caused to be paid, to his son, the said A. E. Mattice, in trust, sums of money amounting in all to $3,503.30, and that the amount now claimed is the balance of such moneys which were owing to him by said A. E. Mattice at the time of his death, in 1921. It is contended, on the part of the defence, that no corroborative evidence has been adduced supporting the statements of the plaintiff with respect to such indebtedness, which would fulfil the requirements of section 11 of the Evidence Act, in an action against an executrix. Further, that strict compliance with such essential in this action should be imposed, on account of the great length of time which has lapsed since the alleged deposit or receipt of moneys forming the basis of the indebtedness. In this connection, I am referred to a portion of the judgment of the Earl of Halsbury in *Watt* v. *Assets Company* (1905), A.C. 317 at p. 333 as worthy of consideration and application, *viz.*:

"My Lords, I do not propose to differentiate Watt's appeal from the case of Mr. Bain, although to some extent there is a difference between them. All I shall say about either of them is that at this distance of time I shall make every intendment in favour of that having been honestly done which purported to be done. I think I should expect some evidence to be produced contradicting that state of things rather than insist on evidence in its support at this distance of time, and with the loss of evidence that undoubtedly has occurred from the delay that has taken place . . . . they have lain by upon their supposed rights all this time, during which time witnesses have died and the means of explanation have disappeared also to an extent which, to my mind, renders it impossible or at all events extremely inexpedient as a matter of law and administration, to allow these things to be ripped up at this distance of time, when both the opportunities of explanation have gone by and when witnesses have passed away."

Judgment

The weight which might otherwise be attached to these statements, with benefit to the defence, is, however, destroyed, if the facts in that case are considered. They differ so materially, from those here presented, as to render the authority of little assistance in this action. Plaintiff, who is now 88 years of age, says that the indebtedness from the late Albert E. Mattice arose under the following circumstances. He had been farming with his son Albert and other members of the family near Carberry, in Manitoba, when he became discouraged, through bad crops and poor prices with attendant liabilities;

MACDONALD, J.

1925

Jan. 14.

MATTICE v. MATTICE

so he decided to seek a new home in British Columbia and engage in fruit raising. The Keremeos District was selected as favourable for the venture. Plaintiff was to be the pioneer and, if satisfied with the change, then, the other members of the family were to follow later on. In the meantime, they were to remain in Manitoba and continue farming operations. Plaintiff came to Keremeos in 1905, and, shortly afterwards, purchased one parcel of land for himself and another for Albert. Good crops and fair prices enabled the farm in Manitoba to produce such results as to reduce the mortgage and pay off the liabilities. Then the farm, and the major portion of the stock and implements, were sold. The proceeds of these sales were from time to time paid into the Bank at Carberry. There is ample evidence to support the making of such deposits and as to their origin. Should I, then, decide that these moneys were, at the time, and subsequently continued to be, the sole property of the plaintiff and held in trust by Albert Mattice up to the time of his death? W. G. Mattice, one of the sons, seems to have been a controlling spirit in the family, and, although he was available for that purpose, the account was opened in the bank at Carberry in the name of Albert. This was a matter of convenience, necessitated in a measure by the fact that the father could not at the time read nor write, though subsequently appears to have been able to write his own name and have a banking account at Keremeos. This course leads me to a conclusion that the father conceded a superior position to this son, Albert, as compared with the others, with respect to the farm and stock. He undoubtedly felt the justice of recognizing Albert as closely associated with him in such farming operations. This son was then approaching middle age. He had lived and worked on the homestead all his lifetime, while William had land of his own and the others had, in a measure, pursued other vocations. The father's working days were practically ended and, in the fresh venture in a new country, he would not be capable of active management nor hard labour. He would likely only potter around the fruit ranches they intended to acquire. So while he did not intend to make a gift to Albert of the moneys deposited in the bank, it was deemed advisable that he should hold

Judgment

them in trust and thus subject to account. In so finding, I have concluded that the necessary statutory corroboration has been supplied by plaintiff. The evidence of corroboration far exceeds the standard referred to by Sir Henri Taschereau, C.J. in *McDonald* v. *McDonald* (1903), 33 S.C.R. 145 at p. 152, as follows:

"The statute does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the facts sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence."

It is then contended that, if any indebtedness existed from the late Albert E. Mattice to the plaintiff, it arose not through an express, but from a constructive trust, and thus that the Statute of Limitations can be successfully pleaded, as a bar to recovery of the claim. I think such a contention cannot be supported by the evidence. Lord Esher, M.R. in *Soar* v. *Ashwell* (1893), 2 Q.B. 390 at 394 discusses a situation, which, being applied in this case, creates an express trust on the part of the late Albert E. Mattice, as follows:

"The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as a trustee of money or other property, *i.e.*, to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his *cestui que trusts* for all such money or property without regard to lapse of time."

Judgment

Compare Gifford, L.J. in *Burdick* v. *Garrick* (1870), 5 Chy. App. 233 at p. 243 as follows:

"Where the duty of persons is to receive property and to hold it for another and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it."

This passage was cited with approval by Lord Macnaghten in *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437 at p. 463, and by Bowen, L.J. in *Soar* v. *Ashwell, supra.* So while such a contention, as to the claim being barred, would only apply, in any event, to a portion of the claim, still, I do not think it was

MACDONALD, J.

1925

Jan. 14.

MATTICE v. MATTICE

applicable to any part of the moneys, which were so held by the late Albert E. Mattice in trust.

Then, as to the nature of this trust, the evidence at the trial and taken on commission, coupled with the bank pass book and cheques, throw light, even at this late date, upon the disposition of the moneys so deposited in the bank at Carberry. No complaint is made, as to the disposition of moneys, prior to the time when such bank book shews there was a balance of $658.20 remaining on deposit. These moneys were used, as occasion required, for the joint benefit of the father and son. Then, from that time forward, and up to December 4th, 1908, further payments were received from different parties in connection with the sale of land and stock and paid into the credit of Albert E. Mattice at such bank. Interest was added from time to time on this account and of the amount thus created, it was conceded that Albert E. Mattice was entitled to draw and properly expend the following amounts: February 5th, 1909, $48.05; November 30th, 1909, $32.15; February 26th, 1910, $23.10, and March 10th, 1910, $200. It was submitted that the following amounts had been improperly expended by Albert E. Mattice, *viz.*: October 12th, 1911, $200; October 24th, 1911, $200; January 2nd, 1913, $600; November 17th, 1913, $219.35; June 19th, 1919, $89.50; September 12th, 1919, $403.45; December 1st, 1919, $87.95, and February 7th, 1920, $150. As to whether all or any of these payments were in breach of the trust depends upon its nature. Plaintiff stated, that he had always found his son Albert honest in every transaction and he does not seem to have been concerned, even after the marriage of his son and his taking up separate housekeeping, as to the moneys on deposit in Carberry. It was not until some time after the death of his son that he inquired as to such moneys. Amounts had been drawn during a lengthy period for household expenses and a portion of the moneys was utilized in the purchase of land for Albert, but when, as has been proved to my satisfaction, Albert expended certain portions of the money, the father asserts a right to complain as being in breach of the trust. It was alleged by plaintiff, in his statement of claim, that prior to the 25th of February, 1908, it had been verbally agreed between himself

Judgment

and the said A. E. Mattice that out of the moneys deposited in the bank, the latter

"should be entitled to appropriate and expend for that purpose a sufficient sum to pay for a ranch at Keremeos, B.C., similar to that purchased by the plaintiff for brothers of the said A. E. Mattice and to establish himself thereon."

This statement was doubtless inserted after due deliberation, and accepting it as being a correct version of the understanding between the parties, then, it supports what I believe, in all the circumstances, was the true nature of the trust, assumed by Albert E. Mattice. It should be borne in mind, as I have mentioned, that he laboured with his father for years and took almost entire management of his fruit farm, and, aside from two expenditures to which I will separately refer, the only objection that could reasonably be made to any of the items complained of are ones in connection with furnishing his house, after 1st March, 1919. He openly, at the time, in paying for furniture and other necessaries for his house, withdrew the said amounts of $403.45, $87.95 and $150. A liberal construction upon the arrangement entered into, before they came to this Province, would justify the son in assuming that, if he so desired, though somewhat advanced in years, to marry, that he should be entitled in thus "establishing" himself to utilize some of the moneys for the joint venture in the new Province.

Judgment

It is not easy to determine, at this late date, the exact nature of the trust assumed by A. E. Mattice. I think that while these moneys, as a whole, belonged to plaintiff, still, A. E. Mattice was entitled to use them, not only for joint household expenses and farming operations while living with his father, but afterwards both before and after his marriage to a reasonable extent in "establishing" his own household, by purchasing furniture and even making payment on a piano. This leaves, however, three withdrawals by A. E. Mattice from the bank at Carberry amongst the items disputed by the plaintiff, which require special consideration, as they represented moneys expended for purposes outside the terms of the trust as indicated. The sum of $200 was paid by A. E. Mattice out of such moneys in the purchase of what proved to be worthless stock in a Portland Cement Company, on 12th October, 1911, and a further

MACDONALD, J.

1925

Jan. 14.

MATTICE v. MATTICE

sum of $200 was paid for a like purpose on 24th October, 1911. These two payments were openly made, but plaintiff says that, while he was aware of the speculation, and in fact his son, W. G. Mattice, took a similar venture at the same time, still, that he had no interest therein and it was unauthorized. I have no reason to discard the statement of the aged father. Then, on 2nd January, 1913, A. E. Mattice purchased an interest in real estate in Winnipeg, and sent the requisite payment of $600 by a cheque on the Carberry Bank in favour of his brother, W. G. Mattice, who, under instructions, made the purchase in his own name. This shewed the honesty of the transaction, and it is hardly reasonable to suppose that at the time, at any rate, W. G. Mattice was not aware of these moneys lying idle in the bank at Carberry and their origin. Then from the form of the cheque, he must have been acquainted with the fact that a portion of such moneys were being utilized by A. E. Mattice in the purchase of real estate in Winnipeg. Still, he now states that he was not cognizant of a diversion of funds, inconsistent with the attitude assumed by his father, as to this and other expenditures being unauthorized and in which he is actively supporting his father.

Judgment

The burden, however, was upon the defence, to shew that the trustee was authorized by his father to so use the trust moneys in these purchases and, without evidence to that effect, I feel that I must hold it has failed in this respect and that there were breaches of trust.

The result is, that the plaintiff is entitled to recover $1,000. There is a balance of $94.14 still remaining on deposit in the bank at Carberry, and which is partly made up of interest credited from time to time. Plaintiff is entitled to this sum.

As to the costs, the defendant did not "unreasonably resist" this claim. It was a very stale one, and, if I had the discretionary power, under our Rules, as I would have in Ontario, of determining "by whom and to what extent the costs shall be paid," I might, in the circumstances, exercise it, but, as such power does exist, the costs must follow the event.

Judgment for plaintiff.

MACDONALD, J.

1925

Jan. 12.

LAKE OF THE WOODS MILLING CO. v. GOLD

LAKE OF THE WOODS MILLING COMPANY LIMITED v. GOLD.

Sale of goods—Shortage in deliveries—Thefts by servant making delivery —Receipts for full amount given by defendant's servants—Full amount credited on defendant's books—Estoppel.

In pursuance of an agreement the plaintiff supplied the defendant with flour for her retail business. She sent orders for delivery as required and the plaintiff would send a load of flour from its warehouse with bill shewing number of sacks and a duplicate to be signed by customer admitting receipt of consignment in good order. The bill would be placed on file by the defendant and on the copy acknowledgment of receipt of each delivery was signed by the workman in charge and returned to the plaintiff. Accounts were rendered to the defendant regularly and the business proceeded for a considerable period without dispute until March, 1924, when it was discovered that the delivery man had stolen a certain amount of flour from each delivery. In an action to recover the balance due estimated on the full amount sent out from the plaintiff's warehouse:—

Held, that the defendant's actions were such as to prevent her from subsequently disputing the delivery of all the flour for which payment was claimed.

ACTION to recover $2,687 being a balance alleged by the plaintiff to be due from the defendant on the 21st of March, 1924, in respect of flour supplied by the plaintiff to the defendant from time to time prior to that date. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 11th of December, 1924. Statement

Davis, K.C., and *E. R. Thomson*, for plaintiff.
Killam, and *J. A. Grimmett*, for defendant.

12th January, 1925.

MACDONALD, J.: Plaintiff seeks to recover $2,687 from the defendant, as being a balance alleged to be due by her, on the 21st of March, 1924, for flour, supplied by plaintiff up to that date. Plaintiff sought to prove such liability by producing the books of the defendant, in which the amount appears credited to the plaintiff. This admission of liability and the *prima facie* case thus established are met by a contention on the part of the Judgment

MACDONALD, J.

1925

Jan. 12.

LAKE OF THE WOODS MILLING CO. v. GOLD

defendant that, while this credit, and other previous ones, were honestly made at the time, and in the belief that the flour, which the different amounts represented, had been received by plaintiff, still, that such flour had not been actually delivered. It was alleged that, while plaintiff purported from time to time to deliver certain quantities of flour, and receive credit therefor as if delivered, still that, as a matter of fact, even if the full complement as represented by the bills or invoices left the warehouse of plaintiff for delivery to the defendant, that the servant, employed to make delivery, was in the habit of stealing a quantity of the flour *en route*. He was not detected in his pilferings for some time, but then a trap being laid for him, he was discovered and confessed his crime. The question of adjustment then arose, and it seemed probable that the matter would, in the circumstances, be amicably settled. The local manager of defendant admitted a number of bags of flour, for which the defendant had been charged, had been stolen. Defendant stated that he, presumably out of regard towards a good customer, led her to believe that the head office of plaintiff Company would arrange the whole matter satisfactorily. This failed of accomplishment, and eventually plaintiff took the ground that while its servant may have stolen flour intended for delivery to defendant, still, that she had, by her negligence, or that of her servants, for whom she was responsible, so acted that she was debarred from now asserting that all the flour, as represented, was not duly delivered. This position involves consideration and, if the facts so warrant, application of the principle of estoppel.

Judgment

The loss alleged to have been suffered by defendant, through the stealing, is very difficult of ascertainment with any degree of certainty. While it is not nearly so large as she claimed, still, I am satisfied it was substantial. Then should plaintiff bear this loss and relieve the defendant?

Plaintiff, in pursuance of an agreement, was supplying defendant with the bulk of the flour she required in her business. She sent in orders for delivery as occasion required, usually for a motor load of flour, and plaintiff would send the requisite amount from its warehouse, together with a bill for its customer, shew-

ing the number of sacks of flour being delivered, and a duplicate to be signed by the customer admitting that such consignment had been received in good order. The copies received by defendant were placed on file and later on afforded the information from which credits could be given to plaintiff in her books. Then, as a rule, the acknowledgment of receipt of each delivery of flour was signed by the workman, for the time being in charge of the bakeshop. They admitted not having counted nor checked in any way the number of sacks which purported to have been delivered, although they knew the object of the receipts. They excused their carelessness by saying, it was somewhat difficult to do so, though not by any means impossible. They trusted the delivery man and assumed he was honest, so upon a glance at the motor-car bringing the flour, to see if it were fully unloaded, they felt justified in acknowledging, on part of defendant, that a specific number of sacks of flour had been delivered. This course was pursued month after month. Plaintiff not only received receipts shewing due delivery, but during this lengthy period, up to the discovery of stealing, heard no complaints as to any shortage. Accounts were rendered to defendant regularly, based on such deliveries. They were undisputed by defendant until March, 1924, and in fact it could not well be otherwise, as they agreed with her own books. I think the plaintiff, in selling its goods, followed the ordinary course of business and could not reasonably be called upon to do more, in order to insure delivery of the quantity ordered. It had a right to expect that its customer would check the number of sacks of flour as they were delivered, according to the bills rendered upon each occasion. Defendant and her servants were well aware that plaintiff was depending upon this being done, and that the duplicate bill was forwarded with each load for that purpose. There was a duty, in the course of their dealings, thus cast upon the defendant, which she failed to properly perform. If it had not been for the negligence of the defendant, the loss would not have occurred or, at any rate, it would not have assumed proportions sufficient to justify defendant in disputing a liability, admitted by her books to exist, up to the time the stealing was discovered. Such negligence was as between these two parties,

Judgment

MACDONALD, J.

1925

Jan. 12.

LAKE OF THE WOODS MILLING CO. v. GOLD

buying and selling goods, the proximate cause of the loss. It enabled the dishonest servant to repeatedly purloin a portion of the flour which should have been received by defendant. Had it not been for such neglect the misconduct of the delivery-man would have become apparent the first time he attempted to steal. The plaintiff, upon the facts, thus shortly outlined, could reasonably believe that the deliveries of flour, according to the orders, were being fully made from time to time, and that it was entitled to payment in due course. I think defendant's actions were such, as to prevent her from subsequently disputing the delivery of all the flour, for which payment is claimed. The principle of equitable estoppel applies, even with its limitations, as referred to in *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175 at p. 181, Blackburn, J. in that case, after saying:

"I agree that a party may be precluded from denying against another the existence of a particular state of things, but then I think it must be by conduct on the part of that party such as to come within the limits so carefully laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Freeman* v. *Cooke* [(1848), 2 Ex. 654],"

Judgment

adds (pp. 181-2):

"In the considered judgment of the Court, Parke, B., lays down very carefully what are the limits. He says, that to make an estoppel it is essential 'if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.'"

In holding defendant liable, I refer, in conclusion, to the case of *Dominion Bank* v. *Ewing* (1904), 7 O.L.R. 90; 35 S.C.R. 133; (1904), A.C. 806; as shewing the length to which the principle of estoppel may be applied, especially in a business transaction.

There should be judgment in favour of plaintiff for $2,687 and costs.

Judgment for plaintiff.

BOSLUND *ET AL.* v. ABBOTSFORD LUMBER, MINING & DEVELOPMENT COMPANY LIMITED.

MCDONALD, J.

1925

Jan. 22.

BOSLUND v. ABBOTSFORD LUMBER, MINING & DEVELOPMENT CO.

Negligence—Forest fire—Spreading to Washington State (foreign)—Conflict of laws—Injury to soil and personalty—Right of foreign owners to sue.

The law of the State of Washington with respect to liability in damages for negligently allowing fire to spread being the same as that of British Columbia, an action for injury so caused to property in that State from a fire originating and being allowed to escape from British Columbia may be maintained in British Columbia.

In such an action damages cannot be recovered by residents of a foreign State for injury done to the soil, trees, or to buildings or fences erected on foreign property for the better enjoyment of the soil and with the intent that they remain permanently whether or not they were affixed to the soil otherwise than by their own weight; but growing crops, including grass used for pasture, should be treated as chattels and the loss recoverable.

Rep'd to Tahsis Co Ltd v Ca Forest Prod Ltd 70 DLR (2d) 376 (BCSC)

ACTION for damages by certain residents of the State of Washington against the defendant Company carrying on lumber operations on the Canadian side of the American boundary line for negligence in allowing certain fires set out on its logged-off lands to spread over the boundary line and onto the plaintiff's lands in Washington State. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 16th of December, 1924. Statement

Mayers, and *W. H. Patterson,* for plaintiffs.

Davis, K.C., and *A. E. Bull,* for defendant.

22nd January, 1925.

MCDONALD, J.: This is an action for damages brought by a number of residents of the State of Washington against the defendant, which is a Company incorporated under the laws of British Columbia and carrying on logging operations in the vicinity of Abbotsford, British Columbia. Judgment

On the 17th of September, 1919, in a dry season of the year, the defendant Company set out fires on its logged-off lands somewhat over one-half mile north of the boundary line between

MCDONALD, J.

1925

Jan. 22.

BOSLUND v. ABBOTSFORD LUMBER, MINING & DEVELOPMENT CO.

British Columbia and the State of Washington. These lands were covered with stumps, logs and other debris which would be left after the timber had been removed. It is claimed by the defendant that these fires were started upon the demand of one Vanetta, the district fire warden, and were, therefore, legally set out under the provisions of the Forest Act. Admittedly no written permit was given and I doubt very much whether the evidence establishes that any demand was made. MacInnes, the defendant's foreman, who set the fires, states in his evidence that what Vanetta said to him was that he might burn the slash if he saw fit, and that he did see fit to do so. Whether this is so or not, it is, I think, beyond question that after the fires were set the defendant was negligent in that it failed to take proper precautions to prevent the spread of the fire to the premises of others. A small patrol was maintained for the first two or three days, it would appear rather for the purpose of protecting the Company's own property than that of its neighbours. After the first two or three days, no one was left in charge to watch the fires. No effective fire guard was prepared and no back fires were lit; in fact, nothing was done to prevent the fires from spreading. During the ten days following 17th September, the fire practically burned itself out and the defendant's officers and servants considered it safe. As a matter of fact, however, it was not safe, as the defendant's officers ought to have well known. It seems unnecessary to repeat what was said in *McIntyre* v. *Comox Logging and Railway Co.* (1924), 33 B.C. 504, where I followed what had been said by the learned Chief Justice and by my brother MACDONALD in previous cases. I think the inevitable conclusion is that the defendant was guilty of negligence in its failure to use reasonable precautions to control the fire in case a wind should arise and to keep it within the defendant's own boundaries.

Judgment

On the 27th of September, there happened what ought to have been expected to happen on any day. A strong north-easterly wind blew up. The fires, which had appeared to have died out, sprang immediately into life and spread very quickly over a frontage one mile to one and a half miles in width

and in a south-westerly direction over lands covered with brush and other inflammable materials towards the American boundary line. The plaintiffs contend that that fire spread on to their respective lands in the State of Washington, causing them serious loss. The defendant contends that it was not its fire which burned the plaintiffs' property, but that before the defendant's fire had reached the boundary line, another fire, which had been burning on the premises of one Maryott immediately south of the line, had caused the plaintiffs' damages before the defendant's fire had crossed the line.

During the progress of the trial, which lasted several days, I formed a very strong conclusion that it was the defendant's fire which caused the losses complained of. I was later greatly impressed by Mr. *Davis's* forceful argument to the contrary. Having again read the evidence and given it the most careful consideration I can, I am satisfied that any jury of reasonable men would be forced to the conclusion that the Maryott fire did not cause the damage complained of, but that the defendant's fire did. I do not propose to analyze all the evidence in this regard, but I may say that I was greatly impressed by the evidence of the witnesses Holmquist, Worthen, Bradley and Don Holmes, and I was not impressed by the evidence of Vanetta nor by that of the Evankos.

The various plaintiffs suffered loss of buildings, fences, growing crops, trees, personal effects and in one or two cases suffered personal injuries. In some cases the soil itself was injured. It was agreed by the parties before the trial that if the defendant Company was found liable, there should be a reference as to damages, but it was understood that certain questions must be disposed of by the trial judge.

Judgment

Expert evidence was called to shew the law in the State of Washington as applicable to the facts of this case, and I am satisfied on that evidence that the acts of the defendant were wrongful in that State, and although I have neither been referred to nor found any case which is identical with the present case, I see no reason why the principles laid down in *Machado* v. *Fontes* (1897), 2 Q.B. 231 should not apply. If the law of the State of Washington were different from that

MCDONALD, J.

1925

Jan. 22.

BOSLUND v. ABBOTSFORD LUMBER, MINING & DEVELOPMENT CO.

of the Province of British Columbia, as applicable to the facts in question, grave difficulties might arise, but whether it be taken that the tort complained of was committed wholly in British Columbia, where the fire was negligently allowed to escape, or wholly in the State of Washington, where the damage was actually done, or partly in British Columbia and partly in Washington, still, I think that the action is maintainable here.

During the trial, after hearing a very careful argument, I reached the conclusion that the plaintiffs could not in this Court recover damages for injury done to real estate situate in the State of Washington, relying upon such authorities as *Cope* v. *Sharpe* (1911), 81 L.J., K.B. 346; *Jones* v. *Llanrwst Urban Council* (1910), 80 L.J., Ch. 145 at p. 149; *Gallon* v. *Ellison* (1914), 20 B.C. 504; Halsbury's Laws of England, Vol. 1, par. 80; Vol. 6, par. 305, and *Companhia de Mocambique* v. *British South Africa Company* (1892), 2 Q.B. 358; (1893), A.C. 619.

Having held that no action could lie here for damages done to real estate situate in Washington, evidence was led with regard to the question of whether or not certain structures, fences, trees, *et cetera,* amounted to fixtures so as to become part of the freehold. As a guide to the registrar in assessing damages, I hold that no damages can be assessed in this action in respect of the buildings for which damages were claimed, and the same rule applies to fences and trees. These buildings and fences, whether or not they were actually affixed to the soil other than by their own weight, were placed there for the better enjoyment of the freehold and with the intent that they remain permanently. In fact, on these farm lands both buildings and fences were essential to the proper operation of the various farms. In this connection, I have relied upon such cases as *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328; *Argles* v. *McMath* (1895), 26 Ont. 224; *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174; *Monti* v. *Barnes* (1901), 1 K.B. 205; *Miles* v. *Aukatell* (1898), 25 A.R. 458, and *Travis-Barker* v. *Reed* (1923), 3 D.L.R. 927.

Judgment

It follows from what has been said that no damages can be allowed for injuries done to the soil itself.

On the other hand, I think growing crops, in which I think should be included growing grass used for pasture, should be treated as chattels: *Evans* v. *Roberts* (1826), 5 B. & C. 829, followed recently in *Stephenson* v. *Thompson* (1924), 2 K.B. 240.

As to the personal injuries suffered by some of the plaintiffs as a result of the fire, while it is not usual that such claims should be referred, there seems no reason for suggesting that any other course should be adopted than that to which I understand the parties have agreed.

There will be judgment for the plaintiffs pursuant to the above findings.

Judgment

Judgment for plaintiffs.

MURRAY v. GOLD.

Practice—Solicitor and client—Bill of costs—Action to recover—Order to registrar to tax bill—Registrar refuses to tax—Judgment for full amount claimed—Appeal.

The plaintiff brought action on a bill of costs for services rendered as a barrister and solicitor. On the trial it was ordered that the bill of costs be referred to the registrar of the Court to be taxed and that the plaintiff recover from the defendant the amount found due on the taxation. The registrar refused to tax the bill on the ground of lack of jurisdiction. On the application of the plaintiff the learned trial judge then gave judgment for the full amount claimed.

Held, on appeal, reversing the decision of GRANT, Co. J., that the judgment must be set aside as the trial judge had already disposed of the case and had no jurisdiction to interfere further with his original judgment.

APPEAL by defendant from the decision of GRANT, Co. J., of the 19th of March, 1924. Whitley Murray, surviving member of the firm of Martin & Murray, Barristers, etc., brought action to recover $244.05 from the defendant for services rendered as barristers and solicitors. The plaintiff obtained judgment at the trial on the 11th of March, 1924, and the bill was referred

Statement

COURT OF APPEAL

1924

Oct. 27.

MURRAY v. GOLD

to the registrar to be taxed. An appointment was taken out and the parties appeared before the deputy registrar who refused to proceed with the taxation on the ground that he had no jurisdiction to tax the bill as it was a bill of costs for services rendered in the Supreme Court. On an application by the plaintiff on the 19th of March judgment was entered for the full amount claimed.

Statement

The appeal was argued at Vancouver on the 27th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Latta, for appellant: The learned judge having given judgment on the 11th of March and referred the bill to the registrar for taxation had no jurisdiction to give judgment for the full amount claimed: see *Newcomb* v. *Green* (1923), 32 B.C. 395 at p. 397. In any event the client is entitled to have his bill taxed.

E. J. Grant, for respondent: The deputy registrar would not tax the bill on account of the bill being in the Supreme Court. The taxation being refused we are entitled to apply for judgment for the amount of our bill.

Latta, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal will have to be allowed and the judgment of the 19th of March set aside. This is an unfortunate case. I quite realize Mr. *Grant's* position, but over it all we must see this: That the learned judge was not properly advised as to the course he ought to take and Mr. *Grant* was the one who took the course which led to the judgment. That is, he applied for directions. Included in those directions was one for judgment for $244. The learned judge adopted that and he adjudged accordingly, not realizing that he had already disposed of the matter, and had no jurisdiction to interfere further with his original judgment. So that, after all, while we have to deal with the matter of costs, the respondent is not altogether free from blame; on the other hand, the appellant was bound to come here to get rid of this judgment, and there is no reason why we should make any exception from the usual rule that costs follow the event.

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

MCPHILLIPS, J.A.: I am of the like view. The learned judge made an order which, of course, cannot be supported, and had it been merely a mistake of the Court and not done at the suggestion or upon application a good deal could be said, but this was not an error or mistake of the Court in strictness, because whoever applies to the Court or a judge for an order must appreciate the responsibility that goes with the application. If the application be acceded to and the order be made, responsibilities follow, that is, if the order be a wrong one, it is set aside with costs, unless there are good grounds—good cause to refuse costs. I see no good grounds to refuse costs here. An order was made without jurisdiction, and was applied for in terms; it is true, alternatively, but applied for in absolute terms by the plaintiff, and the consequence is that, having taken the order, it should be set aside with costs. The rule is that costs follow the event unless there be good cause.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree.

Appeal allowed.

Solicitor for appellant: *T. D. M. Latta.*
Solicitor for respondent: *E. J. Grant.*

SWANSON, CO. J.

1924

Nov. 21.

REX v. HARVEY

REX v. HARVEY.

Criminal law—Summary conviction—Payment of fine—Right of appeal—Waiver.

The accused was convicted before a police magistrate for driving a motor-vehicle in a municipality to the common danger on a public highway. After conviction accused complained of the injustice of the conviction and said "If I had another witness I would appeal the case." A constable then present said "What about payment of that fine?" and accused said "I will give you a cheque, call at the store for it." The constable called and the cheque was paid. After the Court closed accused said to the constable "There is no use my appealing as I have no witnesses."

Held, on appeal, that on the facts the appellant by paying his fine waived his right of appeal.

APPEAL from a summary conviction made by the police magistrate at Salmon Arm against J. R. Harvey for that on the 1st of November, 1924, he did drive a motor-vehicle in the said Municipality of Salmon Arm to the common danger on a public highway, to wit: the Auto Road in said Municipality. Argued before SWANSON, Co. J. at Vernon on the 21st of November, 1924.

Statement

Lindsay, for appellant.
Morley, for respondent.

SWANSON, Co. J.: This is an appeal from a summary conviction made by Hugh Bowden, police magistrate of the City of Salmon Arm, against the appellant, J. R. Harvey, for that the said Harvey on November 1st, 1924, did drive a motor-vehicle in the said Municipality of Salmon Arm to the common danger on a public highway, to wit: the Auto Road in said Municipality.

Judgment

A preliminary objection was raised by counsel for the respondent that the appellant paid the fine imposed by the magistrate, and so waived his right to appeal. Mr. Justice MARTIN in *Rex* v. *Neuberger* (1902), 9 B.C. 272 held that the defendant having paid his fine with the intention of so doing his right to appeal was lost.

In *Rex* v. *Tucker* (1905), 10 Can. Cr. Cas. 217, MacMahon, J. held that there was no waiver of right to appeal where the fine and costs imposed by summary conviction were payable forthwith and in default distress, immediate payment of same being made to the magistrate accompanied by a request for information as to the time allowed for appeal. The evidence of two witnesses shewed that Tucker (appellant) immediately after payment of the fine and costs asked what time was allowed in which to appeal, and the magistrate informed him of the time within which notice of appeal must be given. In *Justices of York and Peel, ex parte Mason* (1863), 13 U.C.C.P. 159, the Court (Draper, C.J.) held that there was no waiver of right to appeal. The defendant was convicted on 27th August, 1862, for "allowing card-playing at his inn, and other disorderly conduct during this year" and was fined $20 and costs. On judgment being pronounced he remarked that he would pay the fine and costs, but he "would see further about it." On 30th August notice of appeal was given and appeal heard on 11th September. Draper, C.J., at p. 162, said:

"I do not think that these facts afford the same ground for inferring a waiver of the right of appeal as in the case [of *Rex* v. *The Justices of the West Riding of Yorkshire* (1815), 3 M. & S. 493, in which Lord Ellenborough held there was a waiver of appeal]. . . . . I think further that a party should not, on any doubtful ground, be deprived of a right to appeal against a summary conviction, and that if his conduct can fairly bear a contrary interpretation, it should not be construed as a waiver of this right. I am disposed to extend, rather than to narrow, Lord Denman's remark, that the Court of Quarter Sessions 'should rather lean to the hearing of appeals than to dismissing them on technical grounds,' 5 B. & A. 992, and would, where the acts and declaration taken together admit of a construction consistent with the preservation of the right to appeal, adopt the construction. Lord Ellenborough's judgment establishes, that a party may waive his right, and shews under what facts he will be held to have done so. In the present case it does not appear to me that the facts establish a waiver, and therefore the rule should be made absolute."

Judgment

In the case at Bar the appellant after conviction says he complained of the injustice of the conviction and said, "If I had another witness I would appeal the case." He says that as he was leaving the Court Constable Hughes said, "What about payment of that fine?" and that he told him that he would give him a cheque if he called down at his store. The

SWANSON, CO. J.
1924
Nov. 21.
REX v. HARVEY

constable, he says, told him to make cheque payable to Mr. Lacey, city clerk, which he did. Appellant said that he thought that if the fine was not paid that his goods would be seized, and that he did not know that if he paid the fine he would lose his right of appeal. Constable Hughes, however, swore that when the appellant was convicted nothing was said in Court about appeal, but that after Court closed the appellant said, "There is no use my appealing as I have no witnesses."

Judgment

With much reluctance I come to the conclusion on the facts of this case that the appellant waived his right of appeal.

Appeal dismissed but without costs.

Appeal dismissed.

SWANSON, CO. J.
1924
Dec. 18.
REX v. BREMNER

REX v. BREMNER.

Municipal law—Licence—Trading—Agent of outside firm—Wholesale or retail—R.S.B.C. 1924, Cap. 179, Sec. 294.

An agent or traveller in the employ of a firm of wholesale stationers, printers, book-binders and manufacturers of loose-leaf devices called on the city clerk of Salmon Arm in his office and solicited orders for stationery and office supplies. He also solicited a grocer as to his supply of counter-check books, which are specially printed and supplied in 1,000 lots. On appeal from a summary conviction for soliciting business by retail as an agent of a Vancouver firm without taking out a licence contrary to section 6 of By-law 136 (1923) and section 294 of the Municipal Act:—

Held, that the sales so made were not sales by retail within the meaning of said by-law or the Municipal Act and the conviction should be quashed.

Statement

APPEAL by accused from a summary conviction by the police magistrate at Salmon Arm for that he did on the 26th of November, 1924, in the said City of Salmon Arm unlawfully solicit business by retail as an agent of Clarke & Stuart Co. Ltd., of Vancouver, B.C., without having first taken out a licence, contrary to section 6 of By-law 136 (City of Salmon

Arm, 1923), and section 294 of the Municipal Act. Argued before SWANSON, Co. J. at Vernon on the 18th of December, 1924.

Savile, for appellant.
Lindsay, for respondent.

SWANSON, Co. J.: This is an appeal from a summary conviction recorded against the appellant by Hugh Bowden, police magistrate of the City of Salmon Arm, for that the said D. A. Bremner did on 26th November, 1924, in the said City of Salmon Arm unlawfully solicit business by retail as an agent of Clarke & Stuart Co. Ltd., of Vancouver, B.C., without having first taken out a licence, contrary to section 6 of By-law 136 (City of Salmon Arm Trades Licence By-law, 1923), and contrary to section 294 of the Municipal Act, Cap. 179, R.S.B.C. 1924.

Mr. Bremner is a commercial traveller in the employ of Clarke & Stuart Co. Ltd., a well-known firm of wholesale stationers, printers, engravers, book-binders and manufacturers of loose-leaf devices. This firm manufactures and prints special books and rolls for the use of municipal and other offices throughout the Province. The company, through its travellers, has been in the habit in the usual commercial way of soliciting orders throughout the different cities of the Province for the supply of its specially printed and manufactured books, and also various office supplies. For many years they have followed this practice, not taking out any trade licences in the various towns and cities covered by their travellers. On 18th November last, Mr. Bremner called on the city clerk of Salmon Arm in his office, and solicited orders for stationery and supplies, as he had previously done. Assessment rolls and other books specially printed by this firm had been supplied to the Salmon Arm Municipality through orders obtained in the same manner by the company's traveller.

Judgment

Mr. Edwards, city clerk of the City of Vernon, testified at the hearing of the appeal that a similar practice was followed by his municipality, no request ever having been made that this com-

SWANSON, CO. J.

1924

Dec. 18.

REX v. BREMNER

pany should ever take out a trade licence for doing business within the municipality. A grocer, Mr. Cross, also testified that Mr. Bremner, on the same date, had called on him and enquired of him as to his supply of counter-check books, which are also specially printed for each customer, and generally supplied in 1,000 lots. No order was given Mr. Bremner.

I do not think that Mr. Bremner was contravening the local Trades Licence By-law; that he was not soliciting or taking orders for the sale by retail of goods, wares or merchandise to be supplied or furnished by his firm.

I think this case falls within the principle set forth in the judgment of Chief Justice BEGBIE in *Heath* v. *Victoria* (1892), 2 B.C. 276, which was the case of a sale of 1,100 business cards (trade circulars) to a person in British Columbia by an agent of a firm doing business outside the Province, to be supplied by them. In that case it was held to be a sale by wholesale, and not a sale by retail. See also *Duncan* v. *Cairns* (1916), 10 W.W.R. 789, where it was held a colporteur of the British and Foreign Bible Society is not obliged to take out a peddler's licence. In my opinion, the sale appealed by Mr. Bremner was in the usual way of the wholesale trade and did not constitute any infraction of the local by-law.

Judgment

The appeal is, therefore allowed and conviction quashed.

Conviction quashed.

what complicated. It came up in Victoria and was then not disposed of, so that it may be just as well that counsel should speak to the costs when the appeal comes on for hearing.

MARTIN, J.A.: This is a motion by The Dominion Bank, dated the 28th of May, 1924, to quash or dismiss the appeal of the authorized assignee from an order of Mr. Justice MORRISON, made on the 10th of January last, which, in view of the report made to us by that learned judge, through the registrar, must be taken to have been made by him sitting in Chambers.

After a consideration of all the sections of the Act and rules to which we have been referred upon the point, I can only reach the conclusion that they are very involved and inconsistent, not to say confused, and draw no clear or practical line of distinction between decisions or orders made in Court or Chambers, those two quite distinct modes of exercising judicial powers being for the most part strangely jumbled together and treated in practice as being interchangeable if not identical. For the purposes of appeal at least the only rational and practical way, in my opinion, out of such confusion is to regard all "orders or decisions" of a "judge" or "Court" under the Act as being on the same plane and to limit appeals therefrom to "ten days after the pronouncing" thereof as provided by rule 68.

MARTIN, J.A.

It follows that the motion to quash the appeal as being brought too late would succeed, were it not for an order granted by Mr. Justice MURPHY on the 10th of June, nearly two weeks after said motion was launched, whereby he extended the time to bring this appeal till the 24th of June last, under powers conferred by section 68 (5) of the Act, as follows:

"(5) Where by this Act, or by General Rules, the time for doing any act or thing is limited, the Court may extend the time either before or after the expiration thereof, upon such terms, if any, as the Court may think fit to impose."

And see also said rule 68 providing that the notice of appeal may be served within the ten days aforesaid or "within such further time as may be allowed by a judge."

That order, if valid, would cure the delay, but an appeal is taken from it on the ground that the learned judge had

IN RE THE OKANAGAN UNITED GROWERS LIMITED AND THE DOMINION BANK.

COURT OF APPEAL

1924

Nov. 25.

IN RE THE OKANAGAN UNITED GROWERS LTD. AND THE DOMINION BANK

Practice—Appeal out of time—Motion to quash—Subsequent order extending time—Appeal from—Can. Stats. 1919, Cap. 36, Sec. 68(5)—Bankruptcy rule 68.

The Court will not entertain an appeal from an order granting extension of time to appeal.

Per MARTIN and MACDONALD, JJ.A.: This is different from a refusal to extend the time for appealing in which case the Court might be justified in removing an obstacle which might stand in the way of an appeal being heard on the merits.

Moore v. *Peachey* (1892), 8 T.L.R. 406 applied.

MOTION by The Dominion Bank to the Court of Appeal from an order quashing or dismissing the appeal of the authorized assignee of the Okanagan United Growers Limited made on the 7th of April, 1924, from an order of MORRISON, J. of the 10th of January, 1924: (a) That the authorized assignee has no right to set off a debt due for advances made and material supplied in respect of the 1921 crop against the proceeds of the 1922 crop; (b) that The Dominion Bank, by virtue of the assignment of the 9th of June, 1922, is entitled to be paid the amount of the packing charges for the 1922 crop due the Summerland Fruit Union out of the proceeds of the sale of the 1922 crop and that the authorized trustees should pay said packing charges when the amount is ascertained. The grounds submitted for quashing the appeal were: (a) That the Court had no jurisdiction to entertain the appeal; (b) that the time allowed for bringing the appeal had expired before the bringing thereof and the appeal was out of time; (c) that the required security for the respondents' costs of the appeal had not been deposited in the proper Court. Upon the application of the said authorized assignee on the 30th of May, 1924, an order was made by MURPHY, J. on the 10th of June, 1924, extending the time for bringing the appeal from the said order of MORRISON, J. to the 24th of June, 1924. From this order The Dominion Bank appealed.

Statement

COURT OF APPEAL

1924

Nov. 25.

IN RE THE OKANAGAN UNITED GROWERS LTD. AND THE DOMINION BANK

The motion was argued at Vancouver on the 16th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

A. Alexander, for the motion: The appeal should be quashed as notice must be given in 10 days under rule 68. There is no jurisdiction to hear the appeal. The sum required as security has not been paid into Court as required by Bankruptcy rule 68(2).

Harold B. Robertson, K.C., contra: The order from which we appealed was a Court order but made when the learned judge was sitting in Chambers. There is the right of appeal under section 74(2) of the Bankruptcy Act.

Alexander, on the appeal from the order of MURPHY, J. of the 10th of June, 1924, extending the time: The learned judge exercised his discretion on a wrong principle, and gave an indulgence for reasons that were wrong, the order being made a long time after the statutory time for appeal had expired. For the cases where an extension is granted see Annual Pratice, 1924, p. 1122. There was insufficient material to make the order: see *In re Coles and Ravenshear* (1907), 1 K.B. 1 at p. 7; Yearly Practice, 1924, p. 1080.

Argument

Robertson, for respondent: There is no appeal from an order extending the time of appeal: see *Re J. McCarthy & Sons Co. of Prescott Limited* (1916), 38 O.L.R. 3 at p. 7; *Re Central Bank of Canada* (1897), 17 Pr. 395; *Ex parte Stevenson* (1892), 1 Q.B. 394 and 609. The Court will not consider the grounds upon which discretion was exercised: see *Lane* v. *Esdaile* (1891), A.C. 210 at p. 214. That the extension may be granted see Bankruptcy rule 68(5).

Alexander, in reply referred to *Koksilah* v. *The Queen* (1897), 5 B.C. 600.

Cur. adv. vult.

25th November, 1924.

MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): A preliminary objection was taken and argued and we reserved judgment on it. We think the preliminary objection should be overruled and the order extending time affirmed. As to the costs the matter is some-

COURT OF APPEAL

1924

Nov. 25.

IN RE THE OKANAGAN UNITED GROWERS LTD. AND THE DOMINION BANK

"obviously improperly exercised his discretion" in granting it on the materials before him, which, it was submitted, amounted to none at all, and we are asked to review his discretion and reverse his order. I invited the appellant's counsel during the argument to cite any case where an appellate Court had entertained an appeal from an order granting such an extension, but none was forthcoming. Since the argument, I have found a decision expressly upon the point, *viz.*, *Moore* v. *Peachey* (1892), 8 T.L.R. 406, wherein the English Court of Appeal, composed of Lord Herschell, and Lord Justices Lindley and Kay, unanimously decided, without even calling upon the respondent, that where an order had been granted extending the time to appeal the Court would not entertain an appeal therefrom. In giving judgment

MARTIN, J.A.

"Lord Herschell said that it was contended that the Divisional Court were wrong in extending the time for appealing against the garnishee order. Even supposing that an appeal would lie where the Court below had granted an extension of time, such an appeal would not be entertained. The case was different from a refusal to extend the time for appealing, in which case the Court might be justified in removing an obstacle which might stand in the way of the appeal being heard upon the merits; but here the contention was that although the Court of Appeal agreed with the Divisional Court in thinking that a case had been made out for reversing the garnishee order, assuming that the appeal had been brought within the proper time, yet it should refuse to let the judgment of the Divisional Court stand merely on the ground that that Court had extended the time for appealing when they ought not to have extended it."

This language of so strong a Court, is so entirely in accordance with what one would expect to find to be the practice respecting this special class of remedial order, that I shall adopt it without further observation, and follow the decision by dismissing the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal, being in agreement with the reasons given by my brother MARTIN.

MACDONALD, J.A.

MACDONALD, J.A.: The first application is by the respondent to quash the appeal on the ground that notice of appeal was not given within the time limited in that behalf. An order, however, was obtained from Mr. Justice MURPHY on the 10th of June, 1924, extending the time to the 24th of June, and there is a further application to set aside that order. It follows

that if the latter order stands the appeal is properly before the Court, whether or not the order of Mr. Justice MORRISON is considered a Chamber order or a Court order, and a consideration of the first application would be unnecessary. Mr. *Robertson* takes the ground that there is no appeal from an order of this kind or that, in any event, the discretion of the learned judge granting the indulgence is not reviewable. The ordinary rule is that an exercise of discretion upon proper principles will not be interfered with. It is objected, however, by Mr. *Alexander* that the written reasons given by Mr. Justice MURPHY for exercising his discretion, *viz.*, that the points involved are of sufficient importance to be determined by the Court of Appeal, shew that his discretion was not based upon any material before him justifying its exercise. These reasons do not necessarily mean that the affidavits in support of the application, as recited in the order, were not considered. In any event he may have looked at the record. We must assume that the affidavits and material available were given consideration and that this material disclosed a situation "sufficiently important" to call for the exercise of a discretion favourable to extending the time. The important consideration is that the discretion was exercised and it was not manifestly exercised on a wrong ground. *Moore* v. *Peachey* (1892), 8 T.L.R. 406, referred to by my brother MARTIN, differentiates, and quite properly, between a refusal to grant an extension of time, thus placing an obstacle in the way of the appeal being heard, and the exercise of a discretion favourable to the hearing of the appeal. It may very well be proper to remove a barrier but improper to reverse a discretion opening the door to an appeal.

MACDONALD, J.A.

I have carefully considered all the authorities cited as well as the Act and rules, none of which affect the conclusion arrived at.

I would dismiss the applications.

Appeal dismissed.

Solicitors for appellant: *Tiffin & Alexander.*
Solicitor for respondent: *W. H. D. Ladner.*

COURT OF APPEAL

1925

Jan. 6.

McDONALD v. WEIR

McDONALD v. WEIR.

Negligence—Motor-vehicles — Highways — Running down pedestrian — Injuries received—Right of pedestrian to cross street—Excessive speed—Dimmers—By-law.

At about 6 o'clock in the evening on the 24th of January, 1924, the plaintiff was walking easterly on the south side of 15th Avenue in the City of Vancouver and on reaching the point where the street enters Kingsway he started to cross to the north side and when about two-thirds of the way across he was struck by the defendant's car coming from Kingsway into 15th Avenue at a speed in excess of the by-law limit with his dimmers only shewing. The defendant's own evidence was that when he struck the plaintiff he put on his brakes and skidded 16 feet. In an action for damages the jury found the defendant was not guilty of negligence and the action was dismissed.

Held, on appeal, reversing the decision of McDONALD, J. (MARTIN, J.A. dissenting), that on the evidence the finding of the jury was perverse and there should be a new trial.

APPEAL by plaintiff from the decision of McDONALD, J. and the verdict of a jury in an action for damages through the defendant's negligent driving of an automobile in the City of Vancouver at about six o'clock on the evening of the 24th of January, 1924. The plaintiff was walking easterly on the south side of 15th Avenue and at the point where said avenue enters Kingsway he turned to his left and started across the road. When about two-thirds of the way across he was struck by an automobile driven by the defendant who was entering 15th Avenue from Kingsway and travelling in a westerly direction at (as the plaintiff contends) an excessive speed. The jury found that the defendant was not guilty of negligence and the action was dismissed.

Statement

The appeal was argued at Vancouver on the 28th and 29th of October, 1924, before MACDONALD, C.J.A., MARTIN, McPHILLIPS and MACDONALD, JJ.A.

A. M. Whiteside (*Winifred McKay*, with him), for appellant: The finding of the jury was perverse. On a dark and dangerous street he should have travelled slowly and carefully.

Argument

He knew there was a crossing at this point and he should have watched for pedestrians. His lights should have been bright and he proceeded in contravention of the by-law and the regulations of the Motor-vehicle Act. He must avoid pedestrians: see *Rainey* v. *Kelly* (1922), 3 W.W.R. 346; *Connelly* v. *Fern* (1923), 1 W.W.R. 69; *Johnson* v. *Giffen* (1921), 3 W.W.R. 596; *Harbour* v. *Nash* (1921), 60 D.L.R. 232; *White* v. *Hegler* (1916), 10 W.W.R. 1150; *Beauchamp* v. *Savory* (1921), 30 B.C. 429; *Kinnee* v. *B.C. Electric Ry. Co.* (1917), 1 W.W.R. 1190; *McCarthy* v. *The King* (1921), 62 S.C.R. 40.

Argument

McTaggart, for respondent: There was no actual crossing here so the plaintiff was acting in contravention of the by-law. This is evidence of negligence: see *Suffern* v. *McGivern* (1923), 32 B.C. 542. The finding of the jury should stand: see *Longman* v. *Cottingham* (1913), 18 B.C. 184; 48 S.C.R. 542; *Windsor Hotel Co.* v. *Odell* (1907), 39 S.C.R. 336; *Commissioner for Railways* v. *Brown* (1887), 13 App. Cas. 133.

Whiteside, in reply.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff, while crossing 15th Avenue, Vancouver, at a point near the intersection of Kingsway, a point which appears to have been the regular place at which pedestrians crossed, was struck by the defendant's motor-car driven by himself. It was a very dark evening. The plaintiff says he looked both ways before leaving the sidewalk; he saw a car on 15th Avenue to the west of him, two or three blocks away, and saw a couple of cars in front of a street-car on Kingsway. He got more than half way across the street when he was struck by the defendant's motor-car. The defendant admits he was going 8 miles an hour at the intersection, which is two miles beyond the speed limit; he admits that he had not his headlights on but dimmers; he admits that his curtain was closed on his left-hand side, the side from which the plaintiff was crossing the street, and could not see through it; he admits that he saw the motor-car on 15th Avenue referred to by the plaintiff, two blocks away. He apparently kept his

COURT OF APPEAL

1925

Jan. 6.

MCDONALD v. WEIR

eyes fixed on the coming motor-car and paid no attention to pedestrians crossing the street. Plaintiff says that the defendant was almost upon him before he realized it, and that he stepped back but that he was struck and badly injured.

The jury were asked to answer questions; they were also told that they might bring in a general verdict. At the close of the charge the following took place between one of the jurors and the Court:

"The Juror: May I make myself clear on one point, my Lord. Are we competent to say what is contributory negligence from a legal point of view in crossing that street, if it was the custom to cross there?

"THE COURT: Find out, if you can.

"The Juror: We are not qualified to say if that is negligence at all.

"THE COURT: You are the very people who are competent, that is what juries are for, that is all you are there for, to make a finding.

"The Juror: Whether this is negligence, we are not competent to say.

"THE COURT: You must give an opinion."

"THE COURT: I will leave it to you, gentlemen of the jury, as to the question of fact—the legal question can be argued later.

"A Juror: From a layman's point of view——

"THE COURT: We don't want your opinions now, go out and discuss them, it will be far better."

Now the importance of this discussion is that a by-law was put in purporting to prohibit pedestrians crossing except at intersections, it was therefore proper, and I think necessary, that the judge should explain the effect of that by-law when he left it to the jury, not only to answer the questions but to find the general verdict.

MACDONALD, C.J.A.

After being out about an hour the jury returned and the foreman said:

"My Lord, if we answer the first question, no, is it necessary to answer the rest of the questions?"

The Court instructed them that it was not, and on returning a few minutes later, they answered the first question, which was that with respect to defendant's negligence, in the negative.

Now, while the judge's charge to the jury is not questioned in the notice of appeal, yet, I can hardly think that the directions to the jury were adequate. It may be, too, that the jury feeling themselves incompetent to deal with the question of contributory negligence, took the short way out by finding that there was no negligence on the defendant's part. With

this, of course, as the appeal comes before us, I have nothing to do, the point is, was the finding that the defendant was not guilty of negligence contrary to the evidence, and with respect to that question, I shall deal only with the defendant's own evidence. He was asked at what speed he was crossing the intersection, and his answer was:

"Oh, I would say between 6 and 8 miles.

"Was it six or eight, do you know? No, and there is no other man who knows."

And again:

"You are bound to slow down to 6 miles, aren't you? No. You mean at a crossing?

"Yes. The law, I believe, says so, I think there is a law on that, but I don't believe anybody does it."

Then again:

"You were not familiar, I suppose, with the particular place? No, no.

"So you did not know? I had passed there a great many times, and I had never seen anybody cross there before."

When asked as to his lights, he said:

"How far would these lights throw sideways? The dimmers—they were very dim, they would not throw to any——"

Then again, speaking of crossing at the intersection:

"After getting across the crossing I naturally put on a little more speed, and started up, I saw a car some ways off down on 15th, a block, maybe two blocks away, I saw the car coming a block or two blocks down the road."

Then again, speaking of his blind:

"You saw the face directly in front of you? No, I didn't say in front of me.

"Oh, I thought you did. No, I did not say in front of me, if he had been in front of me I would have run over him, but it was just off the line from the windshield, just at the corner, I had the blind up and could not see anything on the left-hand side [the side upon which the plaintiff was coming]. I could not see through the curtains, but I just caught a glimpse of his face from the left-hand side of my car.

"Which side? The front view.

"Was the light on his face from the headlights? I would say not; the dimmers were not very bright."

MACDONALD, C.J.A.

The defendant says that he examined the road afterwards and found skid marks 16 feet long, in other words, he was going at such a speed on a rough road, not paved, that his car skidded 16 feet after the brakes were put on. A witness was called on behalf of the plaintiff, who made an actual test at the same place with the same type of car, and going at 15 miles

COURT OF APPEAL

1925

Jan. 6.

McDONALD v. WEIR

an hour he was able to stop in a distance of six feet. Now, in the face of all this evidence, the jury have found that the defendant was not guilty of any negligence. I have no hesitation in saying that the finding is perverse, and that there should be a new trial.

MARTIN, J.A.: This is an appeal from the verdict of a jury in favour of the defendant respondent whereby they found that he had not been guilty of negligence in driving his motor-car in the City of Vancouver on the night of the 24th of January, 1924.

Upon the question of objections to the learned judge's charge coming up, the appellant's counsel, in answer to this Court, expressly withdrew all objections to the charge, and furthermore said that he did not now ask for a new trial (though that request was included in his notice of appeal), and I therefore deal with the appeal upon that statement and basis.

A strictly legal point, however, arises out of the fact that it is conceded that the plaintiff was crossing the street at a point of intersection, and reliance was placed by the defendant upon the City of Vancouver Street Traffic By-law No. 1496, as amended, section 19, subsection 16 of which provides:

"16. It shall be unlawful for any person or persons to cross any street other than at the intersection of such street with another street."

MARTIN, J.A.

But it is submitted that the operation of this subsection is restricted by the opening paragraph thereof as follows:

"19. Any person who operates or drives any vehicle, or who rides or drives any animal, in or through any of the streets of the City, shall conform to the following regulations:"

And the point is taken that all the "following regulations" apply only to a person "who operates or drives any vehicle or who rides or drives any animal" and not to a pedestrian. After mature consideration of the point and the whole by-law, I am of opinion that this submission is correct, and hence there is an omission in the regulations which frees the plaintiff from the consequences of said subsection 16.

Despite that result, however, there was, I think, and with all due respect to the contrary opinion of my learned brothers, sufficient evidence to support the finding of the jury, who had

the advantage of taking a view of the *locus* and, in particular, considering upon the spot the proper application of the sketch of his visibility that the defendant drew for their consideration, and which constitutes a very important piece of evidence in his favour. As the majority of the Court is of the opinion that a new trial should be granted, I shall refrain from an attempt to canvass the evidence, for the reason given by Lord Chancellor Halsbury, in the leading case of *Jones* v. *Spencer* (1897), 77 L.T. 536 at p. 537, as follows:

"My Lords: I believe that your Lordships are all agreed that the result of this trial was unsatisfactory. I do not purpose to enter into the question of the evidence, because, according to a rule which has been established now for a great number of years, when a verdict is being set aside, it is not desirable that the judges who take part in the discussion of the question whether or not there shall be a new trial, should make any observations about what the effect of the evidence was, or what might or might not have been the proper course to pursue, because such observations are likely to prejudice the trial which may come on afterwards; therefore, that matter ought to be left untouched by the tribunal which orders the new trial."

Their Lordships also pointed out that the application of the expressions of "perversity" or "wilful misconduct" to the jury were inappropriate in considering a new trial, the proper question being had they acted "reasonably" in finding as they did, and, if so, "then their verdict cannot be disturbed." And in *Watt* v. *Watt* (1905), A.C. 115, 118, the same Lord Chancellor also said:

"The whole theory of the jurisdiction of the Courts to interfere with the verdict of the constitutional tribunal is that the Court is satisfied that the jury have not really acted reasonably upon the evidence, but have been misled by prejudice or passion."

And the same rule has recently been again laid down by the Supreme Court of Canada in *Laporte* v. *Can. Pac. Ry. Co.* (1924), S.C.R. 278; (1924), 4 D.L.R. 110; *Cf.* also Lord Atkinson's observation in the House of Lords in the recent case of *Calmenson* v. *Merchants' Warehousing Company Limited* (1921), 125 L.T. 129.

After applying these tests to the facts before us, I shall, in accordance with the established rule, confine myself to saying that I am quite unable to take the view that the jury did act unreasonably in all the circumstances, and I have no doubt that

COURT OF APPEAL

1925

Jan. 6.

they were favourably and properly influenced by the unusually fair and candid manner in which the defendant gave his evidence.

An unusual feature of the case is that the Court is ordering a new trial, though the appellant has expressly disclaimed that disposition of his appeal, and asking solely, as above noted, for judgment in his favour. While doubtless we have the power under rule 869, and section 15(3) of the Court of Appeal Act, to order a new trial *ex mero motu,* yet this is the first occasion either in this Court or the old Full Court in which it has been done (that I am aware of), in the face of the appellant's disclaimer, and with every respect, I cannot help feeling that the circumstances herein are far from warranting us in making such a departure from precedent. I would, therefore, sustain the verdict and dismiss the appeal.

McDONALD v. WEIR

MARTIN, J.A.

McPHILLIPS, J.A.: I consider the case a proper one for the direction that there be a new trial. The jury cannot be said to have been other than perverse upon the evidence as adduced at the trial. The side blinds of the motor-car upon the side the plaintiff entered upon the street to cross the same, were drawn and the defendant thereby made it impossible for him to see the plaintiff. This was, in itself, negligence. It was the absence of reasonable care to avoid endangering the life of pedestrians passing upon the street. Mr. Justice Anglin (now Chief Justice of Canada) said in *McCarthy* v. *The King* (1921), 62 S.C.R. 40 at p. 45:

MCPHILLIPS, J.A.

> "What are reasonable precautions and what is reasonable care depends in every case upon the circumstances. Carelessness which ought to have been recognized as not unlikely to imperil human life cannot, in my opinion, be regarded as aught else than culpable negligence."

Here the plaintiff was entitled to succeed if there was actionable negligence and the absence on his part of contributory negligence.

Upon a review of the evidence it is difficult, indeed impossible, to come to the same conclusion as the jury, and I am constrained to say that the jury did not arrive at a reasonable conclusion. In *McCarthy's* case, Mr. Justice Idington, at p. 43, said:

> "The learned trial judge's charge throughout was absolutely correct

until he momentarily, on objection, interjected the remark that there was a possible distinction between that which would render a man liable for civil damages for negligence, and that which would render him liable criminally.

"Even if the distinction had been maintainable as I hold it is not in the application of this section, he seems to have covered the ground."

It will be seen that the same considerations that weighed with their Lordships of the Supreme Court are available and applicable here, although this is a civil case. I would also refer to what Mr. Justice Duff said at p. 44 in *McCarthy's* case:

MCPHILLIPS, J.A.

". . . . . having brought into operation a dangerous agency which he has under his control (that is to say dangerous in the sense that it is calculated to endanger human life), fails to take those precautions which a man of ordinary humanity and reasonably competent understanding would take in the given circumstances for the purpose of avoiding or neutralizing the risk, his conduct in itself implies a degree of recklessness justifying the description 'gross negligence.'"

MACDONALD, J.A.

MACDONALD, J.A. would order a new trial.

New trial ordered, Martin, J.A. dissenting.

MORRISON MILL COMPANY INCORPORATED v. QUEEN INSURANCE COMPANY OF AMERICA.

Marine insurance — Deep-sea raft — Broken in storm — Small portion recovered—Distinct entity—Constructive total loss.

The plaintiff entered into a marine-insurance contract with the defendant Company set out in a covering note providing for the insurance the terms of which were that the plaintiff should be insured against perils of the sea for a sum not to exceed $3,395.50 on one deep-sea raft constructed by T. A. Kelley Logging and Lumber Company including equipment at and from Cumshewa, Queen Charlotte Islands, to Anacortes, Washington, it being a term of the policy that the insurance covered against the risk of total or constructive total loss. While in transit the raft was broken in two by a storm and 83 per cent. of it lost the belance being collected together and taken to port. In an action to recover the amount of the policy it was held that what was insured was a distinct entity and the plaintiff should succeed.

COURT OF APPEAL

1925

Jan. 6.

MORRISON MILL CO. *v.* QUEEN INSURANCE CO. OF AMERICA

Held, on appeal, affirming the decision of MCDONALD, J. (MACDONALD, C.J.A. dissenting), that this special kind of "deep-sea raft" was insured as a distinct entity upon which the insured is entitled to recover as and for a constructive total loss.

APPEAL by defendant from the decision of MCDONALD, J. of the 22nd of May, 1924, in an action to recover $3,395.50 upon a contract of insurance upon a deep-sea raft and for rectification of the policy in accordance with the covering note.

On the 24th of September, 1923, the plaintiff entered into a contract set out in a covering note, the terms of which were that the plaintiff should be insured from perils of the sea in the sum of $3,395.50 for a deep-sea raft constructed by T. A. Kelley Logging and Timber Company including equipment to be carried from Cumshewa, Queen Charlotte Islands, to Anacortes, Washington, for which a premium of $271.65 was paid, it being a term of the policy that the insurance covered against the risk of total or constructive total loss. The raft was wired and chained together and on the 21st of October, 1923, was towed from Cumshewa Inlet by the tug "Imbricaria." On the 23rd of October, owing to heavy sea and gales the raft broke in two and 83 per cent. of it was lost. What could be collected together was taken by the tug "Sea King" from Butedale on the 31st of October to Anacortes where it arrived on the 13th of November, 1923. The raft started with 998,436 feet but only 162,196 feet arrived at Anacortes. The trial judge concluded that what was insured was a distinct entity, *i.e.*, a deep-sea raft that was put in an intact mass to withstand sea weather, and held that there was a constructive total loss and the Insurance Company was liable under the policy.

Statement

The appeal was argued at Vancouver on the 8th and 9th of December, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

J. H. Lawson, for appellant: They contend there was a constructive total loss notwithstanding a portion of the raft arriving at its destination (162,196 feet out of approximately one million feet that was in the raft). We say this is really a cargo and not in the nature of a ship and the principles that

Argument

apply to a hull do not apply to a cargo and therefore do not apply here. This is a collection of logs valuable only as logs. The covering note and policy both shew it was a cargo policy: see Halsbury's Laws of England, Vol. 17, p. 485, par. 960; Lowndes's Marine Insurance, 2nd Ed., 138. He did not insure against partial loss.

Davis, K.C., for respondent: He rests his case on the point that these logs are cargo. It is not cargo under the definition as cargo is something "conveyed in a ship." This was more in the nature of a ship. A deep-sea raft is something different from the ordinary raft. It must be taken in the constructive total loss principle and there was a total loss of the entity: see Arnould on Marine Insurance, 10th Ed., Vol. 1, p. 1. This was not a ship but it was in the nature of a ship.

Argument

Lawson, in reply.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: The action is on an insurance contract, insuring what is called "a deep-sea raft," a raft of logs. The point involved is a very narrow one. It was contended by Mr. *Davis* that a deep-sea raft cannot be considered to be cargo, or goods under the contract in question, whereas, the opposite is contended for by Mr. *Lawson.* If the raft is to be regarded as of the nature of a hull or ship, an entity apart from its component parts, then it is admitted that the insurance money must be paid. On the other hand, it is admitted that if the subject-matter of the policy is to be regarded as cargo, then no insurance money is payable, since part of the raft arrived at destination.

MACDONALD, C.J.A.

Mr. *Davis* made much of the construction of the raft. It was more strongly built and different in construction to the ordinary raft of logs. He, therefore, compared it to the hull of a ship, fit to make a sea voyage. For my part, I cannot see that its peculiar construction is of special importance in the consideration of this appeal. As constructed it was less likely to break and more likely to stand the storms of the sea than an ordinary raft confined by boom logs and chains. This raft had to pass

COURT OF APPEAL

1925

Jan. 6.

MORRISON MILL CO. v. QUEEN INSURANCE CO. OF AMERICA

through very dangerous seas between the point of the commencement of the tow and its destination. It had also to be towed a long distance and it was, no doubt, constructed with reference to these facts. It was to be towed from Cumshewa, north of the Island, to Anacortes, in the State of Washington, where it was to be delivered to the plaintiff and sawn into lumber. I say sawn into lumber, because there is no evidence that it was to be taken beyond Anacortes. If it had been intended to take it to some other port, a port, for instance, in South America, we would not have lacked evidence of that intention. No one has ventured to say that it was intended to be taken beyond Anacortes. I think the logs of which the raft was composed must be regarded as goods bound together for the purpose of transportation. That was the purpose of the raft. It had none of the attributes of a hull and all of the attributes of cargo, except that it was not stowed in a ship.

I therefore think that the subject-matter of the insurance was of the nature of cargo. But apart from this, the parties have indicated their understanding of the matter. Turning to the covering note, we find these words:

"Binding in accordance with the terms and conditions of an ordinary English cargo policy, as issued by this Company."

MACDONALD, C.J.A.

And on the face of the policy itself, we find the words: "Cargo Policy, No. V3/438." Now, if the thing insured was not considered by the parties to be cargo, to be transported as such, why were these references made to cargo policies? Mr. *Davis* argued that the fact that the terms and conditions of a cargo policy were to be applied to the subject-matter of this insurance does not make it cargo, or the policy a cargo policy. That is true, but it shews that the parties to the contract were at least thinking of cargo. If they were thinking of something else, such as hull insurance, one would expect them to have made the terms and conditions of a policy of hull insurance applicable to this subject-matter.

I would allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the learned judge below has taken the right view of this matter in holding this special kind

of "deep-sea raft" to be insured as a distinct entity, upon which the insured is entitled to recover, upon the facts, as and for a constructive total loss. Too much attention should not, I think, be paid to the form of "cargo policy" which was being adapted in the quick endeavour to meet new conditions for which it was not really appropriate. The property insured was what is called a Davis raft, a recent, comparatively, invention in the construction of timber rafts for deep-sea transportation requiring special construction and equipment to meet that class of navigation, and such a cylindrical self-contained raft is as far removed from an ordinary raft as it is from a scow or barge, with deck or hull cargo accommodation, and possesses features and qualities for navigation and otherwise which are quite distinct from ordinary rafts for use in sheltered waters; and the mere fact that the policy covers the delivery of said raft to Anacortes, U.S.A., only, did not deprive it of those valuable special qualities which would be still available for its further economical and speedy transportation to any other port after arrival at Anacortes, should its owners think fit to make a contract to that effect.

MARTIN, J.A.

I would, therefore, dismiss the appeal.

McPHILLIPS, J.A.: The appeal, in my opinion, cannot succeed.

The learned trial judge arrived at a conclusion that cannot be held to be wrong; on the contrary, a conclusion which I consider to be eminently right.

In considering contracts entered into by parties where doubts arise, where ambiguities exist, or inaccuracies of expression appear in the writings, equity looks to the substance and not to the form. (*Counter* v. *Macpherson* (1845), 5 Moore, P.C. 83 at p. 108; *Mackay* v. *Dick* (1881), 6 App. Cas. 251 at p. 263; *Hexter* v. *Pearce* (1900), 1 Ch. 341). Now, what was the risk really undertaken here by the appellant, the Queen Insurance Company of America? It was a marine risk. The covering note, it is true, has contained therein the words:

MCPHILLIPS, J.A.

"Binding in accordance with the terms and conditions of an ordinary English cargo policy, as issued by this Company."

COURT OF APPEAL

1925

Jan. 6.

MORRISON MILL CO. v. QUEEN INSURANCE CO. OF AMERICA

Attached to the covering note, though, we have the following, which rebuts the contention made that the insurance was a cargo risk. It supports the submission made by the learned counsel for the respondent that the insurance was not in its nature a cargo risk at all, but the insurance of the "Davis raft" as a distinct entity, and such was the holding of the learned trial judge:

"Covered against total constructive total loss arising from perils insured against including general average and salvage charges, but warranted free from claim for salvage by towing vessel; this insurance to attach and cover from time rafts are taken in tow by tug and to continue until said raft shall have arrived at destination named and moored thereat for twenty-four hours in good safety, or upon commencement of dismantling, which ever shall first occur.

"Warranted single tow.

"Warranted to leave Cumshewa prior to September 30th, 1923.

"If sailing at later date than September 30th, 1923, and prior to October 31st, additional rate of 2 per cent."

It is to be noted that it is stated that the covering is against total constructive total loss and the insurance is to "continue until said raft shall have arrived at destination and moored thereat for 24 hours in good safety or upon commencement of dismantling, whichever shall first occur." This can only mean that the Davis raft is to be delivered intact, not broken up, by analogy, as in the case of a ship.

MCPHILLIPS, J.A.

The covering note and that which was attached thereto above quoted was followed by the policy, it bearing date the 31st of October, 1923, the covering note bearing date the 24th of September, 1923. The policy reads as follows: [after setting out the policy the learned judge continued].

It is to be observed that the form used was a cargo policy with variations, notably the numerous provisoes that are usually found in a cargo policy as to loss arising from certain causes to cargo and as to exemption from liability, all indicating that the insurance really was not in its nature cargo insurance were struck out. The policy issued was a somewhat clumsy effort to cover the particular risk undertaken, a risk, no doubt, somewhat unique in character, but analogous to the towing of a ship or boat. In these days of quick changes in trade and commerce and methods of transit, the attempt is always being made to

meet the changing conditions, and here, no doubt, the intention was to insure this raft of peculiar construction, known as a "Davis raft," or, as set forth in the policy, "One (1) deep-sea raft constructed by T. A. Kelley Logging and Lumber Company, including equipment in tow of tug 'Imbricaria' and 'Sea King' to Anacortes, Wash." That is the insurance underwriters find it necessary to adjust themselves to the changing conditions of trade and transportation in the commercial world, and all proper adjustments are attempted to be made. By way of analogy I would refer to what Lord Shaw of Dunfermline said in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited* (1915), A.C. 599 (84 L.J., P.C. 98) at p. 617:

"The law must adapt itself to the conditions of modern society and trade. . . . . ."

It will be observed that the policy reads "lost or not lost," and although the loss was before the actual date and issuance of the policy, the policy will govern. The nature of the loss sustained is as set forth in paragraph 10 of the statement of claim, which reads as follows:

"10. The said raft left Cumshewa Inlet on the 21st October, 1923, in tow of the said tug 'Imbricaria' and on or about the 23rd October, 1923, owing to heavy seas and gales broke in two and about 65% of raft was lost. The balance of the said raft was subsequently delivered to the tug 'Sea King' at Butedale and left Butedale in tow of the said tug 'Sea King' on the 31st October, 1923, and arrived in Anacortes on or about the 13th November, 1923, and owing to the condition of the raft and to further heavy gales and seas encountered in the voyage from Butedale to Anacortes, the said raft and equipment when delivered at Anacortes were a mere wreck and a total loss."

MCPHILLIPS, J.A.

The case is not one of a claim for partial loss, it is a claim for total constructive total loss, and it was admitted upon the argument that if the insurance was not in its nature cargo insurance, but insurance of the raft as a distinct and separate entity as a ship or boat, then it would rightly be a total constructive total loss.

It was strongly contended, and I think rightly, that the written matter in the printed forms used should be given the controlling weight when there is any doubt or ambiguity, and it is clear that applying that as a rule the insurance of the raft

COURT OF APPEAL

1925

Jan. 6.

MORRISON MILL CO. v. QUEEN INSURANCE CO. OF AMERICA

was insurance as a separate entity, such as a ship or boat in tow.

It is to be further considered that the raft is so constructed that it may be towed out in the open sea and it may not necessarily be retained and dismantled at the port to which it is to be taken, it may be later decided to take the raft to another port. There is a distinct value in the raft in its constructed state.

It is reasonable to say that the insurance was against a marine loss of the raft in its constructed state, and it seems idle to contend that the insurance effected was an insurance of the logs as goods and as some of the logs were recovered there is no constructive total loss. The witness Gilkey, in his evidence describing the raft as constructed, said:

"You have just an intact mass which is supposed to stand a lot of weather—a lot of rough towing. It is virtually one solid mass then."

MCPHILLIPS, J.A.

The class of insurance here is undoubtedly one of novelty, but the method of transportation of logs across treacherous waters, has brought about the construction of what is known as the "Davis raft," capable of being towed to the open sea and taken from port to port. The raft cannot be viewed as a collection of logs, there is a distinctive value in the constructed state of the raft, and it is reasonable that the raft as such should be insured, and, in my opinion, upon the facts of the present case, it was insured and there has been a constructive total loss entitling the respondent to recover, and the judgment the respondent obtained below should, in my opinion, be affirmed.

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

Solicitor for appellant: *James H. Lawson.*
Solicitors for respondent: *Burns & Walkem.*

GRAY v. FORD AND FORD.

COURT OF APPEAL

1925

Feb. 4.

GRAY v. FORD

Conveyances—Husband to wife—Mortgage on other property of husband—Personal covenant—Interest in arrears at time of conveyances—Bona fides—Action to set aside.

The plaintiff loaned the defendant $3,000 on certain property in 1914, and in 1915 after the mortgage had fallen in arrears the defendant conveyed two other properties to his wife. The plaintiff then recovered personal judgment on the covenant contained in the mortgage, but not being able to realize the amount of his loan brought action to set aside the conveyances from husband to wife. The defendants set up an ante-nuptial agreement made in Ontario in 1902, whereby the husband was to give the wife the home in which they lived and the money obtained from a sale of the home was ultimately invested in the lots in question. It was held by the trial judge that the conveyances were made with intent to defraud the plaintiff, and set them aside.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the evidence justified the conclusion to which the trial judge arrived and the appeal should be dismissed.

APPEAL by defendants from the decision of MCDONALD, J. of the 26th of May, 1924, in an action for a declaration that two conveyances of certain lands in Vancouver dated the 30th of July, 1915, made by Chester B. Ford to his wife Clara Ann Ford are fraudulent and void as against the plaintiff. On the 6th of May, 1914, the plaintiff loaned the defendant Chester B. Ford $3,000 on a mortgage secured by certain other property. When the said transfers were made the defendant Chester B. Ford was in default on his mortgage. The defendant Clara Ann Ford claimed that there was an ante-nuptial agreement made in Peterborough, Ontario, in 1902, whereby Chester B. Ford was to give her a home in Peterborough. This agreement was carried out and subsequently in 1904 she sold the property she had acquired for $2,100 and through her husband as trustee bought a quarter section near Didsbury, in Alberta, for $2,000. In 1906 she sold this quarter section for $6,400. In 1907 the two properties in question were bought with this money by her husband for her but through carelessness was not transferred

Statement

COURT OF APPEAL

1925

Feb. 4.

GRAY v. FORD

to her until 1915. The trial judge found that the sales were made with intent to defraud the plaintiff and set aside the transfers. The defendants appealed.

The appeal was argued at Vancouver on the 28th, 30th and 31st of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C. (*E. S. Davidson,* with him), for appellants: The point is that the creditor had adequate security when the transfers attacked were made. If this is so he cannot succeed: see *The Sun Life Assurance Company of Canada* v. *Elliott* (1900), 31 S.C.R. 91 at p. 95; *Davies* v. *Dandy* (1920), 30 Man. L.R. 306; *Crombie* v. *Young* (1894), 26 Ont. 194. Where a wife hands over her property to a husband a presumption of trust arises: see Halsbury's Laws of England, Vol. 28, p. 57, par. 107; *National Bank* v. *Insurance Co.* (1881), 104 U.S. 54. On the pleadings the action is founded on the Statute of Elizabeth only.

Argument

Jamieson, for respondent: The circumstances here were such as to arouse suspicion when the transfers in question were made and there should be corroboration of the wife's evidence as to the ante-nuptial agreement: see *Koop* v. *Smith* (1915), 51 S.C.R. 554; Lewin on Trusts, 12th Ed., 1151. As to the effect when about to engage in a hazardous business see *Newlands Saw-Mills Ltd.* v. *Bateman* (1922), 31 B.C. 351 at p. 357; see also *Holten* v. *Vandall* (1900), 7 B.C. 331. She did not get a transfer for 20 years which is a bar to her claim under the equitable doctrine: see *Penhall* v. *Elwin* (1853), 1 Sm. & G. 258; *Cunningham* v. *Curtis* (1897), 5 B.C. 472; *French* v. *French* (1855), 25 L.J., Ch. 612. On the question of the husband holding as trustee for the wife see *Glaister* v. *Hewer* (1803), 8 Ves. 195; *Alexander* v. *Barnhill* (1888), 21 L.R. Ir. 511 at p. 515.

Craig, in reply.

Cur. adv. vult.

4th February, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The onus was on the plaintiff to prove that he was a creditor of the defendant Chester B. Ford; that

Ford was insolvent, and that being in that situation he conveyed his property to his co-defendant, his wife. The defendants might rebut the intent by shewing that Clara Ann Ford was a creditor of her husband, or that her husband was a trustee of the property for her.

After a full consideration of the evidence, I agree with the result arrived at by the learned judge, and therefore would dismiss the appeal.

MARTIN, J.A.: With all respect for contrary opinions, I would allow this appeal upon the ground, shortly, that there was, in my opinion, no intent to defraud, but on the contrary the transaction was a *bona fide* attempt on the part of the husband to account to the wife for the considerable sums of money that he for long had in his hands belonging to her: the case is unusual in this important respect, and its consideration should start from this important fact, *viz.*, that there can be no reasonable doubt that the wife was the absolute owner of a valuable estate in Ontario, and it has not been shewn that she ever either gave or had the intention of giving the proceeds thereof to her husband, but simply entrusted them to him to invest on her account. Nor do I take the view, in the face of the independent valuation made for the lender, the mortgagee, that the defendants at the time in question believed the property was not a complete security for the mortgage. If the wife had sued to declare the husband a trustee of the property, she would, in my opinion, have been entitled to succeed; and at least he was her creditor to the extent of about $6,000. The facts are not, as I view them, in substantial dispute: it is the inference to be drawn from them that gave me concern.

MARTIN, J.A.

MCPHILLIPS, J.A.: This appeal, in my opinion, should succeed. With great respect to the learned trial judge I cannot agree that the evidence shews that there was any intention established on the part of the defendants (husband and wife) to delay, hinder or defraud creditors of the defendant Chester B. Ford (the husband). The facts adduced at the trial do not, as I scan and weigh them, establish any infraction of the statute

MCPHILLIPS, J.A.

COURT OF APPEAL

1925

Feb. 4.

GRAY v. FORD

(Cap. 93, R.S.B.C. 1911). Here we have conveyances attacked in 1924 which were made and delivered in 1915, and for which indefeasible titles issued to the defendant Clara Ann Ford (the wife) in 1915. At the time the conveyances were executed and delivered by the husband to the wife the plaintiff had a mortgage upon lands of the husband, which had been valued by an experienced valuator, and the loan was recommended and approved by the solicitors for the plaintiff, the valuation shewing a very substantial value over and above the money advanced thereon. In 1922 only was a judgment recovered for moneys due and unpaid under the mortgage by the plaintiff against the defendant Chester B. Ford, and it was not until 1924 that this action was commenced. The facts shortly would appear to be that the defendants married in the Province of Ontario, the marriage only being agreed to if a home was provided in Ontario. This was done and the property was bought in the name of the wife, and it was her property, being in accordance with the ante-nuptial contract made. Later the wife was not averse to going to Western Canada, and the land in Peterborough, Ontario, the property of the wife, was sold for $2,100. The wife handed $2,000 to the husband to buy a farm or home in Alberta. This was done and the husband and wife went into occupation of the farm and carried it on for some time, finally selling it for $6,400. The husband took title to the farm in his own name, but on the facts, it is clear that he held the land as trustee for his wife. The husband engaged in real estate business in Vancouver, and purchased and sold lands. In 1907 the lands called in question in this action were purchased with the moneys of the wife which the husband had retained, but the conveyances were taken in the name of the husband, the intention being that the wife should again have a home. It would appear that on the 25th of March, 1915, the wife demanded from her husband a conveyance of the lands, and two conveyances were made in March, 1915, and July, 1915, and later certificates of indefeasible title were obtained in 1915, in the name of the wife. The moneys obtained by the husband from the wife were throughout moneys which represented the consideration for marriage, and it certainly would be most in-

MCPHILLIPS, J.A.

equitable that the wife should, after all these long years, be held to have forfeited this consideration, the highest form of consideration known to the law.

The transactions attacked (the conveyances of the land) can only be said to be right conduct upon the part of the defendant and, in my opinion, that which he could have been compelled to do in a Court of Equity, *i.e.*, in recognition of the trust to hold the lands for the wife, the purchase-moneys therefor being the moneys of the wife (*Bennet* v. *Davis* (1725), 2 P. Wms. 316; *Dixon* v. *Dixon* (1878), 9 Ch. D. 587; *Alexander* v. *Barnhill* (1888), 21 L.R. Ir. 511; *Wassell* v. *Leggatt* (1896), 1 Ch. 554; *In re Harkness and Allsopp's Contract* (1896), 2 Ch. 358, *per* North, J. at p. 362; *Mercier* v. *Mercier* (1903), 2 Ch. 98; 72 L.J., Ch. 511).

No evidence was adduced to satisfactorily controvert the value of the land mortgaged to the plaintiff by the husband, *i.e.*, that it was ample security. With the greatest deference to the learned trial judge, he would appear to have proceeded upon what he considered was public and general knowledge, which cannot be accepted as against the concrete evidence adduced at the trial. The present case cannot in any way be deemed to bring in question a voluntary conveyance of land. What the husband did, in my opinion, he was bound to do—execute his trust. Further, the plaintiff was a secured creditor and at the time the impeached conveyances were made it cannot be said that the land mortgaged to him was admittedly insufficient. The evidence does not support this contention (*The Sun Life Assurance Company of Canada* v. *Elliott* (1900), 31 S.C.R. 91 at pp. 95-96). The head-note to *Crombie* v. *Young* (1894), 26 Ont. 194, well indicates the legal proposition laid down by the Common Pleas Division in that case, it reads:

MCPHILLIPS, J.A.

"Mortgagees of land are not, merely by reason of their position as such, creditors of the mortgagor within the 13 Eliz. ch. 5, nor is the mortgage debt a debt within that statute, unless it is shewn that the mortgage security at the time of the loan was of less value than the amount thereof.

"Where, therefore, shortly after the making of a mortgage, the mortgagor, otherwise financially able to do so, made a voluntary settlement on his wife of certain property, the value of mortgaged property at the time being greatly in excess of the amount of the loan, and deemed by all parties to be ample security, and no intention to defraud being shewn, the settlement was upheld, although, from the stagnation in real estate when the

COURT OF APPEAL

1925

Feb. 4.

GRAY v. FORD

mortgage matured, a sale of the property for the amount of the indebtedness thereon could not be effected."

The valuation the plaintiff received at the time of the making of the loan of $3,000 was $8,000, the valuation being made for the plaintiff at the time of the loan, and even in 1915, at the time of the impeached conveyances, the valuation as given by the same valuator was $4,000 to $5,000.

The plaintiff, a judgment creditor, is not entitled to complain of the impeached conveyances upon the particular facts of the present case; the lands were never the lands of the husband. That title to the lands was at one time in him does not advance matters at all, as the lands were bought in the name of the husband with the money of his wife, and it is a case of a resulting trust in her favour. The plaintiff as a judgment creditor can only look to property of the judgment debtor, not property held by him in trust for another, which is this case. It is clear here, that there never was any intention on the part of the wife that the lands bought with her money were to be a gift to the husband, therefore, there was a resulting trust in favour of the wife. That being the case, how is it possible to admit of the plaintiff, a judgment creditor of the husband alone, challenging the conveyance to the wife which was the carrying out of the duty imposed upon him of executing, when called upon, the trust in the lands in favour of his wife? (*Mercier* v. *Mercier* (1903), 72 L.J., Ch. 511, 512).

MCPHILLIPS, J.A.

This case must be differentiated from all the cases where that which is attacked is the voluntary settlement of lands of the husband upon the wife. The lands here, owing to the resulting trust, are the lands of the wife, even were the settlement a voluntary one, though the facts in the present case would not support the judgment under appeal. I would refer to what Perdue, C.J.M., said at pp. 309, 310 in *Davies* v. *Dandy* (1920), 30 Man. L.R. 306:

"The circumstances in this case are very like those in *Crombie* v. *Young*, 26 Ont. 194. There the defendant shortly after making a mortgage made a voluntary settlement of other property on his wife. The value of the mortgaged property was at the time greatly in excess of the amount of the loan and was deemed by the parties to be ample security. No intention to defraud was shewn, but owing to a stagnation in real estate when the mortgage matured the property could not be sold for the amount due upon it. It was held by the Divisional Court that a mortgage debt was not

within the statute, 13 Eliz., ch. 5, unless it is shewn that the mortgage security at the time of the loan was of less value than the amount loaned. The mortgage upon which the plaintiff in the present case bases his claim to be a creditor of Dandy was given by Livingstone to Mrs. Davies to secure a balance of purchase-money of the block in question, the purchase price being $50,000, and there being only $25,000 of mortgages having priority over it. The Davies are hardly in a position to say that the security was not at the time worth the amount of the mortgage."

Here we have the valuation at the time of the placing of the mortgage, $8,000, the mortgage being only for $3,000, and at the time of the trial of this action placed at $4,000 to $5,000. Then if it is a material question, and the matter is to be further pursued, there was in nothing that was done, any intention to defraud. How could there be the intention to defraud where that done was the execution of a trust that the husband was bound to carry out? In this connection I would refer to what Cameron, J.A. said in *Davies* v. *Dandy, supra,* at pp. 310-11.

The language of Cameron, J.A. is exceedingly apposite to the facts of the present case. With every deference to the learned trial judge, I cannot agree that in this case the finding of fact of the learned trial judge is supported by the evidence. I would also refer to what Dennistoun, J.A. said at pp. 314, 315, in *Davies* v. *Dandy, supra.* There is some analogy in some of the facts referred to to the facts of the present case.

MCPHILLIPS, J.A.

I have at some little length dealt with the authorities in cases where the conveyances impeached were founded upon no consideration, but when it is considered here that the lands were always in equity the lands of the wife, it is really not necessary to review the state of the law in such cases, as this case cannot be said to be in that category. Here the attempt is on the part of the judgment creditor to pay himself not out of the property of the judgment debtor but out of the property of the wife of the judgment debtor, and that attempt, in my opinion, has wholly failed.

I would allow the appeal.

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

MACDONALD, J.A.

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

Solicitors for appellants: *Hunter & Davidson.*
Solicitors for respondent: *Wilson & Jamieson.*

MCDONALD, J.

1925

Jan. 19.

PEARSON AND PEARSON v. READ.

Negligence—Motor-vehicle—Driving in fog—Pedestrian injured—By-law to prevent traffic blocking—Breach.

PEARSON v. READ

Driving a motor-vehicle in a thick fog within the City of Vancouver is not in itself negligence.

A by-law of the City of Vancouver provides that "Any person who operates or drives any vehicle . . . . . in or through any of the streets of the city shall . . . . . when travelling at the rate of a walk . . . . . keep as close as possible to the right-hand curb."

Held, that it was passed solely to prevent the blocking of traffic and the breach thereof is not in itself negligence on which an injured pedestrian can base an action for damages.

Gorris v. *Scott* (1874), L.R. 9 Ex. 125; 43 L.J., Ex. 92 applied.

Statement

ACTION for damages for injuries sustained by a pedestrian who was run into and knocked down by the defendant's car from which she sustained a broken leg. The facts are set out fully in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 7th of January, 1925.

J. Edward Bird, for plaintiffs.

McPhillips, K.C., for defendant.

19th January, 1925.

Judgment

MCDONALD, J.: On the 6th of November, 1923, the defendant was driving a Ford coupe in a westerly direction on Broadway, in the City of Vancouver, and passed the intersection of Broadway and Heather Street shortly after 9 o'clock in the evening. There was a very heavy fog in the vicinity, so thick that the driver could not see beyond the front of his car. The plaintiff with a companion, Mrs. Richardson, had walked from her home southerly along Heather Street to Broadway with the intention of taking a street-car going easterly on Broadway. Having crossed Broadway to the point where the easterly bound street-car would stop, they waited a few moments and, as the car did not come, decided to return home and recrossed Broadway. They stood on the sidewalk on the north side of Broadway discussing the question of going to a moving picture theatre when they heard a car coming and they decided to cross Broad-

way again and board that car. As they crossed the street, when Mrs. Richardson, being a foot or so ahead, had reached the devil's strip, the left front corner of defendant's car struck the plaintiff, Mrs. Pearson, and knocked her down, breaking her leg. She, with her husband as co-plaintiff, sues for the damages resulting therefrom. I am satisfied, on the evidence, that the defendant was proceeding at about five or six miles an hour in low gear, and was keeping a sharp lookout and was, as he crossed Heather Street and approached the place where the accident occurred, sounding his horn at short intervals. After the impact occurred his car proceeded only a very few feet before he stopped it, for the plaintiff, Mrs. Pearson, was found lying beside the left door of the motor-car. It is suggested that the defendant was guilty of negligence in that he had three people with himself in this small Ford coupe, and that by reason of the crowding his vision was obstructed. No negligence in this regard is established. I accept the evidence that the defendant was hampered neither in the operation of his car nor was his vision obstructed on this account.

The two main grounds of negligence which are relied on are: (1) that the defendant, in view of the very thick fog that prevailed, ought not to have been driving his car at all, and (2) that, in any event, he was committing a breach of City By-law No. 1496, section 19 (1), which provides in effect as follows:

Judgment

"Any person who operates or drives any vehicle . . . . . in or through any of the streets of the city shall . . . . . when travelling at the rate of a walk . . . . . keep as close as possible to the right-hand curb."

As to the first ground, Mr. *Bird* contended that it was negligence to drive a vehicle in the City of Vancouver in a fog through which the defendant could not see where he was proceeding; that if a driver came into a fog so thick, as prevailed on the evening in question, he should pull up to the curb and leave his car there. It would follow, I suppose, that the street railway cars must also remain stationary until the fog cleared away. No authority was cited for such a proposition, and I am not prepared to hold that the law imposes such an obligation. Any one familiar with Vancouver fogs knows that at one point the air might be quite clear and only a block or two away one may find an impenetrable fog through which he must proceed

MCDONALD, J.

1925

Jan. 19.

PEARSON
v.
READ

for a block or so and then find the atmosphere clear again. To use a common expression, the fog is found in pockets and these pockets are carried from place to place by the slightest breeze. From that standpoint, if from no other, it seems to me that the suggestion of plaintiffs' counsel is entirely impracticable. The driver must, of course, in driving in the fog, as was pointed out by the learned Chief Justice in the Court of Appeal in *Beauchamp* v. *Savory* (1921), 30 B.C. 429, proceed very, very carefully (as the defendant was doing in the present case), and must observe every precaution to warn and avoid pedestrians (who, of course, must also take great care in such circumstances), but it seems to me that no further obligation is imposed upon such driver.

As to the second ground of negligence, which was mainly pressed upon the ground that the defendant was admittedly not driving close to the curb but was proceeding along the right-hand car-tracks in order to enable him to more easily follow the road, again I think the plaintiffs cannot succeed. In the first place, the defendant's car was, as stated, proceeding at five or six miles an hour. The only evidence as to what is "the rate of a walk" was given by a witness who stated that he understood it to be four or five miles an hour. I think the witness is mistaken in this, as I should say that it is common knowledge that three or four miles an hour is as fast as most people walk.

Judgment

In any event, it was not proven that the defendant's car was proceeding at the rate of a walk, and therefore the by-law in question does not apply. Even if am wrong as to this finding, I think there is another ground on which the defendant should succeed. Obviously the purpose of this section of the by-law is that the driver, who is proceeding as slowly as one would walk, must keep by the curb so that others passing him, going in the same direction, may have room on his left to pass, and so that he may not block the traffic. If that be so, the principle laid down in *Gorris* v. *Scott* (1874), L.R. 9 Ex. 125, would apply, inasmuch as the City Council, in passing this regulation, did not contemplate the protection of pedestrians but had in view solely the purpose of preventing a slowly moving vehicle from blocking traffic.

MCDONALD, J.

1925

Jan. 19.

PEARSON v. READ

In view of the above findings, it becomes unnecessary to consider the question of contributory negligence.

Regrettable as the accident was, I am of opinion that the action must be dismissed.

Action dismissed.

MORRISON, J.

1925

Jan. 22.

WOOD v. B.C. ELECTRIC RY. CO.

WOOD v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Damages—Collision between automobile and tram-car—Girl riding in automobile killed — Action by father of — Defendant's admission of negligence—Evidence as to damages—Verdict of jury—No proof of father being girl's executor—R.S.B.C. 1911, Cap. 82, Sec. 4.

In an action for damages by the father of a girl killed in a collision between an automobile and tram-car, the defendant admitted negligence and after the jury assessed the damage and was discharged, on motion for judgment counsel for the defence moved for dismissal on the ground that the father of deceased was not shewn to be her executor.

Held, that as the defendant admits negligence and the trend of the trial turned on the question of the reasonable probability of a pecuniary benefit to the parents during the girl's life and the *quantum* of damages upon which all available evidence was adduced and placed before the jury which could not be affected in any way by evidence as to whether or not there was an executor, evidence of the plaintiff as to executorship (which was to the effect that there was no executor) should be allowed in.

Banbury v. *Bank of Montreal* (1918), 87 L.J., K.B. 1158 and *Cropper* v. *Smith* (1884), 26 Ch. D. 700 at p. 710 applied.

MOTION for judgment after verdict and after the jury was discharged in an action for damages for negligence, the plaintiff's daughter while riding in an automobile with another person having been killed owing to the collision of the automobile with a tram-car of the defendant. The defendant admitted that there was negligence and on the trial the evidence was confined to the question of damages there being no evidence submitted for the defence. The jury brought in a verdict for

Statement

MORRISON, J.

1925

Jan. 22.

WOOD v. B.C. ELECTRIC RY. CO.

the plaintiff for $4,158, and after the jury was discharged, on motion for judgment, the learned judge having reserved leave to apply to dismiss the action, counsel for the defence submitted that if there were an executor or administrator the plaintiff could not have brought this action until after the expiration of 6 months. The action was brought within 6 months and there was no allegation in the pleadings that there was no executor or administrator and no proof thereof, therefore unless the judge allowed evidence to be given of these facts after the discharge of the jury, judgment could not be given for the plaintiff, relying on section 4, Cap. 82, R.S.B.C. 1911. He

Argument

cited in support thereof *Makarsky* v. *C.P.R.* (1904), 15 Man. L.R. 53; *Smith* v. *Kay* (1859), 7 H.L. Cas. 750; *Fruhauf* v. *Grosvenor & Co.* (1892), 61 L.J., Q.B. 717; *Seear* v. *Lawson* (1880), 16 Ch. D. 121; *Read* v. *Brown* (1888), 22 Q.B.D. 128 at p. 132; *Bradley* v. *Chamberlyn* (1893), 1 Q.B. 439 at p. 441; *Hollis* v. *Marshall* (1858), 2 H. & N. 755; *Davis* v. *James* (1884), 26 Ch. D. 778 at p. 780. Heard by MORRISON, J. at Vancouver on the 5th of January, 1925.

J. W. deB. Farris, K.C., for the motion.
McPhillips, K.C., contra.

22nd January, 1925.

MORRISON, J.: The plaintiff's daughter whilst riding in an automobile with another person was killed owing to the collision of the auto with a tram-car of the defendant. Negligence, as pleaded, was admitted by the defendant. A jury rendered a verdict in favour of the plaintiff for $4,158, which they apportioned between the plaintiff and his wife. The action was commenced within six months of the deceased's death.

Judgment

This is a motion for judgment after verdict and after the jury was discharged. The transcript of the proceedings immediately the case was called, having to do with the points now involved, is as follows:

"Mr. *McPhillips*: I have shortened this trial by making admissions. I will admit that the accident was caused by the joint negligence of the driver of the automobile and of the tram-car, and I will admit that as the deceased was not responsible for the acts of the motor driver that in that case the Company is liable for the negligence, but I do not admit any damages, nor the right to get damages.

"THE COURT: There is practically nothing for the jury unless the question of damages is presented to them.

"Mr. *Wismer*: If there are any damages, the question is, how much?

"Mr. *McPhillips*: Yes.

"Mr. *Wismer*: That shortens it considerably."

The trial then proceeded, the evidence being confined to the question of damages. The transcript shews what took place at the conclusion of the plaintiff's evidence:

"Mr. *Wismer*: That is the case.

"Mr. *McPhillips*: There is no evidence, my Lord. I submit formally that there is no evidence to go to the jury on the question of damages. I do not give any evidence, my Lord. My learned friend goes to the jury first.

"[Counsel addressed the jury]."

Mr. *McPhillips,* than whom there is no member of the Bar relies less upon any technical phase of a case, now submits that the plaintiff, who is the father of the deceased and was not shewn to be her executor, cannot sue and asks to have the action dismissed, relying on R.S.B.C. 1911, Cap. 82, Sec. 4. I had reserved leave to apply to dismiss in accordance with what I may venture to say is now the established practice. Counsel did not then enumerate the grounds upon which he based his application. Mr. *Farris,* on behalf of the plaintiff, contends that the defendant is estopped on this application from raising that ground. That had the defendant advanced that objection in his application to dismiss, when leave was reserved to apply later and the jury present, the matter could have been dealt with and, if necessary, the requisite evidence could have been forthcoming. It is now also sought to have the plaintiff recalled, notwithstanding the jury has been discharged, to prove that there is no executor of the deceased. The defendant admits that the death of the plaintiff's daughter was caused by their negligence, and that if it could be shewn that there was a reasonable probability of a pecuniary benefit to the parents from the daughter during her lifetime, they, the defendants, would submit to pay such reasonable sum as the jury should award. The trend of the trial turned on the question of the existence of such probable pecuniary benefit and the *quantum* of damages. All the available evidence on that aspect of the case, which may be termed the merits, was adduced and placed

Judgment

MORRISON, J.

1925

Jan. 22.

WOOD v. B.C. ELECTRIC RY. CO.

before the jury, which could not in any possible way have been assisted in coming to a verdict on such merits by evidence as to whether or not there was an executor. That then makes apposite such cases as *Banbury* v. *Bank of Montreal* (1918), 87 L.J., K.B. 1158, and especially *Cropper* v. *Smith* (1884), 26 Ch. D. 700, where Bowen, L.J., at pp. 710-11, says:

"Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. . . . . It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."

Judgment

I have allowed in, over against the objection of Mr. *McPhillips,* the evidence of the plaintiff that there is no executor (*Banbury* v. *Bank of Montreal, supra*). In the first place, I think Mr. *McPhillips* should have specifically raised the point of the absence of evidence as to the executor before the jury was discharged, having regard to the admissions properly enough made. I had not in mind that point or I should have put the question myself and, if necessary, should have allowed an amendment of the pleadings.

If it should be held, however, that I am wrong in allowing in the evidence, as above stated, then I am of opinion that there was a waiver as counsel submit.

Mr. *McPhillips* also submits that the amount of the verdict is excessive. As to that, I shall not intervene.

MAKINS PRODUCE CO v. CANADIAN AUSTRALIAN ROYAL MAIL LINE.

MURPHY, J.

1925

Feb. 2.

MAKINS PRODUCE CO. v. CANADIAN AUSTRALIAN ROYAL MAIL LINE

Contract—Bill of lading—Carriage of goods by sea—Damaged in transit—Negligence.

In an action by a shipper to recover the loss suffered by damage to a consignment of goods carried by sea, the defence that there was a transfer of ownership to the consignee whereby the plaintiff lost his right to sue, must be supported by evidence to shew that the bargain between the shipper and the consignee was that no matter what condition the goods were in, the consignee was bound to accept them.

The ordinary rule as to the basis of damage to goods while carried by sea is the market price of the goods at the port of discharge at the time of delivery.

ACTION to recover the loss through damage to a consignment of eggs owing to negligence in carriage by the defendant Company. Tried by MURPHY, J. at Vancouver on the 29th of January, 1925.

Statement

Bourne, for plaintiff.
Griffin, for defendant.

2nd February, 1925.

MURPHY, J.: First, as to accord and satisfaction. In my opinion the statement of defence, as drawn, sufficiently raises this plea. I do not, however, consider it substantiated by the evidence. My view is that the settlement effected related not to the contract to carry the eggs but to the damage to the 60 cases admittedly delivered in bad order. The Steamship Company itself segregated these 60 cases by setting them apart in a separate pile on the dock. That act I regard as an invitation by the Steamship Company to open a discussion not on the breach of the carriage contract *qua* contract but as to the damage done to these particular cases. The decision might be otherwise had the segregation been made on behalf of plaintiffs.

Judgment

Second, as to the claim of a transfer of ownership to the Fairmont Company, whereby plaintiffs lost their right to sue.

MURPHY, J.

1925

Feb. 2.

MAKINS PRODUCE CO. v. CANADIAN AUSTRALIAN ROYAL MAIL LINE

Again, I am of opinion this plea is sufficiently raised in the statement of defence, but I hold it also not borne out by the evidence. Admittedly, if this plea is to succeed, the evidence must shew that the bargain between plaintiff and the Fairmont Company went to the full extent that no matter what the condition of the eggs, the Fairmont Company was bound to accept and pay for them without any recourse against the plaintiff. The onus of proving this is on the defendant, and I hold such onus not discharged. Such onus, in my opinion, cannot be discharged by citing isolated paragraphs of a single letter written by plaintiff. All the letters and all proven facts must be considered. Plaintiff at once admitted liability to the Fairmont Company, and paid for the damaged eggs—an unlikely course if the situation were as defendant contends. The letters, other than Exhibit 31, are against the view contended for by defendant. If, as the case now stands, I held the view that the onus was satisfied, I would accede to the request of counsel for the plaintiff to call Makins. As I do not, it is unnecessary to deal with the application.

Third, as to the claim not being filed in time. The paramount clause which opens with the statement "each clause in this document shall be read with the following proviso," is, I consider, a complete answer to this, because treating the proviso set out as one qualifying the time limit clause has the effect of making the time limit clause inapplicable to a cause of action such as that on which I have found defendant liable.

Judgment

Fourth, basis of damage. I hold this to be market price in Vancouver at time of delivery. Admittedly this is the ordinary rule unless the contract contains special conditions. I do not think, having regard to the fact that the bill of lading is a contract for carriage by sea, that the provision that the word "loss" therein in reference to the value and cost of goods at the point and time of shipment is to govern settlement applies to damage done to goods by negligent handling. I am fortified in this view by the occurrence of the phrase "loss or damage" in other clauses of the bill of lading. In assessing damages I rule that no expense incurred for examination and marketing the salved eggs from the 60 cases is to be taken into

MURPHY, J.

1925

Feb. 2.

MAKINS PRODUCE CO. v. CANADIAN AUSTRALIAN ROYAL MAIL LINE

account. I hold the settlement made with regard to these 60 cases concludes everything in connection with them.

Finally, on the matter of adducing further evidence and, if necessary, the issuing of further commissions to establish the *quantum* of damage, in view of all that has happened I hold it to be in the interest of justice that there should be no restrictions placed on plaintiff. All costs incurred, however, because of this ruling are reserved to be disposed of on the motion to enter judgment when damages have been assessed. The assessment is referred to the registrar.

ASSOCIATED GROWERS OF BRITISH COLUMBIA LIMITED v. BRITISH COLUMBIA FRUIT LANDS LIMITED AND JOHN JAMIESON.

MCDONALD, J.

1925

Jan. 23.

ASSOCIATED GROWERS OF BRITISH COLUMBIA v. BRITISH COLUMBIA FRUIT LANDS LTD.

Companies—Proposed contract—Executed by manager of one company—Effect of—Other company not incorporated—Executed after incorporation—Right of action—Use of "co-operative" in name—Effect of—Restraint of trade—Damages—B.C. Stats. 1921, Cap. 10; 1920, Cap. 19, Sec. 4(2).

A document containing the terms of a proposed contract between the defendant Company and a company about to be formed was executed by the defendant Company's manager on its behalf and handed by him to a committee organizing the second company as evidence of the fact that the defendant was willing to enter into the contract as soon as the second company became incorporated. After the second company became incorporated and received its certificate entitling it to commence business it duly executed the document and they proceeded to do business under the contract. In an action by the second Company upon the contract:—

Held, that the plaintiff was entitled to sue for damages for breach thereof.

Kelner v. *Baxter* (1866), L.R. 2 C.P. 174 distinguished.

Where the manager of a company acting in good faith under the authority which he thought was vested in him and which could have been vested in him under the articles of association executes a contract on behalf of the company and the other party accepts him as having authority, the company is bound by his act.

Doctor v. *People's Trust Co.* (1913), 18 B.C. 382 followed.

MCDONALD, J.
1925
Jan. 23.

ASSOCIATED GROWERS OF BRITISH COLUMBIA v. BRITISH COLUMBIA FRUIT LANDS LTD.

Where a company incorporated under the Companies Act, 1921, includes in its name the word "co-operative" contrary to section 4(2) of the Co-operative Associations Act, the company is not thereby rendered illegal as section 28 of the Companies Act makes a certificate of incorporation conclusive evidence that the company was duly incorporated.

A contract between the plaintiff Company and a grower of fruits and vegetables under which the latter agrees to deliver all his products to the company for marketing is not illegal as being in restraint of trade.

ACTION for specific performance of an agreement alleged to have been made between the plaintiff and defendant whereby the defendant agreed to deliver all its fruit and vegetables to the plaintiff for a period of five years and for damages for breach of said contract. The contract in question was carried out by the defendant Company for the summer of 1923 but in June, 1924, the defendant Company wrote a letter to the plaintiff purporting to rescind the contract and refused to be further bound by it. The facts are set out fully in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 19th of January, 1925.

Statement

Craig, K.C., and *W. C. Thomson*, for plaintiff.
Fulton, K.C., and *Ghent Davis*, for defendant.

23rd January, 1925.

MCDONALD, J.: This is an action brought for specific performance of an agreement alleged to have been made between the plaintiff and the defendant Company, whereby the defendant Company agreed, for a period of five years, to deliver all its fruit and vegetables to the plaintiff Company, and for damages for breach of such contract. At the trial, the plaintiff expressly abandoned any claim for an injunction, so it remains only to deal with the question of damages.

Judgment

The main defence set up is that the case falls within the rule in *Kelner* v. *Baxter* (1866), L.R. 2 C.P. 174, which case has been more recently dealt with in *In re Northumberland Avenue Hotel Company* (1886), 33 Ch. D. 16 and in *Natal Land, &c., Company* v. *Pauline Colliery Syndicate* (1904), A.C. 120. I was, at first, under the impression that these cases formed an insuperable barrier to the plaintiff's success,

but, after hearing Mr. *Craig's* argument and giving the matter very full consideration, I have concluded that that is not so. In *Kelner* v. *Baxter* an agreement was made and executed on January 27th, 1866, between John Kelner, on the one hand, and John Baxter and others "on behalf of the proposed Gravesend Royal Alexandria Hotel Company Limited," on the other hand, whereby Kelner agreed to sell and Baxter and his associates agreed to purchase on behalf of the proposed company a stock of wines, etc. The goods were handed over, the company was incorporated 20th February, 1866, and the directors expressly ratified the agreement. The company having collapsed, Baxter and his associates were sued for the price of the goods, and were held liable because there was no company in existence at the time the contract was made and because, when the company did come into existence, it could not then ratify a contract made on its behalf prior to its incorporation. There being a definite contract made by Baxter and his associates on behalf of a principal which did not exist, and which could not ratify, Baxter and his associates were, as stated, held personally liable upon the contract.

In *In re Northumberland Avenue Hotel Company, supra,* one, Wallis, by his agents, on 24th July, 1882, executed an agreement with one Doyle "as trustee for and on behalf of an intended company to be called The Northumberland Avenue Hotel Company Limited," whereby Wallis agreed to grant to the company and Doyle, on behalf of the company, agreed to take an underlease of certain lands. On 25th July, 1882, the proposed company was incorporated and its articles of association purported to adopt the agreement and provided that the company should carry it into effect. The company acted under the agreement, took possession of the lands and expended large sums of money thereon and also paid rent. In 1884 the company passed a resolution for voluntary winding-up. On a summons by Wallis's trustee, asking that he be admitted as a creditor for damages sustained by him, as a result of the breach by the company of the agreement in question, it was held that, as Doyle contracted, as agent, for a company not yet in exist-

MCDONALD, J.

1925

Jan. 23.

ASSOCIATED GROWERS OF BRITISH COLUMBIA v. BRITISH COLUMBIA FRUIT LANDS LTD.

ence the company could not, by reason of the rule in *Kelner* v. *Baxter,* ratify the agreement, and the summons was dismissed.

In *Natal Land, &c., Company* v. *Pauline Colliery Syndicate, supra,* the Pauline Company claimed the benefit of a contract contained in correspondence carried on in December, 1897, with Mrs. de Carrey, whose rights were afterwards acquired by William Louch, " 'in his capacity as a provisional director of the Pauline Colliery and Developing Syndicate about to be registered . . . . under the laws of the' South African 'Republic.' " The proposed company was not incorporated until January 22nd, 1898, and it was held on appeal to the Judicial Committee of the Privy Council that the company so incorporated could not take advantage of the agreement made on its behalf before incorporation.

It will be seen in all these cases that what was sought to be enforced was an agreement executed by two parties prior to the incorporation of the company in question, which agreement purported to be made by a named individual who then and there signed the agreement thereby purporting to bind the proposed company.

Now let us consider the facts in the present case. They are not seriously in dispute.

Judgment

For some time prior to February 23rd, 1923, a number of the growers of fruit and vegetables in the Okanagan and Kamloops districts were trying to work out a scheme whereby they could, by pooling their interests, market and distribute their products in a scientific manner based on commercial experience, so as to prevent waste and loss owing to unregulated shipments here, there and everywhere, with the result that today a certain market was flooded with and another market was without supplies, whereas tomorrow the case might be reversed. On the 23rd of February, 1923, a meeting was held at Kamloops which was attended by the defendant Jamieson, the executive manager of the defendant Company for British Columbia. As one of the chief growers in the vicinity, he was deeply interested. Draft forms of contract to suit the various growers and districts were read and explained at the meeting; the proposed scheme

was fully discussed, and it was explained and understood that an organization committee had been formed, which committee would carry on until the growers, representing 80 per cent. of the estimated production of fruit and vegetables, had agreed to enter into the scheme, and that thereupon a co-operative company would be formed, to which company all those who would sign contracts would deliver their products to be marketed. Up until the 3rd of March at least, Mr. Jamieson knew that the company was not yet incorporated, that the organization committee was still endeavouring to obtain the necessary number of growers to enter into the scheme, that the company would not commence business until such sufficient number was obtained and that the organization committee would cease to function when the company was incorporated. Mr. Jamieson states that on the 5th of March, when he signed Exhibit 1, the document in question in this action, he did not know whether or not the Company had yet become incorporated. He seemed an honest witness and I accept his statement, though it does not seem to me that the situation is thereby altered. On the 5th of March, 1923, the defendant Jamieson, as manager of the defendant Company, executed for his Company a document which opens with the following words:

"This agreement made this 5th day of March, 1923, between British Columbia Fruit Lands Limited hereinafter called 'The Grower' of the First Part and Co-operative Growers of British Columbia Limited a body corporate duly incorporated under the laws of the Province of British Columbia, with its registered office at the City of Vernon in the Province of British Columbia hereinafter called the 'Co-operative' of the Second Part.

The document was not then signed by any other person, but it was handed over to the organization committee to be held by it as evidence of the fact that the defendant Company was willing to enter into the proposed agreement set out in the terms of the document when and so soon as the necessary number of growers had expressed a similar willingness and the company had become incorporated. This document was not an offer then made to a body corporate not yet in existence. I apprehend that such an offer could not be made. To put it in another way, I think the situation was this: the document was

MCDONALD, J.

1925

Jan. 23.

ASSOCIATED GROWERS OF BRITISH COLUMBIA v. BRITISH COLUMBIA FRUIT LANDS LTD.

handed by Mr. Jamieson to the organization committee that they, as his agents, might hold the same and hand it over to the directors of the proposed company when and only when the conditions above mentioned had been complied with. No doubt that agency could have been revoked, but it was not revoked. After the company had been incorporated on the 8th of March and had about the end of March obtained agreements from the necessary number of growers and had on the 20th of April received its certificate from the registrar entitling it to commence business, it thereupon duly executed the document (Exhibit 1) which had been handed to it by the organization committee, and sometime later sent a duplicate of the agreement to Mr. Jamieson, who retained it; and his Company acted upon it during the season of 1923.

I have not overlooked a question that at first gave me considerable trouble, *viz.*, whether the above conclusions offended against what Erle, C.J. referred to in *Kelner* v. *Baxter* (1866), L.R. 2 C.P. 174 at p. 183 as the

"cardinal rule that no oral evidence shall be admitted to shew an intention different from that which appears on the face of the writing."

At the time when this writing first came into effect as a document imposing contractual obligations, every statement, description and recital contained in it was in accordance with the facts, and no attempt is made to contradict or vary the writing. It should be mentioned that on the 28th of June the Company obtained a certificate entitling it to change its name to the name borne by the plaintiff in this action.

Judgment

I think that the circumstances of this case do not bring it within the rule in *Kelner* v. *Baxter* and that the plaintiff Company is entitled to sue for damages for breach of this contract.

During the season of 1923 deliveries were made by the defendant Company to the plaintiff but, inasmuch as the defendant Company was dissatisfied with the result of the season's operations, the defendant Company, on 9th June, 1924, wrote a letter purporting to rescind the contract and refusing to be further bound thereby. As a defence to this action it is claimed that the plaintiff Company's failure to carry out its part of the agreement in the season of 1923 (assuming, of

course, that there was an agreement) entitled the defendant to rescind. It is true that for some days during the busy season the plaintiff Company was unable to handle as promptly as it desired all the fruit that was ready to be delivered, but I cannot find in the case any evidence to shew that the plaintiff by its conduct or otherwise was guilty of any fault amounting to an implied refusal to perform the contract or of any breach negativing its "readiness and willingness to be bound by the contractual relation any further": Benjamin on Sales, 6th Ed., 825; *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434. In my opinion, therefore, the defendant Company was not entitled to rescind the contract.

It was further contended that the defendant Jamieson (who is sued alternatively in his personal capacity) is not shewn to have had authority to execute the document in question. Jamieson was the executive manager for British Columbia and article 74 of the defendant's articles of association provides that

"the directors . . . . may delegate to any local board, manager or agent any of the powers, authorities and discretions for the time being vested in the directors."

Mr. Jamieson acted in good faith under the authority which he thought was vested in him and which could have been vested in him under that article. The plaintiff accepted him as one having the authority and the defendant is bound by his acts. *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382.

Judgment

A further defence was, that the contract in question was a contract in restraint of trade within the terms of the Criminal Code. I think the statement above given as to the purposes of the company negatives this suggestion.

It is finally contended that the plaintiff Company under its former name was an illegal company in that though incorporated under the Companies Act it included in its name the word "Co-operative" contrary to the provisions of the Co-operative Associations Act, B.C. Stats. 1920, Cap. 19, Sec. 4(2). This objection, I think, is clearly met by the provisions of the Companies Act, R.S.B.C. 1924, Cap. 38, Sec. 28, which was in force during all the times material to this action. That section provides that:

MCDONALD, J.

1925

Jan. 23.

ASSOCIATED GROWERS OF BRITISH COLUMBIA v. BRITISH COLUMBIA FRUIT LANDS LTD.

"A certificate of incorporation given by the registrar in respect of a company shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental to incorporation have been complied with, and that the company is a company authorized to be incorporated and duly incorporated under this Act."

It follows from the above that, in my opinion, the plaintiff is entitled to recover damages for the defendant Company's breach of contract in having delivered to others than the plaintiff in the season of 1924, 4,134 boxes of fruit, and it is now necessary to consider upon what basis those damages should be assessed. The contract contains the following clause:

"13. Inasmuch as it is now and always will be impracticable and extremely difficult to determine the actual damage resulting to the Co-operative should the grower fail so to deliver his fruits and vegetables, the grower hereby agrees to pay as liquidated damages for the breach of this contract, and not as a penalty for all fruits and vegetables withheld, delivered, sold, consigned or marketed by, or for him other than in accordance with the terms hereof twenty-five cents per package for all fruits and fifteen cents per crate, sack or other package of vegetables."

Evidence was given by the witness McNair as to the objects and methods of the plaintiff. The Company did not carry on for profit. The growers delivered their products to the Company, which maintained a considerable organization and was under considerable expense by way of overhead and otherwise. All the products of various growers comprising a shipment were pooled and sold, the costs of handling and selling were deducted, and the proceeds divided among the members of the pool in proportion to their respective interests therein. It will be seen from this that it is, as stated in the contract, impracticable and very difficult to ascertain what damages, either direct or indirect, might be suffered by the Company in case any grower or growers failed to deliver his or their products for distribution. I am satisfied, upon the evidence, and from a perusal of the agreement, and notwithstanding that evidence was given that in the case of certain fruits the price obtained was very low and in fact under 25 cents per box, that the parties, with a full realization of the practical impossibility of ascertaining the amount of damages to be suffered in case of a breach of the contract, honestly endeavoured to pre-estimate such damage, and that the rate of 25 cents per box is to be looked upon as liquidated damages and not as a penalty. In

Judgment

MCDONALD, J.

1925

Jan. 23.

ASSOCIATED GROWERS OF BRITISH COLUMBIA v. BRITISH COLUMBIA FRUIT LANDS LTD.

so deciding, I am endeavouring to follow the rules which I understand to be laid down by Jessel, M.R. in *Wallis* v. *Smith* (1882), 21 Ch. D. 243 and by the House of Lords in the more recent case of *Dunlop Pneumatic Tyre Company, Limited* v. *New Garage and Motor Company, Limited* (1915), A.C. 79.

There will accordingly be judgment for the plaintiff for $1,033.50, being at the rate of 25 cents per box on 4,124 boxes of fruit delivered in 1924 by the defendant Company to parties other than the plaintiff.

Judgment for plaintiff.

MATHESON v. THYNNE.

MACDONALD, J.

1925

Jan. 30.

MATHESON v. THYNNE

Agreement for sale—Land—Right of way through—Subsequent agreement by vendor with party having right of way—Land affected—Depreciation in value—Right of action.

The plaintiff purchased three lots in Yale District from the defendant under agreement for sale for $20,000 on the 16th of July, 1921, the last payment to be made on the 1st of May, 1922, the purchaser to assume two mortgages for $9,000. The plaintiff entered on the lands, made valuable improvements and made all payments on the purchase price. A conveyance, dated the 6th of May, 1922, drawn in pursuance of the Real Property Conveyance Act containing the usual covenants was then delivered the plaintiff purporting to convey the lots to him subject to a right of way of a certain railway through the lots, and the two mortgages. An agreement entered into between the defendant and the said Railway Company of the 26th of July, 1921, recited that owing to the lots in question being flooded by reason of the railway embankment on the right of way blocking the outlet from two lakes in the vicinity the defendant had succeeded in an action for damages for destruction of crop and depreciation of land; that this was sustained on appeal and an appeal was then pending before the Supreme Court. The agreement then proceeded to recite that in consideration of the payment of a certain sum the litigation was settled and the Railway Company was released from all claims which the defendant, his heirs, or assigns can at any time hereafter make by reason of any damage arising by reason of the interference of the Railway Company. In an action for damages for depreciation in the

MACDONALD, J.

1925

Jan. 30.

MATHESON v. THYNNE

value of the land purchased by reason of the agreement of the 21st of July, 1921:—

Held, that the plaintiff did not by his purchase acquire any right in the future to claim damages against the Railway Company of which he was deprived by the agreement between the defendant and the Railway Company and the action should be dismissed.

Statement

ACTION to recover damages in the nature of compensation for alleged depreciation in the value of certain land in Yale Division sold under agreement for sale by the defendant to the plaintiff, by reason of an agreement subsequently entered into by the defendant with the Vancouver, Victoria and Eastern Railway and Navigation Company, said Company having a right of way through the property in question. The defendant previously had litigation with the Railway Company by reason of the railway's embankment along the right of way causing floods on the land in question resulting in damage and the agreement entered into between the defendant and the Railway Company was that in consideration of a certain payment made to the defendant the litigation was settled and the Railway Company was released from all claims of the defendant or that he, his heirs or assigns could make at any time thereafter by reason of damage of any nature arising by reason of interference by the Railway Company. The plaintiff claimed that this agreement was wrongfully entered into, after his agreement for sale had been executed and depreciated the value of his property. The further necessary facts are set out in the head-note and reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 18th of June, 1924.

Cassidy, K.C., for plaintiff.

Killam, and *J. A. Grimmett*, for defendant.

30th January, 1925.

Judgment

MACDONALD, J.: On the 16th of July, 1921, by an agreement under seal, the defendant agreed to sell to the plaintiff lots 68, 475, 604, and 784 in the Yale Division of Yale District, in the Province of British Columbia, for the sum of $20,000, payable $5,500 on the execution of the agreement, $3,500 on the 1st of May, 1922, and $2,000 on the 1st of May, 1923, with interest in the meantime at 8 per cent. per annum.

The balanace of the purchase-money was to be paid, by the plaintiff assuming certain mortgages upon the land. Such agreement for sale contained a covenant, providing that upon payment of the purchase price, the defendant would convey and assure to the plaintiff by a good and sufficient deed in fee simple the said land

"free and discharged from all encumbrances save and except local improvements, assessments or tax and sewer rates and subject to the conditions and reservations in the original grant thereof from the Crown."

It was provided that the plaintiff might occupy and enjoy the land until default. He exercised this privilege and made valuable improvements upon the land. He also made the necessary payments and otherwise became entitled to apply for and receive a conveyance of the property according to the terms of the agreement. After some delay, a conveyance was executed, bearing date the 6th of May, 1922, and forwarded to the plaintiff, being in fulfilment by the defendant of his covenant. It purported to convey the said lots, save certain exceptions therefrom, of the right of way for the Vancouver, Victoria and Eastern Railway and Navigation Company through such lots, as outlined on certain plans attached to the deeds referring to such portions. It was also subject to two mortgages, which the plaintiff had agreed to assume. The conveyance was in pursuance of the Real Property Conveyance Act and contained the usual covenants referred to in such legislation. *Inter alia,* defendant covenanted that he had a right to convey, and that the plaintiff should have "quiet possession of the said lands, free from all encumbrances save as aforesaid."

Judgment

Plaintiff now complains that defendant, after having thus agreed to sell the land, entered into an agreement with the said Vancouver, Victoria and Eastern Railway and Navigation Company, which prejudicially affected the plaintiff, when he became entitled to acquire title and become the complete owner of one of such lots, *viz.,* lot 68.

It appears that an agreement was entered into, on the 26th of July, 1921, between the defendant and the said Railway Company, in which the mortgagees joined, relating to lots 67 and 68, group 1, in said Yale Division. This agreement recited

MACDONALD, J.
1925
Jan. 30.
MATHESON v. THYNNE

that there had been complaints on the part of the defendant, by reason of the construction of the line of railway along Thynne Lake and Otter Creek, resulting in said lots 67 and 68 having been flooded, with destruction to the crops and depreciation of the value of the land; that the defendant had succeeded in an action brought for damages, and a judgment in his favour had been sustained by the Appeal Court, and that an appeal was then pending to the Supreme Court of Canada. It also recited that various complaints had been made to the Board of Railway Commissioners for Canada arising out of alleged obstruction to the flowage of water out of the said lake and creek, and that, in consideration of the payment of a certain amount, the litigation was to be settled and the Railway Company, its successors and assigns, forever released from all claims which the defendant had theretofore made or that he

"his heirs, executors, administrators or assigns can at any time hereafter make by reason of any damage of any nature or kind whatsoever arising or to arise by reason of the interference by the Railway Company with the outlet of Thynne Lake or the channel of Otter Creek to the said lots 67 and 68, by reason of water coming upon or remaining on the said lands or any part thereof or otherwise howsoever."

The clause material to this case is the enacting portion of such agreement, which reads somewhat differently, but is practically the same as the recital. This agreement was registered in the proper Registry office on the 23rd of August, 1921, and appears as a charge against said lots 67 and 68. It has been objected that it should not have been so registered or filed as alleged, and should not be considered as an encumbrance; but the fact remains that, aside from its effect, it is an instrument registered against the land, in priority to the agreement for sale to plaintiff. Whether the plaintiff or any other purchaser of the land would be prejudiced or damnified by such registered charge and, if so, its extent, will be subsequently considered. Plaintiff was aware of this agreement with the Railway Company, at the time when he sought to register his conveyance of the lots, referred to in the agreement for sale. He had, in such agreement, an option of purchase of said lot 67, but did not exercise his rights thereunder, and so the registration of the agreement complained of with the Railway Company only

Judgment

affected lot 68, and has no operation as to the other land purchased. Plaintiff had full knowledge, at the time, that his purchase did not include the railway right of way over the land, though not specifically so stated in the agreement for sale. No objection, consequently, was made as to the reservation of the right of way, in the description contained in the deed covering all the lots so purchased. Plaintiff applied for registration of the deed with such reservations, and while there were other difficulties in the way of registration, still, they might have been adjusted, but the agreement with the Railway Company, as a third party, could not be overcome. It remained *quantum valebat* against lot 68. Plaintiff, if he had so desired, could in that event, by segregating his application for registration, have obtained registration and completed his title to all the lots purchased, except lot 68. He did not see fit to do so, and, while retaining the conveyance and possession, of all the property, did not attempt a rescission of the sale and return of the money paid. Pursuant to the settlement under the Railway agreement, defendant had received a large amount of money. This was featured at the trial, and doubtless had an effect upon the plaintiff in pursuing his action, based upon what he has termed a breach of trust on the part of the defendant, in entering into such agreement with the Railway Company after he had agreed to sell the land to the plaintiff. The agreement complained of, in any event, only affected lot 68, so the question arises, as to the rights of the plaintiff as the owner of such property, and whether they have suffered through the action of the defendant. If so, what redress is open to the plaintiff?

Judgment

Plaintiff alleges that the execution and delivery by the defendant of the said Railway agreement was not only a breach of the trust by the defendant, created by the agreement for sale, to his detriment, as purchaser of the said lands, but that the covenants in the said deed of conveyance have been broken, it being contended that the land so conveyed was encumbered by such Railway agreement. Plaintiff is thus apparently endeavouring to rely upon the obligation resting upon the defendant, as a trustee, under the agreement for sale, and also

MACDONALD, J.
1925
Jan. 30.
MATHESON v. THYNNE

upon the covenants contained in the conveyance of the land. He claims damages amounting to $15,000.

As to the first contention, if the defendant had remained in possession of the land, he would have been in a position of trustee for the plaintiff, and required to take reasonable care to preserve the property. See *Clarke* v. *Ramuz* (1891), 2 Q.B. 456. Lord Coleridge, C.J., at pp. 459-60, in that case refers to the position of a purchaser under an agreement for sale as follows:

"The contention is that such an action as this will not lie. It appears to be well established in equity that, in the case of a contract for the sale and purchase of land, although the legal property does not pass until the execution of the conveyance, during the interval prior to completion the vendor in possession is a trustee for the purchaser, and as such has duties to perform towards him, not exactly the same as in the case of other trustees, but certain duties, one of which is to use reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, as it was when the contract was made."

Compare Dart on Vendors and Purchasers, 7th Ed., Vol. 1, pp. 672-3. It says:

"The vendor from the date of the contract holds the estate in trust for the purchaser, subject to payment of the purchase-money . . . . and his fiduciary position demands that he shall, while in possession, take reasonable care to preserve the property . . . . so far as may be, as it was when the contract was made. If therefore, [the purchaser is damaged] by his [vendor's] wilful acts (*Foster* v. *Deacon* (1818), 3 Mad. 394) . . . . or by determining tenancies without the purchaser's consent, or acting so improvidently as to occasion their loss . . . . the purchaser is entitled to an allowance."

Judgment

Romer, J. in *Rafferty* v. *Schofield* (1897), 1 Ch. 937 at pp. 943-4, says:

"After the relation of vendor and purchaser was established between the parties, the purchaser was in equity the owner of the property. And the position of the vendor is clearly stated by Lord Cairns in *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321, 328 as follows: 'Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser . . . . the purchaser was the real beneficial owner,'" etc.

It is not necessary, however, to consider the effect of the agreement for sale or a breach of trust thereunder, in the meantime, if the plaintiff is debarred from now making such a contention, through having subsequently accepted the deed of conveyance and so waived his rights under the agreement for sale. If any existed, were they not merged in the deed? Such

a result would seem to follow, and was considered in the case of *Clarke* v. *Ramuz, supra,* at p. 460, *viz.*:

"Then it was contended that by reason of the execution of the conveyance there was an end of any remedy for the breach of trust which had taken place, and which had lessened the value of the land. I could understand that, where the purchaser knew what had happened, it might possibly be argued that, by reason of his taking a conveyance without making any claim in respect of the breach of trust, there was evidence of a waiver by him of his right."

Compare Kay, L.J. at p. 462.

Here the plaintiff became aware, after delivery of the deed, and particularly upon receipt by his solicitor of a letter (Exhibit 23) from the registrar of land titles, Kamloops, that the Railway agreement had been registered. Notwithstanding such knowledge, he proceeded with the completion of the title of the property sought to be purchased, including said lot 68, which was referred to in said Railway agreement. Further, the application of the doctrine of waiver becomes very applicable, when an alleged charge or encumbrance is placed upon a portion of the property after the agreement for sale has been executed, and it is open to the purchaser, if so advised, and the facts warrant, to refuse to complete the purchase.

Dart on Vendors and Purchasers, 7th Ed., Vol. 1, pp. 290-1:

"And any act of the vendor, which prevents his giving to the purchaser that which was, substantially, the subject-matter of the contract, renders the agreement voidable by the latter . . . . but if the omission by the vendor to keep up the insurance renders the title impeachable, the purchaser, it seems, may be discharged."

Judgment

If the plaintiff had, or thought he had, good grounds to adopt this course, he chose not to pursue it. If he has been injured by the Railway agreement, his remedy should be, under these circumstances, founded upon covenants in the conveyance so accepted, retained and sought to be registered.

It is contended by the defendant that the Railway agreement was not a charge nor encumbrance, and "did not run with the land," and was not in any way binding on the assigns of the defendant. As to whether the Railway agreement is an encumbrance or burden upon the land to be borne by the plaintiff, as a subsequent purchaser, depends upon its nature and extent. If the document be a permanent encumbrance, then I think the submission of plaintiff is well founded, and he is entitled to

MACDONALD, J.
1925
Jan. 30.
MATHESON v. THYNNE

seek redress by way of damages under the covenant in the conveyance. See Sedgwick on Damages, 9th Ed., p. 2003, par. 970:

"Where the land is subject to an encumbrance which cannot be removed by the payment of money, but the entire fee subject to it remains in the grantee, the measure of damages is the depreciation in value of the land by reason of the encumbrances. Compare cases cited at pp. 2004 and 2005 in *Richmond* v. *Ames* (1895), 164 Mass. 467; 41 N.E. 671."

Mitchell v. *Stanley,* 44 Conn. 312 at p. 317 is referred to in Sedgwick at p. 2005, as being a case where the defendants had conveyed to the plaintiff, with a covenant against encumbrance, a tract of land on which there was an encumbrance in the shape of an easement, whereby a third party had the right to pass and repass to make repairs on a canal. It was held that the plaintiff was not restricted to the actual damages suffered before trial. The Court said:

"It is true that this is the only direct damage they received from the exercise of the right of way. But is this the actual damage? We think not. The encumbrance is permanent and perpetual, and the estate of the plaintiffs forever burdened with this servitude which they have no power, as a matter of right, to remove, and which diminishes the value of their land to the amount of $750."

Then again, in the case of *Bronson* v. *Coffin* (1871), 108 Mass. 175; 11 Am. Rep. 335, the measure of damages was considered to be the difference between the fair market value of the property by reason of an encumbrance, based upon what might be reasonably considered the burden to be borne by the purchaser.

Judgment

Defendant contends that the execution of the Railway agreement should not give a right of action to the plaintiff, as if the documents referred to in the letter (Exhibit 23) had been properly examined in the Registry office, he would have discovered that the conveyance of the right of way from the defendant to the Railway Company, under date 16th October, 1912, included not only a specific description of such right of way, as to lot 68, but also the following release:

"And the said grantor for himself, his heirs, executors, administrators and assigns does release the grantees their successors and assigns from all claims for any and all damages resulting to the lands through and across which the strips or pieces of land hereby conveyed are located by reason of the location, grade, construction, maintenance and operation of a railway over and upon the premises hereby conveyed."

Such conveyance was registered many years prior to the execution of the agreement for sale by the defendant to the plaintiff. So, it is argued that the Railway agreement was in reality, as far as lot 68 was concerned, simply a repetition or amplification of the release given by defendant when he sold the right of way and recognized the Railway Company in its utilization of such piece of land for railway purposes. It is contended, however, that no attention should be paid to the release contained in such deed nor any benefit derived by defendant, as no reference was made thereto during the trial, nor was it raised as a matter for consideration until the defendant had replied to the written argument of the plaintiff, delivered in December last. While this is true, still, any defence that is open to a party may be allowed at any time prior to judgment being delivered, subject to terms. The plaintiff was allowed to amend at the trial, and, if it were necessary, the defendant should be permitted to pursue a like course, and raise any defence within reasonable limits. In this connection, I quote the remarks of Haggerty, C.J. in *Peterkin* v. *McFarlane* (1884), 9 A.R. 429 at p. 444:

"I think I am allowed and required by law to give judgment 'according to the very right and justice of the case,' and up to the last moment we have the right to make any amendment proper for the attainment of that very desirable end."

Compare Bowen, L.J. in *Cropper* v. *Smith* (1884), 26 Ch. D. 700 at p. 710:

Judgment

"Every power of amendment given by the Judicature Act seems to me to be applicable to this kind of suit as well as to any other. Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

The remaining and important point then to be decided is, whether the defendant placed a disability upon the lands sold to the plaintiff, either through the release contained in the deed of

MACDONALD, J.
1925
Jan. 30.
MATHESON v. THYNNE

the right of way or by the Railway agreement (Exhibit 3), which damnified the plaintiff and future purchasers, in the enjoyment of the land through preventing redress which they might otherwise possess against the Railway Company, thus depreciating the market value of the property. In this connection, I do not think that the small amount of specific damage alleged to have already occurred, and of which the plaintiff complains, was due to any act of negligence on the part of the Railway Company.

Aside from the apparent damage, which had already occurred, to the balance of the land from the construction of the railway, the plaintiff contends, in his written argument,

> "that it is not open to defendant now, in this case, to maintain that the Railway Company was not, at the date of Exhibit 3—liable in actions by the owner from time to time of the lands, for recurring damages."

He submits that there is almost a certainty of the lands purchased being flooded and damaged in future years, through the construction of the railway, and that he would, as owner, be entitled to recover damages on that account, but is debarred from his remedy by the terms of the Railway agreement. So his action, for the large amount referred to, is not, substantially, for a loss already actually suffered, but for the depreciation in the value of the land through such redress being thus destroyed. If this contention, as to the effect of the Railway agreement, be correct and, while it might only apply so as to affect lot 68, still, there has been a breach of trust on the part of the defendant, which would entitle the plaintiff to a reference to determine the amount of compensation which should be allowed. There is no doubt that the plaintiff purchased the land after proper investigation. He inspected the property and was well aware that it was a valley which had been traversed for years by the railway line, constructed on an embankment. This necessarily interfered with the usual watercourse of Otter River. The Railway Company had, by bridges at divers points, provided outlets for the flow of such stream, but there must have been present to his mind a likelihood of flooding at high water, in that locality. He thus bought the land with its physical condition quite apparent. He had also full knowledge of defend-

Judgment

ant's litigation with the Railway Company in connection with the construction of the railway and a claim for damages therefrom. Further, that the defendant was, at the time, considering the advisability of accepting a proposed settlement of the litigation. As mentioned, he now complains, that he has been deprived of the right to take a like action in the future, should the facts warrant such a proceeding. In fact, the plaintiff, in effect, asserts that he not only purchased the land, as it appeared, but also the right for all time to come to recover damages for the manner in which the Railway Company, an adjoining owner, had, under statutory authority, utilized its land and constructed its railway, long before the plaintiff had acquired his land from the defendant. I do not consider this position tenable. When the Railway Company, in 1912, purchased from the defendant a portion of its right of way, through the Otter River valley, and constructed its line of railway, it safeguarded itself, as to lot 68, by the release, referred to, from any claim for damage which might arise from such construction. It was evident that, as to this part of its railway line, it was not only purchasing the necessary land for right of way, but was also liquidating any future claim for damages which might be made by the defendant as to the manner in which it might construct its railway upon the land thus purchased. This provision in the registered deed was certainly, as to lot 68, binding on the defendant, and should be equally effective against the plaintiff, aside from any action complaining of such construction being barred at this late date.

Judgment

The plaintiff states that damage to lot 68 was included, in the action brought by defendant against the Railway Company and which was settled. He contends that this would lend support to his action. On the contrary, I think, if it were so, it would, irrespective of other considerations, be a complete answer to any further action being brought by the defendant or the plaintiff, as a subsequent purchaser of such land.

"All damage capable of being foreseen must be assessed once for all and a defendant cannot twice be sued for the same cause. . . . ."

See statement of the law contained in the head-note to *Anctil* v. *City of Quebec* (1903), 33 S.C.R. 347. However, in any

MACDONALD, J.

1925

Jan. 30.

MATHESON v. THYNNE

event, upon the facts, such a contention could not be supported, as lot 68 was not so included.

Then the construction by the Railway Company of its line over any portion of the land purchased by the plaintiff was presumably under statutory authority or, even if it were at the time unauthorized, still, it was a single act, and any cause of action in connection therewith accrued to the defendant at that time. In my opinion, defendant, at the time of his sale to the plaintiff, had lost any right to complain in the future, as to the manner of the construction of such railway or as to any damage which ensued therefrom, and the plaintiff did not acquire any right of that nature by his purchase. Even if the construction of the railway had been a trespass, or nuisance and not, as presumably it was, under lawful authority, they were both in the position outlined in the judgment of Chief Justice Taschereau in *Chaudiere Machine & Foundry Co.* v. *Canada Atlantic Ruay. Co.* (1902), 33 S.C.R. 11 at p. 14:

"The right to complain of what they call the trespass or nuisance by the respondents arose when that nuisance or trespass was committed, that is to say, over ten years before their action was instituted. The fact that they became the owners of this lot only in 1895 does not affect the case one way or the other. If they have an action against the respondents every spring after the melting of the snow or after each rain storm during the summer, as they would contend, the party who owned the lot in 1888 would have the same right had he retained the ownership of it. Now that cannot be so. He had then a right of action for the waters shed upon the lot and the impaired access to the street, and the depreciation in value of his property in consequence thereof, and upon such an action the damages caused by the repondents' embankment would have been assessed once for all. . . . . The proposition that every conveyance of the title would revive right of action arising out of the same tort for the additional damages suffered by the new owner is untenable. If an action had been taken by the then owner, when the respondents built this embankment, for the damages to this property, a judgment in his favour in that action would be a bar to any subsequent action for subsequent damages either at his instance or at the instance of the subsequent owners of the property. *Goodrich* v. *Yale* (1864), 90 Mass. 454."

Judgment

I have thus come to the conclusion that the plaintiff did not, by his purchase, acquire any right in the future to claim damages against the Railway Company, of which he was deprived either by the execution of the Railway agreement, or the release contained in the deed for the right of way. He received from

defendant all that was intended to be purchased. It follows, plaintiff is not entitled to claim any damages, in the nature of compensation for alleged depreciation in the value of the land purchased, through the actions of the defendant. If, since his purchase, the Railway Company has been guilty of any act of negligence, to his detriment, he is not deprived of his proper remedy. The insufficiency of a release, to protect a party under such circumstances is referred to, in the judgment of Mr. Justice Duff in *Vancouver Power Co.* v. *Hounsome* (1914), 49 S.C.R. 423 at p. 437.

Judgment

The action is dismissed with costs.

Action dismissed.

COURT OF APPEAL

1925

Jan. 6.

REX v. GIRONE.

Criminal law—Carnal knowledge of child aged four years and two months—Main evidence that of child—Contradiction on vital point—Conviction—Appeal.

REX v. GIRONE

Accused was convicted of carnally knowing a child aged four years and two months. The main evidence was that of the child who told her parents what happened shortly after the alleged act.

Held, on appeal, reversing the decision of YOUNG, Co. J. (MARTIN, J.A. dissenting in part), that as the Crown's case was founded on the evidence of a very young child who contradicted herself on the vital point in the trial and on several minor matters a conviction founded on such evidence cannot be sustained.

Per MARTIN, J.A.: While I agree that the said most serious charge has not been established, this Court has power to convict accused of the lesser offence of indecent assault upon the child, which has been established completely, and the conviction should be amended to cover that offence.

APPEAL by accused from the decision of YOUNG, Co. J. of the 31st of May, 1924, finding the accused guilty on a charge of having had carnal knowledge of a child under the age of 14 years contrary to section 301 of the Criminal Code. The girl was four years and two months old living with her parents at Ocean Falls. There was a bunk-house not far from where the parents lived in which accused lived and the child's evidence was that accused took her to his room up-stairs in the bunk-house and had connection with her. Shortly after she went home and told her mother in the presence of the father and another man. The learned trial judge found there was sufficient evidence to corroborate the child's story and convicted the accused.

Statement

The appeal was argued at Vancouver on the 8th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

L. H. Jackson, for appellant: This is an appeal under section 1013(*b*) of the Criminal Code. The charge was under section

Argument

301. The only evidence is that of the child aged 4 years and two months. My submission is (a) there was no corroboration as to the act; (b) there was no corroboration implicating the accused: see *Rex* v. *Turnick* (1920), 33 Can. Cr. Cas. 340 at p. 346; *Rex* v. *Steele* (1923), 33 B.C. 197. The child contradicted herself in a number of instances. On the question of the judge giving a certificate under section 1013(*b*) see *William Davies* (1915), 11 Cr. App. R. 272 at p. 275; *Louis Cohen* (1914), 10 Cr. App. R. 91 at p. 96.

Argument

Carter, D.A.-G., for the Crown: The trial judge believed the child's story and there is ample corroboration in the evidence of the mother and father and others as to the accused's attitude when the child told her mother of the act.

Jackson, in reply, referred to *Severo Dossi* (1918), 13 Cr. App. R. 158 at p. 161.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The evidence of the little girl, a mere baby, is the foundation of the Crown's case. She flatly contradicted herself on the vital point in the trial. On several minor matters also she gave contradictory evidence.

In view of these facts it is impossible to sustain the conviction founded upon such evidence.

An attempt was made by the Crown to make it appear that the appellant had virtually admitted his guilt by begging for mercy. Silvio Galiazo, a witness for the Crown, who was present at the time the accusation was made against the appellant, and at subsequent times, said that while the accused was appealing for mercy he never ceased to protest his innocence.

The appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from a conviction for rape of a girl under the age of fourteen years, the accused having been tried and found guilty on the 20th of May, 1924, by His Honour Judge YOUNG in the County Court Judge's Criminal Court of Prince Rupert County. Most regrettably, in my opinion, no other lesser charge arising out of the main facts was laid against the accused in the ordinary way, such as, *e.g.*,

COURT OF APPEAL

1925

Jan. 6.

REX v. GIRONE

indecent assault, so the matter comes before us on the sole charge and conviction for rape, and as the learned judge gave a certificate under section 1013(*b*) that the case was a fit one for appeal on questions of fact, it becomes our duty to review the evidence. After having done so, I agree with my brothers that it would not be safe to uphold the conviction for rape because there are certain omissions in the evidence of the child (aged 4 years and 2 months at the time of the alleged offence) which do not go to the necessary length in establishing that charge. In the ordinary sense, however, I do not at all discredit her evidence and I accept the very unusual testimonial that the learned trial judge has given to her exceptional intelligence and veracity. But while I agree that the said most serious charge has not been established, yet I think that this Court has power, and should exercise it, to convict the accused of the lesser offence of indecent assault upon the child, which to my mind has been established completely, and I would amend the conviction to cover that offence and review the sentence to make it appropriate thereto.

MARTIN, J.A.

McPHILLIPS, J.A.: In my opinion this appeal must be allowed. It would indeed be perilous to uphold the conviction upon the meagre and wholly unsatisfactory evidence led at the trial upon the part of the Crown. It falls short in, I might say, every essential particular; the surrounding circumstances comport with the innocence of the accused rather than any evidence of crime.

MCPHILLIPS, J.A.

MACDONALD, J.A.

MACDONALD, J.A. would allow the appeal.

Appeal allowed, Martin, J.A. dissenting in part.

LEE & RUTHERFORD v. CANADIAN PUGET SOUND LUMBER & TIMBER CO. LIMITED.

COURT OF APPEAL

1924

Oct. 17.

Sale of goods—Boom of logs—Sale—Scale bill—Not a document of title.

In the general course of the logging business although the possession of the original scale bill may be the means of facilitating a sale, it is not a document of title nor is there in existence a custom of the trade to that effect.

LEE & RUTHERFORD v. CANADIAN PUGET SOUND LUMBER & TIMBER CO.

APPEAL by defendant from the decision of MURPHY, J. of the 26th of June, 1924, in an action for damages for wrongful conversion of a boom of logs of 183,218 feet on or about the 20th of May, 1923. The plaintiffs were loggers who had been booming logs in Deep Bay, Vancouver Island. They had already sold two booms of logs to one Jackson a log buyer, which were disposed of in Victoria, and as he was taking away the second boom he asked the plaintiffs if they would sell him, at the same price as the others, a third boom that was in the course of formation at the time at Deep Bay, and the plaintiffs agreed that they would do so. Upon the completion of the boom the plaintiffs applied for a Provinical scaler and the logs were scaled on the 11th of May, 1923. Shortly afterwards Jackson went to the Government forestry offices in Vancouver, paid the scale fees and the scale bill was handed to him. About the same time Jackson hired a tug and under his instructions the tug proceeded to Deep Bay and without the plaintiffs' knowledge took the boom of logs in tow on the 15th of May and arrived at Victoria on the 19th of May. The plaintiffs learned of his removal of the logs on the 16th but took no action. On the 19th Jackson, with the scale sheets in his possession, sold the logs to the defendant Company. Jackson was paid for the logs in cheques which he cashed. He then left for the United States without accounting to the plaintiffs for the logs. It was held by the trial judge that it was a custom of the trade to regard the original scale sheets as documents of

Statement

COURT OF APPEAL

1924

Oct. 17.

LEE & RUTHERFORD v. CANADIAN PUGET SOUND LUMBER & TIMBER CO.

title; that Lee let Jackson have possession of the logs so that he would be in a position to negotiate a sale on his own account subject to production of the original scale sheets; that Lee did not think that Jackson would be in a position to give title without possession of the original scale sheets; that Jackson got the scale sheets by fraud without the knowledge or consent of the true owner and the defendant was liable to the plaintiff for the price of the logs.

The appeal was argued at Vancouver on the 16th and 17th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

H. W. R. Moore, for appellant: The alleged custom of the trade never came up at all. It was neither pleaded, proved nor argued at the trial. Jackson was a log buyer. The plaintiffs sold to him and acquiesced in his possession of the logs. He regularly sold to the defendant who obtained a good title to the logs. Under section 15 of the Forest Act Amendment Act, 1920, Cap. 44, Jackson was entitled to receive the scale. There is no evidence that he made improper representations to the forestry office.

Argument

G. Roy Long, for respondent: We ordered the scale and the person who orders the scale gets the scale bill. Jackson paid the scale fees, but he had no authority to get the scale bill. The plaintiffs agreed to sell to Jackson but it never went further. He took delivery before he got the scale bill. He had no title to sell to the defendant: see *Farquharson Brothers & Co.* v. *King & Co.* (1902), A.C. 325; *Heap* v. *Motorists' Advisory Agency, Ld.* (1923), 1 K.B. 577; *Keighley, Maxsted & Co.* v. *Durant* (1901), A.C. 240. On the question of acquiescence see Halsbury's Laws of England, Vol. 1, pp. 375-80; *Oppenheimer* v. *Frazer & Wyatt* (1907), 76 L.J., K.B. 806; *Eastern Construction Co.* v. *National Trust Co.* (1913), 83 L.J., P.C. 122; *Johnson* v. *Credit Lyonnais Co.* (1877), 3 C.P.D. 32.

Moore, in reply: Subsection (2) of section 41 of the Sale of Goods Act governs the transaction.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The transaction was one of purchase

and sale, by which the plaintiffs agreed to sell the logs to Jackson upon certain conditions as to payment; in other words, Jackson was not to obtain possession until he had paid the price. Jackson took the logs into his possession without the plaintiffs' consent, but the learned judge has found that the plaintiffs thereafter acquiesced in the taking of the logs in that way; therefore, the case is as if the logs were delivered by the plaintiffs to the defendant, which delivery would be a delivery by the vendor to the purchasers.

The fraudulent obtaining of the scale bill by Jackson has really nothing whatever to do with the case. It may have facilitated Jackson in making a sale, but the scale bill was not a document of title. I think, therefore, that when Jackson sold to the defendant he had title, and it was not a case of the theft of the goods by Jackson, and the passing of such title as he had, which, of course, in that case would have been none.

MACDONALD, C.J.A.

The appeal should therefore be allowed.

MARTIN, J.A.: I agree.

MARTIN, J.A.

MCPHILLIPS, J.A.: I am of the opinion the appeal should be allowed. I have no hesitation in saying that all the surrounding circumstances here have satisfied me that no crime was committed at all; and as a further assistance in that view if needed, I think the conduct of the plaintiffs themselves was not such as to indicate that they believed a crime had been committed, but in the order of things, when, of course, naturally, the plaintiffs wished to recover the value of these logs, they cast about for a ground upon which they might recover, and it seems to me that they were in grave error in supposing that this transaction originated in crime. I am not saying anything as to the subsequent action of Jackson in regard to leaving the country and not paying his creditors. Of course, we have lots of people who leave the country and do not pay their creditors, but they are not necessarily thieves, or men who have contravened the Criminal Code. It is not commendable nor in accordance with the moral law, but then that does not make it a crime under the Criminal Code of Canada.

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

Oct. 17.

LEE & RUTHERFORD v. CANADIAN PUGET SOUND LUMBER & TIMBER CO.

MCPHILLIPS, J.A.

I am satisfied that the defendant Company is within the protection of the Sale of Goods Act, section 41, subsection (2). That Act was passed, I might state, following a long course of decisions upon the common law, as regards commercial transactions, and it would indeed be impossible to carry out with safety any of the large industries that are being carried on today, and among them notably the timber business, if the circumstances such as we have had outlined here would mean that a purchaser would have to pay twice for logs purchased in the ordinary course of business. The logs, in my opinion, were bought reasonably and in the market with the protection that the law contemplates.

MACDONALD, J.A.

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

Appeal allowed.

Solicitor for appellant: *H. W. R. Moore.*
Solicitor for respondent: *G. Roy Long.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

E. CLEMENS HORST COMPANY v. LIVESLEY *et al.* (p. 19).—Affirmed by Supreme Court of Canada, 11th November, 1924. See (1924), S.C.R. 605; (1925), 1 D.L.R. 159.

TAXATION ACT AND ANDERSON LOGGING CO., *In re* (p. 163).—Reversed by Supreme Court of Canada, 1st October, 1924. See (1925), S.C.R. 45, *sub nom. Anderson Logging Co.* v. *Regem.*

Cases reported in 33 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

CHANNELL LIMITED AND CHANNELL CHEMICAL COMPANY v. ROMBOUGH *et al.* (p. 452).—Affirmed by Supreme Court of Canada, 11th November, 1924. See (1924), S.C.R. 600; (1925), 1 D.L.R. 233.

LEW v. WING LEE (p. 271).—Reversed in part by Supreme Court of Canada, 19th November, 1924. See (1924), S.C.R. 612; (1925), 1 D.L.R. 179.

INDEX.

price. The finance committee passed a resolution referring the question of price to a special committee consisting of Alderman Tracy, the city comptroller, and assessment commissioner for report. The special committee made a report fixing the price at $21,500 of which the plaintiff received notice. On the 28th of November, 1921, the plaintiff wrote the city clerk asking him to advise the finance committee that the price submitted in the report of the special committee was accepted by him for all parties interested. The lots in question were sold for taxes on the 4th of December, 1920, and after due notice had been given the period for redemption expired on the 4th of December, 1921. An action for specific performance of an alleged agreement for sale of the lands in question was dismissed. *Held*, on appeal, affirming the decision of McDonald, J. (Martin, J.A. dissenting), that no enforceable contract had been established. *Per* McPhillips, J.A.: The proposed purchase was a conditional one. The price which was an essential feature had under the resolution of the City Council to be arrived at in a particular way, *i.e.*, by agreement between the owner and the finance committee followed by the approval of the City Council. The price was never fixed, and with that condition unfulfilled there cannot be an enforceable contract. Townley v. The Corporation of the City of Vancouver. - - - - - - - - **201**

3.——*Bill of lading—Carriage of goods by sea — Damaged in transit — Negligence.*] In an action by a shipper to recover the loss suffered by damage to a consignment of goods carried by sea, the defence that there was a transfer of ownership to the consignee whereby the plaintiff lost his right to sue, must be supported by evidence to shew that the bargain between the shipper and the consignee was that no matter what condition the goods were in, the consignee was bound to accept them. The ordinary rule as to the basis of damage to goods while carried by sea is the market price of the goods at the port of discharge at the time of delivery. Makins Produce Co. v. Canadian Australian Royal Mail Line. **531**

4.——*By agent—Agent not liable.* - **136**
See Vendor and Purchaser. 2.

5.——*For sale of land—Oral—Specific performance—Statue of Frauds.* - - **74**
See Vendor and Purchaser. 1.

6.——*Made in California — Breach by purchaser.* - - - - - - - - - **19**
See Sales.

7.——*Of employment — Forbearance to sue — Not voluntary contract of service.* - - - - - - - - - - - - - **408**
See Master and Servant. 2.

8.——*Of employment — Percentage of profits—Computed semi-annually—Finality of computation — Cause of action arising after issue of writ—Included in statement of claim—Traversed by defence—Estoppel.* - - - - - - - - - - - - - **257**
See Master and Servant. 1.

9.——*Promise of marriage — Plaintiff previously married — Divorce proceedings pending—Promise after hearing but before passage of bill of divorce—Immoral relations pending divorce—Public policy.*] The plaintiff, a married woman, petitioned for divorce. The hearing took place in April, 1924, and the bill of divorce received the Royal assent on the 19th of July following. The defendant's promise of marriage, the breach of which is alleged, was made, as found by the Court, after the hearing of the petition but before the passage of the bill of divorce. *Held*, that even assuming the plaintiff were properly entitled to a divorce, any promise of marriage to be performed contingently upon a divorce being obtained is against public policy and no action can be maintained thereon. Caulfield v. Arnold (No. 2). - - - **404**

10.——*Sale and transfer of to build dry dock—Statutory subsidy included—Government consent to transfer—Member using his influence to obtain consent.* - - - **401**
See Commission.

11.——*Special—Validity of.* - - **180**
See Railway.

12.——*Supplying of railway ties—Royalties—Penalty for trespass—Seizure of ties—Payment by defendant of royalty and penalty to secure release—Right to do so under contract—"Government and all other dues"—Scope of.*] The plaintiff contracted to supply the defendant Company with 70,000 ties and put up a mill on the Rock Creek mineral claim in Yale District for the purpose of manufacturing the ties. He took 65,763 feet of timber off the mineral claim and delivered from 1,200 to 1,500 ties at the Rock Creek station. The ties were seized by the forest branch of the department of lands claiming $652.04 as royalty and penalty dues (87 cents per M. as royalty and $4 per M. as penalty for wilful trespass on a mineral claim). The defendant paid the sum demanded and deducted the amount from the plaintiff's tie account.

CRIMINAL LAW—*Continued.*

application, that the warrant was issued without jurisdiction and the defendant could not be held under it. *Collette* v. *The King* (1909), 16 Can. Cr. Cas. 281 applied. REX v. VIENNET. - - - - - - - **242**

6.——*Illegal sale of liquor—Conviction—Habeas corpus—Sale to Indian—Name of purchaser not disclosed—R.S.C. 1906, Cap. 81—B.C. Stats. 1921, Cap. 30, Sec. 26.*] A conviction and the warrant of commitment thereunder for an offence under the Government Liquor Act will not be set aside because they do not contain the name of the person to whom the liquor was sold. An Indian is punishable in the same manner as others, for offences against Provincial legislation when committed outside a reservation. REX v. CHAN LUNG TOY. **194**

7.——*Intoxicating liquors—Sale of beer—Summary conviction — Appeal — Application to amend charge—Appeal from refusal—B.C. Stats. 1921, Cap. 30, Sec. 46; 1922, Cap. 45, Sec. 7.*] An accused was convicted and sentenced to one month's imprisonment with hard labour on a charge of selling "a liquid known or described as beer." On appeal to the County Court the Crown moved to amend the charge by adding after the word "beer" the words "which is liquor within the meaning of the Government Liquor Act." This was refused for want of jurisdiction on the ground that the proposed amendment describes a different article from the beer as originally contemplated under section 46 of the said Act and therefore is a different offence. *Held*, on appeal, reversing the decision of CAYLEY, Co. J. (McPHILLIPS, J.A. dissenting), that there is only one offence contemplated by the Act the object of the section being merely to add a penalty to the original offence. *Rex* v. *Smith* (1923), 32 B.C. 241 followed. *Per* MARTIN, J.A.: This is an appeal from the decision of the judge dismissing an appeal by the accused from a conviction by the police magistrate under the Provincial Summary Convictions Act. That Act makes no provision for questions being reserved by the County judge when an appeal is taken from his judgment under section 6(4) (*f*) of the Court of Appeal Act which gives an appeal to this Court as of right and is subject to our ordinary jurisdiction. The questions submitted should be disregarded and the hearing of the appeal proceeded with in the ordinary way upon points of law raised. REX v. PERRO. - - - - **169**

8.——*Intoxicating liquor—Unlawful sale—Evidence of—Duties of so-called "stool-pigeons" discussed—B.C. Stats. 1921, Cap. 30, Sec. 26.*] Three police officers in plain clothes stationed themselves at night in a motor-car at the curb in front of a house suspected of containing liquor for sale. The accused walking along the sidewalk came to a point between the motor-car and the house when he was asked by one of the officers whether he could get a bottle of whisky for them. He turned to go towards the house when one of the officers started to follow him but to this he objected. He then went to the house and rapped at a window through which a bottle of whisky was handed to him by a woman. He took it to the officers and received $4 for it which he subsequently paid to the woman. An appeal from a conviction to the Supreme Court for the unlawful sale of liquor was dismissed. *Held*, on appeal, affirming the decision of MORRISON, J. (McPHILLIPS, J.A. dissenting), that the appeal should be dismissed as it is impossible to say that there was no evidence to support the view that the magistrate took in holding that there had been a sale by the accused to the police officers. REX *ex rel.* WARD v. BERDINO. - - - - - - - - - - - **142**

9.——*Murder — Conviction — Accused sentenced to be hanged—"Fit case for appeal"—Application to trial judge for certificate—Grounds—Criminal Code, Sec. 1013(b).*] On an application to the trial judge on behalf of accused who was convicted of murder and sentenced to be hanged, for a certificate that "it was a fit case for appeal" under section 1013(*b*) of the Criminal Code, it was submitted that the certificate should be granted on the grounds that the jury erred in not finding (a) that accused was insane within the statute; (b) that he was in such a state of drunkenness at the time of the killing as to be incapable of forming an intention to commit the crime. *Held*, that from the wording of the statute before a trial judge gives a certificate he should have an opinion or belief of the fitness of the appeal upon the questions of fact or mixed questions of law and fact. The questions raised are essentially for a jury to decide and in such circumstances the certificate should be refused. Accused was charged with having murdered his wife at Notch Hill in the County of Yale and Province of British Columbia. There was no direct evidence shewn by the proceedings at the trial that the place known as "Notch Hill" was within the County of Yale or the Province of British Columbia or that accused's wife was killed in such county. *Held*, that after

2.——*Action for specific performance—Practice—Sale of land—Plaintiff trustee for company—Affidavit of documents by company—Further and better affidavit of documents by plaintiff—Joint and several affidavit sufficient.*] In an action for specific performance of an agreement for the sale of land an order was made that an affidavit of documents be filed on behalf of a company incorporated to take over the lands in question, the evidence disclosing that the plaintiff acted as trustee for the company in respect of said lands. The plaintiff's affidavit of documents contained an item "Pleadings and proceedings in an action in the Supreme Court of British Columbia between the plaintiffs and the Grand Trunk Pacific Railway Company as defendant being No. 1, 2315/1915." *Held*, that a further and better affidavit of documents must be made by the plaintiffs in respect of this item. *Taylor* v. *Batten* (1878), 4 Q.B.D. 85 applied. ISITT AND ISITT v. HAMMOND AND NATIONAL RESOURCES SECURITY COMPANY LIMITED. - - - - - - - - - **133**

2.——*Alimony in arrears—Reduced circumstances of respondent—Application to reduce arrears and monthly allowance.*] The claim of a wife upon obtaining a divorce, to alimony is paramount to that of a second wife or any children had by her, and the liability of the husband to maintain her can not be prejudiced by the existence of a second family. That the earning power of the respondent in a divorce action had fallen off to a cosiderable extent is ground for a reasonable reduction in the monthly allowance but not for a reduction in the arrears of alimony. MOODY v. MOODY. - **49**

ELECTIONS — *Provincial — Counterfoil — Left attached to ballot-paper—Absentee vote —Official stamp not on envelope—Marking of ballot-papers — Indelible pencil — Ink — B.C. Stats. 1920, Cap. 27; 1921, Cap. 17.*] Upon appeal from the decision of a County Court judge on a statutory recount of the ballots cast at a Provincial election it was held:—(1) That ballots to which the full counterfoil was left attached should be counted (MACDONALD, C.J.A. dissenting). (2) That ballots to which a portion of the counterfoil was left attached should be counted. (3) That the ballots of absentee voters enclosed in envelopes that were not marked with the official mark in two or more places across the line where the envelope is closed in accordance with section 106(3) of the Provincial Elections Act should be counted (MARTIN, J.A. dissenting). The decision of HOWAY, Co. J., in the result, was affirmed. *Re* DEWDNEY ELECTION. SMITH v. CATHERWOOD. - - **244**

EXECUTION—*Stay pending appeal—Payment into Court of sum pending appeal—Payment into Court of sum covering judgment and costs — Judgment reversed on appeal — Application for payment out — Appeal to Supreme Court pending — Discretion—Appeal.*] The plaintiff recovered judgment at the trial for $5,490, and costs. The defendant appealed and obtained an order staying execution upon paying into Court the amount of the judgment and costs which, with the security for costs of appeal, amounted in all to $6,700. The

NEGLIGENCE—*Continued.*

before the contest Thomas, who examined rifles during the Great War, examined and oiled the rifles. The boys paid for their ammunition and at the contest the rifles were cleaned every three shots. The plaintiff's boy, twelve years old, had to wait for over an hour for his shots and he had difficulty in getting the gun to go off. His third shot on the second attempt to fire, went off and backfired, a particle hitting him in the eye the result of which was that a few days later his eye had to be taken out. It appeared from the evidence that the rifle (a 22 calibre) had a loose bolt and an enlarged chamber. In an action for damages for negligence the jury gave a verdict against the School Board but dismissed the action as against Thomas. *Held*, on appeal, affirming the decision of GREGORY, J., that the trustees were responsible for the holding of the competition; that it is not a question of their power to authorize this form of sport but of their authority to prevent it, or if allowed, to surround it with proper safeguards. *Held*, further, that there was no inconsistency in the verdict by exonerating Thomas as the negligence of the Trustees as found by the jury was in not providing proper safeguards and not the negligence attributed to Thomas. WALTON v. THE BOARD OF SCHOOL TRUSTEES OF VANCOUVER AND THOMAS. - - - - - **38**

8.——*Driving automobile — Finding of jury—Question of fact—Duty of Appellate Court.*] The plaintiff's father while driving a horse and cart with the plaintiff sitting beside him, across a bridge between 7 and 8 o'clock in the evening in February was run into from behind by the defendant driving an automobile that had full headlights. The cart was smashed and the plaintiff injured. Questions were submitted to a special jury who answered the first question only, *i.e.*, that the defendant was not guilty of negligence, and the action was dismissed. *Held*, on appeal, reversing the decision of MCDONALD, J. and directing a new trial (MARTIN, J.A. dissenting), that assuming the story of the defendant and his witnesses was correct that the cart did not have a lantern and that the cart was driven with one wheel on the sidewalk to the right of the road, the defendant driving an automobile with perfect lights set straight ahead with a minimum radius of 20 feet and running down the plaintiff cannot escape the charge of recklessly and negligently driving without taking heed of what he was doing or where he was going. GOUDY v. MERCER. - - - - - - - - - - - - **103**

NEGLIGENCE—*Continued.*

9.——*Forest fire—Spreading to Washington State (foreign)—Conflict of laws—Injury to soil and personalty — Right of foreign owners to sue.*] The law of the State of Washington with respect to liability in damages for negligently allowing fire to spread being the same as that of British Columbia, an action for injury so caused to property in that State from a fire originating and being allowed to escape from British Columbia may be maintained in British Columbia. In such an action damages cannot be recovered by residents of a foreign State for injury done to the soil, trees, or to buildings or fences erected on foreign property for the better enjoyment of the soil and with the intent that they remain permanently whether or not they were affixed to the soil otherwise than by their own weight; but growing crops, including grass used for pasture, should be treated as chattels and the loss recoverable. BOSLUND *et al.* v. ABBOTSFORD LUMBER, MINING & DEVELOPMENT COMPANY LIMITED. - - - - - - - - - - - - **485**

10.——*Motor-vehicle — Driving in fog—Pedestrian injured — By-law to prevent traffic blocking—Breach.*] Driving a motor-vehicle in a thick fog within the City of Vancouver is not in itself negligence. A by-law of the City of Vancouver provides that "Any person who operates or drives any vehicle . . . . in or through any of the streets of the city shall . . . . when travelling at the rate of a walk . . . . keep as close as possible to the right-hand curb." *Held*, that it was passed solely to prevent the blocking of traffic and the breach thereof is not in itself negligence on which an injured pedestrian can base an action for damages. *Gorris* v. *Scott* (1874), L.R. 9 EX. 125; 43 L.J., EX. 92 applied. PEARSON AND PEARSON v. READ. - **524**

11.——*Motor-vehicles—Highways—Running down pedestrian—Injuries received—Right of pedestrian to cross street—Excessive speed—Dimmers—By-law.*] At about 6 o'clock in the evening on the 24th of January, 1924, the plaintiff was walking easterly on the south side of 15th Avenue in the City of Vancouver and on reaching the point where the street enters Kingsway he started to cross to the north side and when about two-thirds of the way across he was struck by the defendant's car coming from Kingsway into 15th Avenue at a speed in excess of the by-law limit with his dimmers only shewing. The defendant's own evidence was that when he struck the plaintiff he put on his brakes and skidded