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 XXXV.

VICTORIA, B. C.
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1926.

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

ATTORNEY-GENERAL:

THE HON. ALEXANDER MALCOLM MANSON, K.C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED

A

B

C

D

H

K

L

M

N

Q

R

S

RULES OF COURT

"COUNTY COURTS ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that under the authority of the "County Courts Act," being chapter 53 of the "Revised Statutes of British Columbia, 1924," and all other powers thereunto enabling, Order 12 of the "County Court Rules, 1914," be amended by inserting after Rule 39 the following:—

"39A. In addition to the costs by law payable to the Sheriff, where a person is arrested under a warrant of execution, the party at whose instance the warrant is issued shall pay to the Sheriff the sum of one dollar per day for maintenance of the person arrested, by weekly payments of seven dollars in advance; and in case the person arrested shall be discharged during any week, the Sheriff shall repay to the person paying the maintenance-money the sum of one dollar a day for each day less than a week for which maintenance-money has been paid. The maintenance-money so paid by the plaintiff shall be recoverable by him from the defendant as costs of execution in the action, of which they shall be deemed to form part.

"39B. In case the said maintenance-money shall not be paid as aforesaid, the defendant shall be entitled to be discharged from custody, on application to a Judge, by summons, which shall be served on the plaintiff.

"39C. The money so paid to the Sheriff shall be paid by him to the Government Agent in the county where such person shall be imprisoned, and shall be accounted for to the proper authorities."

A. M. MANSON,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., January 25th, 1926.

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that under the authority of the "Court Rules of

Practice Act," being chapter 224 of the "Revised Statutes of British Columbia, 1924," Rule 1 of Order 69 of the "Supreme Court Rules, 1925," be repealed, and the following substituted therefor:—

"1. In addition to the costs by law payable to the Sheriff on executing writs of *capias ad respondendum, capias ad satisfaciendum,* or *ne exeat regno,* the party at whose instance the writ is issued shall pay to the Sheriff the sum of one dollar per day for maintenance of the person arrested, by weekly payments of seven dollars in advance; and in case the person arrested shall be discharged during any week, the Sheriff shall repay to the person paying the maintenance-money the sum of one dollar a day for each day less than a week for which maintenance-money has been paid. The maintenance-money so paid by the plaintiff shall be recoverable by him from the defendant as costs of execution in the action, of which they shall be deemed to form part."

A. M. MANSON,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., January 25th, 1926.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

REX v. JORDAN.

COURT OF APPEAL

1925

Jan. 6.

REX v. JORDAN

Criminal law—Conviction insufficiently describing offence—Optometry Act, B.C. Stats. 1921, Cap. 48, Secs. 2 and 12; 1922, Cap. 55, Sec. 5—Summary Convictions Act, B.C. Stats. 1915, Cap. 59, Sec. 62.

An accused was convicted under section 5 of the Optometry Act Amendment Act, 1922, the conviction stating that the accused "from the 30th December, 1923, to the 4th January, 1924, in the City of Vancouver, not being the holder of a certificate of registration . . . . did unlawfully practise optometry within the Province contrary to the provisions of section 5 of said Act." On appeal by way of case stated to the County Court judge the conviction was quashed.

Held, on appeal, affirming the decision of CAYLEY, Co. J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the conviction of the magistrate was bad as it did not set out the act or particular acts which constituted here the practice of optometry.

APPEAL by the Crown by way of case stated on ground involving questions of law only from the decision of CAYLEY, Co. J. of the 31st of March, 1924, quashing the conviction of accused and ordering the return of the fine paid under said conviction by the deputy police magistrate at Vancouver.

Statement

The case stated was as follows:

"On the 31st of March, 1924, the respondent was brought before me on an appeal from the conviction made by J. A. Findlay, Esq., deputy police magistrate for the City of Vancouver, on the 11th of February, 1924,

COURT OF APPEAL

1925

Jan. 6.

REX v. JORDAN

Statement

wherein the respondent was convicted for that he the said A. McKay Jordan of the said City of Vancouver within the space of six months last past, to wit: from the 30th of December, 1923, to the 4th of January, 1924, at the said City of Vancouver, not being the holder of a certificate of registration duly issued and recorded as provided by the Optometry Act did unlawfully practise optometry within the Province of British Columbia contrary to the provisions of section 5 of the Optometry Act Amendment Act, 1922, contrary to the form of the statute in such case made and provided. The objection was raised before me by counsel for the respondent that the conviction was bad in that it did not disclose particulars of the practice of optometry referred to therein. I sustained the objection of counsel for the respondent, allowed the appeal with costs, quashed the conviction and ordered that the fine of $50 paid under the said conviction be returned to the respondent. The question of law raised and argued before me on this appeal was as follows:

"Was the conviction of the magistrate bad as it did not set out the act or particular acts which constituted here the practise of optometry?"

The appeal was argued at Victoria on the 25th of June, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Armour, K.C., for appellant: Accused was found guilty by the magistrate under section 12 of the Act.

[MARTIN, J.A.: Under *Rex* v. *Perro* (1924), 34 B.C. 169, if there is an appeal on a question of law to the County Court judge, the judge cannot, after judgment, state a case for the Court of Appeal. The Court of Appeal should hear an appeal in the regular way.]

Argument

Objection was taken by counsel for accused that we must shew that he violated either of the clauses (*a.*), (*b.*) or (*c.*) of section 2 of the Act, also the different people he practised on, the objection being sustained, the learned judge following *Reg.* v. *Whelan* (1900), 4 Can. Cr. Cas. 277 and *Regina* v. *Spain* (1889), 18 Ont. 385. The answer to this is that section 723 of the Criminal Code is embodied in the Summary Convictions Act, B.C. Stats. 1915, Cap. 59, Sec. 62, and the objections raised are done away with. The judge said there was no offence described but no objection was taken below and he could apply for particulars: see *Reg.* v. *Coulson* (1893), 24 Ont. 246; 1 Can. Cr. Cas. 114. Section 62 overcomes the objection raised.

Maitland, for respondent: We are in the same position as in

Smith v. *Moody* (1903), 1 K.B. 56: see also *Rex* v. *Somers* (1923), 32 B.C. 553. The Optometry Act is peculiar. There is a difference between practising optometry and practising optometry under the Act so that the rule laid down in *Rex* v. *Chow* (1922), 31 B.C. 461 applies. Unless one of three matters set out in section 2 of the Act is done there is no violation. In answer to section 62 of the Summary Convictions Act we base our argument on *Smith* v. *Moody, supra.* They must stand on the information or apply for amendment: see *Reg.* v. *Somers* (1893), 24 Ont. 244; *Rex* v. *Koogo* (1911), 19 Can. Cr. Cas. 56; *Reg.* v. *Tebo* (1889), 1 Terr. L.R. 196.

Argument

Armour, in reply.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: The defendant was convicted of "practising optometry" contrary to the Optometry Act. On appeal to the County Court the conviction was set aside on the ground that the offence was not sufficiently described. The appellant's contention was, that because, as he claimed, the offence is described in the words of the statute, by virtue of section 62(3) of the Summary Convictions Act, the description is sufficient.

The Optometry Act, Cap. 48 of the Acts of 1921, section 2, declares that:

"2. Any one or any combination of the following practices constitutes the practice of optometry:—

"(*a.*) The examination of the human eye without the use of drugs, medicine, or surgery to ascertain the presence of defects or abnormal conditions which can be corrected by the use of lenses, prisms, or ocular exercises;

"(*b.*) The employment of objective or subjective mechanical means to determine the accommodative or refractive states of the human eye or the range or power of vision of the human eye;

"(*c.*) The prescription or adaption without the use of drugs, medicine, or surgery of lenses, prisms, or ocular exercises to correct defects or abnormal conditions of the human eye, or to adjust the human eye to the conditions of a special occupation."

MACDONALD, C.J.A.

Section 12 makes it an offence to practice optometry without having a certificate under the Act.

Assuming that the offence was described in the words of the statute, which I very much doubt, still the description of the offence may be insufficient.

COURT OF APPEAL

1925

Jan. 6.

REX v. JORDAN

The English Summary Jurisdiction Act, 1879, Sec. 39, contains an exact counterpart of our section 62(3). That Act does not contain the clauses of our subsection (1), but these have, in my opinion, no bearing upon the present question: (a) the name of the person injured; (b) the name of the owner of property; (c) the means by which the offence was committed; or (d) the description of any person or thing, have nothing to do with the acts or practices which are declared in terms to constitute the offence in question here.

The English counterpart of section 62(3), *supra,* was construed by the King's Bench Division, Alverstone, C.J., Wills and Channel, JJ., in *Smith* v. *Moody* (1903), 1 K.B. 56. Lord Alverstone, at p. 60, said:

"I have come to the conclusion that this objection is good and must prevail. I was at first inclined to think that the defect was cured by s. 39 of the Summary Jurisdiction Act, 1879 . . . . but on further considering the question, which is undoubtedly one of importance, it seems to me that it could not have been intended by that section to do away with the old rule of criminal practice which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions."

MACDONALD, C.J.A.

Wills, J., at p. 62, puts it even more succinctly:

"It is not that there is any insufficiency in the description of the offence itself; the description of the offence follows the words of the statute; but there is insufficiency with respect to the ingredients of the offence which the appellant has committed, and for which he has been convicted. I think specific information as to the injury to property ought to have been given in the conviction."

The Court was unanimous in setting the conviction aside.

That was not a case which could have been assisted by the clauses of section 62 not included in the English Act. It was the failure to describe the property, not to name the owner, that was fatal. It might be thought at first glance, that said clause (*c.*) had some bearing on the case, but that clause has to do with the means adopted in the commission of the offence, not with the acts or practices which constitute the offence. Whatever may be said of clauses (*b.*) and (*c.*) of said section 62, it cannot be said that clause (*a.*) has to do merely with the means by which the offence was committed.

Unless, therefore, I am prepared to disagree with the decision in *Smith* v. *Moody, supra,* which I am not, I must affirm the judgment appealed from.

It was also contended that because section 62, subsection (2), provides "that the Justice may, if satisfied, that it is necessary for a fair trial, order that a particular further describing such means, person, place or thing, be furnished by the prosecutor," and that because the English Act has no similar provision that circumstance differentiates this case from *Smith* v. *Moody, supra.* But does it? The reason for that subsection is to be found in the first subsection of 62, and the particular that is referred to is a particular of omissions, which are declared in said first subsection to be not fatal to the information. As I pointed out above, those four clauses in subsection (1) do not relate to the matter involved in this appeal. Subsection (2) simply provides that the Justice may order particulars of the matters which subsection (1) declares need not be stated in the information. This being so, there is no distinction at all between the relevant provisions of the Summary Convictions Act and those of the Act in question in *Smith* v. *Moody.*

The question has been raised as to the proper procedure on an appeal to the County Court. It is said that on such an appeal there must be a trial *de novo,* and that the parties cannot select any point upon which the appeal is made, and asks the Court for a decision on that point alone without opening up the other matters which are not in dispute, and moreover, that it is the duty of the County Court judge to insist upon a complete trial *de novo.* I do not take that view of the appeal section of the Summary Convictions Act. The only question which the parties argued before the County Court was the question which was argued before this Court, namely, that the conviction did not properly describe the offence. Persual of the evidence will shew that no application was made to amend, as might have been done had the prosecutor desired it. The whole case turned upon the validity of the conviction as it stood, the appellant arguing that it was invalid and the respondent supporting the conviction on the ground that it was sufficient. Now, it was open to the parties to confine the appeal in the County Court to that one quetsion or to several questions if they chose. The suggestion that the accused ought to have asked for particulars is disposed of by what I have said above, that the particulars

COURT OF APPEAL

1925

Jan. 6.

REX v. JORDAN

mentioned in subsection (2) are not relevant to this case, and that is the only particular which he is authorized to order. The case, therefore, comes to this: that while the Crown had a perfect right to a trial *de novo* and had a perfect right to apply for an amendment of the information, the fact remains that it did not apply, and it seems to me that it would be wholly contrary to the practice to say that the accused should be deprived of his rights because he did not insist upon the Crown amending the information.

The only question, therefore, involved, either in the County Court or in this Court, was that above mentioned. It was a question of law such as could have been raised either on appeal or on *certiorari*. Now, a case remarkably similar, and I think identical in principle to this case, was *Reg.* v. *Ingall* (1880), 44 J.P. 552. In that case the defendant was accused of "corrupt practices," and his offence was so described in the information. The statute defined corrupt practices to include three things—"bribery, treating and undue influence." On *certiorari* the Queen's Bench Division quashed the conviction. Cockburn, C.J., said:

MACDONALD, C.J.A.

> "In this case Groom [the accused] was not told whether it was bribery or treating, or undue influence with which he had been charged. The circumstances ought to have been properly set out in the information with reference to time and place. Now, as the requirements have not been complied with in this information, the conviction was bad."

Field, J. concurred.

That also was a case subject to the English equivalent of our section 62(3). *Rex* v. *Trainor* (1916), 10 Alta. L.R. 164; (1917), 11 W.W.R. 415, was also referred to, but that was a prosecution under the Criminal Code and while the accused was by the Code given the right to have particulars, yet the section (853) declared that the absence or insufficiency of the particulars should not invalidate the count in the indictment. Therefore, the failure of accused to insist on his right left him without redress; the statute took it away. There is no such provision in our Act.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal on points of law from a

judgment of Judge CAYLEY, of the County Court of Vancouver, on a rehearing under the Summary Convictions Act, B.C. Stats. 1915, Part III., but it is necessary again (though I venture to hope for the last time) to point out the error the learned judge has again fallen into by reserving a case for this Court, which he has no power to do, as was pointed out in *Rex* v. *Perro* (1924), [34 B.C. 169]; 2 W.W.R. 1006. The case stated will, therefore, be disregarded, but it is doubtless, and with all due respect, this misapprehension of the nature of the appeal before him and his duty under the statute conferring it that has led to the wrong procedure that was adopted and the unfortunate confusion into which the hearing fell.

When an appeal of this kind is brought before the County Court it is "a trial *de novo* on the merits, as if the information were now brought first to be tried before myself," as Chief Justice BEGBIE, when sitting as a County judge, rightly held more than 30 years ago in *Re Kwong Wo* (1893), 2 B.C. 336 (cited in *Rex* v. *Perro,* with other cases, *q.v.*); in other words, it is a trial upon the substance of the information and the evidence adduced and not upon the form of the conviction below which is appealed against and which is, for the purposes of the appeal, reopened and kept in suspension and abeyance pending the final decision of the county appellate Court upon its validity both in substance and in form.

MARTIN, J.A.

The appeal below was brought by the accused from a conviction by a Vancouver police magistrate, on 11th February, 1923,—

"for that he, the said McKay Jordan of the said City of Vancouver within the space of six months last passed, to wit: from the 30th day of December, A.D. 1923, to the 4th day of January, A.D. 1924, at the said City of Vancouver, not being the holder of a certificate of registration duly issued and recorded as provided by the Optometry Act did unlawfully practise optometry within the Province of British Columbia contrary to the provisions of section 5 of the Optometry Act Amendment Act, 1922, contrary to the form of the statute in such case made and provided."

When the appeal was opened the charge against the accused as contained in the original information was properly read, whereupon his counsel took an objection to the charge, without pleading thereto, that it disclosed in law no offence because, though it followed the "words of the Act . . . . creating the

COURT OF APPEAL

1925

Jan. 6.

REX v. JORDAN

offence" (section 5, Cap. 55, 1922) in alleging an infraction thereof by "practising optometry" in general, yet it gave no particulars of the acts constituting the offence, and the decision of the County Court of York in *Reg.* v. *Whalen* (1900), 4 Can. Cr. Cas. 277, founded on *Regina* v. *Spain* (1889), 18 Ont. 385, was relied on in support of the objection, to which the learned judge, after argument *contra,* gave effect and allowed the appeal and quashed the conviction without any evidence being heard.

I am of opinion that, with every respect, such a course was not the proper one to adopt under the provisions of our statute and on such a trial *de novo,* whatever might be proper to be done elsewhere in other conditions. When an appellant elects to bring his case before the County Court under said Act, he must submit to all its curative provisions, especially section 62, respecting "Defects and Objections," which we partly considered in *Rex* v. *Perro, supra,* and to which I refer, and one of them is the duty of the justice "if necessary for a fair trial" to be had, (2) to "order that a particular further describing such means, person, place or thing be furnished by the prosecutor." In *Rex* v. *Perro, supra,* I said, p. 1011; [34 B.C. 175], that:

MARTIN, J.A.

> "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."

This power it was the duty of the judge to exercise if the appellant requested him to do so, or *ex mero motu,* to prevent a miscarriage of justice, and it would have fully protected the accused, if he needed it, in pleading to the information thus in effect amended. But instead of keeping their attention directed to the information which was the subject of objection and could and should have been amended when it became "necessary" to do so, and the hearing continued thereafter in due course of law, the Court and counsel diverted their attention solely to the form of the conviction instead of reserving that question for consideration at the end of the new trial after all lawful amendments had been made and evidence heard thereupon, the result being, that the conviction was prematurely set aside at the very beginning of the trial *de novo,* instead of at the end, if that would have been the proper thing to do, in

the final light of the amended and completed proceedings. Or to put it in another way, instead of trying the charge in the information "*de novo* on the merits" and in substance, it was in effect prematurely heard upon demurrer upon the mere form of a conviction, though an adjudication thereupon was by the statute suspended till after the substantial merits had been presented to the Court after all necessary amendments, thus completely anticipating and frustrating the clear intention of the statute.

It is not questioned that the "ingredients of the offence" should be stated in the charge (as was conceded in *Rex* v. *Somers* (1923), [32 B.C. 553]; 3 W.W.R. 813), but the manner of attaining that end differs in accordance with various statutes and proceedings, and the salutary and sufficient curative provisions of our statute to attain justice must not be disregarded and nullified by effect being given to objections taken by those invoking the other exceptionally wide appellate powers that the statute beneficially confers to insure justice being done upon the whole merits of the case. No accused person can fairly ask for more, or less, and if he has the means and the opportunity to fully protect himself and yet declines to avail himself of them and relies upon premature technical objections only to support his appeal, I think it is too late for this Court to come to his rescue, the obvious inference being that he had no defence upon the merits, otherwise he would have advanced it when the charge against him came on to be reheard in the fullest possible manner upon law and fact. This view is supported by the principle of the decision of the Appellate Court of Alberta, in *Rex* v. *Trainor* (1916), 10 Alta. L.R. 164; (1917), 11 W.W.R. 415; wherein the sufficiency of a charge in the words of an Act under an essentially similar section (852) of the Criminal Code is considered, and it was held that where the accused has the right to demand particulars to define the charge but refrains from doing so and makes no complaint on that score, it is too late to raise the point after conviction.

MARTIN, J.A.

As to the decision of the English King's Bench Division in *Smith* v. *Moody* (1903), 1 K.B. 56, it is doubtless correct when its application is confined to the statute it is founded on, but

COURT OF APPEAL

1925

Jan. 6.

REX v. JORDAN

Mr. *Armour* has drawn our attention to essential differences from our said statute and the wider and more beneficial powers possessed by our magistrates in ordering particulars, *i.e.*, in effect amending so as to furnish the accused with such "ingredients of the offence" charged as would insure his fair trial.

There is also an important point about the decision in *Smith* v. *Moody* which has escaped attention, but is brought out by the concluding words of Mr. Justice Channell therein, *viz.*, p. 64:

> "I am rather reluctant to give effect to the objection; but we have no materials on which to make an amendment, and there is, therefore, nothing for us to do but to quash the conviction."

Thus it should not be overlooked that the Court had the inclination, though not the power, to make the amendment even after the case had been retried on the merits at quarter sessions on appeal from a summary conviction. But fortunately we have, as before noted, wider and more beneficial powers than the English Criminal Courts and can order a new trial, as we did in *Rex* v. *Perro*.

MARTIN, J.A.

I pause for a moment here to say that when Mr. *Armour* raised this point it was not suggested by Mr. *Maitland* for the accused, nor by any member of the Bench, that the said sections were not wide enough to empower the magistrate to order adequate particulars, but since the argument that suggestion has been made by one of my brothers, but, with all respect, I am unable to concur in it nor do I think it should be decided in a criminal case without an opportunity for full argument thereupon, the point being so important and its consequences far reaching and contrary to long-established practice, therefore I shall only at present note, *e.g.*, that the word "means" in subsection (*c.*) is a very comprehensive one as defined by the Oxford Dictionary, Vol. 6, pp. 269-70, par. 10, and is in fact employed in the statute in question—the Optometry Act, *supra*, Cap. 48, Sec. 2(*g.*).

The proper course for us to adopt here is, in my opinion, to make the same order as we did in *Rex* v. *Perro*, *supra*, *viz.*, allow the appeal and set aside the judgment of the learned county judge and direct a new trial to be had by the said judge,

all necessary amendments being made. I am quite unable to accept the view that in these matters of public criminal trials either the prisoner or the Crown, or both combined, can legally agree to alter the prescribed methods of trial or prevent the Court from, or in any way fetter it in discharging its duty *ex mero motu*: to adopt or sanction such innovations upon long-established practice to the contrary is to unduly interfere with the course of public justice, and a great gulf lies between the determination of private rights, which concern only the immediate parties, and public rights which affect all the people. A striking illustration of the distinction is to be found in the recent case of *Rex* v. *Dennis* (1924), 130 L.T. 830, wherein the Court of Criminal Appeal decided that though both counsel for the Crown and the accused consented for convenience to try two indictments together, yet the Court of its own motion refused to overlook or countenance such a proceeding, though it was pressed to do so, saying:

"We cannot accede to the suggestion made by Mr. Clements, that because this is a test case we should overlook a manifest want of jurisdiction in the Court of trial. It is always the duty of this Court, even although objection is not put forward by counsel, or in the notice of appeal, to take note of a point which goes to the jurisdiction of the Court of trial. . . . . No criminal Court has jurisdiction to try two separate indictments at one and the same time, and therefore the consent given to such a trial cannot give jurisdiction. In these circumstances, however regrettable it may be that another trial should be necessitated, we must follow the course taken in *Crane's* case [(1920), 3 K.B. 236; 124 L.T. 256] and make an order awarding a *venire de novo* for a trial of these two defendants according to law."

MARTIN, J.A.

And in *Rex* v. *Fraser* (1923), 130 L.T. 320, where an averment of intention to defraud had been omitted in an indictment and the deputy-chairman of the Middlesex Quarter Sessions had, after discussion as to the effect of the omission, ordered the indictment to be amended by inserting the averment (under powers of amendment conferred by the Indictments Act, 1915, Cap. 90, Sec. 5), the Court of Criminal Appeal held that he acted properly, saying:

"It was a case in which sect. 5, sub-sect. 1, of the Act imposes a duty on the Court to amend the indictment. There was no injustice, and it would have been a failure of duty on the part of the Court if the amendment had not been made."

COURT OF APPEAL

1925

Jan. 6.

REX v. JORDAN

That course should have been pursued herein, the duty of the judge under our section being no less than under the English Act ("shall" or "may" in such enactments being equivalent), our statute being if anything the stronger because it first declares, by section 62(1) that the proceedings mentioned, including convictions, "shall not be deemed objectionable or insufficient" (*e.g.,* by the sitting justice) on specified grounds and then, by (2), confers the power and provides the means by which it becomes his duty to prevent a miscarriage of justice when he is apprized of the situation.

In support of my preceding observations that in matters of public justice the duty of the Court is higher than and different from that which guides it in private affairs and that a course of conduct pursued by both counsel cannot affect the duty of the Court to safeguard the public interest, I shall conclude by this citation from the decision of their Lordships of the Privy Council in *Reg.* v. *Bertrand* (1867), L.R. 1 P.C. 520 in animadverting upon certain "innovations" upon the ordinary course of trial which had been permitted by the trial judge without objection, *viz.,* p. 534:

MARTIN, J.A.

> "It is a mistake, moreover, to consider the question only with reference to the prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party."

Though in view of the special statutory provisions and proceedings upon which I base my opinion (which distinguish this case from other decisions cited, such as *Regina* v. *Spain, supra,* and *Reg.* v. *Coulson* (1893), 24 Ont. 246, founded upon different circumstances and statutes) it is unnecessary to further pursue the subject, yet I guard myself for the future by saying that the decision, *e.g.,* of the Court of Appeal of Ontario in *Rex* v. *Leconte* (1906), 11 O.L.R. 408; 11 Can. Cr. Cas. 41, and other decisions, *e.g., Rex* v. *Riddell* (1912), 19 Can. Cr. Cas. 400, upon the sufficiency of stating offences in the words of an Act should not be overlooked, the question being not seldom a difficult one to decide.

Finally, it is to be observed that in *Reg.* v. *Whelan,* which was so much relied upon by the respondent, the County judge upon that appeal did in fact hear all the evidence (which im-

portant point was quite overlooked below and at this Bar) and only after so doing did he give his judgment (p. 283) "that the evidence does not support either the information as laid, or the conviction based thereon." It is regrettable that such an obviously proper course was not followed in the Court below; the all-important point as to particulars was not raised in *Reg.* v. *Whelan,* for some good reason doubtless, which it is not necessary to inquire into.

MARTIN, J.A.

I would, therefore, allow the appeal and order a new trial as aforesaid.

GALLIHER, J.A.: I have given this matter a good deal of consideration, and have read the judgment of my brother MARTIN, who goes into the question very carefully and fully, but have been unable to convince myself that the parties could not have adopted the course they apparently have done here, and which is fully outlined in the judgment of the Chief Justice, and in the result my conclusions are, that the appeal should be dismissed.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am in agreement with the judgment of my brother MARTIN. In principle this appeal is within the *ratio decidendi* of *Rex* v. *Perro* (1924), [34 B.C. 169]; 2 W.W.R. 1006. At most, it could only be a case where an amendment should be made, although I am firmly of the opinion it was only a question of particulars and they could have been called for, and would, in due course, have been given. The information, though, in my opinion, was sufficient, being in the words of the statute, and as I have said, the manner of infraction of the statute would be set forth in the particulars, but no demand therefor was made.

MCPHILLIPS, J.A.

MACDONALD, J.A.: This is an appeal by the Crown from the judgment of CAYLEY, Co. J. quashing a conviction of the respondent by the deputy police magistrate of Vancouver, for unlawfully practising optometry contrary to the provisions of section 5 of the Optometry Act Amendment Act, 1922, on the ground that inasmuch as it did not set out the act or particular acts, which constitute the practice of optometry, the conviction

MACDONALD, J.A.

COURT OF APPEAL

1925

Jan. 6.

REX v. JORDAN

was invalid. Section 2 and subsections of the Optometry Act, B.C. Stats. 1921 (Cap. 48), defines the practice of optometry. It is clear that unless any one or any combination of the practices set out in subsections (*a.*), (*b.*) and (*c.*) are practised no offence would be committed or, in other words, the respondent would not be practising "unlawfully" within the meaning of the Act. By section 5, it is provided that

"No person, not a holder of a certificate of registration duly issued and recorded as herein provided, shall practise optometry within this Province after January first, 1923."

Practising optometry, therefore, without a certificate of registration is an unlawful act under this section. The necessary ingredients of the charge, however, are found in the subsections referred to and must be alleged, unless we are led to a different conclusion by reason of section 62 of our Summary Convictions Act, B.C. Stats. 1915, Cap. 59.

The procedure was under the Summary Convictions Act, to enforce a penalty for breach of the Optometry Act. It was open to the accused, under the Act, to ask for particulars, but he was, of course, not obliged to do so. The Crown on this *de novo* hearing might have asked for an amendment of the information setting out the specific acts complained of within the scope of section 2 of the 1921 Act. That was not done. I do not think it is in accord with sound principle or good practice to order a new trial to permit such an amendment. The Crown has had its day in Court and the accused was once in jeopardy.

MACDONALD, J.A.

It is true that under section 62 of the Summary Convictions Act, "no information," etc., shall be deemed objectionable or insufficient on any of the following grounds:

"(*a.*) That it does not contain the name of the person injured, or intended or attempted to be injured; or

"(*b.*) That it does not state who is the owner of any property therein mentioned; or

"(*c.*) That it does not specify the means by which the offence was committed; or

"(*d.*) That it does not name or describe with precision any person or thing."

If the provisions of section 2 and subsections of the Optometry Act merely set out "the means by which the offence was

committed," then the information should not be "deemed objectionable." Much may be said in support of that suggestion, but my view is that these provisions of section 2 of the Optometry Act are ingredients of the offence itself and not "the means by which the offence was committed." Section 62 of the Summary Convictions Act does not obviate the necessity of disclosing the offence itself in the information.

Reference was made to *Regina* v. *Spain* (1890), 18 Ont. 385, and *Reg.* v. *Coulson* (1893), 1 Can. Cr. Cas. 114. It is true that section 723 of the Code and section 62 of the Summary Convictions Act, where the same language is used, were enacted after these decisions. In the present case, however, their authority is not affected, if I am right in the view already expressed as to the non-applicability of said section 62 to the circumstances of this case. Counsel for respondent relies on *Smith* v. *Moody* (1903), 1 K.B. 56 where, on a charge that the accused "wrongfully and without legal authority did injure the property" of the respondent, the conviction was quashed as bad on its face for failure to specify what property of the respondent was injured; in other words, it did not contain all that was necessary as ingredients of the offence. The English Summary Jurisdiction Act, 1879, provided by section 39, subsection 1, that

"the description of any offence in the words of the Act, or any order, byelaw, regulation, or other document creating the offence, or in similar words, shall be sufficient in law."

This provision is also found in our Act in section 62. It was held, notwithstanding that, whatever is necessary to shew that the accused did something which brought him within the statute under which he was charged with an offence, must be specified. The necessary ingredients of the offence must be disclosed.

It is conceivable that in the present case, there may be other treatments applied to the eye not mentioned in the subsections of section 2 of the Optometry Act not at all prohibited by the Act.

I would dismiss the appeal.

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

COURT OF APPEAL

1925

Jan. 6.

JENNINGS v. CANADIAN NORTHERN RAILWAY COMPANY.

Master and servant—Assault on passenger—Railway company—Conductor—Liability of company.

JENNINGS v. CANADIAN NORTHERN RY. CO.

A railway company is liable for the injury caused by the wanton and violent conduct of its conductor while in performance of an act within the scope of his employment.

The plaintiff, a coloured man, was a passenger on a train of the defendant Company. The conductor while collecting tickets passed the plaintiff who was asleep. The plaintiff awakening called to the conductor that he had not collected his ticket. The conductor went back and as he was taking the ticket with one hand he struck the plaintiff a violent blow with the other. An action for damages against the Company was dismissed.

Held, on appeal, reversing the decision of GREGORY, J. (MACDONALD, C.J.A. dissenting), that the evidence supports the view that the assault was committed at the very moment when he was performing a lawful act in the due course of his employment and the Company is liable.

APPEAL by plaintiff from the decision of GREGORY, J. of the 15th of April, 1924 (reported, 33 B.C. 516), dismissing an action for damages for assault committed upon the plaintiff by a conductor of the defendant Company. The facts are that the plaintiff, who was a coloured man, was a passenger on the defendant Company's railway going west from Edmonton on the 22nd of October, 1922. As the conductor was going through the coaches collecting tickets he passed the plaintiff who was asleep. Other passengers wakened the plaintiff up and told him the conductor had passed and had not collected his ticket. The plaintiff then turned and called to the conductor that he had not collected his ticket. The conductor went back and said, "What in hell is the matter with you?" The plaintiff answered, "What is the matter with you?" The conductor then lost his temper and became infuriated and taking the ticket from the plaintiff with his left hand, with his right (on which was a large ring) he struck the plaintiff a violent blow in the face, the ring cutting his face severely. It was held by the trial

Statement

judge that the assault was not within the scope of the conductor's employment and he dismissed the action.

The appeal was argued at Vancouver on the 23rd and 24th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

E. A. Lucas, for appellant: The attack was when the conductor was collecting the plaintiff's ticket, and should be held to be in the course of his employment: see *Seymour* v. *Greenwood* (1861), 7 H. & N. 355; *Dyer* v. *Munday* (1895), 1 Q.B. 742; *Canadian Pacific Rway. Co.* v. *Blain* (1903), 34 S.C.R. 74 at p. 79; *Adams* v. *National Electric T. & L. Co.* (1893), 3 B.C. 199. On the question of damages see *Raines* v. *B.C. Electric Ry. Co.* (1921), 30 B.C. 340. It was in the course of his duty to prevent assault.

A. R. MacLeod, for respondent: The conductor completed his work. He had collected the ticket and given him a slip before hitting him. The course of his employment had ceased: see *Coll* v. *Toronto R.W. Co.* (1898), 25 A.R. 55 at p. 60; *Farry* v. *Great Northern Railway Co.* (1898), 2 I.R. 352. The *Blain* case can be distinguished as in that case the conductor did not carry out his duty: see *Cheshire* v. *Bailey* (1905), 1 K.B. 237; *Abraham* v. *Bullock* (1902), 86 L.T. 796; *Emerson* v. *Niagara Navigation Co.* (1883), 2 Ont. 528 at p. 547; *Ormiston* v. *Great Western Railway Company* (1917), 1 K.B. 598 at p. 601; *East Indian Railway* v. *Kalidas Mukerjee* (1901), 70 L.J., P.C. 63.

Argument

Lucas, in reply, referred to Labatt's Master and Servant, 2nd Ed., Vol. 6, Sec. 2331.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: I agree with the trial judge.

MACDONALD, C.J.A.

MARTIN, J.A.: While the plaintiff, a negro, was travelling upon the defendant's railway as a passenger the conductor of the train came into the car in which the plaintiff was riding to take up the passengers' tickets, and in so doing he overlooked the plaintiff, who was sitting in a seat, and went past him,

MARTIN, J.A.

COURT OF APPEAL

1925

Jan. 6.

JENNINGS v. CANADIAN NORTHERN RY. CO.

whereupon the plaintiff spoke to him and drew his attention in a civil way to the oversight, held out his ticket to him, saying as he deposes on cross-examination:

"'Here is my ticket,' and he said, 'what is the matter with you' and I said, 'there is nothing the matter with me and he told me to mind my own damn business.' Yes, that is what he said.

"'And I said all right I can wait and he hauled off and hit me.' Is that correct? Yes, that is correct.

"That is correct? Yes."

And again:

"Counsel: Am I right in assuming that this happened; this little play of words which didn't amount to much, and after this he took your ticket, punched it, handed it back to you, and handed you a blow in the eye? Yes.

"And when he was finished he had the ticket? Yes."

The only explanations that the plaintiff could offer for this unprovoked and serious assault, are, first, that the conductor seemed to be "prejudiced against him" because "I was coloured" and so inferentially particularly resented his remissness in duty to take up all the tickets being rectified by a coloured man, and, second, that his mental state, whatever it was, had been inflamed and disordered by drink because "he looked kind of funny to me . . . . and when he passed me I could smell the whisky."

MARTIN, J.A.

"I told Mr. MacLeod [representing the defendant Company] that he acted like a man that had been drunk or drinking.

"You didn't tell him about the smell of whisky on him? No, I forgot to tell him that, but I smelled the whisky."

Another witness, Moi, substantially confirmed this by saying that though he "couldn't say the conductor was drunk" yet he "looked flustered up and excited," and also said, to the Court, that there "was no appreciable time between the taking of the ticket and the punching—it was all one transaction I take it? Yes."

The learned trial judge, Mr. Justice GREGORY, accepted in substance the plaintiff's evidence as correct and found that [33 B.C. 516 at p. 517]:

"The assault was made without the slightest justification or excuse. The actual striking of plaintiff was after the ticket had been taken up, but the difference in time was practically nil, it was all one act—the ticket taken and the blow struck plaintiff sitting in his seat. No explanation or excuse for the blow is offered by the defendant. The conductor was not called as a witness. The only inference that I can

draw from the fact is that the conductor resented having the plaintiff, who is a coloured man, draw his attention to the fact that he had omitted to take up his ticket when he took those of the other passengers. Is the Company liable for the conductor's assault? I think not. It was a wanton assault for the purpose of wreaking a private spite."

With every respect, I am unable to accept the learned judge's view as to the result of the decisions upon the facts he has found, which in essence are that the collection of the ticket and the assault in the course of that duty were in effect simultaneous acts—they are no more capable of severance in the immediate chain of events than if the conductor upon being notified of his oversight, had first struck the passenger, who held out his ticket and then taken it, or if had he with his left hand grasped the ticket and at the same instant struck the holder of it with his right hand. It is impossible, legally, in my opinion, to say in such inseparable circumstances that during their continuance (whether at the beginning, the middle or the end of them) the conductor ceased to be acting in the course of his employment, and if that is the case in fact, then the employer is liable for his abuse of his agency in the discharge of his duty unless it can be held that the tortious act complained of is of such a kind that it must be attributed solely to the fulfilment of the servant's own purposes, such as "wreaking his own vengeance or spite upon a particular person," as that great judge Lord Chief Baron Palles gave as illustration in his admirable judgment in *Farry* v. *Great Northern Railway Co.* (1898), 2 I.R. 352.

MARTIN, J.A.

It is often very difficult to decide the question of such a singular intent in ever varying circumstances, and the numerous cases upon the subject are not all reconcilable. The principle which, I think, is best expressed as applicable to the present circumstances is to be found in the leading case of *Seymour* v. *Greenwood* (1861), 7 H. & N. 355, wherein Mr. Justice Williams in giving the unanimous judgment of a distinguished bench of five judges said, p. 358:

"It is said that, although it cannot be denied that the defendant authorized the guard to superintend the conduct of the omnibus generally, and that such authority must be taken to include an authority to remove any passenger who misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one.

COURT OF APPEAL

1925

Jan. 6.

JENNINGS v. CANADIAN NORTHERN RY. CO.

But the master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibus, and he puts the guard in his place; therefore, if the guard forms a wrong judgment, the master is responsible."

In that case the guard in forcibly removing from an omnibus a person whom he deemed to be misconducting himself, threw him into the road whereby his skull was fractured, and the defence set up (6 H. & N. 360) was that "there was no evidence to charge the defendant with the assault committed by his servant, which was not any negligence committed in the performance of his duty, but an unwarrantable assault," which is, essentially, the same defence as that relied upon here.

The inference I draw from what took place here is that the conductor considered that the plaintiff had "misconducted" himself in some way in connection with the conductor's omission to take up his ticket and, the conductor's mind being affected by whisky, he "formed a wrong judgment" of the proper way to deal with such fancied "misconduct," and in the course of carrying out that "judgment" he seriously injured that part

MARTIN, J.A.

of the plaintiff's head containing his eye instead of fracturing another part of it, the skull, as the guard did in *Seymour* v. *Greenwood,* in which case, as Mr. Justice Blackburn said in *Bayley* v. *Manchester, etc., Ry. Co.* (1873), 42 L.J., C.P. 78, "there was great excess," and I am unable to see any real distinction in principle between that case and this. The decision of the Court of Appeal in *Dyer* v. *Munday* (1895), 1 Q.B. 742; 64 L.J., Q.B. 448, set at rest any doubt about the employer's liability even for crimes committed by his servant in such circumstances, and that was a strong case of its kind because the servant was not only a trespasser *ab initio* but in the course of making a forcible entry he assaulted a woman who was lawfully endeavouring to prevent him from breaking into her husband's house, after the lodger whose bedstead the servant was endeavouring to seize on behalf of his master had left the house: the report in the Law Journal gives the salient facts better than the Law Reports. It is difficult to understand how the reasonable "judgment" of the servant in that case could induce him to think he was "furthering his employ-

ment" by acting in so illegal, brutal and cowardly a manner (for which he was later convicted and fined), but nevertheless it shews how the Courts have progressed towards a more comprehensive view of the employer's liability.

I have not overlooked the case of *Emerson* v. *Niagara Navigation Co.* (1883), 2 Ont. 528, but if it is to be regarded as sound in law, it is distinguishable on the facts, the Court having found that the "servant was not acting in the due course of his employment," p. 539, whereas the contrary has been rightly found here, *viz.*, that the event was "all one act," *i.e.*, complete and inseverable.

I find some difficulty, with every respect, in comprehending the exact ground upon which the learned judge below dismissed the action, because after rightly finding in the earlier portion of the judgment that the occurrence was "all one act —the ticket taken and the blow struck," later he draws a distinction in time and sequence and finds "the taking of the ticket was completed" before the blow was struck, and then proceeds to say [33 B.C. at p. 519]:

"Had the plaintiff refused to give up his ticket and then been assaulted the case would, I think, be very different and there would have been evidence to go to a jury that the assault was committed in the course of his employment." MARTIN, J.A.

Now, an assault such as this cannot at once be a joint act and yet severable. And if a conductor is furthering his employer's interests by knocking out the eye of a passenger who refuses to give up his ticket, is he not doing the same thing by adopting the same criminal course towards a passenger who does give up his ticket but in a manner which is "misconduct" in the "judgment" of the conductor?

I am also fortified in the conclusion I have reached upon the whole appeal by the decision of the Supreme Court of Canada in *Canadian Pacific Rway. Co.* v. *Blain* (1903), 34 S.C.R. 74, which I referred to during the argument, but was not brought to the learned judge's attention below: there the company was held liable because it failed after notice to protect one of its passengers from certain assaults of a drunken fellow passenger, and I am of opinon that its duty is just as high to protect them from assaults by its own drunken or

COURT OF APPEAL

1925

Jan. 6.

JENNINGS v. CANADIAN NORTHERN RY. CO.

partially drunken conductor (*i.e.*, agent) perpetrated in the course of his employment, and to whose care it has committed them upon their journey in its conveyances from which passengers have, temporarily, no means of escape to avoid injury at the hands of those in charge of them: the pleadings and the facts deposed to support this aspect of the case.

The appeal, therefore, should be allowed.

MCPHILLIPS, J.A.: This appeal, in my opinion, is entitled to succeed upon the finding of fact of the learned trial judge that the taking up of the ticket of the passenger (the plaintiff) was co-incident with the blow or assault made on the passenger by the conductor of the defendant. The taking up of the ticket and the outrageous assault upon the plaintiff by the conductor were simultaneous acts, and it is not possible to disassociate them, and, with great respect, the learned trial judge having arrived at that conclusion should have entered judgment for the plaintiff, and not dismissed the action.

MCPHILLIPS, J.A.

The case is a clear one of the conductor being guilty of a violent assault upon a passenger upon the railway of the defendant, the conductor at that moment being in the course of his employment taking up the ticket of the passenger, and when so engaged grossly misconducting himself by making an assault upon him, *i.e.*, the conductor takes the ticket and delivers a violent blow at one and the same time. Is it possible to excuse the defendant upon such a state of facts? It would seem to me that there can be but one answer and that is, that the responsibility for the injuries sustained by the plaintiff must be upon the defendant. It was a tortious act of the servant, committed by the servant of the defendant at the actual moment when the servant was in the active discharge and course of his employment (*Seymour* v. *Greenwood* (1861), 30 L.J., Ex. 189; *Dyer* v. *Munday* (1895), 64 L.J., Q.B. 448, Rigby, L.J., at p. 452). Here unquestionably the conductor was doing that which he was called upon to do at the time—taking up the ticket of the passenger—and "certainly he was wrong in acting with violence" (language used by Rigby, L.J., in *Dyer* v. *Munday, supra,* at p. 452). The learned counsel for the de-

fendant strongly relied upon *Cheshire* v. *Bailey* (1904), 74 L.J., Q.B. 176. That case, in my opinion, in no way supports the Company in its defence. That was a case where the servant was guilty of a crime outside the scope of his employment, here the tortious act was at the self same moment that the servant is in the exercise of a duty he is discharging for the master, *i.e.*, taking up the ticket of the passenger, and within the scope of his employment. The defendant was called upon to carry the plaintiff safely to his destination as called for by his ticket; it is true the Company cannot be said to be the insurer of life and limb, the liability as insurer, strangely enough, extends to goods only, but there is liability for negligence and liability also for the negligence of servants. Can the defendant excuse itself upon the facts here and be allowed to say that the act of the conductor must be deemed to be private vengeance or caprice? The facts in no way warrant any such assumption. The conductor approaches the plaintiff in the discharge of his duty to take up the ticket of the plaintiff (the plaintiff must accede to this), and when he is in the act of passing over the ticket to the conductor, is violently assaulted. It is impossible to visualize a more graphic case of a tortious act for which the carrier must be responsible. The duty of a railway company is to safeguard its passengers in all reasonable ways. The passengers are in the care of the railway company and the duty of due care must be complied with. In *Dudley* v. *Smith* (1808), 1 Camp. 167, 170 (10 R.R. 661), Lord Ellenborough at p. 169 said:

MCPHILLIPS, J.A.

"The defendant was bound to carry the plaintiff from the usual place of taking up to the usual place of setting down. As coachowner therefore, he was answerable for the negligent acts of his servant, till the plaintiff was set down at the usual place for passengers alighting at Chelsea." (*Brien* v. *Bennett* (1839), 8 Car. & P. 724).

The case of *Canadian Pacific Rway. Co.* v. *Blain* (1903), 34 S.C.R. 74 is a case which assists in arriving at the proper conclusion in the present case. There the proposition of law as enunciated by the Court is tersely set forth in the head-note:

"If a passenger on a railway train is in danger of injury from a fellow passenger, and the conductor knows, or has an opportunity to know, of such danger it is the duty of the latter to take precautions to prevent it

COURT OF APPEAL

1925

Jan. 6.

JENNINGS v. CANADIAN NORTHERN RY. CO.

and if he fails or neglects to do so the company is liable in case the threatened injury is inflicted. *Pounder* v. *North Eastern Railway Co.* (1892), 1 Q.B. 385, dissented from. Judgment of the Court of Appeal (5 O.L.R. 334) affirmed."

I am of the opinion that this proposition of law supports the view that it is the duty of a railway company to safeguard its passengers and protect them from injury. It is true the company is not an insurer in all cases, but surely an insurer that good order will be maintained upon its trains and that its conductors who are in charge of the trains and acting for the company will not themselves be disturbers of the peace and make assaults upon the passengers; the company can only act through agents, but can a company be admitted to say that the tortious act was that of its conductor? In my opinion, it cannot. The company must be answerable for the conduct of the conductor, and if there be misbehaviour upon the part of the conductor and a passenger suffers injury at his hands, it must be viewed as an injury inflicted by the company itself. The contract of carriage extends to properly guarding and protecting the passenger throughout the whole journey. In the *Blain* case, in the Court of Appeal for Ontario (1903), 5 O.L.R. 334 at p. 341, Moss, C.J.O., said:

MCPHILLIPS, J.A.

"The duty or obligation which the defendants owed the plaintiff was to carry him to his destination, and to use reasonable care and diligence in providing for his comfort and safety while being conveyed by them."

Here the assault was the assault of the conductor, in the *Blain* case it was the assault of a third person, and in this connection Chief Justice Moss, at p. 342, said:

"If the conductor had been present when the assaults were committed, and took no steps to protect the plaintiff or to prevent their recurrence, it could scarcely have been argued that the defendants would not be liable."

A fortiori there must be liability when the conductor himself is the aggressor, especially when he is at the moment of the assault engaged in collecting the ticket of the passenger. He is then engaged in discharging a duty he owes to his employer, and is acting within the scope of his employment. In *Cobb* v. *Great Western Railway Co.* (1893), 1 Q.B. 459, Lord Esher, M.R. said at pp. 462-3, speaking of the case then before the Court:

"It is not alleged that the plaintiff was being ill-used or assaulted in the train, and that, that fact being made known to the defendant's ser-

vants, they did not interfere to protect him. That would be a different case."

It is to be assumed that in such a case there would be liability. Now, is it conceivable that when the assault is the assault of one of the servants, as in the present case, that no liability exists? It is unthinkable that it should be the case. In the House of Lords (1894), A.C. 419, the Earl of Selborne, at pp. 433-4, expressly approved of the language of Lord Esher, M.R., above quoted. The principle of law that has to be applied in the present case and which, in my opinion, imposes liability upon the defendant is stated by Willes, J. in *Barwick* v. *The English Joint-Stock Bank* (1867), 36 L.J., Ex. 147 at p. 149:

"But with respect to the question whether a principal is answerable for the acts of his agent done in the course of his master's business, and for the master's benefit, no sensible distinction can be drawn between the case of fraud and that of any other wrong, as to which the general rule is that the master is answerable for such wrong, if committed in the course of his service and for his benefit. That is the principle which is acted on every day in running-down cases, and which has been applied also to direct trespasses to goods, as where owners of ships have been held liable for the acts of the masters abroad in improperly selling cargoes. It has been held applicable to actions of false imprisonment in cases where officers of a railway company, entrusted with the execution of by-laws, have wrongfully, but intending to act in the course of their duty, imprisoned persons supposed to have come within the by-laws. It has been acted on in the case of a person employed by the owners of boats, to navigate boats and take fares for their use, where a ferry has been infringed, or such like wrong committed. In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act; but he has put his agent in his place as to a class of acts, and he must be answerable for the manner in which the agent conducts himself in doing his business."

And this has ever since been admitted to be a true statement of the law, being approved in the Privy Council as well as in the House of Lords. I would particularly call attention to the last sentence above quoted in connection with the particular facts of the present case:

"It is true he has not authorized the particular act; but he has put his agent in his place as to a class of acts, and he must be answerable for the manner in which the agent conducts himself in doing his business."

Citizens Life Assurance Co. Lim. v. *Brown* (1904), 73 L.J., P.C. 102 was a case of libel. The proposition of law there

COURT OF APPEAL

1925

Jan. 6.

JENNINGS v. CANADIAN NORTHERN RY. CO.

MCPHILLIPS, J.A.

laid down is tersely set forth in the head-note. It reads as follows:

"The ordinary doctrines of agency and of master and servant are as applicable to corporations as to private persons, whether they arise in questions of contracts or of torts and frauds. A corporation is therefore liable for the publication by its agent of a libel when the agent is acting in the course and within the scope of his employment.

"*Dicta* to the contrary effect of Lord Cranworth in *Western Bank of Scotland* v. *Addie* (L.R. 1 H.L. Sc. 145, 167) and of Lord Bramwell in *Abrath* v. *North Eastern Railway* ([(1886)], 55 L.J., Q.B. 457, 458; 11 App. Cas. 247, 250) disapproved."

Lord Lindley, in this case said, at p. 104:

"He had no actual authority, expressly or implied, to write libels nor to do anything legally wrong; but it is not necessary that he should have had any such authority in order to render the company liable for his acts. The law upon this subject cannot be better expressed than it was by the Acting Chief Justice in this case. He said, 'although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant.' This doctrine has been approved and acted upon by this Board in *Mackay* v. *Commercial Bank of New Brunswick* (1874), 43 L.J., P.C. 31; L.R. 5 P.C. 394; and *Swire* v. *Francis* (1877), 47 L.J., P.C. 18; 3 App. Cas. 106, and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick* v. *English Joint-Stock Bank* (1867), 36 L.J., Ex. 147; L.R. 2 Ex. 259, which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317, 326, and has been followed in numerous other cases."

I have at some length dealt with what I consider are the controlling cases and, in my opinion, they are applicable to the facts of the present case, and support the imposition of liability upon the defendant for this outrageous violent assault upon the plaintiff. With the greatest respect to the learned trial judge, I cannot view the case as one of private spite. The happening was one of the moment, and all incident to the taking up of the ticket. The assault was unprovoked by the plaintiff, the plaintiff upon his part acted throughout in a proper manner, and a wanton assault is perpetrated by the servant of the defendant, whose duty it was to protect the plaintiff from injury, at the very moment the plaintiff hands over his ticket to the conductor. It would seem to me to be idle argument to contend that upon such a state of facts as we have here, there

is no liability upon the defendant, its contractual obligation was to carry the plaintiff exercising due care.

I think it well to here quote the learned trial judge's summary of the facts and conclusion: [already set out by MARTIN, J.A.].

The learned trial judge in his judgment entered into a careful analysis of some of the decided cases in arriving at his conclusion that no liability rested upon the defendant for the tortious act of its servant. I do not here intend to canvass the cases referred to. I have given them careful attention, but none of them can be held to be of any avail as against the judgment of their Lordships of the Privy Council in *Citizens Life Assurance Co. Lim.* v. *Brown, supra,* and in that case we find Lord Lindley, that great master of the law, referring with approval to the language of the Acting Chief Justice of New South Wales, the language being:

MCPHILLIPS, J.A.

"Although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant."

This succinct proposition of law is applicable to the fullest extent to the particular facts of the present case.

The appeal, in my opinion, should be allowed.

MACDONALD, J.A.: The principles applicable are well established. The difficulty arises in deciding whether the particular facts are within them. The point is, did the conductor commit this wanton assault with the object, mistaken or otherwise, of furthering the purposes for which he was employed, or to serve some private purpose of his own? It is no answer to say that he had no authority to commit the assault. He was there in the master's place to collect tickets and to protect the passengers under his care, and even if he goes beyond the scope of his authority, committing an excess, the master would still be liable. This principle is established in *Dyer* v. *Munday* (1895), 1 Q.B. 742, and in a long series of cases.

MACDONALD, J.A.

If the servant in the *Dyer* case, after removing the furniture, went back and, to satisfy a private spite, assaulted the plaintiff, he would, of course, be furthering his own, not his master's purposes.

COURT OF APPEAL

1925

Jan. 6.

JENNINGS v. CANADIAN NORTHERN RY. CO.

In the present case the collecting of the ticket and the assault were, as the learned trial judge found, one act. There is evidence to support that finding. The plaintiff deposed:

"He [the conductor] passed through and was taking up tickets; and when he came back I held up my ticket—I handed him my ticket—and he held off and punched me right there and knocked the blood out," etc.

And again:

"He had the ticket when he struck me."

The fair inference from the evidence is that the conductor had no private purpose of his own to serve. He did not give evidence, but the plaintiff testified that there had been no trouble between them. True, he says later:

"He was angry, he must have had something against me for being coloured—I don't know."

If, however, he had a private grudge of his own against coloured folk generally, it is rather surprising that he gave expression to it in this forcible manner, in the very act of collecting the ticket. This, of course, is only surmise by the plaintiff. The statement of the learned trial judge, *viz.*:

MACDONALD, J.A.

"The only inference that I can draw from the fact is that the conductor resented having the plaintiff, who is a coloured man, draw his attention to the fact that he had omitted to take up his ticket when he took those of the other passengers"

is warranted by the evidence. A jury might very well arrive at that conclusion.

I differ, however, in the inferences that should be drawn from that state of facts. Let us suppose the conductor said to this passenger, "you have no right to suggest by your conduct or actions that I, an employee of the Company, am in the habit of overlooking collecting tickets in the hope that you will pay to me in cash a smaller amount than the full value of the ticket, thus defrauding my employers" would he not be serving the Company's purpose and furthering their interests by so doing? That is what he did say, except that he said it with blows. I do not think in a case of this sort, where a passenger has a right to look to the Company through its servants, for protection, we should be meticulous in searching for reasons to attribute the assault to personal and private spleen.

Emerson v. *Niagara Navigation Co.* (1883), 2 Ont. 528, a judgment of the Ontario Common Pleas Division, Osler, J.,

dissenting, was referred to in support of the defendant's contention. There the porter by the purser's directions, imprisoned the plaintiff in his office for the non-payment of fare and to enforce payment, seized his valise, committing an assault in so doing; the company had no authority to resort to this method. The purser was a wrong-doer in taking the valise when in the plaintiff's possession, and could not thereby acquire a lien upon it. The right of lien did not exist where the plaintiff had the custody of the property. The valise was taken in a violent manner for the purpose of obtaining a lien. It was held that although he was acting in the interest, as he believed, and for the benefit of his employers, yet he was not acting "in the due course of his employment." Collecting the ticket in the case at Bar was in the due course of employment. He had a lawful right to collect the ticket, and the assault was committed at the very moment when he was performing a lawful act in the due course of that employment. The purser had not a lawful right to take the valise. Therein lies the distinction.

I would allow the appeal.

Appeal allowed, Macdonald, C.J.A. dissenting.

Solicitors for appellant: *Lucas & Lucas.*
Solicitor for respondent: *A. R. MacLeod.*

COURT OF APPEAL

1924

Dec. 8.

DOWNES v. ELPHINSTONE CO-OPERATIVE ASSOCIATION LIMITED.

Practice — Notice of appeal — Final or interlocutory order — Action for wrongful dismissal—Order dismissing action, proper procedure being under Co-operative Associations Act — B.C. Stats. 1920, Cap. 19, Schedule B, r. 65.

DOWNES v. ELPHINSTONE CO-OPERATIVE ASSOCIATION

An action for damages for wrongful dismissal was, on motion, struck out on the ground that the claim should have been submitted to arbitration under rule 65, Schedule B of the Co-operative Associations Act.

Held, on appeal, to be an interlocutory order and the appeal being out of time, was dismissed.

APPEAL by plaintiff from the decision of GRANT, Co. J. of the 12th of June, 1924, in an action for damages for wrongful dismissal from his employment as general manager of the defendant Company. The defendant moved that the plaint and summons be struck out and action dismissed on the ground that the claim should have been submitted to arbitration under rule 65, Schedule B, of the Co-operative Associations Act. The plaint and summons were struck out and the action dismissed on the 15th of April, 1924, and judgment entered on the 12th of June following. Notice of appeal was served on the 3rd of September, 1924. On the hearing of the appeal defendant moved for its dismissal on the ground that as this is an interlocutory appeal, notice of appeal was not given within fifteen days as required by the rules.

Statement

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

Brydon-Jack, for appellant.

Mayers, for respondent, raised the preliminary objection that the notice of appeal was out of time. This was an interlocutory order. His motion was to strike out the pleadings which was acceded to: see *Bank of Vancouver* v. *Nordlund* (1920), 28 B.C. 342; *Salaman* v. *Warner* (1891), 1 Q.B. 734; 60 L.J., Q.B. 624, which is adversely commented on in *Bozson* v. *Altrincham*

Argument

Urban Council (1903), 1 K.B. 547; *In re Page* (1910), 1 Ch. 489 at p. 492; *Chilliwack Evaporating &c. Packing Co.* v. *Chung* (1917), 25 B.C. 90; (1918), 1 W.W.R. 870. Time runs from the date of the judgment in the County Court: see *Shipway* v. *Logan* (1915), 21 B.C. 595.

Brydon-Jack, contra: As far as the Court is concerned the judgment is final. The action is finally disposed of in that Court: see *Miller* v. *Kerlin* (1923), 33 B.C. 140. In the case of *Langmead* v. *Maple* (1865), 18 C.B. (N.S.) 255 at p. 270, Willes, J. deals with the question.

Cur. adv. vult.

8th December, 1924.

MACDONALD, C.J.A. (oral): I think the appeal should be quashed. The matter is clearly enough settled by our own decisions in this Court, in which we followed *Salaman* v. *Warner* (1891), 1 Q.B. 734, where it was laid down that an order is to be considered interlocutory when it is binding upon one party but not binding upon the other. It is to be final when it is binding upon both parties. Now, applying that rule to this case, we must quash the appeal, giving affect to Mr. *Mayers's* motion. In this, of course, our practice differs somewhat from the practice in England, where *Salaman* v. *Warner,* although a decision of the Court of Appeal, was afterwards disapproved of by the same Court in a later case; but, we having followed *Salaman* v. *Warner,* we cannot now give a decision which would be in conflict with our decision in that case; therefore, I think the appeal should be quashed.

MACDONALD, C.J.A.

The application for extension of time has not been properly made, and, therefore, the decision now is not to prejudice that in any way should you desire to make a motion.

I want to suggest that what we say now is not to be taken as a bar to Mr. *Brydon-Jack* later to make a motion to extend time.

In my opinion the order appealed from is interlocutory and the time for appeal has lapsed.

MARTIN, J.A. (oral): In my opinion, consistent with the principles laid down in this Court, and the observations of the

MARTIN, J.A.

COURT OF APPEAL

1924

Dec. 8.

DOWNES v. ELPHINSTONE CO-OPERATIVE ASSOCIATION

Master of the Rolls in *In re Page* (1910), 1 Ch. 489 at p. 492, where he draws attention to the decision of the Court of Appeal in *Stewart* v. *Royds* (1904), 118 L.T. Jo. 176, I think the only course open for us is to regard this order as being interlocutory for the purpose of the appeal, and from that will follow that the appeal is out of time and it should be dismissed, subject to leave being given, as I understand my brothers wish, to Mr. *Brydon-Jack* to make a motion upon proper grounds to extend the time.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): In my opinion, following our decisions, no different view could be taken than that the appeal was not in time; however, the Court may extend leave to appeal notwithstanding the lapse of time. On the particular facts of this case it is eminently a case in which I think an appeal ought to be allowed. I have no hesitancy in saying that the matter in issue is not *res judicata,* and, apart from any order that this Court may make, another action may be brought.

MACDONALD, J.A.

MACDONALD, J.A.: The order appealed from is interlocutory and the appeal should be quashed.

Appeal quashed.

Solicitor for appellant: *A. C. Brydon-Jack.*
Solicitors for respondent: *Campbell & Singer.*

MacLURE v. THE GENERAL ACCIDENT ASSURANCE COMPANY OF CANADA.

COURT OF APPEAL

1925

Feb. 4.

MacLURE v. THE GENERAL ACCIDENT ASSURANCE CO. OF CANADA

Insurance, accident—Collision through negligent driving—Liability to pay compensation—Unlicensed chauffeur—Indemnity—Public policy.

A policy whereby the owner of a motor-car insures against liability to pay compensation for accidental personal injuries caused through the driving of the car, is not void as against public policy by reason of the fact that at the time of an accident the automobile was driven with the owner's knowledge by a chauffeur who was not a licensed driver as required by the Motor-vehicle Act.

APPEAL by defendant Company from the decision of RUGGLES, Co. J. of the 25th of June, 1924. The plaintiff insured his car in the defendant Company on the 10th of October, 1923. On the 3rd of December, 1923, the plaintiff's chauffeur (one Edmund Mills), while driving a taxi-cab, collided with one George Pitkin (a pedestrian) who was injured. Pitkin brought action against the plaintiff and recovered $350 damages and $71.15 costs. The plaintiff then brought this action against the defendant Company to recover the above $421.15, also the amount of the costs paid his own solicitor, *i.e.*, $203.19. The learned trial judge gave judgment for the two sums, *i.e.*, $624.34. After judgment the parties agreed that the solicitor's bill for $203.19 should be taxed and that the amount of the bill as taxed should be added to the said sum of $421.15 and form part of the judgment and the judgment was drawn accordingly.

Statement

The appeal was argued at Vancouver on the 4th and 5th of November, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Housser, for appellant: The chauffeur was not a licensed driver and he was driving in contravention of section 17 of the Motor-vehicle Act. He was fined in due course for driving to the common danger: see MacGillivray's Insurance Law, 172; *Sowards* v. *London Guarantee and Accident Co.* (1922),

Argument

COURT OF APPEAL

1925

Feb. 4.

MACLURE v. THE GENERAL ACCIDENT ASSURANCE CO. OF CANADA

52 O.L.R. 39. On neglect of statutory duty see *Love* v. *Fairview* (1904), 10 B.C. 330; *London Guarantee and Accident Co.* v. *Sowards* (1923), S.C.R. 365; *Burrows* v. *Rhodes* (1899), 1 Q.B. 816; *O'Hearn* v. *Yorkshire Insurance Co.* (1921), 50 O.L.R. 377 and on appeal 51 O.L.R. 130 at pp. 132-3; *Lundy* v. *Lundy* (1895), 24 S.C.R. 650 at p. 652; *Gedge* v. *Royal Exchange Assurance Corporation* (1900), 2 Q.B. 214 at p. 220; *Cleaver* v. *Mutual Reserve Fund Life Association* (1892), 1 Q.B. 147. The principle of public policy applies to all wrongful acts. On the presumption of guilt see *In the Estate of Crippen* (1911), P. 108; MacGillivray's Insurance Law, 174; *Thompson* v. *Hopper* (1858), 27 L.J., Q.B. 441; *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Company* (1898), 2 Q.B. 114; *The Amicable Society* v. *Bolland* (1830), 4 Bligh (N.S.) 194. These cases lay down that while the plaintiff's negligence would be no defence it is different when the loss is due to a deliberate unlawful act: see *Rainey* v. *Kelly* (1922), 3 W.W.R. 346.

Argument

Hogg, for respondent: They contend we were guilty of a breach of public policy and therefore not entitled to recover but see *Tinline* v. *White Cross Insurance Company* (1921), 37 T.L.R. 733. Negligence on the part of the assured does not take away his right to recover on his policy: see *Thacker Singh* v. *Canadian Pacific Ry. Co.* (1914), 19 B.C. 575. As to the proximate cause of the accident see *Thompson* v. *Hopper* (1858), 27 L.J., Q.B. 441.

Housser, in reply: A careful perusal of *Tinline* v. *White Cross Insurance Company* (1921), 37 T.L.R. 733 will shew that it is in our favour.

Cur. adv. vult.

4th February, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The only defence urged is that the plaintiff employed an unlicensed driver contrary to an Act of the Legislature, who while driving brought about an accident for which the plaintiff was held liable in damages.

At the time the plaintiff entrusted the driver with the car, he was aware that the driver had no licence.

He now seeks to recover indemnity from the insurance company.

Certain limitations to the Company's liability, consisting of statutory conditions, are endorsed on the policy, to the effect that the insurer is not to be liable when the automobile is being driven with the knowledge of the assured by a person under the age fixed by law, or in any case under the age of 16, or by an intoxicated person. There is no condition, statutory or otherwise, applicable to a person who, with the owner's knowledge, had failed to obtain a licence required by law. I think, therefore, the appeal must be dismissed.

MARTIN, J.A.: In this case the plaintiff, a taxi-cab owner, knowingly and deliberately took into his employment as a driver of his taxi-cab in the City of Vancouver a person who was not licensed as a driver thereof under the by-laws of that corporation, which employment was in violation of section 12 (6) of by-law 1510 (as amended) as follows:

"(6.) No person to whom a licence shall have been granted for any vehicle for the carriage of passengers within the said City shall employ or suffer any person to act as a driver of such vehicle while the same is being plied for hire or used for the carriage of passengers for hire under said licence unless such person shall have first obtained from the Inspector a licence and a certificate in writing that such person is a fit and proper person to act as driver of a licensed vehicle whilst the same is being plied for hire or used for the carriage of persons for hire under said licence; nor unless the said licence and certificate is then in force and not suspended or cancelled."

The powers and duties of the inspector in receiving applications for licences for drivers of taxi-cabs and examining into and deciding upon their being "fit and proper persons to hold such licences" are set out in sections 6, 12 and 13 of said by-laws, and are obviously of a nature essential to the protection of the public safety. The said driver, not being licensed, must, in my opinion, be regarded as an unfit person, and it was a wilfully negligent, and, under the penal clause of the by-law, culpable act of the plaintiff to employ him to the public danger, with the direct consequence that he seriously injured a pedestrian, in a grossly negligent, not to say criminal, fashion, as I read the evidence, and was convicted and fined $50 for so doing

COURT OF APPEAL

1925

Feb. 4.

MACLURE v. THE GENERAL ACCIDENT ASSURANCE CO. OF CANADA

on a charge of driving to the common danger contrary to the Motor-vehicle Act, B.C. Stats. 1920, Cap. 62.

In such circumstances I do not think, with all respect to other opinions, that upon principle the plaintiff can recover from the defendant Company under the policy herein. Many cases have been cited to us and they are not all reconcilable, but in brief, the principle I rely on is that laid down by Lord Wrenbury in *Weld-Blundell* v. *Stephens* (1920), A.C. 956 at p. 998, as "correctly stating the law":

> "It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise or indemnity to him for the commission of such an act is void."

MARTIN, J.A.

That proposition was held by Mr. Justice Duff not to apply to the very different circumstances present in *London Guarantee and Accident Co.* v. *Sowards* (1923), S.C.R. 365, 371, but I see nothing to prevent its application to this case; I also regard the expression "criminal offence" as including such *quasi*-criminal contraventions of declared public policy as are contained in public by-laws of this nature, the infraction of which renders offenders (here the plaintiff and his driver) liable to conviction and fine and imprisonment (with or without hard labour) in default of payment, as provided by sections 17 and 18.

I would allow the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: This is an action claiming indemnity from the defendants upon a policy of insurance. The policy covered liability for bodily injuries to persons if caused by a motor-car, described and insured against therein. An employee of the plaintiff, named Mills, ran down a pedestrian and was prosecuted and fined in the police Court for driving to the common danger. The injured person, Pitkin, brought an action against the present plaintiff and recovered the sum of $421.15 damages and costs. The plaintiff sues the Insurance Company asking to be reimbursed this amount, and also the sum of $203.19, his costs of defending the action. The judgment appealed

against is for $421.15, and directs that the cost of defending the action of *Pitkin* v. *MacLure* be referred to the registrar for taxation, and when taxed to be added to the judgment.

Mills had been driving for MacLure for about a week before the accident but had no licence, of which fact he informed his employer. The appellant's contention practically narrowed down to this in the argument: That it was against public policy to hold that the policy of insurance covered the accident, which here took place by reason of the fact that the respondent, knowing that Mills had not a licence, nevertheless hired him and permitted him to operate his motors for hire contrary to the provisions of the Motor-vehicle Act, B.C. Stats. 1920, Cap. 62, and amendments thereto, and of the by-laws of the City of Vancouver. There is no dispute that under the Act and by-laws, any one driving a motor-vehicle for hire is required to take out a licence and penalties are provided against a driver who neglects to do this, and also his employer. The short question then is, can the plaintiff in this action recover because of non-compliance with the requirements of the Act and by-laws? I think we must assume that the accident was caused by the negligence of the driver Mills. Now, had Mills been a licensed chauffeur there can be no question, in the circumstances in this case, that the Company would be liable. Does the fact that he is not so licensed alter the case? A competent licensed driver may by negligence cause an accident. An unlicensed driver might be very competent, so that here the breach, as alleged, of the statutory provisions and the by-laws may not have been the cause of the accident. These laws, of course, are made for establishing a standard of capability for those to whom licences are issued for the better protection of the public. It cannot be said here that the driver's negligence was intentional or such as would constitute a crime, so we can eliminate from consideration the cases that deal with such a state of facts. If Mills was a competent driver the fact that he did not have a licence could not, as I view it, be said to be the cause of the accident. In dealing with the effect of a breach of a statutory duty Mr. Justice Bailhache, in *Tinline* v. *White*

GALLIHER, J.A.

COURT OF APPEAL

1925

Feb. 4.

MACLURE v. THE GENERAL ACCIDENT ASSURANCE CO. OF CANADA

Cross Insurance Company (1921), 37 T.L.R. 733 at p. 735, says:

"Nine out of ten cases of such accidents [motor accidents] were due to a breach of a statutory duty, and if the ordinary law were to be applied this would be a good defence. That defence was never raised in practice, and as far as his Lordship knew this was the first time it had been raised. . . . . In his Lordship's view it had not been held against public policy that these indemnity insurances should cover cases where there had been a breach of a statutory obligation."

In that case manslaughter had been committed, and it was submitted by the defence that the policy did not indemnify the assured because it was against public policy to indemnify him against criminal acts. His Lordship went on to say:

"There was no doubt at all that if the only result of the accident had been that two persons were injured and no one had been killed, there would be no defence to the action,"

and expressed the opinion that the fact that some one was killed made no difference, giving his reasons.

Here, we have not to entertain the question of a criminal act, and I cite his Lordship's views to strengthen my own, that under such circumstances as here, the mere breach of a statutory duty will not relieve the Company from liability, at all events if it cannot be said to be the cause of the accident. I think there is an analogy between the case at Bar on the question of sending a driver out who was not licensed and that class of cases of which *Thompson* v. *Hopper* (1858), 27 L.J., Q.B. 441, is an example. There it was held no defence to an action under a time policy where a ship had been sent out in an unseaworthy condition where the loss was due to another cause.

GALLIHER, J.A.

The evidence as to Mills's (the driver's) competency is his statement that he had been driving motor-vehicles six or seven years. I should think in that time he would have acquired a pretty thorough knowledge of how to operate a car. This evidence as to his competency might have been more fully brought out, but feeling as I do, from reading the evidence, that the accident did not occur from want of competency, I am not prepared to say that the plaintiff has, by employing Mills, taken himself out of the protection under the policy.

A case may come up some time for decision where an owner is shewn to have employed an incompetent or inexperienced

driver, and a nice point may arise as to liability, but this, as I view it, is not that case.

It was further submitted that the Company, knowing the law, should be taken to have contracted on the basis that a licensed chauffeur would be employed to drive the car; in other words, that it should be taken to be an implied term of the contract. I cannot take this view. Most accidents are caused by a breach of one or other of the provisions of the Act or by-laws, such as driving at excessive speed, non-observance of rules of the road, disregarding regulations at crossings, etc. These are all acts of negligence, and negligence is contemplated in these policies, as without negligence there could be no liability.

GALLIHER, J.A.

I would dismiss the appeal.

MCPHILLIPS, J.A.: In my opinion the learned trial judge was clearly right in directing judgment to be entered for the plaintiff (respondent) in the action. No case was made out which would entitle the defendant (appellant) to effectually dispute the right of action under the terms of the policy for indemnification. The accident which took place was one insured against under the terms of the policy, and the appellant left the respondent to defend the action, and the action succeeded against the respondent, which plainly entitled the respondent to complete indemnification.

MCPHILLIPS, J.A.

It would not appear to me that the evidence really disclosed that there was a case of actionable negligence by Pitkin against the respondent, but the appellant left that question to be defended by the respondent, and the judgment standing, the appellant is under the contractual obligation to indemnify the respondent in respect of the judgment.

It has already been held by this Court that the Motor-vehicle Act has no relation to actions brought at common law for accidents upon highways. If there is breach of that Act the penalties under that Act are capable of being enforced, but none of its provisions have relation to the liability at common law for actionable negligence. I fail to see, though, in what way, even if the Act could be invoked, it would help or assist

COURT OF APPEAL

1925

Feb. 4.

MACLURE v. THE GENERAL ACCIDENT ASSURANCE CO. OF CANADA

the appellant in this appeal. That which has happened is exactly what the respondent was insured against, and it is idle to advance contentions which have no merit or legal force. To give effect to the contention made by the appellant would be to render nugatory the very protection the respondent sought and was given under the policy issued by the appellant. I do not hesitate to say that the appeal is wholly unmeritorious and should be dismissed.

MACDONALD, J.A. would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

COURT OF APPEAL

1925

Feb. 4.

McINTYRE v. HAYNES.

Boundaries—Crown grants—Survey—Agreement between owners—Uninterrupted possession—Statute of Limitations—Tax sale not a bar for one year.

McINTYRE v. HAYNES

A. purchased lot 158 in the Similkameen Division of Yale in 1884 and on having it surveyed obtained a Crown grant in 1885. Shortly after A. died and E. purchased the lot from his heirs. M. pre-empted the land adjoining to the south of lot 158 in 1886. In 1895 E. and M. agreed to the boundary line between the two lots and E. put up a fence on this line, M. clearing and cultivating the land up to this fence. It later appeared that 78 acres of lot 158 as surveyed for A. was on M.'s side of the fence. E. not paying his taxes lot 158 was sold for taxes in 1905 to the defendant who obtained a tax-sale deed in 1911. On a petition by M. under the Quieting Titles Act it was held that M. was entitled to the 78 acres in dispute.

Held, on appeal, affirming the decision of GREGORY, J., that M. had uninterrupted possession since his pre-emption in 1886; that the tax sale in 1905 was not an interruption of the running of the Statute of Limitations as the owner having a year within which to redeem he had uninterrupted possession to the end of that year giving him a full period of 20 years' possession.

Statement

APPEAL by defendant from the decision of GREGORY, J. of the 26th of February, 1924, on petition under the Quieting Titles Act for a declaration that the petitioner has a good title

to lot 3473 in the Similkameen Division of Yale as surveyed by C. deB. Green, P.L.S., and containing 317 acres. One Armstrong purchased lot 158 in said District (presumed to contain 160 acres) in 1884. He had it surveyed the same year and obtained a Crown grant in 1885, which included the 78 acres in dispute. The petitioner McIntyre came to the district in 1886 and pre-empted the land adjoining lot 158 to the south and put in his stakes close to what appeared to be the southerly boundary of lot 158. Shortly after Armstrong obtained a Crown grant to lot 158 he died and one Ellis purchased the lot from Armstrong's heirs. There was evidence of Ellis and McIntyre agreeing as to the boundary between the two lots in 1895, and of Ellis putting up a fence along said line and leaving the 78 acres now in dispute on McIntyre's side of the fence. It also appeared that shortly after this McIntyre cleared his ground up to this fence. McIntyre obtained a certificate of improvements in 1905 and in the same year it was surveyed by C. deB. Green, P.L.S., and in 1906 he obtained a Crown grant which included the ground in dispute and shortly after in the same year he obtained a certificate of indefeasible title. Lot 158 was sold for taxes to the defendant V. C. Haynes in 1905. He obtained a tax-sale deed in April, 1911, and a certificate of indefeasible title in the following June. It was held by the trial judge that the plaintiff was entitled to the land in dispute.

Statement

The appeal was argued at Vancouver on the 20th and 21st of October, 1924, before MACDONALD, C.J.A., MARTIN, McPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C. (*Sloan,* with him), for appellant: We say the original survey included the 78 acres in dispute. The Crown grant vested this ground in the owner and the lot was subsequently sold for taxes and embraced this area. As to original survey see *Johnston* v. *Clarke* (1884), 1 B.C. (Part 2) 81. The rule is that the work on the ground governs. That the tax sale includes the ground see *Hyatt* v. *Mills* (1892), 19 A.R. 329 at p. 337. Our title is good as against a pre-emption and the title to lot 3473 gave no title to the disputed

Argument

COURT OF APPEAL

1925

Feb. 4.

MCINTYRE v. HAYNES

area: see *Soper* v. *City of Windsor* (1915), 22 D.L.R. 478; *Tomlinson* v. *Hill* (1855), 5 Gr. 231; Cooley on Taxation, 3rd Ed., Vol. 2, pp. 974-7; *Daveis* v. *Collins* (1890), 43 Fed. 31 at p. 33; *Lee Mong Kow* v. *Registrar-General of Titles* (1923), 32 B.C. 148.

Argument

Harold B. Robertson, K.C., for respondent: In 1895 under agreement between McIntyre and Ellis, Ellis put up a fence leaving the 78 acres in dispute on McIntyre's side and after this McIntyre cultivated the land up to this fence. A conventional boundary was established then. In 1906 we got a certificate of title. As to agreeing on line see *Grasett* v. *Carter* (1884), 10 S.C.R. 105 at pp. 110 and 127.

Farris, in reply, referred to *Phillips* v. *Montgomery* (1915), 25 D.L.R. 499; *Jollymore* v. *Acker* (1915), 24 D.L.R. 503 at pp. 510-1; *De Bussche* v. *Alt* (1878), 47 L.J., Ch. 381 at p. 389.

Cur. adv. vult.

4th February, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is a dispute concerning 78 acres of land, arising, as it is alleged, by reason of the overlapping of boundaries in the original pre-emptions and in subsequent Crown grants.

The questions of fact involved were referred to BROWN, Co. J., who had made very careful and exhaustive findings of fact. It appears that one Hugh Armstrong, in 1884, pre-empted what was afterwards designated lot 158. He had it surveyed and the survey was gazetted in 1885. In the same year a Crown grant was issued to him apparently in accordance with the survey, in which the land was described as containing 160 acres more or less.

In making the survey, Patterson, Armstrong's surveyor, first ran the southern boundary line, line "A," too far to the north to enclose the required acreage. Upon finding that he did not have the acreage required, he ran another line 19.77 links south of his first line, and as BROWN, Co. J. found, put in his boundary stakes there as well. This altered line is known as "line B." This was the survey, with field notes, on which the Crown grant was issued to Armstrong.

The respondent taking line "A" as the southern boundary of Armstrong's land, adopted it as the northern boundary of his pre-emption, which was made in 1886, after Armstrong had obtained his Crown grant. The respondent did not know of line "B." It is claimed, therefore, that he has been in possession of the plot of ground between "A" and "B" for 20 years and upwards. It is also claimed that Armstrong's successor in title, Ellis, by building a fence along line "A" abandoned everything south of that, at any rate, he made no claim to it.

Now there is no doubt that Ellis did build a fence along line "A," and that both he and the respondent believed that that was the true southern boundary of lot 158, and there is, I think, sufficient evidence to shew that the respondent was in undisputed possession of the disputed area from the time of his pre-emption up to the time of the commencement of this action, and for the full period of 20 years.

MACDONALD, C.J.A.

Ellis having become delinquent in the payment of his taxes, lot 158 was sold at a tax sale on the 12th of October, 1905, and was not redeemed. The claimant herein was the purchaser and obtained a deed of the lot in the year 1911. It will, therefore, be seen that the tax sale took place less than 20 years from the date of the respondent's pre-emption record.

In my opinion, the tax sale was not an interruption of the running of the Statute of Limitations in favour of the respondent. It was argued that the owner having two years within which to redeem, the plaintiff's possession must be considered as continuing uninterrupted until the end of that time, thus giving him a full period of 20 years' possession. I think this is correct, it is uninterrupted possession which bars title. Plaintiff was in peaceful possession for 20 years, and that is sufficient to bar the adverse right.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: I am so much in accord with the reasons of my brother M. A. MACDONALD in favour of dismissing the appeal that I shall only add some references to our statutes, the language of which supports his view as to the strength of

COURT OF APPEAL

1925

Feb. 4.

MCINTYRE v. HAYNES

MARTIN, J.A.

the title by possession, that the respondent has, I think acquired, despite the tax sale. Sections, *e.g.*, 129, 131, 133, 140, 144 and 151 of the Assessment Act of 1903-4, Cap. 53, shew that the sale for "delinquent taxes" (section 121 *et seq.*) which the assessor is empowered to make under section 127, does not "vest" the title in the purchaser till, at best, after the period of redemption has expired, and till then there is no "absolute forfeiture and vesting" of the land in the tax-sale purchaser as there is declared to be by section 133 in favour of the Crown when no one comes forward to purchase the land at the tax sale; and this view is carried out by the very strong provisions of section 151 to the effect that after the tax-sale deed has issued, after the expiring of the redemption period

"such deed . . . . shall vest in the purchaser all rights of property, in fee simple or otherwise, which the person assessed . . . . had in such land, and also purge and disencumber such land from all payments, charges, liens, mortgages and encumbrances of whatever nature and kind other than existing lien for taxes, and other than the reservations and exceptions subject to which the person assessed, or those claiming under him, held the said land. . . . ."

These provisions, and those relating to the "trust fund" in favour of the owner created by section 131, are quite inconsistent with the idea that such a sale should be regarded in the light of an ordinary vendor and purchaser agreement, even if that *status* would sustain the appellant.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.: Mr. *Farris* stated at the close of the argument that with the fence eliminated as a so-called conventional boundary, the appellant should succeed, because lot 158 was sold for taxes, and title was therefore obtained to the whole area (assuming that it included the part in dispute) unless the respondent in the meantime acquired title by prescription. I agree with that view.

MACDONALD, J.A.

Without deciding the first point, it is clear that if the respondent occupied the disputed area, in addition to the land admittedly owned by him, in the manner required by law to give title by prescription and there was not such an interruption of possession as would prevent the statute from running, then the disputed area must be excluded from lot 158.

The only interruption suggested was the tax sale referred to. It is urged by the appellant that this sale included the disputed area. The respondent contests this view. Adopting, however, the view (without deciding it) that the tax sale did in fact include the disputed area, did it necessarily interrupt the "possession" of the respondent? Principle and authorities support the view that a tax sale, followed by the two years for redemption, within the 20-year period, would constitute an interruption of possession. Unless, therefore, the respondent occupied the disputed area for 20 years pior to the tax-sale deed, he would not obtain a prescriptive title. *Soper* v. *City of Windsor* (1915), 22 D.L.R. 478.

Lot 3474 was pre-empted in December, 1886, and lot 158 was sold for taxes in October, 1905, *i.e.,* before 20 years had elapsed. But the date of the sale is not the determining factor. The tax-sale deed was in fact secured in 1911, but could not in any event be obtained for two years after the sale. The Statute of Limitations would begin to run again not at the time of the sale, but either after the period for redemption expired, when the deed might have been obtained, or in 1911, when the deed was actually issued. It is not necessary in this appeal to fix one or other of these two dates, as the 20 years of occupation was completed before the time of redemption expired, although the end of the period for redemption would appear to be the right date: *Donovan* v. *Hogan* (1888), 15 A.R. 432 at p. 434.

It follows that there was no interruption of possession within the 20-year period.

The respondent, therefore, had open, visible and exclusive possession for at least 20 years. He cultivated the disputed area. It follows that title was thus acquired. This conclusion is not affected by the evidence, statutory enactments or authorities to which we were referred in argument.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Tunbridge & Colquhoun.*
Solicitors for respondent: *Pooley, Luxton & Pooley.*

COURT OF APPEAL

1925

Feb. 4.

PRIBBLE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Railway—Injury to passenger—Limitation of action—B.C. Stats. 1896, Cap. 55, Sec. 60.

PRIBBLE v. B.C. ELECTRIC RY. CO.

Section 60 of the Consolidated Railway Company's Act, 1896, provides that "all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within 6 months next after the time when such supposed damage is sustained."

The plaintiff recovered judgment in an action for damages for injuries sustained while a passenger by reason of the negligence of the servants of the defendant Company. The accident took place on the 26th of December, 1922, and the writ was issued on the 17th of September, 1923. On appeal on the ground that said section 60 was a bar to the action:—

Held, MCPHILLIPS, J.A. dissenting, that the section does not apply to a case based on the Company's duty to carry the plaintiff safely.

APPEAL by defendant from the decision of MACDONALD, J. of the 10th of April, 1924, in an action for damages for injuries sustained while a passenger on a car of the defendant Company. The plaintiff, a widow, employed by the Universal Knitting Company Limited of Vancouver boarded a street-car of the defendant Company on the morning of the 26th of December, 1922. She paid her fare and became a passenger. She was carried to the corner of Hastings and Cambie Streets, where in alighting from the vestibule at the rear of the car she caught the heel of her left rubber in a hole in a metal tread placed upon the outer edge of the upper surface of the higher of two steps leading from the vestibule to the ground and stepping down without noticing that her heel was so caught, she was thrown violently to the pavement. She sustained three fractures of the left leg, various bruises and mental shock, and was confined to the hospital and to her home for several months and will always be unable to carry on her employment. The accident took place on the 26th of December, 1922, and the writ was issued on the 17th of September, 1923, in this action. On the trial the plaintiff recovered $5,000.

Statement

The defendant Company appealed on the ground that the learned judge erred in holding that section 60 of the Consolidated Railway Company's Act (B.C. Stats. 1896, Cap. 55) was not a bar to the action.

The appeal was argued at Vancouver on the 3rd and 4th of November, 1924, before MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

McPhillips, K.C., for appellant: We appeal on the limitation section of the Consolidated Railway Company's Act, 1896. Section 60 provides that "all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within six months next after the time when such supposed damage is sustained," etc. The learned judge held this section did not apply, following *Viney* v. *B.C. Electric Ry. Co.* (1923), 32 B.C. 468 and *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102. The proper construction is that put upon it by the Privy Council in *British [Columbia] Electric Railway Company, Limited* v. *Gentile* (1914), A.C. 1034 at p. 1039: see also *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586 at p. 595; *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419 at p. 426. The *Sayers* case is not good law in holding that the limitation section does not apply to a contract. The *Ryckman* case, *supra,* is overruled by the *Aitken* case, *supra.* As to damage done by operation of the railway see *Greer* v. *Canadian Pacific Rway. Co.* (1915), 51 S.C.R. 338 and *Canadian Northern Rway. Co.* v. *Pszenicnzy* (1916), 54 S.C.R. 36.

Argument

Cantelon, for respondent: We rely on *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102; see also *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586 at p. 589. As to the words "by reason of the railway" see *Traill* v. *Niagara, St. Catharines and Toronto R.W. Co.* (1916), 38 O.L.R. 1. In the case of breach of contract see *British Columbia Electric Rway. Co.* v. *Turner* (1914), 49 S.C.R. 470 at p. 499. The law is defined in the *Traill* case, *supra,* and *Ryckman* v.

COURT OF APPEAL

1925

Feb. 4.

PRIBBLE v. B.C. ELECTRIC RY. CO.

Hamilton, Grimsby and Beamsville Electric R.W. Co. (1905), 10 O.L.R. 419; see also *The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511. We submit that the *Aitken* case is not in their favour.

McPhillips, in reply: The principle enunciated in the *Aitken* case applies to this case and we are entitled to judgment.

Cur. adv. vult.

4th February, 1925.

MARTIN, J.A.

MARTIN, J.A.: In view of the largely irreconcilable, as I think, state of certain decisions which are binding upon this Court, and necessarily fetter the expression of our opinions, I think the best course to adopt is not to disturb the judgment in such doubtful conditions, but to leave it to a higher tribunal which could do so, should it be so disposed, on a reconsideration *de novo* of the whole matter, which is one of considerable public importance and is now in an unsatisfactory legal state.

The appeal, therefore, should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal has relation to an action for damages for personal injuries sustained by a passenger on the street railway of the appellant in Vancouver, B.C., through tripping and falling from a step of the electric car from which the respondent was in the act of stepping off, her heel catching in a metal tread fixed on the outer edge of the steps of the car. The only point to be passed upon in this appeal is whether the action was brought in time, giving attention to the Statute of Limitations contained in the private Act, the statute under which the appellant operates the street railway system, *viz.*, Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55, Sec. 60. The section reads as follows:

"60. All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act."

The learned trial judge found in favour of the plaintiff (the respondent) and assessed the damages at $5,000, and following *Sayers* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 102, a decision of the then Full Court of the Supreme Court of British Columbia, disallowed and found against the appellant upon the contention made that the action was out of time, which would be the case if the above-quoted section applies. This Court, the Court of Appeal for British Columbia, had this point up for consideration in *Viney* v. *B.C. Electric Ry. Co.* (1923), 32 B.C. 468, and there it was held that the section (60) did apply and the action was out of time. In that action the person injured was a member of the public being run over by a street-car. In the argument of the appeal in the *Viney* case much reliance was placed upon the very learned judgment of Mr. Justice Anglin (now Chief Justice of Canada) in *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586; (1923), 1 W.W.R. 756, but of course the *Viney* case was not the case of a passenger upon the electric railway meeting with an injury. My brother MARTIN expressed himself in the *Viney* case as being of the opinion that the *Aitken* case did not in principle disturb the *Sayers* case, making use of the following language in respect thereto at pp. 374-5:

"I do not regard the recent decision of the Supreme Court in *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586, as a disturbance of the *Sayers* case, despite some individual observations, because the section of the Manitoba Railway Act considered in the *Aitken* case is now so framed as to read: 'All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway,' which removes, from my mind at least, the doubt on the point I hereinbefore expressed, and which is referred to by Mr. Justice Anglin in the *Aitken* case at p. 604; and in his illuminating judgment (if I may be permitted to say so) the whole matter in its varying stages of legislation is elaborately considered in view of the 'uncertainty and confusion existing' upon the effect of the authorities, the intricacies of which I shall not attempt further to reconsider. The *Sayers* case, though cited in argument, was not even referred to in the judgment of the Privy Council in *British Columbia Electric Railway* v. *Gentile* (1914), A.C. 1034, and the question of the construction of section 60 now before us was not considered by their Lordships, because at p. 1040 they held that the action was maintainable under the Families Compensation Act, 'and that section 60 has no application'; therefore their prior observation on p. 1039, that 'their Lordships assume without deciding that the words "operations of the Company" include negligent driving of a car,' means nothing more than

MCPHILLIPS, J.A.

COURT OF APPEAL

1925

Feb. 4.

PRIBBLE v. B.C. ELECTRIC RY. CO.

the usual temporary assumption to accelerate the argument upon the application of the Families Compensation Act to the exclusion of section 60."

I might observe, though, that in the *Sayers* case, *supra,* at p. 111, my brother MARTIN used this language:

"Yet the question is not at all free from doubt, and it is desirable in the public interest that it should be set at rest, either by the Legislature or the Court of last resort."

My brother GALLIHER in the *Viney* case, *supra,* at pp. 478-9, said:

"The learned trial judge felt himself bound by the decision in the *Sayers* case, and the case of *The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511. I have already dealt with the *Sayers* case. With regard to the *McWillie* case, I have carefully read the able and instructive judgment of Anglin, J. in *Winnipeg Electric Railway Company* v. *Aitken* (1922), 63 S.C.R. 586, in which he deals so thoroughly with the cases that it would be superfluous for me to do more than refer to it and if I truly apprehend the learned judge's views as expressed in that case, he would hold, if necessary, that there was nothing binding upon him to conclude that even under the words 'by reason of the railway' the prescription section would not apply (in a case such as he was then considering), and I note that he makes reference to the views of Gwynne, J. in the *McWillie* case.

"If I may say so with respect, I am content to follow what I understand to be the views of Mr. Justice Anglin, my own view also being along similar lines. Such being the case, I do not think I am precluded by authority from holding as I do, that the plaintiffs here are within the prescriptive section. I would, therefore, allow the appeal."

MCPHILLIPS, J.A.

I was a member of the Court in the *Viney* case, and think that I cannot do better in the way of expressing my considered opinion in this case than to quote what I there said, being still strongly of the same opinion: [The learned judge here quoted his judgment at pp. 479-80 and continued].

It is well to bear in mind that we have in this case (section 60) the very compendious words "any damage or injury sustained by reason of the tramway or railway or the works or operations of the company." It is clear to my mind that the plain meaning of this and the intention of the Legislature was to, in this language, cover the whole ambit of and the many phases of the undertaking statutorily authorized, and the limitation, it would seem to me, was put in language so clear and unmistakable that there is room for no doubt. The railway company in the carrying on of its electric railway system must necessarily use electric-cars thereon, and these cars must

be operated and in operating there must be electric power, *i.e.*, electric generation plant, and in the utilization of this electric power in driving the electric-cars what more effective language could be used as descriptive of this than "the works or operations of the company"? And besides these words we have as well "by reason of the tramway or railway." If the passenger in the present case was aboard one of the electric-cars operated upon the tramway or railway line, and it was only because of this "by reason of the tramway or railway" that she met with her accident, it seems quite impossible to visualize the happening other than as an accident happening "by reason of the tramway or railway." Then, further, the moving electric-car, driven by electric power, must surely come within the words "works or operations of the company." Were it not for the works of the company operation of the "tramway or railway" would not be possible, and as it was the respondent met with her mishap because of "the works or operations of the company" and she fell from an electric-car "of the tramway or railway."

MCPHILLIPS, J.A.

In view of the judgment of Anglin, J. (now Chief Justice of Canada) in the *Aitken* case ((1922), 63 S.C.R. 586), it might well be that it would be a matter of supererogation for me to further enlarge upon the question. The judgment covers the whole possible field of any possible argument.

I will, therefore, now set forth by way of excerpts from that judgment the portions thereof which are particularly applicable to the present case. At p. 595, we have the following:

"The primary rule of statutory construction is that, unless to do so would lead to absurdity, repugnancy or inconsistency with the rest of the statute the grammatical and ordinary sense of the words should prevail. The language of section 116 of the Manitoba Act is precise and unambiguous. No absurdity, repugnancy or inconsistency can arise from giving to it its natural and ordinary sense. On the other hand to hold that the case of a man in the street who is injured through negligence in running the cars falls within the purview of the section, but that the case of a passenger who sustains injury from the like cause does not, seems to me to involve inconsistency and repugnancy to common sense as well. Unless compelled by authority to hold otherwise, I should have no doubt that the plaintiff's injury was sustained 'by reason of the operation of the defendant's railway' and that her action is therefore barred by the Manitoba statute above quoted."

COURT OF APPEAL

1925

Feb. 4.

PRIBBLE v. B.C. ELECTRIC RY. CO.

MCPHILLIPS, J.A.

At pp. 602, 603:

"It is true that in some of the earlier cases decided when the section dealt with claims for injuries received 'by reason of the railway,' the view was taken that it applied only to actions for damages occasioned in the exercise, or intended exercise, of powers given for the construction or maintenance of the railway. *Roberts* v. *Great Western Ry. Co.* [(1856)], 13 U.C.Q.B. 615 approved in *Ryckman's* case [(1905)], 10 O.L.R. 419, 430. I cannot but think that the words 'the construction or operation of' were inserted to prevent such a narrow interpretation being given to the section in the future and to ensure that its application should extend to cases of injury arising from the operation or running of the railway as well as to those due to works of construction or maintenance. Parliament and the Legislatures should be credited with having had some purpose in making the change. I think that purpose was to put it beyond doubt that the limitation is applicable to all claims for injuries and damages resting on negligence in working the railway. There can of course be no justification for refusing to give effect to the intention with which the law was changed. *The Ydun* (1899), P. 236 at page 241. In *Greer* v. *Canadian Pacific Ry. Co.* (1915), 51 S.C.R. 338-40 my brother Duff was of the opinion that 'operation of the railway' includes acts other than those done in the discharge of some duty imposed by statute. With Mr. Justice Dennistoun 'I adopt the view of Osler, J.A. in *Ryckman* v. *Hamilton, etc., Ry. Co.* [(1905)], 10 O.L.R. 419 at p. 426, that the words "may prove that the same was done in pursuance of and by authority of this Act and the special Act," mean no more than "may prove that the damage or injury was sustained by reason of the construction or operation of the railway," as in the earlier part of the section.'

"But, if the limitation should be held to apply only to claims for damage or injury sustained by reason of acts 'done in pursuance of and by authority of this Act and special Act,' I would find it not a little difficult to conceive the running of tramcars on the public streets in the City of Winnipeg to be aught else than something so done."

At p. 608:

"In *May* v. *Ontario and Quebec R.W. Co.* (1885), 10 Ont. 70 it was held by Wilson, C.J., after reviewing the prior decisions, that any damage done through negligence upon a railway in the carriage of passengers and the like is damage done 'by reason of the railway,' and the same view was taken by O'Connor, J. in *Conger* v. *Grand Trunk R.W. Co.* (1887), 13 Ont. 160. In these two actions, brought by persons who had been injured through alleged negligence of the respective railway companies while being transported as passengers, demurrers by the defendants were maintained."

At p. 609:

"In *Browne* v. *Brockville and Ottawa R.W. Co.* (1860), 20 U.C.Q.B. 202, a case of injury to the plaintiff and his wagon on a highway crossing, Robinson, C.J., delivering the judgment of the Court said: '"By reason of the railway" is a very comprehensive expression.' Referring to the omission of the statutory signals on approaching a highway crossing he added: 'It may be said that the damage was not sustained by reason of

the railway, but rather by reason of the manner in which the carriages on the railway were driven; but we think the substance and effect are the same in the one case as the other.' The other ground of complaint was defective construction of the crossing."

At pp. 610-11:

"In *Kelly* v. *Ottawa Street R.W. Co.* (1879), 3 A.R. 616, the action, which was to recover damages for injuries sustained by a man in the street owing to the careless driving of one of the defendant's cars, was held by the Court of Appeal to be within the limitation section. If the plaintiff in the case at Bar had reached the pavement before the moment of the collision so that her transportation as a passenger had terminated, her action would admittedly have been barred by the Manitoba limitation section. What ground of distinction, not purely whimsical, can be suggested for holding that, although in that case she would have been injured 'by reason of the operation of the railway,' she should be deemed not to have been so injured because she was still in the vestibule or on the steps of the car in course of leaving it when the collision occurred?

"Although this Court has in several cases considered the limitation section of the Dominion Railway Act since the introduction into it in 1903 of the words 'the construction or operation of' (*Canadian Northern Ry. Co.* v. *Robinson* [(1910)], 43 S.C.R. 387; *Canadian Northern Rway. Co.* v. *Anderson* [(1911)], 45 S.C.R. 355; *Greer* v. *Canadian Pacific Ry. Co.* [(1915)], 51 S.C.R. 338; and *Canadian Northern Ry. Co.* v. *Pszenicnzy* [(1916)], 54 S.C.R. 36) the question whether an action for personal injury to a passenger due to negligent running of a train of cars of a railway company comes within the section as it now stands, *i.e.*, whether such injuries are sustained by reason of the 'operation of the railway,' has never been passed upon here, although the principle of our decision in the case last cited may bear upon it. It is true that in *British Columbia Electric Rway. Co.* v. *Turner* ((1914), 49 S.C.R. 470), Mr. Justice Duff reiterated the opinion which had prevailed in the *Sayers* case [(1906)], 12 B.C. 102, and I also expressed an inclination to the view that such an action was not within the limitation clause. We were there dealing, however, with a British Columbia statute, which read 'by reason of the tramway or railway,' and I was greatly influenced by the judgment in the *Ryckman* case, 10 O.L.R. 419. I have already alluded to the *dicta* of Gwynne, J. in the *McWillie* case [(1890)], 17 S.C.R. 511, and of Duff, J. in *Greer's* case [(1915)], 51 S.C.R. 338."

MCPHILLIPS, J.A.

It is to be remembered that section 60 includes the word "operations." I draw attention to this in consequence of the following excerpt from the judgment of Anglin, J. at pp. 615-16:

"In the Manitoba statute on the other hand 'operation' is now expressly included and that word was inserted, as I think, for the very purpose of precluding in the future the restriction of the general terms in which the first member of the section is couched to matters of construction and maintenance—a restriction which had been inferred by the Courts from the presence of the concluding clause of the section in the Canadian Rail-

COURT OF APPEAL

1925

Feb. 4.

PRIBBLE v. B.C. ELECTRIC RY. CO.

MCPHILLIPS, J.A.

way Acts when the language of its earlier provision had been 'by reason of the railway.' See *Parker* v. *London County Council* (1904), 2 K.B. 501. Neither *Palmer's* case [(1839)], 4 M. & W. 749, nor *Carpue's* case [(1844)], 5 Q.B. 747, it seems to me, warrants the application of the principle on which it was decided to the limitation sections found in our Railway Acts, Federal or Provincial, in actions for injuries sustained by passengers through fault or neglect of railway employees in working the railway.

"My conclusion from this review of the leading authorities (for the length of which I feel I should apologize, although it seemed to be necessary because of the uncertainty and confusion existing as to their effect), is that taken as a whole they would not have compelled us to hold that the present action would not have been within the purview of s. 116 had it stood as it was prior to 1907, *i.e.*, if it still read 'by reason of the railway.' There certainly is nothing whatever in them seriously to embarrass us in giving the section in its present form the construction for which its plain, precise and unambiguous words, read in their grammatical and ordinary sense, appear to call. 'Operation' means 'the working of the railway as constructed' and that assuredly includes the running of cars. While section 116 of the Manitoba statute, notwithstanding the omission from it of a provision similar to s.s. (3) of s. 306 of the Dominion Railway Act of 1906, which can scarcely have been other than designed, may not apply to actions of which the substance is breach of contract, as in cases of loss of or injury to freight in transport, in my opinion it clearly does apply to actions such as that at Bar, of which the substance is fault or neglect attributable to the defendant in the operation of its railway occasioning personal damage or injury to the plaintiff. I cannot see any reasonable ground for distinguishing in this respect between the case where the person so injured is a passenger and that where he does not hold that relation to the company but is lawfully where he is, whether on a highway or elsewhere, when he sustains the injury.

"I would for these reasons allow this appeal with costs here and in the Court of Appeal and would restore the judgment of the learned trial judge dismissing the action."

I have no hesitation in arriving at the conclusion that the limitation provision (section 60) effectively disposed of the case and that the appeal should be allowed.

MACDONALD, J.A.

MACDONALD, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McPhillips, Smith & Gilmour.*
Solicitors for respondent: *Ladner & Cantelon.*

REX v. HUGHES.

COURT OF APPEAL

1924

Nov. 28.

REX v. HUGHES

Criminal law—Robbery with violence—Conviction—Whipping included—Time of administering improper—Convicted by judge at instance of Crown counsel in prisoner's presence—No mistrial.

On a conviction on a charge of robbery with violence the trial judge ordered lashes to be administered to the prisoner within one month from the beginning of the sentence. Counsel for the Crown then drew to his attention that this was contrary to section 1018, subsection 3, of the Criminal Code. The judge then corrected this error, but later being advised that he had not stated the number of times prisoner was to be whipped, provided for this in the record of conviction in the prisoner's absence.

Held, on appeal, MCPHILLIPS, J.A. dissenting, that the learned judge when correcting the error was not *functus officio;* that the sentence as corrected was not illegal and that there was no mistrial.

APPEAL by accused from a conviction by CAYLEY, Co. J. of the 9th of October, 1924, on a charge of robbery with violence. The sentence was pronounced in the presence of the accused as follows: "Five years in the penitentiary and twenty-five lashes to be administered during the first month of your imprisonment." Counsel for the Crown then drew the attention of the learned judge to the fact that under section 1018, subsection 3, of the Code the sentence for whipping could not be executed until after the expiration of the time within which an appeal could be taken, *i.e.,* one month, and the judge then added the words "it will be at the discretion of the prison doctor." Afterwards, when accused was not present, it was brought to the judge's attention that he did not say how many times prisoner was to be whipped, and in the record of conviction subsequently drawn and signed by the learned judge when the prisoner was not present the sentence varied from that pronounced in the prisoner's presence and was as follows:

Statement

"I sentence him to imprisonment for the term of five years in the British Columbia Penitentiary, at New Westminster, and to be once whipped within the said penitentiary under the supervision of the medical officer of the said penitentiary, or if there be no such officer, or if the medical officer be for any reason unable to be present, then under the supervision of a surgeon or physician to be named by the minister of justice."

COURT OF APPEAL

1924

Nov. 28.

REX v. HUGHES

Objection was taken that the sentence as varied should have been pronounced in the presence of the prisoner as required by section 943 of the Criminal Code.

The appeal was argued at Vancouver on the 27th and 28th of November, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Arnold, for appellant: The accused was sentenced when he was not present in Court. This is a mistrial. The conviction and the sentence are the same: see *James Thomas Hales* (1923), 17 Cr. App. R. 193. He has no jurisdiction to vary the sentence except in the presence of accused: see *Regina* v. *Brady* (1886), 12 Ont. 358 at p. 363; *Rex* v. *Alfred M'Dougall* (1904), 8 Can. Cr. Cas. 234 at p. 238; *Rex* v. *Paris* (1922), 38 Can. Cr. Cas. 126 at p. 135. Where there is a mistrial the question of substantial wrong does not arise: see *Rex* v. *Cuhule* (1923), 40 Can. Cr. Cas. 180 at pp. 189 and 195. The conviction being so amended there was no trial: see *Rex* v. *Sam Jon* (1914), 24 Can. Cr. Cas. 334 at p. 335.

Argument

Wood, for the Crown: At the trial the learned judge made a slip and when it was drawn to his attention by counsel for the Crown he corrected it. The time for whipping is in the discretion of the prison surgeon: see *Rex* v. *Boardman* (1914), 23 Can. Cr. Cas. 191. On the question of substantial wrong see *James Swenson, Anton Frank Caba* (1918), 13 Cr. App. R. 209. As to the amended conviction see Crankshaw's Criminal Code, 5th Ed., 1215.

Arnold, in reply.

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

The learned judge made a mistake in ordering the lashes to be administered within one month of the beginning of the sentence, but I think he corrected that mistake before he had become *functus officio* and in the presence of the prisoner. His language was not very clear; he said "when the twenty-fifth lash is to be given, I don't know." He then proceeds to say: "It will be at the discretion of the prison doctor." After this had been said, Mr. *Arnold,* prisoner's counsel, took the objection that

MACDONALD, C.J.A.

sentence had already been pronounced, and that the Court was *functus officio*. This objection is without foundation.

In this view of the case it becomes unnecessary to make a finding on the question of substantial wrong having been done. I put my decision entirely upon the fact that the sentence in this case was not an illegal sentence, even treating it as not having been amended, as I think the statute is directed to the prison authorities and not to the Court. If I am wrong in this, the amendment was sufficient to satisfy the statutory requirements.

MACDONALD, C.J.A.

MARTIN, J.A.: I am of the same opinion. I think that our judgment should be restricted as my brother suggests. I can only gather from the official report of the proceeding before us and the formal record drawn up in form 61, under section 683, and signed by the learned judge, that he did in effect intend to correct his sentence to conform to section 1060 after the Crown counsel had drawn his attention thereto and read its provisions, and as, apparently, the amendment was made in the presence of the accused, therefore no legal exception can be taken thereto, and consequently the appeal should fail.

MARTIN, J.A.

I should add something which I said during the argument; that subsection 3 of section 1018 is a direction to the prison officials charged with execution of the sentence, and that it is something quite apart and distinct from the duty imposed upon the learned judge to pass sentence.

MCPHILLIPS, J.A.: I am of the opinion that the case is one that warrants the direction that there be a new trial. Certainly it is patent that there was error in directing that the twenty-five lashes should be administered during the first month of the imprisonment. That was contrary to law and, therefore, an invalid and illegal sentence was then pronounced. Later, in drawing up the conviction the sentence was changed to conform to the statute, but that was not done in the presence of the accused. As I view it, it is contrary to natural justice that the trial should, in any of its phases, be proceeded with in the absence of the prisoner, except as indicated in the statute itself,

MCPHILLIPS, J.A.

COURT OF APPEAL

1924

Nov. 28.

REX v. HUGHES

such as the misconduct of the accused himself warranting his being ejected from the Court and the proceedings going on in his absence.

Of course, there is really nothing in this point unless it can be said that a part of the trial took place in the absence of the accused. It would be certainly inimical to the maintenance of law and order that it should go abroad that an accused person could be tried, conviction entered, sentence pronounced, that he should be then withdrawn from the place of trial and later some different or other conviction and sentence should be drawn up. Certainly it would be a fundamental error to allow that; it would be, as I say, inimical to the maintenance of law and order. I believe that it could be reasonably said that that is what was done here. I certainly feel, in the interest of justice and the due administration of justice, that a new trial should be had. There was no difficulty in bringing this prisoner back again before his Honour in the Court below, all being done apparently on the same day; but it is an enormity that a prisoner should have presented to him in a gaol a different conviction and a different sentence than that which was pronounced in open Court.

MCPHILLIPS, J.A.

Appeal dismissed,
McPhillips, J.A. dissenting.

WESTERN PACIFIC GRAIN ELEVATOR & TERMINALS LIMITED v. OTTON.

COURT OF APPEAL

1924

Nov. 25.

WESTERN PACIFIC GRAIN & TERMINALS LTD. v. OTTON

Riparian rights—Application for foreshore lease—Protest by owner claiming riparian right—Application refused until protest disposed of—Action for declaration as to riparian rights—Marginal rule 289.

The plaintiff applied to the department of marine and fisheries for a lease of a water lot on Burrard Inlet on which he was to erect an elevator. The defendant entered a protest with the department claiming that he as owner of the adjoining property was entitled to riparian rights over the water lot. The department then refused to grant a lease for the water lot until the defendant's protest was disposed of. An action for a declaration that the defendant was not entitled to any riparian rights in the water lot in question was dismissed.

Held, on appeal, affirming the decision of GREGORY, J., that the action was rightly dismissed as the plaintiff had no existent interest in the foreshore rights in question.

Per MACDONALD, C.J.A.: In order to have a right of action there must at least be privity in law between the parties.

APPEAL by plaintiff from the decision of GREGORY, J. of the 2nd of April, 1924, dismissing an action for a declaration that the defendant is not entitled to riparian rights in respect of a certain property on the southern boundary of the Canadian Pacific Railway right of way on Burrard Inlet, the railway right of way adjoining the high-water mark on its north side. The plaintiff Company applied for the foreshore in question containing 25.74 acres for the purpose of building an elevator, and the defendant then entered a protest with the Dominion Government against the plaintiff's application for the foreshore. The Government decided that in face of the protest they would not grant the plaintiff's application until the rights of the defendant as to the foreshore be determined. The plaintiff then brought this action for a declaration that the defendant's title to the property to the south of the Canadian Pacific Railway's right of way did not carry with it any riparian rights and the defendant counterclaimed for a declaration that his property carried with it riparian rights and he was entitled to the property applied for by the plaintiff. The trial judge dis-

Statement

COURT OF APPEAL

1924

NOV. 25.

WESTERN PACIFIC GRAIN & TERMINALS LTD. v. OTTON

missed the action with costs and dismissed the counterclaim without costs.

The appeal was argued at Vancouver on the 24th and 25th of November, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Bucke, for appellant: We want a declaration that they are not entitled to riparian rights. The Canadian Pacific Railway right of way adjoins the foreshore on the north side of the right of way and this man's land is to the south of the right of way. We want to get rid of his protest against our application for the foreshore. We are entitled to a declaratory judgment: see *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (1892), 3 Ch. 242; *In re Staples* (1916), 85 L.J., Ch. 495; *Burghes* v. *Attorney-General* (1911), 2 Ch. 139; *Guaranty Trust Company of New York* v. *Hannay & Company* (1915), 2 K.B. 536; *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ld.* (1921), 2 A.C. 438; *Hanson* v. *Radcliffe Urban Council* (1922), 2 Ch. 490. Under Order LXV., r. 1, we are entitled to costs of the counterclaim.

Argument

Davis, K.C., for respondent: His action is really for a declaration that the Court advise the Dominion not to pay any attention to the defendant's protest against the sale of the foreshore. On declaratory judgments see annotation by R. M. Willes Chitty in (1924), 1 D.L.R. 1; see also *Dyson* v. *Attorney-General* (1911), 1 K.B. 410; (1912), 1 Ch. 158; *Esquimalt and Nanaimo Railway Company* v. *Wilson* (1920), A.C. 358; *Gray* v. *Spyer* (1922), 2 Ch. 22.

Bucke, in reply.

MACDONALD, C.J.A.: I think the learned judge was right in dismissing the action with costs, and as to the counterclaim the course pursued was the one which, in my opinion, ought to have been taken in a case of this kind.

MACDONALD, C.J.A.

The learned judge could not try the counterclaim without evidence, but in any case it was unnecessary; it did not materially increase the costs, and the Court ought not to be

concerned with trifles. This, in my opinion, is not a proper case for a declaratory judgment. While the limits of the rule relating to such judgments are not well defined, it is always to be remembered that there must at least be privity in law between the parties, such as existed in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (1892), 3 Ch. 242, where a right was denied to shipowners by the regulations. The P. & O. were shipowners and although they had no immediate cause of action, yet they had an interest. Having an existing interest they were given a declaration that the regulations were invalid. The Court in that case seemed to be dubious as to whether it ought to make that declaration, but it thought it expedient to do so. It was just as Mr. *Davis* put it: A is the owner of land, B wants to buy it, C makes some claim to it. A says to B, "I cannot sell this land to you because of the claim of C." According to Mr. *Bucke's* contention this would give B a right to sue C. I do not think it would, but whether that be so or not, I am satisfied that his prayer should not be granted.

MACDONALD, C.J.A.

The costs, I think, of the counterclaim have been dealt with already. I have said that we do not interfere with the learned judge's order in that respect.

The appeal is dismissed with costs.

MARTIN, J.A.: I think the appeal should be dismissed.

I requested the learned counsel for the appellant to cite the strongest cases he could in favour of his position and he did so—several of them, in fact, but not one of them applies to the facts before us, bearing in mind that the rule in these matters is, as set out in the Yearly Practice, 1924, at p. 351, after citation of a large number of cases, that this is a matter of discretion in which the Court should proceed with "extreme care and precaution."

MARTIN, J.A.

I have no doubt at all, quite apart from the consideration of the extent of the rule, that in the exercise of our discretion, upon the special circumstances, I may say the very special, circumstances, of this case we would not be justified in making a declaration.

COURT OF APPEAL

1924

Nov. 25.

WESTERN PACIFIC GRAIN & TERMINALS LTD. v. OTTON

As to the counterclaim, there is no cross-appeal from that dismissal and therefore it is not open to us to say anything about it.

MCPHILLIPS, J.A.: I think the appeal cannot succeed. I cannot say that this question is so clear, or certainly it is not clear to demonstration what the extent of this rule is as to making a declaratory order. Apparently it had its origin in Scotland and needs a very close study as to the extent of the power conferred upon the Court, but as far as I can satisfy myself at the moment, it seems to me that there has to be some colour of right, or an interference with some right, without it meaning that there be some specific right granted by the order made.

Now, in this particular case admittedly the plaintiff has no present or existent right. The defendant, on the other hand, claims a right, incident to ownership of land, that at one time, until severed by the C.P.R. right of way, extended to the sea-shore. He says he has foreshore rights different to those enjoyed by the public. Now, the foreshore rights must be in some authority, either in the Government of Canada or in the C.P.R. Co., under the conditions present here today in Burrard Inlet. As I see it, there is a great deal to be said in favour of either authority.

MCPHILLIPS, J.A.

Now, the question is not one of saying anything as to the relative rights of these two authorities. So far as the application made is concerned the defendant, as I am at present advised, has no greater right than the plaintiff has, that is, the right to apply to whoever the authority may be for foreshore rights. Therefore, there is no conflict of right, as between the plaintiff and the defendant as to the *res,* that is, to foreshore rights, which are being applied for to the Government of Canada.

Lord Sterndale, M.R. at pp. 506-7 in *Hanson* v. *Radcliffe Urban Council* (1922), 2 Ch. 490, said this:

"I think that is a very accurate description of the position, and if that be right it is hopeless to argue that the plaintiff in this case has no right to come to the Court. I do not purpose to decide whether she would have a right to bring an action for wrongful dismissal, but I think she is clearly entitled to come and ask whether the defendants have done right."

The language of marginal rule 289 as to the extent to which a declaratory order may go is very wide indeed.

Now, what right could be declared in this action? It could not be declared that the right to the foreshore is in the C.P.R. Co., as against the Government of Canada, and I cannot see what effect it would have even if anything of that kind were declared. The Government of Canada would not be bound, it is not a party to the proceedings, nor is the C.P.R., and, further, I question the jurisdiction of the Court in this action to make any such declaration.

It seems to me the proceedings taken are futile and I would make this final observation, that the only thing that can be done on the part of the plaintiff is to press the application at Ottawa before the proper department.

I might cite the case of *Odlum* v. *City of Vancouver,* determined in the Privy Council (85 L.J., P.C. 95), to shew that a person who has no land upon the foreshore has no valuable right or interest entitling him to be considered upon an application for foreshore rights.

MCPHILLIPS, J.A.

The facts in the *Odlum* case are similar to the facts here. The claim was made that owners of land severed from the foreshore had foreshore rights valuable in their nature. The Corporation of the City of Vancouver, held a strip of land along the foreshore inclusive of the foreshore and also had the *solum* in the land under the sea. The Privy Council held that landowners so divided from the sea had no foreshore rights or any right that could have a value attached thereto. That is, proprietors who held land behind the land of the Corporation of the City of Vancouver could not be declared to have any priority of right to apply for foreshore privileges because of the intervention of the land of the Corporation of the City of Vancouver; and here the right of way of the C.P.R. intervenes.

MACDONALD, J.A.

MACDONALD, J.A.: This action was rightly dismissed on the pleadings, and I dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *Horace W. Bucke.*
Solicitor for respondent: *Ghent Davis.*

COURT OF APPEAL

1924

Dec. 11.

REX v. WILSON

REX v. WILSON.

Criminal law—Theft—Fur cape—Identification—Evidence of—Conviction—Application for leave to appeal.

Early in May, 1924, a fur cape (value $300) disappeared from the Hudson's Bay Stores. In October following two detectives, at the instance of the Hudson's Bay fur-cutter, who thought he saw the accused wearing the cape, went to accused's house and found the cape which was indentified as the cape that had disappeared in May, by the fur-cutter and the fur-operator in the Hudson's Bay Stores. The accused said she had purchased the cape from a trapper two years previously for $100 and eight witnesses swore they saw accused wearing it prior to May, 1924. The magistrate believed the evidence of the employees of the Hudson's Bay Company and convicted accused. On an application to the Court of Appeal for leave to appeal:—

Held, MCPHILLIPS, J.A. dissenting, that the question of recent possession is excluded as the possibility of the property going from hand to hand was negatived by the defendant's own evidence and her explanation of where she received the cape is an unreasonable one. The magistrate has found that the cape was stolen from the Hudson's Bay Stores and there is sufficient evidence from which that inference can be drawn.

Statement

MOTION to the Court of Appeal on behalf of accused for leave to appeal to the Court of Appeal from a conviction pronounced on the 19th of November, 1924, upon a charge that she did unlawfully steal one fur cape of the value of $300, the property of the Hudson's Bay Company. The fur cape in question disappeared from the Hudson's Bay Store in Vancouver in the early part of May, 1924. The fur-cutter at the Hudson's Bay Store thought he saw the accused wearing the stolen cape in the early part of October, 1924, which resulted in two detectives going to accused's house and finding the cape which was later examined by the fur-cutter in the Hudson's Bay Store and identified as the cape that was stolen. On the trial the fur-cutter swore that it was the stolen cape, that he had made it up, and knew it by the fact that two pieces of fur left over he made up into another cape. The fur-operator in the store also identified the cape as she did the sewing and said she knew her own sewing. Eight witnesses were called for the defence who swore they had seen the accused wearing the cape

in question from one to two years previously and the accused's story was that in July, 1923, a trapper came into the restaurant that she was running at the time and sold her the cape for $100. The police magistrate at Vancouver who tried the case believed the evidence of the fur-cutter and fur-operator in the Hudson's Bay Store and convicted the accused and sentenced her to six months in gaol with hard labour. The grounds submitted for granting leave to appeal were: (a) that the facts did not disclose any evidence that theft was committed by the accused; (b) that the evidence was insufficient to shew that the article alleged to have been stolen was in fact stolen; (c) that the evidence of the identity of the goods alleged to have been stolen was insufficient to support the conviction.

Statement

The appeal was argued at Vancouver on the 11th of December, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Maitland, for appellant: Accused says she got the cape from a trapper. Assuming her story is false there is no proof of theft. There is nothing to connect the accused with the actual crime: see *Reg.* v. *Cooper* (1852), 16 Jur. 750; *Reg.* v. *Cruttenden* (1842), 6 Jur. 267; *Rex* v. *Adams* (1829), 3 Car. & P. 600; *Cockin's Case* (1836), 2 Lewin, C.C. 235; *Reg.* v. *Harris* (1860), 8 Cox, C.C. 333; *Rex* v. *Badash* (1917), 26 Cox, C.C. 155.

Argument

W. M. McKay, for the Crown: Accused's explanation of where she got the cape is very unsatisfactory and was not believed below. It is for the magistrate to say whether she has given a reasonable explanation: see Crankshaw's Criminal Code, 5th Ed., p. 488; *Richard Smith* (1910), 5 Cr. App. R. 77; *Rex* v. *Scott* (1919), 14 Alta. L.R. 439 at p. 441; *Rex* v. *Theriault* (1904), 11 B.C. 117.

Maitland, in reply.

MACDONALD, C.J.A.: This is an application for leave to appeal on facts. I think the motion should be refused and that leave should not be granted. There are certain outstanding facts which have been found by the learned magistrate and which, in my opinion, cannot be disturbed by this Court. The

MACDONALD, C.J.A.

COURT OF APPEAL

1924

Dec. 11.

REX v. WILSON

MACDONALD, C.J.A.

magistrate has found that the coat belongs to the Hudson's Bay Company. That it was stolen on the 6th of May, I think the evidence is sufficient from which that inference can be drawn. It was found in possession of the prisoner some day in October, five months later.

Now, if the evidence had stopped there I think I should find considerable difficulty in saying that this woman could be convicted of theft. The expression "recent possession" is pliable. In one case it might be held to be recent possession if the article were found in the possession of the accused within a month of the theft, and in another case 12 months after. So that I might have some difficulty in finding that because a coat was found in possession of a person five months after it was stolen that that put upon her the onus of explaining how she came by it. In this case it is not necessary to decide that question because she voluntarily went into the box and admitted that she had had the coat in her possession from the 6th of May up to the time it was taken from her; that is to say, she said she had it for a period long before the 6th of May and, therefore, must have had it from the 6th of May. There is no question as to whether some other person may have stolen it and she have come by it honestly. She has told a story quite inconsistent with innocence.

MARTIN, J.A.

MARTIN, J.A.: I am so largely in accord with what the Chief Justice has said that my observations will be brief.

The general principle is conveniently to be found set out in Roscoe's Criminal Evidence, 14th Ed., 22-3 (where there is an excellent resume of cases which have bearing upon the question), *viz.*, recent possession in cases of this class depends upon the nature of the goods, *i.e.*, whether they are likely to pass rapidly from hand to hand.

The learned counsel for the appellant, Mr. *Maitland,* has put before us in his customary clear manner his client's case to the best advantage, and has cited numerous cases which are sound law, but I only want to point out that running all through them there appears the distinction concerning the nature of the article and its capability of being passed from hand to hand rapidly.

In Roscoe, *supra,* illustrations, in the cases cited, are given of possession for various lengths of time, *e.g.,* eighteen days in the case of a horse, and up to six months in others, depending entirely on the nature of the goods stolen.

In *Rex* v. *Partridge* (1836), 7 Car. & P. 551, where two ends of woollen cloth in an unfinished state had been missed for two months, it was submitted in the case of such articles, that it was unsafe to have the case go to the jury, and Patteson, J. said:

"I think the length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time; but here that is not so; it is a question for the jury."

That very distinction has been maintained persistently till now; *e.g.,* it is found in the case of *Rex* v. *Smith* (1910), 5 Cr. App. R. 77. The head-note accurately states the decision of the Court, the Lord Chief Justice saying in effect, on behalf of the Court, that "whether a person found in possession of stolen goods gives a reasonable explanation of his possession and whether the possession is recent are question for the jury." See also *Rex* v. *Bailey* (1917), 13 Cr. App. R. 27.

In this case the possibility of the article having passed from hand to hand since the time of the alleged theft on the 6th of May is absolutely excluded by the defendant's own evidence, because she says that the article remained in her hand not only from the time of the theft, but that she had it long before that time.

In *Reg.* v. *Crowhurst* (1844), 1 Car. & K. 370, it is said that if the explanation given by the prisoner is "unreasonable or improbable on the face of it the onus of proving its truth lies on him," though the onus of establishing guilt upon the charge at large is always upon the prosecution. See late cases cited in Roscoe, *supra,* pp. 988-9.

The magistrate says in the plainest way in this case that he considers the accused's story is "simply ridiculous," and I do not feel at all competent to say that, in the circumstances, he did not arrive at the right conclusion, and therefore leave should be refused.

COURT OF APPEAL

1924

Dec. 11.

REX v. WILSON

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I must say, with the greatest respect to what has been said by my learned brothers, that I cannot agree with the views expressed by them. This case is one of theft. I fail to find even a scintilla of evidence that the theft was committed by this defendant. You may say that an inference may be drawn, but I do not agree that inference will bridge over the clear necessity that there must be concrete evidence of crime. If the case be one of the theft of several articles and you prove one was stolen that may admit of its being assumed that the other articles were likewise stolen, no doubt recent possession entitles inferences being drawn in such cases the accused must satisfactorily explain that possession, and if the explanation is reasonable and might be true, the Court is not entitled to disregard the defence made, even if the Court itself disbelieved the explanation. This was the decision of the Court of Appeal in England in *Rex* v. *Schama* —*Rex* v. *Abnavoitch* (1914), 84 L.J., K.B. 396, and given effect to in this Court in *Rex* v. *Evans* (unreported). The proper direction to a jury in such cases is "that they could and ought to acquit the prisoners if they thought that the explanation given by them might be true although they were not satisfied that it was." Now, in this particular case the lady comes forward and gives an explanation that apparently did not appeal to the learned magistrate. It matters not whether it appealed to him if it might be true even though he was not satisfied that it was, the explanation was that she bought the fur cape from a trapper. I admit it looks a little strange on the face of things, a finished and made up fur cape, but as I remarked during the argument, "Truth is stranger than fiction." The explanation has been given and it may be true. I am not satisfied that it is the cape belonging to the Hudson's Bay Company. It may very well be that a powerful company like the Hudson's Bay Company may come into Court and say with seeming great force "this is our cape," but the young lady who is called to identify the cape says what? Mr. *Hodgson* puts the question; the question is: "You are not swearing absolutely that that is the identical cape that was stolen, are you? The answer was, "It would be difficult for anyone to do that that

didn't go inside of the cape." (Referring to some part of the cape). Then we have several disinterested witnesses swearing that this particular cape was long worn by the accused and the one which this lady had had a certain lining in it, and it was identified it in that way; this was not a casual recognition of the cape, and this testimony relates back to about two years before this theft was supposed to have taken place. Some nine credible witnesses testified on behalf of the accused and to her long possession of the cape, one being a doctor. I cannot see how this evidence can be passed over and be disbelieved. The learned magistrate makes no remark upon the demeanour of the witnesses. Am I to believe that nine people, swearing in the most positive manner that this lady had this cape two years ago, are telling that which is not true? I see nothing to warrant this being done. I feel I must accept this evidence and if accepted, the cape cannot be the cape so ineffectively, in any case, identified, stolen over some five months ago from the Hudson's Bay Company. It would, indeed, be perilous to convict in a case such as this. I recall what was said by Lord Herschell where counsel intends to attack credibility, it must be stated—that course was not adopted here. There was no suggestion made that any of these witnesses were telling other than what was true and now it is said that the evidence of nine witnesses must be disregarded.

MCPHILLIPS, J.A.

Is this Court to be a Court of caprice? We can only proceed upon the evidence, and the learned magistrate below could only proceed upon the evidence, and with respect, let me point out, that the learned magistrate would appear to have been influenced in coming to his decision upon things which were of his own inner consciousness, and he undertakes to say that the story is entirely ridiculous and that the testimony of nine independent witnesses should be disbelieved. I am entitled to assume that these witnesses were people of credibility. It was not shewn that they were not and the decision is against the weight of evidence. It would appear to be beyond doubt that the accused was in possession of the cape for two years, yet the holding is that it is the identical cape which was stolen from the Hudson's Bay Company some time in May this year. In my

COURT OF APPEAL

1924

Dec. 11.

REX v. WILSON

opinion the learned magistrate went wrong in holding as he did, and erred in disregarding evidence which completely met and displaced the case for the prosecution; he was not entitled, in my opinion, to disregard this evidence. I would quash the conviction and an order should go that the cape be returned to the defendant.

Motion refused, McPhillips, J.A. dissenting.

COURT OF APPEAL

1924

Oct. 23, 30.

FRASER v. NEAS

RODDY v. FRASER

FRASER v. NEAS AND NEAS.
RODDY v. FRASER.

Practice—Interpleader—Leave to appeal—Granted after expiration of time limited for appeal—County Court Order XIX., r. 7—Marginal rule 967—Court of Appeal—Further application to extend time for appeal —Refused.

Upon the expiration of the time for right of appeal from an order of the County Court dismissing the claim of a claimant on an interpleader issue, an order was made by the same judge granting special leave to the claimant to appeal.

Held, on appeal, that there was no jurisdiction to make the order.

Per MACDONALD, C.J.A.: Order XIX., r. 7, of the County Court Rules is confined to the enlargement or abridgement of time fixed by the County Court Rules and does not extend to time limited by the Court of Appeal Act.

A further application to the Court of Appeal to extend the time for leave to appeal was refused (MARTIN, J.A. dissenting).

Per MACDONALD, C.J.A.: The character of interpleader proceedings requires that the parties should be active to bring them to finality.

Statement

APPEAL by plaintiff Fraser (defendant in interpleader) from the order of CALDER, Co. J. of the 14th of July, 1924, granting special leave to appeal from his own judgment on an interpleader and that the appellant serve notice of appeal within ten days from the entry of the order. An interpleader issue in which one Roddy was made plaintiff and said Fraser was made defendant was dismissed on the 19th of May, 1924. The plaintiff's solicitors were advised of the judgment on the 23rd of May at Kamloops, the case having been tried at Clinton. Roddy

lived at Big Bar where there was no communication by railway and on being advised of the result of the trial he went to Kamloops and seeing his solicitors on the 28th of May decided to appeal on the ground that new evidence had been discovered since the trial. Under the provisions of Order XIII., r. 10, it was necessary to apply to the trial judge or Court of Appeal for leave to appeal on an interpleader. The Court of Appeal was not sitting and the County judge was some distance away from Kamloops either at Clinton or Ashcroft. On the 6th of June Roddy again saw his solicitors and owing to new evidence he had discovered it was decided to apply for a new trial. This application was refused on the 19th of June. An application for leave to appeal was delayed by reason of Roddy being severely injured in an accident on the 12th of June, 1924, and the application was not made until the 14th of July following when the order extending the time for appeal was made. Statement

The appeal was argued at Vancouver on the 23rd of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

C. L. McAlpine (*Pitts,* with him), for appellant: We say, first, the learned judge had no jurisdiction to make the order; and, secondly, if he did he did not exercise his discretion judicially. The order is interlocutory and there are only 15 days for appeal: see *Frumento* v. *Shortt, Hill & Duncan, Ltd.* (1916), 22 B.C. 427; *Laursen* v. *McKinnon* (1913), 18 B.C. 677; *Ritchie Contracting and Supply Co.* v. *Brown* (1915), 21 B.C. 89. Argument

J. E. Bird, for respondent: Order XIII., r. 10, was considered only in the *Ritchie* case, but that was a summary trial under Order XIII., r. 7: see *Shipway* v. *Logan* (1916), 22 B.C. 410.

MACDONALD, C.J.A.: This appeal should succeed. The question is one of jurisdiction of the learned County Court judge to extend the time for taking the appeal to this Court. Order XIX., r. 7, is relied upon as giving power to a County Court judge to extend the time limited in the Court of Appeal Act for taking an appeal. Even a casual reading of that rule will MACDONALD, C.J.A.

COURT OF APPEAL

1924

Oct. 23, 30.

FRASER v. NEAS

RODDY v. FRASER

shew that no such power is given. The rule is confined to the enlargement or abridgement of time appointed by these rules for doing an act.

The appeal will be allowed.

MARTIN, J.A.: I am of the same opinion, that although the learned judge had power to grant leave, yet once it was granted it thereupon became subject to the ordinary period allowed for the purpose of appeal. The applicants under rule 10, Order XIII., of the County Court Rules do not derive any special benefit in regard to time thereunder. As to the other reason given by Mr. *Bird,* all I need say is this, that after considering the sections they do not import into the County Court the special provisions of Supreme Court Rule 967, which gives the Supreme Court or a judge thereof power to extend time in general, "including the giving of notice of appeal."

MARTIN, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal must be allowed. I do not consider that there is any complexity in this matter, the constitutional right to appeal existed, and no leave was necessary. There is the right to appeal from all orders and judgments in the County Court, providing the amount involved be $100 or over. Now, admittedly in this case it was over $100. The appeal, though, was brought too late and being out of time it cannot stand.

MCPHILLIPS, J.A.

MACDONALD, J.A.: In my view the order appealed from was made without jurisdiction. There is no authority under Order XIX., r. 7, giving leave to enlarge or abridge the time for doing any act when under the Court of Appeal Act the right to appeal has lapsed.

MACDONALD, J.A.

Appeal allowed.

Argument

Bird, on the motion to extend the time for leave to appeal: We submit that we are entitled to an order extending the time now: see *B.C. Independent Undertakers, Ltd.* v. *Maritime Motor Car Co.* (1917), 24 B.C. 300; *McNair & Co.* v. *Audenshaw Paint and Colour Co.* (1891), 2 Q.B. 502 at p. 504; *Haley* v. *McLaren* (1900), 7 B.C. 184; *McEwan* v. *Hesson* (1914), 20 B.C. 94.

McAlpine, contra: On a mistake in law see *Trask* v. *Pellent* (1896), 5 B.C. 1. There are no special circumstances here: see *Edison* v. *Bank of B.C., ib.* 34; *Gold* v. *Evans* (1920), 29 B.C. 81; *Reinhard* v. *McClusky* (1897), 5 B.C. 226. Dilatoriness should not be condoned: see *In re Beldam's Patent* (1911), 1 Ch. 60; *Bouch* v. *Rath* (1918), 26 B.C. 320.

Bird, in reply.

Cur. adv. vult.

30th October, 1924.

MACDONALD, C.J.A.: In *In re Manchester Economic Building Society* (1883), 24 Ch. D. 488 the broad rule was laid down by the Court of Appeal in England that the time limited by statute or rule within which to take an appeal should be extended whenever the interests of justice required it. The case itself is an example of what may be included in the phrase "interest of justice." The order sought to be appealed was founded on a void resolution of a company. The judge who made the order and the applicant for extension were unaware of the invalidity of the resolution. The interest of the creditors plainly required that an order so made should be rescinded and this could be accomplished only by an appeal. The rule there laid down has been followed in many other cases, the latest to which we were referred being *In re J. Wigfull & Sons' Trade Marks* (1919), 1 Ch. 52. The same rule was adopted by the Full Court in *Koksilah* v. *The Queen* (1897), 5 B.C. 600. The essential facts of that case are in the main similar to those under consideration. The application was by the Crown to extend the time for taking an appeal. The time had lapsed by reason of the misapprehension of a solicitor, of the effect of section 16 of the Supreme Court Amendment Act, 1896. The Court refused to extend the time. I refer particularly to the reasons of MCCOLL, J., who was disposed to entertain applications of this kind in a liberal spirit, at pp. 610 and 611. The submission that the mistake or misapprehension or dilatoriness of a solicitor is in itself a ground for extending the time has, therefore, been clearly rejected by the Full Court, and that rule has been followed ever since. In *McEwan* v. *Hesson* (1914), 20 B.C. 94, my brother MARTIN lays stress on the

COURT OF APPEAL

1924

Oct. 23, 30.

FRASER v. NEAS

RODDY v. FRASER

MACDONALD, C.J.A.

difference between extending the time for an appeal and ordinary extension of time, and says that only very exceptional circumstances will justify opening the door to a reconsideration of a judgment which has become under the statute final by effluxion of time.

In *Bouch* v. *Rath* (1918), 26 B.C. 320, where time was allowed to lapse through dilatoriness of the solicitor's agent and an extension was refused, my brother MCPHILLIPS said:

> "Where there is lack of expedition and where there has been no lulling into a sense of security by the opposite party, the statutory requirements should be strictly adhered to."

It is true that cases may arise where there had been mistake or dilatoriness of solicitors and yet justice may require that an extension should be granted. Take the *Manchester* case for the purpose of illustrating this. Even if the applicant had been delinquent and on that ground alone must have failed, yet the facts requiring, in the interests of justice, the rescission of the order of supervision and the substitution for it of an order for compulsory winding-up might in themselves furnish ground for extending the time and thus permitting justice to be done. It therefore, I think, comes to this, that the discretion given to the Court in dealing with extensions of time for appealing should be exercised with strict regard to the right of the judgment creditor and to the conduct of the applicant; that each application must de disposed of on its own facts subject to general rules of caution applicable to the exercise of the power.

Now what are the facts upon which the applicant relies? The judgment was in interpleader. It was pronounced on the 19th of May. The applicant's solicitor learned of it on the 24th of May, his client came in and gave instructions to appeal on the 28th of May. There were 10 days left within which to give notice of appeal, but the notice was not served until long after the expiration of that time. It is clear that Mr. *Pitts* did nothing to lull the applicant to sleep. The parties were at arms' length. There is no suggestion that a mistake has been made in the procuring of the judgment such as was proven in the *Manchester* case. The excuses offered are many but they are all without merit. The solicitor had no clerk, he was busy in another Court, he had made a mistake in thinking that leave

to appeal was necessary. Section 116 of the County Courts Act makes it abundantly clear on its face that no leave to appeal was necessary, all the applicant had to do was to serve his notice. The judgment in question was for $1,300. It is only (section 117) where the judgment in interpleader is for less than $100 that leave is required. The only diligence shewn by the applicant was shewn after it was too late; after the time had expired the applicant proceeded upon unfounded assumptions that leave was necessary, that the County Court judge had authority to extend the time under Order XIX, r. 7, and that the applicant could succeed without shewing that there was something so manifestly wrong in the judgment that in the interests of justice the intervention of the Court was desirable. Not only has he failed utterly to make out a case for extension but the facts disclosed shew that it is in the interest of justice that the extension should be refused. The judgment is an interlocutory one. Under a rule of Court passed by the Lieutenant-Governor in Council a year or two ago appeals from interlocutory judgments may be set down during the sittings of the Court. The Court commenced its June sittings on the 7th and sat during the remainder of that month. The appellant was bound to set down his appeal for hearing at those sittings, but if not then he was at liberty to do so. The character of interpleader proceedings requires that the parties should be active to bring them to finality.

MACDONALD, C.J.A.

In conclusion, I wish to say that, in my opinion, applications to extend the time for appealing are on quite a different footing to applications to extend the time to set down appeals. The one takes away from the judgment creditor the benefit of a statutory limitation, and an extension of time would open to further litigation a judgment which but for the extension would be unassailable. The other has to do with practice and procedure and can, whenever an extension should be granted, *i.e.*, where the opposite party is not otherwise prejudiced, be compensated for by costs.

The application should be refused.

MARTIN, J.A.: It is often a difficult question to decide as to

MARTIN, J.A.

COURT OF APPEAL

1924

Oct. 23, 30.

FRASER v. NEAS

RODDY v. FRASER

MARTIN, J.A.

whether or no leave to appeal should be given, and the difficulty is increased by the fact that the decisions of the Court of Appeal in England, which both this Court and the old Full Court have tried though unsuccessfully and, I now think, mistakenly as well as hopelessly, to apply, are often inharmonious, not to say conflicting, and have varied considerably in the course of years, with the result that our decisions are sometimes correspondingly hard to reconcile or to take in their entirety as guides. But since our unanimous decision in *McEwan* v. *Hesson* (1914), 20 B.C. 94, I have taken one settled rule to be that leave will not be granted unless "under very special circumstances" in which it must appear that the interests of justice require that course to be adopted; and another settled rule is that there is an obvious distinction between extending the time to bring an appeal and extending the time to enter an appeal for hearing after due notice of appeal, because in the latter case the appeal is already in the Court, under section 14(5) of the Court of Appeal Act which declares that the "giving of notice of appeal shall be deemed to be the bringing of an appeal," and so it is a matter of disposing of an appeal already brought, but in the former the would-be appellant is still without its doors seeking an entrance and a vested right in the judgment has accrued to the other party. I do not mean that the position of an appellant who has not shewn due diligence in not entering an appeal properly brought is not precarious, but it is more favourable than that of one who has not brought an appeal at all under said section. And a third rule is, as I understand our said decision, that the matter of slips of solicitors, as an element for consideration, depends upon their nature and the circumstances of each case.

After a careful examination of our subsequent decisions and the facts upon which they are based, I can find nothing in them to interfere with this view of these applications: two of the latest of them, *viz.*, *Gold* v. *Evans* (1920), 29 B.C. 81, and *Rolston* v. *Smith* (1923), 33 B.C. 235, mark the distinction between applications in which notice of appeal has and has not been duly given.

Applying these rules to the case at Bar, I am of opinion that

the applicant has in his affidavits shewn "very special circumstances" which entitle him in the interests of justice to be granted leave to appeal. Seeing that my learned brothers take a contrary view of the facts I shall not attempt to go into them in detail, but only say that from the first there was unquestionably a genuine intention to appeal, of which the other side was apprized, though not by formal notice, and also and in particular we have the very unusual circumstance that on the 14th of June last notice of motion was served of an application to the learned judge below, for leave to appeal from his judgment of 19th May, and upon the hearing of the said motion he granted leave by his order of the 14th of July last, and also in said order extended the time to serve the notice of appeal within ten days thereafter. Now, though it is true that, as we have held upon this argument, the learned judge had no power to grant that extension, yet nevertheless till we so decided the appellant was reasonably justified in being guided by that order as it stood for the observance of the parties, and I regard this novel "circumstance" as an unusually strong one in favour of the motion, quite apart from other explanations given for the delay, which I do not think unreasonable, having regard to distances and difficulty of communication, and moreover no prejudice has been shewn to have been occasioned to the respondent. Therefore, I think, with great respect for contrary opinions, that leave to serve a notice of appeal should now be granted.

MARTIN, J.A.

McPHILLIPS, J.A.: In my opinion the application fails. I am in agreement with the reasons for judgment given by my brother the learned Chief Justice.

MCPHILLIPS, J.A.

MACDONALD, J.A. would refuse the application.

MACDONALD, J.A.

Application refused, Martin, J.A. dissenting.

Solicitor for appellant: *C. H. Pitts.*
Solicitors for respondent: *Macintyre & Chalmers.*

COURT OF APPEAL

1922

June 28.

REX v. CASKIE

REX v. CASKIE AND SPARK.

Criminal law—Intoxicating liquor—Construction of statute—Two repugnant sections—Latter prevails—A particular enactment prevails or a general one—B.C. Stats. 1921, Cap. 30, Secs. 26, 46, 62 and 63.

Where two sections of a statute are in conflict the latter prevails and a section dealing specifically with a subject prevails over a conflicting section that deals generally with the same subject.

On a charge for selling beer the offence is under section 46 of the Government Liquor Act and not section 26 and the penalty to be imposed is as provided in section 63 of the Act and not section 62.

APPEAL from an order of LAMPMAN, Co. J. of the 12th of June, 1922, dismissing the appeals of Angus Caskie and Jerry Spark from the convictions of the police magistrate at Victoria for unlawfully selling liquor contrary to the Government Liquor Act. The evidence disclosed that the only liquid kept and sold by the accused was beer.

Statement

The appeal was argued at Victoria on the 28th of June, 1922, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Harold B. Robertson, K.C., for appellants: As the offence was the sale of beer the charge should have been made under section 46 of the Act and not section 26. The penalty for an infraction of section 46 is provided for in section 63 of the Act and not section 62 which applies to sections 26 and 27. Section 46 deals specifically with beer and prevails as regards beer over section 26: see *Rex* v. *Fleming* (1921), 3 W.W.R. 629. Where there is conflict the second section prevails over the first: see *Regina* v. *Rose* (1896), 27 Ont. 195.

Argument

C. L. Harrison, for the Crown: It is partly a question of fact; section 46 is a different offence altogether and has no reference to its alcoholic qualities at all. In this case the beer is found to be "liquor" under the Act and the charge can be made under section 26 with the penalty prescribed by section 62.

Robertson, in reply.

MACDONALD, C.J.A.: I think the appeal should be allowed. The two sections, section 26 and section 46, are, in my opinion, in conflict with each other so far as the penalty provided for their infraction is concerned. Now the well-known rule of construction is that where there are two sections of a statute in conflict, the later section shall prevail. Apart from that rule of construction there is another, that where a subject is dealt with specifically and it conflicts with another section which deals generally with the same subject, the more specific section shall prevail. Now we have both these elements in this case, whatever the Legislature intended, it may be that they were striking at the sale of near-beer or something simulating near-beer, but they have not said so, and we are only entitled to look at what the Legislature itself has said. Now there is no doubt at all in my mind that the section, section 46, must prevail over the first, when the charge is for selling beer, and therefore the penalties provided by that section are those which ought to be imposed.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion these two sections are repugnant, therefore, in pursuance of the well-known rule recognized in *Wood* v. *Riley* (1867), L.R. 3 C.P. 26; 37 L.J., C.P. 24, the later section should prevail. As Mr. Justice Keating said:

"I am of the same opinion. If the two sections are repugnant, the known rule is that the last must prevail."

And it is quite apparent, to my mind, that the Legislature intended to appropriate to section 46, which is the one dealing with a special subject-matter, the special penalty which is directed to that matter by section 63, and intended to exclude the other remedy under section 62, which is directed to violations of sections 26 and 27.

MARTIN, J.A.

Furthermore, where we have the subject-matter dealt with by a particular section in a general enactment, the rule is that the particular section shall prevail, which is simply in furtherance of what I am saying, and the authority is *Pretty* v. *Solly* (1859), 26 Beav. 606 at p. 610, as follows:

"The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment

COURT OF APPEAL

1922

June 28.

REX v. CASKIE

must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

GALLIHER, J.A.: I agree. It seems to me that section 46 is specially applicable to the matter of the sale of malted or brewed liquor, whether it be designated as beer or near-beer, or by some other name commonly used to describe it. Such being the case, I think that section is directed particularly to the liquor said to be sold in this case, and that the punishment for the offence should be under section 63, and not under section 62.

GALLIHER, J.A.

McPHILLIPS, J.A.: In my opinion the appeal should succeed. I am not incommoded in any way in arriving at my decision by the interpretation section as to "liquor." It may well be that the terminology would cover beer if beer was not dealt with specifically in the statute, but when I find a section of the Act reading as section 46 does:

"No person other than a Government vendor shall sell or deal in any liquid known or described as beer or near-beer or by any name whatever commonly used to describe malt or brewed liquor"

I am compelled to conclude that the Legislature did not intend to cover beer when defining "liquor" or consider that beer or near-beer would be included in the definition.

As I have said, the terminology, apart from section 46, might be sufficient, but when you read section 46 it is clear that the Legislature was desirous that beer should be specially dealt with and contra-distinguished from liquor. Section 46 constitutes a dictionary in the matter and indicates by the use of apt words what the intention of the Legislature is, just as we have cases where a testator uses words with a special meaning and evidences his intention, and the intention of the testator is to be carried out.

MCPHILLIPS, J.A.

In this matter you have the dictionary giving the meaning and specifically defining beer and portraying the intention of the Legislature, and it follows that what must be done is to give effect to the plain intention. Beer and near-beer are not within the term "liquor," but stand outside of and unaffected by the interpretation clause. Should I be wrong in this view, then there is repugnancy between sections 26 and 46, and there

being repugnancy, the later section must prevail. The governing principle was dealt with in *British Columbia Electric Railway Company, Limited* v. *Stewart* (1913), A.C. 816 at p. 828, and *Wood* v. *Riley* (1867), L.R. 3 C.P. 26.

COURT OF APPEAL
1922
June 28.
REX v. CASKIE

EBERTS, J.A.

EBERTS, J.A.: In the notice of appeal I do not notice that any exception has been taken to the form of the information, and therefore I will not turn my attention to that at all. Personally, I am inclined to think the information itself is bad. I am of the opinion that the later section should govern, and under section 46 the punishment is not under section 62, which applies to offences under section 26 or 27, but under section 63.

Appeal allowed.

Solicitors for appellants: *Moresby, O'Reilly & Lowe.*
Solicitor for respondent: *C. L. Harrison.*

REX v. PAYETTE.

COURT OF APPEAL
1925
Jan. 6.
REX v. PAYETTE

Criminal law — Murder — Drunkenness — Impertinence of a child under encouragement from wife—Provocation—Criminal Code, Sec. 261.

On the day prior to the act for which he was tried accused was in a drunken condition and on the following morning he drank two bottles of lemon extract and was still intoxicated. In the afternoon as he was reading in the family sitting-room his little girl spoke to him in an impertinent manner and turning around he saw his wife at the door of the room laughing and apparently encouraging the child to be impertinent. In a fit of temper he seized a poker and chasing his wife into the back yard he struck her on the head and killed her. The jury found him guilty of murder and he was sentenced to be hanged.

Held, per MARTIN and MCPHILLIPS, JJ.A., that the learned judge entirely omitted to charge the jury upon the point of reasonable doubt and if upon the whole question of guilt or innocence of the accused it has not been established "to a moral certainty that all hypotheses inconsistent with guilt" had been excluded then the accused "must be given the benefit of the doubt" and the absence of any such instruction

COURT OF APPEAL

1925

Jan. 6.

REX v. PAYETTE

occasioned a substantial wrong to the accused and there should be a new trial.

Per MACDONALD, C.J.A. (dissenting): That the judge's direction that "if the accused person is merely so drunk as to put himself into a passion, drunkenness would be no excuse, he must have been so drunk as to be incapable of knowing what he was doing" was sufficient and in the circumstances there was no obligation upon the trial judge to make any reference to the alleged provocation in his charge.

APPEAL from the decision of MACDONALD, J. of the 29th of October, 1924, convicting the accused of murder and sentencing him to be hanged on the 18th of January, 1925. Accused had been strongly addicted to drink ever since he was 12 years old. His wife kept a hotel near the Canadian Pacific Railway station at Notch Hill where she lived with her two children. The accused had been in Vancouver where he had work, but a few days before the tragedy he went home. On the 10th of October, being the day before the tragedy, his wife gave him $20 to take him back to Vancouver. He went to the station but finding the train was some hours late, he and two friends started for Salmon Arm where there was a Government liquor store and they bought a bottle of whisky and a bottle of alcohol which they drank on the way home. The next morning accused bought two bottles of lemon extract which he drank being still intoxicated. In the afternoon he was reading in his family's sitting-room when his little girl started to speak to him impertinently and looking around he saw his wife laughing at him and evidently egging the little girl on. This aroused his anger, and seizing a poker he chased his wife into the back yard where he struck her on the head killing her. This act was seen by his other little girl and a girl companion who at the time were in a water-closet at the back of the house. Payette then went to the railway station and told the station master (one Ashdown) what he had done stating he had lost his temper owing to his wife aggravating him.

Statement

The appeal was argued at Vancouver on the 10th and 11th of December, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Maclean, K.C., and *A. D. Macintyre*, for appellant: The insolence of the child egged on by the wife is particularly

Argument

aggravating and sufficient to find provocation and ground for reducing from murder to manslaughter. As to provocation see section 261 of the Criminal Code. A wrongful act or insult may amount to provocation: see *Regina* v. *Brennan* (1896), 27 Ont. 659; *Rex* v. *Hopper* (1915), 2 K.B. 431 at p. 434; *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555; *Rex* v. *Letenock* (1917), 12 Cr. App. R. 221. Provocation will be given effect to more readily in case of a drunken man. As to the charge, the learned judge did not deal with provocation and failed to tell the jury that if they had any reasonable doubt the prisoner should have the benefit: see *Rex* v. *Stoddart* (1909), 25 T.L.R. 612.

Macintyre, on the same side: On the question of insanity see *Rex* v. *Hay* (1911), 22 Cox, C.C. 268; *M'Naghten's Case* (1843), 10 Cl. & F. 200. As to the effect of drunkenness see *Rex* v. *Meade* (1909), 1 K.B. 895; *Rex* v. *Beard* (1920), 89 L.J., K.B. 437. There must be the intent to murder: see *Regina* v. *Cruse* (1838), 8 Car. & P. 541; Crankshaw's Criminal Code, 5th Ed., 36; Phipson on Evidence, 5th Ed., 44.

Argument

Henderson, K.C., for the Crown: No provocation shall render homicide excusable: see Crankshaw's Criminal Code, 5th Ed., 313. There is no direct statement as to reasonable doubt but the charge indicates to the jury that the matter is in its hands. It is not imperative: see *Rex* v. *Fouquet* (1905), 10 Can. Cr. Cas. 255; *Reg.* v. *Riendeau* (1900), 3 Can. Cr. Cas. 293; *Rex* v. *Schurman* (1914), 23 Can. Cr. Cas. 365. The question of reasonable doubt does not arise when the sanity of the prisoner is in question: see Crankshaw's Criminal Code, 5th Ed., 37; *Clark* v. *Regem* (1921), 35 Can. Cr. Cas. 261.

Maclean, in reply: The jury is entitled to assistance from the judge on both facts and law: see *Rex* v. *Finch* (1916), 12 Cr. App. R. 77.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant was convicted of the murder of his wife. He sets up several grounds of appeal, based on non-direction. He says that the jury were not properly directed in respect of the defence of insanity, of drunkenness,

COURT OF APPEAL

1925

Jan. 6.

REX v. PAYETTE

of provocation, and that they were not directed that the appellant was entitled to the benefit of the doubt.

I can find no failure on the part of the learned judge to properly direct the jury on the issue of insanity, nor on that of drunkenness. It was contended by the appellant's counsel that the following was not a sufficient direction:

> "If the accused person . . . . is merely so drunk as to put himself in a passion, drunkenness would be no excuse. He must have been so drunk as to be incapable of knowing what he was doing."

It must be conceded that since the decision in *Rex* v. *Beard* (1920), 89 L.J., K.B. 437, intoxication to a degree which renders a person incapable of forming the intention to commit the crime, would entitle a jury to convict of manslaughter only. It also appears, p. 447, of said report, that a direction such as the one complained of, is equivalent to one that the accused, in order to bring about that result, must satisfy the jury that at the time of the homicide he was so drunk as to be incapable of forming an intention to commit murder.

MACDONALD, C.J.A.

The next complaint is that the learned judge failed to direct the jury on the question of provocation. No case of provocation was made at the trial, nor attempted to be made. It is raised in the present appeal on the evidence of the witness Ashdown, to whom the appellant related the occurrence. Ashdown, giving evidence on behalf of the Crown, said that the accused told him that he was sitting reading a newspaper, and one of his little girls was talking back to him, or "cheeking" him, and that he told her she should not talk that way to her father, and that looking around he saw his wife a short distance behind him laughing and apparently egging the girl on, whereupon he killed her.

Our law in respect of provocation differs from that of England. The Criminal Code of Canada, section 261, provides that culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who caused death does so in the heat of passion, caused by sudden provocation, and declares that any wrongful act or insult of such a nature as would be sufficient to deprive an ordinary person of the power of self-control, may constitute provocation. In other words, it

goes beyond the common law in this, that there may be provocation by words alone. That provocation, however, must be of such a nature as to be sufficient to deprive an ordinary person of the power of self-control. Provocation is a defence the burden of which lies upon the accused, and in the circumstances above set out, I do not think there was any obligation upon the learned trial judge in his charge to make any reference to the alleged provocation. Moreover, if the statement above mentioned were in evidence under oath, it does not sufficiently describe what the provocation was so as to enable a jury to say whether it was such as would be provocation to an ordinary person. The talking back or "cheeking" by the child may have been mere banter, and the laughter of the mother in no way disrespectful to the appellant. There was nothing upon which the jury could be asked to pass.

The next ground of appeal is based on the fact that the learned trial judge did not tell the jury that the appellant was entitled to the benefit of the doubt. One might ask—what doubt? In a trial for murder where the prisoner denies the commission of the crime, the onus remains all through the trial upon the prosecutor, and when the case goes to the jury, the question is, has the Crown discharged the onus? In such a case it is the duty of the judge, with proper explanations, to tell the jury that if they have any reasonable doubt as to the guilt of the accused, they must give him the benefit of that doubt. But this is not that case. The homicide was proved and was not denied, and if at that stage of the trial no evidence had been given on behalf of the appellant, the learned judge would then have been obliged to tell the jury that they must bring in a verdict of wilful murder; he would tell them, as a direction of law, that because the homicide being beyond dispute, and the presumption being that the accused intended the natural consequences of his act, the only thing the jury could do would be to render the verdict of guilty of wilful murder.

In what remained, then, of the trial, the onus admittedly was upon the appellant in respect of all the defences set up, and in respect of each defence the proper direction would have been that the appellant must prove it to the jury's satisfaction, failing

COURT OF APPEAL

1925

Jan. 6.

REX v. PAYETTE

this, the verdict would be the same as if these defences had not been made, *viz.*, wilful murder.

Counsel for the appellant referred us to the decision of the Supreme Court of Canada in *Clark* v. *Regem* (1921), 35 Can. Cr. Cas. 261. Inferentially that case is against the appellant. There the trial judge directed the jury that the onus of proving insanity was upon the accused, which was the proper direction; and that unless he proved this to their satisfaction beyond a reasonable doubt, they ought to find him guilty of the graver offence. The Court held, that he was in error in directing them that they must find the fact beyond reasonable doubt; that the accused was entitled to have the jury instructed that if he had proved to their satisfaction that he was insane at the time the deed was committed, that was sufficient; that he must prove insanity, but not that he must prove it beyond a reasonable doubt.

The decision of the Privy Council in *Doe dem. Devine* v. *Wilson* (1855), 10 Moore, P.C. 502, was relied upon in support of the submission that there was one rule as to onus in civil,

MACDONALD, C.J.A.

and another in criminal cases. That was a civil case in which the plaintiff founded a claim of title upon a deed. It was contended on the part of the defendant that the deed was a forgery. The Privy Council held that the onus of proof of the genuineness of the deed was upon the person relying upon it, and not upon the defendant who alleged it to be a forgery. For the purpose of illustrating this point the Judicial Committee instanced a criminal prosecution for forgery, in which the onus of proof of forgery would be upon the Crown. What bearing that case has on the present one I am at a loss to see. It states what has never been disputed, that in a criminal prosecution the Crown must prove the fact alleged, *i.e.*, the forgery. It also decided that he who relies upon a deed must prove that it is a real deed—that it is what is purports to be, *viz.*, a genuine document and not a forgery. The illustration would be quite as effectual if they had said that a party in a civil case who seeks a declaratory judgment, that a deed affecting his property was a forgery, must prove it. It does not decide that there is one rule in respect of onus at common law in civil and another in criminal cases.

The appellant having failed to prove to the satisfaction of the jury the absence of the presumed intent, there was nothing to direct them upon in respect of reasonable doubt, unless it was that if they had any reasonable doubt that the appellant killed his wife they should give him the benefit of it. Such a direction would have been absurd, since the homicide was not denied.

The submission that there may be a doubt on the whole case as presented by the Crown and the defence, which the jury should in all cases be directed to give the benefit of to the accused, is unsound, as the facts of the present case demonstrate. It is only when there is a doubt about that which the Crown must prove that such a direction is required, and when there is no doubt that such a direction would be inappropriate and would but lead to confusion, since it could not properly be applied to a presumed intention, or to the defences upon which the onus of satisfying the jury rests upon the accused.

MACDONALD, C.J.A.

MARTIN, J.A.: This is an appeal from the conviction of the appellant, at the Kamloops Fall Assizes, 1924, for the murder of his wife at Notch Hill on Saturday the 11th of October in that year. It appears that, owing to trouble occasioned by his drinking habits, the prisoner had not been living with his wife for some six years, but about two or three weeks before the day of the killing he had come up from Vancouver, looking towards a reconciliation, and stayed at the hotel that his wife was keeping at Notch Hill, but during his stay he had been unable to control his drinking habits, and consequent quarrelling with his wife, so it was finally arranged that he should return to Vancouver on Friday, the 10th, by the morning train, and his wife gave him $20 for that purpose, but the train being late he went with one Bishop to the Government liquor store at Salmon Arm, about 20 miles away, where they obtained a supply of whisky and also pure alcohol, with the result that they returned to Notch Hill about five that afternoon in a drunken condition, the appellant particularly so, and "wild looking," as one of the children described his appearance; one of the witnesses who knew him well testified that "it had a very severe effect upon

MARTIN, J.A.

COURT OF APPEAL

1925

Jan. 6.

REX v. PAYETTE

him when he was liquored, he went wild." That evening he went to sleep in the hotel and the next morning, about noon, he went to George Wanik, who had driven him with Bishop to the said Government liquor store, and asked him for a drink, particularly desiring the alcohol bottle that the party had got the previous afternoon, but it had been taken away by Bishop and Wanik did not, he says, give him any liquor. The accused, however, that morning purchased two bottles of lemon extract (containing a very high percentage of alcohol, probably 90%) from a storekeeper and he doubtless also, according to the evidence, got more bottles from the kitchen supplies and drunk their contents (as was his habit, in default of ordinary liquor, or alcohol which of late he preferred), because one of his daughters, Sophie, found him in a drunken condition lying on the lounge, red in the face and mumbling in his speech, and after being roused for his dinner he returned to his bedroom. The next event of consequence was sounds of quarrelling with his wife in the kitchen and then, about 4 o'clock, the sound of a scream followed by the appearance of the wife outside the house running away from the prisoner, who, armed with an iron poker, was pursuing her and calling out "run, you whore," and overtook her and struck her with it several times so that she died almost immediately.

MARTIN, J.A.

The only first hand account of what happened preceding the killing is given by the prisoner who went to the office of the C.P.R. station agent, Ashdown, almost immediately afterwards and said, as Ashdown narrates:

> "He told me that he was sitting reading the paper, sitting in a chair reading the paper, and one of his little girls—I can't just remember the name that he mentioned then—was talking back to him, or cheeking him, and he told her she should not talk to her father like that, and he said he looked around and saw his wife standing a short distance behind him laughing and apparently egging the girl on. He said, 'Ashdown, by God, I picked up the poker and I killed her.' I asked him was he sure she was dead. He replied yes. I gave him a chair to sit down in. First I was going to let him sit in my office, but on second consideration I put him in the baggage room."

It appears that since many years, when the prisoner became inflamed with drink, his jealousy of his wife (which was an unfounded delusion of infidelity) was greatly aroused, leading

to violent quarrels, and doubtless the said foul expression he used when pursuing her had reference to that state of mind, which would be greatly accentuated by the alcohol and extracts he had taken, and very probably had some reference to her having gone the evening before with a number of neighbours to a card party at the house of a farmer near by, a resident of some 21 years, and who spoke well of the accused's habits when he was not in liquor, as did several other witnesses: the deceased was about 50 years of age, and the prisoner 65 at the time of the killing.

The defence set up at the trial was temporary insanity under section 19 of the Criminal Code, caused by intoxicating liquor, and expert medical testimony was adduced in support thereof (especially as to the speedy and poisonous effect of the said alcohol upon the prisoner in particular) as well as that of other lay witnesses; and during the argument at this Bar we ruled that no objection could properly be taken to the way in which that question, in its restricted sense, was put to the jury. But it is objected at this Bar that there was evidence of provocation which would reduce the killing to manslaughter under section 261 of the Code, yet that question was not left to the jury; and also that the learned judge entirely omitted to charge the jury upon the point of the existence of reasonable doubt and, if so, that then the accused should have the benefit of it.

MARTIN, J.A.

Taking up the second objection first, the charge is silent upon that important point, and after a proper direction, as aforesaid, upon the question of insanity, it merely concludes as follows:

"Does it occur to you gentlemen that I can be of any further assistance to you? You, doubtless, in common with every person else within the sound of my voice have a sympathetic feeling towards the accused for finding himself in this position. Then again you have your duty to perform in the words of your oath which men are bound to follow. You are required to give a true verdict according to the evidence. You may retire."

It is urged upon us that the "sympathetic" reference does not supply the grave deficiency as regards the benefit to the accused of reasonable doubt. Many cases were cited on the point, the leading one in Canada, and binding on us, being the decision of the Supreme Court in *Clark* v. *The King* (1921), 61 S.C.R. 608; (1921), 2 W.W.R. 446, wherein nearly all

COURT OF APPEAL

1925

Jan. 6.

REX v. PAYETTE

the relevant cases are reviewed, and it was decided that where a defence of insanity is pleaded to a charge of murder it is misdirection to charge the jury that insanity must be proved beyond a reasonable doubt.

That case is not exactly on all fours with this, the complaint here being that nothing was said about reasonable doubt. But Mr. Justice Anglin (pp. 624-5) after pointing out the difference between English law and ours created by sections 19 and 966 of the Code, says, pp. 627-8:

"With Mr. Justice Beck [in *Rex* v. *Anderson* (1914), 7 Alta. L.R. 102] (p. 117) I am convinced that the expression 'proven beyond reasonable doubt' has become consecrated by long judicial usage as pointing to an amount or degree of proof greater than is imported by the word 'proved' standing alone or by the expression 'established to the satisfaction of the jury,' or even by 'clearly proved'—certainly greater than is required to discharge the burden of proof in civil matters. That learned judge quotes an extract from the judgment delivered by Sir John Patteson in *Doe d. Devine* v. *Wilson* [(1855)], 10 Moore, P.C. 502, at page 531, and a passage from Taylor on Evidence (par. 112) as illustrating this difference. But the actuality of the distinction in law between an instruction that the existence of a fact or condition must be proved and that it must be proved beyond a reasonable doubt is perhaps best tested by the inquiry whether an accused would not have ground for complaint if the trial judge having charged that the jury must be satisfied of his guilt—that it is clearly proven—should refuse to direct them that they must be so satisfied beyond reasonable doubt. I put that question to counsel for the Crown during the argument. It was not answered. I find it was anticipated by Mr. Justice Stuart in *Anderson's* case (pp. 113-4). With that learned judge 'I think the rule is well established that an accused person is entitled to have such a direction given,' accompanied by an explanation of what is reasonable doubt."

MARTIN, J.A.

And further, p. 628:

"I also agree with Mr. Justice Stuart that 'if the expression (beyond reasonable doubt) was not improper in the present case, then it inevitably follows that it is not necessary in the ordinary case,' *i.e.*, in directing the jury as to the burden of the prosecution."

Two other members of the same bench, Scott and Walsh, JJ. had agreed with this view of Mr. Justice Beck, and it is clear that if, as a matter of justice to the accused, the direction should have been given, it is the duty of this Court to see that the accused is not deprived of his rights because his counsel omitted to ask the trial judge to preserve them—*Rex* v. *Hopper* (1915), 2 K.B. 431. Furthermore, Mr. Justice Duff, at p. 618, says:

"The law presumes innocence but it prescribes also a supplementary rule,

namely, that in criminal proceedings, at all events, the presumption of innocence is not rebutted unless the evidence offered for that purpose demonstrates guilt in the sense of excluding to a moral certainty all hypotheses (not in themselves improbable), inconsistent with guilt.

"The precise question to be determined is whether the same rule governs where the presumption to be overcome is a presumption of sanity."

And he goes on to consider that "precise question" with the result, as I understand him, that there is no distinction in the application of the rule, saying that he is unable to think of any reason (p. 619)

"why the general principle should not be adhered to that in judicial proceedings conclusions of fact may legitimately be founded upon a substantial preponderance of evidence. I have moreover no doubt that the expressions which have for generations been used by judges in instructing juries in criminal proceedings as to the degree of certainty justifying a conviction (as 'the prisoner must be given the benefit of the doubt,' 'guilt must be established to the exclusion of reasonable doubt'), are expressions which have passed into common speech; and that a Canadian jury receiving instructions couched in similar terms as to the probative weight of the evidence necessary to justify a given conclusion would in the great majority of cases attach to these expressions the significance which they ordinarily bear and are intended to bear when used in relation to the presumption of innocence. A jury being instructed that a finding of insanity would only be proper if they should be satisfied to the exclusion of all reasonable doubt upon that point, would not, I am quite sure, understand that an affirmative conclusion would be justified by proof consisting only of a substantial preponderance in the weight of evidence."

MARTIN, J.A.

In that view Mr. Justice Brodeur agreed, and it follows therefrom, in my opinion, that if upon the whole question of the guilt or innocence of an accused it had not been established to "a moral certainty that all hypotheses (not in themselves improbable) inconsistent with guilt" had been excluded, then the accused "must be given the benefit of the doubt," and the absence of any such instruction herein, I think (after again perusing the evidence), clearly occasioned a substantial wrong to the accused. Such being my view I, in accordance with ancient precedent, express no opinion on the other ground of appeal, it not being necessary to do so, bearing in mind the apt observation of Lord Justice Vaughan Williams in *Maass* v. *Gas Light and Coke Company* (1911), 2 K.B. 543 at p. 548, *viz.*:

"The rule adopted generally by judges of old, not to decide anything more than was necessary to decide the case before the Court, was a wise and astute rule. . . . . ."

It follows that there should be a new trial.

COURT OF APPEAL

1925

Jan. 6.

REX v. PAYETTE

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I am in entire agreement with what my brother MARTIN has said. At the same time I wish to state that I am clear upon the point that an error in law took place with reference to the non-direction as to provocation. The prisoner here was a parent, the child was denying his authority; that is the statement of the prisoner which the Crown put in, and which, I think, must be accepted in its entirety; as stated by the prisoner, upon hastily turning around he noticed that his wife was "egging" the child on to deny his authority. It seems to me that that was a very serious thing to do, and it is difficult to set a limit on what may be the result of such a class of interference. In this case the wife, who was "egging" on the child to dispute the father's authority, was taking a great risk, and in the heat of the moment this uxoricide may be said to have taken place. In the circumstances, it is my opinion that the happening came within the purview of the Criminal Code, and might be held to be provocation.

New trial ordered, Macdonald, C.J.A. dissenting.

COURT OF APPEAL

1925

Jan. 6.

GREEN v. GORDON

GREEN v. GORDON.

Motor-vehicles—Collision at intersection of street and lane—Negligence—Excessive speed—Breach of—By-law—Verdict of jury.

The plaintiff, while riding a motor-cycle easterly in the afternoon in a lane between Hastings and Pender Streets, Vancouver, entered Homer Street and intending to turn to his right (south), looked to his left and saw nothing. On reaching the curb he commenced to turn to his right and when about two-thirds of the way towards the middle of the road he was struck by the defendant's car going south on Homer Street and was knocked over sustaining severe injuries. In an action for damages the jury found the defendant guilty of negligence and assessed damages for which judgment was entered.

Held, on appeal, affirming the decision of MURPHY, J., that on the evidence the jury was justified in concluding that excessive speed or want of care on the part of the defendant caused the accident and the appeal should be dismissed.

Statement APPEAL by defendant from the decision of MURPHY, J. of the

27th of June, 1924, and the finding of a jury, in an action for damages for negligence the jury having found for the plaintiff for $3,000. The facts are that on the 25th of October, 1923, at about 4 o'clock in the afternoon, the plaintiff was riding a motor-cycle going east in the lane between Hastings and Pender Streets, and on coming out of the lane on to Homer Street, intending to turn to his right (south) up the street, he turned gradually and was out about two-thirds of the way from the curb of the sidewalk to the middle of the road when he was struck on the left leg by the bumper of the defendant's McLaughlin car as he was driving up Homer Street in a southerly direction and thrown across the street to the east side of Homer Street against another car standing against the curb on that side, breaking his leg and sustaining other injuries that kept him from work for one year. Judgment was given for $3,000.

Statement

The appeal was argued at Vancouver on the 24th and 27th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: In coming out of a lane one must look for traffic and we say the plaintiff was guilty of contributory negligence: see *Milligan* v. *B.C. Electric Ry. Co.* (1923), 32 B.C. 161 at pp. 163 and 165; *Monrufet* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 91 at p. 92; *Carter* v. *Vadeboncoeur* (1922), 2 W.W.R. 405. On the effect of the by-law see *Leech* v. *Lethbridge* (1921), 3 W.W.R. 319; *Bloomfield* v. *T. Alexander and Sons* (1923), 32 B.C. 110.

Argument

C. L. McAlpine (*D. J. McAlpine,* with him), for respondent: A person need not look more than once: see *Ramsay* v. *Toronto R.W. Co.* (1913), 30 O.L.R. 127; *The Ottawa Electric Railway Co.* v. *Booth* (1920), 63 S.C.R. 444; *Wallace* v. *Viergutz* (1920), 2 W.W.R. 333. Breach of a by-law is evidence of negligence: see *Myall* v. *Quick* (1922), 1 W.W.R. 1 at p. 4. The rule that the setting aside of a verdict should only be in exceptional circumstances is still the law: see *Commissioner for Railways* v. *Brown* (1887), 13 App. Cas. 133.

Farris, in reply.

Cur. adv. vult.

COURT OF APPEAL

1925

Jan. 6.

GREEN v. GORDON

6th January, 1925.

MACDONALD, C.J.A.: The plaintiff, who was riding a motor-cycle on a public street, was struck by a motor-car driven by the defendant. The case was tried before a jury, and a verdict rendered for the plaintiff for $3,000 damages. The defendant appeals on the ground that the verdict was against the weight of evidence, and was perverse, also against the finding of contributory negligence.

MACDONALD, C.J.A.

I think there is ample evidence to support the jury's findings on all material points, and that the appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: I agree. Despite the almost convincing way in which Mr. *Farris* presented the appellant's case, I find it impossible to say that there were not facts to go to the jury sufficient to support the verdict.

MCPHILLIPS, J.A

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

MACDONALD, J.A.

MACDONALD, J.A.: The plaintiff, on coming out from the alley, looked to the left and noticed that the way was clear for such a distance as would ensure safety and procure respect for his rights if due care had been exercised by the defendant. True, if he had looked again at a later stage he might have avoided the accident, but he was not obliged to do so.

The relative distances of the motor-cycle and the defendant's motor-car from the point of collision at the moment the plaintiff looked to see if he might emerge with safety, were such that excessive speed or want of care on defendant's part must have caused the accident, at all events, the jury were justified in so believing. Further, in the distance referred to, the defendant, even if the plaintiff displayed negligence (and the jury were justified in thinking otherwise) could have avoided the accident by stopping or turning aside, assuming his car was under proper control. It is apparent, therefore, that all the inferences from these facts justified the verdict of the jury.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Farris, Farris, Emerson, Stultz & Sloan.*

Solicitors for respondent: *McAlpine & McAlpine.*

REX v. IACI.

Criminal law—Keeping liquor for sale—Search warrant—Liquor found on premises—Occupants arrested without a warrant—Objection taken to jurisdiction of magistrate—Appeal—B.C. Stats. 1921, Cap. 30, Sec. 26.

Police officers entered the premises of accused under a search warrant and after finding a quantity of liquor in both the dwelling-house and the garage they arrested the occupant without a warrant. Upon being brought before the magistrate on a charge of keeping liquor for sale accused took the objection that having been arrested without a warrant the magistrate had no jurisdiction to hear the charge. He was convicted on the charge and an application for release on *habeas corpus* was refused.

Held, on appeal, affirming the decision of MORRISON, J., that accused was rightly convicted as jurisdiction existed in the magistrate, and the warrant being a proceeding and not a condition precedent, it is immaterial whether objection was taken by accused or not.

APPEAL by accused from the decision of MORRISON, J. of the 29th of April, 1924 (reported 33 B.C. 501) on appeal by way of *habeas corpus* with *certiorari* in aid from a conviction by H. O. Alexander, stipendiary magistrate for the County of Vancouver, on a charge of an infraction of section 26 of the Government Liquor Act. The accused's premises were entered by police officers under a search warrant. They found a large quantity of liquor in both the dwelling-house and the adjoining garage. Both occupants were then arrested without a warrant. Upon being charged they did not plead and counsel took the objections: (1) that having been arrested without a warrant the magistrate had no jurisdiction to hear the charge as laid; (2) that the police magistrate for the City alone and not the stipendiary magistrate had jurisdiction to hear the charge under section 245 of the Vancouver Incorporation Act, 1921; (3) that as the charge read "unlawfully did keep for sale" whereas the section of the statute reads "expose or keep for sale" there is no offence known to the common law as described in the warrant of committal. All three grounds were overruled and the application was dismissed.

Statement

COURT OF APPEAL

1925

Jan. 6.

REX v. IACI

The appeal was argued at Vancouver on the 7th and 8th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: Accused was arrested without a warrant and taken forcibly before the magistrate against his will and he refused to plead. Objection was taken to the jurisdiction and the conviction should be quashed: see *Rex* v. *Suchacki* (1923), 33 Man. L.R. 456; *Rex* v. *Marks* (1918), 26 B.C. 73; 31 Can. Cr. Cas. 257; *Rex* v. *Alberts* (1923), 42 Can. Cr. Cas. 64; *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614. There was a search warrant but the arrest was illegal: see *Rex* v. *Pollard* (1917), 29 Can. Cr. Cas. 35; *Rex* v. *Davis* (1912), 20 Can. Cr. Cas. 293; *Rex* v. *Linder* (1924), 2 W.W.R. 646; *Rex* v. *Lizotte* (1905), 10 Can. Cr. Cas. 316; *Ex parte Grundy* (1906), 12 Can. Cr. Cas. 65; *Rex* v. *McLatchy; Ex parte Wong* (1923), 3 D.L.R. 291.

Brougham, on the same side: There was one offence in the information and he was convicted of two offences: see *Reg.* v. *Farrar* (1890), 1 Terr. L.R. 306 at p. 308.

Argument

W. M. McKay, for the Crown: The magistrate had jurisdic- to try the offence. The irregularity is not a ground for quashing the conviction: see *Rex* v. *Nat Bell Liquors Ltd.* (1922), 37 Can. Cr. Cas. 129; *Harvey* v. *Hall* (1870), 23 L.T. 391; *Gray* v. *Commissioners of Customs* (1884), 48 J.P. 343; *Reg.* v. *Doherty* (1899), 32 N.S.R. 235. *Rex* v. *Suchacki* (1923), 33 Man. L.R. 456 followed *Pearks, Gunston & Tee, Limited* v. *Richardson* (1902), 1 K.B. 91; *Blake* v. *Beech* (1876), 1 Ex. D. 320 and *Dixon* v. *Wells* (1890), 25 Q.B.D. 249. He can be tried after illegal arrest; his remedy is a civil action: see *McGuiness* v. *Dafoe* (1896), 23 A.R. 704; *Papillo* v. *The King* (1911), 20 Can. Cr. Cas. 329; *In re Thompson* (1909), 14 B.C. 314; *Potter* v. *Block* (1902), 2 S.R. (N.S.W.) 325. If wrongly taken before the magistrate he is only entitled to an adjournment: see *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614; *Reg.* v. *Shaw* (1865), 34 L.J., M.C. 169.

Farris, in reply: In the New South Wales case the accused was legally arrested. Further cases on illegal arrest without

a warrant are *Reg.* v. *Hughes* (1879), 48 L.J., M.C. 151 at pp. 162 and 166; *Ex parte Cohen* (1902), 8 Can. Cr. Cas. 312; *Re Walter A. Dickey (No. 1)* (1904), *ib.* 318; *Re Walter A. Dickey (No. 2)*, *ib.* 321.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: The appeal is from an order of MORRISON, J., refusing to make absolute an order for the release of accused on *habeas corpus*.

The appellant was tried for an offence against the Government Liquor Act; he was arrested without a warrant after a search of his premises had been made under a search warrant, and liquor found upon them. He was charged before the magistrate, either by information laid after the arrest, or verbally, with the offence of which he was afterwards convicted. His counsel took the objection that he had been illegally brought before the Court, and that therefore the magistrate had no jurisdiction to proceed. There is no complaint that he was not given an adjournment and allowed sufficient time to prepare his defence. The sole objection now is that the magistrate had no power to try him in the premises.

The Canadian cases are in sharp conflict on this question. The New Brunswick Appellate Court in *Rex* v. *McLatchy; Ex parte Wong* (1923), 3 D.L.R. 291, though objection was taken at the trial, followed *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614. The Court of Appeal in Manitoba, in *Rex* v. *Suchacki* (1923), 33 Man. L.R. 56, while not disputing the authority of *Reg.* v. *Hughes,* held that where the accused had objected, as he had there, to the illegality of his arrest, the magistrate had no jurisdiction. These two Canadian cases fairly represent the conflict of opinion in the Canadian Courts.

In *Reg.* v. *Hughes* the prisoner was arrested on an illegal warrant, taken before justices and charged with an offence which they had jurisdiction to hear. No objection was made by the prisoner, probably because, as suggested in the judgment of Hawkins, J. at p. 625, he was not aware of the illegality of his arrest. The trial proceeded and the conviction and other proceedings were afterwards brought up on *certiorari*. The

COURT OF APPEAL

1925

Jan. 6.

REX v. IACI

Court consisted of ten judges, who held (Kelly, C.B. dissenting) that the justices had jurisdiction, notwithstanding the irregular manner in which the accused was brought before them. They held that an information and warrant were not conditions precedent to jurisdiction, but were procedure and that in a case such as that was, the right of the prisoner was to demand an adjournment giving time to prepare his defence.

It is trite law that a Court cannot be given jurisdiction by consent. There is no question here of the magistrate's general jurisdiction to try the person accused. The contention is that having been brought before the magistrate illegally, he had no jurisdiction to try him. This can only be sound if it be held that an information or a warrant is a condition precedent to jurisdiction. If not, then the consent to proceed or the objection to proceeding is not a matter which can possibly affect jurisdiction, which is the only matter with which we are concerned.

I think it useful to refer to some of the opinions of the learned judges in *Reg.* v. *Hughes.*

MACDONALD, C.J.A.

Lopes, J. said that a warrant was a mere matter of procedure and had nothing to do with the jurisdiction of the justices, and that it was immaterial whether the accused came into Court voluntarily or was taken there by force.

Hawkins, J. said that process was not an essential to jurisdiction, that it was but the proceeding adopted to compel the appearance of the accused. He further pointed out that the accused might, if he had known of the illegality of his arrest, have asked the judge to release him, or asked for an adjournment to enable him to prepare for his defence, but that a refusal would not have destroyed the jurisdiction of the justices to put him on his defence *instanter.* He also affirms what was said by Lopes, J., that the party being before the magistrate and then charged with an offence, the magistrate would have jurisdiction to proceed with the charge.

Manisty, J. refers to proceedings to bring an accused before justices as directory only, and as not affecting the jurisdiction of the justices.

Huddleston, B. said the arrest of the accused was illegal, and that if the objection had been taken to the magistrate, he might have entertained it.

Denman, J. also speaks of the fact that the accused was before the magistrates, and that he might then be charged and the trial proceeded with.

In *Dixon* v. *Wells* (1890), 25 Q.B.D. 249, a case like the present, where objection had been taken, Coleridge, C.J. seems to have had some doubt as to whether or not the taking of the objection in time did not differentiate the case before him from *Reg.* v. *Hughes,* but he finally came to the conclusion that he could not found his judgment upon that circumstance. There is a suggestion in his judgment that the judges in *Reg.* v. *Hughes* had unnecessarily assumed that if the two conditions precedent, that of the presence of the accused and of jurisdiction over the offence, were fulfilled, his protest would be of no avail.

The conclusion I would draw, with great respect, is that the judges in *Reg.* v. *Hughes* decided the case on the broader ground, *viz.,* that the jurisdiction existed in the justices and that the warrant being directory and not a condition precedent, it was immaterial whether objection was taken or not.

MACDONALD, C.J.A.

If a warrant were a condition precedent, I could understand why an objection to its absence would prevent the jurisdiction of the magistrate from coming into existence, but we have seen above that it is not a condition precedent, therefore the objection in any view of it could not affect the jurisdiction of the magistrate.

I would dismiss the appeal.

The case of Frank Iaci was, by agreement of counsel, made to depend upon the decision of this case. The appeal in that case is therefore also dismissed.

MARTIN, J.A.: I agree in dismissing the appeal.

MARTIN, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. I would also dismiss the appeal in the case of Frank Iaci.

MCPHILLIPS, J.A.

MACDONALD, J.A.: This is an appeal from an order of MORRISON, J., made the 29th of April, 1924, dismissing the application of the appellant, Peter Iaci, for an order absolute for a writ of *habeas corpus* and a writ of *certiorari* in aid,

MACDONALD, J.A.

COURT OF APPEAL

1925

Jan. 6.

REX v. IACI

directed to the keeper of His Majesty's gaol at Oakalla Farm, where the appellant was sentenced to six months' imprisonment by H. O. Alexander, Esquire, stipendiary magistrate for the County of Vancouver, for unlawfully keeping liquor for sale contrary to section 26 of the Government Liquor Act.

The principal ground urged before us for reversing the order of MORRISON, J. and quashing the conviction was, that the convicting justice had no jurisdiction to try the accused as he was brought before him without a warrant for his arrest being obtained. The accused, by his counsel, at the first opportunity, raised the objection and protested against the assumption of jurisdiction by the magistrate. The objection was overruled and a conviction recorded. It is conceded that no warrant for his arrest was issued, nor is it contended that the charge was one in which an arrest might be made without a warrant. The respondent contends, however, that no matter how the accused was brought before the magistrate, whether with or without a warrant, voluntarily or involuntarily, if the offence charged was within his jurisdiction, the conviction is valid.

MACDONALD, J.A.

Was the jurisdiction of the magistrate ousted under the circumstances outlined? Judicial opinion has not been uniform on the point. All jurisdiction is acquired from the Crown, and of course through the Crown by statute.

Mayor, &c., of London v. *Cox* (1866), L.R. 2 H.L. 239 at p. 254. If such is its origin there is no warrant in principle for the suggestion that a jurisdiction so acquired can be taken away by the action of some one who fails to comply with one of the methods for bringing a party before the Court, or who adopts illegal methods. Neither can it be said that jurisdiction so acquired could be lost simply because the accused objects or protests against the magistrate assuming jurisdiction.

Broadly speaking, there is no wrong without a remedy, but the remedy must be appropriate to the wrongful act. Actions lie for unlawful arrest; or for failing to follow a course required by law. The magistrate also, by adjournment or otherwise, may take measures to prevent prejudice to the accused. If he does not do so the proceedings may be set aside on appeal, but not on the ground of want of jurisdiction. It is going too

far to say that jurisdiction conferred on the magistrate from another source is taken away because a third party fails to observe a process required by law in bringing the alleged offender before the Court. Would it follow that if under these circumstances the accused was tried and acquitted, a new information might be laid and the plea of *autre fois acquit* could not be raised? A statute, of course, can make the compliance with certain processes a condition precedent to jurisdiction, but that is only another way of saying that jurisdiction may be conferred or taken away by statute. It follows that, as Cave, J. pointed out in *Reg.* v. *Bradley* (1894), 70 L.T. 379 at p. 381:

"Absence of jurisdiction only arises when he has no power to decide in the matter at all."

It was argued that *Reg.* v. *Hughes* (1879), 48 L.J., M.C. 151 is not necessarily an authority favourable to the respondent, because expressions there found favourable to their contention were not necessary for the decision of the case. I cannot agree. It was a strong Court of nine judges. It is true, the issue to be tried was whether or not Hughes was guilty of perjury on the hearing of a charge that one Stanley had obstructed a police officer in the discharge of his duty. The defence was that the proceedings against Stanley were *coram non judice* by reason of an illegal arrest, and that therefore perjury would not lie. It is also true that special statutes entered into the decision of the case. The further point, however, *viz.*, that of the magistrate's jurisdiction in view of the illegality of the warrant was also an issue. Lopes, J. said at p. 156:

MACDONALD, J.A.

"I think the warrant in this case was mere process, for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that, whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force or under an illegal warrant, is immaterial."

That is one of the grounds of the decision, and it was clearly one of the issues upon which the decision depended. Hawkins, J., who delivered the principal judgment, points out that,

"The magistrate who issued the warrant, and the defendant who, with knowledge of the illegality, executed it, were liable to an action for false imprisonment."

That, of course, is *obiter*, but it shews the only logical result which could possibly follow. The learned judge addresses himself to the question as to whether or not the justices had juris-

COURT OF APPEAL

1925

Jan. 6.

REX v. IACI

diction, and finds they had, notwithstanding the illegality of the warrant. At p. 157 he says:

"The illegality of the warrant and of the arrest did not, however, affect the jurisdiction of the justices to hear the charge, whether that hearing proceeded upon a valid verbal information followed by an illegal process, or upon an information for the first time laid in the presence of Stanley, upon which he was then and there instantly charged."

In the case of *Dixon* v. *Wells* (1890), 25 Q.B.D. 249, where a protest was entered by the accused, the judgment of Coleridge, C.J., who presided in the *Hughes* case, makes it clear that jurisdiction was lacking because the statute made certain procedure a condition precedent. A limit to the magistrate's authority was prescribed by statute. Referring to the *Hughes* case he states that it appeared to be assumed there, though not necessary to the decision of the case, that a protest by the accused would not have altered the decision.

MACDONALD, J.A.

I cannot agree with the reasoning in *Rex* v. *Suchacki* (1923), 33 Man. L.R. 456, and in *Rex* v. *Pollard* (1917), 13 Alta. L.R. 157. The contrary decision in *Rex* v. *McLatchy; Ex parte Wong* (1923), 40 Can. Cr. Cas. 32, based largely on the decision in *Reg.* v. *Hughes,* is in harmony with the principles I have referred to.

I would therefore dismiss the appeal.

I would also dismiss the appeal in *Rex* v. *Frank Iaci,* where the facts are similar.

Appeals dismissed.

REX v. BOVERO.

COURT OF APPEAL

1925

Jan. 6.

REX v. BOVERO

Criminal law—Sale of liquor—Accused arrested on warrant—Complainant not examined on issue of warrant—Disclosed on hearing—Objection to jurisdiction then taken—B.C. Stats. 1921, Cap. 30, Sec. 26; 1915, Cap. 59, Sec. 14.

Upon an information being laid against the accused for the sale of intoxicating liquor a warrant was issued and he was taken into custody. On appearing before the magistrate the charge was read and he pleaded "not guilty." Evidence was then taken and it was disclosed that neither the complainant nor any one on his behalf was examined by the justice of the peace who issued the warrant for arrest. Counsel for accused then took objection to the magistrate's jurisdiction on the ground that there had been no proper information upon which a warrant could issue. Upon the conviction of accused an appeal by way of case stated was dismissed.

Held, on appeal, affirming the decision of MORRISON, J., that under section 14 of the Summary Convictions Act it is only when the justice of the peace considers it advisable or necessary that he should hear witnesses, and the appeal should be dismissed.

APPEAL by accused from the order of MORRISON, J. of the 17th of September, 1924, dismissing the appeal by way of case stated from a conviction by H. C. Shaw, Esquire, police magistrate, Vancouver. The case stated was as follows:

"On the 13th of May, 1924, an information was laid by one J. C. Barr, under oath, who said that he had just cause to suspect and believe, and did suspect and believe, that the said Bovero did, at the City of Vancouver on the 8th of May, 1924, sell intoxicating liquor to him, J. C. Barr, contrary to section 26 of the Government Liquor Act, 1921, and amendment Acts. A warrant for the arrest of Bovero was issued by a justice of the peace and said Bovero was arrested and taken into custody on the said 13th of May when he perfected bail. The case came on for hearing on the 14th and was remanded from the 14th until the 22nd of May at the request of counsel for the defence and on the 22nd of May the charge being read to the said Bovero, he pleaded 'not guilty.' Evidence was thereupon taken and it was disclosed by witnesses called for the Crown that neither the complainant nor anybody on his behalf was examined by the justice of the peace who issued the warrant for the arrest of the accused. Immediately this fact became known counsel for the defence raised the point that I had no jurisdiction as there had been no proper information upon which a warrant could issue. I thereupon ruled against the contention and found the accused guilty of the offence whereof he had been charged. Counsel for the said Charlie Bovero desires to

Statement

COURT OF APPEAL

1925

Jan. 6.

REX v. BOVERO

question the validity of the said conviction on the ground that it is in excess of jurisdiction.

"The question submitted is: Was I right in holding that I had jurisdiction to proceed with the hearing of this case after objection by counsel as to the validity of the warrant of arrest?"

The appeal was argued at Vancouver on the 9th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Sloan, for accused: The question is as to the validity of the warrant of arrest as the justice of the peace did not examine the complainant before issuing the warrant. The information was insufficient in law to give the magistrate power to issue his warrant without examining the complainant as to his information and belief: see *Ex parte Boyce* (1885), 24 N.B.R. 347. Under the common law there was authority to arrest without examination: see *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614; *Blacklock* v. *Primrose* (1924), 3 W.W.R. 189; see also *Ex parte Grundy* (1906), 12 Can. Cr. Cas. 65 at p. 67; *Ex parte Coffon* (1905), 11 Can. Cr. Cas. 48. He raised objection as soon as he knew the warrant was issued without examination which relieves him of the charge that he submitted to the jurisdiction: see *Dixon* v. *Wells* (1890), 25 Q.B.D. 249; *Rex* v. *Wessell* (1924), 34 B.C. 119. The strictest regularity must be observed: see *Rex* v. *Kilmartin* (1923), 33 B.C. 151.

Argument

W. M. McKay, for the Crown: The question of waiver is much in point. In going on with the trial he cannot raise this point: see *Rex* v. *Pinder* (1923), 40 Can. Cr. Cas. 272 at p. 273; *Rex* v. *Tey Shing* (1920), 51 D.L.R. 173; *Rex* v. *Kostich* (1919), 31 Can. Cr. Cas. 407. These cases shew he has submitted to the jurisdiction and he cannot now raise the question. The moment he pleads he is estopped: see *Rex* v. *Suchacki* (1923), 33 Man. L.R. 456; *Ex parte Archambault* (1910), 16 Can. Cr. Cas. 433; *Rex* v. *Kay*: *Ex parte Dolan* (1911), 41 N.B.R. 95; *White* v. *Dunning and Brown* (1915), 8 Sask. L.R. 76; *Ex parte Kane* (1915), 26 Can. Cr. Cas. 156; *Rex* v. *Mercier* (1910), 18 Can. Cr. Cas. 363; *Rex* v. *Mitchell* (1911), 24 O.L.R. 324.

Sloan, in reply: The case of *Rex* v. *Suchacki* (1923), 33 Man. L.R. 456, does not apply as in this case he does not know

of the illegal arrest: see also *Western Canada Investment Co., Ltd.* v. *McDiarmid* (1922), 1 W.W.R. 257 at p. 261; *Alderson* v. *Palliser* (1901), 70 L.J., K.B. 935.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: This case involves the same question as that involved in *Rex* v. *Iaci* [*ante*, p. 95], and my conclusion is the same as in that case.

The only distinction between the two is that in *Iaci's* case, the objection was taken before the trial proceeded, while in this it was not discovered until after the trial had commenced.

MACDONALD, C.J.A.

I would dismiss the appeal.

MARTIN, J.A.: I agree in dismissing the appeal.

MARTIN, J.A.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.: Reliance is placed by appellant on *Ex parte Boyce* (1885), 24 N.B.R. 347, and *Rex* v. *Mills*: *Ex parte Coffon* (1905), 37 N.B.R. 122, particularly the latter, as it is suggested that the language of section 559 of the Code, 1892, is similar to the words used in section 14 of our Summary Convictions Act. In the first-mentioned case, the determining statute required that the information should be substantiated by the oath or affirmation of the informant or by some witness or witnesses on his behalf before the warrant should be issued. The wording of the statute possibly justified the decision. In *Ex parte Coffon* the Supreme Court of New Brunswick were of opinion that the proper construction of section 559 of the Code led to the same conclusion as arrived at in *Ex parte Boyce*. Section 14 of our Summary Convictions Act differs from section 559 of the 1892 Code. The information was laid under oath before the magistrate. It does not follow because no examination of the complainant was made that the justice did not "hear and consider" the allegations therein contained. It is only, when he considers it advisable or necessary that he should hear the evidence of any witness or witnesses. Further, there is no distinction so far as procedure

MACDONALD, J.A.

COURT OF APPEAL

1925

Jan. 6.

REX v. BOVERO

is concerned between a summons and a warrant, and counsel at Bar conceded that unless there is a distinction the objection fails. This admission would not, of course, alter the law.

I would dismiss the appeal.

Appeal dismissed.

COURT OF APPEAL

1925

Jan. 6.

REX v. ALBERTS

REX v. ALBERTS.

Criminal law—Sale of liquor—Conviction—Error in date of commitment of offence—Appeal—B.C. Stats. 1921, Cap. 30; 1922, Cap. 45, Sec. 7.

An accused was convicted on a charge for an infraction of the Government Liquor Act on the 25th of September, 1923. The conviction recited that "he the said Sam Alberts within the space of one month last past, to wit, on the 18th day of August, 1923, did unlawfully sell a liquid known and described as beer," etc. An appeal to the County Court was dismissed.

Held, on appeal, affirming the decision of CAYLEY, Co. J., that as the date on which the offence was committed is clearly stated, the erroneous statement that it was committed within "one month" is in no way misleading and the conviction should be affirmed.

APPEAL from the decision of CAYLEY, Co. J. of the 11th of March, 1924, on appeal from the conviction of accused by the stipendiary magistrate at Vancouver on a charge under section 46 of the Government Liquor Act. It was stated in the conviction that the appellant had been charged before the justice on the 25th of September, 1923, and that the offence had been committed "within the space of one month last past" to wit: on the 18th of August, 1923. The appellant had been arrested without a warrant and objection was taken by counsel for the appellant before the magistrate before the appellant pleaded to the charge.

Statement

The appeal was argued at Vancouver on the 8th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Brougham, for accused: The learned judge was asked to

strike out "within the space of one month" but he let it stay in. The conviction does not set out the correct dates: see *Rex* v. *Rodgers* (1923), 33 B.C. 16. The accused was arrested without a warrant and objection was taken before pleading. This is the same case as *Rex* v. *Suchacki* (1923), 33 Man. L.R. 456, which should be followed: see also *Rex* v. *Miller* (1913), 25 W.L.R. 296 at p. 298; *Rand* v. *Rockwell* (1871), 8 N.S.R. 199; and *Rex* v. *Iaci* [(1925), *ante*, p. 95].

W. M. McKay, for the Crown: In this case by appealing the validity of the conviction is acknowledged: see *Rex* v. *Miller* (1913), 25 Can. Cr. Cas. 151 at p. 153. When he appeals from the magistrate he cannot then bring up the question of arrest without a warrant. By taking the appeal he gives jurisdiction. Argument

Brougham, in reply.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: One of the grounds of appeal is the same as that raised in *Rex* v. *Iaci* [*ante*, p. 95], in which judgment has just been delivered, my reasons in which apply to this appeal.

Neither is the second ground of appeal tenable. The magistrate by the conviction dated the 26th of September, 1923, says that the appellant was convicted by him for an offence committed within the space of one month last past, to wit: on the 18th of August, 1923. There is a patent error in dates in the conviction, but the date on which the offence was committed is clearly stated, and therefore the erroneous statement that it was committed within "one month" is in no way misleading, nor does it prejudice the appellant. See *Rex* v. *Rodgers* (1923), 33 B.C. 16. MACDONALD, C.J.A.

The appeal should be dismissed.

MARTIN, J.A.: I agree in dismissing the appeal. MARTIN, J.A.

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

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

Appeal dismissed.

COURT OF APPEAL

1925

Jan. 6.

HANSEN v. KILLICK.

Bailment—Hotel—Departing guest — Luggage left in charge — Change of proprietors—Subsequent delivery by clerk to wrong person—Liability.

HANSEN v. KILLICK

The plaintiff, a guest at a hotel, when departing left certain boxes for safe keeping. Shortly afterwards the proprietor selling out, the defendant took charge as proprietor and later a clerk in the hotel handed over the boxes to a person representing himself as the plaintiff's brother. When threatened with action the defendant adopted the act of the clerk as that of his own. An action for damages was dismissed.

Held, on appeal, reversing the decision of LAMPMAN, Co. J., that the only defence of the defendant's ignorance of what was done and want of authority of the clerk was nullified by the defendant's letter in which he adopts the clerk's act as that of his own and the appeal must be allowed.

APPEAL by plaintiff from the decision of LAMPMAN, Co. J. of the 30th of June, 1924. The plaintiff who had been a planter in India first came to Victoria in 1922, and stayed at the Douglas Hotel. He did some travelling about but when he came to Victoria he always stayed at this hotel. When he first went there Mrs. Paula White was the proprietress. On each occasion when he went away he would leave part of his baggage at the hotel. When there he would keep all his baggage in his room but on going away what he left would be stored in the baggage-room. On the 15th of August, 1923, the plaintiff left the hotel on one of his trips and left two boxes and a valise to be stored away for which a receipt was given him. Shortly after he left, the proprietress transferred her furniture and effects to the defendant who became the proprietor of the hotel. On the 15th of October following and while the defendant was proprietor, a man came to the hotel who registered as Rene Hansen. He claimed he was the plaintiff's brother and stated he was authorized by his brother to take the boxes away. Thereupon the clerk in charge of the baggage-room handed over the two boxes to him. Later in the same month the plaintiff returned to the hotel and asserted that he had not authorized any person to receive his boxes. An action for damages in the

Statement

sum of $803 for the loss of boxes and contents thereof was dismissed.

The appeal was argued at Vancouver on the 15th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Lowe, for appellant: The proprietor was either an express bailee or by implication. He knew the boxes were there: see *Sutherland* v. *Bell and Schiesel* (1911), 3 Alta. L.R. 497; *Sech* v. *Rodnicke* (1915), 32 W.L.R. 505; *Ultzen* v. *Nicols* (1894), 1 Q.B. 92; *Frank* v. *Berryman* (1894), 3 B.C. 506; *Brewer* v. *Calori* (1921), 29 B.C. 457. Did he take reasonable care of the goods? See *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; *Mackenzie* v. *Cox* (1840), 9 Car. & P. 632; *Reeve* v. *Palmer* (1858), 5 C.B. (N.S.) 84; *Maunsell* v. *Campbell Security Fireproof Storage, &c., Co.* (1921), 29 B.C. 424.

Hinchliffe, for respondent: There is no evidence to shew the goods were even in the defendant's possession as from the 15th of August to the 10th of October the goods were neither in the possession of the plaintiff nor of the defendant. Further, there is no evidence of the boxes handed out on the 19th of October being the plaintiff's boxes: see *Phipps* v. *The New Claridge's Hotel (Limited)* (1905), 22 T.L.R. 49; *Jones* v. *Dowle* (1841), 9 M. & W. 19; *McKay Bros.* v. *V.Y.T. Co.* (1902), 9 B.C. 37. The clerk had no authority to deliver the boxes: see Halsbury's Laws of England, Vol. 20, p. 252, par. 601; *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259; *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716 at p. 733; *Allen* v. *London and South Western Railway Co.* (1870), L.R. 6 Q.B. 65; *McGowan & Co.* v. *Dyer* (1873), L.R. 8 Q.B. 141 at p. 145. The relationship of innkeeper and guest had never arisen in this case. On the question of defendant's knowledge see *Howard* v. *Harris* (1884), 1 Cab. & E. 253; *Lethbridge* v. *Phillips* (1819), 2 Stark. 544. The clerk had no authority to hand over these goods. He could deal with the baggage of guests but the plaintiff was never a guest of the proprietor at that time.

Argument

Lowe, in reply, referred to Beal on Bailments, 1911 Ed.,

COURT OF APPEAL

1925

Jan. 6.

HANSEN v. KILLICK

p. 11; English & Empire Digest, Vol. 1, p. 396 and Vol. 3, p. 54; *Giblin* v. *M'Mullen* (1869), 38 L.J., P.C. 25; *Baker* v. *Atkins* (1910), 15 B.C. 177; *Landels* v. *Christie* (1923), 1 D.L.R. 509; *Bevan* v. *Webb* (1901), 2 Ch. 59; *Richardson* v. *The Countess of Oxford* (1861), 2 F. & F. 449.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: The plaintiff, a guest at the Douglas Hotel in Victoria, left two boxes with the then proprietor, Paula White. Subsequently Paula White transferred her furniture and effects to the defendant, who became the proprietor of the hotel. These boxes were left in the baggage-room by Paula White. Shortly after the defendant took possession of the hotel a man, registering as Rene Hansen, came to the hotel and representing himself, falsely, to be a brother of the plaintiff, said he was authorized to take the boxes away, which he was allowed to do.

The action is for the value of the boxes and their contents, the value not being in dispute.

MACDONALD, C.J.A.

The defence was that defendant knew nothing of the boxes being in the hotel, and was not in any way responsible for their safekeeping, and that if they were delivered to Rene Hansen by his servant, the servant acted outside the scope of his authority, since it was not his duty to wait upon Paula White's former guest, but upon the defendant's guests.

The alleged ignorance of the defendant is the reason for the judgment dismissing the action. But the learned County judge appears to have overlooked the defendant's letter of 10th December, 1923, written to the plaintiff's solicitors, in which he said:

> "Mr. R. Hansen who stayed with us, to whom we delivered the boxes, furnished us with an accurate description of the boxes, also their markings, and told us where they were stored before he saw them. . . . . We maintain that we used all possible prudence in this matter, and do not consider ourselves liable to compensate Mr. Hansen for his alleged losses."

The appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: I agree in allowing the appeal upon the facts before us, and only add a reference to the latest case on the

subject, *Waterbury* v. *Hyde Park Hotel, Limited* (1924), 69 Sol. Jo. 66, which confirms my view.

MCPHILLIPS, J.A.: I would allow the appeal. The learned judge, in my opinion, would have been right in the disposition of this case, *i.e.*, in dismissing same, if the respondent had not been shewn to have actually identified himself with taking over the baggage in the hotel premises. When taking possession from the previous proprietor this brought about the usual responsibility of a gratuitous bailee. Now if the case had halted there and the baggage was not forthcoming, there being no negligence upon the part of the innkeeper, the appeal would necessarily fail. But what are the facts here? The servant of the innkeeper delivered up the baggage to other than the owner instead of satisfying himself that the person (he claimed to be the brother of the owner, and evidently an imposter) had authority from the owner. Even then, there might be the possibility of some doubt as to whether that constituted negligence under the circumstances, in that there was no communication by the servant with the innkeeper, *i.e.*, the innkeeper did not know what was being done and there might have been want of authority in the servant. However, the responsibility for the act of the servant is made complete upon the innkeeper when the letter adduced in evidence, written to the plaintiff's solicitors, is read, wherein the innkeeper adopts the act of the servant and in effect ratified the servant's act.

MCPHILLIPS, J.A.

It follows that the appeal must be allowed.

MACDONALD, J.A.: The learned trial judge held that the defendant was under no obligation in respect to boxes left with the former proprietor in the absence of knowledge by said defendant that they were in the store-room. When, however, defendant purchased the goods, chattels and effects from the former proprietor an inventory was made, the rooms and contents specified, and in respect to room 105, where the boxes in question were stored, the notation was made "used as a store-room." The defendant knew this was a store-room when he took over the hotel, and that "there was a lot of baggage there."

MACDONALD, J.A.

COURT OF APPEAL

1925

Jan. 6.

HANSEN v. KILLICK

He also states that he saw the baggage there (not necessarily noting the two boxes) soon after he became proprietor. Further, the defendant looked over several of the rooms when he purchased, the remaining rooms, including number 105, being looked over by his clerk. Knowledge, therefore, of baggage in room 105, belonging to some one, or to several, must be imputed to the defendant. It was in his interest to care for the baggage of former patrons in the hope such patronage would continue.

Defendant's employee, without written order from the plaintiff or production of the receipt originally given to the plaintiff, gave these two boxes to a stranger, who falsely represented himself to be the plaintiff's brother. It is suggested, on the facts of this case, that the defendant is not liable for the conduct of his clerk. We have, however, the additional fact that the defendant identified himself with the servant's act in a letter written to plaintiff's solicitors amounting to ratification.

The defendant was bound, through his servant, as a gratuitous bailee, to exercise the care that was necessary under the circumstances. I use that expression in preference to the "slight," "ordinary," etc., degree of care and the "negligence" or "gross negligence" referred to in the books in dealing with different classes of bailments. The servant in extenuation says that the stranger described the articles in the boxes although not saying they were opened to test the accuracy of his description. The care required by a gratuitous bailee was not exercised. After a *prima facie* case of negligence was established (and the mere inability to produce them establishes a *prima facie* case), the onus was on the defendant to excuse his conduct in parting with them to a stranger. That onus has not been satisfied.

MACDONALD, J.A.

Mr. *Hinchliffe* submitted it was essential to prove beyond doubt that it was the two boxes left by the plaintiff, containing the same articles, that were given out and that no part of these were abstracted by theft or otherwise in the meantime. The bailee, however, was bound to deliver the boxes deposited, and this he failed to do. The plaintiff's evidence, that he did deposit the boxes, and that they contained the articles enumerated, was not questioned at the trial. He had, in fact, a receipt for them. To suggest that they were interfered with in the meantime

would be simply to assume that the bailee was negligent on more than the occasion in question.

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Moresby, O'Reilly & Lowe.*
Solicitor for respondent: *J. Hinchliffe.*

CHASSY AND WOLBERT v. MAY *ET AL.*

Judgment — Lien on an interest in mineral claims — Assignment — Free miner's certificate—R.S.B.C. 1911, Cap. 157, Sec. 12.

Any person who has a lien upon a mineral claim in a certain sum has a "right or interest in or to a mining property" and must have a free miner's certificate unexpired as provided in section 12 of the Mineral Act, 1911.

APPEAL by defendants David K. May and Samuel C. Warr from the order of MORRISON, J. of the 30th of May, 1924, dismissing a motion for an order to enforce a lien upon a one-quarter interest of the plaintiff J. M. Wolbert in seven mineral claims known as the Gibson Group near Cariboo Creek in the Ainsworth Mining Division. The said David K. May was declared to be entitled to said lien by a judgment of the Supreme Court in this action dated the 30th of June, 1919: see 29 B.C. 83. On the 14th of July, 1922, D. K. May made an assignment of the judgment to Samuel C. Warr the premable of the assignment reciting that "whereas judgment was entered in this action against J. M. Wolbert for $1,997 and interest in favour of David K. May said judgment being set out in full in paragraph 5 thereof." The assignment in the next paragraph then proceeded: "I David K. May do hereby assign . . . . all my interest in and to the above described judgment." There was nothing in paragraph 5 of the judgment as to a lien, the

Statement

COURT OF APPEAL

1925

Feb. 4.

CHASSY v. MAY

direction in that regard being in paragraph 7 of the judgment. It was held by the trial judge that taking the paragraph of the judgment of GREGORY, J. (*i.e.*, paragraph 5) relied on with the assignment there was no assignment of any lien and the motion was refused.

The appeal was argued at Vancouver on the 3rd of December, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

A. H. MacNeill, K.C., for appellants: May assigned the benefit of his judgment to Warr. The Company owns the lands and is resisting the right of lien. The judgment was registered in Kaslo, November 4th, 1919. An assignment of a judgment carries with it the vendor's lien: see *Union Bank of Canada* v. *Dutczak* (1924), 3 D.L.R. 457. In answer to the contention that the joining of new parties is irregular see marginal rule 181; Yearly Practice, 1925, p. 239; Annual Practice, 1925, p. 301; *Salt* v. *Cooper* (1880), 16 Ch. D. 544; *Stewart* v. *Rhodes* (1900), 1 Ch. 386 at p. 402; *In re Clements* (1901), 1 K.B. 260; *Collings* v. *Wade* (1903), 1 I.R. 89. New proceedings independent of the action granting a lien is not proper: see *Lycett* v. *Stafford and Uttoxeter Railway Co.* (1872), L.R. 13 Eq. 261; *Munns* v. *Isle of Wight Railway Co.* (1870), 5 Chy. App. 414; *Ware* v. *Aylesbury and Buckingham Railway Company* (1873), 21 W.R. 819; Seton on Decrees, 7th Ed., p. 2221. Having the order adding new parties the next step was under marginal rule 601, having in addition the right to apply in pursuance of the judgment: see *In re Bagley* (1911), 1 K.B. 317; Holmested's Ontario Judicature Act, 4th Ed., 762 and 1188.

Argument

Cantelon, for respondent: When Warr took the assignment he did not have a free miner's certificate and could not hold an interest in a claim. It is the wrong procedure to add parties after judgment: see Halsbury's Laws of England, Vol. 14, pp. 109-10; *Leggott* v. *Western* (1884), 12 Q.B.D. 287; *Kolchmann* v. *Meurice* (1903), 1 K.B. 534. As to the requirement of a free miner's certificate see *Roundy* v. *Salinas* (1915), 21 B.C. 323; *The Engineer Mining Co.* v. *Fraser* (1922), 31

B.C. 224; *Archibald* v. *McNerhanie* (1899), 29 S.C.R. 564; *Barinds* v. *Green* (1911), 16 B.C. 433. The absence of a certificate is fatal. Joining new parties is irregular. The words "that the proceedings shall be carried on" in marginal rule 181 are interpreted in *Attorney-General* v. *Corporation of Birmingham* (1880), 15 Ch. D. 423. The case of *Salt* v. *Cooper* (1880), 16 Ch. D. 544 and other cases cited deal with execution by the appointment of a receiver and do not apply. The order applied for is for sale and cannot be granted under marginal rule 601. The lien assigned by May to Warr is not a vendor's lien but is in the nature of a charging order, so that *Munns* v. *Isle of Wight Railway Co.* (1870), 5 Chy. App. 414 and the like cases cited do not apply. The respondent Warr should have instituted a new action so that the issues could be properly tried instead of by affidavit: see *Leggott* v. *Western* (1884), 12 Q.B.D. 287; *Kolchmann* v. *Meurice* (1903), 1 K.B. 534.

Argument

MacNeill, in reply: As to a free miner's certificate this is not an interest referred to in the Mineral Act at all. It does not apply to equitable rights of parties: see *McNerhanie* v. *Archibald* (1899), 1 M.M.C. 320. On the definition of lien and the right to enforce an assignment thereof see Ashburner on Equity, pp. 340-2; Story on Equity, 3rd Ed., 514, pars. 1218-20; *Union Bank of Canada* v. *Dutczak* (1924), 3 D.L.R. 457 at p. 460; Pomeroy's Equity Jurisprudence, 2nd Ed., par. 1259; Williams on Vendor and Purchaser, 3rd Ed., 990; Halsbury's Laws of England, Vol. 19, p. 18, pars. 26 to 49; *Cavander* v. *Bulteel* (1873), 9 Chy. App. 79; *Kelly* v. *Hutton* (1868), 3 Chy. App. 703 at p. 709.

Cur. adv. vult.

4th February, 1925.

MACDONALD, C.J.A.

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

MARTIN, J.A.

MARTIN, J.A.: The appeal should, I think, be dismissed upon several of the points taken by the respondent's counsel, *viz.*: First that the assignment relied on by the appellant has not been legally proved and is not properly before the Court. Second, there is no practice to warrant the making of an order in the present circumstances to sell the one-quarter interest of Wolbert

COURT OF APPEAL

1925

Feb. 4.

CHASSY v. MAY

in the mineral claims in question in order to enforce the appellant Warr's lien upon that interest. None of the cases cited by the appellant's counsel, when carefully examined, supports such a proceeding in an action of this different kind, and in the circumstances before us. There is no machinery in the Court, that I am aware of, that would meet such a case as this where the respondent, Daybreak Mining Co., contests the appellant's assignment as invalid and as having been obtained fraudulently and without consideration. Though it may be too late to remedy the error which was, in my opinion, originally made by adding the said respondent Company as co-defendant after judgment in such an unusual case as this, yet there is no good reason when the impropriety of that order in relation to the special circumstances has become apparent why it should be further acted upon in a situation which is foreign to the practice of the Court, this being in no sense a matter of enforcing execution, legal or equitable, and so neither rule 601, nor the special provisions of, *e.g.*, the Execution Act or Interpleader Rules, providing for the determination of adverse claims by trial of issues or otherwise, have any application and cannot be resorted to: in short, justice cannot be done between the parties upon such a motion as was misconceivedly launched here.

MARTIN, J.A.

There is also a third and still graver objection that I think should prevail, *viz.*, that at the times in question the appellant was not in possession of a free miner's certificate as required by section 12 of the Mineral Act, Cap. 157, R.S.B.C. 1911, *viz*:

> "Subject to the proviso hereinafter stated, no person or joint-stock company shall be recognized as having any right or interest in or to any mining property unless he or it shall have a free miner's certificate unexpired."

It cannot legally be said, I think, that one who has a lien upon a mineral claim in an amount, *e.g.*, greater than the value of the claim has no "right or interest in or to any mining property." The letter of the Act clearly covers such a case and there is nothing in the spirit of it that I can perceive, contrary to the letter. Upon what principle should any person have an interest of great or small value in a mineral claim and not make the same contribution to the State for holding it by paying a licence fee therefor as does the miner who located the claim?

Here the appellant swears his interest under his lien amounts to almost $2,000 under the judgment of the 30th of June, 1919, with subsequent interest in addition, so his "right or interest" is of a substantial character, though that would not alter the principle.

There is nothing in the Act nor in any of the cases cited that I can see that detracts from this view. The expression "full interest" in the interpretation section 2, does not advance the matter in the appellants' favour: that is a definition which was first introduced into our Mining Acts by the Mineral Act of 1882, Cap. 8, Sec. 1, and was enacted to conform to the change in the law made by the same Act, section 104, respecting the manner of voting by members of a mining partnership to represent their "full interests" in working their combined claims. The appellant has moreover recorded the judgment giving him his lien with the mining recorder under section 74, thus treating it (and properly in my opinion) as a "document of title relating to any mineral claim or mining interest" which that section requires to be so recorded, except in the case of Crown-granted claims; and see also section 138, requiring the recorder to "record . . . . a memorandum of any judgment affecting a mineral claim or other mining property in the record book," and by section 148 (6) power is conferred upon the County Court in its mining jurisdiction to entertain suits relating to charges or liens upon mineral claims, mines or other mining property. The language in these sections is very wide, and after a careful consideration of the whole Act and cases cited I am unable to see any escape from the conclusion that in the absence of a free miner's certificate it is the duty of this Court, under said section 12, not to "recognize" the "right or interest" that the appellant claims in this "mining property." And I entertain no doubt that one who has a judgment declaring that he has a lien upon a mineral claim has "an adverse right of any kind" which he would, in proper circumstances, be entitled to protect under Part VI.—"Disputes and Adverse Claims"—*Cf.* sections 81 and 85.

MARTIN, J.A.

The definition of "lien," at law, and in equity, and in admiralty, is well and succinctly set out in Hall on Possessory Liens (1917), Cap. 1, and at p. 16 it is said:

COURT OF APPEAL

1925

Feb. 4.

CHASSY v. MAY

"The word is derived directly from the French *lien*, and further back from the Latin *ligamen*, which signifies 'a tie' or 'something binding.' As will be seen the right in its fullest and widest application means a charge upon property—that is to say, something which is binding upon it."

And at p. 17:

"Perhaps the widest and most satisfactory definition is that adopted by Whitaker in his 'Treatise of the Law of Lien,' published in 1812—namely, 'Any charge of a payment of debt or duty upon either real or personal property.' This is lien in its most extensive sense."

And at p. 18:

"A lien, therefore, is 'any charge of a payment of debt or duty upon either real or personal property,' whilst a possessory lien is 'a right in one man to retain that which is in his possession belonging to another, till certain demands of his, the person in possession, are satisfied.'"

I have found no case wherein special liens created by statute, such as our Mechanic's Lien Act, or declared by the Courts to exist upon special facts upon real property (apart from the ordinary vendor's lien) are considered, but beyond question they

MARTIN, J.A.

create a certain and defined "charge" upon the property and constitute an "interest" in it to the full extent of that of the person whose conduct created the lien. In *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273, it was said by their Lordships of the Privy Council, at p. 282:

"It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit."

No liens can stand upon a higher footing than those ascertained and declared by judgment and in the case at bar the "charge upon the property" (mining claims) has been declared by the Court to the "extent of the interest" of Wolbert herein, which, in my opinion, brings the matter directly within the scope of said section 12 as being "a right or interest in . . . . mining property," and therefore the appeal should be dismissed on this ground also.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same opinion with respect to this appeal as that expressed by my brother MARTIN. The insuperable obstacle in the way of the establishment or recognition of a lien is the absence of a free miner's certificate. The situation is one of the failure to be clothed with that initial authority to support the holding of any right or interest in or

to any mining property (R.S.B.C. 1911, Cap. 157, Sec. 12). The requirement to have the free miner's certificate is statutory and the Court is in no way clothed with any power to cure the situation. Section 12 is absolute in terms:

"12. Subject to the proviso hereinafter stated, no person or joint-stock company shall be recognized as having any right or interest in or to any mining property unless he or it shall have a free miner's certificate unexpired."

The proviso referred to is in no way helpful in the present case.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *A. H. MacNeill.*
Solicitors for respondent: *Ladner & Cantelon.*

WALTON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence — Electric current — Supplied for house lighting — Defective system—Person killed in house—High tension current—Failure to exercise care—Damages.

The defendant Company's electric system for the supply of electricity for house lighting had a primary wire containing 2,200 volts running between poles above a secondary wire containing 110 volts that supplied power for lighting the defendant's house. Her husband on going into the cellar came in contact with the secondary wire and was killed. It was then found that between the poles opposite the house the secondary wire leading into the house had broken and the part leading into the house flew over the primary wire carrying 2,200 volts into the house which was the cause of the husband's death. In an action for damages by deceased's wife the jury found the Company negligent in not grounding the secondary wire.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C., that had the secondary wire been grounded the fuse would have blown out when the voltage was increased, the current going to ground outside the house, thus rendering the secondary wire into the house harmless, there was therefore negligence in not having the secondary wire grounded and the appeal should be dismissed.

COURT OF APPEAL

1925

Jan. 6.

WALTON v. B.C. ELECTRIC RY. CO.

Statement

APPEAL by defendant from the decision of HUNTER, C.J.B.C. of the 23rd of June, 1924, and the verdict of a jury in an action for damages brought by the wife of George Wild Walton, who upon going into his cellar at about 9 o'clock in the morning of the 6th of January, 1924, was killed by an electric current of high voltage which passed from the defendant's main transmission wires on Fort Street, through the secondary wires serving the deceased's house. It appeared on examination that on the poles opposite the plaintiff's house the primary wire was above the secondary wire that led into the house. This secondary wire broke and the portion leading into the house flew over and rested on top of the primary wire carrying 2,200 volts from the primary wire into the house. The jury found in favour of the plaintiff, giving the wife $7,500 and deceased's mother $500.

The appeal was argued at Vancouver on the 9th to the 14th of October, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Harold B. Robertson, K.C., for appellant: The jury found the Company negligent for not grounding the secondary wire attached to a suitable plate. It was clearly shewn the only effective way to ensure safety was to attach the wire to the water pipes but the City would not allow us to do this. We say there was no evidence of negligence to go to the jury and as to grounding we were prevented from carrying out the only effective way. The plaintiff must shew the way they suggest is effective: see *Dumphy* v. *Montreal Light, Heat and Power Company* (1907), A.C. 454; *Barnabas* v. *Bersham Colliery Company* (1910), 103 L.T. 513; *Loffmark* v. *The Adams River Lumber Co.* (1912), 17 B.C. 440; *The Canadian Coloured Cotton Mills Co.* v. *Kervin* (1899), 29 S.C.R. 478. The ordinary grounds for setting aside a verdict do not apply where a scientific question arises: see *Managers of the Metropolitan Asylum District* v. *Hill* (1882), 47 L.T. 29; *Jackson* v. *Grand Trunk Railway Co.* (1902), 32 S.C.R. 245; *Phelan* v. *Grand Trunk Pacific Rway. Co.* (1915), 51 S.C.R. 113; *Jackson* v. *Hyde* (1869), 28 U.C.Q.B. 294; *Fields* v. *Ruther-*

ford et al. (1878), 29 U.C.C.P. 113. We are entitled to judgment if the verdict is perverse: see *Quinn* v. *Walton* (1921), 30 B.C. 401; *City of Victoria* v. *Meston* (1905), 11 B.C. 341 at p. 346; *Jackson* v. *B.C. Electric Ry. Co.* (1917), 24 B.C. 484 at p. 489.

Beckwith, for respondent: There was evidence upon which the jury could reasonably find as they did and this Court will not interfere. The onus is on them to shew that with the secondary wire grounded to a plate the accident would nevertheless take place. They must conduct their electricity without negligence: see *Young* v. *Town of Gravenhurst* (1910), 22 O.L.R. 291. We are not bound to prove a precaution that would be 100 per cent. proficient: see *Jackson* v. *Grand Trunk Railway Co.* (1902), 32 S.C.R. 245 at p. 249. As to contributory negligence, section 11 of the Electric By-law precludes the Company from relying on any infringement thereof, and in any case any infringement that there was had no connection with the accident. We are entitled to rely on ultimate negligence. The case of *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177 does not apply as we have the evidence here shewing how the accident happened.

Argument

Robertson, in reply.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The defendant is a company engaged in the supplying of electricity for lighting purposes. The plaintiff is the administratrix of G. W. Walton, deceased, who was killed by an electric shock received in his cellar while handling or coming in contact with an electric lamp connected with the defendant's lighting system.

The action is to recover damages for the death of the said deceased, and the allegation is that the defendant was negligent in not properly grounding the wire which supplied the electricity. The defendant's counsel admitted before us that the Company was bound to ground its wires where it was reasonably practical to obtain a proper grounding. It gave evidence that the best method of grounding was to the City water mains, but

COURT OF APPEAL

1925

Jan. 6.

WALTON v. B.C. ELECTRIC RY. CO.

that the City had refused permission to do this. It was proved in evidence that grounding to a plate sunk in the ground, while not giving as complete protection as grounding to a water main, yet would be reasonably effective if the ground were damp, but that when the ground became dry such a method of grounding affords little protection to the users of electricity.

During the greater part of the year in the City of Victoria, and in January when the fatality occurred, the ground is wet. I therefore think the defendant was negligent in not grounding its wires to a plate, and that it is a fair inference that had they done so the death of the deceased would not have happened.

The voltage of electric current for lighting purposes was 110. There was another wire, a high voltage wire, carrying 2,200 volts strung on the same pole with the light wires. The high-voltage wire broke without any known reason, and came in contact with the light wire, thus throwing 2,200 volts into it. It was this heavy voltage that killed the deceased.

MACDONALD, C.J.A.

It is said that had the light wire been grounded the fuse would have blown out when the voltage was increased, and thus have isolated the house, and the current would have gone down to ground outside the house. If, for instance, the wire had been broken a few seconds before deceased came in contact with the lamp, a fuse would have been blown out and the light wire in the house become disconnected, and therefore thereafter harmless.

There is no evidence as to the time of these events, but the initial negligence of the defendant in not taking what was always regarded as a necessary precaution against what occurred in this instance, must, I think, be held responsible for the death.

Contributory negligence was alleged in not having a properly guarded cellar lamp. This was required under a City by-law, but the by-law, I think, goes beyond the statute, 1914, Cap. 52, Sec. 54, Subsec. (101). This is aimed not at consumers but at the Company.

I would therefore dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: I agree in dismissing the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal has relation to a very un-

fortunate accident, whereby one, George Wild Walton, lost his life.

It would appear that a break had taken place in the electric transmission wires, carrying into the home of the deceased 2,200 volts instead of 110 volts, *i.e.*, the primary and secondary wires became crossed. The appellant was not aware of this condition of things until after the fatal accident. The jury found as follows:

"For the plaintiff, we find the B.C. Electric Co. guilty of negligence through not grounding the secondary wire."

The defence was that the most approved methods for the carrying of electric power were in use by the Company, and it was shewn that the Corporation of the City of Victoria had refused permission to the Company to ground to the City water pipes, the today only known system giving absolute security. The case for the plaintiff was that there was at least one known other precaution than that of grounding to the City water pipes, *viz.*, grounding to plates, and a great amount of scientific evidence was given upon this point, for and against its efficiency. The Company had installed this system of grounding but by practical experience had discarded it as being non-efficient and dangerous to pedestrians. There was, however, contending and rival evidence on this point. It may be further remarked that the deceased when he met his death was using, with a lamp guard, the electric light on an extension wire in the basement, the Company contending that if a properly protected lamp guard had been used by him he would have been immune from danger. Dr. Vickers, Professor of Electrical Engineering, and head of the Department of Mechanical Engineering in the University of British Columbia, was a witness for the plaintiff, and in his evidence he stated that "If connection had been made to a copper plate in moist earth, it would have certainly afforded protection. That is as far as I shall go." Considerable evidence was directed to this question of providing some form of protection from the happening that occurred here, which I do not propose to in detail canvass, and have only this to say, that I am not at all prepared to say that I would have been satisfied, as the jury would appear to have been, that any known form of protection was capable of being used that would have rendered

COURT OF APPEAL

1925

Jan. 6.

WALTON v. B.C. ELECTRIC RY. CO.

the fatality impossible. I am not able, though, to say that there was an absence of evidence which would, if believed, disentitle the jury finding as they did, that is to say, it cannot be said upon the evidence adduced at the trial that the jury could not reasonably find as they did. That being the case, it is not a case which the Court of Appeal should disturb (*Coughlan* v. *Cumberland* (1898), 67 L.J., Ch. 402, Lindley, M.R. at p. 402). In *Toronto Power Company, Limited* v. *Paskwan* (1915), A.C. 734 at p. 739, Sir Arthur Channell said:

"It is unnecessary to go so far as Middleton, J. did in the Court below and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable."

I cannot refrain from saying that the case is very close to the line, and had the finding of the jury been as inconclusive and non-supportable as the finding of the jury was in *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177, I would have been of the opinion that the appeal should be allowed. In the *Newberry* case a trolley arm fell on a passenger while travelling on the top of one of the defendant's electric tram-cars. The Master of the Rolls, at pp. 178-9, referring to what the trial judge said to the jury, quoted this:

MCPHILLIPS, J.A.

"'I asked you if you found there was negligence to tell me on what grounds.' It was quite clear that there was a written memorandum by the jury. The foreman said:—'Well, the tramways company, having used a trolley arm, knowing the risk to passengers, did not take sufficient precautions to ensure their safety.' The judge asked, 'What precaution do you think they could have taken?' The foreman.—'We are not engineers, but they undoubtedly knew the trolley arm under certain circumstances would come out, and, knowing that, they were running a risk.' The judge then asked, 'Do you suggest what they could have done by way of precaution?' The foreman.—'We cannot.'

"Now, if the jury had simply given a general verdict, his Lordship thought they could not have interfered. But they had told the Court what they meant by their verdict. They had negatived all the alleged acts of negligence—or at least they had held that no one of these alleged acts of negligence was established to their satisfaction. He thought they, in substance, treated the tramways company as insurers—as being bound to 'ensure' the safety of their passengers. In other words, they thought the company ought not to carry passengers on the car unless they could carry them safely, and this without any question of negligence on the part of the company."

And Lord Justice Hamilton (now Lord Sumner), at p. 179, said that

"He did not think that a jury could fix a defendant with liability for want of care, without proof given or reason assigned, out of their own inner consciousness and in their own notions of the fitness of things. The evidence shewed how the accident happened. It proved a small residuum of risk which nobody at present knew how to guard against. The jury were not tramway experts; they might conceive an ideal tram-car, but their hopes and aspirations could not take the place of evidence or support a verdict which rested on no foundation of actuality."

In the present case the jury had some evidence upon which to proceed, and as I am not called upon to necessarily say "that the jury have come to the right conclusion" (*Toronto Power Company, Limited* v. *Paskwan, supra*), the case would appear to be one for the non-disturbance of the verdict of the jury. I therefore would dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The jury made a finding of negligence against the defendant by reason of its failure to ground the secondary wire to a suitable plate in the ground. We are asked to say that there is no evidence, or, in any event, no reasonable evidence to support that finding. The plaintiff must establish that deceased met his death by some negligent act of omission or commission on defendant's part. If there is no direct proof, and the facts established are equally consistent with lack of negligence, the plaintiff fails.

The evidence is highly technical and no doubt the jury experienced difficulty in testing it by applying their own knowledge to the question of the weight the statements of opinion should carry. They were justified, however, in basing their verdict on opinion evidence, if any, shewing that the absence of grounding to a plate caused the accident. There is such evidence, subject, possibly, to the qualification that it should be grounded in moist soil. Dr. Vickers, for the plaintiff, testified that grounding to metal plates would be effective, adding that the soil must be moist for a good ground. He suggests, therefore, that moist ground merely makes it more effective. He repeats that by saying, in another place, "It should be in moist ground, if possible." It is said that the ground in this vicinity was dry and rocky for eight months of the year. I doubt if the evidence on this point was exhausted. The degree of moisture necessary for safety is not disclosed. One would think that this difficulty

MACDONALD, J.A.

COURT OF APPEAL

1925

Jan. 6.

WALTON v. B.C. ELECTRIC RY. CO.

MACDONALD, J.A.

could be overcome by artificial means, to some extent at all events. However, we must take the evidence as we find it. The ground was certainly moist when the accident occurred and for at least four months of the year. Mr. Wilson, the wiring inspector for the City of Victoria, described the cellar floor as very wet, the clay being soft and muddy, and Mr. Cornwall, an electrical engineer, who examined the premises, stated that, from his observation, he would say the floor of the basement was above the level of Fort Street. Grounding to a plate would, therefore, be effective when the accident happened and for a considerable period each year. True, it is stated, in a letter from the inspector of electrical energy, that a permanent moist soil at all seasons of the year is required, meaning presumably for protection at all seasons. With, therefore, this evidence on behalf of the plaintiff and with Mr. Cornwall's statement on behalf of the defendant that,

> "it depends wholly on the nature of the locality and the way the ground is made, and there are so many variabilities about the thing, it would be difficult to say, in the case of driving a pipe into the ground, or using metal plates whether it is really effective or ineffective."

not by any means directly negativing the suggestion of plaintiff's witnesses, I think the jury had evidence before them justifying the finding of negligence in this respect.

Mr. *Robertson* submitted that the contributory negligence of the deceased was the real cause of the accident. It was said that the appliances in the basement were inadequate; that deceased, or members of his family, who were not electricians, installed them without first obtaining a permit required by a by-law, the provisions of which, if followed, would have prevented the accident. This, however, is disputed. Deceased was subjected to 2,200 volts through a break occurring in the secondary wire causing it to come in contact with the primary wire carrying that high voltage, when the normal inflow, which he should only be obliged to provide against, was 110 volts. Against such abnormal events, the protection required was to ground the wire in some effective way, and that duty rested on the defendant. There was evidence to shew that the interior appliances were sufficient to carry with safety this normal inflow of 110 volts. He was not required to furnish equipment to

withstand an inflow of 2,200 volts. Further evidence was submitted shewing that the wiring or equipment in the basement, defective though it may have been, played no part in causing the death, and that with the best possible equipment the accident would occurr, if the primary wire dropped and came in contact with the secondary wire without grounding either to water mains, the most effective method (but one not available), or to metal plates. Two witnesses for the defendant testified that it would not be safe to go near the electrical fixtures of any kind in premises, if one knew 2,200 volts were available for distribution.

In the absence of answers to questions, the jury's verdict must be taken to mean either that there was no contributory negligence or, if so, the defendant could notwithstanding, by the use of safeguards, *viz.*, grounding to a plate, have avoided the accident. There is, at all events, evidence to support the latter view and, therefore, the verdict on the whole case must stand. In this view, it is unnecessary to determine whether or not the by-law is *ultra vires*.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Robertson, Heisterman & Tait.*
Solicitor for respondent: *H. A. Beckwith.*

COURT OF APPEAL

1925

Jan. 6.

WHALEN v. BOWERS.

WHALEN v. BOWERS

Negligence—Fire-arms—Dog shot—Want of proper precautions—Prima facie evidence of negligence—Burden of proof.

The plaintiff when out shooting with his dog, shot at a pheasant which appeared to fall in a ditch running along the side of a field he was in. The dog ran to where the bird appeared to have fallen and then continued along the ditch. When about 150 feet away plaintiff heard a shot which was immediately followed by a cry from his dog. He ran forward and on reaching the spot he saw the defendant about 30 feet away from the dog lying in the ditch. The defendant said he shot at a pheasant as it rose from the ditch when it was about six feet in the air. He saw the dog just as he was shooting but not in time to deflect his shot and part of the charge struck the dog. An action for damages was dismissed.

Held, on appeal, reversing the decision of GRANT, Co. J. (MACDONALD, C.J.A. dissenting), that the defendant's evidence on discovery established a *prima facie* case of negligence and the onus shifted to the defendant who was in possession of a dangerous weapon to disprove negligence.

APPEAL by plaintiff from the decision of GRANT, Co. J. of the 14th of May, 1924, dismissing an action to recover $750, as damages for loss of services and depreciation in value of a dog by reason of the wrongful and negligent shooting and wounding of the dog. The plaintiff and defendant were shooting on the 1st of October at about 9 o'clock in the morning. The plaintiff shot a bird and it fell in a ditch running along the field. The plaintiff's dog then ran forward, jumped into the ditch, and continued to run along the ditch getting about 150 yards ahead of his master who then heard a shot followed by a cry from his dog and on getting to the spot in the ditch where his dog lay he saw the defendant about 30 feet away. Defendant asked him if it was his dog he shot. Plaintiff then looked at the dog and saw it was hit, the dog appearing to have been hit in the rump and testicles and in evident great pain. The dog although not killed was ruined as a hunting dog. Defendant said he saw a pheasant and fired at it when it was about 6 feet high. He missed the pheasant but hit the dog. The trial judge dismissed the action.

Statement

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

Mayers, for appellant: This is an action for the value of a setter. Neither of the parties were owners of the field, both had a right to be there. It is no answer to say it was an accident: see *Potter* v. *Faulkner* (1861), 1 B. & S. 800; *Parry* v. *Smith* (1879), 4 C.P.D. 325 at p. 327; *Whitby* v. *C. T. Brock and Co.* (1888), 4 T.L.R. 241. Firearms must be handled with the greatest care. The defendant's own story shews he was negligent.

Argument

Cantelon, for respondent: This is a question of fact and the trial judge is in our favour. It is true that a man handling a gun must take more than ordinary care but he did not see the dog when he fired: see *Bayley* v. *Love* (1924), 34 B.C. 195.

Mayers, in reply.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: The plaintiff was hunting with a valuable hunting dog. The dog followed a pheasant in a ditch at the side of a field, and got out of the plaintiff's sight. When the pheasant rose out of the ditch, the dog was practically at its tail. The defendant was in the field about 30 yards from the place where the pheasant rose. He fired and part of the charge hit the dog, destroying its value as a hunting dog.

There is no suggestion that the defendant fired wilfully at the dog. On the contrary, he did not see him until it was too late to deflect his aim. The burden of proof was upon the plaintiff to prove that the shot was fired negligently. This he has failed to do. The only evidence is of defendant's statement to the plaintiff, and defendant's answer on discovery, neither of which proves negligence, but the contrary. It was put in by the plaintiff and is to be treated as evidence given on his behalf.

MACDONALD, C.J.A.

The learned trial judge found that there was no negligence. I think he could not find otherwise, except by reversing the rule as to onus, and then disbelieving the defendant.

The appeal should be dismissed.

COURT OF APPEAL

1925

Jan. 6.

WHALEN v. BOWERS

MARTIN, J.A.: I agree with the reasons of my brother M. A. MACDONALD in allowing the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal involves the question of the liability of the defendant for shooting and seriously injuring a valuable hunting dog, the property of the plaintiff. The occurrence took place on the opening day of the season of 1923. Both the plaintiff and defendant were shooting through fields at the time, but some distance from each other. The plaintiff had with him the valuable field dog which was afterwards shot by the defendant. The plaintiff had just shot a pheasant and it fell in a ditch in the field, and his dog ran in the direction of where the bird fell. The plaintiff was accompanied by one Murray, a dog trainer, who had trained the dog of the plaintiff. Murray went for the bird and the dog passed on up the ditch, the dog appearing to be following the scent of a bird. The plaintiff followed his dog, and in a little time a shot was fired. It was fired by the defendant, and was the cause of the very serious wounding of the dog, rendering him quite unfit for further use in hunting.

The plaintiff, hurrying on in the direction his dog went, came across the defendant and was asked by him whether the dog he had shot was the plaintiff's, and the plaintiff, looking at it, said that it was his dog "Prince Albert." The defendant said a bird flew out of the ditch and just as he fired at it a dog jumped out of the ditch, and the dog was shot, not the bird. The story would look to be highly improbable, but be that as it may, it does not at all follow that there is no liability upon the defendant for that which, without some very satisfactory explanation, imports negligence upon the part of the defendant. No evidence was called upon the part of the defence. There was an examination for discovery of the defendant, though, which was introduced in evidence by the plaintiff, and the counsel for the defendant at this Bar stated that the defendant had made his complete answer in that discovery evidence. Considering the evidence in all its bearings, I cannot, with great respect to the learned trial judge, arrive at the conclusion at which he arrived, namely, that the shooting was accidental and without negligence.

The grass in the ditch was about five or six feet high, and the defendant had heard and seen a pheasant there, and says that he shot when the pheasant was seven feet up in the air, which would be above the grass. It certainly seems more than strange that in circumstances such as described, the defendant would shoot a dog following along the ditch. The defendant fired at a distance of 30 feet, and missed the pheasant but shot the dog. The probabilities are against this being at all a satisfactory explanation. How, in such circumstances, could it be possible to shoot the dog? That was only possible if the defendant fired into the grass or ditch. Firing as he claimed, though, was in itself a negligent act in the circumstances, as the spread of the shot would render it dangerous to not only dogs and domestic animals, but even children who might be playing about.

Great caution is required of persons having dangerous weapons such as loaded guns, and when engaged in hunting in a settled area the degree of care is proportionately high. Here others were hunting at the time and the defendant must be affected with notice that there would be hunting dogs about (see Halsbury's Laws of England, Vol. 21, pp. 365-407). With great respect to the learned trial judge, I consider that he misdirected himself when he held, upon the evidence, that there was an absence of negligence upon the part of the defendant.

MCPHILLIPS, J.A.

In the discovery examination of the defendant in evidence the following questions were put to the defendant and he made the answers there appearing:

"Where was the dog after you had fired? He was in the ditch.

"How high was the ditch, how deep, rather? I guess as high as this table, say two feet or two and a half feet.

"Any higher? Perhaps four feet.

"Four feet. Was the ditch lined with grass on your side? Yes.

"I just want to fix this again. When you saw the dog behind the bird, all you saw was the face of the dog? Yes.

"Was the grass along the side of the ditch so that you could see right through it? No, it was very thick.

"It was very thick. You had an idea that the bird was getting up in the air before you shot it? Yes.

"And you know that you should wait until the bird does get up in the air? Well, I guess I can hold my own with anyone shooting, as far as that is concerned. I seen the bird when I shot at it."

COURT OF APPEAL

1925

Jan. 6.

WHALEN v. BOWERS

It is clearly apparent that upon the testimony of the defendant he was guilty of negligence. The ditch was lined with grass upon the side the defendant was, and the dog was in the ditch, and in shooting at the pheasant the defendant shoots the dog. This could only take place if the defendant fired into the grass, not at a pheasant some two feet above the top of the grass, *i.e.*, seven feet in the air. The story is indeed too improbable; in any case, it is unsatisfactory and is not an explanation that is acceptable or should be acted upon in a Court of law. It in no way establishes want of negligence, but on the contrary, in my opinion, establishes negligence against the defendant. The defendant would appear to have acted recklessly throughout the whole occurrence, disregardless of the consequences of his firing in this very negligent manner. Persons using fire-arms are under a duty to take a high degree of care (*Dixon* v. *Bell* (1816), 5 M. & S. 198; *Sullivan* v. *Creed* (1904), 2 I.R. 317). Here had proper care been exercised this poor dog would not have been shot and so grievously wounded. When a happening such as the evidence discloses in this case occurs, it is *prima facie* evidence of negligence. In *Whitby* v. *C. T. Brock and Co.* (1888), 4 T.L.R. 241 at p. 242, the Master of the Rolls said:

MCPHILLIPS, J.A.

> "The mere fact that the fireworks struck the plaintiff was sufficient *prima facie* evidence of negligence, because fireworks did not ordinarily strike the spectators and bystanders."

It cannot be said that sportsmen ordinarily shoot hunting dogs in pheasant shooting, it is a very unusual occurrence, and when it happens, as it has happened here, there certainly should be better evidence to excuse liability than would appear to be present in this case. I would refer also to what Lord Justice Fry and Lord Justice Lopes said in the *Whitby* case:

> "Lord Justice Fry agreed. There was *prima facie* evidence of negligence on the part of the defendants which had not been rebutted by any evidence on their part.
>
> "Lord Justice Lopes said he adhered to what he had said in *Parry* v. *Smith* [(1879)], 4 C.P.D. 325, that under such circumstances the defendants were bound to use care. The fact that Mrs. Whitby was struck was evidence of negligence, and the defendants had called no evidence to rebut that negligence."

The defendant in the present case called no evidence to rebut

the negligence shewn. The defendant's examination upon discovery, in my opinion, only accentuated the evidence of negligence, as led at the trial upon the part of the plaintiff. The case was essentially one that called upon the defendant to make complete justification and excuse for the shooting of the dog, and justification was not made out.

It cannot be said that there was any evidence that would entitle the learned trial judge to hold as he did, and, with great respect to the learned judge, I am of the opinion that the dismissal of the action was wrong, as judgment should have been for the plaintiff.

MCPHILLIPS, J.A.

I would allow the appeal.

MACDONALD, J.A.: On proper inferences to be drawn from defendant's evidence on discovery, put in at the trial, at least a *prima facie* case of negligence was established. The pheasant, he stated, was one or two feet above the top of the grass, which he says was five or six feet high. At one point he states that he did not see the dog "until I had almost shot." That means he saw him before he fired. He again says, "He didn't have time to deflect his shot." That also assumes he saw him before, though of course momentarily. It suggests to my mind that as a matter of fact, he did see him and hoped to shoot the bird notwithstanding the proximity of the dog. Then he goes on to say that he did not know there was a dog there at all before shooting.

MACDONALD, J.A.

The driver of a motor-car may be negligent in driving into a man although he can truthfully say that he did not see him. It may be that he should have seen him if he exercised caution. The onus shifted to the defendant, who was in possession of a dangerous weapon, to disprove negligence. He was examined for discovery, but did not testify at the trial, nor submit to cross-examination.

The plaintiff testified that the dog would be visible when out of the ditch. If so, he should have seen him. As stated, the defendant said the grass was five or six feet high; if so, he should justify, if possible, shooting into a thicket of grass. The Courts must exact a high degree of care from sportsmen

COURT OF APPEAL

1925

Jan. 6.

WHALEN v. BOWERS

carrying dangerous weapons, particularly near large centres of population.

I would allow the appeal.

Appeal allowed, Macdonald, C.J.A. dissenting.

Solicitors for appellant: *Phipps & Cosgrove.*
Solicitors for respondent: *Ladner & Cantelon.*

COURT OF APPEAL

1925

Jan. 6.

CAUDWELL v. GEORGE

CAUDWELL v. GEORGE.

Statute, construction of—Execution—Sale of property—Payment into Court—Scheme of distribution by registrar—Appeal—Persona designata—R.S.B.C. 1911, Cap. 60, Secs. 35, 35(4) and 39; Cap. 79, Secs. 50 and 51.

Where money realized from the sale of lands by a judgment creditor is paid into Court under section 50 of the Execution Act and the registrar prepares his scheme of distribution under section 35 of the Creditors' Relief Act, any person prejudiced by the proposed scheme of distribution may contest same under section 35(4) of the Creditors' Relief Act.

APPEAL by the claimants (Tait & Marchant) from the decision of MCDONALD, J. of the 16th of July, 1924. The defendant, F. W. B. George, obtained judgment against M. L. Caudwell for the costs of an action on the 20th of March, 1923, of which a balance of $347.64 remained due and for costs of the appeal on the 16th of October, 1923, of which a balance of $117.10 remained due and in pursuance of direction under an order of the Court the registrar found that lot 6, in block 5, section 48, City of Victoria, belonged to the judgment debtor and was liable to be sold under the judgments. The charges forming a lien against the property were: (a) mineral reservations in favour of the Hudson's Bay Company; (b) mortgage in favour of one H. Matthews for $350; and (c) the two judgments above referred to. An order was made confirming the

Statement

certificate of the registrar and directing a sale of the lot by the sheriff to satisfy the claim of the judgment debtor. The sheriff sold the property and pursuant to section 35 of the Creditors' Relief Act the registrar made his list of creditors entitled to share in the amount levied which included the name of F. W. B. George only, the total amount to be distributed being $180.10. A summons was then issued by Messrs. Tait & Marchant, Barristers, who had obtained judgment against the judgment debtor for costs in the sum of $1,466, and duly levied execution against him, contending that under sections 50 and 51 of the Execution Act and section 35 of the Creditors' Relief Act they were entitled to be on the list of creditors to share in the distribution of the moneys in Court. It was held by McDONALD, J. that the registrar was *persona designata* under section 51 of the Execution Act, and he had no jurisdiction to adjudicate on the matter; further, that he had no power to hear an appeal from the registrar under the rules of the Supreme Court.

Statement

The appeal was argued at Vancouver on the 14th and 15th of October, 1924, before MACDONALD, C.J.A., McPHILLIPS and MACDONALD, JJ.A.

Harold B. Robertson, K.C., for appellants: The question is whether the registrar is *persona designata* under section 51 of the Execution Act. My contention is that he is not and the judge below had jurisdiction: see *Blackman* v. *The King* (1924), S.C.R. 406; *Adam* v. *Richards* (1915), 21 B.C. 212.

Alexis Martin, for respondent: We are entitled to priority. Our judgment was registered: see *Porteous* v. *Myers* (1885), 12 A.R. 85; *McGuinness* v. *McGuinness* (1902), 3 O.L.R. 78; *Clarkson* v. *Ryan* (1890), 17 S.C.R. 251; *Cedar Rapids Saving Bank* v. *Dominion Purebred Stock Co., Ltd.* (1923), 3 W.W.R. 1214. On question of *persona designata* see Annual Practice, 1924, p. 911; *Owen* v. *London and North Western Railway Co.* (1867), L.R. 3 Q.B. 54; *Sandback Charity Trustees* v. *North Staffordshire Railway Co.* (1877), 3 Q.B.D. 1 at p. 4.

Argument

Robertson, in reply, referred to *Royal Trust Co.* v. *Liquidator of Austin Hotel Co.* (1918), 26 B.C. 353; *The Canadian Pacific Railway Company* v. *The Little Seminary of Ste.*

COURT OF APPEAL

1925

Jan. 6.

CAUDWELL v. GEORGE

Therese (1889), 16 S.C.R. 606; *Chandler* v. *City of Vancouver* (1919), 26 B.C. 465. The Act has no application where the judgment is only for costs.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: Section 50 of the Execution Act, R.S.B.C. 1911, Cap. 79, enacts that money realized from the sale of lands by a judgment creditor, shall be deemed money held under execution within the meaning of the Creditors' Relief Act, R.S.B.C. 1911, Cap. 60, and must be paid into Court. Section 51 enacts that money so paid in, shall be distributed by the registrar to the persons to whom the sheriff would distribute them under the Creditors' Relief Act. Section 39 of the Creditors' Relief Act gives a right of appeal to a judge from the sheriff's scheme of distribution.

An appeal was taken to the learned judge, who held that because the money was in Court and distributable by the registrar, he was *persona designata,* and that therefore there was no appeal such as there would have been had the money been in the sheriff's hands as the proceedings in execution.

It is a sound rule of construction, that when there is ambiguity in a statute, the intention may be sought by scanning the whole Act and considering the object of the ambiguous section, and if that object can be found in consonance with reason without doing violence to the language of the Act, it ought to be given effect to.

MACDONALD, C.J.A.

It seems clear enough to me that the object was to render the money in Court distributable as if it were money in the hands of the sheriff. I do not think, with respect, that the registrar was *persona designata;* he was an officer of the Court, and I think the intention of the statute was to substitute him for the sheriff, with authority to distribute, subject to the right of any party to ask for a review of the scheme by a judge.

It follows from this that there was an appeal to the learned judge, and that it was error to hold otherwise.

It was also argued that if the above construction were adopted, then the judgment creditor, at whose instance the sale was had,

is entitled to his costs as if he were the creditor whose execution first came to the sheriff's hands. That, I think, follows from what I have said and is the logical result of it.

The appeal should therefore be allowed.

McPHILLIPS, J.A.: I am of the same opinion as that expressed by my brother the Chief Justice.

MACDONALD, J.A.: I agree with the Chief Justice and would allow the appeal.

Solicitors for appellants: *Tait & Marchant.*
Solicitor for respondent: *Alexis Martin.*

CLAMAN v. CLAMAN.

Divorce—Decree for judicial separation—Granted on agreement between parties—No evidence taken—Action in Supreme Court to set aside—Jurisdiction—Appeal—Imperial Stats. 20 & 21 Vict., Cap. 85, Secs. 5 and 6.

In January, 1920, the defendant filed a petition for judicial separation on the grounds of cruelty and misconduct, and the plaintiff filed an answer including a counter petition for nullity of the marriage. Shortly before the day fixed for trial the parties arranged a settlement, agreeing to live separately, that the counter petition be dismissed, that the present arrangement for alimony be continued until the hearing of a petition for permanent alimony and that the agreement be made a rule of Court by entry of a consent judgment. Without any evidence being taken a decree for judicial separation was then made in accordance with the settlement and shortly after a decree was issued for permanent alimony. An action brought in the Supreme Court in September, 1924, to set aside the two decrees on the ground that the Court had no jurisdiction to pronounce the decrees in question without evidence or proof on the hearing being submitted that the plaintiff had been guilty either of adultery, cruelty or desertion without cause for two years, as provided by sections 5 and 6 of the Divorce and Matrimonial Causes Act, 1857, was dismissed.

Held, on appeal, that this was in substance an appeal from the Court having jurisdiction in divorce and matrimonial causes and the Court of Appeal ought not to assume jurisdiction.

Per MARTIN, J.A.: That a judge of the Supreme Court sitting in his ordinary capacity has no jurisdiction in matters which are within the meaning of divorce and matrimonial causes under the English statute of 1857.

Per MACDONALD, J.A.: This is an indirect way of reviewing the decree of the Chief Justice in a divorce matter, but decisions in this Province stand in the way.

APPEAL by plaintiff from the decision of McDONALD, J. Statement

COURT OF APPEAL

1925
Jan. 14.

CLAMAN
v.
CLAMAN

of the 13th of November, 1924, in an action for a declaration that a decree of HUNTER, C.J.B.C. of the 17th of March, 1920, ordering judicial separation between the plaintiff and defendant and a decree of MACDONALD, J. of the 20th of September, 1920, made pursuant to said decree for judicial separation, awarding permanent alimony are null and void for lack of jurisdiction because no evidence or proof on the hearing was made that the plaintiff had been guilty either of adultery or of cruelty or of desertion without cause for two years or upwards as provided by sections 5 and 6 of the Divorce and Matrimonial Causes Act, 1857. Prior to the hearing of the original action the parties came together and agreed: (a) that the plaintiff and defendant should live separate and apart from each other; (b) that the counter petition for nullity of marriage be withdrawn and dismissed; (c) that the plaintiff pay the costs of the defendant; (d) that the arrangement then existing between the plaintiff and defendant for the payment of *interim* alimony pending the hearing of the said action be continued until the hearing of a petition for permanent alimony; (e) that the compromise agreement be made a rule of the Court by entry of a consent judgment. Without hearing any evidence the decree of the 17th of March, 1920, was issued in accordance with the arrangement. It was held by the trial judge that in an action for judicial separation there is nothing that prevents the Court from becoming satisfied by admission, as well as by sworn statement, and he dismissed the action.

Statement

The appeal was argued at Victoria on the 14th of January, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Cassidy, K.C., for appellant: The ground of the action and appeal is that a decree was pronounced by the Chief Justice of British Columbia without any evidence being taken and there was no proof that the plaintiff had been guilty of either adultery, cruelty or desertion. The act of the Court in pronouncing judicial separation can only be done on evidence. This decree was without any sanction and not in the exercise of divorce jurisdiction. The Divorce and Matrimonial Causes Act (20 & 21 Vict., Cap. 85) enacts a substantive law of divorce that is in force in this Province and it is a separate jurisdiction: see *Sheppard* v. *Sheppard* (1908), 13 B.C. 486; *Boyd* v. *Boyd*

Argument

and Collins (1859), 1 Sw. & Tr. 562; *Walker* v. *Walker* (1919), A.C. 947; *Laird* v. *Laird* (1920), 28 B.C. 255 at p. 257. The proper course is to bring a direct action for annulment of these judgments: see Black on Judgments, 2nd Ed., 302; *Great North-West Central Railway* v. *Charlebois* (1899), A.C. 114 at p. 123. The cases of *Scott* v. *Scott* (1891), 4 B.C. 316 and *Brown* v. *Brown* (1909), 14 B.C. 142 were wrongly decided: see *Smyth* v. *Smyth* (1824), 2 Addams Ecc. 254; and *Hooper* v. *Hooper* (1861), 30 L.J., P. 49.

Davis, K.C., for respondent, was not called on.

MACDONALD, C.J.A.: The action is for a declaration that a decree of judicial separation made in March, 1920, and one for permanent alimony made in September of the same year, are null and void on the ground that they were made without jurisdiction.

These decrees were made in the Court having jurisdiction in Divorce and Matrimonial Causes.

In the early history of this Province, the Courts considered that the English Divorce Act was in force here, and that an appeal would lie only to the Privy Council. Since that time appeals have invariably been made to the Privy Council and not to the Court of Appeal of the Province, so that that became the established or recognized rule and has remained such for many years unquestioned. MACDONALD, C.J.A.

The plaintiff continued to pay alimony under said decree until the commencement of this action in September of last year, when he brought this action to set the decrees aside.

Upon the appeal coming on for hearing the Court was unanimously of the opinion that it ought not to assume jurisdiction.

In a previous case before this Court, I expressed some doubt as to the correctness of the course of appealing directly to the Privy Council, but I also said that the procedure had become so well established in the Province and so many cases had gone to the Privy Council and been dealt with there without questioning the propriety of that procedure, that I would not interfere by holding that the Court of Appeal had jurisdiction. One case in this Court was relied upon by Mr. *Cassidy,* in which

COURT OF APPEAL

1925

Jan. 14.

CLAMAN v. CLAMAN

he claimed that the Court had assumed jurisdiction in a case like the present one. I cannot agree with that contention. In that case an execution had been issued for costs incurred in a divorce suit; chattels were seized and claimed by a third party, and an interpleader issue ordered. We entertained an appeal from the judgment upon the issue because we thought it a matter of execution and in no way trespassed on the jurisdiction of the Divorce Court. It will also be remembered that execution is issued in the Supreme Court, in fact the divorce jurisdiction of the Supreme Court, if it may be called such as distinct from any other, is exercised by the judges thereof, and when it comes to execution, the judgment is enforced in the Supreme Court. In this case, however, it is the decree for judicial separation and the decree for alimony which is sought to be interfered with—clearly matrimonial causes.

MACDONALD, C.J.A.

The appeal should therefore be dismissed.

MARTIN, J.A.: I restrict my remarks to the facts before us. In a case such as this the learned judge below was right in taking the view, as I understand him to take from his reasons, that he had no jurisdiction to interfere with the decrees that were pronounced by the Court sitting as a Court for Divorce and Matrimonial Causes; that is to say, that a judge of the Supreme Court of this Province sitting in his ordinary capacity, has no jurisdiction in matters which are within the meaning of Divorce and Matrimonial Causes under the English statute of 1857. That view is consistent with the decision of this Court in *Laird* v. *Laird* (1920), 28 B.C. 255, and I have nothing to add on that point. Nor do I say anything as to what might be the result of the proceedings that were taken by consent before a learned judge in the Divorce Court; because whether they could be attacked or disregarded in any other form of proceeding, it is inadvisable for me to attempt to anticipate or forestall something that might happen. All I do say is this, that under the circumstances which are before us the Supreme Court below in its ordinary capacity had no jurisdiction to interfere with said decrees. Therefore this appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: I agree in dismissing the appeal.

GALLIHER, J.A.

COURT OF APPEAL

1925

Jan. 14.

CLAMAN v. CLAMAN

MACDONALD, J.A.: I agree in dismissing the appeal. I am of the opinion that this is simply an indirect way of reviewing the decree of the learned Chief Justice in divorce matters. Decisions in the Province stand in the way at the present time.

Appeal dismissed.

Solicitor for appellant: *Robert Cassidy.*
Solicitor for respondent: *L. B. McLellan.*

CLAMAN v. CLAMAN. (No. 2).

GALLIHER, J.A. (At Chambers)

1925

Feb. 4.

CLAMAN v. CLAMAN

Practice—Court of Appeal—Action to set aside a decree for judicial separation—Alimony—Payment in to stay execution pending decision of Court of Appeal—Application that money remain in Court pending decision of Supreme Court—Jurisdiction.

An action for a declaration that two decrees of the Court sitting in Divorce and Matrimonial Causes, one ordering judicial separation and the other awarding in pursuance thereof permanent alimony are null and void for lack of jurisdiction was dismissed. Pending the determination of the appeal to the Court of Appeal, the plaintiff paid into Court $1,000 for stay of execution under the decree of alimony. Upon the dismissal of the appeal the plaintiff applied to a judge of the Court of Appeal in Chambers for an order that the $1,000 be retained in Court pending the determination of the appeal to the Supreme Court of Canada.

Held, that the application must be dismissed as there is no jurisdiction to make the order.

APPLICATION by plaintiff to a judge of the Court of Appeal to perfect his appeal to the Supreme Court of Canada, for an order retaining in Court $1,000 already paid in under appeal and for a further order that upon filing a satisfactory bond for $1,500 execution under the decree for alimony be stayed until the determination of the appeal to the Supreme Court of Canada. The $1,000 had been paid into Court for stay of execution pending the determination of the appeal to

Statement

GALLIHER, J.A. (At Chambers)

1925

Feb. 4.

CLAMAN v. CLAMAN

the Supreme Court of Canada. Heard by GALLIHER, J.A. at Chambers in Victoria on the 4th of February, 1925.

Cassidy, K.C., for the application.
L. B. McLellan, contra.

GALLIHER, J.A.: On March 17th, 1920, Maude Henrietta Claman obtained a decree for judicial separation from her husband, Isidor Claman, in the Supreme Court of British Columbia in Divorce and Matrimonial Causes, which was later followed by a decree for permanent alimony on 30th September, 1920, which was duly paid her up to the time of the issuance of the writ herein, on 11th September, 1924.

This action was brought entitled in the Supreme Court of British Columbia to set aside the decree for permanent alimony, was tried before MCDONALD, J. and dismissed. Isidor Claman, the plaintiff in this action, then appealed to the Court of Appeal, which appeal was dismissed by this Court for want of jurisdiction. A further appeal is now being taken to the Supreme Court of Canada.

Pending the hearing of the appeal to the Court of Appeal of British Columbia, the plaintiff paid into Court the sum of

Judgment

$1,000 by way of stay of execution under the decree for alimony and no alimony was paid during that period.

The appellant upon applying to perfect his appeal to the Supreme Court of Canada, by putting up a bond for $500, which is not objected to, also applies to me as a judge of the Court of Appeal for an order retaining in Court the $1,000 already paid in under appeal, and for a further order that upon filing a satisfactory bond for $1,500 execution under the decree for alimony be stayed until the hearing and determination of his appeal to the Supreme Court of Canada has been had.

An application on behalf of the respondent has been made and is now pending for payment out to her of this $1,000, and I am quite clear that I have no right to make any order interfering with this. That alimony is now due, and could be recovered by the respondent at any time.

With regard to the staying of execution, the Supreme Court

GALLIHER, J.A. (At Chambers)

1925

Feb. 4.

CLAMAN v. CLAMAN

of Canada Act, Rules 76 and 77, do not, in my opinion, apply to this case.

The action that came before us on appeal does not decree the payment of any money. The only judgment which decrees payment is the decree for alimony in the Divorce and Matrimonial Causes side of the Supreme Court of British Columbia, and since this Court has decided that we have no jurisdiction to entertain an appeal affecting causes in that Court, it seems to me to follow as a natural result that I have no power to make the order asked.

The case of *Agricultural Insurance Co.* v. *Sargent* (1895), 16 Pr. 397, referred to by Mr. *Cassidy,* does not touch the point to be decided in this case.

Judgment

The application will be dismissed with costs, except as to the security to be given to perfect the appeal to the Supreme Court, of which I approve.

Application dismissed.

MCDONALD, J.

1925

Feb. 9.

RE DEWDNEY ELECTION.

SMITH v. CATHERWOOD

RE DEWDNEY ELECTION. SMITH v. CATHERWOOD AND DUNCAN.

Elections—Provincial—Affidavit in Form 27—Eleven absentee voters failed to make—Validity of votes—Sitting member's majority five—B.C. Stats. 1920, Cap. 27, Secs. 106 and 107; 1921, Cap. 17, Secs. 10 and 11.

On a petition to set aside the election of the sitting member for the constituency of Dewdney whose majority was five it appeared that eleven absentee voters failed to make the affidavit in Form 27 as required by sections 106 and 107 of the Provincial Elections Act, the two essential facts required by the statute to be deposed to being: (1) That the voter has not marked any ballot paper "for the election now pending"; and (2) that he has not received nor been promised anything in order to induce him to vote or to refrain from voting "at the election now pending." But the said voters each made an affidavit purporting to be made under the Liquor-control Plebiscite Act, B.C. Stats. 1923, Cap. 39, which did not include the essential facts required under Form 27.

Held, that there was non-compliance with the Act by the eleven voters in two essential particulars and as the sitting member had a majority

MCDONALD, J.

1925

Feb. 9.

RE DEWDNEY ELECTION.

SMITH v. CATHERWOOD

of five the non-compliance with the Act may have affected the result of the election. The petition is granted and the election and return is declared invalid.

PETITION to set aside the election of John Alexander Catherwood, sitting member in the Provincial Legislature for Dewdney, on the ground that eleven absentee voters failed to make the affidavit in Form 27 as required by sections 106 and 107 of the Provincial Elections Act, the sitting member having obtained a majority of five at the election. Heard by McDONALD, J. at Vancouver on the 5th of February, 1925.

J. W. deB. Farris, K.C., and *Sloan,* for petitioner.
Read, for respondent.

9th February, 1925.

McDONALD, J.: The petitioner seeks to set aside the election of John Alexander Catherwood, the sitting member in the Provincial Legislature for the constituency of Dewdney, upon the ground that eleven absentee voters failed to make the affidavit in Form 27 which is required by sections 106 and 107 of the Provincial Elections Act. Each of the eleven voters, whose votes are in question, was required, under the Act, before receiving a ballot, to make the affidavit which is set out in the form, and the two essential facts required by the statute to be deposed to are: (1) That the voter has not marked any ballot paper "for the election now pending," and (2) that he has not received, nor been promised, anything in order to induce him to vote or to refrain from voting "at the election now pending." None of these eleven voters made any such affidavit. On the contrary, each of them made an affidavit purporting to be made under an entirely different statute, *viz., the* Liquor-control Plebescites Act, and none of them deposed to the essential facts required to be sworn to under Form 27. So that *in limine* I find non-compliance with the Act in two essential particulars. In *Re Dewdney Election. Smith* v. *Catherwood* (1924), 34 B.C. 244, it was held by two of three learned judges of the Court of Appeal that certain other provisions of section 106 were directory only. No similar question to that now in issue was there raised. In my opinion, there is no escape from the

Judgment

conclusion that the making of the affidavits produced did not satisfy the condition precedent to these voters becoming entitled to a ballot. If I am right thus far, it becomes unnecessary to consider the various cases which have been decided as to which provisions are directory and which mandatory in similar statutes.

It was contended that by virtue of section 136 the election should not be declared to be invalid. That section provides as follows:

"136. No election shall be declared invalid by reason of a non-compliance with the rules of procedure contained in this Act, or any mistake in the use of the forms in the Schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles of this Act, and that such non-compliance or mistake did not affect the result of the election."

In my opinion, this was not "a mistake in the use of the forms in the schedule to the Act." The form in the schedule to the Act was not used at all, but an entirely different form which had no relation to the Elections Act. In principle the situation is exactly as if no form whatever was used. Nor can it be said that the election was conducted "in accordance with the principles of the Act," particularly the principles surrounding the taking of the votes of "Absentees." Those principles have been departed from, and it is no answer, regrettable as the situation may be, that the voters themselves were not to blame.

Judgment

It is clear on the evidence that of the eleven voters in question nine may have voted for Mr. Catherwood. If they did so vote his present majority of five is reduced to a minority of four, as there is no possible way of telling how the voters in question actually did vote. It cannot, therefore, be said with certainty that the non-compliance with the Act "did not affect the result of the election."

It was forcibly contended by Mr. *Hamilton Read* for the respondent that, in any event, the petitioner waived all objections to the affidavits in question and cannot now be heard to complain. It is quite true that when the deputy returning officer was making his count, both candidates consented to these ballots being counted before the envelopes containing them were opened. I think, however, Mr. *Farris's* contention is correct,

MCDONALD, J.

1925

Feb. 9.

RE DEWDNEY ELECTION.

SMITH v. CATHERWOOD

that it was not within the power of the petitioner to waive compliance with the statute in this regard. By section 192 of the Act, it is provided that a petition may be presented by any person who voted or who had a right to vote at the election to which the petition relates. The right to present a petition is not confined to the unsuccessful candidate. It resides in every voter in the Electoral District. The statute was passed not for the benefit of any individual but for the benefit of the public at large, who have an interest in seeing that the safeguards provided by the statute are observed. I have neither been referred to, nor have I found any direct authority in this regard. True, if I were dealing solely with the question of "irregularity" then the cases of *Jenkins* v. *Brecken* (1883), 7 S.C.R. 247 at p. 265 and *Eastern Division of Clare Case* (1892), 4 O'M. & H. 165 might be apposite. But this is not a case of irregularity.

Judgment

In Vol. 12, Encyclopædia of the Laws of England, pp. 501-02, it is laid down that

"a statutory provision which is introduced for general public purposes, and not for the benefit of a particular person only, cannot be waived,"

and the learned author cites *Habergham* v. *Vincent* (1793), 2 Ves. 204 at p. 227, and *Hunt* v. *Hunt* (1862), 31 L.J., Ch. 161 at p. 175. The cases cited are not election cases, but I think are authority for the author's statement.

It follows that, in my opinion, the prayer of the petitioner must be granted and the election and return must be declared invalid.

Petition granted.

PREMIER GOLD MINING COMPANY LIMITED v. COASTWISE STEAMSHIP & BARGE CO. LIMITED.

COURT OF APPEAL

1925

Jan. 6.

PREMIER GOLD MINING CO. v. COASTWISE STEAMSHIP & BARGE CO.

Shipping—Contract—Breach—Negligence—Damages—Loss of cargo of ore—Seaworthiness of barge—Perils of the sea—Onus of proof—Evidence.

The defendant Company having contracted with the plaintiff to carry in its own barges crude ore from the Port of Stewart to the smelter at Anyox, brought two barges to Stewart on the 14th of March, 1922, for the purpose of loading them with ore. On the morning of the 15th one of the barges, the Independent, while at the wharf for loading, was found to have listed and rested on the ground at one corner but on being pumped out righted itself and both barges were loaded with ore the Independent having on board 480 tons. On the morning of the 16th a tug of the defendant Company took the barges in tow (the Independent in front) and on the following afternoon when nearing Anyox in rough weather the Independent was seen to list and gradually getting worse overturned in about half an hour. An action for damages for loss of the cargo was dismissed.

Held, on appeal, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that the decision of the case depends on the condition of the scow at the commencement of the voyage and the care taken of her during the voyage and irrespective of the question of onus of proof of seaworthiness the evidence amply justifies the findings of fact of the trial judge that the issue of seaworthiness must be found in the defendant's favour.

APPEAL by plaintiff Company from the decision of GREGORY, J. of the 15th of February, 1924, in an action to recover $17,600 damages for failure to deliver 480 tons of crude ore taken by the defendant on its barge the Independent at Stewart, B.C., but lost in transit to Anyox, B.C. Under contract the defendant was to supply seaworthy barges with tugs to carry ore from the plaintiff Company's wharves at Stewart to the smelter at Anyox. On the morning of the 14th of March, 1922, the defendant Company brought two barges (the Independent and Griffnip) to the plaintiff Company's wharves at Stewart and from its ore bins and with the machinery of the plaintiff Company supplied for the purpose the defendant Company loaded the barges with ore, the Independent having 480 tons on board. On the morning of the 15th it was found the Independent listed and rested on the ground at one corner. An extra pump was obtained and on the water being pumped

Statement

COURT OF APPEAL

1925

Jan. 6.

PREMIER GOLD MINING CO. v. COASTWISE STEAMSHIP & BARGE CO.

Statement

out the barge righted itself. There was evidence to the effect that on the night of the 15th the watchman had to pump her out again. On the morning of the 16th a tug of the defendant Company took the two barges in tow (the Independent being in front) and started for Anyox. On the afternoon of the 17th when the tow was nearing its destination they encountered heavier weather than usual and the Independent began to list. It proceeded to get worse and about half an hour after it was first seen to list it overturned but the other scow remained intact. The scow was taken to Anyox and from there to the dry dock at Prince Rupert for repair. The learned trial judge dismissed the action.

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

Argument

F. G. T. Lucas (*E. A. Lucas,* with him), for appellant: They lost our ore and the burden of proof is on them: see *The Xantho* (1886), 11 P.D. 170 at p. 172, and on appeal (1887), 12 App. Cas. 503 at p. 512; *Woodley* v. *Michell* (1883), 11 Q.B.D. 47. Notice was not given but the clause in relation thereto is of no effect by reason of The Water-Carriage of Goods Act: see *Anthony Hordern & Sons, Limited* v. *Commonwealth and Dominion Line, Limited* (1917), 2 K.B. 420 at p. 424.

Mayers, for respondent: The facts do not warrant the shifting of the burden of seaworthiness to the defendant: see *Corporation of the Royal Exchange Assurance Co. (of London)* v. *Kingsley Navigation Co.* (1922), 31 B.C. 294 at pp. 298 and 302-3, and on appeal (1923), A.C. 235; 92 L.J., P.C. 111. A ship is *prima facie* deemed seaworthy: see *Pickup* v. *Thames Insurance Co.* (1878), 3 Q.B.D. 594 at p. 600; *Blackburn* v. *Liverpool, Brazil & River Plate Steam Navigation Co., Lim.* (1901), 71 L.J., K.B. 177. The barge had repairs in April, 1922, and she has been going ever since. It was a question of credibility and the judge accepted our story: see *Standard Marine Insurance Co.* v. *Whalen Pulp and Paper Mills, Ltd.* (1922), 64 S.C.R. 90 at p. 95. As to defendant's rights acquired by bill of lading see *Australasian United Steam Navigation Co.* v. *Hunt* (1921), 2 A.C. 351 at p. 357; *Atlantic*

Shipping and Trading Co. v. *Louis Dreyfus & Co.* (1922), 2 A.C. 250; *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* (1924), A.C. 522 at p. 530.

Lucas, in reply, referred to *The Europa* (1907), 77 L.J., P. 26; *Liver Alkali Co.* v. *Johnson* (1874), L.R. 9 Ex. 338. As to the bill of lading containing section 4 of The Water-Carriage of Goods Act see *Bank of Australasia* v. *Clan Line Steamers, Limited* (1916), 1 K.B. 39; *Morris and Morris* v. *The Oceanic Steam Navigation Company (Limited)* (1900), 16 T.L.R. 533; *Tattersall* v. *National Steamship Company* (1884), 12 Q.B.D. 297. A package is not a cargo of ore loaded on a boat: see *Luckenbach* v. *McCahan Sugar Co.* (1918), 248 U.S. 139.

Argument

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: The decision of this case hinges upon whether or not the scow in question was seaworthy when she commenced her voyage, and upon whom the onus of proof of that issue rested.

The case was exhaustively argued on both sides. The subject of the onus of proof of seaworthiness was argued at great length, but having regard to the evidence, it appears to me to be unnecessary and unprofitable as well, though I have little doubt respecting it, to consider the question of onus, as in view of the evidence, which amply justifies the findings of fact of the learned trial judge, the issue of seaworthiness must be found in defendant's favour.

MACDONALD, C.J.A.

I do not agree with some of the opinions expressed by the learned judge, such for instance as those which led to the virtual rejection of the evidence of the watchman and of Anderson. Consideration, I think, ought to be given now to the evidence of both these witnesses, so far as it is material.

The other evidence, however, except that of Wilkie and Watts, which the learned judge found to be unsatisfactory, and with respect to which I am not in as good a position as he was to weigh, is so convincing if believed, and it was believed by the learned judge, that following a sound rule of decision, I cannot say that he was in error in respect of his finding of fact. It is

COURT OF APPEAL

1925

Jan. 6.

PREMIER GOLD MINING CO. v. COASTWISE STEAMSHIP & BARGE CO.

perfectly clear to me, if indeed it were not admitted by counsel for the plaintiff, that the decision of the case depends on the condition of the scow when she commenced her voyage and the care that was taken of her during the voyage. On this question the evidence of what occurred during the voyage is all one way: there appears to be no fault on the part of those who had the scow in tow. If she were seaworthy, *i.e.*, fit for the voyage in those waters with her load, then the plaintiff cannot succeed. On the other hand, if she were unfit, the defendant must pay the plaintiff's loss. There are no other circumstances in the case which open a wider field for survey. The evidence is no doubt conflicting in some respects, but I think the weight of evidence is unquestionably in the defendant's favour. The examination of the scow at the dry dock at Prince Rupert does not indicate unseaworthiness when she commenced her voyage; that is to say, it does not necessarily indicate this, although there was conflicting evidence which the learned judge was entitled to weigh, and which he did weigh in coming to his conclusion. In weighing it anew, I arrive at the same conclusion.

MACDONALD, C.J.A.

The appeal should therefore be dismissed.

MARTIN, J.A.

MARTIN, J.A.: I agree with the reasons of the Chief Justice in dismissing the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal raises the following questions: whether the barge supplied by the respondent to the appellant was seaworthy? and whether the loss of the ore was caused by perils of the sea?

The learned trial judge held that the barge was seaworthy, and that the loss occurred by perils of the sea, and the respondent was not liable for the loss of the ore by the scow capsizing.

It is really unnecessary to determine, upon the particular facts of this case, whether the onus of establishing that the barge was seaworthy was upon the respondent, as the evidence adduced at the trial, in my opinion, taken as a whole, establishes unseaworthiness, and that was the proximate cause of the loss of the ore. The respondent contracted with the appellant to carry by sea a cargo of gold and silver crude ore from Port Stewart, British Columbia, to the Port of Anyox, British Columbia, the

cargo of ore consisting of 960,000 pounds, from the mines of the appellant, the ore being put upon the scow supplied pursuant to contract by the respondent, named "Independent Asphalt No. 2" (hereinafter called the Independent). There was failure to deliver the ore because of the capsizing of the scow when under tow to the point of delivery. The evidence establishes to my complete satisfaction that the scow was unseaworthy at the time of the delivery thereof for loading, and at the commencement of the voyage, to the knowledge of the respondent, the unseaworthiness of the scow and its unfitness for the carriage of the cargo of ore being well demonstrated by the evidence in the case.

The value of the ore lost was claimed to be $17,600.

Pursuant to the contract, the respondent supplied two scows to the appellant to be loaded by the workmen of the appellant, and after loading on the following morning, the Independent was down by the left, upon the side next the wharf. Later the scow was pumped out and this happening was made known to respondent. Captain Cameron, acting for the respondent, had delivered the scows at the wharf of the appellant. Captain Cameron made a cursory examination—nothing in the nature of a survey of the condition of the scow—and that was after the pumping out of the scow, it then being on an even keel, and it was reported that there was no water. The night watchman the following night pumped the scow out twice during the night. The voyage was proceeded with, the two scows forming the tow of the respondent's tug Tartar, Captain Cameron being in command. The voyage to near the point of delivery of the cargo was uneventful save that off Ramsden Point a little weather was encountered, and the tug took shelter with its tow, *i.e.*, the two scows, between North Point and Low Point in Big Bay, below the entrance to Observatory Inlet. It is claimed that the Independent had not at this time taken any water. The voyage was proceeded with until off Frank Point, not far from Port Anyox, the point of delivery of the cargo. Then it was that the Independent, which was the closest scow to the tug in the tow, took a slight list, the channel at the time being somewhat sloppy, the tug then making about two to three

COURT OF APPEAL

1925

Jan. 6.

PREMIER GOLD MINING CO. v. COASTWISE STEAMSHIP & BARGE CO.

knots an hour. This was at about 11.40 a.m., and the scow capsized at 12.15 p.m.; before the scow actually capsized, the captain of the tug noticed that the scow had listed, and he started hauling in the tow line, but later desisted and went ahead. The scow was then going over fast, and the weather was described as "blowing a good stiff breeze." Almost immediately, the scow capsized, spilling out the whole cargo. The other scow in the tow came through all right, it being 139 feet behind. Captain Cameron, the master of the Tartar, the tug having the two scows in tow, was a witness for the respondent. His testimony shews that the water was coming aboard the scow in considerable quantities and the Independent took a slight list at 11.30 a.m.; the Griffnip, the other scow, being directly behind the Independent, and he did not notice any list upon her.

I do not propose to, in detail, go through the evidence, but upon a careful reading and study of it all, it is a remarkable circumstance that, in the weather encountered, the scow Independent capsized and the Griffnip came through all right. The only reasonable conclusion upon all the evidence is that the Independent was unseaworthy and took in water, not only through open seams above and below the water line, but especially through the unprotected eleven inch hole upon her deck. The truth is, she was palpably unfit for the carriage of the cargo. There are circumstances which tend to support this view. No log was kept as the voyage was proceeded with; it was all written up later, and there was an absence at the start of the exercise of due diligence to see to the seaworthiness of the scow Independent, with express notice that she was in a leaky condition. It was a proper case before the voyage was entered upon, especially in view of her listing at the wharf, the point of loading, to have made a thorough and complete survey of the scow, but this was not done. It therefore comes to this, that the respondent has upon the evidence been shewn to have been negligent in not taking all proper steps to advise itself of the seaworthiness of the scow, and with evidence of unseaworthiness it is of no avail to plead a peril of the sea, as the happening was occasioned by its own negligence. In my opinion, the judgment of their Lordships of the Privy Council

MCPHILLIPS, J.A.

in *Royal Exchange Assurance Corporation* v. *Kingsley Navigation Co.* (1923), 92 L.J., P.C. 111, is very much in point in this case, and supports the view I have formed that upon the particular facts of this case, the respondent is liable for the loss of the cargo occasioned by the capsizing of the scow Independent in that the respondent, in the language of Lord Parmoor, appearing at p. 114, "did not exercise due diligence to make the [Independent] in all respects seaworthy."

The appellant in the present case relies upon the Canada Shipping Act, R.S.C. 1906, Cap. 113, and The Water-Carriage of Goods Act, Can. Stats. 1919, Cap. 61, Acts relied upon in the *Royal Exchange* case. As the head-note of the case sets forth in a succinct way the material portions of sections of the two Acts that need consideration in the present case, I think it well to quote same in full:

"By section 964 of the Canada Shipping Act, 1906: 'Carriers by water shall be liable for the loss of or damage to goods entrusted to them for conveyance, except that they shall not be liable when such loss or damage happens,—(*a*) without their actual fault or privity, or without the fault or neglect of their agents, servants or employees; or, (*b*) by reason of fire . . . .'

"By section 4 of the Canadian Water-Carriage of Goods Act, 1910, a shipowner is prohibited from contracting out of his obligation to exercise due diligence to make and keep the ship seaworthy.

"By section 6 the owner of a ship who exercises due diligence to make the ship in all respects seaworthy is protected against responsibility for loss or damage resulting from faults or errors in navigation, or in the management of the ship, or from latent defect.

"By section 7: 'The ship, the owner, charterer, agent, or master shall not be held liable for loss arising from fire, ... or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants, or employees.'

"A cargo of lime in barrels was shipped on board a barge, the property of the respondent company. In consequence of the unseaworthy condition of the barge water leaked in, which came into contact with the lime and generated heat sufficient to set the vessel on fire, and the cargo was lost:—*Held*, that the statutory immunity against liability for loss by fire was not absolute, but that the onus was upon the respondents to shew that the loss occurred without their actual fault or privity, or without the fault or neglect of their agents, servants or employees, and that, as there was evidence that their manager was aware of the condition of the barge, they could not claim the protection of the sections."

MCPHILLIPS, J.A.

In the *Royal Exchange* case the judge at the trial held that the barge was unseaworthy (here we have it held that the scow Independent was seaworthy) and that the defendants had failed to prove that the unseaworthiness had not caused the loss (here we have it held that the cargo was lost by perils of the sea).

COURT OF APPEAL

1925

Jan. 6.

PREMIER GOLD MINING CO. v. COASTWISE STEAMSHIP & BARGE CO.

Lord Parmoor, dealing with the abstract question of law which has to be considered in this case, in the *Royal Exchange* case, at p. 113, said:

"Apart from any limitation of liability, either by statute or agreement, a carrier of goods by sea is liable as insurer of the safety of the goods which he undertakes to deliver, and further warrants that the vessel, in which the goods are intended to be carried, is seaworthy at the time when the goods are placed on board; in other words, that the vessel has that degree of fitness, in relation to the character of the goods to be carried, which a prudent owner of the goods would require a vessel to have at the commencement of a voyage, in view of all probable conditions and contingencies. It follows that, apart from the protection of The Water-Carriage of Goods Act, the respondents would be liable. The case for the respondents is that they are within the exceptions from liability, created by that Act, in favour of the shipowner. The first important section is section 4. This section (*inter alia*) renders any clause, covenant or agreement illegal, null, and of no effect which purports to relieve the owner, charterer, or agent of any ship, or the ship itself, from obligations to exercise due diligence to make and keep the ship seaworthy. There is nothing in this section which prohibits a shipowner from contracting out of his common law liability to warrant the absolute seaworthiness of the ship, but he cannot contract out of the obligation to exercise due diligence to make and keep the ship seaworthy."

MCPHILLIPS, J.A.

Now, as to the evidence of unseaworthiness that I consider was established upon the evidence of the defence as well as that led by the plaintiff. One Charles C. R. Anderson was called by the defence, being the foreman shipwright on the dry dock at Prince Rupert (the Independent after the capsizing being taken there for repair). This witness made a statement in writing relative to the condition in which he found the scow and, in answer to the learned trial judge, the witness said, referring to the statement after reading it at the time of the trial:

"I think that is pretty fair. Certain clauses I cannot recollect, but it might be, the oakum being absolutely rotten, or so why. . . . ."

Later, in re-direct examination, to the counsel for the defence the witness said:

"Is there anything in this writing which conflicts with your statements today? Which do you say is the correct statement? The statements I made today to my own mind now are correct. There are several points in this statement that I made to Mr. *Lucas*. [Mr. *Lucas* was later counsel for the plaintiff at the trial and upon this appeal]. I should think in a general way the two statements bear out pretty nearly the same, the conditions of the seams and so forth."

The statement which was adduced in evidence reads as follows: [His Lordship, after setting out the statement, continued].

This statement specifically deals with the eleven-inch hole,

and that alone unquestionably demonstrates that the scow was unseaworthy, and this was a defective condition that could not be in any way changed by the scow capsizing, and all that took place in getting the scow on an even keel again and towing it to Prince Rupert for repair. It is to be noted that Anderson says "right alongside the pump was an 11-inch hole. This hole was not water-tight. When the barge came on the dock this hole was covered with a plank, nailed down but not water-tight. Water on the deck would leak through this hole." And taking seas as it is shewn at and before the capsizing this situation alone gives sufficient cause for the capsizing, and by this alone unseaworthiness is established. Wilkie, the marine surveyor's evidence is, in my opinion, quite conclusive in establishing unseaworthiness also. Wilkie had large experience and was well able to give testimony as to the seaworthiness or want of seaworthiness of the Independent, and after dealing with the condition he found it in in Prince Rupert and as an expert when the condition of the Independent he was asked the following questions by the counsel for the plaintiff:

"Then Mr. Wilkie, I will ask this question, what would be the result if a scow went to sea in that condition? It would be unseaworthy.

"What would happen? She would get water in her and eventually capsize."

As to the eleven-inch hole, there is the evidence of Captain Cameron, the tug master of the Tartar in charge of the tow. Mr. *Mayers,* counsel for the defence at the trial, asked this question:

"That hole that he [Woolston, a ship's carpenter, a witness called for the defence] mentioned, that 11-inch hole, what do you know about that? I know nothing at all about the hole, I never seen the hole. I seen a square piece of wood somewhere around the vicinity of the pump that was nailed down and in my opinion that was solid and it had been there for some time.

"Anyhow it was there before you had anything to do with the Independent? Yes."

This makes it clear to demonstration that there was the grossest of negligence here. Think of it! A scow is delivered by the respondent to the appellant in this defective condition with a board nailed over an eleven-inch hole shielding the situation from observation, and yet it is claimed the scow was seaworthy when it is plain the scow would take in water in that way as well as in the many other ways as the evidence shews. The

COURT OF APPEAL

1925

Jan. 6.

PREMIER GOLD MINING CO. v. COASTWISE STEAMSHIP & BARGE CO.

Independent before capsizing took a list—unquestionably the list was caused by the water that got below, it is idle to contend otherwise. The circumstance that tells the tale is, why was it that the Griffnip, the other scow, 129 feet behind, did not capsize? The plain answer is, she did not capsize because she was watertight, but the Independent did because of the open seams and the eleven-inch hole.

It cannot be said that Captain Cameron, tug master of the Tartar, who represented the respondent in the voyage, pursued the usual and customary course; in fact, the required duty to enter up the log as he proceeded on the voyage, that was not done until after the arrival at Anyox, and then of course the disaster, *i.e.*, the loss of the cargo on the Independent had taken place, 960,000 pounds of gold and silver crude ore had gone to the bottom of the sea. What was written up at Anyox? Captain Cameron, under examination as to the contents of the log, said:

"You also have the words 'sounded Independent' [this was at Big Bay on the way below the entrance to Observatory Inlet], that is your handwriting? I don't think that is my handwriting.

MCPHILLIPS, J.A.

"When was that put in? Probably after we arrived in Anyox, but it was not my handwriting.

"It was not in there originally? No.

"It was put in after you arrived at Anyox? Yes."

I do not propose to at any greater length deal with the evidence, suffice it to say that the evidence satisfies me that the scow was not seaworthy at the time of the commencement of the voyage, and if that be the proper conclusion upon the facts, that really ends the matter and the liability for the loss of the cargo falls upon the shipowner, the respondent in this appeal.

In view of the fact that the Independent had a list at the wharf when loaded, and that night had to be pumped out twice, the defective condition as shewn of the seams, and, above all, the eleven-inch hole, it must be said, in my opinion, that there was negligence upon the facts of the present case. The Independent was really unseaworthy, and it is no answer for the respondent to claim want of knowledge. Captain Cameron, its representative, knew all these facts and, if not, he should have known them, and liability is plainly upon the respondent for the loss of the cargo. To merely say the cargo was lost by reason

of the capsizing of the Independent is not enough, it laid upon the respondent to shew beyond any possible doubt, considering the previous happenings, that the Independent was carefully surveyed and found fit for the purposes for which she was to be used, *i.e.*, carrying safely the valuable cargo of ore, and failing to do that, there was negligence that can reasonably be said to have been the proximate cause of the loss of the cargo. In this connection I would refer to what Lord Herschell said in *Thomas Wilson, Sons & Co.* v. *Owners of Cargo of the Xantho* (1887), 56 L.J., P. 116 at p. 120:

"Much argument was addressed to your Lordships on the question, whether when the plaintiffs had proved that the goods had not been delivered, thus throwing the onus on the defendants of excusing their non-delivery, proof by them that the vessel had been sunk in a collision would be sufficient to shift the onus and render it incumbent on the plaintiffs to establish that the collision was due to the defendants' negligence, or whether the defendants, to bring themselves within the exception, must shew that the loss was not due to a cause induced by their own negligence. I do not think that this point is now before your Lordships for decision. Arguments of weight have been adduced in support of either view. I certainly must not be understood as deciding that the mere proof of loss by collision under circumstances as consistent with its resulting from the negligence of the carrying ship as from any other cause, would exonerate the defendants."

MCPHILLIPS, J.A.

I would also refer to what Lord Macnaghten said at p. 122:

"In this case the bill of lading on which the question arises is in common form. In the usual terms it states the engagement on the part of the shipowner to deliver the goods entrusted to his care. At the same time it specifies, by way of exception, certain cases in which failure to deliver those goods may be excused. So much for the express terms of the bill of lading. But the shipowner's obligations are not limited and exhausted by what appears on the face of the instrument. Underlying the contract, implied and involved in it, there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the shipowner, it seems to follow as a necessary consequence that, even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss. . . . . It seems to me to be equally difficult to support the rule in *Woodley* v. *Michell* (1883), 52 L.J., Q.B. 325; 11 Q.B.D. 47 on principle. If the accident is brought about by the negligence of the owner of the carrying vessel or his servants, it would be contrary to common sense and against all sound principle to allow one who was the author of the mischief to avail himself of his own wrong."

Unquestionably the law is that the shipowner is liable for negligent acts and defaults, by himself, his servants and agents employed in the carrying out of the contract and losses owing to want of seaworthiness or unfitness of the ship. (*Nelson*

COURT OF APPEAL

1925

Jan. 6.

PREMIER GOLD MINING CO. v. COASTWISE STEAMSHIP & BARGE CO.

Line (Liverpool), Limited v. *James Nelson & Sons, Limited* (1908), A.C. 16, Lord Loreburn, L.C. at p. 19; *The Xantho* (1887), 12 App. Cas. 503 at pp. 510, 512, 515; *Hamilton, Fraser & Co.* v. *Pandorf & Co., ib.* 518 at pp. 524, 526, 528).

There is, of course, always the liability upon the shipowner of exercising due diligence to make and keep the ship in all respects seaworthy. This point was dealt with in the *Royal Exchange* case, *supra,* by Lord Parmoor. At p. 113 he said:

"It remains to consider whether the respondents did exercise due diligence to make and keep the Queen City seaworthy."

Here there was the failure of Captain Cameron to make a survey of the Independent when he had knowledge that she was leaking after being loaded and had listed, necessitating her being pumped out twice that night. Neverthless, Captain Cameron took the Independent in tow and this must be deemed to be the act of the respondent, a negligent act. Undoubtedly, anything approaching a survey of the Independent would have shewn her absolute unseaworthiness for the voyage and the carrying of the cargo. At p. 114, Lord Parmoor in the *Royal Exchange* case said:

MCPHILLIPS, J.A.

"There is ample evidence that the actual conditions of rot which affected the ship, and rendered her unseaworthy, were known to Mr. Mather on his own personal inspection. The respondents are a limited company, as were the defendants in the case of the *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* [(1913), 83 L.J., K.B. 861; (1914), 1 K.B. 419; affirmed in H.L. (1915), A.C. 705; 84 L.J., K.B. 1281]. They could only act through some individual as their *alter ego,* and they did so act through Mr. Mather. The result is that, as the owners of the *Queen City* did not exercise due diligence to make and keep the ship seaworthy, no clause, covenant or agreement to escape liability, under this head, would have protected them from a claim for the loss of cargo, and any such clause, covenant or agreement would have been illegal, null and void, and of no effect, unless it had been in accordance with other provisions of the Act. In the present case there is no suggestion that the other provisions of the Act would have operated to render valid such a clause, covenant or agreement."

It is quite evident that Captain Cameron was somewhat fearful of leakage, and when in Big Bay near the entrance to Observatory Inlet, after meeting some weather, a stick or rod was used, a most perfunctory examination, and in this connection I would refer to what Lord Parmoor said in the *Royal Exchange* case, at pp. 114-115.

It is reasonable to believe that before the tow reached the point of disaster the Independent had taken in a good deal of

water, and everything points to the fact that the Independent when she was subjected to the seas she encountered off Brooke Island and Frank Point (the water dashing over her), leaked at the seams, shewn to have been open above the water line and took in water through the eleven-inch hole which was left unprotected; in truth, the Independent was wholly unseaworthy.

Then by section 964 of the Canada Shipping Act, there is express liability for the loss of goods. The section reads as follows:

"964. Carriers by water shall be liable for the loss of or damage to goods entrusted to them for conveyance, except that they shall not be liable when such loss or damage happens,—

"(*a*) without their actual fault or privity, or without the fault or neglect of their agents, servants, or employees; or,

"(*b*) by reason of fire or the dangers of navigation; or,

"(*c*) from any defect in or from the nature of the goods themselves; or,

"(*d*) from armed robbery or other irresistible force."

This is an express statutory liability, with only the stated exceptions. The Merchant Shipping Act, 1894 (57 & 58 Vict., Cap. 60, Sec. 502), analogous legislation, was referred to by Lord Parmoor in the *Royal Exchange* case, at pp. 115-16:

"Under the terms of section 502 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), the owner is not liable to make good to any extent whatever any loss or damage happening without his actual fault or privity where (*inter alia*) goods on board his ship are lost or damaged by reason of fire on board the ship. It has been held under this section that parties who plead the section must bring themselves within its terms, and that the whole onus lies on the shipowner to prove that the loss has happened without his actual fault or privity—*Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* and *Ingram & Royle, Lim.* v. *Services Maritimes du Treport* [(1913), 83 L.J., K.B. 382; (1914), 1 K.B. 541]. In this latter case, Kennedy, L.J., says that the party who is relying upon the provisions of section 502 of the Merchant Shipping Act, 1894, has not merely to shew that the goods, for the loss of which he is being sued, were lost by reason of fire, but also to shew affirmatively that the loss happened without his actual fault or privity. Their Lordships are of opinion that the same principle applies in the construction of section 7 of The Water-Carriage of Goods Act, and, therefore, that the onus was upon the respondents to shew that the loss arose without their actual fault or privity, or without the fault or neglect of their agents, servants, or employees. The words 'actual fault or privity' include acts of omission, and if an owner has means of knowledge which he ought to have used, and does not avail himself of them, his omission so to do may be a fault, and if so, it is an actual fault, and he cannot claim the protection of the section—*Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (83 L.J., K.B. at p. 869; (1914), 1 K.B. at p. 432), *per* Buckley, L.J. It is not necessary to analyze further the words 'actual fault or privity,' since the loss must also be without the fault or neglect of the agents, servants or employees of the respondents, and, quite apart from any question of onus, it is impossible to say in the present case that the loss arose without the fault or neglect of Mr.

MCPHILLIPS, J.A.

COURT OF APPEAL

1925

Jan. 6.

PREMIER GOLD MINING CO. v. COASTWISE STEAMSHIP & BARGE CO.

MCPHILLIPS, J.A.

Mather, who, having seen the report of Captain Cullington, and himself being cognizant of the rotten condition of the timbers in the *Queen City*, sent her to sea with a cargo of lime."

In the present case it must be held, in my opinion, that the respondent is liable for the loss of the cargo. It cannot be absolved from knowing the absolute unseaworthy condition of the Independent, the onus was on the respondent to excuse itself and the respondent has wholly failed to establish exemption from liability under section 964 of the Canada Shipping Act, and it is to be remembered that there can be no contracting out of this statutory liability, as by section 4 of The Canada Water-Carriage of Goods Act, 1910, a shipowner is prohibited from contracting out of his obligation to exercise due diligence to make and keep the ship seaworthy, and any bill of lading with provisions which attempt to lessen the statutory liability are plainly invalid, likewise any provisions of insurance protection by subrogation from the shipper are invalid. The insurance held by the appellant is only payable to the appellant if there is failure of recovery from the shipowner. In the *interim* of time when the question is being litigated, the appellant is loaned the money, to be returned if the appellant is successful against the shipowner. It is unthinkable to admit of the shipowner obtaining compensation where there has been the lack of due diligence to make and keep the ship seaworthy, it would offend against the statute; if not, it would be contrary to public policy.

I am unhesitatingly of the opinion that the appeal should succeed; the respondent must be held liable for the loss of the cargo.

I wish to state that Mr. *F. G. T. Lucas,* the learned counsel for the appellant, very ably and carefully presented the case upon his side, and Mr. *E. C. Mayers,* the learned counsel for the respondent, also very fully and very ably presented the case for the respondent, the arguments being of great assistance in a case which, until unravelled, appeared to be one of seeming great complexity.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Lucas & Lucas.*

Solicitors for respondent: *Mayers, Stockton & Smith.*

WM. H. WISE & CO. v. KERR.

COURT OF APPEAL

1925

Jan. 6.

WM. H. WISE & CO. v. KERR

Contract—Sale of set of books—Contract with owner—Action brought by distributor—Privity—B.C. Stats. 1921, Cap. 10, Secs. 141-2.

The defendant contracted with The Roycrofters, East Aurora, New York, for the purchase of the Memorial Edition "Little Journeys to the Homes of the Great" (14 volumes) at $8.25 per volume, the contract reciting that the books be delivered "through your distributors Wm. H. Wise & Co., New York." An action by the distributors to recover the balance due on the contract was dismissed.

Held, on appeal, affirming the decision of GRANT, Co. J. (MCPHILLIPS, J.A. dissenting), that the plaintiffs were not a party to the contract, they being merely the agents of The Roycrofters and had no *status* for bringing the action.

APPEAL by plaintiffs from the decision of GRANT, Co. J. of the 15th of February, 1924, dismissing an action to recover a balance of $107.10 for goods sold and delivered. The contract was for the sale of the Memorial Edition "Little Journeys to the Homes of the Great" by Elbert Hubbard (14 volumes) by The Roycrofters, East Aurora, Erie Co., New York, to the defendant and were to be delivered through their distributors Wm. H. Wise & Co., New York. At the close of the plaintiffs' case a motion for nonsuit was made on the grounds: (a) that there was no contractual relation between the plaintiff and the defendant, as the contract in question was with The Roycrofters and the plaintiff was only a distributor for a disclosed principal, and as such was not entitled to bring action; (b) that the plaintiff had no legal *status* as an extra-provincial company under the Companies Act, and not being registered could not maintain an action within the Province in respect of a contract made in whole or in part within the Province. It was urged in answer that under section 141, subsection (*b*) of the Companies Act, 1921, it was not necessary for the plaintiff to take out a Provincial licence to carry on business. It was held by the trial judge that section 158, subsection (1)(*a*) applied and the action should be dismissed.

Statement

COURT OF APPEAL

1925

Jan. 6.

WM. H. WISE & CO. v. KERR

The appeal was argued at Vancouver on the 9th of December, 1924, before MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.

Cassidy, K.C., for appellants: On the question of *status,* the Act does not apply to the plaintiffs as they do not "carry on business" within the Province within the meaning of the Companies Act, 1921: see sections 141 and 142.

Jonathan Ross, for respondent: They must prove their *status* where incorporated: see *Alexander Hamilton Institutes* v. *Chambers* (1921), 3 W.W.R. 520. On the right of the plaintiffs to sue see *Tweddle* v. *Atkinson* (1861), 30 L.J., Q.B. 265; *Bickerton* v. *Burrell* (1816), 5 M. & S. 383 at p. 386; *In re Rotherham Alum and Chemical Company* (1883), 25 Ch. D. 103; *Evans* v. *Hooper* (1875), 45 L.J., Q.B. 206; *Paice* v. *Walker* (1870), L.R. 5 Ex. 173 at p. 178; *Coquillard* v. *Hunter* (1875), 36 U.C.Q.B. 316. A person not a party to the contract cannot sue.

Argument

Cassidy, in reply: On the right to bring this action see *Schmaltz* v. *Avery* (1851), 16 Q.B. 655; *Fred. Drughorn, Limited* v. *Rederiaktiebolaget Trans-Atlantic* (1919), A.C. 203 at p. 209; *Formby Brothers* v. *Formby* (1910), 102 L.T. 116. We are entitled to apply to add The Roycrofters as party plaintiffs, and I do so now.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.: The defendant, on a form, evidently supplied by The Roycrofters, the publishers of a set of books of Elbert Hubbard, offered to buy the books on the terms set out in the offer, purported to be made to The Roycrofters. It was provided therein that the offer might be accepted by "our distributors," the plaintiffs, and that they might collect the price.

MACDONALD, C.J.A.

The distributors supplied the books and received part of the price, and sue in this action for the balance. There is no evidence of the relationship of the parties other than that contained in the said offer.

The learned County Court judge dismissed the action on the ground that the plaintiffs were debarred from bringing the

action by reason of a provision in the Companies Act prohibiting action by incorporated foreign companies which had not obtained registration here. That judgment does not deal finally with the point now to be decided, nor do I think it was well founded. But the respondent seeks to sustain the result by setting up, as he did in the Court below, that the plaintiffs are not a party to the contract. This, I think, the defendant has shewn. The plaintiffs were the agents of The Roycrofters, and are so described when named "our distributors," and their assent to the contract is that of their principal, as is also their authority to receive and collect the price. There is no question of a trust here; it is a plain commercial transaction.

MACDONALD, C.J.A.

The appeal should be dismissed.

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

MARTIN, J.A.

MCPHILLIPS, J.A.: In my opinion this appeal should succeed. The contract sued upon is as follows: [after setting out the contract his Lordship continued].

It will be observed that "The Roycrofters" are mentioned in the contract but the delivery is to be through the distributors, the appellants. Further, it is to be noted that the order, *i.e.*, the contract is not to be binding until accepted by the appellants. The situation of affairs and the nature of the contract admittedly is somewhat unique, but, in my opinion, the contract is enforceable by the appellants.

The correspondence of the respondent with reference to the contract was with the appellants. There is really nothing upon the face of the contract to indicate that the contract entered into was between "The Roycrofters" and the respondent, at most, that name is used as descriptive of the publication. They are the publishers of the books, but that does not necessarily import that they are the vendors, rather do I view it that being publishers the books are passed on to the distributors, and what is there to dispute that the property in the books passed to the distributors and that the distributors are the vendors? That is the way I read the contract. If this is not its correct reading, why the provision that the order is not to be binding until it is accepted by the appellants? The natural and necessary

MCPHILLIPS, J.A.

COURT OF APPEAL

1925

Jan. 6.

WM. H. WISE & CO. v. KERR

MCPHILLIPS, J.A.

inference is because it is a contract between the respondent and the appellants. Further, the respondent in the contract agreed to pay the appellants: "I agree to pay them [the appellants] in Canadian Funds," payment to be made to the appellants "at their [the appellants] New York office."

That the appellants have the right to enforce the contract is supported by the reasons for judgment of Cleasby, B. in *Paice* v. *Walker* (1870), L.R. 5 Ex. 173 at pp. 178-9, which reads as follows:

"I am of the same opinion. I do not object at all to the view expressed by the rest of the Court, but I am not disposed to reject or to give less than considerable weight to the fact that this contract shews on the face of it that it was made on account of a foreign principal. It is laid down in Buller, N.P., p. 130, that 'where a factor to one beyond sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last, the promise will be presumed to be made to him, and the rather so as it is much for the benefit of trade;' the author only qualifies this by adding that there is nevertheless a contract also with the principal. In an old case of *De Gaillon* v. *L'Aigle* [(1799)], 1 B. & P. 368, Eyre, C.J. says, 'I am not aware that I have ever concurred in any decision in which it has been held that if a person, describing himself as agent for another residing abroad, enters into a contract here, he is not personally liable on the contract.' The same view is adopted and expressed in Story on Agency, ss. 400, 401, and in Smith's Mercantile Law, p. 164 (7th ed.). Suppose that the present case were one in which the defendants had in a similar form contracted to buy, and were suing the seller in their own names for non-delivery, would it be possible to hold them not entitled to sue? It may be said this is *idem per idem*, and it is so; but the case I put is somewhat more obvious. If the principles I have referred to are applied here, the defendants, who have signed in their own name without any qualification, must be held to have contracted personally. The words 'as agents for J. Schmidt & Co., of Danzig,' have a sufficient meaning if we take them to be inserted for the purpose of giving notice to the buyers that the defendants were acting for those foreign principals, if for any purpose it should become necessary to refer to them."

In *Coquillard* v. *Hunter* (1875), 36 U.C.Q.B. 316, Morrison, J. in delivering the judgment of the Court, said at p. 319:

"We have to look at the terms of this agreement to ascertain what the parties really intended, and one test is to see who is to act in the performance of it, bearing in mind it is made with an agent acting for a foreign principal."

Then at pp. 319-20:

"It is, we think, very clear on the face of this agreement that the defendant contracted with the plaintiff, and that the intention of the parties was that the fulfilment of the defendant's contract might be enforced either

in the name of the plaintiff or the Howe Machine Company, and that the plaintiff might repossess himself of the machine in the event of non-compliance with the terms of the lease. We see no reason why a person may not make himself liable to either of two parties on account of the same interest, such as in this case. This alternative contract very probably was stipulated for by the plaintiff owing to the fact that the Howe Machine Company was a foreign corporation, so as to enable the plaintiff to take such a step as he has done here.

"The defendant having contracted as he has done, and upon the faith of which he received on lease from the plaintiff a machine for which he, the plaintiff, was responsible to the Howe Machine Company, it does not lie in his mouth to dispute the validity of his own contract, or deny the right of the plaintiff to resume possession upon non-fulfilment of the conditions of the lease.

"On the whole, we are of opinion that the plaintiff may maintain such an action as this, and that the learned judge erred in directing a nonsuit."

Here the learned trial judge, in my opinion, fell into the same error in directing a nonsuit. I would allow the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

RETALLICK v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Street railway—Boys stealing ride—Brushed off by car passing in opposite direction—Injury to boy—Duty of motorman—Freight cars—Right to operate in City.

As a motor-engine of the defendant Company was slowly hauling four box cars easterly along Hastings Street in Vancouver in December about 7.30 in the evening the plaintiff (a boy of nine years) with a companion ran out from the north sidewalk the companion jumping on the rear ladder on the left side of the first box car and the plaintiff on the rear ladder of the 3rd or 4th box car. Almost immediately a street-car of the defendant's approached going westerly, and brushed off the boy on the first box car killing him and then brushed off the plaintiff who lost his right leg. In an action for damages:—

Held, that the motorman on the street-car was not negligent in failing to see the boys in time to avoid the accident or in failing after seeing the boy on the first car, to see the plaintiff and stop his car in time to avoid injuring him.

Hackett v. *Toronto R. W. Co.* (1907), 10 O.W.R. 582 followed.

Prior to the 14th of October, 1901, when the agreement now in existence between the Street Railway Co. and the City came into operation, the

MCDONALD, J.

1925

Feb. 23.

RETALLICK v. B.C. ELECTRIC RY. CO.

right did exist to operate freight-cars on that portion of Hastings Street where the accident took place, and by that agreement such right was, if not expressly, at least by necessary implication preserved.

Statement

ACTION for damages for personal injuries sustained by the plaintiff when brushed off a ladder on a freight-car of the defendant Company by a street-car proceeding in the opposite direction on Hastings Street in Vancouver. The facts are set out fully in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 12th of February, 1925.

Cantelon, for plaintiff.

McPhillips, K.C., and *Riddell,* for defendant.

23rd February, 1925.

Judgment

MCDONALD, J.: The defendant Company and its predecessors in right and title have operated freight-cars on that portion of Hastings Street in the City of Vancouver where the accident in question occurred, for at least 32 years, and the right to do so has not, so far as appears, been before questioned. In such circumstances, when it is now contended that no such right exists, it becomes necessary to scan carefully the legislation as well as the various agreements affecting the question. This I have done, and I am satisfied that prior to 14th October, 1901, when the agreement now in existence, between the defendant and the City, came into operation, the right did exist, and by that agreement was, if not expressly, at least by necessary implication preserved. The plaintiff's contention therefore that the defendant in operating its freight-cars at the point in question was a trespasser, in my opinion, fails.

The accident out of which this action arose occurred on the 18th of December, 1923, at about half past seven in the evening. The infant plaintiff, a bright, intelligent boy, then nine years of age, was with another boy proceeding easterly on the northerly sidewalk on Hastings Street when a motor hauling four freight-cars, commonly called "box cars," passed them going slowly in an easterly direction. The other boy ran out and jumped onto the rear ladder on the north side of the first car, and the infant plaintiff followed him and caught the ladder of either the third car or the last car, intending to steal a ride. Almost immediately a westerly bound street-car hove in sight and as

it passed the freight-train the first boy was brushed off and killed and the infant plaintiff was brushed off and suffered such injuries to his right leg that it became necessary to amputate it a few inches below the knee.

The street was well lighted and there was good visibility at the time, and it is contended that the motorman on the street-car was negligent in that he failed to see the boys clinging to the freight-cars in time to stop his car or to warn the crew of the freight-train to stop, and that, in any event, having seen the first boy just as his car struck him, he ought then to have seen the second boy and to have stopped his car. I am unable to see that on either ground the motorman was negligent. His duty was, of course, to keep a lookout but he was not bound to see these boys clinging to the cars, a sight such as he had never seen before. There is a dispute as to whether the infant plaintiff was on the third or fourth car, but it seems to me it makes little difference in all the circumstances. The train and street-car were moving in opposite directions and would pass each other in a few seconds. The motorman says he saw the second boy after his car struck the first boy, and I would hold that he brought his car to a standstill as quickly as he could reasonably be expected to do.

Judgment

I am quite unable to distinguish this case from *Hackett* v. *Toronto R.W. Co.* (1907), 10 O.W.R. 582, and would adopt the language of Meredith, C.J. in that case at pp. 584-5 as being particularly applicable to this case. His Lordship there said:

"Now, it seems to me it would be most unjust, under such circumstances, to fasten upon the motorman a breach of duty because, in such an emergency—the boy coming out suddenly from a place where he was not expected to be—he did not see and immediately apply the proper remedy. The man had but two eyes; of course, he had to keep a proper lookout, but the occurrence happened in possibly the fraction of an instant, and to say that the motorman was guilty of negligence, and his employers are liable, because, in circumstances such as existed in this case, he did not see the boy and did not apply the remedy, would be, I think, practically to make the defendants insurers against any accident that happens. . . . .

"We think, on the evidence, that if anybody was to blame it was the unfortunate boy himself, and, although this is a deplorable accident, it is one for which these defendants ought not to be made liable."

The action is dismissed.

Action dismissed.

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM.

Criminal law—Practice—Habeas corpus—Appeal—Jurisdiction—Criminal proceeding—B.N.A. Act, Sec. 91 (No. 27)—Criminal Code, Sec. 299.

REX v. MCADAM

A judge of the Supreme Court refused an application for a writ of *habeas corpus* for a person arrested and imprisoned under a warrant of a stipendiary magistrate on a charge of rape.

Held, on appeal, MARTIN, J.A. dissenting, that the decision of the Supreme Court was given in a "criminal proceeding" within section 91 (No. 27) of the British North America Act and no appeal lies to the Court of Appeal.

APPEAL by accused from the order of MACDONALD, J. of the 21st of October, 1924, refusing an application for a writ of *habeas corpus* with *certiorari* in aid for his discharge from arrest and imprisonment under a warrant signed by the stipendiary magistrate in and for the County of Victoria to answer to a charge of rape upon one Olive Anderson on the 13th of June, 1924. Objection to the jurisdiction of the Court to hear the appeal was taken on the ground that the matter before the Court was a criminal one and that therefore no right of appeal can be conferred by a Provincial Act.

Statement

Accused had been charged with rape and the Grand Jury brought in a true bill at the Court of Assize on the 8th of October, 1924. The petit jury was empanelled and the case called for trial. Counsel for the Crown then asked the Court to traverse the trial until the next sitting of assize. This was refused, whereupon counsel for the Crown moved to quash the indictment. After discussion the matter was adjourned until the afternoon when counsel for the Crown stated that the Attorney-General directed the officer of the Court to enter on the records that proceedings were stayed by his direction and such entry was made on the indictment, thereupon the accused was released from custody. Later, on the same day, he was re-arrested on a warrant on a second information for the same offence.

The appeal was argued at Vancouver on the 6th, 7th and

11th of November, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

Jackson, K.C., on motion to quash for want of jurisdiction: He was arrested on a warrant issued upon a charge of rape. He now applies for a writ of *habeas corpus*. This is a criminal proceeding to which the provisions of the Provincial Act as to the right of appeal do not apply: see *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832; *Rex* v. *Carroll* (1909), 14 B.C. 116; *Cox* v. *Hakes* (1890), 15 App. Cas. 506; *In re Rahim* (1912), 17 B.C. 276; *In re Wong Shee* (1922), 31 B.C. 145 at p. 151; *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176; *Rex* v. *Barre* (1905), 11 Can. C.C. 1; *Rex* v. *Loo Len* (1923), 33 B.C. 448.

Argument

Cassidy, K.C., contra: Under the 1920 amendment to the Court of Appeal Act there is an appeal in all *habeas corpus* proceedings as all *habeas corpus* proceedings are civil proceedings: see *Ex parte Tom Tong* (1883), 108 U.S. 556; *Ex parte Bollman* (1807), 4 Cranch 75 at p. 101; Crankshaw's Criminal Code, 5th Ed., pp.1234-6; *Rex* v. *Alamazoff* (1919), 30 Man. L.R. 143; *Attorney-General for Ontario* v. *Daly* (1924), 40 T.L.R. 814; *Rex* v. *Dean* (1913), 21 Can. C.C. 310; *Reg.* v. *St. Clair* (1900), 27 A.R. 308 at p. 309; *Rex* v. *Spence* (1919), 31 Can. C.C. 365; *Reg.* v. *Gillespie* (1898), 1 Can. C.C. 551; *Reg.* v. *Bougie* (1899), 3 Can. C.C. 487; *Rex* v. *Kavanagh* (1902), 5 Can. C.C. 507.

Jackson, in reply.

Cur. adv. vult.

6th January, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant was indicted for felony, but during the course of the trial, and before it was completed, a *nolle prosequi* was entered at the instance of the Attorney-General, and the appellant was discharged. He was, however, re-arrested on the same charge and committed to prison. He applied for a writ of *habeas corpus* and of *certiorari* in aid, which writs were refused by Mr. Justice W. A. MACDONALD. He now appeals to this Court.

The question of jurisdiction of the Court to hear the appeal

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

was raised, and we heard counsel on that question both for and against the jurisdiction. We also heard the appeal on the merits, reserving the question of the jurisdiction for further consideration, and this judgment has to do with the preliminary objection.

If the proceedings now in appeal are civil proceedings, our jurisdiction is not questioned, but if they are criminal proceedings, then I think we have no jurisdiction to hear the appeal. The right of appeal is a substantive one which can only be conferred by statute, and the only statute dealing with the right of appeal to this Court in matters of this kind is a local one. If, therefore, the matter is a criminal one, the local Legislature had no jurisdiction to confer a right of appeal. It has, indeed, not purported to do this; it has given the right of appeal in respect of *habeas corpus,* a right which it had power to confer in civil matters. It is only when the matter in question is a civil matter, that the Court is competent to hear it.

It seems to me that the case is concluded by *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832, a decision of the Court of Appeal in England. The appellant's counsel relied principally on an American case, *Ex parte Tom Tong* (1883), 108 U.S. 556. That case, of course, is not an authority here, but it is entitled to respect as the decision of the highest Court of the United States on a question which is largely common to both countries.

MACDONALD, C.J.A.

I find myself, though not bound in the legal sense, at all events constrained, if in doubt, to follow the clear decision of the English Court of Appeal, approved in subsequent cases by the same Court, and with which I entirely agree.

It becomes necessary to advert to the respective powers enjoyed by the Dominion Parliament and by Provincial Legislatures in respect of criminal and civil law. The criminal law and procedure in criminal cases is assigned exclusively to the Dominion Parliament, while civil rights are assigned to the Provinces. This becomes important when we come to consider more closely *Ex parte Alice Woodhall.* The Judicature Act in England contains a section giving an appeal to the Court of Appeal from all judgments, orders and decrees of the High Court. Section 47 of the Act limits this right by providing

that no appeal should lie in a criminal cause or matter. The Court held that an appeal from a refusal of the Queen's Bench Division to liberate the appellant in that case, who was held for extradition to the United States, on a charge of forgery, was an appeal in a criminal cause or matter, and that they could not entertain it.

The section authorizing appeals from judgments, orders and decrees of the Supreme Court to the Court of Appeal in this Province contains no such limitation, for the very good reason that the local Legislature, which gave the right of appeal as aforesaid, has no jurisdiction in criminal causes or matters. As to *habeas corpus* in civil matters, the Legislature has such power. This divided jurisdiction shews the analogy between this case and the case of *Ex parte Alice Woodhall.* There the Court of Appeal was refused by Parliament the right to entertain an appeal in a criminal cause or matter, here the right to legislate in respect of a criminal cause or matter was withheld from the Provincial Legislature, and hence it could confer no right of appeal in such a matter. It was, therefore, quite unnecessary and would be improper to introduce into the Provincial statute respecting appeals, any reference to appeals in criminal causes or matters. *Ex parte Alice Woodhall* has been referred to, with approval, in the following subsequent cases: *Rex* v. *Governor of Brixton Prison* (1910), 2 K.B. 1056; *Rex* v. *Garrett* (1917), 2 K.B. 99, and in *Scott* v. *Scott* (1912), P. 241. The same question came up on a number of other occasions anterior to *Ex parte Alice Woodhall,* but I do not think any useful purpose would be served by referring to them, as the case last mentioned is directly in point. I will only refer to *Reg.* v. *Weil* (1882), 9 Q.B.D. 701, for the purpose of quoting the language of Sir George Jessell, M.R. who said in that case:

MACDONALD, C.J.A.

"If this is not a criminal matter it is difficult to conceive what would be."

That was an appeal from a refusal of bail, and in Short and Mellor's Crown Office Practice, 2nd Ed., p. 485, it is said, referring to *Reg.* v. *Weil*:

"Although that case did not come before the Court on *habeas corpus,* it might have and formerly could only have done so, the jurisdiction exercised being the same."

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

In Manitoba, where the law is the same as in this Province, the Full Court held that there was no right of appeal in a case like this. *Rex* v. *Barre* (1905), 11 Can. C.C. 1.

In Ontario the Court has entertained appeals of this sort, relying upon a statute of Canada passed before Confederation, and not repealed by Dominion legislation, as authority for this. We have no such statute in this Province.

MACDONALD, C.J.A.

I think the appeal must be dismissed. It therefore has become unnecessary to consider the merits.

MARTIN, J.A.

MARTIN, J.A.: This is an exceptionally important appeal from an order of Mr. Justice W. A. MACDONALD dismissing an application for a writ of *habeas corpus ad subjiciendum.* It appears that the applicant is in close custody on three charges of rape and other sexual offences, the legality of which custody is challenged on the ground that all proceedings on said charges have come to an end owing to the stay of proceedings after indictment directed by the Attorney-General (under section 962 of the Criminal Code) to be entered at the Victoria Assizes on the 10th of October last, and therefore the applicant is entitled to his liberty. It is, however, objected, *in limine,* by counsel for the Crown Provincial that this Court has no jurisdiction to hear the appeal on the ground that the order appealed from and the precedent proceedings instituted therefor are within the meaning of the expression "criminal law . . . . . including the procedure in criminal matters" which subject-matter is by section 91, class 27, assigned to the exclusive jurisdiction of the Federal Parliament, and therefore, as appeals to this Court in Federal matters are limited by section 1012, Cap. 41 of the Criminal Code Amendment Act of 1923, to those from conviction on indictment (as therein defined) there is no appeal from *habeas corpus* proceedings. In answer to this it is submitted that such proceedings come within the expression "property and civil rights in the Province," which are assigned to the exclusive jurisdiction of the Provincial Legislatures by section 92, class 13, of the said B.N.A. Act, and as our (B.C.) Provincial Legislature has, by section 6 (vii.) of the Court of Appeal Act, Cap. 52, R.S.B.C. 1924, conferred the

general right of appeal in "matters . . . . . of . . . . . *habeas corpus*" it is our duty to entertain this appeal.

This assumption by the Province of the right to grant an appeal at large in such matters, raises, in my opinion, a constitutional question of exceptional importance, and with all respect for contrary views, I still remain of the opinion that it was our duty, under the Constitutional Questions Act, Cap. 46, R.S.B.C. 1924, to notify the Attorney-General of Canada before proceeding to an adjudication thereupon, and the fact that we have (I am reluctantly compelled to say) received so little assistance from counsel on behalf of the Province in the solution of the difficult question, makes me regret the more that the Attorney-General of Canada was not represented, and so I am free to say that as I do not regard this matter as being adequately presented I shall hold myself entitled to review this decision should it later come in question before us, but in the meantime dealing with it to the best of my ability, and in the unusual circumstances of counsel for this Province contending against the extent of its jurisdiction over the fundamental civil right of personal liberty.

MARTIN, J.A.

The fact that the Federal Parliament has in certain respects undertaken to deal with this question of *habeas corpus* as if it were within the Federal jurisdiction of criminal law under said section 91 only emphasizes the desirability of the Attorney-General of Canada being represented here, because unless the Federal Parliament has in law the necessary power its assumption of it in fact is of no avail: I refer, *e.g.*, to section 576 of the Criminal Code, whereby "every superior Court of criminal jurisdiction" is given power to make rules for "regulating in criminal matters the pleading, practice and procedure in the Court, including the subjects of *mandamus, certiorari, habeas corpus* . . . . ." etc., and also to the "concurrent jurisdiction with the Courts or judges of the several Provinces" conferred upon "every judge" of the Supreme Court of Canada by section 62 of the Supreme Court Act (Cameron's Supreme Court Practice, 3rd Ed., p. 236, *et seq.*) "to issue the writ of *habeas corpus ad subjiciendum* for the purpose of inquiry into the cause of any commitment in any criminal case under any Act

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

of the Parliament of Canada"; it is to be noted that by sub-section 2, an appeal shall be to the Court "if the judge refuses the writ or remands the prisoner." If in these two illustrations the Federal Parliament had confined its legislation to the great area of its own territories, the Yukon and the North West, it would not have encroached upon the exclusive Provincial area of property and civil rights, but it is not necessary for the purpose of the question now at Bar to further consider the said assumption of said Federal rights in *habeas corpus* though they are undoubtedly indirectly challenged by this appeal, so I only now notice that the special position of the Supreme Court of Canada under section 101 of the B.N.A. Act would require consideration—*Cf.* Cameron's Supreme Court Practice, *supra,* 244, and particularly the decision in *In re Boucher* (1879), and other cases cited at pp. 237, 239.

The meaning of the expression "criminal law . . . . . including the procedure in criminal matters" as employed in said section 91 (27) of our great constitutional enactment, the first of its kind in British history, is something quite distinct from its meaning in more or less similar but never identical expressions employed in English or Canadian statutes of an essentially different nature, as is aptly pointed out by Mr. Justice Duff in *In re McNutt* (1912), 47 S.C.R. 259, and the danger is notorious of attempting to extract similar principles of construction from decisions founded on statutes which are not only dissimilar in language but in nature and object; and, moreover, the cardinal rule of constructing them, laid down by the House of Lords in *Quinn* v. *Leathem* (1901), A.C. 495, 506, *viz.,* that every decision is qualified by its particular facts and is "only an authority for what it actually decides" is peculiarly applicable to questions of the present special nature.

MARTIN, J.A.

A striking example of the different effect of similar language in different circumstances is to be found in the leading case of *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128; (1921), 62 S.C.R. 118, wherein it was decided that an appeal did not lie to the Supreme Court from the decision of the Appellate Court of Alberta (1921), 16 Alta. L.R. 149, allowing an appeal

from Hindman, J. quashing, upon *certiorari,* a conviction under the Provincial Liquor Act of Alberta, because such a matter was within the prohibition of section 36 of the Supreme Court of Canada Act, as amended (Cameron's Supreme Court Practice, li., 114), excepting appeals "in criminal causes and in proceedings for or upon a writ of *habeas corpus, certiorari,* or prohibition arising out of a criminal charge" from the jurisdiction of the Supreme Court: the Privy Council, pp. 166-8, confirmed the opinion of the Supreme Court that the said expression "arising out of a criminal charge" should, for the purposes of that appeal, be given a wide construction, saying, at pp. 167-8, after a consideration of the two decisions of the Supreme Court in *In re McNutt* (1912), 47 S.C.R. 259 (a case of *habeas corpus*) and *Mitchell* v. *Tracey and Fielding* (1919), 58 S.C.R. 640 (a case of prohibition):

"The issue is really this. Ought the word 'criminal' in the section in question to be limited to the sense in which 'criminal' legislation is exclusively reserved to the Dominion Legislature by the British North America Act, s. 91, or does it include that power of enforcing other legislation by the imposition of penalties, including imprisonment, which it has been held that s. 92 authorizes Provincial Legislatures to exercise? It may also be asked (though this question is not precisely identical) under which category does this conviction fall of the two referred to by Bowen, L.J., in *Osborne* v. *Milman* (1887), 18 Q.B.D. 471, 475, when he contrasts the cases 'where an act is prohibited, in the sense that it is rendered criminal,' and 'where the statute merely affixes certain consequences, more or less unpleasant, to the doing of the act.'

MARTIN, J.A.

"Their Lordships are of opinion that the word 'criminal' in the section and in the context in question is used in contradistinction to 'civil,' and 'connotes a proceeding which is not civil in its character' . . . . . After all, the Supreme Court Act is concerned not with the authority, which is the source of the 'criminal' law under which the proceedings are taken, but with the proceedings themselves, and all the arguments in favour of limiting appeals in such cases apply with equal force, whether the Provincial Legislature is or not the competent legislative authority."

But at the same time while deciding that the proceedings then in question came "in the context," within the expression "arising out of a criminal charge" which for that appellate purpose included convictions under the Provincial penal statute in question, yet, *per contra,* their Lordships held that it was within the power of the Province under the B.N.A. Act to pass the said statute with its penalties of fine, imprisonment and forfeiture, and hence the proceedings and convictions there-

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

under though "criminal" under the Federal Supreme Court for appellate purposes yet did not come within the said expression "criminal law" and "procedure in criminal matters" under said section 91 of the Imperial B.N.A. Act in its constitutional distribution of legislative powers.

This decision followed one in the previous year, *Canadian Pacific Wine Co.* v. *Tuley* (1921), 2 A.C. 417; 3 W.W.R. 49; wherein their Lordships had finally decided that the Prohibition Act, 1920, and the Summary Convictions Act, 1915, of this Province were valid as being within its powers, even though the penal effect of them was to subject offenders to fine, imprisonment and forfeiture. As to the latter their Lordships said, pp. 422-3:

"It was contended at the Bar that this statute was *ultra vires* of the Provincial Legislature, on the ground that it was an attempt to enact Provincial legislation for 'criminal law,' including procedure in criminal matters, within the words of s. 91, head 27, of the British North America Act. But that section only declares that it is to be lawful for the Sovereign, with the advice of the Dominion Parliament, to make laws for the peace, order and good government of Canada generally, in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the Legislatures of the Provinces, and the enumeration of matters which follows in s. 91 to which the exclusive authority of the Dominion Parliament extends is only a declaration that certain subjects fall under this description. When the language of s. 92, which defines the matters to which the exclusive legislative authority of the Province extends, is scrutinized, this definition is found to include the administration of justice in the Province embracing the constitution, maintenance and organization of Provincial Courts, both civil and criminal, and procedure in civil matters in these Courts. Head 15 of s. 92 expressly adds the imposition of punishment by fine, penalty or imprisonment, for enforcing any law of a Province, made in relation to any of the classes of subject enumerated in the section; and head 16 gives exclusive legislative power to the Provincial Legislatures in all matters of merely local character. Reading ss. 91 and 92 together, their Lordships entertain no doubt that the Summary Convictions Act was within the competence of the Legislature of British Columbia. It relates only to punishment for offences against the provisions of the statutes of the Province, and is to be read as if the provisions to this end were expressly declared in some such statute. No other conclusion would appear to be in harmony with the principle of construction laid down by the Judicial Committee in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348."

MARTIN, J.A.

And still later, on 15th January, 1923, Mr. Justice Anglin, in *In re Roberts* (1923), S.C.R. 152, in a *habeas corpus* application, said, p. 154:

"The applicant, Roberts, as appears by his petition, is held in custody at Quebec for an alleged offence against the privileges, honour and dignity of the Provincial Legislature of Quebec and under the authority of special legislation enacted by it. (13 Geo. V. c. 18). The cause of his commitment is that Act of the Legislature. There is, in my opinion, no ground whatever for suggestion that it is 'in a criminal case under any Act of the Parliament of Canada.'

"On that simple ground I am satisfied that I am without jurisdiction to entertain the present application for the issue of a writ of *habeas corpus ad subjiciendum*. Entertaining this opinion without any doubt, I think I should not exercise the discretionary power of referring this application to the Court."

It is unnecessary to consider further the numerous decisions on the meaning of the said expression "not arising out of a criminal charge" used as aforesaid in the Supreme Court Act, because the absolute right of the Federal Parliament to restrict appeals to the Supreme Court whatever proceedings they may "arise out of," is conceded; it could, *e.g.*, deny an appeal in an action for damages arising out of imprisonment on a criminal charge. In the *Mitchell* case, *supra*, Mr. Justice Mignault, like Mr. Justice Duff (*supra*) was careful to point out, p. 650:

"No question whatever as to the power to legislate with respect to criminal law under the 'British North America Act' arises here, and no consideration of the respective powers of Parliament and of the Legislatures with regard to criminal or penal matters can be of any assistance in the construction of the sections of the 'Supreme Court Act' to which I have referred and which undoubtedly, however wide may be their application, are *intra vires* of the Canadian Parliament."

MARTIN, J.A.

And see *post*, the quoted observations of the Ontario Appellate Court to the same effect.

In deciding whether or no the writ of *habeas corpus* comes within the said expression "property and civil rights in the Province" and not within Federal "criminal law" it is essential to consider carefully its special nature. Blackstone in his Commentaries, and in the first Book "Of the Right of Persons," Cap. I., under the heading "Of the Absolute Rights of Individuals," says, p. 125:

"Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."

And at p. 129, after referring to the "rights of the people of England," he says:

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

"And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property."

And at pp. 134-5:

"II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty, consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that, in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I., it is enacted, that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. By 16 Car. I. c. 10 [1640] if any person be restrained of his liberty by order or decree of any illegal Court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the Court of King's Bench or Common Pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2 [1677] commonly called the *Habeas Corpus* Act; the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer."

MARTIN, J.A.

At p. 135, he observes:

"Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper (as in France it is daily practiced by the crown), there would soon be an end of all other rights and immunities."

And at p. 136:

"The confinement of the person, in any wise, is an imprisonment."

In Book 3, p. 127, *et seq.*, he considers "the violation of the right of personal liberty," and says, "Let us next see the remedy, which is of two sorts; the one removing the injury, the other making satisfaction for it." Of the first "sort of remedy," *i.e.*, p. 129—"the writ of *habeas corpus*, the most celebrated writ in the English law," and then proceeds to con-

sider the "various kinds [of it] made use of by the Courts at Westminster," and of that kind now before us says:

"But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum;* directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,* to do, submit to, and receive whatsoever the judge or Court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the Court of King's Bench not only in term-time, but also during the vacation, by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions; for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."

Then follows a brief review of the proceedings to obtain and enforce the writ and of the statutes down to his time supplementing the ancient common law procedure and removing certain abuses and "pitiful evasions" and concluding, p. 137:

"This is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law, it is now expected by the Court, agreeable to ancient precedents and the spirit of the Act of Parliament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries;* otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of government. For it frequently happens in foreign countries (and has happened in England during temporary suspensions of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten."

MARTIN, J.A.

Unfortunately time proved that the "remedy" was still not "complete," and so it was necessary to pass further statutes, notably that of the 56 Geo. 3, Cap. 100 (1st July, 1816), "commonly called after its author, Mr. Sergeant Onslow's Act" (Introduction, p. 26, to Fry's Report of *The Canadian Prisoners' Case* (1839), 3 St. Tri. (N.S.) 963, and *Crowley's Case* (1818), 2 Swanst. 1 at pp. 60-1), which after reciting that "the writ of *habeas corpus* hath been found to be an expeditious and effectual method of restoring any person to his liberty who hath been unjustly deprived thereof" and declaring

COURT OF APPEAL
1925
Jan. 6.

REX v. MCADAM

MARTIN, J.A.

that "extending the remedy of such writ and enforcing obedience thereunto and preventing delays in the execution thereof will be advantageous to the public," proceeded to "extend the remedy" at large as therein specified (particularly respecting proceedings in vacation), after declaring that the "additional remedies beyond what the subject had at common law," as Lord Eldon styles them in *Crowley's Case* (1818), 2 Swanst. 1, 69, of the Act of 1679 "for the better securing the liberty of the subject, only extend to cases of commitment or detainer for criminal or supposed criminal matter"; one of the chief practical provisions of the Act of 1816 is contained in section 3 empowering the "Justices or Baron" after the return to the writ, "though good and sufficient in law," to "proceed to examine into the truth of the facts set forth in such return . . . . . and to do therein as to justice shall appertain," and where the writ and return are transmitted by the Justice to the Court it shall likewise "proceed to examine into the truth of the facts set forth in the return in a summary way . . . . . and order and determine touching the discharging, bailing, or remanding of the party." By this statute, as stated in Short and Mellor's Crown Office Practice, 2nd Ed., 308—"the procedure on the common law writ was much improved," but it is unnecessary for the present purpose to pursue it further; the Act of 1679 "though a very beneficial enactment and eminently remedial in many cases of illegal imprisonment, introduced no new principle, nor conferred any right upon the subject, and was only declaratory of the common law." *Ib.* 306.

The only relevant exception that may now be taken to Blackstone's observations is that one in Book 1, p. 132, respecting the doubtful power of the Court of Chancery to issue the writ in vacation, founded upon the decision in *Jenkes' Case* (1676), 6 How. St. Tri. 1189, but in a later and leading decision, Lord Chancellor Eldon, in *Crowley's Case, supra,* in an elaborate and instructive judgment, held (and his view is confirmed by the Privy Council in *In re Belson* (1850), 7 Moore, P.C. 114) that his Court always had at common law and from time immemorial the inherent right to issue the writ during vacation as well as during term: "his Court is open

every day of his life, at the pleasure of any suitor," pp. 10, 59, 65; and at p. 48, quoting Lord Coke:

"'The Court of Chancery is *officina justitiæ*, and is ever open, and never adjourned, so as the subject, being wrongfully imprisoned, may have justice for the liberty of his person, as well in the vacation time, as in the term.' . . . . 'the Chancellor, having the custody of the great seal, should be about the king at all times; and this is the cause that the Court of Chancery cannot be adjourned.'"

At p. 48, Lord Eldon says:

"The doctrine originates in the maxim of law, that the writ of *habeas corpus* is a very high prerogative writ, by which the King has a right to inquire the causes for which any of his subjects are deprived of their liberty: a liberty most especially regarded and protected by the common law of this country."

And at p. 55, after quoting with approval the decision of the Court of Common Pleas in *Bushell's Case* (1680), Vaugh. 135, he says of it:

"The judgment supports the right of issuing the writ on broad principles; namely, that the King's Court could not, *salvo juramento suo*, have before it the King's subject unlawfully committed, without releasing him from that unlawful imprisonment."

And again at p. 66:

"The Court of Common Pleas having no jurisdiction except in civil cases, although, as it was held in *Bushell's* case, and in the case to which I now refer, they could issue writs of *habeas corpus*, yet they discouraged applications to that Court; and for this reason, that the party who was to have the benefit of the writ was placed in a situation as distressing as if application had been made to the Court of Chancery; provided, I mean, that the warrant appeared good, but stated a bailable offence; for the Court of Common Pleas could not try him, and therefore there was a convenience in applications to the King's Bench, which did not exist in applications to Chancery, or to the Common Pleas; and although it is true that no such inconvenience would occur where on the warrant of commitment, it appeared that the prisoner ought to be discharged, yet there had grown a habit of practice out of those cases where the warrant stated a bailable offence, of applying to the King's Bench, which extended to almost every case."

A good illustration of this special "convenience" in the King's Bench in the expedition of the trial of criminals after the legality of their detention had been established by *habeas corpus* and therefore the prisoner was not entitled to a discharge, is to be found in *Rex* v. *Hensey* (1758), 1 Burr. 642, wherein, after the body of the prisoner had been brought up and it appeared by the return that his detention by warrant of one of H.M.'s principal secretaries of State was lawful, the

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

return was ordered to be filed, and thereupon the prisoner was called upon to plead to the indictment which had been preferred against him.

But apart from this mere convenient "habit of practice" according to the circumstances of each case, Lord Eldon goes on to say:

"Chief Justice de Grey then refers to *Bushell's* case, in which it is laid down as a great principle, that if a subject of the King is brought from prison before one of the King's superior Courts, and it appears that the imprisonment is unlawful, the Court cannot, *salvo juramento suo*, remand him to that unjust imprisonment; in other words, cannot refuse to discharge him."

The reference to Chief Justice de Grey arises out of *Wood's Case* (1771), 3 Wils. 172; 2 W. Bl. 745, wherein the Court of Common Pleas, by unanimous decision of its four judges, approved *Bushell's* case, and held that there was no doubt of their general jurisdiction in matters of *habeas corpus* in all cases and at all times despite the fact that their Court was one for civil causes only. The practical effect of the decisions of the Court upon the subject is well and concisely summed up by Gould, J., the other justices concurring (at p. 177 of Wils. Rep.) thus:

MARTIN, J.A.

"I am of the same opinion with my Lord Chief Justice. I have heard Lord Apsley say, when he sat in this Court, that he had some doubt touching this matter; but for my own part, I have no doubt at all, and think that this Court has a general jurisdiction to grant writs of *habeas corpus* in all cases; but when the prisoner is brought here, it then becomes another question, what we shall do."

That illustrates the practical application of the "great principle" Lord Eldon supports so learnedly, and speaking later of said practice by the Lord Chancellor, he says, p. 75:

"When the party is brought before him by *habeas corpus*, the proceedings must be exactly the same as if he were brought before the common-law judges . . . . ."

thus declaring the harmony of all curial proceedings upon this special writ and remedy.

Referring to the celebrated answers of the judges to the ten questions put before them by the House of Lords in 1758, arising out of a bill before the Lords to extend the provisions of the Habeas Corpus Act of 1679, Lord Eldon says, p. 61, that:

"On the first question, 'Whether in cases not within the Act 31 Car. 2. [1679] writs of *habeas corpus ad subjiciendum*, by the law as it now stands,

ought to issue of course, or upon probable cause verified by affidavit?' the judges were unanimous. They agree that it is a very high prerogative of the crown to issue the writ of *habeas corpus ad subjiciendum*, because absolutely necessary to the liberty of the subject. 'It is a remedial mandatory writ, by which the King's Supreme Court of Justice, and the judges of that Court, at the instance of a subject aggrieved, commands the production of that subject, and inquires after the cause of his imprisonment; and is a writ of such a sovereign and transcendant authority, that no privilege of person or place can stand against it.'"

The view of one of them, Chief Justice Wilmot, "a great lawyer," as Lord Eldon styles him (p. 62), is given in his "Opinions and Judgments," p. 81 *et seq.* At p. 83, he describes the writ of *habeas corpus* with other "writs of right" as "the birthright of the people, subject to such provisions as the law has established for granting them," and in regard to the framers of the Act of 1679, says, pp. 85-7:

"They wisely drew the line between civil constitutional liberty, as opposed to the power of the Crown, and liberty as opposed to the violence and power of private persons. They thought this power of judging might be abused in favour of the Crown, but they saw no danger of an abuse of it as between one subject and another; and therefore they applied the remedy to the evil they had seen and experienced, and left the law as they found it in respect of private persons."

At p. 88 he points out the peculiar nature of this writ of right and its application to, and practice in, cases founded upon imprisonments by "many kinds of private restraint," and "upon imprisonment for criminal matters"; it is (p. 88) not the ordinary

MARTIN, J.A.

"commencement of a civil suit, where the party proceeds at the peril of costs, if his complaint is a groundless one: it is a remedial mandatory writ, by which the King's Supreme Court of Justice, and the judges of that Court, at the instance of a subject aggrieved, commands the production of that subject, and inquires after the cause of his imprisonment; and it is a writ of such a sovereign and transcendant authority, that no privilege of person or place can stand against it."

And he proceeds to say that such writs where sought "upon imprisonment for criminal matters, were never writs of course: they always issued upon a motion, grafted on a copy of the commitment," and that "The 31 Car. II. [1679] makes no alteration in the practice of the Courts in granting them . . . . .": in the case of the "many kinds of restraint that exist at this day, some in the nature of punishments," the same reasons of granting the writ in this manner are followed,

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

as he sets forth, so that proper authority shall not "be broken in upon wantonly, upon mere suggestion" but upon "some reason for an interposition."

At p. 91, he says:

"When a judge is called upon for a *habeas corpus*, in order to bail a man for a bailable offence, the injustice of the imprisonment is obvious and self-evident: for imprisonment before trial, being only to secure his being amenable to justice; if that security can be obtained by bail, in bailable offences, it is unjust that he should be kept in prison. The authority which committed him ought to have bailed him.

"The authorities I have mentioned are equally legal, and therefore within the spirit and reason of the Habeas Corpus Act itself. The injustice of the imprisonment ought to appear in the first instance, before the party has a right to demand the remedy."

The "authorities" he refers to are imprisonments by public authority, such as in criminal matters, and the "many private restraints" cited; he applies the same principles and practice to them all, as does Lord Eldon, *supra*, saying, p. 96:

"When the practice of the Chief Justice, and the judges of the Court of King's Bench, granting these writs in vacation, in cases of private custody, first began, does not appear; but in all probability, it was either coeval with what the Court did, or very soon followed it; because the principle which supports the one, concludes as forcibly to the supporting the other; and the principle is this; if the writ is applicable to one species of unlawful imprisonment, it is in reason equally applicable to another. They are cases *'ejusdem generis'*; and therefore let the usage of issuing this writ have begun sooner or later, it was in the first instance a warrantable extension of a legal remedy in one case, to another case of the same nature; and I consider the usage in this case as the voice and testimony of the judges, for near eighty years together, to the legality of the very first application of it.

MARTIN, J.A.

"The principle upon which the usage was founded, lay in the law; and the usage is nothing but a drawing that principle out into action, and a legal application of it to attain the ends of justice. It is upon this foundation only, that an infinite variety of forms, rules, regulations, and modes of practice in all Courts of Justice must stand, and can only be supported."

And at p. 97:

"A writ applicable to one kind of imprisonment, is in reason equally applicable to another."

At p. 106, he says:

"To get at the bottom of it, the nature of this writ must first be considered: It is a demand by the King's Supreme Court of Justice to produce a person under confinement, and to signify the reason of his confinement."

He then proceeds to discuss the practice upon the return as it was in his day, saying that (p. 107):

"The writ is not framed or adapted to litigating facts: it is a summary short way of taking the opinion of the Court upon a matter of law, where the facts are disclosed and admitted. . . . . ."

And he declares at p. 112:

"I find no authority which warrants a difference between returns, when filed to writs of *habeas corpus* in cases of private custody, and of public custody, where the facts justifying the imprisonment have been set forth; that is, where there has been a full, complete, sufficient return."

The only particular wherein the imprisonment is viewed differently is given at p. 121:

"A difference is made between the case of an officer and a mere private person—a difference in favour of interposing upon the return of an officer, rather than of a private person, because an officer is a minister of Justice, and more under the control of the Court than a mere stranger. If said to be a wrong-doer—that is begging the question; for it depends upon the truth or falsity of the return, whether he is a wrong-doer."

It is in all its states a contempt of Court to disobey this "very high prerogative" and "transcendent" writ, 104-5; and "as the liberty of the subject is affected it is entitled to precedence over all other motions on the same day"—Halsbury's Laws of England, Vol. 10, p. 57.

Since the foregoing clear expositions of the nature of the writ there has been no essential change therein or in the manner of its application: thus in, *e.g.*, Short and Mellor's Crown Office Practice, *supra*, p. 310, it is stated: MARTIN, J.A.

"It is used to obtain the discharge of prisoners from custody on commitments, whether civil or criminal, for some illegality or informality in such commitments, or for want of or excess of jurisdiction."

And in Halsbury's Laws of England, Vol. 10, p. 40:

"The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty."

And at the same page and 41:

"In any matter involving the liberty of the subject the action of the Crown or its ministers, or high officials of the Privy Council, or the executive Government, is subject to the supervision and control of the judges on *habeas corpus*. It is this fact which makes the prerogative writ of the highest constitutional importance, it being a remedy available to the meanest subject against the most powerful. No peer or lord of Parliament has privilege of peerage or Parliament against being compelled to render obedience to a writ of *habeas corpus* directed to him."

"The writ of *habeas corpus ad subjiciendum*, unlike the other writs of *habeas corpus*, is a prerogative writ, that is to say, it is not a writ ministerially directed, but is one of the extraordinary remedies known as prerogative writs, which are issued upon cause shewn in cases where the ordinary legal remedies are inapplicable or inadequate. It is also a writ

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

of right, and is grantable *ex debito justitiæ*. Though it is a writ of right it is not a writ of course."

And at p. 48:

"The remedy by *habeas corpus* is equally available in criminal and civil cases, provided that there is a deprivation of personal liberty without legal justification."

The reason, in practice, why such writs were issued out of the Crown side in the King's Bench when the detention was on a criminal charge, is explained in *Easton's Case* (1840), 12 A. & E. 645 at p. 648, the Court saying, after deciding against the objection that the imprisonment under the Smuggling Act was not a criminal one:

"That being so, the regular course undoubtedly is for the writ to issue on the Crown side. That should always be done in such cases, because parties may desire to search the proper office in order to learn whether the writ has issued."

To shew, if it be necessary, that no importance is to be attached to the loose English practice of distributing business in the King's Bench Division, it is said in Halsbury, *supra,* p. 64, note (*r*):

"In non-criminal cases, such as cases relating to the custody of infants, it would seem that the writ of *habeas corpus* might be issued on the civil side of the King's Bench Division, but in practice the writ is always issued at the Crown Office."

MARTIN, J.A.

Modern changes of the practice in England, governed largely by the Crown Office Rules (conveniently set out in Short and Mellor, *supra*), tending to the convenient distribution of business in the English Courts in the transaction of Crown and civil proceedings, obviously affect neither the principles nor the practice which govern the writ in this Province. It is said in Halsbury, *supra,* p. 56, note (*p*):

". . . . . under modern practice applications for the writ are invariably made under the common law jurisdiction and not under the statute, though there appears to be no reason why an application for the writ in criminal cases should not be made to a judge in vacation under the statutory jurisdiction."

Its exact origin is obscure, though its antiquity is extreme and it is believed to ante-date Magna Carta, Encyclopædia of the Laws of England, Vol. 6, p. 130; Short and Mellor, *supra,* 306, and it is said in 15 A. & E. Encycl. of L., 2nd Ed., 128, that:

"Until the reign of Henry VII. (1485-1509), it was used only in cases where one subject was restrained of his liberty by another subject, that is,

it was a remedy only for private restraints. In the last-mentioned reign occur the first instances of its use as between the subject and the crown, and it was finally admitted to be a constitutional remedy."

In Encyclopædia of the Laws of England, Vol. 6, p. 130, it is said:

"The fundamental principle of the English constitution, denoted by the various phrases 'Liberty of the Subject,' 'the Right of Personal Security,' etc., which is an essential part of the common law of England, and which is enunciated, though in no sense originated, by numerous constitutional charters and statutes dating from the Magna Carta, is effectively protected by the common law writ of *habeas corpus*."

And in Stephen's Commentaries on the Laws of England, 17th Ed., Vol. III., p. 665, *et seq.*, under "Prerogative Writs" we find this:

"It is, as has previously been remarked (Vol. I., p. 110), one of the most remarkable features of English law that it places freely at the disposal of the subject certain highly effective remedies which were originally intended solely for the use of the Crown. Such a feature, so opposed to the general character of the State until the end of the eighteenth century, is a striking proof of the wholesome relations between rulers and ruled which have, with certain conspicuous exceptions, distinguished this country for many centuries. It is therefore, important to examine the actual procedure for giving effect to these powerful remedies, or, as they are called, 'prerogative writs.'"

And, as to the writ of *habeas corpus*:

"This is the prerogative remedy which the law has provided against violations of the right of personal liberty."

In Taswell-Langmead's English Constitutional History, 8th Ed., at p. 597, it is said:

"Of all the statutes passed in the reign of Charles II., perhaps the most celebrated is the Habeas Corpus Act. But although this Act afforded to the subject a prompt and efficacious remedy in many cases of illegal imprisonment, it is a mistake to suppose that it introduced any new principle or conferred any new right.

"The right of personal liberty—the most precious of all rights—is as old as the constitution itself. It rests upon the common law, which was merely defined and declared by Magna Carta and the stream of statutes which affirm that enactment. The subject was therefore always legally free from detention except upon a criminal charge or conviction, or for a civil debt."

I come now to the leading case of *Cox* v. *Hakes* (1890), 15 App. Cas. 506, wherein Lord Halsbury, L.C. said, pp. 514-5:

"My Lords, probably no more important or serious question has ever come before your Lordships' House. For a period extending as far back as our legal history, the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

to appear justifying detention, the consequence was immediate release from custody. . . . . .

"In days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, and the two-fold quality of such a determination that, if favourable to liberty it was without appeal, and if unfavourable it might be renewed until each jurisdiction had in turn been exhausted, have from time to time been pointed out by judges as securing in a marked and exceptional manner the personal freedom of the subject. It was not a proceeding in a suit but was a summary application by the person detained. No other party to the proceedings was necessarily before or represented before the judge except the person detaining, and that person only because he had the custody of the applicant and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. It was as Lord Coke described it, *festinum remedium*."

The form of the writ itself (Halsbury's Laws of England, Vol. 10, p. 63) demonstrates this, not being addressed to any Court but directly to the person detaining the applicant and commanding him to have "immediately after the receipt of this Our Writ the body of A.B. being taken and detained under your custody as is said, together with the day and cause of his being taken and detained. . . . . ." Lord Halsbury then proceeds to consider the statutes and the application of the writ, and says, p. 517:

MARTIN, J.A.

"The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom.

"My Lords, I have insisted at some length upon the peculiarities of the procedure, because I think one cannot suppose that the Legislature intended to alter all the procedure by mere general words without any specific provision as to the practice under the writ of *habeas corpus* or the statutes which from time to time have regulated both its issue and its consequences."

And at p. 522, he thus concludes:

"It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal."

Lord Bramwell, Lord Watson concurring, at pp. 525-6, also emphasizes one of the "peculiarities of the procedure" attached to the writ, thus:

"I have an indistinct misgiving whether in awarding or disposing of a writ of *habeas corpus* a judge of the High Court, or the High Court itself,

is acting as a Court or judge of a Court of Judicature. There is no *lis;* there is no action; these proceedings are entitled *ex parte.* No doubt sect. 16 transfers the power to grant writs of *habeas corpus,* but is that power a power of judicature?"

I pause here to say that I cannot help thinking that the too frequent failure of late to adhere to the ancient proper practice, thus confirmed, of entitling the proceedings *ex parte,* instead of wrongly giving them a criminal caption, has had the effect of opening the door to an erroneous conception of the extraordinary nature of the writ and the peculiarities of its summary procedure: the use of the Sovereign's name in a position even nominally adverse to the subject, is in itself a misstatement of the essential nature of the proceedings which, so far from being directed against the subject, are, on the contrary, a high prerogative remedy granted by the Sovereign *ex abundanti gratia* to all the lieges.

The quotations I have made shew the view taken by the House of Lords of the "peculiar nature" of the writ and its procedure; owing to the limitation of the scope of the argument therein (p. 513), and the existence of our statute giving an appeal, the decision is not otherwise in point, so I shall only note that though their Lordships brushed aside (p. 520) the two decisions of the Privy Council on *habeas corpus* cited to them, nevertheless they would be binding on this Court, our "relation" to the Privy Council "differing altogether," as Lord Herschell says, p. 535, from that of the Courts of England thereto.

MARTIN, J.A.

In the recent striking and instructive case of *Secretary of State for Home Affairs* v. *O'Brien* (1923), A.C. 603; (1923), 2 Q.B. 361, the nature of the writ was considered in a case arising out of the imprisonment in England and deportation to Ireland of the applicant by an order of the Home Secretary in circumstances which Lord Shaw, at p. 631, thus describes:

"The proceedings themselves constitute abduction, imprisonment, and enforced exile—a violation, if unwarranted, of the elementary rights and liberty of the subject."

As applicable to such conditions Lord Birkenhead thus speaks of the writ in question, p. 609:

"We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege."

He quotes in part the expressions by Lord Halsbury above set out, as do, at large, other of their Lordships, at pp. 621, 637, *et seq.*, and at p. 639, Lord Shaw says:

". . . . . it was held that it could not have been the intention under general words occurring in an Act regarding legal procedure to abrogate the fundamental rights of the citizen in regard to one of the most vital parts of our Constitution."

And at p. 641:

"In Lord Halsbury's language the real decision is the determination of a right. 'The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom.' "

And at pp. 643-4:

"My Lords, I think it right further to observe that urgency is written all over the face of *habeas corpus* proceedings. 'Preventing delay,' 'immediate determination of the right to the applicant's freedom,' the avoidance of 'the delay and uncertainty of ordinary litigation'—these expressions are significant of urgency as an essential quality of the proceedings."

He says, at p. 645, that "the occasions are frequent in which the temptations are severe to abridge those fundamental rights," therefore the Courts should not "permit an invasion" of them, and concludes, p. 646, by adopting the following quotation from Hallam:

MARTIN, J.A.

" 'It is obvious, that these words [in Magna Carta], interpreted by any honest Court of law, convey an ample security for the two main rights of civil society. From the aera, therefore, of King John's Charter it must have been a clear principle of our constitution that no man can be detained in prison without trial. Whether Courts of Justice framed the writ of *habeas corpus* in conformity to the spirit of this clause, or found it already in their register, it became from that aera the right of every subject to demand it. That writ, rendered more actively remedial by the statute of Charles II., but founded upon the broad basis of Magna Carta, is the principal bulwark of English liberty; and if ever temporary circumstances, or the doubtful plea of political necessity, shall lead men to look on its denial with apathy, the most distinguishing characteristic of our constitution will be effaced.' "

It must clearly appear, I apprehend, from all these high authorities that the constitutional right *ex debito justitiæ* to the "swift and imperative remedy" (*per* Lord Birkenhead, *supra*) afforded by this "very high prerogative" and "transcendent" writ in English law, is a civil right, the assertion of which in all cases is by its own peculiar and summary procedure which

does not vary in essentials whether the custody be under criminal process, or civil, or military, or naval, or private, or governmental executive act, or otherwise: its whole procedure with its "peculiarities" is extraordinary and entirely apart and distinctive from the ordinary proceedings that it reviews, and brings the person detained thereunder before the Court or judge so that the appropriate remedy may be applied. "It was not" (as Lord Halsbury puts it, like Chief Justice Wilmot before him, in apt cited language, *supra*) "a proceeding in a suit but was a summary application by the party detained, no other party to the proceeding was necessary. . . . . It was as Lord Coke described it *festinum remedium*"; and "the essential and leading theory of the whole procedure is the immediate determination of the right of the applicant's freedom."

I do not understand my brothers to dispute that the right to *habeas corpus* comes within Provincial "property and civil rights," and such being the case, I am, with the greatest respect, unable to follow the reasoning which seeks to change the extraordinary nature of the writ and remedy to conform to the various ordinary matters it is applied to. In other words, that it should change its general constitutional complexion because of its particular application, in practice; to my mind it is a confusion of fundamentals to say that because one tribunal has a special, summary, entirely independent, and overriding remedial power to inquire into, within defined limits, proceedings in another tribunal and exercises that power, then and thereupon its own peculiar and extraordinary proceedings become *instanter* a part of the alien proceedings which it has under review. I venture to think that if the suggestion had been made to a Lord Chancellor in ancient days that his "very high prerogative" and inherent writ of *habeas corpus* to bring before him a convicted prisoner in jail was somehow transformed into a criminal proceeding, it would have amazed him; his writ in truth ran against and not in or out of the criminal proceedings he was reviewing. In Anson on the Law and Custom of the Constitution, 3rd Ed., Vol. 2, Pt. I., p. 154, speaking of the office of Lord Chancellor, it is said:

MARTIN, J.A.

"His political and judicial duties do not come into conflict, because he is not concerned with the administration of the criminal law, and so is

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

not liable to preside in Court over prosecutions which he has advised in the Cabinet."

I can find nothing in reason to support the suggestion that the judge (or Court) before whom the special summary proceedings under the writ are being taken steps or projects himself in some inexplicable way into the proceedings of the other authority, be it public or private, the legality of whose detention he is investigating in entire aloofness from the method of its practice or procedure in bringing about such detention: it is because he is entirely aloof that he proceeds with his own independent investigation.

No authority has been cited to shew that the writ was ever regarded as part of the criminal law; in Sir James Stephen's History of the Criminal Law of England (1883), Vol. I., p. 243, he properly puts it to one side thus:

"The history of the writ of *habeas corpus*, regarded as a protection against wrongful imprisonment, hardly falls within the scope of . . . . . a history of the criminal law."

But great reliance is placed upon certain decisions in England upon the language used in section 47 of the Judicature Act,

MARTIN, J.A.

1873, declaring that

"No appeal shall lie from a judgment of the said High Court in any criminal cause or matter, save," etc.

The leading decision is *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832, and the Court of Appeal held that the said expression "in any criminal cause or matter" covered the case of a refusal to grant a writ of *habeas corpus* to one who was in prison under the Extradition Act, 1870. My first observation upon that decision is that it is not binding on this Court (*vide Pacific Lumber Agency* v. *Imperial Timber & Trading Co.* (1916), 23 B.C. 378 at p. 380; *Chilliwack Evaporating, Etc. Co.* v. *Chung* (1918), 1 W.W.R. 870), though it is to be treated with every respect. The next is that the decision is based upon the special statute in question and the reasoning is founded upon the supposed intention of the Legislature regarding appeals in criminal matters in England in the absence of express words to cover matters in *habeas corpus*, whereas the contrary is the case under our statute, which specifically confers an appeal in "matters of *habeas corpus*" without any restriction. To sup-

port its decision the Court of Appeal had to go the length of holding, p. 835, *per* Lord Esher, that:

"The result of all the decided cases is to shew that the words 'criminal cause or matter' in s. 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term, this Court being constituted for the hearing of appeals in civil causes and matters."

And at p. 836:

"I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises."

This view has been taken in later cases by the same Court, *e.g., Rex* v. *Garrett* (1917), 2 K.B. 99, 106, but with great deference, I am unable to accept such a sweeping declaration as applicable to *habeas corpus* in general, though, until reversed by the House of Lords, it stands as the law upon the English statute in particular. Moreover, later cases in the same Court shew that the scope of the decision has been still further expanded so that "criminal cause or matter" has been held, *e.g.,* to include the refusal of a *mandamus* to compel a magistrate to state a case in a proceeding under the Health Act to abate smoke from a chimney (*Ex parte Schofield* (1891), 2 Q.B. 428); and a like decision respecting the erection of a building beyond the general street line under the London Building Act —*Rex* v. *D'Eyncourt* (1901), 85 L.T. 501; and also to include an appeal from a judgment by justices in petty sessions granting a warrant of distress against the appellant for the amount of a poor rate—*Seaman* v. *Burley* (1896), 2 Q.B. 344, the reason for the decision being, *per* Lord Esher, pp. 347-8:

MARTIN, J.A.

"The cases cited . . . . . all seem to me to shew that the question is not whether the proceeding must, but whether it may end in imprisonment. If it is before justices and may end in imprisonment, the cases have held that it is criminal within s. 47 of the Judicature Act, 1873. For these reasons I think that in this case no appeal will lie to this Court."

And Lord Justice A. L. Smith said, p. 352:

". . . . . This Court has looked to the question whether or not the proceeding before magistrates might result in a committal to prison, and, if so, have held that it was a criminal proceeding for the purposes of s. 47."

It will be seen at once that this definition for English appellate purposes is, on the face of it, wholly inappropriate to the language employed for the distribution of powers under the

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

B.N.A. Act, because it includes as "criminal causes or matters" all that large body of penal offences "which may end in imprisonment" and which have been held by the Privy Council in the cases cited *supra* to be infractions of "Provincial criminal law" (to employ the apt expression of Mr. Benjamin approved by the Privy Council in *Russell* v. *The Queen* (1882), 7 App. Cas. 829, 840), and yet it is conceded that under the B.N.A. Act an appeal in them lies to this Court though none would lie in England under *Woodhall's* case, and so this direct conflict in both reason and result between that decision and those of the Privy Council, *supra,* shews, with every respect, how fruitless it is to attempt to interpret our constitutional Act by the English Judicature Act dealing with wholly different circumstances and objects: the remarks in general of Mr. Justice Meredith (in an "admirable judgment" as Osler, J.A. calls it, p. 486), concurred in by all the other members of the Ontario Court of Appeal in *The Copeland-Chatterson Co., Ltd.* v. *Business Systems Co., Ltd.* (1908), 16 O.L.R. 481, in a contempt of Court matter, upon this subject and in relation to this very subsection (27) as to "criminal matters" are so appropriate that I shall quote them in general, p. 487:

MARTIN, J.A.

> "The decisions in England require much consideration, and can be applied safely only with much discrimination, for at least two obvious reasons: (1) they interpret an enactment different in several respects from those upon which this case depends, and (2) there are decisions and decisions as well as 'contempt and contempts.'"

He then proceeds, in particular, to criticize the decision in *Woodhall's* case in illustration of his observations upon "Provincial crimes" (which are "exemplified every day" by the "thousand and one cases of offences against Provincial laws"), and says, p. 488:

> "The words 'criminal matters,' which we have to interpret, therefore seem to me to comprehend only matters which are criminal in the strict meaning of that word, criminal matters such as are under the British North America Act, 1867, committed to the exclusive authority of the Parliament of Canada."

The expression "criminal law" in subsection (27) has been considered by the Privy Council in, *e.g., Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A.C. 524 at p. 528, wherein it was said that those words "must be construed

according to their natural and ordinary signification"; this would clearly, in my opinion, exclude *habeas corpus* even if the "widest sense" be given to "criminal law." In *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96, after saying that sections 91 and 92 of the B.N.A. Act should be read together so as to "arrive at a reasonable and practical construction" thereof by reconciling conflicting provisions, the Privy Council held that "the words 'property and civil rights' are plainly used in their largest sense," as they were in the Quebec Act of 1774. And in *John Deere Plow Company, Limited* v. *Wharton* (1915), A.C. 330, 339, their Lordships say, after considering the said quoted language in the *Parsons* case, that:

"The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words 'civil rights' in particular cases. An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality."

MARTIN, J.A.

In my opinion the application of this guide to interpretation would lead only, in the "facts" herein, to the conclusion that the writ in question came inevitably within "civil rights" and not "criminal law," even assuming that the stage of any conflict on that point should be deemed to be reached, though to my mind, when the true historical nature of the writ is understood, no conflict does or can arise. And in this connexion there is a most apt observation in the *Parsons* case, *supra,* p. 108, thus:

"Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of conflict of powers, it is obvious that in some cases where this apparent conflict exists, the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament."

In Manitoba it was decided, by two judges sitting as the Full Court, in *Rex* v. *Barre* (1905), 15 Man. L.R. 420, that there was no appeal from a refusal to grant a *habeas corpus*

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

on the application of a prisoner under a conviction for an offence against the Federal Criminal Code; the report is very scanty and as the decision was based, apparently, solely upon the *Woodhall* case it does not require further consideration.

On the other hand, there is considerable authority in Canada confirming the view I have put forth; *e.g.*, the direct opinion upon the point of Mr. Justice Mellish, in *Rex* v. *Morris* (1920), 53 N.S.R. 525, wherein it was raised by objection taken (535) to the Court's jurisdiction to entertain an appeal from a refusal to grant a writ of *habeas corpus* to one imprisoned for an offence contrary to the Federal Criminal Code, and he says, p. 537, overruling the objection:

> "I think that such an appeal lies, and that the Provincial statute allowing such an appeal is not *ultra vires* on the ground that it is legislation dealing with criminal procedure. I do not think that legislation to secure the liberty of the subject from illegal imprisonment can properly be called legislation making, altering or affecting criminal law or criminal procedure. I am, therefore, of opinion that the appeal was properly taken under the Provincial statute."

The other judges of the Full Court, who agreed in dismissing the appeal, did not, apparently, deal with this point; the report

MARTIN, J.A.

is ambiguous as to them, and they may have disposed of the matter in its other aspect of an original motion to the Full Court for the prisoner's discharge.

There is an instructive case before the Appellate Division of Ontario, *Rex* v. *Spence* (1919), 45 O.L.R. 391, wherein a writ of prohibition was applied for to restrain a police magistrate from further proceeding with the trial of a charge under the Federal War Measures Act, 1914, Cap. 2, on the ground that he had no jurisdiction to do so; the magistrate had directed that a plea of "not guilty" be entered and proposed to continue the trial, upon which the motion for the writ of prohibition was made to Mr. Justice Sutherland and upon his refusal thereof, an appeal was taken to the Appellate Division. When the appeal came on to be heard the Crown counsel objected that the Court had no jurisdiction as the matter was a Federal criminal one. Chief Justice Meredith overruled the objection thus, p. 402:

> "If the officer were usurping a power which he had not, this Court should have prohibited him; and such a proceeding would not have been one

affecting 'the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters,' within the meaning of those words in sec. 91 (27) of the British North America Act, 1867, conferring exclusive legislative power in such matters upon the Parliament of Canada: it would not have been a step in a criminal proceeding in the matter of this criminal charge, but would be one quite without and only collateral to it. It is, therefore, in my opinion, quite competent for the appellant to prosecute this appeal from the order in appeal dismissing the application for prohibition on the ground of want of jurisdiction."

The other four judges assumed, without expressly deciding the point, that they could entertain the appeal and dealt with it on the merits, agreeing with the Chief Justice in the result. But it is fair to draw the inference that no real doubt existed regarding the Court's jurisdiction, because in the following month (p. 407) a second appeal upon a second motion of the same nature, upon an alleged new aspect of the same matter, came before the said Court, but this time no objection was raised to the appeal being heard, and so the Court disposed of it, *per* the judgment of Chief Justice Meredith, upon the merits.

MARTIN, J.A.

The importance of these proceedings is that the writ of prohibition is also, like that of *habeas corpus,* a prerogative writ, and yet the exercise of that prohibitory remedy in favour of an accused person upon his trial for a crime admittedly against the Federal law did not have the effect of bringing the writ and its procedure within the said expression "criminal law . . . . . and procedure in criminal matters"; *i.e.,* despite the fact that it was invoked to stay criminal procedure in the midst of the trial of a Federal "criminal" offence, yet the said prerogative writ and summary proceedings were not a "step" in the criminal proceedings, it was the means of inquiring into but "quite without" them. This view of the matter is in exact analogy and conformity to the view I have expressed upon the nature of *habeas corpus,* only everything of the kind that applies to prohibition applies *a fortiori* to *habeas corpus* for many obvious reasons; the form of the writ of prohibition also shews this, being addressed directly to the tribunal ("We hereby prohibit you from further proceeding . . . . exercising jurisdiction," Short and Mellor, 519), whereas *habeas corpus* is directed

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

to the keeper of the body, *supra*. And see *post* the decision of the Supreme Court of the United States in *Farnsworth* v. *Montana*. In no true legal sense does *habeas corpus* interfere with the proceedings of another tribunal, as is shewn by the judgment of the Supreme Court of Canada in the leading case of *In re Melina Trepanier* (1885), 12 S.C.R. 111; at pp. 113-4, Chief Justice Ritchie says:

"The commitment having been made by a Court of competent jurisdiction in the exercise of its unquestionable authority, this Court, assuming the conclusion arrived at to have been erroneous, has no authority to review the proceedings, or, in other words, to re-try the case. It cannot be disputed that we have no power to quash the conviction. If the conviction shews a want of jurisdiction, or if it was shewn that the magistrate had no jurisdiction, it would be a nullity, and we would discharge the prisoner, because, in such a case, he could not be held by process of any legal tribunal; but with a valid conviction standing against him, and a regular warrant issued thereon, upon what principle can he be discharged?

"If there is a principle clear beyond all doubt, it is that when a party is in execution under the judgment of a competent Court in which the Legislature has entrusted the jurisdiction on the merits to a magistrate, whatever his decision on the merits may be, it cannot be reversed on *habeas corpus*."

MARTIN, J.A.

And at p. 128, Mr. Justice Strong points out that:

"The officer who has the prisoner in custody has not the record. He cannot return the record. He can only return the warrant of commitment, and, if that appears to be good, it must be conclusive so far as the writ of *habeas corpus* is concerned."

And at p. 129:

". . . . . if a judge in chambers undertakes to go behind the conviction and to consider the merits at large by way of appeal, I should say there was no jurisdiction to do so."

Speaking of excess of jurisdiction under military law Anson says, *supra*, Vol. II., Pt. II., p. 187:

"The remedies for such excess of jurisdiction are by writs of prohibition, of *certiorari*, of *habeas corpus*, issuing from the High Court of Justice. The holding of a trial or the infliction of a sentence may be restrained by a writ of prohibition, a sentence may be quashed or a matter brought up to the High Court to be dealt with by writ of *certiorari;* one who is deprived of his liberty wrongfully may recover it by writ of *habeas corpus*. Beyond this the Courts will give a remedy in damages to persons who have suffered by the application of military law without jurisdiction."

And at p. 237, as to offenders in holy orders against certain statutes:

"Like the soldier or sailor, he is subject to an exceptional code, enforced by an exceptional procedure, and like them he is protected by the secular

Court, which restrains excess of jurisdiction by writ of prohibition and improper restraint of the person by writ of *habeas corpus*."

And it is to be remembered that prohibition lies not only for lack of jurisdiction, but also as the King's Bench decided, *per* Lord Ellenborough, C.J., in *Gould* v. *Gapper* (1804), 5 East 345 at p. 364, in cases where the tribunal complained of is "proceeding to try such matters contrary to the principles of the common law," and, in such a case does so only after the "sentence be given," which decision is very apt herein, because the remedy of *habeas corpus* is most frequently invoked after conviction. I confess I am unable to perceive why the two remedies should be regarded differently in their application to the same class of Federal powers; it is correctly stated in Clement's Canadian Constitution, 3rd Ed., p. 551:

"All Federal penal legislation, that is to say, legislation imposing punishment as its sanction, is within this class, 'the criminal law,' whether such legislation is to be found in the Criminal Code or in separate enactment."

This view is confirmed by *In re Richard* (1907), 38 S.C.R. 394, 408.

In the case of *Re George Edwin Gray* (1918), 57 S.C.R. 150, an application for *habeas corpus* by a soldier in military custody awaiting sentence of a court martial for disobeying orders in violation of the Militia Act, the Chief Justice of Canada said, p. 155: MARTIN, J.A.

". . . . . In any case of an application for this writ which, as is said in Maitland's Constitutional History of England, 'is unquestionably the first security of civil liberty,' this Court, the Court of last authority in the country, would not willingly admit any doubt of its authority to grant to any of His Majesty's subjects the protection which the writ affords."

In that case the applicant was, under the statutes cited by Mr. Justice Anglin, detained on a criminal charge, nevertheless, the Chief Justice rightly, if I may say so, regarded the writ as the constitutional means to assert "civil liberty," but as the point raised at this Bar under the B.N.A. Act was not there taken, the important result of that view was not considered.

Then in *In re Lewis* (1918), 13 Alta. L.R. 423, the Appellate Division of Alberta on *habeas corpus* discharged from military custody a man who had been called up for active service under the Federal Military Service Act, 1917, and impressed into

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

a battalion though he was exempt from military duty. Now, can it be seriously suggested that this was an infringement of the powers which by section 91 (27) of the B.N.A. Act are exclusively conferred upon the Federal Parliament? What the Court did there was to hold that the Provincial writ of *habeas corpus* was the proper remedy for the discharge of a person from Federal custody under one head of the allotted Federal "subject-matters," *viz.*, "militia, military and naval"—section 91 (7), and there can be, I think, no doubt of the correctness of that decision. But such being the case, the writ must also be the proper remedy for persons in custody under other Federal "classes of subjects" in the same section, including "criminal law" (27). Can it be reasonably controverted that once the detention is shewn to be Federal it is just as much subject to the summary remedy of the writ in all said "classes of subjects" as in one of them? Surely all such "classes" are on the same constitutional plane, and no reasonable line of demarcation can, I think, be drawn: the writ can remedially invade the Federal field wholly, or not at all. The truth is, of course, that it does not invade it but only asserts, in its peculiar way, the fundamental civil right of personal liberty.

MARTIN, J.A.

Then this Court in *In re Wong Shee* (1922), 31 B.C. 145, unanimously decided that we had jurisdiction to hear an appeal by the Crown Federal under our Court of Appeal Act, *supra*, though the applicant for *habeas corpus* was then in the custody of Federal Immigration authorities under the Federal Immigration Act, 1910, Cap. 27, but had been released by the writ before appeal brought, despite which we ordered her again into Federal custody, which custody was a detention under the exclusive powers of the Federal Parliament by section 95 of the B.N.A. Act, since Parliament has occupied that field of immigration as specially provided. The effect of this decision is the same, therefore, as that in *Lewis's* case, *viz.*, that in the assertion of the civil right of *habeas corpus* the fact that the detention is founded upon or arises out of the exercise of Federal powers, does not constitute an invasion of those powers by the Provincial remedial writ or even raise a conflict between them. In other words, all Federal detentions are, under the

B.N.A. Act, equally subject to the Provincial remedy of *habeas corpus,* whether, *e.g.,* caused by the exercise of military powers under (7), or quarantine powers under (11) or criminal powers under (27) or immigration powers under 95, or otherwise.

That is the direct legal consequence of our said decision, in its application of the judgment of the Supreme Court in *Rex* v. *Jeu Jang How* (1919), 59 S.C.R. 175; (1919), 3 W.W.R. 1115, even though some of us assumed (the exact point now raised here not being there before us) that there might have been another result had the detention been based on criminal process. Upon the way this Province has acquired jurisdiction over the writ, the Chief Justice in *Wong Shee's* case, said, p. 148:

"The right to the writ of *habeas corpus* is not given by Dominon statute but is part of the common and statutory law of England introduced into and made part of the law of this Province."

The B.N.A. Act provides for the distribution of rights and powers between the Dominion and the Province: it does not in general concern itself with the machinery by which the Legislature exercises them.

MARTIN, J.A.

Then assuming I am right in my view of the nature of the remedy of *habeas corpus,* as being within Provincial "property and civil rights," and not Federal "criminal law," there is a practical test to be applied in considering the application or continuance of it, *viz.,* what Legislature, Federal or Provincial, has the right to suspend, alter, or even abolish it? The course of suspension has frequently been taken by the British Parliament (Halsbury's Laws of England, Vol. 10, p. 44), and that power no doubt may be exercised in Canada by the properly delegated authority. The answer to this question is to be found in the judgment of the Manitoba Court of King's Bench, *in banco,* in *The Queen* v. *Robertson* (1886), 3 Man. L.R. 613, *per* Killam, J., p. 627:

"The Provincial Legislature, under its authority to legislate upon the subject of 'Property and Civil Rights,' could undoubtedly limit civil rights; could take away some already existing, could prohibit their exercise as such."

In this connection the Nova Scotia Act, "Liberty of the Subject Act," R.S.N.S. 1900, Cap. 181, is to be noted, and *Cf.*

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

Rex v. *Murphy* (1922), 56 N.S.R. 100, and *Rex* v. *Morris, supra.*

Finally, there is, fortunately, an expression of opinion from a tribunal of exceptionally high authority, which though not binding on us is entitled to corresponding respect, and especially so when, as here, it is dealing broadly and historically with matters like *habeas corpus* which pertain to the general principles of the common law of England and have taken root in the United States. I refer to the unanimous decision of the Supreme Court of the United States in *Ex parte Tom Tong* (1883), 108 U.S. 556, a case of *habeas corpus,* as delivered by Chief Justice Waite, and the following expressions (which, be it noted, are founded upon the opinion of Chief Justice Marshall therein cited) so admirably affirm the view of the special nature of the writ at common law that I have ventured to sustain, founded largely upon Lord Halsbury's observations, *supra,* that I cite them without further comment—pp. 559-60:

MARTIN, J.A.

"A question which meets us at the outset is whether we have jurisdiction, and that depends on whether the proceeding is to be treated as civil or criminal. . . . . The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offence; but if he succeeds he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. This petitioner claims that the Constitution and a treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part, is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution. It was said by Chief Justice Marshall, speaking for the Court, as long ago as *Ex parte Bollman & Swartwout* [(1807)], 4 Cranch. 75-101:

"'The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of

the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different Courts.' "

This view has been repeatedly and unanimously followed by the same Court, *e.g.*, in *Kurtz* v. *Moffitt* (1885), 115 U.S. 487 at p. 494:

"A writ of *habeas corpus*, sued out by one arrested for crime, is a civil suit or proceeding, brought by him to assert the civil right of personal liberty, against those who are holding him in custody as a criminal. *Ex parte Tom Tong* [(1883)], 108 U.S. 556."

And again, three years later, in *Farnsworth* v. *Montana* (1889), 129 U.S. 104 at p. 113:

"A writ of prohibition is a civil remedy, given in a civil action, as much so as a writ of *habeas corpus*, which this Court has held to be a civil and not a criminal proceeding, even when instituted to arrest a criminal prosecution. *Ex parte Tom Tong* [(1883)], 108 U.S. 556."

It will be noted that this last view as respects prohibition also confirms that taken by Chief Justice Meredith in *Rex* v. *Spence, supra,* and the deductions I have made therefrom.

MARTIN, J.A.

It follows from all the foregoing that, in my opinion, we have, under our said Provincial statute, jurisdiction to hear this appeal, and so the objection by counsel for the Province to its own powers should be overruled.

In conclusion, I repeat the expression of my regret that in a matter of such great constitutional importance and far-reaching effect, we have not had that assistance which is due to us, and so, like Lord Chancellor Eldon (in *Crowley's* case, 36)—"I have spent many hours in researches upon the question," because as Lord Chancellor Halsbury said in similar circumstances (*Cox* v. *Hakes,* 514), "probably no more important or serious question has ever come before your Lordship's House." Therefore, I feel no apology is necessary for the unavoidable length of my "researches" in the additional and still more difficult constitutional question that has arisen on this appeal.

GALLIHER, J.A.: I agree in the reasons for judgment of the Chief Justice.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal unquestionably has relation to criminal law, the appellant being in custody to answer a criminal charge.

MCPHILLIPS, J.A.

Proceedings were had and taken to bring about the discharge

COURT OF APPEAL
1925
Jan. 6.

REX v. MCADAM

of the appellant by way of *habeas corpus,* which was unsuccessful, and what is now attempted by this appeal is to have this Court discharge the appellant, it being contended that *habeas corpus* is a civil right, and as there is an appeal in *habeas corpus* under Provincial legislation, that an appeal lies even where the applicant for the writ is held under a criminal charge.

It would be idle to contend that in England there is any right of appeal. The authorities are uniform holding to the contrary, and my opinion is that in British Columbia the law is the same. The Legislature of British Columbia would have no authority whatever to invade the domain of criminal law; that authority is exclusively conferred upon the Parliament of Canada by the British North America Act, 1867, Sec. 91 (No. 27):

"The Criminal Law except the constitution of the Courts of Criminal jurisdiction, but including the procedure in criminal matters."

Section 129 of the British North America Act provides that all laws in force and all Courts of civil and criminal jurisdiction and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing in the Provinces at the Union were to continue as if the Union had not been made, subject nevertheless (except as to any existing under Imperial Acts) to be repealed, abolished or altered by the Parliament of Canada or by the Provincial Legislatures according to their authority under the Act.

MCPHILLIPS, J.A.

After the passage of the British North America Act, the domain of criminal law and procedure in criminal matters rested with the Parliament of Canada, and the learned counsel for the appellant, in his very able argument, was not able to refer to any legislation of the Parliament of Canada admitting of appeals being had in *habeas corpus* proceedings. British Columbia entered the Union later (1871), and at the time of entering into the Union no change was made in the criminal law by the Parliament of Canada as affecting British Columbia in respect to appeals in *habeas corpus* proceedings, and no legislation of this character has been enacted since. Further, no authorities were cited or were capable of being referred to establishing any right of appeal.

Therefore, the question resolves itself into the solution

of the one point so ably pressed by Mr. *Cassidy* on behalf of the appellant, that *habeas corpus* is process civil in its nature, and will extend to persons held under criminal charges, that the right to the writ of *habeas corpus* is exclusively vested in the Legislature of the Province under section 92 of the British North America Act, No. 13, ". . . . Civil Rights," and in that the Legislature of the Province of British Columbia has accorded an appeal in *habeas corpus* proceedings that an appeal lies in the present case. The learned counsel referred to a case in the Supreme Court of the United States—*Ex parte Bollman* (1807), 4 Cranch 75 at p. 101. The decisions of the Supreme Court of the United States are entitled to the very highest consideration. We have the Privy Council and the House of Lords, the Supreme Court of Canada and the Superior Courts of the Provinces always giving great heed to these decisions, but of course it is necessary to bear in mind the marked distinction that exists between the Constitution of the United States and the Constitution of Canada and the respective powers conferred upon the States of the Union and the Provinces of the Dominion. The States of the Union have the power of legislation both as to criminal and civil law, whilst the Provinces of the Dominion are without the power to deal with criminal law or procedure in criminal matters. Further, all residuary powers are vested in the respective States of the Union. In view of this consideration I cannot think that it can be at all said that the decision can be helpful in the consideration of the present appeal. The decision in the Supreme Court of the United States cannot be said to be a decision upon analogous statute law, and in that case only could it be of assistance. The learned counsel for the Crown, Mr. *Jackson,* contented himself in the main by relying upon the contention which certainly seems to be, to me, unanswerable, that there is no authority capable of being cited that will warrant it being said that an appeal lies in *habeas corpus* proceedings where the person held is under a criminal charge and is in close custody awaiting trial. That the Legislature of British Columbia further must be considered to have legislated only, and it would have no right to transcend it, in respect to civil

MCPHILLIPS, J.A.

COURT OF APPEAL

1925

Jan. 6.

REX v. MCADAM

MCPHILLIPS, J.A.

proceedings, and that the right of appeal must be so confined. With every deference to the learned argument of counsel for the appellant which exhibited great research and industry, my opinion is that there is but one answer capable of being made to this appeal, and that must be a negative answer. It is impossible to decide otherwise. The field of criminal law and procedure in criminal matters is solely for the Parliament of Canada, and it is fully occupied, and all appropriate legislation in respect thereto exists, enacted by the Parliament of Canada, and no legislation is capable of being referred to which will admit of its being contended that an appeal lies, nor have any authorities been cited which in any way support the contention that an appeal is permissible.

I have no hesitation whatever in arriving at the conclusion that no appeal lies. I would therefore dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A. would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

PAINLESS PARKER v. KOGOS.

COURT OF APPEAL

1925

Feb. 4.

PAINLESS PARKER v. KOGOS

Vendor and purchaser—Agreement for sale—Construction—Purchaser to assume payments under previous sale to vendor—Interest not mentioned—Specific performance—Rectification.

The defendant purchased a property under agreement for sale from the Vowell estate for $79,000 with interest at 7% on deferred payments. He made no payments under this agreement and eight months later sold under agreement for sale to the plaintiff for $123,000. The agreement provided that the deferred payments included a payment of $79,000 to the original vendor, and further contained a clause as to the Vowell agreement that "the payments due thereunder the purchaser doth hereby assume." The plaintiff made all the payments in accordance with the agreement aggregating the sum of $123,000 and a dispute then arose as to who should pay the interest under the Vowell agreement that accumulated prior to the execution of the second agreement. In an action for specific performance it was held that the interest should be paid by the purchaser.

Held, on appeal, *per* MACDONALD, C.J.A. and MACDONALD, J.A., that the sum due on the Vowell sale that the plaintiff agreed to pay was $79,000 and no more. The basis of the agreement in question was a clear title for $123,000. The defendant's contention that the plaintiff should also pay this interest is in the teeth of the agreement as it increases the purchase price by $3,686 and cannot be upheld. The defendant must pay this interest.

Per MARTIN and MCPHILLIPS, JJ.A.: Under this agreement the plaintiff was to make the payments due under the Vowell agreement the words being "and the payments due thereunder the purchaser doth hereby assume." In light of all the facts and circumstances it was the intention of the parties that the plaintiff should pay the interest and the agreement should be construed so as to carry this into effect.

The Court being equally divided the appeal was dismissed.

APPEAL by plaintiff from the decision of GREGORY, J., of the 26th of May, 1924, in an action for specific performance of an agreement for sale of land. The plaintiff entered into an agreement for sale to purchase lots 25 and 26 in block 9, subdivision of District Lot 196 in group 1, New Westminster District, from the defendant on the 8th of February, 1923. The defendant held the lots under an agreement for sale from the Vowell estate dated the 20th of July, 1922, for the sum of $79,000, but neither principal nor interest (which amounted to $3,686 on the 8th of February, 1923), was paid. Under the agree-

Statement

COURT OF APPEAL

1925

Feb. 4.

PAINLESS PARKER v. KOGOS

ment of the 8th of February, 1923, the vendor agreed to purchase for the sum of $123,000 in the manner following: $7,000 on the execution of the agreement; $79,000 being the balance due under the agreement for sale of the 20th of July, 1922, which said agreement and the payments due thereunder the purchaser assumed; $28,000 on the 15th of March, 1923, and $1,000 on the 15th of August, 1923, and on the 15th of each of the eight following months with interest at 7 per cent. per annum payable on the last instalment of principal. The plaintiff made all payments under the agreement, paying in all $123,000, but refused to pay the interest under the Vowell agreement from the 20th of July, 1922, to the 8th of February, 1923, being the sum of $3,686, claiming that this sum should be paid to the Vowell estate by the vendor. It was held by the trial judge that under the agreement of the 8th of February, 1923, the purchaser should pay this sum.

Statement

The appeal was argued at Vancouver on the 18th and 19th of November, 1923, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C. (*Molson,* with him), for appellant: The plaintiff's assumption of the Vowell payment only applies to the principal as he was only to pay $123,000 on his agreement and he paid this in full. The agreement never contemplated he was to pay any more than this amount. It was Kogos's duty to pay this interest. On costs of issues raised and on which they fail see marginal rule 976; *Blank* v. *Footman & Co.* (1888), 57 L.J., Ch. 909 at p. 914; *Dominion Fire Insurance Co., Ltd.* v. *Thomson* (1923), 3 W.W.R. 1265.

Argument

Mayers, for respondent: Oral evidence is admissible to explain this agreement: see *Fordham* v. *Hall* (1914), 20 B.C. 562; *Booth* v. *Callow* (1913), 18 B.C. 499; *Frey* v. *Floyd* (1922), 30 B.C. 488; *Johnson* v. *Bragge* (1901), 1 Ch. 28. On the question of costs see *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1919), 26 B.C. 560.

Farris, in reply, referred to Pollock on Contracts, 9th Ed., pp. 556-7; *Campbell* v. *Edwards* (1876), 24 Gr. 152.

Cur. adv. vult.

4th February, 1925.

COURT OF APPEAL

1925

Feb. 4.

PAINLESS PARKER v. KOGOS

MACDONALD, C.J.A.: This is an action for specific performance of an agreement for sale of land, with a counterclaim for reformation of the agreement.

The learned judge refused to reform the agreement, and with that refusal I agree.

The property in question at the time of the sale by the defendant to the plaintiff, was encumbered to the extent of $79,000 and some interest, and by the agreement of sale the plaintiff assumed the payment of the $79,000 as part of the purchase price. The vendor was under an agreement to pay off the encumbrance in instalments of $6,000 each, in which the principal and interest were combined. At the time of the agreement one of these instalments was accruing, and it is with respect to the adjustment of this that the dispute arose. The price at which the plaintiff agreed to purchase the property from defendant, is stated in the agreement to be $123,000. That price was to be paid by the assumption of the said $79,000; by the payment of $7,000 in cash at the time of sale, by the payment of $28,000 at a subsequent date, and the balance of $9,000 in monthly instalments, making in all $123,000.

MACDONALD, C.J.A.

It is useful, perhaps, to refer to the manner in which the parties arrived at the purchase price. The defendant asked a higher price, and after some bargaining they finally arrived at the price of $123,000. That, as I understand the evidence, was the defendant's price of $125,000 less $2,000 of future rents then in the hands of the defendant, which he was to retain.

The defendant's contention is that the plaintiff was to pay him $44,000 net, and that therefore the plaintiff was to assume not only the $79,000, but the accrued interest upon it up to the 15th of March, 1923, the day fixed for adjustments. I cannot accept the defendant's contention. He would not receive $44,000 net, even if the said interest were payable by the plaintiff, since other admitted adjustments amount to a considerable sum against him.

The evidence of the solicitor who drew the agreement, and whose veracity is not questioned, shews that there was no mistake made in the drafting of the document. The document con-

COURT OF APPEAL

1925

Feb. 4.

PAINLESS PARKER v. KOGOS

tains a clause providing for the making of adjustments on the 15th of March, in which interest is not mentioned, but it was not necessary to make any mention of the interest, the sum assumed and agreed to be paid by the plaintiff was $79,000 and no more. Moreover, there is evidence that at the time the adjustments were made on the 15th of March, the defendant asked that the adjustment of interest should be postponed until the instalment should fall due on 20th of July. He claimed that as the plaintiff would not have to pay this until the 20th of July, it ought not to be deducted until then.

MACDONALD, C.J.A.

To sum up the whole case, it comes to this: That the defendant is now contending in the teeth of the agreement, that the purchase-money was not the sum of $123,000, as stated in the written agreement, but this sum plus the interest in question, which is approximately the sum of $3,600, making the whole purchase price the sum of $126,000. In this he has, I think, completely failed, and therefore the appeal should be allowed, and the counterclaim dismissed, with costs here and below.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed upon the ground, first, that the learned judge below reached the right conclusion on the interpretation of the contract respecting the interest between the dates in question, and second, that, if such is not the right view the contract should be rectified because of mutual mistake.

In the consideration of both points it is important to observe that the learned judge speaks highly of the defendant's veracity,

MARTIN, J.A.

and in my very careful review of all the evidence I have formed a like opinion, though without the benefit of the trial judge's opportunity to scrutinize him in the witness box; and on the other hand he was "not as satisfied with Boultbee's evidence as I would like to be," and I share that feeling.

I have but little to add to the reasons given by the learned trial judge for construing the agreement to mean that Kogos was to get $44,000 in money over and above the sum of $79,000, being the balance due under the Vowell agreement which bulk sums made up the gross purchase price of $123,000, and in view of the plaintiff's express covenant to "hereby assume" the "said

agreement and payments due thereunder," I am unable to take the view that the plaintiff should be relieved from that covenant by the prior recital of the purchase price. It must be borne in mind that at the date of the agreement to purchase (8th February, 1923), no payments were in arrear under the Vowell agreement and the next payment of $6,000 did not fall due until four months thereafter, and moreover that payment of $6,000 included the interest, the situation in that respect being unusual and hence the defendant was dealing with that payment as one sum in block and in order to guard himself from liability therefor inserted the said covenant which provided for its assumption by the plaintiff, who if he wished to reduce it by substracting any interest therefrom should have stipulated to that effect.

Then as to rectification. Whatever tentative view the learned judge may have expressed during the discussion at the end of the trial, the fact is that in the formal judgment the counterclaim is allowed *in toto* and it may well be argued that this unrestricted allowance would include the rectification prayed by said counterclaim. But however that may be, I have no doubt that a clear case for rectification has been established by the evidence of the defendant and Black, and there is much in Boultbee's evidence also which supports them. The vivid account given by Kogos and Black of the assurance given by the plaintiff's solicitor *Housser,* when Kogos (who had no legal representative) "paused" in proceeding to sign the agreement submitted to him, till he received the assurance from *Housser* that it meant that the plaintiff was to pay the said instalment of $6,000 due in July, is of itself sufficient, if believed, to prove a case of mutual mistake, because it is not suggested that *Housser* was guilty of any misrepresentation, and therefore if both he (acting for the purchaser alone), and the vendor believed the document was so drawn as to conform to his assurance, and yet was later found not to do so, no clearer case of mutual mistake could be required. This positive evidence of two credible witnesses on a vital point of the agreement could only be displaced by evidence of the same character, but *Housser,* who gave his testimony in an unexceptional manner, could go no further than appears from the following concluding and crucial portions of his evidence upon cross-examination, and to the Court:

MARTIN, J.A.

COURT OF APPEAL

1925

Feb. 4.

PAINLESS PARKER v. KOGOS

"How far do you disagree with Kogos, I did not quite gather from your evidence, when he said he was insisting on payment of the $6,000 instalment? As I say I have no recollection, Mr. *Mayers*, of $6,000 ever having been mentioned by Mr. Kogos in my presence, I am perfectly honest in that. I cannot remember any such thing having been mentioned. I heard Mr. Black's evidence and I know Mr. Kogos's evidence and I can't remember any such thing ever having been said.

"THE COURT: But you do not say it certainly was not? All I can say is I have no recollection of any such amount being mentioned. I certainly would not want to contradict them."

MARTIN, J.A.

In such circumstances judgment, in my opinion, can only be given for the defendant in favour of rectification, and I merely add that this case is much stronger than *Booth* v. *Callow* (1913), 18 B.C. 499, and *Frey* v. *Floyd* (1922), 30 B.C. 488, wherein this Court made decrees to that effect.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with my brother MARTIN, and would dismiss the appeal. To further indicate what was the intention of the parties, I might refer to the cross-examination of Mr. *Housser*:

"Mr. *Mayers*: You agree with me that Kogos's anxiety on the 8th of February was to make sure he got rid of his liability to the Vowell Estate? Yes.

"And you intended, I presume, to carry that out in the agreement. Well—

"Surely you did. I certainly intended to carry out the intentions of the parties, no doubt about that.

"Then you can answer that question. You did intend in this agreement to carry out Kogos's intention as you have just described it to me? That is really a technical question.

"You can surely answer yes or no? I did not intend to saddle Dr. Parker with any interest up to the 15th of March. After that I fully intended to protect Kogos against any payments maturing under the agreement, exhibit 6.

"Did you say to Kogos, 'you sign this agreement and you will not be free to the Vowell Estate, because you have to pay a half a year's interest?' Did you say that to him? I certainly did not.

"If in fact you had had a little more time to think about it you could have worded this agreement more happily if it was intended to carry out what you say it was intended to carry out? I don't think so. I think the agreement sets out the intentions of the parties.

"You say then there is no amendment to be made. If you were to sit down now and draft this agreement knowing what you know, would you draft it the same way? I don't think I would."

It is clear from the language of the agreement (8th February, 1923, between Kogos and Painless Parker) that Parker was to

make the payments due under the Vowell agreement, that is, Parker was to step into Kogos's shoes. The language is ". . . . and the payments due thereunder the purchaser doth hereby assume."

In the light of all the facts, that Mr. *Housser* was the only solicitor acting in the matter, that Kogos was without independent legal advice, all the circumstances point to it being a case for rectification although, possibly, that is not absolutely necessary, that is, the agreement can be construed and should be construed so as to carry into effect the intention of the parties. In *Viscount Wellesley* v. *Withers* (1855), 24 L.J., Q.B. 134, Wightman, J., in delivering the judgment of the Court (Lord Campbell, C.J., was a member of the Court) said, at p. 137:

"And it was said, that as the deed did not for these reasons operate so as to release or convey any interest the admission of the one was in point of law, an admission of the three, and fixed the lord with three tenants so as to entitle him to a treble fine. We do not acquiesce in this reasoning. We have no difficulty in holding according to a well known rule of law, that the deed must be construed so as to give effect to the intention of the parties expressed in the deed and according to the actual interest that they had."

Here clearly Parker was to take over and make payments of all moneys due and payable under the Vowell agreement as before the execution of the agreement the now contentious amount was known and spoken of and Mr. *Housser's* evidence in no way displaces this, but as I read it must be held to concede the point; in any case he would not contradict the other positive sworn evidence upon the point, and according to the rules of evidence the positive evidence will be accepted.

It is evident upon the facts of the present case that if the language of the agreement is such that the defendant cannot insist upon the payment of the $6,000, a construction the learned judge did not agree with, and with the view of the learned judge I wholly agree, even then the facts are, in my opinion, conclusive that the defendant was induced at the time of the execution of the agreement to execute fully believing that the $6,000 would be paid by the plaintiff. In *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108 at pp. 121-2, Lord Watson said:

"Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that, in the case of onerous contracts reduced

COURT OF APPEAL

1925

Feb. 4.

PAINLESS PARKER v. KOGOS

MCPHILLIPS, J.A.

to writing, the erroneous belief of one of the contracting parties, in regard to the nature of the obligations which he has undertaken, will not be sufficient to give him the right, unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract."

Here unquestionably there were the representations, and further, the language of the agreement rightly construed and as construed by the learned trial judge imposes liability upon the plaintiff.

Upon the whole case, as we have it here, the construction put upon the agreement by the learned trial judge does no violence to its terms and it is a construction in accordance with the intention of the the parties thereto and that being the case the Court is rightly entitled to give effect to the intention.

The appeal, in my opinion, should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal by the plaintiff from the judgment of GREGORY, J.

The defendant was the owner of an equity under an agreement of purchase from the Vowell Estate, dated the 20th of July, 1922, covering the land and premises mentioned in the pleadings which he obtained for $85,000 with interest at 7 per cent., payable in five instalments of $6,000 each, one on the date of execution and yearly thereafter; $25,000 in July, 1927, and the balance in July, 1928. These instalments were adjusted to include interest as well as principal. On the 8th of February, 1923, after making one payment, the defendant, as vendor, agreed to sell said lands and premises to the plaintiff for the sum of $123,000 (subject to later observations), the latter to assume all the moneys due and owing to the Vowell Estate. The material parts of this latter agreement are as follows:

"WHEREAS the vendor has agreed to sell to the purchaser and the purchaser has agreed to purchase of and from the vendor the lands and hereditaments hereinafter mentioned, that is to say: [description of property] together with all the privileges and appurtenances thereto belonging at or for the price or sum of One Hundred and Twenty-three Thousand Dollars ($123,000) of lawful money of Canada, payable in manner and on the days and times hereinafter mentioned, that is to say: the sum of Seven Thousand ($7,000) Dollars on the execution of this agreement (the receipt whereof the said Vendor doth hereby admit and acknowledge), and the balance payable as follows: $79,000, being the balance due and

owing under a certain agreement for the sale and purchase of the said lands, dated the 20th day of July, 1922, between Arthur William Jones and Arthur Philip Luxton, trustees under the will of Arthur Wellsley Vowell, Deceased, which said agreement and the payments due thereunder the purchaser doth hereby assume. $28,000 on the 15th day of March, 1923, and $1,000 on the 15th day of each of the months of April, May, June, July, August, September, October, November and December, 1923, together with interest at Seven (7%) per cent. per annum payable with the last instalment of principal. . . . .

"AND ALSO, it is hereby agreed that the purchaser may at any time within the above-mentioned period pay the balance of the purchase-money of the said lands and the interest thereon, at the rate aforesaid up to the date of such payment. . . . .

"ALL adjustments, including rents, are to be made as of the 15th day of March, 1923, provided however that the vendor shall not be required to account to the purchaser for any advance rents which he may have collected prior to the date hereof.

"UPON payment of the instalment of principal due on the 15th day of December, 1923, the vendor will cause to be registered in the Vancouver Land Registry office the said Articles of Agreement of the 20th day of July, 1922, and will perfect his title in such manner as will enable the purchaser, his heirs, executors, administrators or assigns, to register these presents and any assignment thereof."

MACDONALD, J.A.

The defendant Kogos, under his agreement to purchase from the Vowell Estate, made his first payment of $6,000 on the date of execution, leaving a balance due for principal of $79,000. The next instalment due thereunder was $6,000 due on July 20th, 1923, said sum being made up of the interest then due, the balance being principal. When, therefore, Kogos sold to the plaintiff on the 8th of February, 1923, certain interest was accruing due to the Vowell Estate which plaintiff contends should be charged against Kogos, and as all adjustments were to be made as of the 15th of March, 1923, he should be charged with the interest due to that date. The proper apportionment, therefore, of this interest, amounting approximately to $3,600, is the only question in issue. The plaintiff (appellant), paid the $6,000 due in July, 1923, to preserve title and sought to deduct the portion representing interest from a subsequent payment.

On this state of facts the plaintiff brought action for a declaration that the agreement should be specifically performed on the basis aforesaid. The defendant averred that on the true construction of the agreement of the 8th of February, 1923, this

COURT OF APPEAL

1925

Feb. 4.

PAINLESS PARKER v. KOGOS

MACDONALD, J.A.

interest charge should be assumed by the plaintiff, and further alternatively, that if necessary, said agreement should be rectified by correcting the statement of purchase price therein to conform to an alleged oral agreement made a few days before the 8th of February (thus alleging mistake), and that the agreement as rectified be enforced.

It will clear the way for a consideration of the main issue, *viz.*, the proper apportionment of the interest charge referred to under the terms of the agreement itself, if the claim for rectification, on the ground of mistake, is disposed of. It is urged, that the agreement is so framed as not to express the real intention of the parties and should be reformed. Evidence of the alleged antecedent oral agreement was, therefore, admissible in contradiction of the written instrument. Much evidence was given without, I fear, a serious effort to confine it to this one point. Evidence of mutual mistake must be clear and unmistakable. It must amount, as Lord Romilly, M.R., observed in *Bentley* v. *McKay* (1862), 31 Beav. 143 at p. 151, "to proof of a mistake common to all the parties." A different intention or mistake by one of the parties is, of course, not sufficient. If a new agreement is to be substituted for one which the parties have deliberately committed to writing evidence of the most satisfactory character must be adduced. The learned trial judge found that the evidence was insufficient to justify rectification although adding that he is "satisfied it should be," an observation difficult to understand. If the evidence, as he finds, is insufficient, then the trial judge should have been satisfied that it should not be rectified. In my view, the evidence adduced, the antecedent agreements, actions of the parties and oral statements fall so far short of establishing mutual mistake that an extended analysis of the evidence is unnecessary. There are some obvious errors in the findings of fact by the learned trial judge. He states that "the question of interest was never discussed by any of them." That is not the evidence. The defendant Kogos says he discussed it in the Holden Building, saying that the $6,000 in question included principal and interest. True, he states, in an earlier portion of his evidence, that "there was no interest mentioned at all" in conversation with Mr.

Housser, the solicitor, and Mr. Parker, who was acting for the plaintiff, but this was at another time and place. Boultbee too, plaintiff's agent, testifies that the question of interest was raised at an interview in the solicitor's office prior to the signing of the agreement. Mr. *Housser* also testifies that he had a distinct recollection of Kogos stating that he did not want to have the interest deducted from his cash payment at that time as he was buying a property on Granville Street and "needed all the cash he could get hold of." True, no mention of interest was made in the statement of adjustments on March 15th, but it was not then due and, in any event, an oversight, if made, would not determine the matter. There is evidence that Kogos claimed he was about to buy other property on Granville Street, and to be in ample funds did not want a deduction made which could, under his agreement with the Vowell Estate, stand until the due date in July. The learned trial judge finds that this statement, which has an important bearing on the case, could not have been made by Kogos, but, to my mind, he entirely misconceived the evidence. The denial by Kogos (and it is only partial) of this conversation, definitely sworn to by Mr. *Housser* and by Mr. Boultbee, together with his whole evidence on the point, should have led the trial judge to the conclusion that such a conversation did in fact take place. The reason given for doubting Mr. *Housser's* recollection of the statement, *viz.,* that he had forgotten about it until Mr. Boultbee suggested it to him, is not convincing. Forgotten incidents and conversations may at once become clear when recalled to mind by another. He says his recollection is very distinct and his evidence is not disbelieved. It is only questioned on a wrong hypothesis. Kogos said he had not bought any property on Granville Street (something which was not suggested) but to quote him,—

MACDONALD, J.A.

> "Not that I had bought the property, just simply someone up there chatting with me, wanting to know what I was going to do with my interest after making it from that building, and I simply said, there are several places selling on Granville. Granville is the ideal street to buy property, and if a person could buy at the right price, I might consider it, that is all. I was not buying anything at all."

His evidence is an unsuccessful attempt to evade a direct admission of a conversation sworn to by parties who were less interested in the issue and which would explain why the deduc-

COURT OF APPEAL

1925

Feb. 4.

PAINLESS PARKER v. KOGOS

tion of interest was deferred to a later date. The learned trial judge fortifies his findings of fact with a favourable statement as to the demeanour of the defendant. This should not prevent a misconception of the evidence from being rectified on appeal.

On March 15th, when adjustments were made and E. A. Parker, handed the plaintiff's cheque already made out for $28,000 to Kogos, a sum found to be $856.08 in excess of the amount due, the latter gave his own cheque to E. A. Parker for this amount to balance accounts and took a receipt signed "Painless Parker per E. A. Parker," which was expressed to be "in full of all adjustments." This defendant's counsel contends precludes the plaintiff from seeking a further adjustment in respect to interest payable at a later date. A receipt, however, is not in itself conclusive. It is only some evidence of the facts and, in any event, should not be read to embrace any other adjustments than those the parties were specifically dealing with at the time.

As no case for rectification has been established, we turn to the construction of the agreement of the 8th of February, 1923.

MACDONALD, J.A.

The outstanding feature of any agreement for purchase is the purchase price itself. That is expressed to be $123,000. The stipulations, as to payment of instalments which follow must naturally be read as explaining how the principal sum is made up. The purchaser was not concerned about how his money should be applied so long as he obtained title: he was concerned with the amount he should pay. If these features are kept in view, difficulties in construction will disappear. The defendant contends that, in any event, he was to receive $44,000 for himself and the accounts must be so adjusted that he will receive this sum. They might have provided for that in the agreement but they have not done so. This amount of $44,000, so frequently mentioned in the evidence of the defendant, as the main feature of the agreement, is not mentioned at all in the agreement itself. It is only suggested inferentially. True, the amount is mentioned in a loosely drawn option for four days given by Kogos on February 6th, but even there it is not stated the $44,000 is to go to him. Even if it did, or if it is open to that construction, it would not follow that he would be relieved from discharging his own obligation to pay interest accrued

in part before he resold to the plaintiff. He received a privilege, a deferred payment, and he is required to pay for it. That is why interest is charged. He obtains the privilege but wants the plaintiff to pay for a benefit which this latter never received. They provide in the main agreement that all adjustments, including rents, are to be made as of the 15th of March, 1923. Why interest, which the defendant owed, should not be included in the adjustments, is difficult to understand. The plaintiff might have paid the whole amount due on the 15th of March, or at any time after the agreement was executed and compel the defendant to give him title free from encumbrances by making all necessary payments under his agreement with the Vowell Estate. The fact is, that to compel the plaintiff to pay this interest charge would be to add it as a principal sum to the purchase price. It would not be interest at all so far as the plaintiff is concerned. The free construction of the whole agreement is that once the purchase price was decided upon, *viz.*, $123,000, to be paid in part by the assumption of the Vowell Estate agreement, the plaintiff, so far as the latter agreement is concerned, steps into defendant's shoes, subject only to a definite date being fixed to make adjustments. The defendant really contends that the plaintiff should do more and assume a charge for interest accruing due before sale, making the purchase price $126,000, instead of $123,000. There is no warrant in the agreement for such a construction. It should be specifically performed with this deduction for interest charged against the defendant. I would allow the appeal with costs here and in the Court below.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Walsh, McKim & Housser.*
Solicitors for respondent: *Congdon, Campbell & Meredith.*

COURT OF APPEAL

1925

Feb. 4.

SAINT v. C. A. WELSH LIMITED.

Undue influence—Stifling a prosecution—Illegal pressure and duress—Compelled to hand over money—Inadequate protection—Suit for refund.

SAINT v. C. A. WELSH LTD.

The plaintiff, after being in the employ of the defendant for nearly six years, came under suspicion of pilfering moneys in defendant's store from time to time. She was called into the main office of the defendant and in the presence of two members of the firm, a detective and an employer, was questioned as to taking funds and as to her bank account, and under pressure and threats was induced to give up a cheque for $1,500 on her savings account in a local bank. An action to recover this money was dismissed.

Held, on appeal, affirming the decision of MURPHY, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that as the trial judge found that for years the plaintiff had been appropriating the Company's moneys to her own use, that there was money of an unascertainable amount due from the plaintiff to defendant for which she gave a cheque for $1,500, that there was no bargain to stifle a criminal prosecution nor direct threats to prosecute in connection with said payment, and the findings were justified by the evidence the whole setting surrounding the interview going no further than to create in her mind the impression that if she did not settle she would be prosecuted which does not constitute duress and the appeal fails.

APPEAL by plaintiff from the decision of MURPHY, J. of the 11th of April, 1924, dismissing an action to recover $1,552 moneys received by the defendant from the plaintiff and for services rendered. The defendant Company had a main store in New Westminster and a branch store at Sapperton in which was a local post office. The plaintiff (a woman of 25 years of age) had been in the employ of the defendant for five and one-half years in the Sapperton store her main duty being to look after the post office but during the lunch hour she also attended to the business in the store. According to her own story in March, 1922, she found a shortage of $60 in the post office cash and in order to make this up she took small amounts from time to time from the cash register in the store but declares she never took anything for herself. The defendant Company finding that there was something wrong as to the cash in the Sapperton

Statement

store removed the plaintiff to the main store in New Westminster in March, 1923. Shortly after the removal she was called into the office and in the presence of two members of the defendant Company, a detective and an employer, was accused of taking funds while in the Sapperton store. She was examined as to what bank account she had and was induced to give the defendant Company a cheque drawn on her savings bank account for $1,500. She now seeks to recover the $1,500, $20 paid the defendant in cash, and $32 for services performed. The action was dismissed.

Statement

The appeal was argued at Vancouver on the 12th to the 18th of November, 1924, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers (*van Roggen,* with him), for appellant: The plaintiff worked in the Sapperton store for five and one-half years getting $8 per week when she started and $16.50 per week when she was discharged. She was threatened by these men in the main office and frightened when she gave the $1,500 cheque. On the question of pressure see *Williams* v. *Bayley* (1866), L.R. 1 H.L. 200 at p. 215; *Ward* v. *Lloyd* (1843), 6 Man. & G. 785; *Flower* v. *Sadler* (1882), 10 Q.B.D. 572; *Ex parte Caldecott; Re Mapleback* (1876), 35 L.T. 172; *Ex parte Butt; Re Mapleback, ib.* 503; *Jones* v. *Merionethshire Building Society* (1891), 60 L.J., Ch. 564; 61 L.J., Ch. 138; *Osbaldiston* v. *Simpson* (1843), 13 Sim. 513; *Evans* v. *Llewellin* (1787), 1 Cox 333; *O'Rorke* v. *Bolingbroke* (1877), 2 App. Cas. 814 at p. 823. We were under pressure without adequate protection: see *Fry* v. *Lane* (1888), 40 Ch. D. 312 at p. 321. The material issue is what happened at the interview: see *Atkinson* v. *Denby* (1861), 6 H. & N. 778 and on appeal (1862), 7 H. & N. 934; *Smith* v. *Cuff* (1817), 6 M. & S. 160 at p. 165.

Argument

Griffin, for respondent: It is not sufficient to render the transaction illegal to shew the creditor was induced to abstain from prosecuting: see *Bow* v. *Pfeiffer and Gilbert* (1924), 1 W.W.R. 332 and on appeal (1924), 2 W.W.R. 1149; *Flower* v. *Sadler* (1882), 9 Q.B.D. 83 and on appeal 10 Q.B.D. 572;

COURT OF APPEAL

1925

Feb. 4.

SAINT v. C. A. WELSH LTD.

Jones v. *Merionethshire Building Society* (1891), 60 L.J., Ch. 564; 61 L.J., Ch. 138; *Major* v. *McCraney* (1898), 29 S.C.R. 182; *Graves* v. *Harris* (1914), 7 W.W.R. 68; *Johnson* v. *Musselman* (1917), 2 W.W.R. 444 at p. 448; *McClatchie* v. *Haslam* (1891), 65 L.T. 691; Falconbridge on Banking and Bills of Exchange, 3rd Ed., p. 854; *In re Mapleback. Ex parte Caldecott* (1876), 4 Ch. D. 150; *Barnes* v. *Richards* (1902), 71 L.J., K.B. 341; *Piper* v. *Harris Manufacturing Co.* (1888), 15 A.R. 642; *Anjademmessa* v. *Rahim* (1915), I.L.R. 42 Calc. 286. All the finding we have is a finding of threat.

Argument

Mayers, in reply, referred to *Cumming* v. *Ince* (1847), 11 Q.B. 112; *Scott* v. *Sebright* (1886), 12 P.D. 21; *The Duke de Cadaval* v. *Collins* (1836), 4 A. & E. 858 at p. 867.

Cur. adv. vult.

4th February, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree with Mr. Justice GALLIHER.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, I think, be allowed on the defendant's evidence alone. Assuming that the learned judge below is right in holding "with some hesitation, that there was no direct or indirect bargain to stifle a criminal prosecution," yet he does

> " hold further that [she] plaintiff, made this payment [in question] because she feared if she did not do so she would be prosecuted criminally. I do not accept her testimony of any direct threat or of the presence of a blue paper on the desk but the whole setting of the interview of March 9th, 1923, coupled with what was said by the Welshs, Eagles and the detective led her to this belief although I think her a person not easily frightened despite her sex and comparative youth."

I am prepared, after a very careful consideration of the evidence, to hold that the plaintiff signed and gave the cheque in question under duress when she was overawed at the said interview to such an extent as to be no longer a free agent, and hence the defendant wrongfully acquired a large amount of the plaintiff's money to which on its own shewing it had no claim that could be established: to support such an exceptional transaction the strongest and clearest proof would be required. Though the plaintiff was culpable to a certain degree, yet the very lax long continued business methods of those in immediate

authority over her almost invited her to such a course, and I have no doubt that the defendant by the transaction in question has taken much greater advantage of the plaintiff than she did of it originally, and in such circumstances the transaction cannot stand, any legal consideration to support it being entirely wanting, as I view the whole matter. The defendant should, therefore, repay to the plaintiff the proceeds of the said wrongfully acquired cheque, but the plaintiff is not entitled, I think, to recover the two weeks' salary she claims. Neither party asked in the pleadings for an account to be taken to settle the state of the accounts between them, so that question does not arise here.

MARTIN, J.A.

GALLIHER, J.A.: A great deal of evidence was adduced at the trial of this action, and appears in the appeal book before us, but in view of the finding of fact by the learned trial judge, that the plaintiff had been for years, whilst in defendant's employ, taking money the property of the defendant and appropriating it to her own use, in which a majority of the Court during argument expressed its concurrence, it comes down to a consideration of the evidence surrounding the obtaining from the plaintiff of a $1,500 cheque (the amount of which the plaintiff now seeks to recover back), in order to ascertain whether such cheque was obtained by undue influence, or duress, as alleged in plaintiff's plea.

GALLIHER, J.A.

The learned judge has found that on March 9th, 1923, when the interview took place and the cheque was given, that there was money of an unascertained, and probably unascertainable amount, due from plaintiff to defendant, and that the plaintiff paid this $1,500 in satisfaction thereof. I am in agreement with that finding. I am also in agreement with his finding that there was no bargain to stifle a criminal prosecution and no direct threats to prosecute, nor presence of a blue paper on the desk as the plaintiff alleges.

It may be that the $1,500 was in excess of the amount actually due—only a small portion had been traced at that time. The plaintiff would know better than any one, and after several denials, there is evidence that she admitted to not more than

COURT OF APPEAL

1925

Feb. 4.

SAINT v. C. A. WELSH LTD.

GALLIHER, J.A.

$800. At the trial it was proved that something like half this amount had been taken, and the difficulty in proving just what had been taken arose from the fact that the check slips in the cash register had been destroyed, and in some cases the amounts paid had not been rung up. All these acts were the acts of the plaintiff, and the uncertainty as to the amount was created by her own unlawful acts. Although she denied taking as much as $1,500, this amount was fixed by Charles A. Welsh, the cheque made out and presented to her for signature, and she signed it. Welsh says, he fixed this amount based partially on the fact that they had gone behind some $1,400 in the last year at the Sapperton store, where the plaintiff was employed, and had gone behind some $3,000 at that store during the plaintiff's employment. This is not very satisfactory, but be that as it may, the sum of $1,500 was fixed and paid.

I have read all the evidence touching this point, and at the most, I think it can only be said that the whole setting surrounding the interview (as the learned judge puts it) created in her mind the impression that if she did not settle, she would be prosecuted. On these findings of fact is she entitled to recover?

I have carefully read the cases cited to us, and as I am of the opinion that the learned judge has properly interpreted the effect of these cases, I accept such and agree that what happened here does not constitute duress.

I would dismiss the appeal.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: The appeal is from the judgment of Mr. Justice MURPHY dismissing an action brought by the appellant to recover the sum of $1,500 obtained by the respondent by duress and undue influence. The facts of the case are very voluminous indeed, the appeal book extending to 665 pages. The facts demonstrate that the appellant, a young woman, entered the employ of the respondent in the year 1917, and was continued in that employment with the respondent until the 9th of March, 1923. The duties of the appellant consisted of attending to the branch post office of the respondent's Sapperton branch store and as sales clerk, and was in charge of the daily cash in the post office and store, but officers of the respondent and

employees had access to the cash and at various times intermeddled with the cash, and the young woman at the outset was introduced to a very loose system of carrying on business, especially with the cash. Notably it was common practice, with the knowledge and assent of the officers of the respondent and indulged in by them, to take moneys from the post office, moneys of the Government of Canada, for the purpose of change in the carrying on of the store, and then to later replace the same, always leading to difficulties in balancing cash and bringing about discrepancies in the cash. In the end this culminated in November, 1922, in a shortage of $60 in the cash of the post office, not arising from any abstraction of cash on the part of the appellant, but fearing she would be charged with it she proceeded to cover this by manipulating the cash register in the store, believing that she was entitled to do this as the store really owed the post office. In truth, there was such laxity all around and negligent system of bookkeeping and audit that it was a very trying position in which this young woman was placed. However, there came a time when directors and officers of the respondent arrived at the conclusion that there were deficits in the cash and apparently became suspicious of the appellant; this resulted in the engaging of a private detective to observe things, all culminating in a very tragic occurrence. Then it was that the whole transaction in this action attacked was staged and most cruelly carried out, duress and intimidation of the most glaring character was exercised against this young woman, the appellant. The occurrence took place on the evening of the 9th of March, 1922, at the respondent's main store in the City of New Westminster after closing time. There were four men present, directors and officers of the respondent inclusive of the private detective, and during the course of an hour and a half this young woman was grilled, badgered, brow-beaten and threatened, and statements were made that unless she disgorged and paid every cent she had certain papers, alluded to as legal papers which would place her in gaol, would be made out. In the end finding out all the money she had to her credit in the Royal Bank, a cheque was filled up, in typewriting, for the amount, *viz.*, $1,500, payable to the respondent and placed

MCPHILLIPS, J.A.

COURT OF APPEAL

1925

Feb. 4.

SAINT v. C. A. WELSH LTD.

MCPHILLIPS, J.A.

before her by the private detective, and under this coercion she was compelled to sign the same, a nervous wreck by this time as the evidence shews. These facts demonstrate the most inhuman conduct upon the part of these four men closeted with this young woman, who was without any one to turn to for help or guidance and with no legal or independent advice, although it was evident the officers of the respondent were proceeding upon legal advice and the advice, at hand, of this private detective. This method of treatment of a young woman or of any one for that matter, and this detective atmosphere and the utilization of threats of the criminal law to collect moneys is certainly a line of conduct that must receive the very severest condemnation by the Court. Society, peace, order and good government cannot obtain in this or any other country if approval is given to such atrocious conduct—it is nothing less than a crime against humanity. Yet we have the respondent endeavouring to justify all that has been done and the right to retain the moneys so unjustly exploited and taken from the appellant. I could still further enlarge, and justifiably, upon this pitiful tragedy where a nervous young woman was overreached. However, notwithstanding all these nefarious practices the respondent claims justification for all that was done—the hardihood is indeed extreme. I am of the opinion that there never was any criminal intent upon the part of the appellant to abstract money of the respondent from the cash, all were guilty of laxity in the handling of cash and the officers of the respondent can hardly pose as censors considering the looseness with which the business was carried on, looseness to which they introduced this young woman, the appellant, and were parties to, throughout years. Even if it was a case of discovered crime, all that took place was equally reprehensible. I might point out this: the evidence shews that Mr. Welsh, the principal personage of the respondent Company, by what he said and did, evidently did not believe that crime had been committed by this young woman. He stated that if later it was found that too much money was taken from her it would be returned to her. Further, as a good citizen, if he believed crime had been committed, his duty was to make it known to the proper

authorities, which he did not do, all pointing to the staging of this most deplorable and contemptible as well as inhuman spectacle to wring from a young woman reduced to the condition of a nervous wreck this sum of $1,500, being every cent she had to make up losses made in the business. In this connection it may be remarked that later, after a most careful audit, all that the respondent on their own shewing could claim was due to it was $400, yet the balance, *viz.*, $1,100, is retained. A more sordid drama could not be visualized than which here took place. Is it possible that a transaction of this kind can meet with the approval of any Court, the transaction upheld and the moneys withheld from the appellant? I am satisfied that the transaction is one that cannot stand. In arriving at this conclusion, it is without the smallest hesitancy, at the same time, I view, with the greatest respect, the contrary opinion of the majority of the Court. I well know that they, no more than I, approve in principle of what was done here but believe that, according to the jurisprudence we have to carry out, the case is not one that admits of any relief. With that view, of course, I respectfully dissent. I note that the learned trial judge in holding as he did did so as he states "reluctantly," and "with some hesitation." I am clear that the learned judge erred in law, and with the greatest respect, I am of the opinion that he did not arrive at the right but the wrong conclusion in dismissing the action. To indicate the state into which the appellant was reduced, at the time the cheque was wrested from her, with the exercise of duress and undue influence of the most despicable nature, the respondents had the following writing signed by the appellant:

MCPHILLIPS, J.A.

"I hereby state that during the past year I have been taking funds belonging to C. A. Welsh Ltd. Sapperton Branch and turned same to my own use.

"I give this statement of my own free will without threat promise of reward or immunity."

It will be noticed that the writing says "I give this statement of my own free will, without threat, promise of reward or immunity." Why any such writing? Unquestionably to make the appellant believe that for all time she was prevented from telling that which was the truth. The $1,500 was ex-

COURT OF APPEAL

1925

Feb. 4.

SAINT v. C. A. WELSH LTD.

MCPHILLIPS, J.A.

torted from her under threats and the dire consequence of her refusal to part with all her money would mean public disclosure and incarceration in gaol. It is to be noted that two of the dread quartette that reduced the young woman to a nervous wreck in the ordeal append their names as witnesses to this precious and lying document, of which they were the authors, obtained to give credit to a most discreditable proceeding and one that merits the severest animadversion. This writing is most cogent evidence of the very reverse facts to those stated. Can this transaction be supported? In my opinion it cannot, and if it cannot be, the respondent must repay this money to the appellant. In this connection I would refer to *Williams* v. *Bayley* (1866), L.R. 1 H.L. 200 at pp. 215, 216. There the Lord Chancellor deals with a situation that, in my opinion, is applicable to the facts of the present case, and it is to be noted that in the *Williams* case the party signing the agreements had the advice of a solicitor. In the present case she was without legal advice or aid of any kind. There a similar defence to that set up in the present case was attempted to be made, but unsuccessfully.

The significant piece of evidence that the respondent put in and made part of its case, which, in my opinion, makes the case for the appellant, is from the discovery evidence of the appellant. It follows. The private detective is here the principal actor and makes the threats:

"Write out the papers? He had the papers there. He said he would put me in gaol. I guess he said he meant he would put me in gaol.

"Oh, you think that is what he meant? He said he would run me in, if I didn't sign the cheque.

"After he had the cheque written out on a typewriter? Yes, he had it there.

"And he then said if you didn't sign it, he would run you in? Yes, sir.

"Who was present at the time? Mr. Welsh and the detective."

The situation here was that this young woman, helpless in the hands of these four men, in the evening after business hours, with no other persons around, had coercively extracted from her a cheque of $1,500. It is useful when considering such a situation to call to mind what Mr. Justice Kay said in *Fry* v. *Lane* (1888), 40 Ch. D. 312 at p. 321:

" 'These changes of the law have in no degree whatever altered the *onus*

probandi in those cases, which, according to the language of Lord Hardwicke, raise "from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness"—a presumption of fraud. Fraud,' says Lord Selborne, 'does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.'"

(*Atkinson* v. *Denby* (1861), 6 H. & N. 778).

In *Scott* v. *Sebright* (1886), 12 P.D. 21, Sir R. Webster, A.G. (later Lord Alverstone) in his argument at p. 23, said:

"The consent must be given without fraud or duress, and the duress need not be confined to fear of bodily harm."

There the young woman was reduced to "a state of bodily and mental prostration," an analogous condition to that of the appellant here. Eagles, one of the despicable quartette who in the present case impounded the appellant and extorted the cheque from her, said that on that fateful occasion "She [the appellant] kind of wilted and sat back." I disbelieve all statements that the appellant was calm and collected; it is inconceivable that this young woman could be in any other condition than nervously over-wrought, in view of the circumstances detailed. Mr. Justice Butt in *Scott* v. *Sebright, supra,* at p. 23, said:

MCPHILLIPS, J.A.

"The Courts of law have always refused to recognize as binding contracts [here we have the appellant's cheque and the $1,500 taken from her], to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract."

Upon the point as to whether the moneys can be recovered back I would refer to what Coleridge, J. said at pp. 867-8 in *The Duke de Cadaval* v. *Collins* (1836), 4 A. & E. 858. The following is an excerpt from the judgment (pp. 867-8):

"I rely on the position which is laid down in 1 Selwyn's Nisi Prius, 89, Assumpsit II. 8th Ed. 1831, 'If an undue advantage be taken of a person's situation, and money obtained from him by compulsion, such money may be recovered in an action for money had and received.' For this *Astley and Reynolds* [(1731)], 2 Str. 915, is cited, in which the circumstances of compulsion were much less strong than in the present case. My opinion, therefore, is founded upon the particular circumstances of the case' . . . . . I should have been sorry to find that our hands were tied in such a case."

COURT OF APPEAL

1925

Feb. 4.

SAINT v. C. A. WELSH LTD.

In *Boyse* v. *Rossborough* (1857), 6 H.L. Cas. 2, the Lord Chancellor in considering the question of undue influence made use of this language at p. 48:

"In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud."

Both coercion and fraud were present in this case. I will not further elaborate the facts in demonstrating this, save to say the young woman when nervously prostrated "wilted" consequent upon the savagery of the staging, four men (one a private detective) closeted with her, in the evening, after business hours in the silent store, the arch villain of the piece, the detective, then and there threatens her with gaol, finds out her last cent in the bank, typewrites the cheque and presents it to her for signature. One might almost say, at the point of the pistol, she signs it. Previous to this the appellant tells of having spoken to Mr. Howard Welsh. Her evidence is:

MCPHILLIPS, J.A.

"Mr. Howard Welsh asked me if I had taken—how much I had taken out of there? And he said 'Did you take six hundred?' and I said 'No, nor one'; and then they stood talking, Mr. Welsh and the detective were talking, and Mr. Howard—Mr. Charles Welsh asked Mr. Howard how much he should write it out for? and he said 'Take it all and go to her father for more.' And I said—I told him he could not do that, and then he told me if I did not sign or didn't do what they wanted, they would write up these papers, and that would mean going to gaol. And then the detective went out and wrote the cheque on the typewriter for fifteen hundred dollars and he brought it in and I signed it."

With a case with the features the present case has, I have no hesitation in saying that the transaction carried out in the way it was cannot stand. It is eminently a case where the Court will relegate the parties to their original position. The cheque for $1,500 was acquired by threats, coercion and fraud, under circumstances so direful in their setting that even banditry would seem kindly, at least history tells of incidents of gentlemanly conduct when people were relieved of their money. At the time the respondent obtained this cheque for $1,500, $29 was the total sum owing by the appellant so far as the researches then shewed, but $1,500, all she had, was exacted; then after an elaborate audit all the respondents can establish

is $400, yet the whole $1,500 is withheld from this young woman. The unconscionableness of all this truly beggars description. A Court of Equity must declare against the validity of this whole transaction. The appellant is entitled to recover the money so wrongfully abstracted from her, and to the extent that it may later be proved she is indebted to the respondent there will be the right of recovery by the respondent. That the appellant is indebted to the respondent in any sum cannot stand in the way of giving the appellant the relief claimed. Coercion, duress and fraud are amply proved. I would allow the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: Unfortunately for the plaintiff the findings of fact by the learned trial judge were justified by the evidence, and this must be borne in mind in deciding whether or not she was a free agent in making payment of the $1,500 in question under the circumstances disclosed in the evidence. I do not think the payment was the result of intimidation or of a veiled threat to take criminal proceedings. There was not, therefore, that duress which would prevent full bargaining power on the part of the plaintiff. I must add, however, that I disapprove of the methods pursued by the defendant.

I would dismiss the appeal.

MACDONALD, J.A.

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

Solicitors for appellant: *van Roggen & Wallace.*
Solicitors for respondent: *Martin & Sullivan.*

COURT OF APPEAL

1925

Feb. 4.

SPORLE v. GREAT NORTHERN RAILWAY COMPANY.

SPORLE v. GREAT NORTHERN RY. CO.

Railway company—Carriage of goods—From United States into Canada—Polo ponies—Injured in Canada in transit—Condition limiting liability for loss—Classification—Can. Stats. 1919, Cap. 68, Sec. 322(4).

The plaintiff shipped four valuable polo ponies from New Westminster to Portland, State of Oregon, and after being used there for exhibition purposes were shipped back to New Westminster. On reaching New Westminster junction the car in which the ponies were shipped was placed temporarily on a side track and while there was run into by a Canadian Northern train in a fog. The polo ponies were very severely injured. The shipment was under a uniform live stock contract (prescribed by the Interstate Commerce Commission) by which the ponies were to be carried by the Railway and connecting lines to place of delivery. One of the conditions endorsed on the back of the contract was that when a lower value than the actual value is represented in writing by the shipper as the released value of the stock as determined by the classification or tariffs upon which the rate is based such lower value plus freight charges shall be the maximum amount to be recovered in case of loss and the shipper declared over his signature that the shipment covered by the bill of lading was ordinary live stock and under the consolidated freight classification the standard or basic value of each pony is $150. The plaintiff succeeded in an action to recover the total loss sustained.

Held, on appeal, reversing the decision of MACDONALD, J., that section 322(4) of The Railway Act, 1919, authorizes the contract of carriage and as there was nothing to shew that the Board of Railway Commissioners had made any regulation, order or direction to the contrary, the parties were competent to make the contract and the plaintiff could only recover $150 per pony.

Per MCPHILLIPS, J.A.: With the respondent's declaration that the value of the ponies was $150 per head, he induced the Company to accept them for shipment. It is impossible that he should now be allowed more than the full value so declared. See *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1918), 26 B.C. 397 at p. 413; (1919), 89 L.J., P.C. 17 at p. 21.

APPEAL by defendant Company from the decision of MACDONALD, J. of the 25th of June, 1924, in an action for damages for injuries sustained by four polo ponies belonging to plaintiff through the Company's alleged negligence. The plaintiff who lived in New Westminster had sent his four polo ponies to Portland, Oregon, for exhibition purposes. The ponies were

Statement

shipped back from Portland on the 12th of November, 1923, under a contract with the defendant Company. On the 15th of November when the car containing the ponies had arrived at New Westminster Junction the car was left on a side track and owing to a fog a car of the Canadian Northern ran into it and the ponies were badly injured and bruised. The defendant alleges that under its contract it was to carry the ponies subject to the classification and tariffs in effect at the time of the accident and that the classification or tariff in effect at the time provided that the value of the ponies was $150 per head. It admitted liability in said sum and paid into Court $600, to cover the loss sustained. The plaintiff recovered judgment for $3,000.

Statement

The appeal was argued at Vancouver on the 21st and 24th of November, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

A. H. MacNeill, K.C., for appellant: The contract did not shew they were fancy ponies. On the question of classification see MacMurchy & Denison's Railway Law of Canada, 3rd Ed., pp. 577 to 580. There is ample evidence of approval of the classification which is prescribed by the Interstate Commerce Commission and is substantially the same as that approved by the Railway Board of Canada. There is the contract and if there is any qualification they must say so. Section 322(4) of the Railway Act is discussed in *British American Oil Co.* v. *Grand Trunk Ry. Co.* (1909), 9 C.R.C. 178; *Graham Co.* v. *Canadian Freight Association* (1916), 22 C.R.C. 355; *Canadian Pacific Railway* v. *Canadian Oil Companies, Limited* (1914), A.C. 1022 at pp. 1032-3; *Grand Trunk Ry. Co.* v. *British American Oil Co.* (1910), 43 S.C.R. 311 at p. 325; *British American Oil Co.* v. *Canadian Pacific Ry. Co.* (1911), 12 C.R.C. 327; *Grand Trunk and Canadian Pacific Ry. Cos.* v. *Canadian and British American Oil Cos.* (1912), 14 C.R.C. 201; *Canadian Pacific Ry. Co.* v. *Canadian Oil Cos., Ltd.* (1912), 47 S.C.R. 155; *Macdonald* v. *Grand Trunk R.W. Co.* (1900), 31 Ont. 663; *Sutherland* v. *Grand Trunk R.W. Co.* (1908), 8 C.R.C. 389; (1909), 18 O.L.R. 139. We say, first, the United States classification is applicable and the

Argument

COURT OF APPEAL

1925

Feb. 4.

SPORLE v. GREAT NORTHERN RY. CO.

maximum amount payable is $150 per pony; and, secondly, this class of contract has been approved by the Canadian Railway Board. There is no evidence of negligence by the defendant Company, any negligence that there was was that of the Canadian Northern Ry. Co.

Mayers, for respondent: The Railway Act governs this contract of carriage. The Company cannot contract itself out of the Act. There is no evidence that the Railway Board approved of any class of contract and if wrong in this the contract would be governed by the law of the United States, and it is neither pleaded nor proved what the law of the United States is. Next the classification as to tolls and freight rates has nothing to do with limiting the liability of the Company. The defendant is bound by its pleadings: see *White* v. *Sandon* (1904), 10 B.C. 361 at p. 365; (1904), 35 S.C.R. 309 at p. 317. Although this is an American company and carries the goods partly in the United States they must comply with the Act (see section 6, Cap. 68 of 1919). Sections 312 to 348 of the Railway Act apply: see *Premier Lumber Co.* v. *Grand Trunk Pacific Ry. Co.* (1922), 31 B.C. 152. The section as to proof of approval by the Railway Board has not been followed: see *Sutherland* v. *The Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139; *Sherlock* v. *The Grand Trunk Railway Co.* (1921), 62 S.C.R. 328. An expert in the foreign law is necessary: see Bullen & Leake's Precedents of Pleadings, 8th Ed., p. 670, note (*p*); Odgers on Pleading and Practice, 8th Ed., 310; *The Duke of Brunswick* v. *The King of Hanover* (1844), 6 Beav. 1 at p. 59. As to pleading foreign law see *Jacobs* v. *Credit Lyonnais* (1884), 12 Q.B.D. 589 at p. 593. As to condition on a railway ticket see *Bate* v. *Canadian Pacific R.W. Co.* (1888), 15 A.R. 388 at p. 403, and on appeal (1889), 18 S.C.R. 697. As to duty of carrier to produce the contract see *Nelson Line (Liverpool), Limited* v. *James Nelson & Sons, Limited* (1908), A.C. 16 at pp. 20-21. On the liability for loss through negligence of servants notwithstanding condition see *Price & Co.* v. *Union Lighterage Company* (1904), 1 K.B. 412 at p. 414. The right was to sue for extra freight: see *Ashbee* v. *Can. Nor. Ry. Co.* (1913), 6 Sask. L.R. 135 at p. 139.

Argument

MacNeill, in reply: The Board approved of a class such as is shewn in the American classification and of contracts of this nature. It became Canadian law by virtue of section 322(4). He referred to *Canadian Pacific Railway* v. *Canadian Oil Companies, Limited* (1914), A.C. 1022 and *Sutherland* v. *The Grand Trunk R.W. Co.* (1908), 18 O.L.R. 139.

Cur. adv. vult.

4th February, 1925.

MACDONALD, C.J.A.: I think section 322, subsection (4) of the Railway Act of Canada, 1919, authorizes the contract of carriage in question. It was not suggested that there was any regulation, order or direction of the Board of Railway Commissioners to the contrary, therefore I think the parties were competent to make the said agreement. The amount due thereunder has been paid into Court, and I think the plaintiff should have judgment for that amount, together with the costs, if any, incurred by him up to the time of payment in. The defendants should have the costs of the action from the date of such payment, and also of this appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: While I entertain not a little doubt concerning the main questions raised on this appeal, I do not feel justified in dissenting from the view of it that my brothers have taken.

MARTIN, J.A.

MCPHILLIPS, J.A.: This appeal calls for the consideration of the freight classification governing in reference to a shipment of polo ponies from the City of Portland, Oregon, to the City of New Westminster, B.C. It would appear that an exhibition was taking place in Portland and the polo ponies were for exhibit thereat. They were shipped from New Westminster, B.C., to Portland, and the tariff rate therefor was paid. It was agreed, however, that the return carriage of the polo ponies would be free.

MCPHILLIPS, J.A.

It is provided by the United States Railway Administration Freight Tariff No. 145, issued May 1st, 1919, effective May 15th, 1919, that in respect to exhibits for exhibitions, *i.e.,* live stock should only be handled at less than full tariff rates when the carrier's liability was limited, *viz.,* each pony $150, and the ponies were so valued, and it was agreed that they would be

COURT OF APPEAL

1925

Feb. 4.

SPORLE v. GREAT NORTHERN RY. CO.

carried free of any charge for the return trip from Portland, Oregon, to New Westminster.

The appellant (the Railway Company) also in its defence relies upon the Canadian Freight Association (Western Lines) Tariff No. 117, issued March 29th, 1923, effective April 5th, 1923, which provides that when exhibitors accept free transportation for the return of exhibits, that such shipment will be at the risk of the owners, as to loss and damage.

The polo ponies were seriously injured, not killed, without negligence, the appellant claims, on its part by a collision with a train of another railway company, when the car was stationary with all proper signals showing. The appellant, however, has paid into Court the sum of $600, being $150 for each polo pony injured in the collision and admits liability in the sum of $150 per head for each of the polo ponies injured, and says that the sum in the whole, *viz.*, $600, is enough to satisfy the claim of the respondent.

MCPHILLIPS, J.A.

The learned trial judge found for the respondent (the plaintiff), and assessed the damages sustained for the injuries to the polo ponies at $3,000. From this judgment the appeal is taken.

It would appear that the attention of the learned judge was not called to what would appear to be the governing legislation on the facts of this case, and that is section 322 of The Railway Act, 1919 (Canada), which reads as follows:

"322. (1) The tariffs of tolls for freight traffic shall be subject to and governed by that classification which the Board may prescribe or authorize, and the Board shall endeavour to have such classification uniform throughout Canada, as far as may be, having due regard to all proper interests.

"(2) The Board may make any special regulations, terms and conditions or order or direction in connection with such classification, and as to the carriage of any particular commodity or commodities mentioned therein, as to it may seem expedient.

"(3) The company may, from time to time, with the approval of the Board, and shall, when so directed by the Board, place any goods specified by the Board in any stated class, or remove them from any one class to any other, higher or lower, class: Provided that no goods shall be removed from a lower to a higher class until such notice as the Board determines has been given in the *Canada Gazette*.

"(4) Any freight classification and exception thereto in use in the United States may, subject to any regulation, order or direction of the

Board, be used by the company with respect to traffic to and from the United States."

It is to be observed that subsection (4) provides that any freight classification and exception thereto in use in the United States, may be used by railway companies with respect to traffic to and from the United States. The shipment in question here was from Portland, Oregon, in the United States, to New Westminster, in British Columbia. It is clear that the shipment comes within section 322(4). It is a statutory recognition and assent to international traffic, and any freight classification in the United States in use may be the governing freight classification subject only to the Railway Board's order, direction or regulation. It follows that freight passing to and from Canada to the United States is subject to the classification in use in the United States. This must be so in view of this legislation, when, as here, we have the shipment made in the United States to a point in Canada. In *Graham Co.* v. *Canadian Freight Association* (1916), 22 C.R.C. 355, Mr. Commissioner McLean, at p. 356, said:

"Under s. 321 (4) of the Railway Act, it is provided that any freight classification in use in the United States may, subject to any order or direction of the Board, be used by the company with respect to traffic to and from the United States. It was pointed out in *British American Oil Co.* v. *Grand Trunk Ry. Co.* (1909), 9 C.R.C. 178 at p. 184, that no order of the Board had up to that date been issued respecting the Official Classification by the issuance of any order or direction under sub-s. 4. One point involved in the decision in question was the validity of an 'exception' to the Official Classification where such 'exception' had not been approved by the Board; and an adverse ruling was given. The Board has in the case of the movement of silver ore from a point in Canada to a point in the United States approved of an 'exception' to the Official Classification—Order No. 7720 of July 28, 1909. But the Board has not otherwise amended the Official Classification by exercising over it such power as it has in the case of the Canadian Classification.

"While the use of the Official Classification, as has been indicated, is permitted with respect to traffic to and from the Untied States, what the applicants are interested in is a movement from Canadian points to Canadian ports."

MCPHILLIPS, J.A.

Here the case is one of a shipment from a United States point to a Canadian point. There were two shipping contracts in the present case, one from New Westminster to Portland and one from Portland to New Westminster, the contract headed

COURT OF APPEAL

1925

Feb. 4.

SPORLE v. GREAT NORTHERN RY. CO.

"Uniform Live Stock Contract (Prescribed by the Interstate Commerce Commission)," and section 2 (b) under the heading "Contract Terms and Conditions" we find this provision:

"(b) In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the live stock as determined by the classification or tariffs upon which the rate is based, such lower value, plus freight charges, if paid, shall be the maximum amount to be recovered whether or not such loss or damage occurs from negligence."

The Consolidated Freight Classification No. 3, issued October 2nd, 1922, effective November 15th, 1922, appears in the evidence, and may be found in the appeal book. The shipment here was as "ordinary live stock." Turning to the shipping contract we have the respondent, the shipper, under his own signature, declaring as follows:

"I declare the shipment covered by this bill of lading to be ordinary live stock."

And it will be found in the Consolidated Freight Classification that the standard or basic value of "each horse or pony (gelding, mare or stallion), burro, donkey, mule, jack or jenny, is stated to be $150."

MCPHILLIPS, J.A.

It was not necessary to shew that the Railway Board of Canada had approved the "freight classification and any exception in use in the United States," and it is evident the Railway Board is fully conversant with it and has recognized its application (*Graham* v. *Canadian Freight Association, supra*).

That the United States freight classification was sufficiently proved upon the facts adduced at the trial cannot be open to question, and the course of the trial fully supports this view. There never is need to plead fundamental law, it must be that the Railway Act of Canada can at all times be referred to and relied upon, quite independent of pleadings, when it is the Act which governs in determining the rights of the parties to the action.

It was strongly pressed at this Bar that the plaintiff's action was one at common law and the action was one for negligence, and that negligence was found, and no limitation of liability was made out. It cannot be said that negligence was found against the appellant, but it was found that it was liable for the Canadian Northern Railway Company's negligence, and it

cannot be said that the shipping contract does not refer to or cover liability and the limitation thereof in the case of negligence, the United States freight classification clearly covers this point. It is plain that where the live-stock is not declared to be "Ordinary Live Stock" then it is provided that "he [the shipper] must declare the kind and value of each animal, space for such declaration being provided below." These words appear in the shipping contract in question, the Uniform Live Stock Contract. Now in this contract, being the return contract, which was free transit, no valuation of the ponies was made, but it was declared, as previously stated over the signature, as follows:

"I declare the shipment covered by this bill of lading to be ordinary live stock."

In the shipping contract, when the ponies were shipped from New Westminster to Portland, the following appears having relation to the same ponies which were shipped upon the return journey from Portland to New Westminster:

"Number and description of animals—5 head of horses. Shipper's declared value (if on live stock chiefly valuable for breeding, racing, show purposes, or other special uses) $150 per head."

In view of this it is difficult to see how in this action it would be possible for the respondent to recover more than the $150 per head; however, I will later deal with this point. There are some authorities that it would seem to me are in point in considering the question to be determined, and I purpose to refer to a few of them. In *British American Oil Co.* v. *Grand Trunk Ry. Co.* (1909), 9 C.R.C. 178 at p. 182, the Chief Commissioner (The Hon. J. P. Mabee) said:

"Any freight classification in use in the United States may, subject to any order or direction of the Board, be used by the company with respect to traffic to and from the United States (section 321, sub-section 4)."

In *Canadian Pacific Railway* v. *Canadian Oil Companies Limited* (1914), A.C. 1022 at p. 1033, Lord Dunedin said:

"Now in the first case it is admitted that a joint tariff was filed; and it is admitted that the companies did not, so far as the classification is concerned, make use of a classification which the Board has prescribed or authorized under s. 321, sub-s. 1, but availed themselves of the liberty given them by s. 321, sub-s. 4, to use a classification in use in the United States."

And that was what was done in the present case.

COURT OF APPEAL

1925

Feb. 4.

SPORLE v. GREAT NORTHERN RY. CO.

It is attempted to support the judgment in the present action irrespective of the United States freight classification and the limitation contained therein, although it is a classification in use in the United States and, as we have seen, may be adopted in shipments to and from the United States. In this connection *Macdonald* v. *Grand Trunk R.W. Co.* (1900), 31 Ont. 663, seems much in point. There, Meredith, C.J., at pp. 664-5, said: [The learned judge, after quoting the judgment in full, continued].

The case of *Sutherland* v. *Grand Trunk R.W. Co.* (1908), 8 C.R.C. 389 (18 O.L.R. 139) is very much in point, and I think the best and shortest way to effectually refer to the legal proposition there laid down is to quote the head-note, which succinctly sets forth the judgment of the Court, and it is to be observed that the judgment of Falconbridge, C.J. was sustained by a very strong Court, consisting of Osler, Garrow, Maclaren and Meredith, JJ.A.:

MCPHILLIPS, J.A.

"The plaintiff delivered to a railway company at Brockton, Mass., U.S., a number of valuable horses for carriage to Grimsby, Ontario, under a contract known as a live stock contract, by which the horses were to be carried on the line of that railway as far as it went and then by connecting lines to the place of delivery, the contract being expressly entered into by the contracting railway on its own behalf, as well as on behalf of the connecting lines. The contract contained a provision that on payment of a specified rate of freight, being a rate lower than that which the company was entitled to charge, liability was to be limited to an amount not exceeding $100 for each animal, or a total liability not exceeding $1,200, the plaintiff having the option of shippng at a higher rate and obtaining the company's liability as common carriers. The provision restricting liability was similar to that contained in the form of live stock contract of the defendants approved by the Railway Board under sec. 340 of the Railway Act, R.S.C. 1906, ch. 37. The horses were carried by the contracting railway as far as its line extended, and were then delivered to a connecting railway and thence to the defendants, and during the transit on the defendants' line an accident occurred through the negligence of the defendants, in which some of the animals were killed and others injured.

"*Held*, that by the terms of the contract it applied not only to the railway company with which it was made, but with the connecting railways, and that by its terms the defendants were exempted from liability beyond the amount stipulated for; and that, even if the approval of the Railway Board was essential to its validity, such approval had been obtained, for it was, in substance, the same class of contract which had been approved."

There is one point, though, that I said I would deal with later

in my judgment, and it seems to me that it is conclusive upon the respondent in this appeal, and that is this: admittedly he declared that the value of the five polo ponies was $150 per head. With that statement of value he induced the appellant to accept the ponies for shipment from New Westminster to Portland as "ordinary live stock," to be returned free. It is impossible for the respondent to be allowed more than his own valuation, and payment into Court was made of $600, the full value so declared.

It would be unthinkable that a Court should allow a greater sum and in any way approve of conduct of this nature. If the ponies were worth more it should have been so stated. Evidently that which was done was done to obtain the lower rate, but notwithstanding this valuation, it is now attempted to obtain $2,400 more. This can only mean that there was a false declaration of value if the ponies are worth more than $600. The respondent cannot be admitted to take any such stand, certainly not in a Court of Law. Such conduct must be disapproved, it is conduct which results in the lowering of commercial and business morality and should at all times receive the severest condemnation. In this connection I would refer to what I said in *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1918), 26 B.C. 397 at p. 413. There there was the attempt to recover $75,000 for the loss of the dock when for customs purposes the value was sworn to be $34,500:

MCPHILLIPS, J.A.

"Even were the action maintainable upon the ground that the breach was the failure to place the insurance, the damages could have only been, apart from the rent, the value of the dry dock now a total loss. There was no contract for a valued policy, and the value upon all the facts and surrounding circumstances, in my opinion, could not reasonably, upon the evidence as adduced at the trial be placed higher than the value sworn to by Mr. Paterson, the president of the plaintiff Company (the respondent), and that was $34,500 (see *Carreras (Limited)* v. *Cunard Steamship Company (Limited)* (1917), 34 T.L.R. 41, and note that that also was a case of 'the value shewn in the customs entries'). To that amount would be added the rent as allowed by the learned trial judge. (Fry, L.J. in *Joyner* v. *Weeks* (1891), 60 L.J., Q.B. 510 at p. 517: 'As a general rule I conceive that where a cause of action vests, the damages are to be ascertained according to the rights of the parties at the time when the cause of action vested.')."

The case just referred to went to the Privy Council, and the

COURT OF APPEAL

1925

Feb. 4.

SPORLE v. GREAT NORTHERN RY. CO.

point dealt with was referred to by Lord Buckmaster in the following terms (*Grant, Smith & Co.* v. *Seattle Construction, &c., Co.* (1919), 89 L.J., P.C. 17 at p. 21):

"This cross-appeal challenges the judgment of the Appeal Court on two grounds: the one, that the value of the dock, placed at $34,500, is insufficient; and the other, that the covenant to insure was broken, and that its breach resulted in the loss of the total $75,000. Upon the first point all the judges in the Court of Appeal are in agreement as to the value. Their judgments depend upon the fact that Mr. Paterson, on behalf of the appellants, on May 1, 1914, made, for the purpose of customs, an affidavit as to the value, stating that to the best of his knowledge and belief the value of the floating dry dock was $34,500. Attempts were made to explain that this affidavit was given for the purpose of customs, so that the value would consequently be only modestly estimated. Such arguments naturally found no favour before the Court of Appeal, and cannot prevail before their Lordships."

MCPHILLIPS, J.A.

Therefore it is impossible upon any ground for the respondent to be held to be entitled to more than $600, that is, even if it be an action for negligence unembarrassed with all questions of railway law and the limitation of liability. If negligence was established the respondent could not be entitled to more damages than the value declared, even if the ponies had been killed. There is no statement of the present value of the ponies. It is not inconceivable that they still have value; it is, of course, regrettable that they suffered injury, but their owner is not entitled for even their serious injury to five times what he valued them at.

I would allow the appeal, the respondent to have the costs in the action up to the time of the payment of the $600 into Court, and the appellant all the costs thereafter, inclusive of this appeal.

MACDONALD, J.A.

MACDONALD, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellant: *A. H. MacNeill.*
Solicitors for respondent: *Macdonald & Laird.*

COURT OF APPEAL

1925

Feb. 4.

IN RE KAMLOOPS COPPER CO. AND CITY OF KAMLOOPS

[IN BANKRUPTCY.]

IN RE KAMLOOPS COPPER COMPANY AND THE CITY OF KAMLOOPS

Practice—Bankruptcy—Claim as secured creditor—Disallowed—Right of appeal—Can. Stats. 1919, Cap. 36, Sec. 74(1).

Bankruptcy—Municipality—Electric power supplied company—Judgment for amount due—Registered prior to assignment—B.C. Stats. 1914, Cap. 81, Sec. 151; 1918, Cap. 98, Sec. 38.

A judge of the Supreme Court having dismissed an appeal of the City of Kamloops from the decision of the authorized trustee in bankruptcy of the Kamloops Copper Company disallowing the City's claim to rank as a secured creditor under The Bankruptcy Act, on objection to the jurisdiction of the Court of Appeal to hear an appeal:—

Held, per MACDONALD, C.J.A. and MACDONALD, J.A., that the objection should be sustained following *Re Andrew Motherwell of Canada Ltd.* (1924), 55 O.L.R. 294; 5 C.B.R. 107.

Per MARTIN and MCPHILLIPS, JJ.A.: That in the circumstances there is the right of appeal under section 74 of The Bankruptcy Act.

The Court being equally divided the objection was overruled.

Held, further, on the merits (*per* MARTIN, MCPHILLIPS and MACDONALD, JJ.A.), reversing the decision of MURPHY, J., that the Municipality is not affected by the provisions of section 150 of the Water Act, 1914, but is entitled to the position of a secured creditor under section 151 of the said Act and the appeal should be allowed.

APPEAL by the City of Kamloops from the decision of MURPHY, J. of the 18th of June, 1924. Under a written agreement of the 14th of April, 1913, the City of Kamloops agreed to supply electrical power to one Erick Gustaf Wallinder, the then owner of the Iron Mask and Erin groups of mineral claims at certain rates. Subsequently Wallinder had the Kamloops Copper Company incorporated, he becoming president. He then transferred the Iron Mask and Erin groups of mineral claims to the said Company. After this transfer the City continued to supply electrical power to the Company until the Company became bankrupt. Prior to that, however, and on the 3rd of March, 1924, the City recovered judgment against the Company for $17,106.42 and two days later the Company made an authorized assignment under The Bankruptcy Act. At the time of the assignment the Company owed the City

Statement

COURT OF APPEAL

1925

Feb. 4.

IN RE KAMLOOPS COPPER CO. AND CITY OF KAMLOOPS

$19,262.75. The City claimed that by virtue of The Bankruptcy Act the City was a secured creditor under the registered judgment. The authorized trustee disallowed the claim as a secured creditor. An application to the Supreme Court for a reversal of said disallowance was dismissed by MURPHY, J.

The appeal was argued at Vancouver on the 31st of October and 3rd of November, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Mayers (*Fulton, K.C.*, with him), for appellant.

Abbott (*G. W. Black*, with him), for respondent, raised the preliminary objection that there was no jurisdiction to hear the appeal. This is under The Bankruptcy Act and there is nothing to shew the claim exceeds $500 as required by section 74(2)(*c*) of The Bankruptcy Act: *see Townsend* v. *Northern Crown Bank* (1913), 10 D.L.R. 652. The amount has not been ascertained but it is the difference between the amount as secured and the amount as unsecured.

Argument

Mayers, contra: We have a secured claim and the trustee is taking away from us property in which we have a charge of $19,262. Further, this affects future rights as the result of the appeal affects all the creditors.

Judgment

Per curiam: Objection overruled with costs.

[MACDONALD, C.J.A. was not present during the argument on the merits.]

Mayers, on the merits: We come within section 151 of the Water Act which gives us the security claimed. That section should be read independently of section 150. There is a valid toll due the municipality.

Argument

Abbott: The original contract was in April, 1913, and in September, 1913, a permit was granted under the Water Act merely to enable surveys to be made. Section 151 of the Act of 1914 does not apply as it came into force over a year later. The term "power" is distinguished from "electrical energy." Once they are a licensee under the Water Act they are governed by that Act.

Mayers, in reply: There was power in a municipality to create a charge in 1902. We are literally within the words of section 151.

19th November, 1924.

COURT OF APPEAL

1925

Feb. 4.

IN RE KAMLOOPS COPPER CO. AND CITY OF KAMLOOPS

Abbott, applied to cite a further case on the question of jurisdiction. The case of *In re Motherwell of Canada* (1924), 5 C.B.R. 107 did not appear in the Reports until two days after the last hearing. This judgment should be considered by the Court before finally deciding on the question of jurisdiction: see also *Cushing Sulphite-Fibre Co.* v. *Cushing* (1906), 37 S.C.R. 427; *Marston* v. *The Minnekahda Land Co.* (1918), 25 B.C. 372; *Brown* v. *Cadwell, ib.,* p. 405; *Winteler* v. *Davidson* (1903), 34 S.C.R. 274; *Toussignant* v. *County of Nicolet* (1902), 32 S.C.R. 353; *Talbot* v. *Guilmartin* (1900), 30 S.C.R. 482.

Mayers, contra, referred to *Zimmerman* v. *Trustee of Andrew Motherwell of Canada Limited* (1922), 54 O.L.R. 342; *Re Union Fire Insurance Co.* (1886), 13 A.R. 268 at pp. 294-5; *Re Clarke and the Union Fire Insurance Co.* (1889), 16 A.R. 161; *Shoolbred* v. *Union Fire Ins. Co.* (1887), 14 S.C.R. 624; *Shoolbred* v. *Clarke* (1890), 17 S.C.R. 265; *Re J. McCarthy & Sons Co. of Prescott Limited* (1916), 38 O.L.R. 3.

Argument

Abbott, in reply.

Cur. adv. vult.

4th February, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The City of Kamloops is a judgment creditor of the said Company. Subsequently to the registration of the judgment, the Company assigned under The Bankruptcy Act, to an authorized trustee. The trustee has sold the property of the Company for $17,500. The City's judgment is for a sum in excess of $17,000, and its claim is that by virtue of its registered judgment it is a secured creditor of the Company. The trustee denies the City's right to rank as a secured creditor, whereupon it appealed to a judge, who dismissed the appeal.

The City now appeals from the order of the said judge, and the Company takes the preliminary objection that as no sum of money is involved, in the appeal, and as none of the other subsections of section 74 of The Bankruptcy Act assist the appellant, the Court has no jurisdiction to entertain the appeal.

When the objection was first taken no authorities were referred to, and the Court overruled the objection. Subsequently

COURT OF APPEAL

1925

Feb. 4.

IN RE KAMLOOPS COPPER CO. AND CITY OF KAMLOOPS

we allowed the matter to be re-opened, heard argument and reserved our decision for further consideration.

The case of *In re Motherwell of Canada* (1924), 5 C.B.R. 107, was referred to by Mr. *Abbott* on the reargument. That case seems to cover the point, and following the rule of *stare decisis,* I should, when there is doubt, dispose of the objection in accordance with that decision. I think it is in accordance with the decision of the Supreme Court of Canada in *Cushing Sulphite-Fibre Co.* v. *Cushing* (1906), 37 S.C.R. 427. The objection should be sustained and the appeal quashed.

MARTIN, J.A.: In the disposal of this appeal the principal relevant sections of the controlling Water Act, 1914, are 149-151 and 159, as amended in 1918, Cap. 98, Sec. 38, the first of them confers additional powers upon "Class C" licensees, and in the case of such licensees, who, like the appellant, are municipalities it recognizes and preserves the special powers they derive from the Municipal Act, and section 151 deals only with tolls due to municipalities. The main and publicly important conflict arises from the view taken by the learned judge below that unless the tolls were imposed under section 150 they could not become a charge upon the land or be levied or collected as ordinary rates and taxes under the provisions of section 151. With great respect, however, I am unable to take this restricted construction of the rights conferred by said sections, because, in brief, section 150 does not apply to such a licensee as the appellant in these circumstances, at least. The power to pass by-laws conferred by section 150 is only necessary in certain cases, as is clearly, *e.g.,* shewn by subsection (*d*) which deals with "the mode of collection of tolls and the inforcement thereof," though this is entirely unnecessary in the case of municipal tolls which are specially provided for by section 151 as aforesaid. This view is further confirmed by section 159 (as amended) which deals with schedules which must be submitted to the Board for approval by "any company" (*vide* section 3, defining "schedule") holding a "Class C Licence," but not by any municipality holding such a licence. By section 54 (22) of section 52 of the Municipal Act, B.C. Stats. 1914,

MARTIN, J.A.

municipalities are given power to construct and operate works of the present description furnishing public utilities and to regulate the "rates, conditions and terms under or upon which the same may be supplied and used . . . . ." subject to the approval of the Lieutenant-Governor in Council, the expression "tolls" in section 151 would obviously include such rates and charges even if said definition section 3 did not so declare.

Such being my view of the legal effect of the said sections, it is only necessary to say that I entertain no doubt that by the by-laws that were passed by the appellant and contracts entered into, and the course of conduct adopted thereunder, the "tolls" were in the legal sense "fixed" between the parties concerned under the adequate combined effect of sections 149 and 151, and hence the claim of the appellant has been established and its appeal should be allowed.

MARTIN, J.A.

McPHILLIPS, J.A.: The City of Kamloops appeals from a judgment of Mr. Justice MURPHY in Bankruptcy proceedings, whereby it was determined that the City of Kamloops, a judgment creditor of the Kamloops Copper Company, was not a secured creditor, the learned judge supporting the decision of the authorized trustee to the like effect.

The whole question would appear to depend upon whether the City of Kamloops, in the generation of hydro-electric power, could be said to be subject to section 150 of the Water Act, 1914, or whether section 151 only applies to the City, and that the tolls due to a municipality are separate and distinct to and have no relation to the tolls due to a company. I have no hesitation in coming to the conclusion that the municipality is in no way affected by the provisions and requirements as contained in section 150 and, in particular, subsections (*c*), (*d*) and (*e*), having reference to the fixing of tolls, their collection, time and place of payment. Section 151 reads as follows:

MCPHILLIPS, J.A.

"151. All tolls due to a municipality under any licence and all costs and charges in connection therewith shall be a charge on the lands upon which the water, power, or electricity is supplied or used, and may be levied and collected in the same manner as municipal rates and taxes are by law recoverable."

In the interpretation clauses of the Act, it is provided as follows:

COURT OF APPEAL

1925

Feb. 4.

IN RE KAMLOOPS COPPER CO. AND CITY OF KAMLOOPS

MCPHILLIPS, J.A.

"'Tolls' shall include fees, charges, and rentals or rates payable to any person save the Crown in respect of water or water-power held under any record, licence, or Act."

It may be said at the outset that there can be and there is no contest as to the judgment debt, the whole question being whether the City is or is not a secured creditor? Under section 151, unquestionably the City, if entitled to the statutory charge as set forth in section 151, is in the position of a secured creditor with the right to levy and collect the tolls in the same manner as municipal rates and taxes. It would appear that there was really no formal contract between the City and the Company, but it is not contested that the business relations between the City and the Company continued under the same terms as contained in the agreement between the City and one Wallinder, for the supply of hydro-electric power, the agreement bearing date the 14th of April, 1913. Two pertinent passages of the agreement that are material are, 14 and 16, reading as follows:

"14. The provisions, terms and conditions of any electrical by-law of the City of Kamloops relating to the supply of electricity now or at any time hereafter in force shall so far as the same are not inconsistent herewith be applicable to this agreement in the same manner as if they were incorporated herein and made a part of this agreement."

"16. This agreement shall continue in force after the term herein mentioned from year to year until terminated by notice in writing given by either party hereto at least six months before the end of the term or any yearly term thereafter."

Two by-laws, Nos. 20 and 160, were passed by the City relative to the lighting system and electric power supply, of date, respectively, the 6th of June, 1895, and the 12th of October, 1911. The period of time of the supply of the electric power which is represented by the judgment debt has relation to power supplied by the City to the Company between January, 1923, and March, 1924.

The amendment of section 159 of the principal Act (Cap. 81 of 1914) by section 38 of the Water Act, 1914, Amendment Act, 1918, makes it perfectly clear that sections 149 and 150 have no relation to the tolls imposed by municipalities. Section 38 reads as follows:

"38. Section 159 of said chapter 81 is hereby amended by striking out the words 'such licensee' in the first line of subsection (1) of said section, and substituting therefor the words '"Class C" licensee not being a muni-

cipality'; and by striking out the word 'company' in the second line of subsection (2) of the said section, and substituting therefor the word 'licensee.'"

That the municipalities have a distinct position in reference to the acquirement, installation and operation of electric power plants, and the collection and imposition of tolls, is well established by the Municipal Act (Cap. 52, B.C. Stats. 1914), subsection (22) of section 54 being the section providing for the power to make by-laws, reading as follows:

"(22). For purchasing, constructing, operating and maintaining works for supplying, for any and all purposes, water, water-power, electric light, electric power, and gas to the inhabitants of the municipality and of localities adjacent thereto, and for regulating the rates, conditions and terms under or upon which the same may be supplied and used: Provided, however, that no by-law passed under the provisions of this paragraph shall come into force until approved by the Lieutenant-Governor in Council."

It will be noticed that this language is used in the above subsection "for regulating the rates, conditions and terms under or upon which the same may be supplied and used." There is no difficulty whatever in reading section 151 independently of section 150; there is no necessary relation between sections 150 and 151, 151 stands quite independent of sections 149 and 150. Section 149 has relation to additional powers and these sections, made particularly in view of the amendment to section 159, have no relation to municipalities.

MCPHILLIPS, J.A.

The City passed by-laws in 1913 and 1915, being Nos. 186 and 232, which duly received the approval of the Lieutenant-Governor in Council, which support the tolls imposed by the City, and there was a certificate of approval of the hydro-electric plant, the certificate of approval reading as follows: [after setting out the certificate the learned judge continued].

Then there was a conditional water licence to the Company, No. 1474, under the hand of the comptroller of water rights, dated the 31st of January, 1916. Turning to the terms thereof, it is to be noticed that the source of the water supply is "(a) Barriere River," and it is important to read:

"(c) The date from which this licence and the right to take and use water thereunder shall take precedence is 12th December, 1912."

And

"(g) The area and description of the lands or mines upon which the

COURT OF APPEAL

1925

Feb. 4.

IN RE KAMLOOPS COPPER CO. AND CITY OF KAMLOOPS

water may be used or the power generated, and the territory within which the water or the power generated from the water may be sold, bartered, or exchanged, are shewn in the said exhibit A."

Section 46 of By-law No. 186, which preceded the certificate of approval, reads as follows:

"46. The Council may in any case require from any consumer desiring a supply of electricity or a renewal of a supply of electricity, an agreement between such consumer and the City as a condition upon which supply is to be granted, and such agreement may contain any terms and conditions not inconsistent with this by-law."

This establishes the right to make special contracts. Further, section 56 reads as follows:

"56. When the rates and rents remain unpaid for thirty days after the day upon which they shall become due and payable the Council may sue for and recover the same in any Court of competent jurisdiction, and if from any cause whatsoever such rates and rents when in arrears shall not be so recovered the same shall constitute a charge or lien upon the land or premises to which the light or power was supplied in like manner as ordinary rates or taxes."

Then as to the rates, rents and charges (tolls) section 53 reads as follows:

"53. The rates, rents and charges shall be those mentioned in Schedule A annexed to this by-law, and the same shall be due and payable at the city clerk's office, to any person authorized to receive the same, on the first day of each month for the month preceding."

MCPHILLIPS, J.A.

In the agreement between the City and Wallinder (the agreement that governed) it was provided by paragraphs 6 and 8 as follows:

"6. It is agreed between the parties that the consumer shall pay to the Corporation for the said electrical power at the rate of one and one-quarter cents (1.1/4c.) per kilowatt hour of energy supplied for the first twelve months, plus a fixed charge of Two hundred dollars ($200) per month, but in no case except as provided for in article seven shall the total charge for electrical power or amount of bill rendered at the end of each or any month during the period of the contract be less than the sum of Fourteen hundred dollars ($1,400) which sum is arrived at by multiplying 96,000 K.W.H. as a minimum quantity of power per month, by 1.1/4 cents and adding the fixed charge of $200 per month as above provided."

"8. It is also agreed between the parties that on or after September 1st, 1914, when power is available to the consumer from the Barriere River Hydro-electric Plant, the rate to the consumer will then be reduced to one cent (1c.) per K.W.H. plus the fixed charge of $200 per month, and the minimum payment to the Corporation for any calendar month will then be Eleven hundred and sixty dollars ($1,160) except as provided for in article seven (7)."

In the affidavit of the city clerk paragraph 3 reads as follows:

"3. Since the date of said agreement the said Erick Gustaf Wallinder has caused to be incorporated the above named Kamloops Copper Company of which the said Erick Gustaf Wallinder is President and has transferred the said Iron Mask and Erin groups of mineral claims to the said Kamloops Copper Company and the said City of Kamloops has continued to supply electrical power to the said Iron Mask and Erin groups of mineral claims under the said above mentioned agreement and the said Kamloops Copper Company has been paying the said City of Kamloops the tolls or rates for said electrical power specified in said agreement."

It will be seen that the supply of power to the Company by the City was upon the terms of the agreement with Wallinder, Wallinder being the principal member of the Company and president thereof, *i.e.*, the Company adopted the Wallinder agreement as its agreement with the City for the supply of the hydro-electric power.

In further relation to the contract between the City and Company I might refer to the letter of the president of the Company of October 1st, 1923, to the city clerk, which reads as follows:

"In compliance with your desire for a written statement of what we could do regarding payment for power service, we beg to state that we will pay for the power used during September, October, November and December when the bills are received for same. Commencing January 1st, 1924, we will pay for the power used during each month following, plus a minimum of $500 to be applied on the old account. We will pay the interest on the amount you have to borrow on account of our delinquency, such interest not exceeding 6% per annum. Trusting this coincides with your views of our conference and that we may hear from you as soon as possible."

With respect to the many exceptions taken as to the powers of the City, it being questioned whether there was the right in the City to supply hydro-electric power, owing to some irregularities in the proceedings to obtain that power from the Crown, I may say that I am satisfied that the City was fully clothed with the necessary powers from the Crown. Further, if there was any frailty in this, it is not open to the Company to raise any such questions—the Company agreed to take the power and the power was supplied. It could only be the Crown that could take any exception upon any of the grounds advanced. The Crown has taken none, and is not a party to these proceedings. I might, though, in this connection, refer to the permit (No.

COURT OF APPEAL

1925

Feb. 4.

IN RE KAMLOOPS COPPER CO. AND CITY OF KAMLOOPS

262) which was as early in date as 1913, the following is a copy thereof: [after setting out the permit at length the learned judge continued].

Then, later, the certificate of approval issued under date the 18th of August, 1914, and there was also the conditional water licence of the 31st of July, 1916, reading as follows: [The learned judge here set out the licence and continued].

That there was the right to take and use the water and sell the power is amply provided for in the conditional water licence of the 31st of January, 1916. Note, "Now therefore in pursuance of said Act, this conditional licence is issued granting the licensee thereunder the right to take and use water. . . . . ."

"(g) The area and description of the lands or mines upon which the water may be used or the power generated, upon the territory within which the water or the power generated from the water may be sold, bartered, or exchanged, are shewn in the said Exhibit A."

It was not necessary to complete the undertaking before making commercial use of the power generated. It is fundamental under the British Columbia water policy that water power should be at the earliest possible moment adapted to beneficial use, and all undertakings of that character are encouraged, being in their nature the advancement of the interests of the Province and adding to the revenue of the Province. The completed undertaking, as outlined, often means the lapse of years, in the *interim* of time what power can be generated may be disposed of, and this is a matter of general and public knowledge. (Also see present state of the statute law as to issuance of first licence, section 75, Water Act, R.S.B.C. 1924, indicating the right in the *interim* of time to utilize the water and put the water to beneficial use).

MCPHILLIPS, J.A.

Then we have the interpretation put upon licensee, which the City undoubtedly was, and it reads as follows:

"'Licensee' means any owner of any land, mine, or undertaking in respect of which a licence is issued under this Act or any former Act, and shall include any record-holder or other person lawfully entitled to divert water."

The City not only was lawfully entitled to divert water but was entitled to put the water to beneficial use, generate hydro-electric power and sell the same. It may be further pointed out that care was taken throughout the many changes in legis-

lation to always preserve prior rights and in no way disturb or affect the carrying out of powers at any time conferred, and the compliance with contracts made. With great respect to the learned trial judge, he went wrong in considering that section 150 had relation to the undertaking of the City, what was to be determined was the effect of section 151. The situation, as I view it, and I have no hesitation in so saying, is clear to demonstration. The City is a Class C licensee, and section 133 of the Water Act, 1914, confers additional powers, and if there was any frailty in its powers previous thereto, with which contention I do not agree, here we have ample powers entitling it to carry on its hydro-electric plant. That section reads as follows: [his Lordship quoted the section at length and continued].

It will be observed that the section in part reads, "in addition to the general powers conferred upon licensees any 'Class C' licensee having a licence for 'power purposes,' shall, subject to the terms of its licence and certificate and to the provisions of this Act, and in the case of a municipality to the Municipal Act . . . . ."—the powers are then set forth—it is plainly evident that this legislation safeguards all powers already granted, and the City undoubtedly had previously to this enactment power to carry on a hydro-electric undertaking and was duly authorized to carry on the same, and fix the tolls therefor in pursuance of the provisions of the Municipal Act, and all requisite steps were had and taken in that regard.

MCPHILLIPS, J.A.

Then it may be further pointed out in respect to the previously existing powers that the City had, *i.e.,* previous to the Water Act, 1914, "all the rights, powers, and privileges of a power company" (see section 152(*a*) of the Water Act, R.S.B.C. 1911, Cap. 239); that being the case, the City then had the powers conferred under section 150 of the said Water Act of 1911, where, *inter alia,* power was conferred "(*c*) For fixing tolls, rates, rents, and charges for . . . . . (2) Power, light, heat, and electricity."

Then in further elucidation of matters, if further elucidation be necessary, with relation to the right in the City to fix the

COURT OF APPEAL

1925

Feb. 4.

IN RE KAMLOOPS COPPER CO. AND CITY OF KAMLOOPS

tolls, I would refer to the interpretative clauses of the Water Act, 1914, defining "Schedule." It reads as follows:

"'Schedule,' in relation to any 'Class C' licence, means and shall include every by-law, resolution, or minute of any company holding such licence, and every schedule or proceeding which fixes or determines the tolls to be made, levied, or collected by such company, whether in the nature of a preliminary charge or bonus, or of an annual fee or rate, or any rental or rate based on the quantity of water or power delivered, or on the service rendered."

The City held a licence and had fixed tolls, the Municipal Act empowered the fixing of tolls, the Water Act as well, and the tolls were fixed, and there was approval of the by-laws by the Lieutenant-Governor in Council. In particular there is By-law No. 232, passed on the 29th of April, 1915, which received the approval of the Lieutenant-Governor in Council on the 8th of June, 1915, and in that by-law it was provided that

"special contracts on maximum demand for large power users on a yearly basis or for supplying power or light in any cases not provided for by this by-law, may be made from time to time by the committee."

MCPHILLIPS, J.A.

The "committee" is, of course, the responsible advising committee of the Corporation of the City of Kamloops, and the determination of the tolls, rates and charges is the act of the Corporation of the City of Kamloops, and the Corporation did decide the matter and, as previously pointed out, this by-law received the approval of the Lieutenant-Governor in Council.

It would, therefore, seem to me that there is no difficulty whatever in the way of according to the Corporation of the City of Kamloops that which the statute provides, that is, that the City is entitled to the position of a secured creditor under the provisions of section 151 of the Water Act, 1914.

The decision of the authorized trustee disallowing the claim of the City to a secured claim and the judgment of the learned judge affirming the same, in my opinion, should be reversed and it should be decided that the City is entitled to a secured claim and all the benefits conferred by section 151 of the Water Act, 1914.

I would, therefore, allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Dealing with the preliminary question of the right, if any, to entertain the appeal, it is to be noted

that the appellant's claim is that it is entitled to a charge under the Water Act, 1914, upon the lands of the debtor, and to rank against the latter's estate as a secured creditor under the Bankruptcy Act. The judgment of the Ontario Appellate Division of the High Court of Justice in *In re Motherwell of Canada* (1924), 5 C.B.R. 107, is in point.

It could be said there with as much force as in the present case, that a monetary sum was involved sufficient to give a right of appeal. The point for decision, however, was the validity of a mortgage, just as here the question is the existence or not of a charge and the right to rank as a secured creditor.

I would therefore hold that there is no right of appeal. The preliminary objection to our jurisdiction to hear the appeal having been dismissed by an equal division of the Court, I would, on the main appeal, join in allowing it.

Preliminary objection overruled, Macdonald, C.J.A. and Macdonald, J.A. dissenting, and appeal allowed.

Solicitors for appellant: *Fulton, Morley & Clark.*
Solicitors for respondent: *Black & Dunbar.*

COURT OF APPEAL

1925

March 3.

REX v. BOAK

REX v. BOAK.

Criminal law—Grand jury—All original panel not served—Order for additional men for grand and petit jury—Words "grand jury" omitted from order by mistake—Requisite number summoned—Deafness of one petit juryman—Secret test by trial judge—Evidence of deafness on appeal—Substantial wrong—Criminal Code, Secs. 1013 and 1014—B.C. Stats. 1913, Cap. 34, Secs. 17(2) and 31.

A sheriff, after selecting the requisite number of grand and petit jurors from the jury lists was unable to serve five of the grand jurors and fifteen of the petit jurors so selected. On the sheriff's report the judge for assize then made an order under section 31 of the Jury Act directing the sheriff to summon as many persons as were necessary to make up the required number but, through inadvertence, the words "grand jury" were left out of the order. No objection was taken to the order until notice of appeal was served.

Held, on appeal, *per* MARTIN and MACDONALD, JJ.A., that the body composed of the five jurors added to the jurors originally summoned does not constitute a grand jury and a conviction on an indictment found thereby should be set aside (MACDONALD, C.J.A. and GALLIHER, J.A. *contra*).

During the trial a question arose as to the deafness of one of the jurymen and counsel for accused, fearing the loss of witnesses in case of an adjournment, undertook not to raise the question of the juror's deafness in case of appeal. The trial judge would not accept the undertaking but later, without the knowledge of the accused or his counsel, made a secret test with the sheriff's assistance by which he satisfied himself that the juror was qualified.

Held, per MARTIN, GALLIHER and MCPHILLIPS, JJ.A., that such a test should be an open one made after the accused and his counsel have been advised of it and given an opportunity of participating therein, a test made secretly by the judge with the sheriff's assistance being a "miscarriage of justice" within the meaning of section 1014(*c*) of the Criminal Code.

Where it is established on appeal that a juror was so deaf that he could not hear, a "substantial wrong or injustice" is proven to have occurred and there should be a new trial. An appeal on this ground is a question of law within the meaning of section 1013 of the Criminal Code and leave to appeal is not necessary (MACDONALD, C.J.A. dissenting).

Statement

APPEAL by defendant from the decision of MURPHY, J. of the 8th of October, 1924, and the verdict of a jury, convicting the defendant of the offence of manslaughter, he being sentenced

to imprisonment in the penitentiary for four years. The grounds raised were (a) errors in the judge's charge to the jury; (b) error in the constitution of the grand jury; (c) disqualification of a petit juror by reason of deafness. The facts as to the composition of the grand jury are that on the 11th of September, previously to the trial, the sheriff drafted the panel of thirteen grand jurors for the assizes which was duly "completed" and returned to the Attorney-General and in due course the sheriff proceeded to summon the said grand jurors to attend the assizes but found he was unable to serve five of them and he had the same difficulty as regards the petit jury. He then applied under section 31 of the Jury Act to Mr. Justice MURPHY on the 16th of September for an order authorizing him to summon such further number of persons as were necessary to make up the number required to serve on the grand jury and petit jury. The order was signed by the judge but through a slip or oversight the words "grand jury" was not included in the order. The sheriff proceeded as though the order included the words "grand jury" and summoned the necessary number to complete both lists. No objection was taken to the order until notice of appeal was served. As to the third ground of appeal, during the trial it was brought to the notice of the trial judge that one of the jurors was afflicted with deafness. Counsel for the accused urged that the case should proceed and offered an undertaking that no objection would be raised as to this juror in case of appeal the excuse for his doing this being that he was afraid of losing some of his witnesses in case of delay. The undertaking was not accepted by the trial judge but he made a test as to the juror's capacity for hearing by having the sheriff call the names of the jurors over twice, once in an ordinary tone and once in a lower tone (without the knowledge of accused or his counsel) and satisfied himself that the juror was qualified to act as on each occasion the juror answered promptly to his name. There was no certificate of the trial Court under section 1013(1*b*) of the Criminal Code that it was a fit case for appeal on any ground which involves a question of fact alone or a question of mixed law and fact, but the notice of appeal contained a paragraph that an application would be made for leave to appeal on questions of fact or questions of

Statement

COURT OF APPEAL

1925

March 3.

REX v. BOAK

mixed law and fact and an application made on the appeal for leave to so appeal was refused.

The appeal was argued at Victoria on the 28th of January to the 3rd of February, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

W. J. Taylor, K.C., for appellant: There are two grounds of appeal: (1) to quash the indictment on the ground that there was no grand jury; (2) to quash the conviction on the ground that there was a deaf man on the jury. As to the first point we say there was in law no grand jury. Additional jurymen were required for both the grand jury and petit jury and an order was made by the presiding judge under section 31 of the Jury Act, but the word "grand jury" was left out of the order. Five men were added to the jury list: see *Rex* v. *Hayes* (1903), 11 B.C. 4 at p. 8; *Rex* v. *McCraw* (1906), 12 Can. C.C. 253 at p. 266. The law was the same prior to 1903 as it is now in that respect: see *Rex* v. *Marsh* (1837), 6 A. & E. 236 at p. 242; Hawkins's Pleas of the Crown, 8th Ed., Vol. 2, p. 651; *Rex* v. *Donald McDougall* (1904), 8 Can. C.C. 283; *Rex* v. *Wakefield* (1918), 1 K.B. 216; 87 L.J., K.B. 319; *Rex* v. *Crane* (1920), 3 K.B. 236; *Rex* v. *Churton* (1919), 27 B.C. 26; *Rex* v. *Battista* (1912), 21 Can. C.C. 1; *Rex* v. *Tremearne* (1826), 5 B. & C. 254; *Regina* v. *Burke* (1893), 24 Ont. 64; *Reg.* v. *Aaron Mellor* (1858), 27 L.J., M.C. 121. It constitutes a fundamental lack of jurisdiction. As to the deafness of two of the petit jury the trial judge has the right to set a juryman aside but has no right to keep him on: see *Mulcahy* v. *The Queen* (1868), L.R. 3 H.L. 306 at p. 325. In the judge's charge there was misdirection in law: see *Hodge's Case* (1838), 2 Lewin, C.C. 227. The evidence of two important witnesses was not properly before the jury. It is an important principle that the defence must be put fairly to the jury: see *Rex* v. *Warner* (1908), 1 Cr. App. R. 227; *Rex* v. *Richards* (1910), 4 Cr. App. R. 161; *Rex* v. *Rowan* (1910), 5 Cr. App. R. 279 at p. 281; *Rex* v. *Hill* (1911), 7 Cr. App. R. 26 at p. 28; *Rex* v. *Bartlett, Bradberry and Green* (1920), 14 Cr. App. R. 157 at p. 158.

Jackson, K.C., for the Crown: *Rex* v. *McCraw* (1906), 12

Can. C.C. 253 is a totally different case as here the jurors who served were on the proper list: see *Rex* v. *Marsh* (1837), 6 A. & E. 236 at p. 242; 112 E.R. 89 at p. 92; *Brisebois* v. *The Queen* (1888), 15 S.C.R. 421. This is not a question of law but a question of fact: see *Reg.* v. *Aaron Mellor* (1858), 27 L.J., M.C. 121. This objection should have been submitted at the trial; it is too late now: see Criminal Code, section 898; see also section 921. There is the common law right to summon as many grand jurymen as are required: see *Reg.* v. *McGuire* (1898), 34 N.B.R. 430. If the order had included "grand jury" the same men would have constituted the jury. The jury was accepted by the Court and it is merely a preliminary proceeding, not a trial. The trial followed and it was a fair trial. We rely on sections 1010 (*c*) and (*d*) and 1011 of the Code as an answer to this objection. As to the deaf jurymen there was no evidence of the capacity of the two men at the time of the trial. The first evidence applies to months after the trial: see *Reg.* v. *Earl* (1894), 10 Man. L.R. 303; *Veuillette* v. *The King* (1919), 48 D.L.R. 158. The case of *Rex* v. *Hayes* (1903), 11 B.C. 4 is in our favour: see pages 19 to 21; see also *Belanger* v. *The King* (1902), 12 Que. K.B. 69; *Rex* v. *Hayes* (1902), 9 B.C. 574; *Hill* v. *Yates* (1810), 12 East 229; *Sheridan's Case* (1811), 31 St. Tri. 543; *Rex* v. *Hunt* (1821), 4 B. & Ald. 430; 106 E.R. 994 at p. 995. That this objection comes too late see *Dovey* v. *Hobson* (1816), 6 Taunt. 460; *Rex* v. *Tremearne* (1826), 5 B. & C. 254; *Williams* v. *Great Western Railway Co.* (1858), 3 H. & N. 869; *Doe d. Ashburnham* v. *Michael* (1851), 16 Q.B. 620; *Reg.* v. *Allum* (1846), 2 Cox, C.C. 62. This is not a question of law: see *Reg.* v. *Aaron Mellor, supra; Whelan* v. *The Queen* (1868), 28 U.C.Q.B. 2; *Brisebois* v. *The Queen, supra.* The charge to the jury must be taken as a whole: see *Rex* v. *Fouquet* (1905), 14 Que. K.B. 87 at p. 92. On the question of the grand jury see *Reg.* v. *McGuire, supra; Reg.* v. *Kennedy* (1867), 26 U.C.Q.B. 326; *Rex* v. *Brown and Diggs* (1911), 19 Can. C.C. 237; *Rex* v. *Battista* (1912), 21 Can. C.C. 1. Objection must be taken at the time of the arraignment: see *Rex* v. *Roberts* (1923), 39 Can. C.C. 324 at

Argument

COURT OF APPEAL

1925

March 3.

REX v. BOAK

p. 325. On the question of deafness there was no substantial wrong in any case: see *Veuillette* v. *The King* (1919), 48 D.L.R. 158 at pp. 171-2; *Reg.* v. *Earl* (1894), 10 Man. L.R. 303 at p. 311. As to the judge's charge there must be substantial miscarriage: see *Rex* v. *Nicholls* (1908), 1 Cr. App. R. 167; *Rex* v. *Brann, ib.* 256; *Rex* v. *Farrington, ib.* 113; *Rex* v. *Maclean* (1923), 17 Cr. App. R. 79; *Rex* v. *Kams* (1910), 4 Cr. App. R. 8; *Rex* v. *Brownhill* (1912), 8 Cr. App. R. 118; *Rex* v. *Eberts* (1912), 7 D.L.R. 530 and 538; *Rex* v. *Lew* (1912), 17 B.C. 77; *Rex* v. *Pratley* (1910), 4 Cr. App. R. 159; *Rex* v. *Wann* (1912), 23 Cox, C.C. 183; *Rex* v. *Beecham* (1921), 3 K.B. 464 at p. 470. As to objection to

Argument

juror see *Harris* v. *Dunsmuir* (1902), 9 B.C. 303 at p. 308; *Reg.* v. *Bertrand* (1867), L.R. 1 P.C. 520.

Taylor, in reply: The cases of *Reg.* v. *Earl* (1894), 10 Man. L.R. 303 and *Rex* v. *Sutton* (1828), 8 B. & C. 417 can be distinguished. This Court is bound to examine into the validity of the indictment: see *Reg.* v. *Eduljee Byramjee* (1846), 5 Moore, P.C. 276; *Reg.* v. *Webb* (1848), 3 Cox, C.C. 183; *Rex* v. *Tremearne* (1826), 5 B. & C. 254; *Reg.* v. *Heane* (1864), 9 Cox, C.C. 433; *Reg.* v. *Burke* (1893), 24 Ont. 64; *Hoffman* v. *Crerar* (1899), 18 Pr. 473; *Veuillette* v. *The King* (1919), 48 D.L.R. 158 at p. 163. On the question of substantial wrong see *Alaska* v. *Spencer* (1904), 10 B.C. 473; *Allen* v. *The King* (1911), 44 S.C.R. 331 at pp. 361-2.

Cur. adv. vult.

3rd March, 1925.

MACDONALD, C.J.A.: There were three grounds of appeal: Errors in law in the judge's charge to the jury; error in the constitution of the grand jury; disqualification of a petit juror by reason of deafness.

MACDONALD, C.J.A.

Following the direction contained in the Criminal Code as amended in 1923, Cap. 41, Sec. 1013, I announced that the decision of the Court (the majority) was that the conviction should be set aside on the ground that one of the petit jurors was deaf; that the question was a question of law; that the motion for leave to appeal on the facts should be refused, and that the members of the Court might give separate judgments. In the

judgment so pronounced, no opinion was expressed on the first and second grounds of appeal. I expressed my dissent from the finding that the third question was one of law; I am of the opinion that it was one of fact or one of mixed law and fact, and that an appeal upon such a question could not be entertained without leave. I think the second ground should, if known, have been raised at the trial by motion to quash the indictment, but in any case it involves a question of law and fact.

The judgment of the Court is founded on the third ground alone. I shall therefore now deal with the motion made during the hearing for leave to appeal on the facts, which was denied.

I regard the question involved as one of very great importance, coming as it does so nearly at the beginning of our duties under the amendment aforesaid, which broadens very much the privilege of appeal in criminal cases. There was, before the amendment, the right to apply to the trial judge to reserve a case on a point of law but there was no appeal to the Court of Appeal on a question of fact. Questions of fact, necessary to found the reserved case, must then have been decided by the trial judge.

MACDONALD, C.J.A.

The amendment of 1923 radically changed the law. The reserved case and the statement of fact by the trial judge were entirely eliminated and an appeal was given to the Court of Appeal direct. Section 1013 of the amended Code reads as follows:

"A person convicted on indictment may appeal to the Court of Appeal against his conviction—(*a*) on any ground of appeal which involves a question of law alone; and (*b*) with leave of the Court of Appeal, or upon the certificate of the trial Court that it is a fit case for appeal, on any ground of appeal which involves a question of fact alone or a question of mixed law and fact; and (*c*) with leave of the Court of Appeal, on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal."

Subsection 3 of the same section reads as follows:

"No proceeding in error shall be taken in any criminal case, and the powers and practice now existing in the Court of Criminal Appeal for any Province, in respect of motions for the granting of new trials of persons convicted on indictments, are hereby abolished."

The powers of the Court of Appeal are set out in section 1014 of the Code. The only one to which I need refer is clause (*c*) of subsection 1, which provides that a conviction may be

COURT OF APPEAL

1925

March 3.

REX v. BOAK

set aside if "on any ground there has been a miscarriage of justice."

It will be seen from the above that redress in all cases like the present one must be sought by an appeal only.

It will be convenient here to refer to the older laws respecting appeals, in order to apply to this case, decisions in two cases, one in the Court of Crown Cases Reserved in England, the other in the Supreme Court of Canada, which I think are the only authorities I need refer to of the many cited in argument.

In England the trial judge was empowered by 11 & 12 Vict. (1848), Cap. 174, Sec. 259, to state a case for the opinion of the Court of Crown Cases Reserved, a statutory Court like our Court of Appeal. The trial judge might "reserve any question of law which shall have arisen on the trial for the consideration of the justices," etc. *Mellor's Case* (1858), Dears. & B. 468, a case very similar to the one at Bar, came before the Court of Crown Cases Reserved, in which 14 judges were present. The question involved was the legality of the jury since there was a man on it who had not been on the panel. The trial judge reserved a case on evidence which was not elicited at the trial and on that evidence stated the facts in the case reserved. There was a difference of opinion upon several matters which were argued, but on the only one with which I am concerned, there was an equal division. They divided equally on the question of the admissibility of evidence not adduced at the trial, but procured afterwards, which evidence was submitted to the trial judge to enable him to find the fact. The learned judge admitted it, found the fact and reserved a case upon it for the opinion of the Appellate Court. Not one of the judges doubted that if the evidence had been admissible that the trial judge might have found the fact and reserved the case.

MACDONALD, C.J.A.

In *Brisebois* v. *The Queen* (1888), 15 S.C.R. 421, which fell under an Act similar to 11 & 12 Vict., namely, R.S.C. 1886, Cap. 174, Sec. 259, the facts were similar to those involved here. There it appeared to the trial judge and he so found on evidence, such as we have in this case, and which was obtained after sentence, that a wrong man had sat on the convicting jury. The fact did not appear on the proceedings at the trial. Neverthe-

less, the trial judge afterwards admitted the evidence, found the facts and reserved a case for the Appellate Court of Quebec. The majority of the Supreme Court held the evidence inadmissible to found the reserved case, but none of the learned judges suggested that, if admissible, the question was not a question of fact which must first be found by the trial judge. This ground of inadmissibility was removed subsequently by the Criminal Code of Canada.

It, therefore, appears that under the former laws here and in England, when a question of fact was involved, the trial judge was charged with the duty of finding the fact and the Court of Appeal with the decision of the question of law. The trial judge was not to state the evidence in the reserved case, but was required to state the facts which he inferred from the evidence.

The evidence adduced here is to the effect that one of the jurymen was deaf. If the tribunal authorized to declare on that evidence, whether or not he actually was deaf, should find deafness, then the effect of that would be a question of law, but it was necessary to infer from the evidence one thing or the other. If he were not deaf, then there was no disqualification. If it were found as a fact that he was deaf, then a question of law arose as to the effect of that upon the trial. When, therefore, Parliament divested the trial judge of the power to find the facts, in whom did it vest that power? The fact must be found by one tribunal or another unless it were admitted, which was far from being the case here, since it was contested strenuously all along. I should have had little doubt, as to how the fact was to be ascertained, were it not for the difference of opinion in this Court on the question. My opinion is, that when the trial judge was divested of the power to find facts and to state a case thereon, Parliament by the said amendment vested the power of finding the fact in the Court of Appeal, but at the same time made it a condition precedent to the Court's entering upon the facts that it should first have given leave to appeal. Moreover, I cannot conceive how there could be two opinions about deafness being a question of fact. The Criminal Code disqualifies deaf persons from sitting upon the jury, but

MACDONALD, C.J.A.

COURT OF APPEAL

1925

March 3.

REX v. BOAK

the fact must be proven and found before disqualification can be declared.

It was submitted that "an appeal on any ground of appeal, which involves a question of fact alone, or a question of mixed law and fact," can mean only an appeal on facts which appear on the record, that is to say, facts to be inferred from the evidence given at the trial, and that since the evidence now adduced was not on the record, it falls outside of section 1013. If that submission were sound there could have been no redress for the appellant in this case. His only remedy for the wrong which he complains of is an appeal. If he cannot get the evidence in in an appeal, he cannot get it in at all. No original motion can be made to the Court to set aside the conviction. The appellant relies wholly in this appeal on the evidence obtained after trial. If it be not evidence in the appeal, he cannot get it before the Court, and if it be evidence, which clearly it is, which involves the finding of the facts deposed to in the evidence, then, this Court can only entertain it when leave has been granted. The appeal is founded on this evidence and that alone. It is the very ground of the appeal. How can the appeal then be said not to be an appeal on facts?

MACDONALD, C.J.A.

I am, therefore, of opinion that the appeal cannot be entertained in the absence of leave, and that leave ought not to be granted in the circumstances of this case for the following reasons:

During the trial a rumour was started which came to the ears of the trial judge to the effect that one of the jurors was afflicted with deafness. Counsel for the appellant urged that the trial should be proceeded with. He even went the length of offering an undertaking that no question would be raised concerning the juror in question in case of an appeal. This was practically a confession that there was no ground for the rumour, but be that as it may, the accused, through his counsel, had the opportunity of having the rumour confirmed or denied, and if confirmed of asking that the jury should be dismissed and a new jury called, but far from taking that course, he gave as one of his reasons for urging that the trial be proceeded with, that some of his witnesses were from a distance and might not

be available again. The undertaking was not accepted by the learned judge, but that does not affect the fact that the objection which counsel might then have taken against proceeding with the trial was not taken. The appellant took his chance of success with the jury as it was then constituted, and with knowledge that there was a question respecting the hearing of one of the jurors, and it was only when he failed to secure an acquittal that this rumour was revived. He now appeals on evidence of the deafness of the juror and asks leave to be allowed to put that evidence before the Court of Appeal to enable the Court of Appeal to decide the fact. In these circumstances, I do not think leave to appeal ought to be granted. No question of the jurisdiction of the trial Court arises; jurisdiction is not ousted, if at all, until the fact of deafness has been decided, and that has not been decided in this case.

It has been suggested that in a criminal case an accused person is not bound by the course which his counsel takes at the trial. Whatever may be said on this score in capital cases, and there is authority for saying that a person on trial for his life may be relieved of the consequences of his counsel's act or omission, I think there is no authority for the statement that in general the client is not bound by the course taken by his counsel, but may repudiate it when it suits his purpose to do so.

MACDONALD, C.J.A.

We were satisfied, on consultation with the learned trial judge, that the test made by him of having the sheriff call the names of the jurors twice over, once in an ordinary tone of voice, and once in a lower tone, was not known to either the appellant or his counsel, but there is no suggestion that the appellant was not made aware of the alleged deafness of the juror. Indeed, it would be strange if he were not consulted by his counsel. I cannot assume that counsel would conceal from him the fact or the course he had urged in respect of it.

MARTIN, J.A.: This is an appeal from the conviction of the appellant at the Victoria October Assizes on 8th October last, for manslaughter caused by the negligent driving of a motor-car whereby two pedestrians were killed. There are several grounds of appeal, but I deem it advisable to deal with two

MARTIN, J.A.

COURT OF APPEAL

1925

March 3.

REX v. BOAK

only which relate to alleged defects in the grand and petit jury.

As to the first, it appears from the affidavits of the sheriff and *W. A. Brethour* that the panel of the competent number of thirteen grand jurors for the approaching assizes was drafted by the sheriff under sections 17-27 of the Jury Act, Cap. 34, of 1913, on the 11th of September previous, and was duly "completed" and returned to the Attorney-General with the precept therefor as required by sections 17 (2), 20, 26 (4), (5), and 27. In due course the sheriff proceeded to summon the said 13 grand jurors to attend the assizes as required by section 30, but found that he was unable to serve five of them with the necessary "note in writing," so to surmount this serious obstacle, and a similar one as regards the petit jury, an application was made under section 31 to Mr. Justice MURPHY on the 16th of September, 1924, who made the following order:

"In the Supreme Court of British Columbia,

"Court of Oyer and Terminer and General Gaol Delivery.

"The sheriff having reported that he has been unable to summons all persons drafted to serve as Grand and Petit Jurors.

"Upon request of Mr. *M. B. Jackson* of counsel on behalf of the Crown and in pursuance of section 31 of the Jury Act.

MARTIN, J.A.

"I do order that the sheriff or other proper officers do summon such number of persons, whether qualified jurors or not as will be necessary to make up the number of persons drafted to serve on the petit jury at the present sittings of the above Court holden at the City of Victoria in the County of Victoria.

"Dated this 16th day of September, 1924.

"D. Murphy, J.
"Presiding Judge.

"M.B.J."

It is to be noted that this order is signed by the learned judge who made it as "presiding judge" purporting so to act under the statute, though in fact the assizes did not open for six days thereafter, but I pass over further consideration of this formidable objection to his jurisdiction, because the order that he did make, whatever weight it might have in such circumstances, did not confer any power upon the sheriff to summon additional grand jurors, as it is restricted to those "persons drafted to serve on the petit jury" only. The sheriff in his said affidavit deposes that the intention was "to cover and include both grand and petit jurors, but by a slip and oversight the word [*sic*] 'grand jury' was not included in the order."

The order, nevertheless, is initialled by the Crown counsel who, it recites, made that "request on behalf of the Crown" which said section 31 requires, and it would be entirely without precedent or warrant, as well as most dangerous and unfair to the accused, to permit any attempt to be made here either to add to or detract from or in any way alter such an order in these circumstances: to do so would be putting accused persons at the mercy of the memory, or worse, of the opposing counsel, and how very dangerous that would be we have had a striking illustration in this appeal which will be noted later. The said order, therefore, must be given effect to as it stands, no more, no less, the result being that it cannot be invoked to sustain the action that the sheriff, with the best of intentions, misconceivedly took thereunder and unlawfully added five more names to the panel of grand jurors and proceeded to summon them as such, and they attended the assizes in due course and found the true bill against the appellant upon which he was tried and convicted as aforesaid. In my opinion, this entirely unauthorized addition of the names of five persons to the panel, upon the sheriff's own motion, was something fundamentally illegal and contrary to the express and imperative provision of the statute (section 31), which provides the only way by which "names of persons . . . . may be added to the said list of grand or petit jurors drafted as aforesaid," except in the case of talesmen under section 33, and as no subsequent proceedings were taken to empanel talesmen under that section the matter must, on the facts before us, stand or fall, in my opinion, on the original panel. To hold otherwise, simply means that if the sheriff, without any authority whatever, has the power to alter that "completed" and "returned" panel (under sections 20, 26 (4), 27) which it is his duty to summon jurors from, and from it alone, by adding five names to it (an alteration of over 35 per cent. in its personality), there is nothing to prevent him from altering it 100 per cent. by adding thirteen names in substitution for the entire original number, and I for one am not prepared to support a power so unprecedented, so dangerous and so unfair to accused persons at the assizes in that it sweeps away their primary safeguard. I do not

MARTIN, J.A.

COURT OF APPEAL

1925

March 3.

REX v. BOAK

regard as of any consequence the fact that those persons added by the sheriff happened to be upon the jury list, and therefore liable to be drafted upon the panel under proper conditions, because nobody could be lawfully added to the panel without an order, whatever their qualifications might or might not be, and hence they could not be regarded in any legal sense whatever as grand jurors at all: in other words, to unlawfully undertake to summon persons of any description to act as jurors, without any power of summoning, is, in law, to accomplish less than nothing. This view of the case brings the matter within the principle of my decision in *Rex* v. *Hayes* (1902), 9 B.C. 574 wherein, at the Victoria Assizes in 1902, I sustained an objection taken by Mr. *Duff, K.C.* (now Mr. Justice Duff of the Supreme Court of Canada) that where the sheriff had omitted to summon one of thirteen grand jurors, that body had not acquired a legal "constitution," saying:

MARTIN, J.A.

"This is not really an objection to the constitution of the grand jury within the meaning of section 656, because there is no such body in existence till the sheriff has summoned that number, *i.e.*, thirteen, which the statute (Jurors' Act, Sec. 48; Jurors' Act Amendment Act, 1899, Sec. 2) imperatively directed him to summon and return; the twelve he did summon and who now appear form a collection of individuals unknown to the law and have no 'constitution' in a legal sense that an objection could operate on, and consequently their proceedings are absolutely void *ab initio*. The fact that in the opinion of the sheriff it was useless to summon the missing juror because he had become demented is no answer, for if it were possible to summon him, as it admittedly was, he should have been summoned; it would be a dangerous precedent to substitute the discretion of the sheriff for the positive requirement of a statute which aims at excluding all discretion. For the purpose of criminal procedure in this Province, a grand jury is 'constituted' after the thirteen have been summoned by the sheriff and a sufficient number of those (*i.e.*, seven under our Act) so summoned have appeared and taken their places in the box, ready to be duly sworn to discharge the duties of their office."

That view of the law was, in effect, subsequently ratified, as I understand our decision, by the Full Court when the same case came before us, *Rex* v. *Hayes* (No. 2) (1903), 11 B.C. 4, and the appeal which was taken to the Supreme Court of Canada was abandoned, and as over twenty-one years have gone by since then and the decision has stood unreversed, it should continue to be followed. I am aware of the decision of the Supreme Court of Canada in *Verronneau* v. *The King* (1916), 54 S.C.R. 7,

with the erroneous statement in the head-note that *Rex* v. *Hayes* was "disapproved" by three of the learned judges of that Court, *viz.,* Davies, Anglin and Brodeur, JJ. The point as regards the grand jury therein was quite distinct from that at Bar and related solely to the conduct of a properly qualified grand juror who had been duly summoned. Three out of five of their Lordships do not refer to *Rex* v. *Hayes,* and of the two dissenting judges, Mr. Justice Anglin, p. 21, does not agree with it on a point which does not arise here (*viz.,* an objection *propter affectum*), and Mr. Justice Brodeur took the same view, p. 27, their opinion being more favourable to the accused in this respect than is *Rex* v. *Hayes.*

The present case is, when clearly understood, much stronger in degree than *Rex* v. *Hayes,* being an extreme accentuation of the invalid proceedings taken therein, and so the curative sections of the Code which have been invoked have no application to a collection of individuals who do not constitute a grand jury at all in the legal sense. Since, therefore, we have our own decisions upon our own statute, I do not think it would be profitable to enter here into a lengthy consideration of the numerous cases which have been cited to us, but only note, since it was so strongly pressed upon us, that in *Rex* v. *Brown and Diggs* (1911), 45 N.S.R. 473, the power to make additions to the panel was specially conferred upon the sheriff in that Province, and the Court held that he had been merely irregular in the exercise thereof, and therefore the case does not support the Crown's position here.

MARTIN, J.A.

It follows that, for reasons aforesaid, I am of opinion the appeal should be allowed because no true bill was found by a grand jury properly so called, and so there should be a new trial.

The second, as to the petit jury: The objection here is that it included two members who were excluded therefrom by section 5(1) of the said Jury Act, which declares that

"5. Every person coming within any of the classes following shall be absolutely disqualified for service as a juror, that is to say:—

"(1.) Persons infirm, decrepit, or afflicted with blindness, deafness, or other physical infirmity incompatible with the discharge of the duties of a juror:" etc.

COURT OF APPEAL

1925

March 3.

REX v. BOAK

MARTIN, J.A.

This expression, "absolutely disqualified," could not be stronger, and is in contrast with the next section 6, which merely declares that certain "persons shall be exempt from being returned and from serving as grand or petit jurors. . . . ." The obvious intention, to my mind, is to exclude from the jury-box all such persons, because they are manifestly not in a position to do justice between the Crown and the prisoner at the Bar. During the course of the trial, it came to the attention of the learned presiding judge that one of the jurors was suspected of the prohibited infirmity of deafness, and he arranged for a test of that vital question to be carried out by the sheriff the following morning in a manner set out in the affidavit of the sheriff, dated the 26th of January last, and later reported to us by the learned judge under section 1020 (1) on the 9th of February last, supplementing his former written report on the early aspects of the appeal. But it is objected by the appellant's counsel that no intimation of this so-called test was given to him and that he was in entire ignorance of it, and that it should have been made openly and not in the way deposed to by the sheriff, which was in effect secretly and consisted merely of calling the names of the jurors in a certain way, and so was entirely inadequate and, by its being secretly done, the appellant was prevented from safeguarding his rights and securing a proper test. I am of opinion, with every respect for the course adopted by the learned trial judge, with the best intentions, that the objection should prevail, and that the only lawful test that could be made was an open one after the person most concerned, the prisoner, had been apprized of what was being done and given an opportunity to make the test a thorough one, should he feel so disposed. It is not at all uncommon for presiding judges to have to deal with questions affecting the right or propriety of jurors to continuing to sit in a case. I have referred to a number of instances in *Rex* v. *Hayes* (No. 2), *supra,* at pp. 17-18, to which may be added *Reg.* v. *Beere* (1843), 2 M. & Rob. 472, wherein, upon a juror being taken with a fit, a medical man was required by the Court to give evidence that he was unable further to attend the trial, and thereupon another juror was sworn in his place, and all the witnesses were recalled and re-sworn; and

I also add that in the course of my experience in former days upon circuit I invariably adopted the course of openly investigating all objections to jurors whenever they were brought to my attention. This departure from established practice (which I may say with every respect, is always an unsafe course to adopt even with the highest intentions, as the Privy Council pointed out in *Reg.* v. *Bertrand* (1867), L.R. 1 P.C. 520) now complained of constituted in itself a "miscarriage of justice" within the meaning of section 1014 (*c*) on that "ground" alone, but as I do not conceive that, under subsection (2), it would be our duty to order a new trial unless we are "of opinion that (a) substantial wrong or injustice has actually occurred," I agreed in the course we decided to adopt of receiving and reading the affidavits of various persons tendered upon the point, including those of medical specialists, and their cross-examination thereupon so as to insure a thorough test, with the result that I have no doubt that one of the jurors certainly, *viz.*, George Keown, and another very probably, *viz.*, George T. Worledge, were "absolutely disqualified" by said statute, because of deafness, from serving as jurors, and therefore the appellant has "actually" suffered "substantial wrong" of a grave kind and so is entitled to a new trial on that ground also.

MARTIN, J.A.

Some question arose as to whether the present objections to the grand and petit juries were not questions of "mixed law and fact" within section 1013 (*b*) and so required leave to appeal. I do not so regard them: in the way they came before us they are really primarily and purely questions of law, and so do not require leave to raise them, but if they are to be regarded as mixed law and fact, then I share the opinion of some of my brothers at least, as I understand them, that leave should be granted. As I view the matter, the Court (not the jury) is simply informing itself as to what the facts are upon which objections to the jury are based, and there must be some way of obtaining this knowledge, because all questions of even pure law must arise out of and be based upon facts. Under the old practice of a case stated, the trial judge stated the facts respecting objections to the constitution of the jury or otherwise to the Court of Appeal, as is well exemplified and fully

COURT OF APPEAL

1925

March 3.

REX v. BOAK

set out in numerous cases, *e.g., Verronneau* v. *The King, supra,* and though since the change effected by the statute of 1923 the convenient case stated has been abolished, yet we have in substitution therefor the report to us of the trial judge, under section 1020 and rule 9, which is ordinarily sufficient, and any deficiency can be supplied in the way we allowed it to be supplied here, *viz.,* by affidavits of officers of the Court and others and by statements made to us by counsel at the Bar, and of course by the records of the Court itself and the report of the official stenographer, which would include a note of such proceedings if they were had and taken openly in open Court as they ought to be.

In the very recent case of *Rex* v. *Dennis* (1924), 1 K.B. 867, the Court of Criminal Appeal in England, under a very similar statute, in considering a case where by agreement of counsel two distinct indictments were tried at the same time, received the report of the recorder that he was under the impression throughout the trial that the defendants were jointly indicted, and the conviction was set aside on the ground that the trial was a nullity because of a manifest want of jurisdiction. Why should we not be fully informed as to what happened below here so that complete justice may be done? Such information is not an appeal upon "fact alone" or "mixed law and fact" in the ordinary sense at all: those expressions in section 1013 really relate to facts laid before the jury to pass upon, and not to those special ones which are for the Court alone to consider when very unusual circumstances arise, as here.

MARTIN, J.A.

It only remains to be noted that the learned judge below in his said report to us in person, which we had the benefit of receiving, informed us that the statement made to us by counsel that he had agreed to accept the undertaking of the accused's counsel not to raise any question arising out of deafness of a juror, is directly contrary to the fact, and it is greatly to be deplored that the learned judge was misrepresented in so important a matter.

GALLIHER, J.A.

GALLIHER, J.A.: At the Court of Oyer and Terminer and General Gaol Delivery, holden at the City of Victoria, in the

Province of British Columbia, for the Fall Assizes, 1924, the appellant, Erick Wellesley Boak, was convicted before MURPHY, J. and a jury, of the crime of manslaughter, in causing the death of one David Ballantyne.

An appeal was taken to this Court, and was argued before us on the 28th, 29th and 30th of January, and on the 2nd and 3rd of February, 1925, when judgment was reserved.

Mr. *W. J. Taylor, K.C.*, for the appellant, confined his argument to three heads: (1) That the grand jury which found the bill of indictment was illegally constituted; (2) that the petit jury was illegally constituted; and (3) objections to the judge's charge to the jury.

Dealing with them in the above order:

Section 17, subsection (2), of Cap. 34, B.C. Stats. 1913 (An Act respecting Jurors and Juries), fixes the panel of grand jurors at 13, and the precept to sheriffs or other officers commands them to return not less than 13 grand jurors. What happened here was this: The sheriff, after having duly and properly selected the requisite number of grand and petit jurors from the respective jury lists, to be summoned for the said assizes, was unable to serve five of the grand jurors so to be summoned, and likewise to serve 15 of the petit jurors so to be summoned. He then reported to Mr. Justice MURPHY, who had been assigned to take the said assizes, and the following order was obtained from him: [already set out in the judgment of MARTIN, J.A.].

GALLIHER, J.A.

It will be noted that in the recital in the order, the sheriff reported as to both grand and petit jurors, but in the operative part of the order only petit jurors are referred to. Mr. *Jackson*, who acted as Crown counsel at the trial and before us, and who made the application for the order, stated that in using the printed form of order, which in the body refers only to petit jurors, he inadvertently omitted to insert the words "grand jurors," and the sheriff's affidavit filed supports this. The sheriff, without noticing the omission, and assuming to proceed under section 31 of our Jury Act, summoned five other jurors to serve, and who did serve on the grand jury who brought in the indictment. These jurors were on the grand jury list and were

COURT OF APPEAL

1925

March 3.

REX v. BOAK

duly qualified jurors. No objection was taken and no motion made to quash the indictment, and the accused pleaded, the trial was had and he was convicted. I have little doubt, in view of Mr. *Jackson's* statement, the sheriff's affidavit, and the recital in the order itself, that by inadvertence the order as signed is not the order as pronounced, but no application was made by the Crown to the judge below to rectify it, and it may be, that we can only look to the order itself. Even so, I would refuse the application on this first ground.

All the five grand jurors who were summoned were qualified to act, their being summoned without an order under section 31 was an irregularity in procedure only, and where it is merely a matter of irregularity in procedure, it is too late to move after verdict.

In *Reg.* v. *Heane* (1864), 9 Cox, C.C. 433, referred to by my brother MARTIN in *Rex* v. *Hayes* (1903), 11 B.C. 1 at p. 4, the language of Cockburn, C.J., at p. 436, is:

"As regards the objection that the motion to quash cannot be made after plea pleaded, I think if it is made to appear clearly that there was no jurisdiction, we have power to quash the indictment at any stage, and even for matter, not apparent on the face of the indictment, brought to our notice by extraneous evidence upon affidavit."

GALLIHER, J.A.

This language clearly applies to a case of want of jurisdiction.

Moreover, section 1011 of our Criminal Code enacts that no omission to observe the directions contained in any Act as respects . . . . . the drafting of panels from the jury lists, shall be a ground for impeaching any verdict or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case. This section, I think, is wide enough to cover what was done in the selection of the five grand jurors objected to. Our section 31 (Jury Act) says that "the names of the persons so summoned shall be added to the said list of grand . . . . . jurors drafted as aforesaid."

Then section 899 of the Criminal Code provides as follows:

"Any objection to the constitution of the grand jury may be taken by motion to the Court, and the indictment shall be quashed if the Court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby."

This section is dealt with in *Rex* v. *Brown and Diggs* (1911), 19 Can. C.C. 237. The Court was composed of Sir Charles Townshend, C.J., Graham, E.J., Drysdale, and Russell, JJ.

Objection was taken to the constitution of the grand jury because the sheriff omitted, in striking from the grand jury panel, on his own motion, the names of two jurors known to him to be exempt from jury duty and substituting duly qualified jurors therefor; to have before him an affidavit of exemption required by a statute of the Province of Nova Scotia. The motion was refused and the conviction affirmed. Graham, E.J., at p. 244, after quoting section 899, proceeds:

"These substituted grand jurors had the qualifications and they were properly substituted, barring this collateral matter of the want of an affidavit, which the sheriff failed to require, and the want of that affidavit did not prejudice the defendant."

In the case at Bar, the jurors were qualified, and were summoned (irregularly it is true, by reason of the absence of a judge's order), but I fail to see how this could prejudice the accused if it was not a circumstance which affected jurisdiction, and it seems to me the case of *Rex* v. *Brown and Diggs* is directly in point.

On the second ground, objection was taken that two of the petit jurors, who sat during the trial, were disqualified by reason of deafness. Several affidavits and cross-examinations on some of them were admitted to be considered by the Court, among them being those of two eye, ear and nose specialists. This is not, strictly speaking, an appeal on a question of fact or a question of mixed law and fact. It is an objection to the constitution of the jury, is jurisdictional, and can be taken at any time.

GALLIHER, J.A.

It has been established to my satisfaction by this evidence, that the juror Keown was disqualified for service under the provisions of our Jury Act, 1913, Sec. 5, being affected with deafness. That we can receive such affidavits and proof, we deem necessary to shew this, is, I think, clear. See *Reg.* v. *Heane, supra,* also *Mellor's Case* (1858), Dears. & B. 468, where Lord Campbell, C.J., at p. 476, quotes Willes, C.J., as saying in *Norman* v. *Beamont* [(1744)], Willes 484, that in cases where the objection (to receive extraneous evidence) could not appear on the record, the fact might be ascertained by extraneous evidence. See also Erle, J., at bottom of p. 497, and p. 498. It being thus established that the juror Keown is disqualified, it seems to me that the jury who tried the accused was not properly

COURT OF APPEAL

1925

March 3.

REX v. BOAK

constituted, and that is a pure question of law. As Lord Campbell said in *Mellor's Case, supra,* there never were more than eleven jurymen that the law could recognize, and further observes, at p. 472:

> "The question reserved is one purely of law, wholly irrespective of the merits, being, not whether the verdict was right, but whether, in point of law, the tribunal before which the trial took place was duly constituted."

The case of *Rex* v. *Wakefield* (1918), 13 Cr. App. R. 56, is also, I think, in point.

It was urged upon us by Mr. *Jackson,* for the Crown, that as counsel for the accused had objected to the discharge of the jury, and the empanelling of a new jury for the reasons hereinafter set out, and had gone on and taken his chances of an acquittal, it is now too late to complain and the accused is bound by the acts of his counsel.

After the case had proceeded before the jury for some two or three days, it in some way came to the ears of the learned judge presiding that one of the jurors was affected with deafness. The learned judge consulted with the sheriff and counsel for the Crown, and for the accused at the trial, and informed them of the rumour and that, if it was well founded, there was nothing to do but dismiss the jury and empanel a new one. To this the counsel then acting for the accused objected, stating that he desired in defence the evidence of some medical students which he would either have to dispense with, and which was very important to the accused, or these students, if they remained, would lose their year at college if any such course was pursued, and offered an undertaking on behalf of the accused that the point would not be taken in case of appeal. It is regrettable that the impression was created in our Court, and was disseminated through the press, that this offer of undertaking was accepted by the learned judge. The members of this Court have had the opportunity of consulting with Mr. Justice MURPHY, as to this, and I accept without qualification his statement that no such offer, though made, was accepted. It is in justice to the learned judge, for whose ability and decorum in conducting cases on the Bench I have the highest regard, and in order to correct the wrong impression that has got abroad, that I venture to mention the matter in the way I do.

GALLIHER, J.A.

Upon Court assembling the next morning, the learned judge, by pre-arrangement with the sheriff, and without the knowledge of the juror Keown or the accused or his counsel, had the sheriff call the names of the jurors in a low voice and out of their regular order, and after later repeating the same process, came to the conclusion that the rumour was groundless, as Keown each time answered promptly to his name, the learned judge having him under close observation during the time.

Had the trial proceeded by reason of the attitude taken by Mr *Maclean,* who represented the accused at the trial, the question would no doubt come up as to how far the accused was bound by the acts of his counsel, and having accepted the juror with knowledge of the rumour as to infirmity of hearing, if bound by the acts of his counsel, a question of estoppel might arise, but in the view I take of the matter, it is not necessary for me to discuss this objection. As I understand the matter, the learned trial judge did not allow the trial to proceed by reason of Mr. *Maclean's* attitude. He took the steps outlined above and applied a test which seemed to satisfy him that the juror was competent to act.

GALLIHER, J.A.

In the light of the facts which are now before us, and which had they been before the learned judge, I feel certain he would not have accepted the juror; I am, with every respect, impelled to say that, in my opinion, the test was not adequate and that a new jury should have been empanelled.

There has therefore been, in my opinion, a mistrial, and a new trial should be granted on this point, which renders it unnecessary for me to discuss the third ground of objection.

McPHILLIPS, J.A.: The appeal was argued at this Bar upon the basis that (a) The indictment should be quashed in that there was no valid grand jury, which would invalidate the whole later proceedings, *i.e.,* that the indictment would necessarily be quashed if the conditions precedent statutorily required were not complied with, and for various stated reasons within the *ratio decidendi* of *Rex* v. *Hayes* (1903), 11 B.C. 4, the grand jury was illegally constituted; (b) that likewise for stated reasons the petit jury was illegally constituted; (c) that owing

MCPHILLIPS, J.A.

COURT OF APPEAL

1925

March 3.

REX v. BOAK

to the deafness of one of the jurors, the whole proceedings were void and rendered the trial a nullity owing to the statutory disqualification of the juror so affected with deafness, the deafness of the juror only becoming known to the prisoner after the trial was had.

I have not found it necessary to elaborate with any stated precision all the points that were argued in respect to (a) and (b), forceful as they would seem to be. Ground (c) stated, as I understood the line of argument to be, upon the part by the learned counsel for the prisoner is, in my opinion, decisive of the appeal. It is incontrovertible upon a review of the course of the trial and the facts later adduced that the juror whose qualification was impeached was afflicted with deafness—the medical testimony is overwhelming in proof of the disqualification. The Jury Act (Cap. 123, R.S.B.C. 1924), section 6, reads as follows:

"6. Every person coming within any of the classes following shall be absolutely disqualified for service as a juror, that is to say:—

"(*a.*) Persons infirm, decrepit, or afflicted with blindness, deafness, or other physical infirmity incompatible with the discharge of the duties of a juror;

MCPHILLIPS, J.A.

"(*b.*) Persons not in possession of natural faculties;

"(*c.*) Persons convicted of indictable offences, unless they have obtained a free pardon;

"(*d.*) Aliens."

It is to be observed that there is in the case of a juror afflicted with deafness absolute statutory disqualification.

Now it would appear that some knowledge was received by the learned trial judge that a juror upon the panel was alleged to be afflicted with deafness, the same juror who has since, to my satisfaction, been proved to be afflicted with deafness. The trial having then proceeded some distance, the learned trial judge being so apprized, took steps to satisfy himself as to the qualification or disqualification of the juror in conjunction with the sheriff, and bid the sheriff call the panel out of the usual order and, closely observing the demeanour of the juror and his answer made in ordinary course, when his name was called, arrived at the conclusion that the juror was not disqualified. This test made by the learned trial judge, with great respect, could not but be a most precarious test in a most vital matter,

i.e., a constitutional right to be tried by a competent tribunal, and was, with the greatest deference to the learned trial judge, not carried out in the manner called for by the practice long obtaining in criminal trials, and was a test made unknown to counsel for the prisoner and without the knowledge of the prisoner, the prisoner being unapprized of any suggestion that one of the jurors was said to be afflicted with deafness, nor made known openly in Court and in the hearing of the public assembled in Court (see *Scott* v. *Scott* (1913), A.C. 417, *per* Viscount Haldane, L.C.: "The general rule as to publicity. . . . . ."

Per Lord Shaw of Dunfermline at pp. 477-8:

"To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.

"It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.' But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.'

MCPHILLIPS, J.A.

"I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary—and they appear to me still to demand of it—a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law."

COURT OF APPEAL

1925

March 3.

REX v. BOAK

If express authority be necessary to indicate what should have been done, I would refer to the course adopted by Cresswell, J. in *Reg.* v. *Beere* (1843), 2 M. & Rob. 472:

"This was an indictment for a felony.

"After the evidence for the prosecution had been partly gone through, a juryman was taken with a fit, and was carried from the box. Cresswell, J. required it to be proved on oath before him, by a medical man, that the juryman was unable further to attend the trial, and then desired another juryman to be sworn in his stead (giving the prisoner and the other prisoners who had been arraigned with the prisoner, their challenges), and each witness who had been previously examined was recalled into the box, and resworn, and the judge read over to him the note of his evidence and asked if he was correct. The trial then proceeded, and the prisoner was convicted."

In the present case no medical man was called by the learned trial judge, examination of the juror had, or evidence taken on oath; in truth, nothing but the observation of the learned trial judge alone and observation in private and not to the knowledge of the counsel for the prisoner or the prisoner himself. This was not procedure in accordance with the practice and the due course of publicity required upon a criminal trial. The prisoner has the constitutional right to have his trial in public, and all the proceedings of the trial must be publicly had in his presence and within his hearing and made known to him, so that he may know and understand all that is taking place. What is more important, what can strike more at the true foundation and the due administration of justice than the incompetency of the tribunal? Here the prisoner was entitled to a jury of twelve, all of whom must be qualified. The language of that very eminent and distinguished Chief Justice of Ontario, Hagarty, in the *City of Brantford* v. *Ontario Investment Co.* (1888), 15 A.R. 605 at p. 608, is exceedingly apposite to the present case:

MCPHILLIPS, J.A.

"I consider the whole proceedings . . . . . as *ultra vires* and (as it were) *coram non judice*."

And I would adopt this language as descriptive of my opinion of what occurred at the trial, that is, the prisoner was not tried by a competent tribunal. In the present case the examination of the juror said to be afflicted with deafness was had after the trial and medical men of high professional standing (Dr. Stewart and Dr. Keyes) made the examination and testified

under oath, and that evidence was adduced and laid before this Court conclusively establishing the juror's disqualification as being afflicted with deafness and utterly incompetent to discharge the duties devolving upon a juror, and the juror was in accordance with the terms of the statute absolutely disqualified, the resultant effect being that the prisoner was tried by an incompetent tribunal.

It is patent that the prisoner, tried as he was by an incompetent tribunal (one of the jurors being afflicted with deafness and statutorily disqualified), suffered an injustice in consequence of the disability of the juror. Upon all that has been disclosed before this Court it is impossible to say that there was no miscarriage of justice. On the contrary, in my opinion, one is compelled and constrained to hold that, owing to the disability of the juror, being afflicted with deafness and statutorily disqualified, the prisoner was not tried before a competent tribunal, and upon this ground there was a miscarriage of justice.

It is therefore utterely impossible in this case to say that no substantial wrong or miscarriage of justice actually occurred; on the contrary, there was palpably substantial wrong and miscarriage of justice. MCPHILLIPS, J.A.

In *Attorney-General of New South Wales* v. *Bertrand* (1867), 36 L.J., P.C. 51, Sir John T. Coleridge considering questions of proper procedure and the publicity thereof at criminal trials, said at p. 57:

"It is a mistake, moreover, to consider the question only with reference to the prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party. This remark very much lessens the importance of a prisoner's consent, even when he is advised by counsel"

(and in the present case it is to be observed that the able and learned trial judge refused in the interests of justice to act upon any undertaking or consent of counsel for the prisoner),

"and substantially, not of course literally, affirms the wisdom of the common understanding in the profession, that a prisoner can consent to nothing; from this it will be seen that a most important consideration is forgotten—that of the jury charged with deciding on the effect of the evidence. It is essential that no unnecessary difficulty should be thrown in the way of their understanding and rightly appreciating it."

COURT OF APPEAL

1925

March 3.

REX v. BOAK

In *Ibrahim* v. *Rex* (1914), A.C. 599, Lord Sumner, who delivered the judgment of their Lordships of the Privy Council, when remarking upon what would be considered good ground for jury leave to appeal, referred to *Reg.* v. *Bertrand, supra,* and made use of the following language which I consider pertinent to the matter here being considered:

"The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice; *Ex parte Macrea* (1893), A.C. 346. There must be something which in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg.* v. *Bertram* (1867), L.R. 1 P.C. 520."

MCPHILLIPS, J.A.

The prisoner in the present case did not in view of all the circumstances here enlarged upon have the "substance of fair trial," neither did the prisoner have "the protection of the law," and to approve what in the present case occurred at the trial would "in general terms tend to divert the due and orderly administration of the law into a new course." This undoubtedly would result in the establishment of "an evil precedent in future." I am unhesitatingly of the opinion that justice requires the quashing of the conviction. I am, though, of the view that justice also requires that there be a direction for a new trial, my conclusion all proceeding upon the firm opinion that for the reasons hereinbefore set forth a miscarriage of justice occurred at the trial.

MACDONALD, J.A.

MACDONALD, J.A.: Just as the accused could not be convicted without the verdict of a petit jury, so he could not be brought before the petit jury for trial without an indictment found by the "grand jury." Was a true bill found by a legally constituted "grand jury" in this case, or so far, at all events, as five of their number were concerned were they, in the words of my brother MARTIN in *Rex* v. *Hayes* (1902), 9 B.C. 574 at p. 575; 7 Can. C.C. 453 at p. 454, "a collection of individuals unknown to the law"? By section 921 of the Code

"Every person qualified and summoned as a grand or petit juror, according to the law in force for the time being in any Province of Canada,

shall be duly qualified to serve as such juror in criminal cases in that Province."

The grand jury is a tribunal created by statute and must be constituted as such before it can discharge its functions. There are two prerequisites. They must be qualified and summoned in accordance with our Provincial Act. Under section 30 of the Jury Act, B.C. Stats. 1913, Cap. 34, the sheriff must serve a summons on the jurors drafted to serve on the grand jury four days at least before the day on which such jurors are required to attend. By section 31,

"Should the sheriff be unable to summon any or all of the said persons drafted to serve on a grand or petit jury, or should any of the said persons fail to attend at the time they are summoned to attend, he shall report the fact to the presiding judge, who may, upon request made on behalf of the Crown, order the sheriff to summon such number of persons, whether qualified jurors or not, as will be necessary to make up the number of persons drafted to serve on the said grand or petit jury, and such jurors may, if necessary, be summoned by word of mouth, and such service on such persons may be made at any time. The names of the persons so summoned shall be added to the said list of grand or petit jurors drafted as aforesaid."

By order of the presiding judge jurors may be summoned in this special manner "whether qualified jurors or not." The fact, therefore, that any so summoned under this section were on the original list drafted by the selectors and therefore qualified is of no importance. The presiding judge might orally direct the sheriff to summon sufficient to make up the required number. He is not required to do so "by order." The words are "who may . . . . . order the sheriff." The order, however, in whatever form it may be made, must be by the presiding judge. All the sheriff can do is to report and receive an order or direction. If without reporting and receiving directions he summoned the five jurors in question they would have been "a collection of individuals unknown to the law." As a written order was made we must look at it to ascertain its scoope and extent. This order made by the "presiding judge," about a week before he actually became the "presiding judge" (due to an imperfection in the Act), recites that the necessary report was made by the sheriff in respect to his inability to serve "all persons drafted to serve as grand and petit jurors." Upon that report an order was made

MACDONALD, J.A.

COURT OF APPEAL

1925

March 3.

REX v. BOAK

"that the sheriff or other proper officer do summon such number of persons, whether qualified jurors or not as will be necessary to make up the number of persons drafted to serve on the petit jury at the present sittings of the above Court holden at the City of Victoria in the County of Victoria."

No order was made nor direction given in respect to grand jurors. Confined as we must be to the order itself, what is its effect? It may have been thought by the learned judge who afterwards presided that with six days remaining the sheriff might with diligence secure the required number of grand jurors in the ordinary way; hence no order in respect to them, notwithstanding the request. The report of the sheriff might disclose a situation where a further effort would be futile in respect to petit jurors but not as in respect to grand jurors. In that event the request would be granted in part only. Whether that was the true situation or instead error unwittingly crept into the order, we are unable to say. Our task is to find, if possible, authority for the presence of the five jurors in question. If they were there without statutory authority no "grand jury" was constituted at all. The tribunal was not set up. All jurisdiction is acquired either direct from the Crown or by statute.

MACDONALD, J.A.

There is no evidence that in respect to these grand jurors a separate oral or other written order was obtained. An attempt was made to shew by the sheriff's affidavit that it was the intention to include both grand and petit jurors in the order. Here, however, the verbal order, or the decision arrived at, was converted into a written order and it is now too late to attempt its amendment. It must be accepted as it appears on the record. It could, of course, have been amended below, thereby laying a proper basis for the summoning of additional grand jurors. Obviously it cannot be done at this stage, or if done it would have no remedial value. This conclusion is not affected by the probability that there was in law no order made at all, inasmuch as there was no "presiding judge" to make it. The five jurors would still be assuming to take part in the deliberation of a so-called grand jury without statutory authority of any kind. No "grand jury" was therefore constituted.

It was argued, however, that an unauthorized number of individuals acting with others properly summoned were converted into a legally constituted tribunal by certain so-called curative sections of the Code. We were referred to section 898.

Obviously it has no application. We are not dealing with defects in indictments. The point is, "was a tribunal known as a 'grand jury' constituted?" As to section 899, as was pointed out in *Rex* v. *Hayes* (1902), 7 Can. C.C. 453 at p. 454, and referred to by Crankshaw in his notes, the limitations there referred to have no application where the grand jury was never legally constituted. As already pointed out, section 921 requires that the juror must be both "qualified" and "summoned" before becoming "duly qualified" to serve. The second element is absent in the case at Bar. It can scarcely be suggested either that because seven of the number may bring in a true bill this seven would constitute a legal tribunal. As to section 1010 it does not refer to grand juries at all. They do not return verdicts. Section 1011 might require further examination if the word "summoning" appeared after the word "qualification" or in any other appropriate part of the section. In the absence of this or a similar word, it is not necessary to dispose of the point as to whether this section of the Code is restricted to attempts at "impeaching any verdict," a matter not involved in this appeal.

MACDONALD, J.A.

We were referred to *Rex* v. *Brown and Diggs* (1911), 19 Can. C.C. 237, as a conclusive authority by a Court of co-ordinate jurisdiction. There it was simply a question of two grand jurors being removed from the panel without an affidavit shewing that they were exempted under the Nova Scotia Juries Act. As a matter of fact the sheriff had other knowledge that they were exempted. The want of the affidavit was simply a collateral matter. It is not a question of dereliction of duty by an official in the case at Bar. It is the absence of a clear statutory requirement necessary before the additional grand jurors could function at all.

No relief therefore is afforded by any of these sections.

I have examined with great care all the authorities cited and many others, but do not feel that any useful purpose would be served by reviewing them, other than to say that my conclusions are deduced from such examination and the application of well established principles.

I would allow the appeal and direct a new trial.

New trial ordered, Macdonald, C.J.A. dissenting.

MORRISON, J.

1924

Dec. 16.

COURT OF APPEAL

1925

March 3.

COX v. HOGAN

COX v. HOGAN AND THE CORPORATION OF THE CITY OF VICTORIA.

Will—Construction—Charitable gift—"Some good public purpose"—Ejusdem generis rule.

The main clause in a testator's will was as follows: "I give devise and bequeath to Mary Ann Hogan, Knowlton, Province of Quebec, rent or benefit that may accrue from my real property on David Street known as lot 5, block D, Work Estate during her lifetime, then for the citizens of Victoria British Columbia to have it for some good public purpose. Such as one of these to build an emergency hospital, woman's home or park with urinary on it and entail. In trust to the City of Victoria, B.C. so that it will be put to some good public purpose and not to any combination of thieves." It was held on originating summons that the clause created a valid charitable trust.

Held, on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that the "good public purpose" is indicated by the words "emergency hospital, woman's home and park with urinary" so that there is nothing uncertain as to the character of the objects of the gift.

Held, further, that even if there is any concern as to the land not being fit for any of the purposes named, it is fit for some of them or for purposes *ejusdem generis* with the charities named.

APPEAL by defendant Mary A. H. Hogan from the decision of MORRISON, J. of the 16th of December, 1924, on an application by way of originating summons by R. L. Cox as administrator with will annexed of the estate of David A. N. Ogilvy, deceased, that certain matters arising in the administration of said estate may be determined and relief given in respect thereof. The facts are sufficiently set out in the judgment of the learned trial judge. Argued before MORRISON, J. at Victoria on the 28th of October, 1924.

Statement

O'Halloran, for administrator.
Harold B. Robertson, K.C., for City of Victoria.
D. M. Gordon, for Mary A. H. Hogan.
N. W. Whittaker, for next of kin.

16th December, 1924.

MORRISON, J.

MORRISON, J.: The deceased left a will in which the following clause appears:

"I give devise and bequeath to Mary Ann Hogan, Knowlton, Province of Quebec, rent or benefit that may accrue from my real property on David Street known as lot 5, block D, Work Estate during her lifetime, then for the citizens of Victoria British Columbia to have it for some good public purpose. Such as one of these to build an emergency hospital, a woman's home or park with urinary on it and entail. In trust to the City of Victoria, B.C. so that it will be put to some good public purpose and not to any combination of thieves."

This is an application by way of originating summons in which a number of questions are propounded. Amongst them are:

"Does the said clause create a valid charitable trust?

"Is the devise to the citizens of Victoria, British Columbia, in the above-mentioned portion of the will identical with the devise to the City of Victoria, B.C. in the above-mentioned portion of the will?

"Is the devise to the citizens of Victoria, British Columbia and the devise to the City of Victoria, B.C. in the above-mentioned portion of the will or either of the said devises in the above-mentioned portion of the will identical with a devise to the Corporation of the City of Victoria?"

My answer, compendiously put, is in the affirmative, which answer obviates the necessity of dealing with the other phases of the application.

The proper meaning of the word "charity" is not synonymous with its legal meaning, as to which for a guide we must look at the statutes which set out a list of charitable purposes not at all exhaustive, and which has been added to by the interpretation of the Courts from time to time. The intention of the testator clearly was to have the property applied to charitable purposes in Victoria. There is an accepted description of charitable purposes to be found in the judgment of Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1891), A.C. 531 at p. 583:

MORRISON, J.

"'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly."

From this decision the defendant appealed. The appeal was argued at Victoria on the 9th and 12th of January, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

MORRISON, J.

1924

Dec. 16.

COURT OF APPEAL

1925

March 3.

COX v. HOGAN

Argument

A. D. Crease, for appellant: Both land and money trusts are void for uncertainty and are not charitable trusts: see Halsbury's Laws of England, Vol. 4, pars. 167, 229 and 234; *Blair* v. *Duncan* (1902), A.C. 37 at pp. 42 and 49; *Houston* v. *Burns* (1918), A.C. 337 at p. 345; *In re Davis. Thomas* v. *Davis* (1923), 1 Ch. 225; *Re Greaves* (1917), 1 W.W.R. 997; *In re Macduff* (1896), 2 Ch. 451 at pp. 462 and 469; *Morice* v. *The Bishop of Durham* (1804), 9 Ves. 399; (1805), 10 Ves. 522; *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1891), A.C. 531 at p. 554; *Attorney-General* v. *National Provincial Bank* (1924), A.C. 262 at p. 268; *Ellis* v. *Selby* (1836), 1 Myl. & Cr. 286 at p. 299; *Attorney-General for New Zealand* v. *Brown* (1917), A.C. 393. "Public purposes" are the special words that govern. Hospitals in England must be distinguished as in England they subsist on charity, here they are subject to statute: see *Ambatielos* v. *Anton Jurgens Margarine Works* (1922), 2 K.B. 185 and on appeal (1923), A.C. 175 at p. 182. The genus here is "some good public purpose." He can give his whole estate to some public purpose, but he must say what it is. He cannot leave it to someone else to decide. If the trust is void the City cannot take beneficially, it goes to the next of kin (Mary Hogan). On general words followed by particular description see Theobald on Wills, 7th Ed., 225; *Dean* v. *Gibson* (1867), L.R. 3 Eq. 713; *King* v. *George* (1876), 4 Ch. D. 435 and on appeal (1877), 5 Ch. D. 627; *In re Fleetwood* (1880), 15 Ch. D. 594; *Smyth* v. *Smyth* (1878), 8 Ch. D. 561.

Harold B. Robertson, K.C., for respondent: The words should be read disjunctively: see *Blair* v. *Duncan* (1902), A.C. 37. As to it being uncertain because citizens have to choose see Theobald on Wills, 7th Ed., 350; Jarman on Wills, 6th Ed., 233-4. That hospitals are charitable here see *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1891), A.C. 531 at p. 583; *Corporation of Town of Whitby* v. *Liscombe* (1875), 22 Gr. 203; *Shaw* v. *Halifax Corporation* (1915), 2 K.B. 170; Jarman on Wills, 6th Ed., 213; *In re Mellody* (1918), 1 Ch. 228; *Shillington* v. *Portadown U.D.C.* (1911), 1 I.R. 247; *Morice* v. *The Bishop of Durham* (1805),

10 Ves. 521 at p. 539. "Public purposes" in this will means "charitable purposes": see *Houston* v. *Burns* (1918), A.C. 337 but in this case the head-note is misleading: see also *Caldwell* v. *Caldwell* (1921), 91 L.J., P.C. 95 at p. 96; *Mitford* v. *Reynolds* (1841), 1 Phil. 185 at pp. 190-1; *Goodman* v. *Mayor of Saltash* (1882), 7 App. Cas. 633; *In re Allen* (1905), 2 Ch. 400; *Verge* v. *Somerville* (1924), 93 L.J., P.C. 173 at p. 177. As long as there is the charitable intent the uncertainty makes no difference. The Court does the rest. A charitable trust is different from any other. They will formulate a scheme for carrying it out.

Argument

Crease, in reply: This is not a charitable trust, it is a public purpose.

Cur. adv. vult.

3rd March, 1925.

MACDONALD, C.J.A.: I would dismiss the appeal. The remainder, after the life interest of Mrs. Hogan, is given to the "Citizens of Victoria to have it for some good public purpose such as one of these, to build an emergency hospital, woman's home or park with urinary on it and entail." Now, the good public purpose is indicated by the words "emergency hospital, woman's home and park with urinary," which are charitable purposes as well as public, and therefore there is nothing uncertain about the character of the objects of the gift.

MACDONALD, C.J.A.

Though no trustee is named, the Court will always appoint one to a charity. It is argued that the land was not fit for any of the purposes named, but if we are concerned with this at all, I think it cannot be denied that it is fit for some of them or for purposes *ejusdem generis* with the charities named.

MARTIN, J.A.: I agree in dismissing the appeal.

MARTIN, J.A.

GALLIHER, J.A.: I think the language of the will brings it under the head of charitable purposes, and notwithstanding the very able argument of Mr. *Crease,* I find myself unable to give effect to it. Many authorities were cited to us, but in view of my conclusion as to the effect of the language in the will, after considering these cases, I do not think it useful to deal with them.

GALLIHER, J.A.

MORRISON, J.

1924

Dec. 16.

COURT OF APPEAL

1925

March 3.

COX v. HOGAN

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal involves the consideration of the terms of the will hereinafter set forth and as to the validity of the bequest to the City of Victoria "for some good public purpose," "be put to some good public purpose," "go in ade of whatever may be chosen by the citizens." The bequest is challenged upon the ground that it is not a charitable bequest; further, the bequest is in its nature uncertain and vague. The will reads as follows: [The learned judge after setting out the will continued].

It may be at once stated that the land described in the will is of little or no value but there is quite a considerable sum of money to the credit of the estate. The appeal is from the judgment of Mr. Justice MORRISON, given upon originating summons proceedings. The operative part of the order issuing in pursuance of the judgment reads as follows: [the learned judge after setting out the order, continued].

I am clearly of the opinion that the bequest fails, and although many authorities were referred to upon the argument at this Bar it would seem to me that *Houston* v. *Burns* (1918), 34 T.L.R. 219 is determinative of the appeal and calls for its allowance. There it was necessary to consider the words "public, benevolent or charitable purposes." Here, we have only "some good public purpose," "go in ade of whatever may be chosen by the citizens." It was held in the *Houston* case that the bequest was bad for uncertainty as "public purposes" were in their nature entirely uncertain and the vagueness of the purpose was not cured by the specification of the locality to be benefited. Likewise here, the words "then for the citizens of Victoria, British Columbia, to have it for some good public purpose":

> "In trust to the City of Victoria, B.C., so that it will be put to some good public purpose and not to any combination of thieves."

will not avail or cure the uncertainty and vagueness. If the benefit was to some certain existing institution or institutions in the City of Victoria there might be some helpfulness in the matter, but even then, taking the will in all its terms, I would still have grave doubt as to its efficacy; further, there is uncertainty and unworkability in defining and selecting the public purpose when we have the words "then to go in ade of what-

ever may be chosen by the citizens." I am not at all of the view that the words "Such as one of these to build an emergency hospital, woman's home or park with urinary on it and entail" lend any assistance. There is no bequest in favour of any such institution or purpose, it is at most merely illustrative and suggestive, nothing binding or controlling. The Lord Chancellor in the *Houston* case, in whose judgment Lord Dunedin concurred, said at pp. 219, 220; [(1918), A.C. at pp. 339-342] that: [After quoting the judgment of the Lord Chancellor the learned judge continued].

I have quoted the judgment of the Lord Chancellor in full, as it would seem to me that it really covers all the points that were debated in this appeal, and the *ratio decidendi* fully and completely established that the bequest in the present case is equally ineffective. I would in particular call attention to the following excerpts from the above-quoted judgment: "While 'charitable purposes' have a defined meaning both in England and Scotland, 'public purposes' are in their nature entirely uncertain." Then as to the fixing of the locality in the present case, it may be said that the locality of the "public purpose" is fixed, but even that is doubtful as at best it is stated "then for the citizens of Victoria, British Columbia, to have it for some good public purpose." Where, though, are they "to have it"? Not necessarily in the City of Victoria, and it is to be noted that the Lord Chancellor when directing his attention to the point said "it was not really necessary for the decision, which rested upon the vagueness of the purpose, whatever the locality within which the purpose was to be served." Further on the Lord Chancellor said:

"It followed from the decision to which he had referred [*Dolan* v. *Macdermot* (1867), L.R. 5 Eq. 60; (1868), 3 Chy. App. 676, Lord Cairns] that if the clause was to be construed as being for such public or benevolent or charitable purposes in connexion with the locality as the trustees thought proper, it would be bad."

And that is exactly the present case. "The purpose was too vague, and the vagueness of the purpose was not cured by the specification of the locality to be benefited."

In *Blair* v. *Duncan* (1902), A.C. 37 it was held that " 'such charitable or public purposes as my trustee thinks proper,' was void for uncertainty."

MORRISON, J.

1924

Dec. 16.

COURT OF APPEAL

1925

March 3.

COX v. HOGAN

This is a judgment which may be also said is decisive of the present case. At p. 42, the Lord Chancellor (Earl of Halsbury) said:

"The disposition here given to A.B., to determine what particular public purposes should be the objects of the trust, is too vague and uncertain for any Court either in England or Scotland to administer."

And here we have no certain person to determine the objects of the trust but "the citizens of Victoria," all the more vague and uncertain and impossible of being carried out. Lord Davey, at p. 44, said:

"Now, my Lords, I am not aware of any case in which effect has been given in the Scottish Courts to a trust for 'public purposes.' . . . ."

And at p. 45, further said:

"My Lords, it appears to me that the point to which I have directed my observations is put clearly and concisely by Lord Young, when he says that he could not on authority or principle sustain public purposes as a valid direction to a testamentary trustee."

I would also refer to what Lord Robertson said at p. 49:

"But while charitable trusts are, as a matter of legal doctrine, merely one class of trusts, and while their prominence in legal decisions results from nothing more than their being the most numerous class of public trusts, I do not think that it is true that they have been uniformly treated by the Courts in Scotland exactly as other trusts would be treated. The Courts have, I think, as a matter of historical fact, reflected more or less, consciously or unconsciously, the bias which disposes every one favourably towards charity; and this never appeared more plainly, or was avowed more frankly, than in the decision of your Lordships' House, in the *Morgan Case* (*The Magistrates of Dundee* v. *Morris* (1858), 3 Macq. H.L. 134). To this favour of charities I ascribe the decision in favour of the validity of a bequest for such charitable purposes as a trustee may select. Accordingly, when I am asked to apply, by analogy, to public purposes decisions about charitable purposes, I decline to do so. The proper inference from these cases is, not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest is relaxed, but merely that it is settled that charitable purposes form such a particular class. On the merits of the question now before your Lordships, I am unable to hold that the designation of public purposes is a compliance with the rule."

MCPHILLIPS, J.A.

In the *Houston* case, as reported in (1918), A.C. 337, Viscount Haldane, at p. 344, said:

"The disposition is therefore inoperative as regards the residue, for the trustees are not bound to distribute the property among objects restricted to any defined class which can form a valid object of a disposition."

Then we have Lord Atkinson at p. 345 saying:

"It was rendered void, according to Lord Halsbury, because a disposition

which left it to the trustee to determine what particular public purpose should be the object of the trust was too vague and uncertain for any Court, either in England or Scotland, to administer. And it was void, according to Lord Davey, because 'public purposes' were not so within the description of a particular class of objects as to satisfy the test which Lord Lyndhurst suggested. The purposes which would come within the description were, as pointed out, vast in number, and were sometimes of a kind which would have reduced the gift in the case before him to an absurdity. It is the insufficiency of these words, 'public purposes,' because of their vagueness and uncertainty, to identify and fix the limits of the class of individuals or objects from which the trustees are to choose that renders void a bequest for 'public purposes.' That is their weakness, and that weakness is not cured by coupling them with a definition or description of the physical area within which the public purposes are to be comprised. It may possibly be that the words 'public purposes' are more vague and uncertain where the trustees have the whole world as the ambit of choice than where the ambit is limited to a much smaller area, but they are sufficiently vague and uncertain, even if applied to parishes, to render them insufficient to define and fix the limits of the class or classes from which the trustees are to make their selection."

(*Attorney-General* v. *National Provincial Bank* (1924), A.C. 268).

MCPHILLIPS, J.A.

I cannot see that anything further can be usefully adverted to to more clearly indicate the ineffectiveness of the bequest here made. I am, without hesitation, of the opinion that the bequest of the *corpus* fails in the creation of a valid charitable trust, and that it is invalid and void for uncertainty and vagueness. In the result, in my opinion, the *corpus* falls into residue and that the appellant is absolutely entitled thereto under the will and it would follow, if I should be right in my opinion, that the Corporation of the City of Victoria is not entitled to any part of the estate whether as trustee or otherwise under the will, the appellant being absolutely entitled to the whole estate under the will.

For the foregoing reasons, I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: To ascertain the intention of the testator the two clauses, one relating to real estate and the other to cash on hand, on the decease of the testator, must be read together. There is internal evidence in the will itself that the testator did not have in mind separate and distinct dispositions of these two classes of property. He refers to the "citizens of Victoria" as the ultimate beneficiaries in the first clause dealing with the

MORRISON, J.

1924

Dec. 16.

COURT OF APPEAL

1925

March 3.

COX v. HOGAN

real estate, and again refers to the "citizens" (meaning, of course, of Victoria) in the clause relating to personalty.

Again in the first clause, while he gives examples of the so-called public purposes he has in mind, not to limit the trustee, but to shew by illustration his view of suitable benevolent objects, he does not repeat the illustrations in the second clause, or select others, shewing that those already given sufficiently indicate the class of charities the "citizens" might select. It is clear, therefore, that the testator had in mind benevolent purposes in respect to both the real estate and moneys on hand at the time of his death. The fact, too, that the mayor is made sole executor is another indication of intention to benefit the local public of the City of Victoria.

If we were obliged to hold that these two clauses did not fit into and explain each other, the latter, in respect to personalty, would doubtless be void for uncertainty. For the reasons stated, however, I cannot adopt that view. It cannot be said that the first clause is void on that ground. There are many cases in the books in which bequests were held valid where less particularity was shewn than here. On construing, therefore, the whole will, it is clear that the testator intended to limit the appellant to the receipt of income arising from the whole estate, the *corpus* to go to such charitable purposes of a public nature "such as one of these to build an emergency hospital, woman's home or park" as the citizens might decide.

MACDONALD, J.A.

As in my view the will discloses a good charitable bequest (*In re Allen* (1905), 2 Ch. 400) the objection that there is no adequate method outlined for ascertaining the will of the citizens loses much of its force. Where a clear charitable intention is disclosed, it will not be allowed to fail because the method of executing it is difficult or impracticable as by substituting another scheme it may be executed *cy pres*.

The fact that the testator uses the words "good public purpose" does not necessarily make it a devise and bequest for "public purposes" if it is clear that the purposes mentioned are in fact charitable. "Charitable purposes" have a meaning fairly well defined. The preamble to the statute of 43 Eliz., Cap. 4, containing a comprehensive list of "charities," is usually

referred to for the purpose of deciding whether a particular purpose is charitable or not. The objects therein set out and all others "within its spirit and intendment" are charitable. The definition and examples of "charitable purposes" is so wide that it would seem clear that the objects enumerated by the testator are within it. See Jarman on Wills, 6th Ed., Vol. 1, pp. 212 to 216.

The appeal should be dismissed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Crease & Crease.*
Solicitor for respondent: *H. S. Pringle.*

JACK v. NANOOSE WELLINGTON COLLIERIES LIMITED.

Agreement—Deeds and documents—Instrument signed by plaintiff releasing defendant from liability—No intention to give release—Fraud—Right of relief—"Non est factum."

The plaintiff who owned a brick plant upon which one B. held a chattel mortgage sold the plant to the defendant Company, the Company undertaking to incorporate a new company to take over the business and further agreeing to assume and pay off the amount due on the chattel mortgage. In carrying out the agreement the plaintiff at the instance of the defendant Company signed what he thought was a mere transfer of the property to the Company but the instrument was in fact a new agreement which expressly released the defendant Company from its obligation to pay off the chattel mortgage. It did not appear that anything was said either to or by the plaintiff as to the release and the evidence was conflicting as to whether he read the instrument over before signing it. An action for a declaration that he was entitled to be indemnified by the defendant Company against his liability under the chattel mortgage was dismissed.

Held, on appeal, reversing the decision of McDONALD, J., that the plaintiff's signature to the instrument containing the release was obtained by fraud that he is entitled to be indemnified by the defendant against his liability on the mortgage and to a decree for specific performance of defendant's agreement to pay it off.

COURT OF APPEAL

1925

March 3.

JACK
v.
NANOOSE WELLINGTON COLLIERIES

APPEAL by plaintiff from the decision of MCDONALD, J. of the 28th of July, 1924, in an action for a declaration that the plaintiff is entitled to be indemnified by the defendant against a debt and chattel mortgage from the plaintiff to one J. M. Braun, and that the plaintiff is entitled to be discharged and exonerated from all liability in respect of said debt. An order for specific performance by the defendant of an agreement between the plaintiff to the defendant on the sale of a brick-plant by the plaintiff to the defendant whereby the defendant assumed and agreed to pay the plaintiff's debt or mortgage to said J. M. Braun. The facts are that the defendant was an illiterate man who was an expert in brickmaking. The defendant Company found in working their coal mine that it included a large amount of clay and on consulting with the plaintiff they found the clay was of very good quality for brickmaking and they asked the plaintiff to put up a brickmaking plant for which 3 acres were leased to plaintiff. The plaintiff had no money so the president of the defendant Company, one J. M. Braun agreed to advance the money to build the plant and took a mortgage on the plant and a mortgage on plaintiff's wife's house in Vancouver worth about $5,000. Braun advanced for payment of the construction of the plant in all $23,000. After the plant worked for a short time the defendant Company offered to buy the plaintiff out and agreed to pay him $10,000 ($5,000 in cash and $5,000 in stock of a company to be formed for running the brick-plant) and to assume and pay the mortgage of $23,000 held by Braun. The brick-plant was worked a short time by the Company and proved a failure. The defendant Company (the members of which were all Americans who had an American lawyer looking after the legal business) then induced the plaintiff to sign documents telling him it was necessary for the transfer of the business to the new Products Company. He did not read the documents according to his statement and one of them included a clause releasing the Company from their agreement to assume the mortgage held by Braun. The plaintiff claimed that the signature to the last agreement was obtained by fraud. The trial judge dismissed the action.

Statement

The appeal was argued at Victoria on the 21st of January,

1925, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Cassidy, K.C., for appellant: As to the agreement releasing the defendant from the debt to Braun we plead *non est factum*. It is not necessary to bring an action to set aside the agreements: see *Ascherson* v. *Tredegar Dry Dock and Wharf Company, Limited* (1909), 2 Ch. 401. We say the Products Company has no power to indemnify so there is no consideration for releasing the defendant Company: see *Carter Dewar Crowe Co.* v. *Columbia Bitulithic Co.* (1914), 20 B.C. 37 at p. 40; *Bonanza Creek Gold Mining Company, Limited* v. *Rex* (1916), 1 A.C. 566. On the question of *non est factum* he is entitled to advice: see *Willis* v. *Barron* (1902), A.C. 271 at pp. 277 and 284; *Bank of Montreal* v. *Stuart* (1911), A.C. 120. In the last case *Cox* v. *Adams* (1904), 35 S.C.R. 393 is disapproved: see also *Bank of Ireland* v. *M'Manamy* (1916), 2 I.R. 161; *Foster* v. *Mackinnon* (1869), L.R. 4 C.P. 704 at p. 713; *McLaurin* v. *McDonald* (1865), 12 Gr. 82. They must shew this was a valid release. As to a document under seal see *M'Eachern* v. *Somerville et al.* (1876), 37 U.C.Q.B. 609 at p. 621. On the meaning of "par value" see Words and Phrases, Vol. 6, p. 5163.

Argument

Davis, K.C., for respondent: The question is whether the agreement was obtained by fraud. The plea of *non est factum* does not arise. Mistake is not pleaded and it must be mutual mistake proved beyond doubt: see *Campbell* v. *Edwards* (1876), 24 Gr. 152. It is solely a question of whether there was fraud. As to following the trial judge's finding see *Barron* v. *Kelly* (1918), 56 S.C.R. 455; *Campbell River Lumber Co.* v. *McKinnon* (1922), 64 S.C.R. 396. On observations of witnesses see *Montgomerie & Co., Limited* v. *Wallace-James* (1904), A.C. 73 at p. 75. The burden of proof is on him and he must shew clearly there was fraud.

Cur. adv. vult.

3rd March, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Plaintiff brings action for a declaration that he is entitled to be indemnified by defendant against

COURT OF APPEAL

1925

March 3.

JACK v. NANOOSE WELLINGTON COLLIERIES

MACDONALD, C.J.A.

his liability on a mortgage to one Braun, which defendant had agreed to assume and pay off, and for specific performance of such agreement.

The facts may be shortly stated as follows:

Plaintiff is a brickmaker, the defendant is a coal-mining company. Over the seams of coal is a bed of clay suitable for brickmaking. The parties therefore entered into an arrangement by which the plaintiff was to erect a brickmaking plant and defendant to supply the clay. An agreement to that effect was signed on the 12th of March, 1921. On the 11th of August of the same year, the parties agreed, in writing, that the plaintiff should sell out his brick-plant and the benefit of said agreement to the defendant, and that the defendant should assume and pay certain debts owing in connection with the plant, including the mortgage given by the plaintiff to Braun, a very large shareholder in defendant Company, for the sum of $23,000, of which there appears to have been owing about $17,000. In addition to assuming that debt and others, the defendant agreed to pay the plaintiff $5,000 in instalments; incorporate a new company to carry on the brickmaking business and have allotted to the plaintiff $5,000 of shares in said company. The result of this would be that the plaintiff should receive $5,000 in cash and $5,000 in shares, and be free of the liability to Braun, which was further secured by a mortgage of his wife's house for $4,000 as collateral, and which on payment of the principal amount would be released. Nothing further occurred between the parties until October of the same year, when Coleman, the defendant's managing director, went to Vancouver, called the plaintiff up by telephone, and said he had come down to incorporate the new company. He and plaintiff went to the office of Messrs. *Davis & Co.*, solicitors, where they met an employee named Spears, and instructions were given by Coleman to incorporate the company.

The next thing that occurred was in December of the same year, when Coleman again called the plaintiff up, asked him to go to the office of the said solicitors for the purpose of signing transfers of the brick property to the new company. They met in Mr. Spears's room, and instructions were given. Whether the

instructions were given in plaintiff's presence or not is a matter of some controversy. At all events, the plaintiff was told to come back next day, where he again met Coleman. Two agreements were produced by Mr. Spears, ready for signature, and were then signed by the plaintiff. Plaintiff says he did not read them over. Coleman had represented that they were mere transfers of the property which, of course, plaintiff was bound to make. Spears and Coleman say that the plaintiff did read them over. I am by no means satisfied that he did, but if he did, I am quite satisfied that he did not realize that one of the agreements contained a clause releasing the defendant from his liability to assume payment of the Braun mortgage, which that agreement contained. My reason for saying this is, that according to the evidence there was not one word said between the plaintiff and Coleman with regard to such a release, and the defendant is in this position that it must rely upon the plaintiff's signature to the agreement, unaccompanied by any evidence, that the matter of a release was ever adverted to in the proceedings leading up to the signing of the document. Coleman and Spears, the only other parties to the transaction, do not say that the word "release," or anything similar, was mentioned to plaintiff. We are asked to assume that the plaintiff, apparently a poor man, gave up a valuable right, the right to have a liability of $17,000 discharged by the defendant Company, without a word, involving as it would the loss of his wife's property and his own liability to pay Braun. The fact of the two agreements themselves infer fraud. All that the plaintiff could be called upon to do was to sign a transfer of the property, instead of that, elaborate agreements are drawn up, and this release clause was inserted, I am satisfied by design, to cover up the fraud that was being perpetrated upon him.

MACDONALD, C.J.A.

It must be conceded, in fact it was practically conceded in the argument, where, if I am not mistaken, it was admitted that the new company had gone into bankruptcy, without attempting to do any business at all, that the new company was a thing of straw, without capital and without any intention of carrying on the business. It was used as a means of transferring from the defendant Company, a substantial corporation,

COURT OF APPEAL

1925

March 3.

JACK v. NANOOSE WELLINGTON COLLIERIES

able to carry out its undertaking, to the shoulders of this thing of straw, its liability to the plaintiff, and at the same time getting from the plaintiff a release of itself, and the assumption by the new company of the liability.

The learned trial judge was not impressed with the plaintiff's evidence. The plaintiff, apparently enraged by the trick that had been played upon him, made most reckless statements on the witness stand, but after reading all his evidence I have come to the conclusion that the man was honest, though hot-headed and intemperate in his expressions and in his evidence. He was very cleverly led on by cross-examining counsel to make those reckless statements, doubtless in the hope of destroying the value of his evidence, a result which was apparently accomplished in the mind of the learned trial judge. Mr. *Davis,* in argument, pointed out that these reckless statements could not have been made from sudden passion upon discovery of the release clause, since it was pleaded in the original defence before the plaintiff had given any evidence at all, but that does not advance the matter to my mind. The plaintiff simply became frenzied, whether from the sudden discovery of the release clause, or from brooding over the fraud that had been perpetrated, and made statements which, it is quite apparent, even to himself on calmer thought, ought never to have been made in the witness box.

MACDONALD, C.J.A.

But I am not driven to rely altogether or even principally upon the plaintiff's evidence. In the circumstances to which I have referred, not a word was said about the release, a vital thing to the parties. The plaintiff's evidence upon this is uncontradicted, and could have been contradicted if untrue, which satisfies me that a deliberate fraud was perpetrated upon him by Coleman.

In the face of this conviction, I cannot do otherwise than declare that the release was not the plaintiff's deed; that it was obtained by fraud, and that if not utterly void, is at least voidable between the parties and ought to be set aside, and that the plaintiff should have the consequential relief for which he asks.

The appeal should be allowed.

GALLIHER, J.A.

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

McPHILLIPS, J.A.: I do not propose to enter into the evidence in detail. I content myself by saying that a careful perusal of it demonstrates beyond the possibility of doubt, in my opinion, with the greatest respect to the learned trial judge, who no doubt did not have the benefit of the elaborate argument which was addressed to this Court, that the respondent had evolved a deliberate and callous scheme of fraud whereby they would as against the non-discerning appellant be excused from a monetary obligation to the plaintiff, *i.e.*, obtain a release from the covenant under the guise of further assurance of the sale theretofore made. The learned counsel for the appellant very ably laid bare this fraud and, swept clear of irrelevant facts, the fraud stands out boldly and patently. It follows that the release as contained in the deed must be declared to be void and of no effect.

The learned counsel for the respondents in a very strenuous argument endeavoured to support the transaction and shew that the circumstances surrounding the transaction failed to establish fraud. The reason given for the execution of the further documents was merely to further effectuate the sale, and it was so stated to the appellant—no mention was made of a release of the covenant. There was a partial statement of the truth. That which was withheld was vital in the interests of the appellant, and changed the whole situation to the serious and monetary disadvantage of the appellant and released the respondent from an existing liability to the appellant. The facts disclose deceit of the gravest kind. Unquestionably the case is one of *suppressio veri,* that which was withheld changed the whole character of the transaction. There was really no need of the further documents as the sale had been effectually made, but the *modus operandi* was the effectuation of a release by this roundabout and colourable scheme. There was here an untrue representation to the appellant as to the effect of the documents, and no mention whatever was made of the release contained therein, and this constitutes fraud (*Hirschfield* v. *London, Brighton and South Coast Railway Co.* (1876), 2 Q.B.D. 1; *West London Commercial Bank* v. *Kitson* (1884), 13 Q.B.D. 360; 53 L.J., Q.B. 345; *Arkwright* v. *Newbold* (1881), 17

COURT OF APPEAL

1925

March 3.

JACK v. NANOOSE WELLINGTON COLLIERIES

MCPHILLIPS, J.A.

Ch. D. 301 at p. 318; *Peek* v. *Gurney* (1873), L.R. 6 H.L. 377 at p. 403, *per* Cairns, L.C.).

The transaction here impeached is one still as between the original parties—there has been no acquirement by third persons of any interest which would be affected by the setting aside thereof and relief given. The fraud here was the *suppressio veri*, as to that part of the writings which granted a release, the documents in the endorsement thereon and throughout being represented as being merely a further assurance only: see *per* Blackburn, J., *Kennedy* v. *Panama &c. Mail Co.* (1867), L.R. 2 Q.B. 587. The circumstances surrounding the execution of the documents here impeached renders it impossible for the respondent to gain any assistance upon the contention that the appellant read the documents. It was but a cursory reading of them, and the very limited education of the appellant has to be borne in mind. It is plain that the appellant acted upon what were the fraudulent misrepresentations of the respondent that it was further assurance only and in conformity only with the terms of sale, and the respondent thereby induced the appellant to execute documents to his detriment, *i.e.*, the giving of a release of which he was wholly unconscious.

The ways of fraud are said to be infinite, and Courts of Equity have studiously refused to concretely define fraud, as it might tend to fetter relief or bring about the denial of justice in proper cases. The present case has unique features, but in my opinion fraud was perpetrated and should be relieved against.

The learned counsel for the respondents, as is customary with him, exhibited great perspicacity in his argument, and intimated that it was apparent that the Court would not appear to be impressed by his client's case. He nevertheless forcefully presented the case of the respondents in all its phases, frankly remarking at the same time that it would be unnecessary to debate the particular form of relief to be granted if the Court should hold in favour of the appellant, that no technical exceptions would be advanced in admittting of the Court granting the relief which the nature of the case required.

It follows in my opinion that a case of fraud has been made

out, the appeal should be allowed, and the consequential relief decreed.

MACDONALD, J.A.: The plaintiff, a brickmaker and a man of little education, after interviews with Mr. Coleman and Mr. Braun, the former managing director and the latter a shareholder in defendant Company, entered into an agreement with the defendant on March 12th, 1921, to lease three acres of ground for a clay-products factory at a monthly rental of $10, said plaintiff to erect thereon a plant for the manufacture of bricks and clay products, the raw material to be purchased from the defendant at specified prices. On the same day the lease was executed. The plaintiff was financed by Mr. Braun in the purchase of the necessary plant and brickmaking machinery, advances being made from time to time to the extent of $17,000 as parts were purchased. To secure Braun the plaintiff in July of the same year executed a chattel mortgage on the plant for $23,000 and as additional security plaintiff's wife signed a mortgage for $4,000 in favour of Mr. Braun on her home property in Vancouver.

On the 11th of August, 1921, an agreement was executed by the plaintiff as vendor and the defendant as purchaser for the sale of the vendor's interests under the two agreements of 12th March (the plant having been erected in the meantime wholly or in part) for $10,000, of which $5,000 was to be paid in cash and the balance in stock of the company to be formed by the defendant with a capital of $100,000. In this agreement the defendant undertook to incorporate a company to take over the lease and brick-plant and to operate it within 90 days. It was further provided that the purchaser (that is, this defendant) should assume and pay the amount due to Mr. Braun under said chattel mortgage and obtain a release and discharge of the mortgage for $4,000 given by plaintiff's wife to the said Braun.

That being the situation, on the 11th of August, Mr. Coleman in October or November met the plaintiff and went with him to a solicitor presumably to carry out the agreement arrived at and get the formation of the company referred to under way. They again went to the solicitor's office in December to com-

COURT OF APPEAL

1925

March 3.

JACK v. NANOOSE WELLINGTON COLLIERIES

plete the transfer and two documents were signed, dated December 22nd, 1921. The parties to the first agreement of this date are the plaintiff as vendor, the defendant and Nanoose Clay Products Limited, the new company. It recited all the prior agreements, the incorporation of the new company, and provided for the transfer by the two first named parties to the new company the rights of the vendor under the agreements of the 12th of March, his interest in the lease and the brickmaking plant and machinery and the benefits accruing to the vendor and the defendant Colliery Company under the agreement of the 11th of August, 1921. This agreement provided consideration to the vendor from the new company by the allotment of shares to the value of $5,000, while the Colliery Company was to receive the sum of $94,980 to be satisfied by the allotment of shares to that amount. It further provided:

"As the residue of the consideration payable for the sale and transfer hereby agreed to be made the Products Company will indemnify and hold harmless the Colliery Company and the vendor from and against all liability on the part of the Colliery Company and the vendor respectively for payment of the liabilities referred to in paragraph 3 of the said agreement of the 11th day of August, 1921, and upon the completion of the said purchase the Colliery Company shall be released from its obligation to the vendor under the said paragraph 3 to pay the chattel mortgage of $23,000 therein referred to."

MACDONALD, J.A.

The second agreement of the same date between the same parties was executed to effectuate the agreement last referred to.

It will be observed that before the transfer to the new company, the plaintiff was the lessee of three acres and the owner of a plant subject to a chattel mortgage to Braun for $23,000, the latter being further secured by the collateral mortgage referred to from the plaintiff's wife. On the 11th of August, when the first step was taken to transfer the plaintiff's interests, he secured a covenant from the defendant, a solvent Company, to assume the chattel mortgage, which, when discharged, would release the mortgage given by his wife. In December the understanding arrived at was perfected with, however, an important addition, *viz.*, that the plaintiff by a release clause lost the defendant's covenant to assume the mortgages referred to and is now confronted with a present liability, particularly distressing in so far as the mortgage given by his wife is concerned.

There is no suggestion any where in the evidence of any discussion covering this particular feature of the agreement. It was not suggested, as some consideration for this release, that the plaintiff already received $5,000 in cash, that the project was, or might prove to be, a failure, that he was wholly or partly responsible for it and might therefore reasonably be expected to give up the protection he obtained by the agreement of August the 11th. The defendant secured practically all the stock in this new company. It was organized in the belief either that it could be successfully operated as a brick-plant, or that, under cover of the necessary transfers, relief could be obtained for the defendant from the obligation referred to without the knowledge of the plaintiff.

The plaintiff undoubtedly signed all the documents referred to, but it is submitted he did not intend to do so in so far as the release is concerned, and it is therefore *non est factum*.

His own evidence is most unsatisfactory, but it does not prevent a true perception of the facts. I think the plaintiff honestly believed that the agreements he signed were of an entirely different character, and that in view of his relianace on Mr. Coleman, who was the dominant figure, in fact the only party who gave instructions to the solicitor, negligence should not be imputed to the plaintiff. As stated in *Bank of Ireland* v. *M'Manamy* (1916), 2 I.R. 161 at p. 173, commenting on *Foster* v. *Mackinnon* (1869), L.R. 4 C.P. 704:

MACDONALD, J.A.

> "Where a party signs a document under a fundamental mistake as to its nature and character, and that mistake is not due to negligence on his part, he is not bound by his signature, upon the ground that there is, in reality, no contract at all binding him on his part."

It is not necessary, however, in this case to rely on this principle, a principle that should be sparingly applied where one not blind nor illiterate seeks to escape from the consequences of his own act in signing a document. I believe there was fraud on the part of Coleman, and I rest my judgment on that ground. *Carlisle and Cumberland Banking Company* v. *Bragg* (1911), 1 K.B. 489 at pp. 493 to 498. He undoubtedly instructed the solicitor to insert this release in the agreement, believing that it would not be discovered by the plaintiff. He believed, and it so transpired, that the plaintiff would not read

COURT OF APPEAL

1925

March 3.

JACK v. NANOOSE WELLINGTON COLLIERIES

the document carefully or if he did read it would not grasp its significance in this respect. There is no ground for imputing fraud to the solicitor; in fact, it was disclaimed in argument. He felt secure in taking instructions from the one man (who, by the way, was a lawyer) capable of intelligently giving them so long as the plaintiff seemingly acquiesced by reading it over or affecting to do so. The solicitor would assume that the details were discussed between them. Apparently they were not; at least there is no evidence of it. The plaintiff had no intention of executing such a release or of giving up the protection he then enjoyed. In the *Bank of Ireland* case the jury did not find fraud. There was a disagreement on that point, yet relief was given. As stated by Mowat, V.C. in *McLaurin* v. *McDonald* (1865), 12 Gr. 82 at p. 85:

> "Where, through the relationship of the parties, or through ignorance, or weakness of understanding, on the part of the one, he or she is incapable of adequately protecting his or her own interests, the improvidence of the transaction may in this Court be fatal to its validity."

MACDONALD, J.A.

However, in my view, the element of fraud existed and Mr. *Davis* conceded that if so the appellant was entitled to relief. To determine it one must keep in mind the circumstances and the relation of the parties. Fraud may be revealed by withholding information or in obtaining an advantage by silence where there is a duty to speak. I am quite convinced that Coleman well knew that the plaintiff was surrendering an important right and also knew that in all probability he would not discover it even if he did read what to him would be a complicated document. He, therefore, fashioned his conduct to procure that result. There is an ominous silence in the evidence on the all important point, *viz.*, discussion between the parties of this particular term in the agreement. Coleman was not asked if he discussed with plaintiff his willingness to give up a perfectly good covenant by the defendant to assume this indebtedness. If he did mention it, and the plaintiff assented, it is inconceivable that such testimony would not be given. He did, however, instruct the solicitor behind the plaintiff's back to insert the release in question. That, while not so stated, is the fair inference from all the evidence.

It was forcibly urged that we have strong findings of fact

against the plaintiff by the learned trial judge. The plaintiff did not impress his Lordship as being ignorant or illiterate, but did impress him as being wholly unreliable. I am drawing inferences, however, from facts about which there can be no dispute and from surrounding circumstances which are reasonably clear. The case does not turn on the credibility of witnesses, but rather on circumstances. I think, with respect too, that the learned trial judge misconceived, to some extent, the situation. He states that the main point relied upon was that the plaintiff was induced by the fraud of Coleman and the solicitor to enter into the agreement in question and wholly failed to establish any such case. The case, as disclosed by the evidence, however, shews fraud on the part of Coleman only, and it was a misconception to view it otherwise. The judicial eye should have been focussed on Coleman alone. I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *A. C. Brydon-Jack.*
Solicitor for respondent: *Ghent Davis.*

COURT OF APPEAL

1925

March 3.

COOIL v. CLARKSON

COOIL v. CLARKSON.

Mortgage—Misrepresentation—Signature to mortgage so obtained—Plea of non est factum—Estoppel.

The defendant desiring to purchase a property asked S. for a loan. S. agreed to advance the money and to act for the parties in carrying out the sale. S. then without defendant's knowledge obtained the necessary money from the plaintiff undertaking to have the purchaser execute a mortgage on the property to be purchased in his favour for the amount loaned when the purchase was completed. S. carried through the sale and submitted a mortgage deed to the defendant for his signature which he signed on S.'s representation that it was merely an acknowledgment of the receipt of the money loaned by S. the defendant thinking he advanced it. S. without registering the mortgage put it away and did not deliver it to the plaintiff. The defendant later made two payments to S. on account of the loan and shortly after this S. disappeared without accounting to the plaintiff for the money paid him. An action by the mortgagee to recover the mortgage money was dismissed.

Held, on appeal, affirming the decision of BARKER, Co. J. (GALLIHER and MCPHILLIPS, JJ.A. dissenting), that the plaintiff having put in evidence the defendant's examination for discovery it has the seal of his approval and this evidence disclosed that the defendant was induced to sign the mortgage by the fraudulent representation of a person other than the mortgagee that the deed was not a mortgage, and the defendant is not estopped from denying that it is his deed unless he owed a duty to the mortgagee; as there were no relations of any kind between the defendant and the mortgagee there can be no such duty and the appeal should be dismissed.

Statement

APPEAL by plaintiff from the decision of BARKER, Co. J. of the 1st of November, 1924, in an action to recover principal and interest on a mortgage, of the 21st of December, 1923, given to secure $300 with interest at 8 per cent., payable quarterly. The mortgage provided that in case of default in payment of principal or interest when due principal and interest shall then become due and payable. The interest due on the 21st of March and the 21st of June, 1924, was not paid and the plaintiff on the 10th of September, 1924, brought action to recover principal and interest. The facts are that Clarkson, wanting to purchase a property from one Arents for $550, had

to borrow $300 to make up this sum. The purchase was carried out for both parties by one Stewart, a Ladysmith broker, who on Clarkson's behalf borrowed $300 from Cooil on the understanding that a mortgage would be executed in his favour on the property to be purchased to secure the loan with interest at 8 per cent. Stewart carried out the sale and had Clarkson execute the mortgage as stipulated. Clarkson paid Stewart $100 on account of the mortgage on the 29th of December, 1923, and another $100 on the 23rd of February, 1924. These two sums Stewart did not pay to Cooil and shortly after the second payment he disappeared. On the trial counsel for the plaintiff put in the defendant's examination for discovery. The defendant said he trusted Stewart, that he signed the mortgage thinking that the $300 was advanced by Stewart himself and that he did not know Cooil in the transaction at all until after Stewart disappeared.

Statement

The appeal was argued at Victoria on the 23rd and 26th of January, 1925, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

R. O. D. Harvey, for appellant: The defendant received $300 from the plaintiff for which he executed a mortgage and he is estopped from denying liability: see Halsbury's Laws of England, Vol. 13, p. 366, par. 509. As to mistake see paragraph 519 of the same volume.

[He was stopped by the Court.]

Arthur Leighton, for respondent: The mortgage was never delivered to Cooil until after Stewart disappeared, when it was handed over by the curator of Stewart's effects. As to the mortgage we plead *non est factum.* He understood from Stewart that the document was an acknowledgment of the receipt of $300 from Stewart and he did not know of Cooil in the transaction: see *Foster* v. *Mackinnon* (1869), 38 L.J., C.P. 310 at p. 315. The defendant's evidence as to this must be accepted as it is put in by the plaintiff. As to *non est factum* see also *Staffordshire Financial Co. (Lim.)* v. *Hill* (1909), 53 Sol. Jo. 446. The mortgage was never delivered: see *Carlisle and Cumberland Banking Company* v. *Bragg* (1911), 1 K.B. 489 at pp. 493 and 495; Addison on Contracts, 11th Ed., 18;

Argument

COURT OF APPEAL

1925

March 3.

COOIL v. CLARKSON

Howatson v. *Webb* (1908), 1 Ch. 1; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459. On the effect of plaintiff putting in defendant's evidence taken on discovery see *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263 at p. 267. Estoppel by negligence does not apply here: see Halsbury's Laws of England, Vol. 13, p. 398.

Harvey, in reply: Cooil advanced the $300 and is entitled to the security. Defendant is estopped by the deed: see *Bowman* v. *Taylor* (1834), 2 A. & E. 278 at p. 291; *Bateman* v. *Hunt* (1904), 2 K.B. 530; Addison's Law of Contracts, 11th Ed., 18; *Sharington* v. *Strotton* (1564), 1 Plowd. 298 at p. 309; *Foster* v. *Mackinnon* (1869), L.R. 4 C.P. 704; Bigelow on Estoppel, 5th Ed., 332; *King* v. *Smith* (1900), 2 Ch. 425; *Hunter* v. *Walters* (1871), 7 Chy. App. 75 at pp. 87-8. On the question of mistake see Halsbury's Laws of England, Vol. 7, p. 354, par. 732; *Kelly* v. *Enderton* (1912), 2 W.W.R. 453; *Bell* v. *Macklin* (1887), 15 S.C.R. 576; *Letourneau* v. *Carbonneau* (1904), 35 S.C.R. 110 at p. 111. When he is negligent even although ignorant he is bound by the deed: see *Macdonald* v. *Bank of Vancouver* (1915), 22 B.C. 310; Caspersz on Estoppel, 4th Ed., 320; *Deo Narain Rai* v. *Kukur Bind* (1902), 24 All. 319; *Shannon* v. *Smith* (1922), 69 D.L.R. 291. Where there are two innocent parties the one who makes a mistake must suffer.

Argument

Cur. adv. vult.

3rd March, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The facts upon which this appeal must be decided are not in dispute, they are contained in the defendant's examination for discovery, which was put in by the plaintiff's counsel, and has, therefore, the seal of the plaintiff's approval.

This evidence makes it quite clear that Stewart, and he only, was the lender and the plaintiff the borrower of the money required to make up the balance of the cash payment, *viz.,* $300.

Stewart said to defendant:

"I will put the money [the balance] up and you will pay me.

"Did he not tell you he would get the money? No."

And again, when pressed, he said:

"Did he just say 'It is alright. I will get the money'? 'I will put the money up.'"

Turning then to what Stewart did. Without the knowledge of the defendant, he obtained the $300 from the plaintiff, from whom he had on other occasions received advances for customers. The defendant had no knowledge of the plaintiff in the transaction whatever. Shortly afterwards, within a few days, Stewart called the defendant into his office and asked him to sign a document:

"What did he tell you? 'I want you to sign this agreement for the $300 I put up.' I said 'All right.' He told me it was an agreement for the $300 he was laying out, and he wanted my signature on it, and he said it would be 8 per cent. He told me as soon as I said '8 per cent.' 'Yes,' he said, '8 per cent.' 'Well,' I said, 'the sooner I pay it up the better.' It was only a week later I had a $100 coming and I paid it."

He gave a receipt in his own name which was produced at the trial. Subsequently defendant paid to Stewart a further sum of $100, after which Stewart absconded.

It then turned out that the document signed by defendant was a mortgage in favour of the plaintiff, who brought this action to recover the $300 and interest.

MACDONALD, C.J.A.

At the time plaintiff parted with his money, no act of the defendant induced him to do so; at the time of the signing of the document, defendant had no knowledge of the plaintiff or of his advance to Stewart; the defendant and Stewart were principals in respect of the loan. Now in these circumstances the mortgage was not the deed of the defendant, since he never intended to make it such; he never intended to make any contract with the plaintiff, nor did he intend to make a mortgage to any one. But it was argued, that the defendant is estopped from alleging that it was not his deed; that his failure to read the instrument was negligence, and that therefore he is estopped from asserting that it is not his deed. There is, however, no element of estoppel. The defendant owed no duty to the plaintiff, and he must have been under such duty to be estopped. The rule which has been applied to negotiable instruments is not applicable to a deed, as will be shewn presently, but if it were, there could still be no estoppel since the defendant did not place Stewart in the position of using this mortgage

COURT OF APPEAL

1925

March 3.

COOIL v. CLARKSON

to obtain an advance of the money on the faith of it, since the money had already been advanced.

It is unnecessary to refer to the earlier authorities. They support in general the respondent's case. The most recent authority, and one which covers this case is *Carlisle and Cumberland Banking Company* v. *Bragg* (1911), 1 K.B. 489. In that case the Court of Appeal laid it down that in the signing of a deed, unlike in the making of a negotiable instrument, negligence is immaterial; that where a person is induced by fraud to sign a document which is represented to be one thing, whereas it is another, the instrument so signed is not the signor's deed; that there can be no estoppel unless the defendant can be said to have owed a duty to the plaintiff; that as he was under no duty to the plaintiff in the matter, the proximate cause of the plaintiff's loss was the fraudulent action of R. and not the defendant's supposed negligence. Vaughan Williams, L.J., at p. 493, said:

"The jury were asked: 'Was the defendant induced to sign the guarantee by the fraud of Rigg?' They answered that he was. They then were asked: 'Did the defendant know that the document which he signed was a guarantee?' They answered in the negative. It seems to me that on those findings alone the defendant would be entitled to say in respect of this guarantee that it was not, in contemplation of law, signed by him."

MACDONALD, C.J.A.

Then again, at p. 494:

"The only other thing which I wish to say is on the question of negligence. I do not know whether the jury understood that there could be no material negligence unless there was a duty on the defendant towards the plaintiffs. Even if they did understand that, in my opinion, in the case of this instrument, the signature to which was obtained by fraud, and which was not a negotiable instrument, Pickford, J. was right in saying that the finding of negligence was immaterial."

Buckley and Kennedy, L.JJ. were of the same opinion.

Therefore, even if it were to be assumed, which I think it cannot be, that defendant was negligent in not reading the document, and accepting Stewart's explanation of it, yet as he owed no duty to the plaintiff, that fact cannot be relied upon as an estoppel against his denying that the deed in law is his deed.

I have not overlooked the authorities which were submitted by Mr. *Harvey,* who presented his case very well indeed, but these authorities have, in my view of the case, no bearing on the facts.

The appeal should be dismissed.

GALLIHER, J.A.: The Court being, as I understand, equally divided, the appeal herein fails. My own view is that it should succeed. The strongest case in respondent's favour seems to me to be *Carlisle and Cumberland Banking Company* v. *Bragg* (1911), 1 K.B. 489. The facts in the case at Bar, in my opinion, distinguish it from that case.

It will serve no purpose to deal with those facts (as I am in no way impugning the principle in the *Carlisle* case as applied to the facts there), particularly as my judgment must be regarded as a dissenting judgment and does not alter the result.

GALLIHER, J.A.

McPHILLIPS, J.A.: This appeal brings into review a very simple set of facts. The respondent desired to purchase a certain piece of land having a house thereon and came into contact with the owner of the property, one Arents. The purchase price was $550. The respondent had $250 in cash but not the balance, *viz.*, $300. One Stewart, a broker and real estate agent at Ladysmith, well known to the respondent, was acting for Arents and also acting for the respondent in the carrying out of the sale and purchase. Stewart said to the respondent that he would get the money or arrange matters so that the transaction would go through. Stewart went to the appellant and explained matters and got the necessary $300 from the appellant. Stewart was undoubtedly the respondent's agent to get the needed $300, and Stewart stated to the appellant that he would be given a mortgage upon the land to secure the $300. The respondent put up $250 in cash, paying same to Stewart, and Stewart obtained the $300 from the appellant and presented a mortgage in the appellant's favour for the respondent to sign, charged upon the land purchased from Arents by the respondent. The respondent signed the mortgage which is regular in form and under seal, and has thereon the usual notarial certificate shewing the execution and delivery of the same. The respondent is pleased to say that he never read the document and merely signed a writing presented to him by Stewart to acknowledge having received from Stewart $300 and that he understood he borrowed the money, *viz.*, the $300 from Stewart. The respondent is not an illiterate man. This account

MCPHILLIPS, J.A.

COURT OF APPEAL

1925

March 3.

COOIL v. CLARKSON

is too improbable to believe—he must have known how the whole transaction was to be carried out. In any case, Stewart was his agent and he (the respondent) is bound by all that Stewart was reasonably entitled to do in obtaining the $300 for him, so as to admit of the transaction being carried through. It is to be observed that during the trial of the action the learned trial judge made certain observations that, if adhered to by the learned trial judge, would have resulted in judgment being given for the appellant, the mortgagee, which, with great respect, in my opinion, would have been the proper judgment. The following is an excerpt from the evidence of the appellant, and certain observations made by BARKER, Co. J., the learned trial judge: [After setting out the evidence at length the learned judge continued].

It is clear to demonstration that Stewart was the respondent's agent in getting the $300. The appellant issued a cheque for $300 payable to Stewart, and this cheque was endorsed by Stewart to Arents, the vendor of the property, who conveyed the same to the respondent, and the respondent executed and delivered the mortgage for $300 to the appellant, the mortgage previously referred to, and which was sued upon in the action, the vendor in this way receiving the whole purchase price of $550. The following are two receipts given by Stewart to the respondent, being claimed repayments to the extent of $200 in respect of the loan, asserted by the respondent to be a loan from Stewart to him, the respondent wholly repudiating the mortgage, admitting, though, that he signed an agreement which he thought was made with Stewart covering an advance of $300. What he really did sign was the mortgage and he cannot now be admitted to say that it is not his deed. It is plainly a case of estoppel, and there was no authority from the appellant to the respondent admitting of Stewart receiving any of the moneys payable under and by virtue of the mortgage executed by the respondent as mortgagor in favour of the appellant as mortgagee. The receipts read as follows: [The learned judge here set out the receipts and continued].

MCPHILLIPS, J.A.

It would appear that Stewart has disappeared from Ladysmith and no trace of him can be found. Whether he met with

foul play or is voluntarily absent it is impossible to say. In any case the payments made to Stewart by the respondent can only be viewed as payments made by the respondent to his own agent. He was not the agent for the appellant, the mortgagee, and these payments cannot be deemed to be payments to the appellant, the mortgagee. The contention put forward in the present case would be destructive of all safety in business affairs. There was absolutely no authority in Stewart to receive these moneys, and further, if there was any fraud perpetrated whereby the respondent executed a mortgage to the appellant rather than a security of some nature or kind that he thought he was giving to Stewart, then it was the fraud of the respondent's own agent that caused him injury, and the fraud of his own agent cannot be invoked to discharge himself or be released from the covenants in a mortgage purporting to be solemnly executed by the respondent as mortgagor to the appellant as mortgagee.

An examination of the authorities proves conclusively that upon the facts of the present case it is quite impossible for the respondent to escape liability upon the mortgage which admittedly he signed as mortgagor, but as he claims not reading it and thinking it to be a security given to Stewart, if this was the fact, then the fault was that of the respondent and the consequence of such fault cannot be imposed upon the appellant, the innocent mortgagee, who in good faith advanced his money at the request and upon the representation of Stewart, the agent for the respondent. In *Henderson & Co.* v. *Williams* (1895), 1 Q.B. 521, Lord Halsbury at pp. 528-9 said:

MCPHILLIPS, J.A.

"I think that it is not undesirable to refer to an American authority, which, I observe, was quoted in the case of *Kingsford* v. *Merry* [(1856)], 1 H. & N. 503, *Root* v. *French* [(1835)], 13 Wend. 570, and see Kent's Comm. ii. 514, in which, in the Supreme Court of New York, Savage, C.J. makes observations which seem to me to be well worthy of consideration. Speaking of a *bona fide* purchaser who has purchased property from a fraudulent vendee and given value for it, he says: 'He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer, who by his indiscretion, has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the usual course of trade materially rests.'"

Here we have Stewart, acting as the agent for the respondent,

COURT OF APPEAL

1925

March 3.

COOIL v. CLARKSON

preparing the mortgage which he had, acting as the agent for the respondent, agreed to give the appellant upon the land which had been purchased by the respondent from Arents, $300 of the purchase-money being supplied by the appellant.

Then as to the $200 paid on account of the mortgage to Stewart, the mere fact that Stewart had prepared the mortgage and attended to the execution of it in no way entitled the respondent to make payments in respect of the mortgage to Stewart. It may be said that the current of the authorities in recent times is uniform; that even in the case of a solicitor there is no power in the solicitor for the mortgagee to receive either the principal or the interest of the mortgage debt and the possession of the security in no way assists or authorizes payment to him (*Jared* v. *Walke* (1902), 18 T.L.R. 569). I am thoroughly satisfied that the respondent fails upon the defence set up of *non est factum*. Here we have the respondent, according to his own story, negligently failing to read the writing. He signs it and now discovers it to be a mortgage, and in so doing acts upon the suggestion and request of his own agent. He could have satisfied himself as to the contents of the deed he signed, but did not do so. The appellant is the person who advanced the $300 which was a portion of the money that completed the purchase of the land from Arents, and the payment of the money enured to the advantage of the respondent. The appellant, if he had to meet this state of facts, is one who innocently acted upon the faith of the mortgage being valid, and it is impossible for the respondent to be relieved of his liability upon the mortgage and the appellant be allowed to suffer the loss of his money (*Hunter* v. *Walters* (1871), 7 Chy. App. 75, *per* Mellish, L.J. at p. 87; *Howatson* v. *Webb* (1908), 1 Ch. 1). I have no hesitation whatever, in entirely rejecting the case put forward by the learned counsel for the respondent in support of the judgment under appeal. In my opinion, the judgment, with great respect to the learned trial judge, is wholly wrong and should be set aside. I would allow the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.

MACDONALD, J.A.: As between the plaintiff and the defend-

ant the element of fraud is lacking in this case. The fraud was on the part of a third party, Stewart, who by representing that he was advancing $300 of his own money on behalf of the defendant (whereas it was plaintiff's money) obtained a mortgage from said defendant in favour of the plaintiff, the former believing that he was signing an agreement to repay Stewart and acting on that belief to the extent of repaying Stewart $200 on account. The defendant at no material time had any knowledge of the plaintiff in the transaction. The plaintiff, on the other hand, advanced the $300 to Stewart knowing that it was to be applied on defendant's behalf and that to secure him a mortgage would be taken from defendant in his favour.

The evidence shews that the defendant signed the mortgage without reading it on the fraudulent representation by Stewart that it was not a mortgage but rather an agreement with Stewart to secure repayment with interest at 8 per cent. These facts are as firmly established by the evidence on the record as if a jury had so found.

On these facts what is the law applicable? It is true that when one enters into a solmen undertaking by deed under seal one is not permitted to deny any matter therein asserted. That is a rule of evidence of so conclusive a nature that it will not admit of contradiction. But there are exceptions to the rule. If a deed is obtained by fraud no quesion of estoppel arises. It may be executed also under circumstaces that will justify the plea *non est factum*. The difficulty arises where a signor, not illiterate, might in spite of the intended fraud by simple means, have satisfied himself as to the contents of the document and not by negligently executing it cause an innocent party to suffer. If, however, negligence is an element in this case, it can only be on the question of estoppel as pointed out by Buckley, L.J. in *Carlisle and Cumberland Banking Company* v. *Bragg* (1911), 1 K.B. 489 at p. 495:

MACDONALD, J.A.

"Negligence has nothing to do with the question whether the deed is in fact the deed of the defendant. Negligence has only to do with the question of estoppel."

On the question of estoppel, other considerations arise. It was not the defendant's negligence in not reading the document

COURT OF APPEAL

1925

March 3.

COOIL v. CLARKSON

that caused loss to the plaintiff. He advanced the money to Stewart before the mortgage was signed. The plaintiff was not induced to part with his money by any act negligent or otherwise on the part of the defendant. Had the defendant armed Stewart with an executed document, on the faith of which the plaintiff was induced to part with his money, the situation would be very different. That is not this case. In the judgment quoted above Buckley, L.J. discussing estoppel says at pp. 496-7:

"The defendant did not owe any duty to the plaintiffs, and the act of the defendant was not the act which involved the plaintiffs in loss. What involved the plaintiffs in loss was the act of Rigg, a rogue, who obtained from the defendant his signature to an instrument which he never intended to sign, and, having thus defrauded the defendant proceeded to do another act which was what caused the plaintiffs loss."

That is this case, except that Stewart obtained the money from the plaintiff before he procured the defendant's signature to the mortgage. That circumstance, however, does not affect the principle. The defendant on the facts disclosed in evidence owed no duty to the plaintiff.

MACDONALD, J.A.

"Before any one can be estopped by a representation inferred from negligent conduct, there must be a duty to use due care towards the party misled":

Halsbury's Laws of England, Vol. 13, p. 398.

Howatson v. *Webb* (1908), 1 Ch. 1 was referred to in support of the appellant's contention. The facts, however, as set out in the report of the trial in (1907), 1 Ch. 537, and the judgment of Warrington, J., which was sustained on appeal, disclose a clear distinction. It is pointed out at p. 549 that "the misrepresentation was as to the contents of the deed, and not as to the character and class of the deed." Here the fraudulent representation by Stewart to the defendant was "this is an agreement between you and me for the repayment of $300 advanced by me," whereas it was not a document of that character or class at all. It was in fact a mortgage to the plaintiff. In the *Howatson* case, too, the mortgage deed was subsequently assigned to an innocent holder for value.

It was submitted that of two innocent parties the defendant should suffer owing to his alleged negligence in not reading and

ascertaining the contents of the mortgage signed by him. That is not, however, an element in these cases.

I would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

COURT OF APPEAL

1925

March 3.

COOIL v. CLARKSON

Solicitor for appellant: *Robert O. D. Harvey.*

Solicitors for respondent: *Leighton & Meakin.*

THE SPEEDWAY.

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

1925

Feb. 2.

THE SPEEDWAY

Admiralty law—Practice—Sale of ship—Balance to credit of ship after payment of claim—Application for payment out by assignee of owner—Suspicious circumstances—Publication of application first required.

A ship having been arrested to answer a claim for wages, judgment was entered against her for $2,925. She was ordered to be sold by the marshal and after payment of all costs and charges there remained in Court a balance of $36,709 to the credit of the ship. On an application for payment out by a resident of Vancouver who claimed to be the assignee of the reputed owner who lived in California:—

Held, that in the unusual circumstances the application should be adjourned and before being again heard the application should be published in Victoria and Vancouver by notice and advertisement for one month, the notice to be posted in the registry and served upon the collector of customs and the American Consul at Vancouver.

APPLICATION for payment out of the balance in Court standing to the credit of the ship. On the 22nd of October, 1924, the ship was arrested at Vancouver to answer a claim for wages by one Sinclair, and on the 19th of November following judgment was entered against her for $2,925 and she was ordered to be sold by the marshal, which was done, and after the sale and payment of all costs and charges there remained in Court a balance of $36,709 to the credit of the ship: no appearance had been entered for her in the action, nor did any one appear on her behalf at the trial. Subsequently an *ex parte* application was made to the judge on behalf of a resident of

Statement

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

1925

Feb. 2.

THE SPEEDWAY

Statement

Vancouver, who claimed to be the assignee of the reputed owner, Harry C. Wilson, of Los Angeles, California, and documents were submitted in support of the claim. The learned judge, however, was not satisfied with the proof adduced, and, moreover, having regard to the unusual circumstances, adjourned the application to the 2nd of February, 1925, and directed that due notice of it should be published for one month in newspapers published in Victoria and Vancouver by notice and advertisement to be settled by the registrar, and that the notice should be posted in the registry and served upon the collector of customs at Vancouver and the American Consul at that port. Heard by MARTIN, Lo. J.A. in Chambers at Victoria on the 2nd of February, 1925.

Argument

Haskins, moved for payment out to the alleged owner, the said Wilson, and supported his motion by affidavits of compliance with the said directions, by the certificate of the registrar as to the balance in Court free of all claims; and by documents of title to the vessel clear of all incumbrances.

No one *contra.*

Judgment

MARTIN, Lo. J.A.: Having regard to the very unusual, not to say suspicious, circumstances of this case, *viz.,* that no owner appeared on behalf of the ship though her value was greatly in excess of the relatively small claim against her; that from the evidence at the trial it was more than probable that she had been engaged in unlawful liquor traffic; and that the assignment first relied upon was of doubtful authenticity and might well be a means to escape from the just claims of creditors by means of an unduly expeditious application to obtain the money in Court to the ship's credit, I deemed it advisable to proceed with due caution and require public and special notice to be given to prevent any advantage being taken of the Court or possible creditors, and also that strict proof of ownership be adduced. These objects have now been accomplished, and as no reason appears why the application should not be granted, an order will issue for payment out as prayed.

Application granted.

HUGHES AND HUGHES v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

COURT OF APPEAL

1925

March 3.

HUGHES v. B.C. ELECTRIC RY. CO.

Practice—Action in County Court—Standing generally for more than one year—Order II., r. 50 of County Court Rules—Effect of—Application for reinstatement of action—County Courts Act, Sec. 77—Marginal rules (Supreme Court) 187 and 973.

Order II., r. 50 of the County Court Rules provides that "where any cause or matter shall have been standing for one year in the plaint and procedure book marked as 'abated,' or standing over generally, such cause or matter at the expiration of the year shall be struck out of the plaint and procedure book."

After an action in the County Court had been standing over generally for more than a year an order was made by a County judge reinstating the action and transferring it to the Supreme Court.

Held, on appeal, reversing the order of GRANT, Co. J., that where no step has been taken in a County Court action for more than a year the action is dead and cannot be reinstated.

APPEAL by defendant Company from the order of GRANT, Co. J. of the 1st of December, 1924, on the application of the plaintiffs, reinstating the action notwithstanding Order II., r. 50, of the County Court Rules and transferring the same to the Supreme Court. The action was commenced in the County Court on the 25th of May, 1922, and notice of day to fix date of trial was given on the 10th of June, 1922, but owing to the plaintiff's illness the trial had to be adjourned. No further step was taken in the action until the above application was made for reinstatement and transferring same to the Supreme Court. The ground given for the delay was the continued illness of the plaintiff largely owing to the injury sustained through the alleged negligence of the defendant Company and for which the action was brought. The main ground of appeal was that Order II., r. 50, of the County Court Rules, 1914, shews that there was not in existence in the County Court of Vancouver any such plaint as *Hughes* v. *British Columbia Electric Railway Company, Limited* at the time the said order of GRANT, Co. J. was made as the material shews that the said

Statement

COURT OF APPEAL

1925

March 3.

HUGHES v. B.C. ELECTRIC RY. CO.

action had been standing generally for more than a year before the motion was made and under Order II., r. 50, the plaint should be deemed by the Court to have been struck out of the plaint book prior to the said motion having been made, therefore the action was dead at the time when the motion to reinstate and remove was made, and there was nothing to remove to the Supreme Court.

The appeal was argued at Victoria on the 26th of January, 1925, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

McPhillips, K.C., for appellant: The learned County judge had no power to reinstate the action when he did as long before the plaint was struck out under County Court Order II., r. 50. Under this rule when any cause or matter shall have been standing over generally for one year such cause or matter at the expiration of the year shall be struck out of the plaint and procedure book. The action had been standing for over two years without any action whatever being taken. The plaint was *ipso facto* struck out and he applied on the assumption that it was struck out. There is no rule or statute that enables a judge to put a case back after it has been struck out. They say under section 77 of the County Courts Act the Supreme Court Rules apply but we say they do not apply.

Argument

Banton, for respondent: Order II., r. 50, is the same as marginal rule 187 of the Supreme Court Rules. We can rely on section 77 of the County Courts Act, and we can give notice of motion under marginal rule 973 of the Supreme Court Rules. In fact the action was never struck out or abated. An application must be made to strike out after the year has expired: see *Le Blond* v. *Curtis* (1885), 33 W.R. 561, where the case was struck out and the plaintiff successfully applied for reinstatement.

McPhillips, in reply: Marginal rule 187 is qualified by rule 186 so that it is not the same as the County Court rule: see *Bailey* v. *Granite Quarries* (1913), 18 B.C. 149.

Cur. adv. vult.

3rd March, 1925.

MACDONALD, C.J.A.: County Court Rule 50, Order II., reads as follows:

"Where any cause or matter shall have been standing for one year in the plaint and procedure book marked as 'abated,' or standing over generally, such cause or matter at the expiration of the year shall be struck out of the plaint and procedure book."

This was an action in the County Court in which no steps had been taken for more than a year. Application was then made to a County Court judge, although apparently the cause had not been actually struck out of the book, to reinstate it, and to transfer it to the Supreme Court, which order was made and is the one now appealed from.

There is a similar rule in the Supreme Court, but there is an additional rule there providing that where no step has been taken in the cause for a year, no step can thereafter be taken unless notice is given and a certain time allowed to elapse. Therefore, when construing the Supreme Court rules, one must construe these together, and of course, would have to come to the conclusion that notwithstanding the lapse of a year, in the absence of either an order of or an act of the registrar striking out the cause, it would continue. This, of course, is merely a matter of construction.

MACDONALD, C.J.A.

Coming back then to the County Court rule, we find no rule corresponding to the second Supreme Court rule above mentioned. The learned judge has held under section 77 of the County Courts Act, that he was entitled to resort to the Supreme Court rule in the absence of one in the County Court. Whether that be true or not, I need not decide, since it has nothing to do with the case.

As I have said, the matter is one of construction, and I think that effect must be given to the County Court rule, standing as it does alone, without any key to its meaning, such as exists in the Supreme Court.

The action dies at the end of the year. I think it may be struck out by the registrar, or if an order of a judge were necessary, only one order could be made by him; that is to say, an order striking it out.

The appeal should be allowed.

COURT OF APPEAL

1925

March 3.

HUGHES v. B.C. ELECTRIC RY. CO.

GALLIHER, J.A.: I agree in allowing the appeal.

MCPHILLIPS, J.A.: I would allow the appeal.

MACDONALD, J.A.: I agree in allowing the appeal.

Appeal allowed.

Solicitor for appellant: *L. G. McPhillips.*
Solicitor for respondent: *W. E. Banton.*

COURT OF APPEAL

1925

March 3.

F. W. WOOLWORTH CO. LTD. v. POOLEY

F. W. WOOLWORTH CO. LIMITED v. POOLEY *ET AL.*

Practice—Application in chambers in three distinct matters—Marginal rule 742—One summons and one order—Application granted in one matter and refused in two—Taking benefit under successful matter—Right of appeal in others.

Sale of land—Action for rescission against trustees—Examination for discovery—Person entitled to rents and profits for life—"Person for whose immediate benefit"—Interpretation—Marginal rules 370d and 704.

The plaintiff on an application in chambers acting under marginal rule 742 included three separate matters in one summons, namely, (a) to examine a party for discovery; (b) to obtain further production of documents; (c) to amend the statement of claim; (a) and (b) were refused but (c) was granted and one order disposing of the three matters was taken out and entered. The plaintiff amended his statement of claim pursuant to the order and appealed in respect to the other two matters. On preliminary objection that he took a benefit under the order by amending his statement of claim which destroyed the right of appeal:—

Held, that taking the benefit under the order by amending the statement of claim had no relation to and was not dependent upon the disposition of the other two matters and was not a bar to the appeal.

The trustees under a will sold two certain lots belonging to the estate. The purchasers brought action against the executors and trustees for rescission and against their solicitors for damages alleging fraud on the part of the defendants in carrying out the sale. An application by the plaintiff under marginal rule 370d to examine F. for discovery who as a beneficiary was entitled to the rents and profits of the property for life but was not a party to the action, was refused.

Held, on appeal, affirming the order of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that on the facts she is not "a person for whose immediate benefit" the action was defended and is not subject to examination for discovery.

COURT OF APPEAL

1925

March 3.

F. W. WOOLWORTH CO. LTD. *v.* POOLEY

APPEAL by plaintiff from the order of GREGORY, J. of the 13th of January, 1925, dismissing the plaintiff's application that the plaintiff be at liberty to examine Beatrice Alma Ashley Furber for discovery, and that the defendants file further affidavits of documents. The action was against the executors and trustees of the estate of Forbes George Vernon, deceased, for an accounting of $140,000 paid by the plaintiff to the defendants for lots 418-9 Victoria City and for damages against the defendants Pooley and Luxton for non-disclosure of the interest of the defendants in said lots and concealment of the relationship of the defendants among themselves and to the said executors and trustees. Mrs. Furber who is the daughter of deceased is entitled as beneficiary to the rents and profits of the lots for life. Of the three matters applied for before GREGORY, J. the application to amend the statement of claim was granted. Preliminary objection was taken by the respondent that as the plaintiff had taken the benefit of the order in respect of the amendment of the statement of claim the appeal should be quashed.

Statement

The appeal was argued at Victoria on the 27th and 28th of January, 1925, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, and *J. R. Green*, for appellant.

Harold B. Robertson, K.C., for respondents, took the preliminary objection that as appellant had taken the benefit of what was granted in the order appealed from the appeal should be quashed: see *Spencer* v. *Cowan* (1896), 5 B.C. 151; *Atlas Record Co. Ltd.* v. *Cope & Son, Ltd.* (1922), 31 B.C. 432; *Videan* v. *Westover* (1897), 29 Ont. 1 at p. 6 (note); *Wright* v. *Beatty* (1911), 1 W.W.R. 220. The English cases are *Giraud* v. *Austen* (1842), 1 D. (N.S.) 703 at p. 704; *Hayward* v. *Duff* (1862), 12 C.B. (N.S.) 364; *Wilcox* v. *Odden* (1864), 15 C.B. (N.S.) 837.

Argument

COURT OF APPEAL

1925

March 3.

F. W. WOOLWORTH CO. LTD. v. POOLEY

Mayers, contra: There were three matters entirely distinct but under marginal rule 742 were all brought on one motion. This is really three distinct orders: see *International Wrecking Co.* v. *Lobb* (1887), 12 Pr. 207; *Clarke* v. *Creighton* (1890), 14 Pr. 100. The different matters were not in any way dependent on one another.

Robertson, in reply, referred to *Phillips* v. *Corporation of City of Belleville* (1905), 10 O.L.R. 178.

Mayers, on the merits: Mrs. Furber is the person for whose benefit the action is defended being the sole beneficiary. Jones and Luxton were the trustees for the estate and Pooley & Luxton advised the purchasers as to the value of the property. We claim rescission and damages against the estate. As to introducing new evidence without any notice see *Royal Bank of Canada* v. *Pacific Bottling Works* (1916), 23 B.C. 463 at p. 464. On the examination of Mrs. Furber for discovery see *Isitt* v. *Hammond* (1924), 34 B.C. 133. She gets the benefit of the litigation and is subject to examination: see marginal rule 370d; *Macdonald* v. *Norwich Union Ins. Co.* (1884), 10 Pr. 462; *Tollemache* v. *Hobson* (1897), 5 B.C. 214 was decided under rule 704: see also *Garland* v. *Clarkson* (1905), 9 O.L.R. 281; *Stow* v. *Currie* (1909), 14 O.W.R. 223; *Trusts and Guarantee Co.* v. *Smith* (1915), 33 O.L.R. 155; *Argles* v. *Pollock* (1917), 12 O.W.N. 158; *Patterson* v. *Toronto General Trusts Corporation* (1918), 15 O.W.N. 42; *Holmested's* Ontario Judicature Act, 4th Ed., 812, and cases there referred to. Anyone mainly interested in the result may be examined: see *Willis & Co.* v. *Baddeley* (1892), 2 Q.B. 324. There is no distinction between disclosing documents and disclosing facts. That we are entitled to an order for further and better affidavits see *British Association of Glass Bottle Manufacturers, Limited* v. *Nettlefold* (1912), 1 K.B. 369 at p. 374; *Compagnie Financiere du Pacifique* v. *Peruvian Guano Co.* (1882), 11 Q.B.D. 55 at p. 62; *Lyell* v. *Kennedy* (1884), 27 Ch. D. 1 at p. 20; *Ormerod, Grierson, & Co.* v. *St. George's Ironworks Lim.* (1906), 95 L.T. 694 at p. 696.

Argument

Robertson: We submit that Mrs. Furber does not come under marginal rule 370d. The action is not defended for her

"immediate benefit." She is not the owner. She cannot dispose of the property, she merely has a life interest. The correctness of the decision in *Macdonald* v. *Norwich Union Ins. Co.* (1884), 10 Pr. 462 is questioned by some of the Ontario judges: see *Trusts and Guarantee Co.* v. *Smith* (1915), 33 O.L.R. 155; *Johnston* v. *McIntosh* (1883), 3 C.L.T. 313; *Beaton* v. *Globe Printing Co.* (1894), 16 Pr. 281. On the interpretation of "immediate benefit" see Words and Phrases, Vol. 2, p. 946; Oxford Dictionary, Vol. 5, p. 63. As to further affidavits on production they have already had all these documents and it is superfluous to make affidavits: see *Irwin and Purvis* v. *Jung* (1912), 17 B.C. 69. The rule is that it is discretionary: see Annual Practice, 1925, p. 513. As to the necessity of an affidavit see *British Association of Glass Bottle Manufacturers, Limited* v. *Nettlefold* (1912), 1 K.B. 369 at p. 375.

Argument

Green, in reply, referred to Words and Phrases, Vol. 4, p. 3394; Daniell's Chancery Practice, 8th Ed., Vol. 1, pp. 147 and 180; *Merry* v. *Pownall* (1898), 1 Ch. 306 at p. 311.

Cur. adv. vult.

3rd March, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant submits that he has a right under Supreme Court Rule 370d, to examine in this action, to which she is not a party, Mrs. Furber, a beneficiary under the will of the late F. G. Vernon, for discovery.

The action is against the trustees of the will.

Certain property on Douglas Street, in the City of Victoria, belonging to the estate, was sold by the trustees to the appellant, who alleges fraud in connection therewith, and claims rescission of the contract of sale and damages against the alleged fraudulent parties.

Mrs. Furber is entitled to the rents and profits of this property for life, with a power of appointment.

The said rule 370d declares that a person for whose immediate benefit an action is prosecuted or defended, shall be regarded as a party for the purpose of examination. Does Mrs. Furber come within the purview of the rule? I think not. I am of opinion that the rule was passed primarily to meet the

COURT OF APPEAL

1925

March 3.

F. W. WOOLWORTH CO. LTD. v. POOLEY

case of a person suing as nominal plaintiff. It may be wide enough to cover other cases. I do not intend to say exactly what it does cover, but I am satisfied that it is not applicable to the facts of the present case. True, the sale made by the trustees was of property concerning which Mrs. Furber was entitled, whether sold or not, to the rents and profits, but this does not bring the case within the rule. The action cannot be said to be defended for her immediate benefit, it is defended for the immediate benefit of the defendants, who are charged with wrongful acts in connection with the sale of it.

MACDONALD, C.J.A.

The appeal also includes a demand for further and better affidavits on production. The facts upon which this demand is based were gone through in detail during the argument, and I was then convinced that an order should not be made. Counsel have since referred us to further authorities, but these have not changed my opinion, which is founded on facts of the case rather than on questions of law.

The appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with my brother MACDONALD.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal in so far as the same is aimed at the requirement that there should be further discovery ordered, being of the opinion that the learned judge, in the exercise of the discretion he had, cannot be said to have erred in principle in the exercise of that discretion.

In so far as the appeal asks that an order be made for the examination of Mrs. Furber, I am clearly of opinion that the learned judge erred, as she is a party interested and rightly examinable under the rules of the Supreme Court. I would therefore vary the order made below by affirming the order made refusing further discovery and reversing the order refusing examination and direct that the examination may be had.

MACDONALD, J.A.

MACDONALD, J.A.: We were asked, by preliminary motion, to quash the appeal because the plaintiff had taken a benefit under the order appealed from. The plaintiff resorted to marginal rule 742 and properly included separate matters in one summons instead of making several applications. One subject-

matter was for an order to amend the statement of claim. That was granted. The other subject-matters were to examine a party for discovery and to obtain further production of documents. These applications were dismissed. One order disposing of the three matters was taken out and entered. The plaintiff amended, pursuant to the order, and now appeals in respect to the two other matters referred to. It is said he took a benefit under the order by amending the statement of claim. That matter, however, had no relation to, nor was it dependent upon, the disposition of the remaining parts of the application. *Clark* v. *Creighton* (1892), 14 Pr. 100.

It did not indicate acceptance of, nor acquiescence in, that part of the order refusing to permit examination for discovery, or to order further production. There is, no acceptance of a benefit under the parts of the order appealed against. *Phillips* v. *Corporation of City of Belleville* (1905), 10 O.L.R. 178. The preliminary motion is therefore dismissed.

On the main appeal in so far as it refers to a further affidavit of documents, I would not interfere with the discretion exercised by the learned judge in chambers.

MACDONALD, J.A.

The appellant also appeals against the order refusing to allow examination for discovery of one Beatrice Alma Ashley Furber on the ground that she is not "a person for whose immediate [*i.e.,* without intermediary or intervening agency] benefit an action is prosecuted or defended": marginal rule 370d.

In the pleadings it is alleged that she is the sole beneficiary of the estate of Forbes George Vernon, deceased. The probate and copy of the will filed shews, however, she is not the sole beneficiary. She received (broadly speaking) the income during her lifetime. However, the rule is not "for whose sole benefit an action is defended." It is "for whose immediate benefit," etc. Suppose there were numerous beneficiaries, would each one be examinable? The object of discovery, as pointed out by Rose, J. in *Macdonald* v. *Norwich Union Ins. Co.* (1884), 10 Pr. 462 at p. 464, is to obtain information on the issues from one who has knowledge of the facts. The present action was brought to rescind a sale of certain property formerly owned

COURT OF APPEAL

1925

March 3.

F. W. WOOLWORTH CO. LTD. v. POOLEY

by the Vernon Estate in which Beatrice Alma Ashley Furber was interested as aforesaid, also for damages and an accounting; but it is not alleged that she had any part in bringing about the sale to the plaintiff. Even if behind the scenes, she communicated with, prompted or advised the defendants, so long as there is no allegation that she came in contact with the plaintiff and wholly, or in part, induced him to purchase, her actions would not be material. What light, therefore, could she throw on the issues? The defendants would have to act upon their own responsibility. They were in control. It is not a case where she is in fact the real defendant and the parties on the record nominal defendants. If, however, she is a person for whose immediate benefit the action is defended these considerations would not entirely dispose of the matter. They throw light, however, upon the reasonable construction of the rule.

The point was not squarely up for decision in *Isitt* v. *Hammond* (1925), 1 W.W.R. 94, where an action was stayed until discovery of documents should be made by a company for whom the plaintiff was trustee. The construction or application of rule 370d was not involved. The Ontario cases are not conclusive. I think, in the main, however, the judgment of Riddell, J. in *Trust and Guarantee* v. *Smith* (1915), 33 O.L.R. 155, is sound. Some expressions therein may be criticized, but the principle seems to be in accord with the true purpose of the rule. All that can be said in the present case is that the party sought to be examined may ultimately, not immediately, be benefited if the action is successfully defended. Even that is not certain. If unsuccessful the interest payments to her may or may not be diminished. That depends upon unforeseen contingencies. *Argles* v. *Pollock* (1917), 12 O.W.N. 158, even if it were a decision of a higher Court, which it is not, does not overrule *Trust and Guarantee* v. *Smith, supra.* In the *Argles* case the party sought to be examined and not the plaintiff was the one who knew all about the matters in issue. The action too was prosecuted for the immediate benefit of his firm, as appeared by the endorsement on the writ. The case of *Patterson* v. *Toronto General Trusts Corporation* (1918), 15 O.W.N. 42, is not reported fully enough to assist.

MACDONALD, J.A.

COURT OF APPEAL

1925

March 3.

F. W. WOOLWORTH CO. LTD. v. POOLEY

We are not guided by any decisions binding upon us, and for the reasons given I would dismiss the appeal.

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

Solicitor for appellant: *John R. Green.*

Solicitors for respondents Pooley and Luxton: *Pooley, Luxton & Pooley.*

Solicitor for defendant trustees: *W. A. Cantelon.*

MODERN CONSTRUCTION COMPANY LIMITED v. SHAW.

COURT OF APPEAL

1923

July 6.

MODERN CONSTRUCTION CO. v. SHAW

Building contract—Action to recover price agreed upon—Certain deficiencies in construction—Modification of rule requiring completion—Substantial performance—Deductions for trivial deviations—Effect of taking possession—Quantum meruit—R.S.B.C. 1911, Cap. 154, Sec. 34.

Where a building contractor fails to follow plans agreed upon, the general rule is that he is not entitled to the contract price and the proprietor has the option of calling upon him to remove the materials from his ground or of retaining them subject to the builder's claim against him for the work and material supplied, but where the deviations are not material, the proprietor may be ordered to pay the contract price less the cost of bringing the building into conformity with the plans.

The Court being equally divided the judgment of the trial judge allowing the contract price less certain amounts for deficiencies in the construction of the building in question, was allowed to stand.

APPEAL by defendant from the decision of RUGGLES, Co. J. of the 24th of October, 1921, in an action to recover the balance due for the construction of an apartment-house. The price of the building was $7,000. A first instalment of $1,000 was paid and $850 of the second. The plaintiff sued for the balance. The plaintiff claims the building was completed the actual amount expended upon it being $7,560. The defence is that the contract had not been completed; that there were defects in

Statement

COURT OF APPEAL

1923

July 6.

MODERN CONSTRUCTION CO. v. SHAW

Statement

the construction, namely, there was no porch at the back; there was leakage in the roofing and bad construction; there were no proper drainage fixtures in front of the building and the cement work was defective. They particularly complained of the defective plastering, claiming that portions of it fell down and that it became discoloured. The defendant had taken over the building and had received rents and profits for it for some time before this action was commenced. The learned trial judge found that the contract was completed but that certain deductions should be made for small defects amounting in all to $189. The defendant appealed mainly on the ground that the deviation from the contract by the Construction Company was in so many ways and to such a degree that the Court was not justified in treating the defects as a mere matter of deduction.

The appeal was argued at Vancouver on the 14th, 15th and 16th of March, 1923, before MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

J. A. MacInnes, for appellant: There was no contract signed as the defendant claimed the specifications did not provide for certain matters the chief of which was a second-storey porch at the back of the building. A contract was, however, arrived at although never in writing. There were three findings of fact: (1) The parties were not *ad idem*; (2) there was an agreement to construct a building for $7,000; (3) that the building when finished had certain defects. We say the parties were *ad idem* and that there was a complete contract, but the building was never completed. The various deficiencies are set out, namely, there was no porch at the back; the roof was defective both in material and workmanship. The defect in the plaster alone was sufficient to negative completion. The ceiling of the second floor was 9.10 feet high and the agreement was that it was to be 12 feet high. On the general question of completion see *Leroy* v. *Smith* (1901), 8 B.C. 293; *Champion* v. *World Building, Limited* (1914), 20 B.C. 156 at p. 159.

Buell, for respondent: The weather conditions were such that we could not carry out the construction to the letter. The defendant Shaw lived with a man who worked on the construc-

tion and she knew how the work was being done, but there was no complaint until some time after completion. We carried out our contract substantially, with but a few minor defects, easily remedied, and we are entitled to be paid the contract price less what is necessary to remedy these defects. The deductions made by the trial judge were reasonable. Whether the defects were sufficient to vitiate the contract is largely a question of fact which was decided in our favour and the decision should not be disturbed. There has been substantial compliance with the contract: see Halsbury's Laws of England, Vol. 3, p. 187, par. 369. When she entered into possession she raised no objection: see *Lowther* v. *Heaver* (1889), 41 Ch. D. 248 at p. 262. On the question of omission or deviation see *Ramsay & Son* v. *Brand* (1898), 25 R. 1212 at p. 1214. By taking possession and renting the property there was acquiescence and she is estopped from repudiating: see *Knights* v. *Wiffen* (1870), L.R. 5 Q.B. 660. The case of *Sumpter* v. *Hedges* (1898), 1 Q.B. 673 does not apply as in that case the contract was not completed.

Argument

MacInnes, replied.

Cur. adv. vult.

6th July, 1923.

MARTIN, J.A.: I concur in the allowance of this appeal, because, in brief, the contract has not been completed in one particular at least, *viz.,* the plastering, to such a degree that the learned trial judge was not, with all respect, justified in treating it as a mere matter of deduction.

MARTIN, J.A.

This question of deviation from the contract is always one of degree and circumstance, but in the present case I am unable to take the view that the deviations are of such a minor nature as to justify a modification of the rule requiring completion.

The appeal, therefore, should be allowed.

GALLIHER, J.A.: In my opinion this appeal must be allowed.

I have read all the evidence carefully, and it seems beyond doubt that this is not a case within the modification to the general rule that a contractor must finish his work according to his contract before he can recover the stipulated price. That

GALLIHER, J.A.

COURT OF APPEAL

1923

July 6.

MODERN CONSTRUCTION CO. v. SHAW

modification is expressed in *Ramsay & Son* v. *Brand* (1898), 25 R. 1212 at p. 1214; 35 Sc. L.R. 927, as follows:

"In the application of this rule it suffers a modification which in no way invades the principle. A building contract by specification necessarily includes minute particulars, and the law is not so pedantic as to deny action for the contract price on account of any and every omission or deviation. It gives effect to the principle by deducting from the contract price whatever sum is required to complete the work in exact compliance with the contract."

There are a number of cases in which this point has been decided, and the question always is as to the materiality of the deviations or whether they are mere matters of detail, in which case deductions may be allowed.

One cannot read the evidence without coming to the conclusion that in more than one respect there was material deviation and improper construction. Several are claimed, some trivial and others serious. Take the one item of plastering alone, and I would doubt from the evidence if it could even be made a workmanlike job by patching, and there are others which cannot be classed as trivial or merely deviations of detail. If the plaintiff for these reasons is not entitled to sue under the contract, neither is he entitled to claim as for a *quantum meruit,* there being no agreement upon which that could be founded. It is all very well when the parties come to Court to say, "We admit certain defects and will make them right and they can be made right for a certain amount." The fact is, they have not done so and were not prevented from doing so; indeed, when the question of the leaking roof was taken up by the defendant with Merrick, the president of the Company, he said they were not in a position financially to remedy matters. It looks very like saying, "Pay us the balance of the contract price and we will make what is wrong or deficient, right." In any event, they have refused and failed to live up to their contract, and have lost their right to sue for the contract price until that is duly performed. The learned trial judge's finding must really be upon contract, as he has allowed the contract price less certain deductions and cannot be upon *quantum meruit.*

GALLIHER, J.A.

The question of waiver was raised by the plaintiff, but that has not been established. In this connection see the judgment

of Lord Campbell, C.J. in *Munro* v. *Butt* (1858), 8 El. & Bl. 738 at p. 752; 4 Jur. (N.S.) 1231.

MCPHILLIPS, J.A.: It would appear that it was at first intended that the usual building contract with specifications, would be signed between the parties for the construction by the respondent of an apartment-house on Granville Street, in the City of Vancouver. In the end the contract was not actually signed but the building was built and the appellant took possession of it, and has for a long time taken the rents and profits therefrom.

The learned trial judge has found that there was an agreement to construct the building for $7,000. It was to be a building of the size, style and general description of the plans and specifications prepared, which plans and specifications were to form part of the written contract. The building was commenced to the knowledge of the appellant and was carried on with her knowledge throughout, and she took an active interest in the work as it progressed, and gave directions from time to time. According to the finding of the learned trial judge the respondent expended in the supply of materials and for work and labour upon the building $7,560, but as it was common ground that the building was not to exceed in cost $7,000, the excess of $560 could not be allowed. The appellant, in refusing to enter into a written contract with specific terms, cannot now rely upon any special contract. The whole question is, Has the building been built which was contracted to be built? The learned trial judge has so held, and the evidence amply supports the holding. The appellant cannot be admitted upon the evidence to say that the building was not being constructed for her and in pursuance of the agreement come to verbally; further, if necessary, the facts and circumstances support it being held there was an implied contract, the appellant taking part and being fully conversant with all the work done and materials supplied, keeping herself advised throughout the time of construction of all the work done. The appellant at the trial did not dispute liability for the cost of the building, but contended that it was not finished and therefore she could not be

COURT OF APPEAL

1923

July 6.

MODERN CONSTRUCTION CO. v. SHAW

called upon to make payment therefor. Upon this point it is to be noted that payments were made during the progress of the work, and it is evident that the payments made had relation to the terms of the proposed memorandum of agreement of October 31st, 1921, which memorandum was left unsigned. The second clause thereof reads as follows:

"2. The owners shall pay or cause to be paid to the builders, the sum of ($7,000) in the manner following, that is to say: $1,000 on the completion of this agreement, a further sum of $1,000 on November 20th, and balance when work is complete."

The first $1,000 was paid by the appellant to the respondent on November 15th, 1921, and $850 of the second $1,000 payment was made on February 14th, 1922, but no further moneys have been paid, the contention of the appellant being that the contract is an entire one and no further moneys are payable until the building is fully completed. Even upon this basis, in my opinion, upon the evidence, there has been completion of the building. The allowances made by the learned trial judge, in amount $189, are trivial in their nature and cannot be allowed to defeat the right to recovery of the balance due by the appellant to the respondent. The taking of possession of the building and the receipt of the rents and profits therefrom render it unjustifiable for the appellant to contend that there has not been an acceptance of the building. The allowances in their very nature demonstrate that they are not structural but really trivialities when it is considered that they amount to merely $189, when the building constructed cost the builders $7,560. The particulars of the allowances demonstrate that nothing remains to be done that could be said to leave the building in any way incomplete. The evidence amply establishes completion. It is only necessary to set forth the allowances made to punctuate this:

MCPHILLIPS, J.A.

"Paid for fixing leaking roof	$ 54.00
"Amount to fix discoloured plaster	75.00
"Tile drain in front of building	10.00
"Amount to fix cement work	50.00
	"$189.00"

There is nothing in these allowances which would indicate in the slightest way that there has been failure to complete the

building; further, it is not to be forgotten that the learned trial judge had a view of the premises and his judgment was following that view. The Court of Appeal decided that a slight omission in completion, consisting of some zinc not being placed on the roofs of annexes, did not prevent the builder from enforcing a contract—*Lowther* v. *Heaver* (1889), 41 Ch. D. 248; 58 L.J., Ch. 482. Even if it could be said that there was a contract here which has not been fully performed, the appellant has taken advantage of and benefited by the actual performance and a new contract will be implied to pay remuneration commensurate with the benefit derived from the partial performance. Here, in my opinion, there has been complete performance; if not, the allowances made shew that what remains to be done is really trivial in its nature, and the learned judge proceeded rightly in entering judgment on a *quantum meruit.*

The appellant in taking possession of the premises and renting the same has taken advantage of and greatly benefited by the building constructed upon her land, being now and for a long time in receipt of rents and profits therefrom, *i.e.,* benefiting to the extent of being in possession of a building which cost $7,560, and the appellant has only paid so far $1,850 on account of the cost of the construction of the building. This is a most inequitable situation. Upon the facts it must be held, if necessary, that there has been a waiver of exact and complete performance (Hudson on Building Contracts, 4th Ed., Vol. 1, p. 275; *Munro* v. *Butt* (1858), 8 El. & Bl. 738; 4 Jur. (N.S.) 1231; *Whitaker* v. *Dunn* (1887), 3 T.L.R. 602; *Oldershaw* v. *Garner* (1876), 38 U.C.Q.B. 37). I do not, however, as previously expressed, hold the view that the contract has not been fully performed. On the contrary, I am of the opinion that it has been fully performed, but if I were in error as to this —that that which remains to be done is trivial in its nature— then there has been waiver. Further, the judgment of the learned judge is supportable on a *quantum meruit,* as it is a remuneration commensurate with the benefit derived from partial performance.

MCPHILLIPS, J.A.

It is idle argument, though, to contend that the building has not been completed, or the contract fully performed, upon the

COURT OF APPEAL

1923

July 6.

MODERN CONSTRUCTION CO. v. SHAW

part of the respondent. This is a question of fact, and the case is not one which admits of there being disagreement with the learned trial judge. It follows that, in my opinion, the appeal should be dismissed, and the judgment of RUGGLES, Co. J. affirmed. (*Coghlan* v. *Cumberland* (1898), 1 Ch. 704; 67 L.J., Ch. 402; *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96; 116 L.T. 257; *McIlwee* v. *Foley Bros.* (1919), 1 W.W.R. 403, Lord Buckmaster at p. 407).

EBERTS, J.A.

EBERTS, J.A. would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *MacInnes & Arnold.*
Solicitors for respondents: *Senkler, Buell & Van Horne.*

[NOTE.—Reasons for judgment of the Supreme Court of Canada delivered the 15th of November, 1923.]

The Chief Justice: I am to dismiss this appeal and concur with the reasons for so doing stated by my brother Mignault.

Idington, J.: A perusal of the entire evidence in this case convinces me that the appellant never got what she was led to believe she would get for $7,000. Her reasonable expectations of what she was to get according to the respondent's representations would entitle her to an allowance, in my opinion, of at least 10% of the $7,000, or perhaps as high as 20% thereof. It is the difference in the selling value between what she got and what she had a right to expect to get that I would apply as the measure of damages.

I would therefore allow the appeal with costs here and below throughout.

I assent to the amount agreed upon for damages by those concurring in allowing the appeal.

Duff, J.: I think the County Court judge rightly held in a general way that the plaintiff Company was entitled to recover the sum of $7,000, which he held was the maximum fixed by agreement of the parties, less the diminution in value due to the failure of the plaintiff Company to complete the building in a workmanlike and satisfactory way in accordance with ordinary and reasonable standards—the amount of the diminution to be ascertained by reference to the cost of making good the defects.

I agree, on the other hand, that the learned judge was very parsimonious in his allowances, and the only serious doubt I have had about the case is whether there should be a reference back or whether this Court, using its best judgment in the circumstances, ought not to settle now the amount

of the deduction. There are obvious objections to referring the case back to the County Court judge on a question which, after all, is a mere question of fact upon which the learned judge has given his judgment after a personal inspection of the premises. I think on the whole the better course is to dispose of the litigation at this stage, and I agree in fixing the amount of the deduction at the sum proposed, $1,000.

Anglin, J.: As one of her grounds of appeal the appellant has challenged the jurisdiction of the County Court to pronounce the judgment appealed from on the ground that the foundation of that jurisdiction disappeared when the plaintiff's claim for lien was disallowed. But s. 34 of the Mechanic's Lien Act of British Columbia (R.S.B.C. 1911, Ch. 154) confers a special jurisdiction on the County Court "upon the hearing of any claim for lien" to give judgment "for any indebtedness or liability arising out of the claim." There was here a *bona fide* claim for a lien and that sufficed to give the County Court jurisdiction although the claim for the lien itself should fail. But the indebtedness or liability of the defendant did not "arise out of the claim" for lien—the only "claim" mentioned in the section—and upon a literal interpretation the objection to the jurisdiction would prevail on that ground. The draftsmanship of s. 34 is certainly slipshod. Having regard to the obvious purpose of the enactment, what the Legislature must have meant was that where a claim for lien is preferred in the County Court *bona fide* and not merely colourably, upon the hearing of it, whatever the result as to the claim for a lien, the Court should be empowered to give judgment for any indebtedness or liability out of which that claim arose or upon which it was based. The statute should be construed so as to effectuate the obvious intent of the Legislature in enacting it. I am therefore of the opinion that the objection to the jurisdiction of the County Court should not prevail.

On the merits, counsel for the appellant maintains that the evidence establishes that the building erected by the plaintiff is incomplete to such an extent that its action to recover the balance of the lump sum of $7,000, for which it was to be constructed, is premature and cannot succeed. For the respondent it is asserted that the building is substantially complete, and that any defects or omissions in it are of a minor character and proper subjects for deductions such as the learned County Court judge made, amounting to $189.

It is not—it could not truthfully be—averred either that the work done by the plaintiff has been of no benefit to the defendant or that it is entirely different from the work contracted for; but it is claimed by the defendant that the plaintiff abandoned the work and left it unfinished. *H. Dakin & Co., Limited* v. *Lee* (1916), 1 K.B. 566. The plaintiff insisting that the work is substantially finished refuses to perform further work which the defendant says is necessary to completion of the contract, and demands payment in full of the cost price for the building as it now stands, less the small deductions made in the County Court. The issue therefore is whether the building contracted for has, or has not, been substantially completed—whether the case is merely one of bad workmanship which can be made good by some expenditure or is really a case of only part of the work

COURT OF APPEAL

1923

July 6.

MODERN CONSTRUCTION CO. v. SHAW

contracted for having been done and the rest abandoned, the omitted work being a substantial part of that contracted for.

After careful consideration of all the evidence, I am of the opinion that it does not disclose a case of the latter kind. Although the plastering is condemned by the architects of both parties (Gardner and Griffith), who say that they would not accept it, and is probably so defective that it cannot be made satisfactory by any mere repairs, nevertheless it cannot be said that that part of the work was not performed. Beyond doubt it was done negligently and inefficiently; but that does not suffice to preclude all recovery. The case in this particular is not one of "doing only a part of the work and abandoning the rest."

I am satisfied on the evidence of Mr. Griffith that double joists have not been placed under the partitions which run parallel with them, as specified, that the floor of the store is at a lower level than that of the sidewalk in front of it (no doubt serious and perhaps irremediable structural defects) and that the cement work in the foundation and basement has been carelessly done. Here again, however, the plaintiff has performed the work it contracted to do, but insufficiently and badly.

Other omissions, such as the weeping tile drain, can probably be made good at some little expense.

The evidence on the question of the porches is not entirely satisfactory, although I rather incline to think the defendant always expected that a rear porch would be furnished and that the plaintiffs were to some extent responsible for creating that expectation. I am not, however, prepared to hold that there was a contract for the erection of porches. Consequently their non-erection cannot, in my opinion, avail as a defence.

Moreover, the roofing is certainly seriously defective. It has been patched and leaking has been stopped at least temporarily. But a patched roof is not the equivalent of a sound new roof, and an allowance of the mere cost of patching is certainly an inadequate compensation for the difference in value between a new roof properly laid and such a patched roof as the defendant now has. The inadequacy of the allowance in respect of this item and that of $75 in respect of the defective plastering seems to me to be obvious.

On the whole case, while the plaintiff has, in my opinion, proved such substantial fulfilment of its contract as is necessary to maintain a judgment in its favour, the deductions allowed the defendant in respect of defective and omitted work are clearly insufficient. Reasonable allowances should have been made to cover (1.) The cost of putting the plastering of the building in good condition; (2.) The cost of supplying and inserting the necessary double joists, including the cost of any repairs which putting them in would entail, or if that be impracticable, to cover the diminution in value caused by the absence of double joists omitted; (3.) The costs of a weeping tile drain properly laid and connected with a sufficient outlet (which will certainly exceed the $10 allowed); (4.) The difference in value between the patched roof as it stands and a roof of the kind contracted for properly laid; (5.) The cost of putting the cement work in the foundation and basement in good condition; (6.) Diminution in value

of the building owing to the level of the shop floor being below that of the sidewalk in front, and to the shop ceilings being only ten feet high.

In order to avoid the expense and worry of a new trial or a reference back to fix proper allowances for such defects, and to do approximate justice to the appellant, I would increase the allowance made to her for defective work from $189 to $1,000, and would vary the judgment accordingly reducing the plaintiff's recovery by $811. The appellant should have her costs in this Court and the Court of Appeal.

Mignault, J.: The respondent succeeded in the County Court of Vancouver in an action against the appellant for the balance due on the construction of a building for the latter. On appeal by the appellant, this judgment was sustained by the Court of Appeal for British Columbia on an equal division of the learned judges, and the appellant now comes to this Court seeking the reversal of the two judgments rendered against her on what is merely a question of fact. The whole point is whether the respondent Company, which undertook the construction of this building, has completed its contract and can recover the balance of the contract price.

I have referred to a contract between the parties for the construction of the building in question for, although the learned trial judge found that these parties were not *ad idem* and that no contract existed, and although he awarded compensation on the basis of a *quantum meruit*, it is common ground between the learned counsel for both the appellant and the respondent, who argued the case before us, that there was really a contract. The appellant's counsel argues that the contract was a verbal one, and was to construct, for $7,000, a building of the same general type as one shewn on a plan called the Chadney-McKenzie plan, which the appellant had in her possession, with certain changes, modifications and additions which the appellant says were agreed upon. The contention of counsel for the respondent is that the real contract is that contained in a formal building contract with specifications annexed, which was signed by the respondent and given to the appellant for her signature, but which she never signed. The respondent adds that the matter was overlooked and that the construction was continued without obtaining the appellant's signature to this writing. Both parties agree that the building was to be erected for $7,000, $2,000 to be paid during the construction and the balance on completion.

I have carefully read the conflicting testimony adduced at the trial. In fact, it was so conflicting on the question whether the building had been completed according to the agreement of the parties—whether the version of the one or the other as to this agreement be accepted—that the learned trial judge took himself a view of the building in the presence of counsel for both parties. In the result, he deducted certain items from the respondent's claim amounting in all to $189 and gave judgment for the balance.

After due consideration, I have come to the conclusion that the two judgments below should not be disturbed. The evidence as to the state of the building, I have said, is very conflicting, and to solve the doubt he entertained the learned trial judge saw fit to view it himself. How can I hope, under these circumstances, to arrive at a better solution of the difficulty merely by reading the conflicting statements of the witnesses?

COURT OF APPEAL

1923

July 6.

MODERN CONSTRUCTION CO. v. SHAW

It was, of course, evident that there were some defects in the building, and for these defects the learned trial judge made a deduction, but I cannot say that there was substantial non-completion of the contract sufficient to entirely defeat an action claiming payment of the contract price.

I will refer briefly to some of the complaints of the appellant.

She says that the building was without her consent narrowed by two feet in the rear. It is admitted that it was narrowed in order to leave sufficient space for the light wells on either side as required by the civic by-laws. But the answer to this complaint is that with full knowledge of the narrowing of the building the appellant made to the respondent the second payment provided for by the agreement and should not now be heard to complain that the contract was not carried out.

Then there was much testimony about the condition of the plastering. The learned trial judge evidently accepted the statement in rebuttal of Atkin, the respondent's builder, that he had recently inspected the building and that for the sum of $75 the plastering could be put in perfect condition. This sum was deducted from the respondent's account, and I cannot say that under these circumstances there was substantial non-compliance with the contract.

The same observations could be made as to the roof, which the appellant says leaked very badly. But she had it repaired, and is allowed what she paid to the roofer. I think this complaint cannot now be sustained.

Finally, the non-building of a porch in the rear was greatly insisted upon. Whether there was any agreement to build it at all rests on contradictory testimony. It is true that in the specifications there is a provision for placing meter loops in a steel meter box on rear porch. But this is the only mention of a porch, and I do not think it suffices to support the appellant's contention which failed in the two Courts that a porch should have been built.

On the whole, I would not disturb the trial judge's allowance to the respondents of the sum of $4,951 after deducting the sum of $1,850 paid on account and $189 for repairs. I would not, however, allow this amount on the basis of a *quantum meruit* but because I think it is the balance due on a completed agreement between the parties, although not signed by the appellant.

The appellant, in this Court, raised the question of the jurisdiction of the County Court to render judgment as it did, and the objection to the jurisdiction being *ratione materiæ* should be considered although it was not taken in the Courts below.

The objection is that this was a claim for a lien, that this lien was disallowed, and that therefore the County Court had not jurisdiction to award an amount in excess of $1,000.

It is true that the ordinary jurisdiction of the County Court is restricted to claims for $1,000, but where the question is of a mechanic's lien, the statute gives jurisdiction to the County Court irrespective of amount.

And the objection of the appellant is, in my opinion, answered by section 34 of The Mechanic's Lien Act, R.S.B.C. 1911, Cap. 154, which reads as follows:

"34. Upon the hearing of any claim for a lien, the Court or judge may,

so far as the parties before him, or any of them, are debtor and creditor, give judgment against the former in favour of the latter for any indebtedness or liability arising out of the claim, in the same manner as if such indebtedness or liability had been sued upon in the County Court in the ordinary way, without reference to this Act.

"And judgment may be given for the sum actually due, notwithstanding such sum may exceed the ordinary jurisdiction of the County Court."

Here the learned trial judge found that the mechanic's lien proceedings had not been properly proved, and the lien was not allowed. But there was a "claim for a lien," and the County Court could give judgment against the debtor for the indebtedness or liability "arising out of the claim." The objection is therefore not well taken.

I would dismiss the appeal with costs.

BOYLE v. SEGUIN.*

Mines and minerals—Hydraulic mining lease—Prior placer claims within area—Lapse of placer claims—Relocation of same ground as placer claim — Validity of — Hydraulic regulations, 3rd December, 1898 — Placer mining regulations, 18th January, 1898—Yukon Placer Mining Act, R.S.C. 1906, Cap. 64, Sec. 17.

On the 5th of November, 1900, a lease of a tract of land in the Yukon Territory was granted for twenty years with the right to mine by hydraulic or other mining process. The lease provided that it should be "subject to rights and claims, but to such rights and claims only of all persons who may have acquired the same under regulations"; also that it shall be subject to the Hydraulic Regulations of the 3rd of December, 1898. Said regulations provided, *inter alia*, that "No application for a lease for hydraulic mining purposes shall be entertained for any tract which includes within its boundaries any placer, quartz or other mining claim acquired under the regulations in that behalf or in the immediate vicinity of which placer, quartz or other mining claims have been discovered and are being profitably operated." At the date of the lease there were within its boundaries two existing placer mining claims but they lapsed in 1901 and 1902 respectively. In the year 1920 the plaintiff who had nothing to do with the lapsed claims, relocated the ground that was included in the lapsed claims and duly applied to the mining recorder for a grant under the Placer Mining Act. The lessee of the hydraulic lease had been in continuous

* Reversed by the Judicial Committee of the Privy Council: see (1922), 1 A.C. 462.

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

possession thereof and had performed the covenants therein contained. The mining recorder refused to issue a grant to the plaintiff, firstly, because when the former placer grants lapsed the ground covered by them fell within the lease and was not open for location and, secondly, two prior applicants for the ground had been refused for the same reason. The plaintiff applied for and obtained a *mandamus* compelling the mining branch to issue to her a grant for the said placer claim.

Held, on appeal, affirming the decision of MACAULAY, J. (MCPHILLIPS, J.A. dissenting), that this case cannot be distinguished from the principle involved in the judgment of the Supreme Court of Canada in the case of *Smith* v. *Canadian Klondike Mining Co.* (see *post* p. 359) and the appeal should be dismissed.

APPEAL by defendant from the decision of MACAULAY, J. in the Territorial Court of the Yukon, of the 11th of May, 1920, on the return of an order issued on the application of the plaintiff calling upon the defendant the mining recorder for the Dawson Mining District to shew cause why a writ of *mandamus* should not issue directing him to accept the plaintiff's application for a grant of Creek Placer Mining Claim No. 3, on Crofton Gulch in said mining district and issue to her a grant of said claim under the provisions of the Yukon Placer Mining Act. The plaintiff staked said claim in accordance with the provisions of the Act on the 9th of March, 1920, and duly applied to the mining recorder for a grant of the said claim tendering the required fee. The said claim was 500 feet in length and comprised the ground formerly covered by Creek claims 3 and 4, Crofton Gulch, which were originally staked and granted as 250-foot claims under the Placer Mining Regulations in force in the Yukon prior to the passing of the Placer Mining Act. The mining recorder refused to issue the grant because Crofton Gulch was within the limits of Hydraulic Lease No. 18, the location being on land lawfully occupied for placer mining purposes as described in section 17 of the Placer Mining Act. As a further ground for refusing the grant he stated that two prior applicants for the same ground had been refused grants for the same reason. Hydraulic Lease No. 18 was issued to Joseph W. Boyle on the 5th of November, 1900, for a period of twenty years, and on the 16th of the same month Boyle assigned the lease to H. B. McGiverin of Ottawa, Ontario. The holders of this lease and predecessors in title have been in

Statement

occupation for placer mining purposes of the tract of land described in the lease since the issue thereof, have complied with the provisions of said lease as to carrying on operations, payment of rentals, and in all other respects. In December, 1900, Mr. McGiverin wrote the Department of the Interior claiming that all placer-mining claims within the limits of the area leased to him as lease No. 18 when abandoned would revert to and become part of the leasehold and he asked the department to verify this. The department acceded to this by letter, a copy of which was filed in the gold commissioner's office in Dawson. The original location of placer mining claims Nos. 3 and 4, Crofton Gulch, were made in February, 1899, for which grants were duly issued. Number 4 was allowed to lapse in February, 1901, and No. 3 in February, 1902. Evidence was introduced that other placer-mining claims within the limits of the said lease are still in good standing and are being profitably operated by ordinary placer mining methods. Clause 3 of lease No. 18 provides that "the said lease or demise shall be subject to the rights or claims but to such rights or claims only, of all persons who may have acquired the same under the regulations of any order of the Governor-General in Council up to the date of these presents," and there is the further provision in said lease being clause 18(3) as follows:

Statement

"Provided also that this demise is subject to all other regulations contained and set forth in the said order in council of the 3rd day of December, A.D. 1898, as amended by subsequent orders in council, as fully and effectually to all intents and purposes as if they were set forth in these presents."

The amendments to the regulations included an order in council of the 25th of August, 1900, which contained the following prohibition:

"No application for a lease for hydraulic mining purposes, however, shall be entertained for any tract which includes within its boundaries any placer, quartz or other mining claim acquired under the regulations in that behalf, or in the immediate vicinity of which placer, quartz or other mining claims have been discovered and are being profitably operated, and also that the gold commissioner shall, in addition to furnishing the reports above referred to, be required to furnish a certificate that the location applied for does not contain any such placer, quartz or other mining claim, nor have any such claims been granted in the immediate vicinity of such location."

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

It was held by the trial judge that when placer mining claims Nos. 3 and 4 on Crofton Gulch, located in February, 1899, reverted to the Crown in February, 1901 and 1902 respectively, the ground did not fall into lease No. 18, but again became vacant Dominion land and was open for location under the Placer Mining Act when the plaintiff staked it as a 500-foot claim on the 9th of March, 1920.

Statement

The appeal was argued at Vancouver on the 11th, 12th and 13th of October, 1920, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and EBERTS, JJ.A.

Argument

Davis, K.C., and *J. P. Smith, K.C.*, for appellant: A placer claim is entirely different from a quartz claim record as a grant is given for the placer claim each year on proof of the representation work and payment of fees: see *Chappelle* v. *Rex* (1904), A.C. 127. The lease provides that it is subject to such rights and such rights only as were acquired prior to the date of the lease. The moment those rights expire then that land must come within the lease. *Nelson and Fort Sheppard Ry. Co.* v. *Jerry et al.* (1897), 5 B.C. 396 is different as the exceptions there are made by apt language. A hydraulic lease is an absolute lease of the soil for 20 years: see *Pearce* v. *Watts* (1875), L.R. 20 Eq. 492. We say that clause 18(2) of the lease does not apply to a placer grant, it applies only to something "demised" and not to a right acquired. The trial judge followed *Smith* v. *Canadian Klondike Mining Co.* (1910), 16 W.L.R. 196 and on appeal to the Court *en banc* in the Yukon (1911), 19 W.L.R. 1. This judgment was sustained in the Supreme Court of Canada (not reported). It was clause 18(3) of the lease (see statement of case) on which the judgment below was based, but they never excluded this ground by apt words: see *Quesnel Forks Gold Mining Co.* v. *Ward* (1918), 25 B.C. 476; *Osborne* v. *Morgan* (1888), 13 App. Cas. 227 at p. 228. As to the *Smith* case the holder of a quartz claim record has rights which are clearly distinct from the rights held under a hydraulic lease. A quartz record does not include placer gold at all, so that the *Smith* case does not cover the point involved here: see *Tanghe* v. *Morgan* (1904), 2 M.M.C. 178. Each case is governed and qualified by the particular facts

proved and assumed to be proved: see *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506.

Smith, on the same side, referred to *Creese* v. *Fleischman* (1903), 34 S.C.R. 279; also *Fleischman* v. *Getchell* and *Schade* v. *French* (Yukon cases not reported).

Pattullo, K.C., for respondent: Placer claims in the vicinity were worked at a profit at that time and this is as found by the trial judge a valid reason why the claim in question should not fall within the lease. He is not entitled to ground that can be worked profitably by placer mining methods: see *Klondyke Government Concession* v. *McDonald* (1906), 38 S.C.R. 79. We rely on the judgment of the Supreme Court of Canada in *Canadian Klondike Mining Co.* v. *Smith* [*post* p. 359] copies of the reasons you have before you. The case is precisely the same except that in that case it was a quartz claim that was in conflict with the concession; *a fortiori* the same reasoning would apply to a placer claim. The cases of *Quesnel Forks Gold Mining Co.* v. *Ward* (1918), 25 B.C. 476; *Osborne* v. *Morgan* (1888), 13 App. Cas. 227; and *Hartley* v. *Matson* (1902), 32 S.C.R. 644, do not apply as the locations were made after the lease had been issued. *Nelson and Fort Sheppard Ry. Co.* v. *Jerry et al.* (1897), 5 B.C. 396 where it is laid down that once ground is excluded it is always excluded is in our favour. Again reverting to the *Smith* case if the concession is not entitled to placer ground within a quartz claim so much the more is it not entitled to the ground within the placer claim. If it was intended that reverted claims should fall into the lease there would have been express provision for it.

Argument

Davis, in reply: The question of ground within or in the vicinity of the lease being fit for placer mining is a matter for the department to deal with before the issue of the lease, but once the lease is issued the value of the ground is no longer in question as far as the validity of the lease is concerned, and in this I take issue with the trial judge. The distinction from the *Smith* case is that a placer claim carries no interest in the land, whereas a quartz claim does: see *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch. 475 at p. 483.

Cur. adv. vult.

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

March 1st, 1921.

MACDONALD, C.J.A.: This appeal, in my opinion, is governed by the decision of the Supreme Court of Canada in *Canadian Klondyke Mining Co.* v. *Smith* [*post,* p. 359]. The appeal should therefore be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed, because after a careful consideration of it and the judgments of the learned judges of the Supreme Court of Canada in *Canadian Klondyke Mining Co.* v. *Smith* (1910), 16 W.L.R. 196 and (1911), 19 W.L.R. 1, copies of which we have been presented with (the case has not been reported, though of much importance, in the Supreme Court Reports), I am unable to distinguish it from the principle involved in the reasoning in that decision. The only difference of fact between the two cases is that in the *Canadian Klondyke* case the contest was between the lease now before us and a quartz claim, whereas the claim now in question is a placer claim, but after an examination of the various regulations I am quite unable to see why the holder of a placer location is not entitled in the enjoyment of his location to just as much protection from a hydraulic lease-holder as is the holder of a quartz location, *i.e.,* the area it comprised at the time of the granting of the hydraulic lease, whatever that may be found to be, that is exempted or excluded from the lease.

GALLIHER, J.A.

GALLIHER, J.A.: Notwithstanding the able argument of Mr. *Davis,* I am unable to distinguish the present case in principle from *Smith* v. *Canadian Klondike Mining Co.* reported first in (1910), 16 W.L.R. 196; in appeal (1911), 19 W.L.R. 1. Appeal was then taken to the Supreme Court of Canada and although the case was not reported we have been furnished with copies of the reasons for judgment in that Court. This case is, of course, binding on us.

Mr. *Davis* seeks to distinguish that case on the ground that there the ground was recorded as a quartz claim and an interest in land was acquired by the locator under the statute, while here it was the grant of a right only and not an interest in land. That point was not dealt with by the Supreme Court. The

Supreme Court was unanimous in its decision, and two of the learned judges, Duff and Anglin, JJ., based their decision on the ground that the incorporation of the regulation of August 25th, 1900, excluded all areas previously granted from the limits of the land demised, notwithstanding that the areas are defined in the hydraulic lease embraced in the same lands.

I would dismiss the appeal.

MCPHILLIPS, J.A.: This appeal is from the judgment of Mr. Justice MACAULAY of the Territorial Court of the Yukon Territory, directed the appellant, the mining recorder for the Dawson Mining District, Yukon Territory, commanding him to accept the application of the respondent for a grant of Creek Placer Mining Claim No. 3 on Crofton Gulch, in the Dawson Mining District, in accordance with the Yukon Placer Mining Act.

The appellant had refused to issue the grant, contending that Crofton Gulch was within the limits of Hydraulic Lease No. 18 and was land lawfully occupied for placer mining purposes as described in section 17 of the Yukon Placer Mining Act. The Hydraulic Lease No. 18 is in the form of an indenture of lease dated the 5th of November, 1900, made between Her Majesty Queen Victoria, represented by the Minister of Interior of Canada as lessor, and one Boyle as lessee, whereby a certain tract of land in the valley of the Klondike River was leased for a period of 20 years from the said 5th of November, 1900, to be worked by hydraulic or other mining process, being an exclusive right of taking and extracting all Royal or precious metals, there being the right of renewal for a second term of 20 years—the lease is stated to be a demise of the lands and the lands are described by metes and bounds—the lease in terms is stated to be subject to certain exceptions, restrictions, provisoes and conditions, *i.e., inter alia,* to the rights or claims only of all persons who may have acquired the same under the regulations of any order of the Governor-General in Council up to the date of the lease. Now it is to be observed that the exemptions and reservations would appear to be confined to the existing conditions at the time of the execution and delivery of the lease, and the lease was authorized by an order of the

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

Governor-General in Council. There is a specific provision that if it should be that the demised premises include any location demised to any other person under the regulations of any order of the Governor-General in Council, the application first recorded should have priority, and a general clause that the demise is subject to all other regulations set forth in the order in council of the 3rd of December, 1898, as amended by subsequent orders in council.

It would appear that at the time of the execution and delivery of the lease, there was an existent placer mining claim within the area demised, covering the same area that the respondent made application for on the 9th of March, 1920, but it had lapsed, and the respondent's application was for that area, being for a grant of Creek Placer Mining Claim No. 3 on Crofton Gulch. The answer of the appellant to the respondent was that the desired area was within the limits of Hydraulic Lease No. 18, commonly known as the Boyle concession, and was not open for location as a placer-mining claim. Creek Placer Mining Claim No. 3 on Crofton Gulch would appear to have been at a time anterior to the lease, *viz.*, on the 17th of February, 1899, held by one Omar Patton under the provisions of the regulations governing placer mining as approved by order of the Governor-General in council of the 18th of January, 1898, and as amended by subsequent orders in council, and that the claim was in good standing until the 17th of February, 1902, when the claim lapsed.

MCPHILLIPS, J.A.

It would appear that the area in question in this action, *viz.*, Creek Placer Claim No. 3, Crofton Gulch, after its lapse on the 17th of February, 1902, was never deemed to have become vacant Dominion lands and open for record, but ever since that date in the Dawson mining district, Yukon Territory, the area was deemed to be and treated as being included in the demise covered by Hydraulic Lease No. 18, and at least two applications for record were refused on that ground, one in March, 1902, and one in May, 1913, and of course as well, the application of the respondent was refused upon the same ground, that is, for 18 years the area has been considered to be comprised in the description and within the limits of Hydraulic Lease No. 18,

which in fact always was the case, according to the metes and bounds description as contained in the lease. Hydraulic Lease No. 18, by assignment, is now the property of the Canadian Klondyke Mining Company, Limited; it was first assigned by Boyle, the lessee, to one McGiverin, and by subsequent assignments became on the 26th of June, 1913, the property of the Company. The files of the Company relative to the lease shew the following correspondence relative to existent and outstanding claims within the area comprised in the lease from McGiverin (to whom, as we have seen, the lease had been assigned) to the Minister of the Interior of Canada, and the answer thereto from P. G. Keyes, Secretary to the Minister of the Interior.

"Ottawa, Canada,
"November 22nd, 1900.

"To the Honourable,
"The Minister of the Interior,
"Ottawa, Ont.

"Regarding any placer mining claims existing within the limits of the area leased for hydraulic purposes, on record in the Timber and Mines Branch of the Interior Department as Lease No. 18, File No. 55466, I beg to state that while the intention is clearly apparent that when abandoned these claims are to revert to and become a part of the leasehold, it appears to be necessary that the lessee should have a letter from your Department to this effect.

MCPHILLIPS, J.A.

"Will you kindly look into this matter at your earliest convenience and have a letter issued to me covering this point.

"I have the honour to be,
"Sir,
"Your obedient servant,
"H. B. McGiverin."

"File 55466, Y. & M.,
"Department of the Interior,
"Ottawa, 12th December, 1900.

"Sir:

"I beg to acknowledge the receipt of your letter of the 22nd ultimo, addressed to the Minister of the Interior, with respect to Hydraulic Mining Lease No. 18, issued in favour of Mr. Joseph W. Boyle, of Dawson, of a tract of land situated on the Klondike River in the Yukon Territory, and in reply to inform you that all placer mining claims within the boundaries of the above leasehold for which entry was in force at the date of the lease, but which may be abandoned or forfeited for any cause, will at any time during the currency of the lease revert to the lessee.

"Your obedient servant,
"P. G. Keyes,
"Secretary."

"H. B. McGiverin, Esq.,
"Barrister, etc.,
"Ottawa, Ont."

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

"That on March 19th, 1920, I received from H. H. Rowatt, Comptroller Mining Lands and Yukon Branch Department of the Interior, Ottawa, a telegram of which the following is a copy:

"'Ottawa, Ont., March 18, 1920.

"'Andrew Baird, Dawson,

"'Department letter twelfth December nineteen hundred to McGiverin written under instructions Deputy Minister *re* placer claims in Boyle concessions Hydraulic Lease Eighteen in good standing when lease issued states if such claims are abandoned or forfeited during currency of lease they revert to lessee. Assignment this lease Boyle to McGiverin registered seventeenth November nineteen hundred.

"'H. H. Rowatt.'"

In accordance with the practice of the department of the interior at Ottawa, a copy of the letter of the 12th of December, 1900, from P. G. Keyes, the secretary to the minister, above set forth, was sent to the gold commissioner's office at Dawson, and in further pursuance to practice it was stamped "Department of the Interior," and bears the date of its receipt and that date, as stamped, is 8th January, 1901, and it has been on file in the Administration Building at Dawson ever since.

MCPHILLIPS, J.A.

Further, the gold commissioner as well as the mining recorder, refused to issue grants for placer mining to any persons locating ground for placer mining purposes within the limits of the premises described as Hydraulic Lease No. 18. It would also appear that the Company or its predecessors in title of the said Hydraulic Lease No. 18, have been in occupation of the tract of land comprised in the lease since the 5th of November, 1900, the date of the lease, and that in 1907 and in each year since 1907, the lessees made expenditure in excess of $5,000 in actual money operations in compliance with the terms of the lease and the Hydraulic Mining Regulations, and the rentals have been duly paid, aggregating a very large outlay, and work of great magnitude has been done upon the faith of the lease and the assurance given by the Crown.

The application as made by the respondent is not only inclusive of Creek Placer Mining Claim No. 3, Crofton Gulch, but also includes Creek Placer Mining Claim No. 4, which lapsed in the year 1901, and the learned trial judge, in his reasons for judgment, has held that by reason of the lapse of these claims the ground covered by them reverted to the Crown and held against the contention of the appellant made in the

Court below, and as well submitted here, that the ground applied for by the respondent was not occupied ground but ground open to location under the provisions of section 17 of the Placer Mining Act, notwithstanding that it is ground within the limits and boundaries of Hydraulic Lease No. 18. The learned trial judge held that the applicant, the respondent in the appeal, had no *status* to attack the Hydraulic Lease No. 18 if the Canadian Klondike Mining Company was in possession of the ground covered by Creek Claim No. 3, Crofton Gulch, with the consent of the Crown, or if the ground was lawfully occupied for placer mining purposes, the applicant must fail and that in any case the applicant, to contest the lease, would have to have the aid and interposition of the Attorney-General, and as to this latter requirement the Attorney-General is not a party to these proceedings. The learned trial judge in his reasons for judgment called particular attention to the following:

"The said Hydraulic Lease No. 18 contains many provisoes, exceptions, conditions and prohibitions, and among them is the following:

" 'Provided also that this demise is subject to all other regulations contained and set forth in the said order in council of the 3rd of December, 1898, as amended by subsequent orders in council, as fully and effectually to all intents and purposes as if they were set forth in these presents.'

MCPHILLIPS, J.A.

"And when we turn to the amendments made in the said regulations by an order in council of the 25th of August, 1900, we find the following prohibition:

" 'No application for a lease for hydraulic mining purposes, however, shall be entertained for any tract which includes within its boundaries any placer, quartz or other mining claim acquired under the regulations in that behalf, or in the immediate vicinity of which placer, quartz or other mining claims have been discovered and are being profitably operated and also that the gold commissioner shall, in addition to furnishing the reports above referred to, be required to furnish a certificate that the location applied for does not contain any such placer, quartz or other mining claim, nor have any such claims been granted in the immediate vicinity of such location.' "

It was pressed strongly in the Court below, as well as at this Bar, by counsel for the applicant, the respondent in the appeal, that the decision in *Smith* v. *Canadian Klondyke Mining Co.* (1911), 19 W.L.R. 1, was absolutely determinative of the question requiring consideration, in that upon appeal to the Supreme Court of Canada the judgment of the Court *en banc* of the Territorial Court of the Yukon Territory was affirmed (the

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

judgment of the Supreme Court of Canada has never been reported), and that the ground covered by Placer Claim No. 3, Crofton Gulch, was excluded from the ground covered by the lease by the terms of the lease itself, and that the ground was, therefore, vacant Dominion lands open for location consequent upon the lapse of the claims although subsequent to the grant of the lease, the same having lapsed, as we have seen, in the year 1901 and 1902, the lease having issued in the year 1900.

It would appear upon perusal of the judgments of Idington, Duff and Anglin, JJ., that there is language capable of its being concluded that areas covered by other claims existent at the date of Hydraulic Lease No. 18, although within the boundaries of the demise, were absolutely and physically withdrawn areas, *i.e.*, excluded areas, and that the lease would be in no way operative as to such areas, yet it was not necessary to so hold to decide the case. The situation clearly upon the facts differs altogether from the facts of the present case, and were the facts the same in the present case, the *Smith* case would unquestionably support the judgment of the learned judge in the Court below and be decisive of this appeal and require its dismissal, as admittedly, if the areas of the existent claims at the time of the making of the lease were still in good standing, it would be idle to contend that the lease was operative or affected such areas. If, however, the claims lapsed at any time within the term of the lease, then it is contended the areas would fall to the lessee and that is the contention advanced by the appellant upon this appeal, and, in my opinion, there is merit in the contention. Further, and with great respect to the Supreme Court of Canada, I venture to interpret the judgment of the Court as not laying down any principle of decision that would extend beyond the facts of the case then before it, and the facts are not the facts we have before us in this appeal. Here we have a very different situation, the existent claims at the time of the granting of the lease have lapsed and have been non-existent for nearly twenty years. Is it reasonable to suppose that it ever was the intention of the Crown, that isolated placer claim areas falling in in this way and within the boundaries of hydraulic leases later granted, should be deemed to be areas unaffected by

MCPHILLIPS, J.A.

those leases? In my opinion, with this different state of facts presented, the whole situation changes and that occurs which was in the contemplation of the Crown—the lessees under the Hydraulic Lease No. 18 became the lessees as well of the lapsed areas; in short, Hydraulic Lease No. 18 was in its legal effect operative as to the whole area comprised in the description save that as to any existent claims at the time of the demise the lease was subject to those prior claims. As a matter of conveyancing this is a well known and well understood position, and I cannot see anything in the facts nor in the law as applied to the facts which inhibits one from coming to this conclusion, which to me seems to be the manifest and right conclusion. I only come to this conclusion after the most anxious consideration, especially in view of the decision in the *Smith* case, which, of course, is absolutely binding upon this Court, if it can be said to have determined the point this Court has now to pass upon. I may say, though, that the present case is very different, and I hesitate to apply the decision and say that it is determinative of this appeal. Unquestionably, the appeal would be idle if the facts were the same as in the *Smith* case. But they are radically different, the existent claims at the time of the demise lapsed within two years of the issuance of Hydraulic Lease No. 18, as against the continued existence of the quartz claim in the *Smith* case, and that being the situation, I cannot bring myself to the belief that the *Smith* case, decided upon an entirely different state of facts, can be said to be conclusive in this appeal. At this stage I would refer to what Lord Dunedin said in *Charles R. Davidson and Company* v. *McRobb or Officer* (1918), A.C. 304 at p. 322:

MCPHILLIPS, J.A.

"I now turn to the point of whether I am bound to take the view which I personally do not hold in respect of decisions of this House.

"My Lords, I apprehend that the *dicta* of noble Lords in this House, while always of great weight, are not binding authority and to be accepted against one's own individual opinion, unless they can be shewn to express a legal proposition which is a necessary step to the judgment which the House pronounces in the case. Now, the *dicta* I have quoted were not as *dicta* agreed to by Lords Macnaghten and Mersey."

I would also refer to what the Lord Chancellor (Earl of Halsbury) said at p. 81 in *Quinn* v. *Leathem* (1901), 70 L.J., P.C. 76:

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

"Now, before discussing the case of *Allen* v. *Flood* [(1897)], 67 L.J., Q.B. 119; (1898), A.C. 1 and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision in the case of *Allen* v. *Flood*."

With unfeigned respect to the Supreme Court of Canada and absolute loyalty to the undoubted position of that Court's judgments and their binding effect upon this Court, I have ventured, possibly wrongly, to hold the opinion that the *Smith* case is not determinative of this appeal.

MCPHILLIPS, J.A.

It is to be noted that a placer holding is from year to year, and each year is a new grant, and unquestionably when the placer holding lapsed the area covered became the property of the Crown, and Hydraulic Lease No. 18 is from the Crown. (See *Nelson and Fort Sheppard Ry. Co.* v. *Jerry et al.* (1897), [5 B.C. 396]; 1 M.M.C. 161, MCCREIGHT, J. at pp. 178-80; also see *The Queen* v. *Demers* (1894), 22 S.C.R. 482 at p. 487). It cannot be said that the lease contains any apt words of exception of placer mining claims, at least not where same have lapsed (see *Pearce* v. *Watts* (1875), L.R. 20 Eq. 492). An insuperable barrier, in my opinion, in any case, stands in the way of the respondent in this appeal. Shortly, the position is this: Hydraulic Lease No. 18 admittedly in terms covers the area in question in this appeal and for which the respondent is the applicant and the lease in the way is a lease from the Crown, of admittedly Crown lands, in the face of this and without the intervention of the Crown, how can any claim be advanced or given effect to even if it were conceded that the lease transcends the statute? That is, the respondent cannot be accorded any rights which would interfere with the lessee's possession. In *Osborne* v. *Morgan* (1888), 13 App. Cas. 227, Lord Watson, at pp. 236-37, said:

"Lands let by the Crown for gold mining purposes, whether before or after the proclamation of a goldfield, are not Crown lands within the meaning of the Act of 1874, and against these sect. 9 gives no right whatever to the holder of a miner's licence. That is hardly disputed by the appellants, but they contend that the provisions of sect. 9 give them a title to try the validity of leases bearing to be granted by the Governor in terms of the statute, in a question with the lessees, and in the absence of the Crown, with the view of restoring the areas let to the category of Crown lands. It appears to their Lordships that the Act does not, expressly or by necessary implication, confer any such right. It is, in their opinion, sufficient to exclude the holder of a miner's right that the land is *de facto* occupied in virtue of a lease granted and recognized by the Crown. Their Lordships do not doubt that, in cases where reasonable grounds can be shewn for interfering with the lessee's possession, the Crown will lend its assistance in terminating the lease, and that it will refuse its aid to any attempt to disturb his possession merely for the purpose of giving the holders of miners' rights the benefit of his outlay and operations."

(Also see *Quesnel Forks Gold Mining Co.* v. *Ward* (1918), [25 B.C. 476]; 3 W.W.R. 230 at pp. 248, 250; (1919), 89 L.J., P.C. 13; 3 W.W.R. 946; (1920), A.C. 222).

It is clear, in my opinion, that Hydraulic Lease No. 18 could only be said to be subject to the existing mining locations at the time of the issuance of the lease and that the respondent cannot be admitted after the lapse of nearly twenty years (of any outstanding claims at the time of the demise), come in against this lease from the Crown and be accorded a placer claim from and out of the area admittedly described in the lease (*North Pacific Lumber Co.* v. *Sayward* (1918), [25 B.C. 322]; 2 W.W.R. 771).

MCPHILLIPS, J.A.

To summarize my view, the area occupied by existing mining locations at the time of the granting of Hydraulic Mining Lease No. 18 was not physically excluded and set apart, the whole intention and effect of the lease was to merely make the same subject to any then existing mining locations, *i.e.*, subject to all prior mining locations, but when they lapsed unquestionably the lease would have complete operation over the area, as the description by metes and bounds fully covers the lapsed area.

In *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch. 475, Lord Justice Lindley, at p. 483, said:

"A right to work mines is something more than a mere licence: it is a *profit a prendre*, an incorporeal hereditament lying in grant. The distinction between a licence and a *profit a pendre* was pointed out in

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

Wickham v. *Hawker* [(1840)], 7 M. & W. 78, a leading case on rights of sporting.

"Counsel for the appellant contended that the reservation clause ought to be construed as an exception of the mines and minerals. But this, we think, would be to violate well-settled rules of conveyancing. The words used are not apt for the purpose. No conveyancer intending to except mines and minerals from a conveyance of lands would express his intention by reserving a liberty to get minerals. If, indeed, it were plain from recitals or other clauses in the deed that an exception was intended, possibly effect might be given to it. But here there is nothing *aliunde* to shew what was intended, and the intention can only be inferred from the wording of the clause in question."

When the mining locations existing at the time of the lease lapsed upon the authority of *Rajapakse* v. *Fernando* (1920), [A.C. 892; 89 L.J., P.C. 159]; 3 W.W.R. 218 the lessee under Hydraulic Lease No. 18 became entitled to the possession of the lapsed area, it being within the description of the lands as described in the lease from the Crown. Lord Moulton in the *Rajapakse* case, at p. 220, said:

"Their Lordships are of opinion that by the Roman-Dutch law as existing in Ceylon, the English doctrine applies that where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the benefit of the earlier grantee or as it is usually expressed 'feeds the estoppel.' When, therefore, on February 22, 1912, Thomas Carry acquired from the Government the title to the lands which he had conveyed by the deed of December 11, 1909, the benefit of that title accrued to the grantees under that deed, *i.e.*, the respondent's predecessors in title."

MCPHILLIPS, J.A.

Finally, in this case we have the unquestioned representations made by the Government of Canada by and through the Department of the Interior, the letter of the secretary reading that "all placer mining claims within the boundaries of the above leasehold for which entry was in force at the date of the lease but which may be abandoned or forfeited, for any cause will at any time during the currency of the lease, revert to the lessee." In view of this something that the lessee was entitled to rely upon, I cannot persuade myself that the respondent has any enforceable position or can successfully uphold the judgment of the Court below. In this connection I would refer to what Lord Davey said in *Ontario Mining Co.* v. *Seybold* (1902), 72 L.J., P.C. 5 at p. 8:

"The learned counsel of the appellants, however, says truly that his clients' titles are prior in date to this agreement, and that they are not

bound by the admissions made therein by the Dominion Government. Assuming this to be so, their Lordships have already expressed their opinion that the view of their relative situation in this matter taken by the two Governments was the correct view. But it was contended in the Courts below, and at their Lordships' Bar was suggested rather than seriously argued, that the Ontario Government, by the acts and conduct of their officers, had in fact assented to and concurred in the selection of, at any rate, Reserve 38B, notwithstanding the recital to the contrary in the agreement. The evidence of the circumstances relied on for this purpose was read to their Lordships, but on this point they adopt the opinion expressed by the learned Chancellor Boyd that the Province cannot be bound by alleged acts of acquiescence on the part of various officers of the departments which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any order in council or other authentic testimony. They therefore agree with the concurrent finding in the Courts below that no such assent as alleged had been proved."

MCPHILLIPS, J.A.

In the present case there is no doubt about the intention of the Crown, the representation made, and the assent on the part of the Crown that when the prior mining claims (prior to the lease) were abandoned or forfeited, the beneficial property in the area covered by them should pass to the lessee, and as that did occur, it would seem to me that the title of the lessee (now the assignee from the lessee) is incontestable, certainly incontestable on the part of one holding no interest in the area in question whatever, and no interpositions upon the part of the Crown.

I would, for the foregoing reasons, therefore, allow the appeal.

EBERTS, J.A.

EBERTS, J.A.: I feel bound to give effect to the decision rendered by the Supreme Court of Canada in *Canadian Klondyke Mining Co.* v. *Smith,* decided in 1912. This is an unreported case, but copies of the judgment were furnished the members of this Court. That case is one which, in my opinion, must govern my decision in the present case.

The appeal should be dismissed.

Appeal dismissed, McPhillips, J.A. dissenting.

[NOTE.—Reasons for judgment of Supreme Court of Canada in Action of the Canadian Klondike Mining Co. v. Smith, included in present case by consent of parties.]

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

Idington, J.: The parties here submitted a stated case respecting rival claims made by each in or over a certain mining location and derivable from or under the Mining Acts and Mining Regulations made thereunder and in force in the Yukon Territory in 1898 and following years.

The respondent's claim is known as "The Golden Age" which was located on the 2nd of November, 1899, recorded next day and a record issued therefor, as provided by the regulations for the disposal of quartz mining claims in said Territory, and it is still by virtue of such compliance with the requirements of the Act, and regulations on foot.

A quartz mining claim such as this might be fifteen hundred feet in length by fifteen hundred feet in breadth.

The right is described by section 33 of the said regulations as follows:

"33. The holder of a mineral claim on vacant Dominion lands shall be entitled to all surface rights including the use of all timber thereon for mining or building purposes in connection with the working of said claim for the purposes of developing the minerals contained therein."

It might ripen into a Crown grant by the free miner holding it complying with the terms of the regulations in that regard and by section 50 of the regulations that would transfer:

"50. A Crown grant of a mineral claim located on any Dominion vacant lands shall be deemed to transfer and pass the surface right to all minerals within the meaning of these regulations (excepting coal) found in veins, lodes or rock in place, and whether such minerals are found separately or in combination with each other, in, upon and under the land in the said Crown grant mentioned."

This is only of importance herein as shedding some light on the nature of the right conferred by the respondent's record and defined in said section 33, for his rights are admitted, and the only dispute arises from the possibility of those rights being consistent, as contended, with the alleged rights of the appellant as lessee under a lease I am about to refer to.

Those under whom the appellant claims had been in the years 1898 and 1899 in communication with the Department of the Interior and its local officers relative to a lease they desired to acquire for hydraulic mining purposes but nothing definite had been reached or settled upon until the 5th of November, 1900, when a hydraulic mining lease of that date was made by the Crown to one Boyle, under whom appellant claims, of lands so described that the boundaries comprised the said mining location of respondent.

It is claimed that because the boundaries are such, the rights intended to be given over vacant land are equally extensive over this mining location.

The actual operations conceivable under each of these alleged rights would seem to me so clearly conflicting that they could not advantageously be operated together on the same land, and I do not think ever were intended to be so. The two claims are mutually destructive of each other.

I think the definition of the respondent's rights as given in section 33, above quoted, are clearly exclusive of any such pretension as appellant sets up.

And even if there was nothing else to guide me than a comparison of the respective rights of operation implied in these two grants (treating

the lease as a demise freed from the operative effects to be given the terms I am about to advert to) I should come to that conclusion.

The respondent's rights were acquired earlier and therefore in such view must stand and appellant's contention fail.

But as other arguments addressed to us may deserve attention, let us look at the lease.

Its recital sets forth that the lessee had made application "for the exclusive right and privilege of taking and extracting by hydraulic or other mining process, all royal or precious metals or minerals from, in, under or upon that certain tract of land," etc., and further "that it was desirable to introduce hydraulic mining and to warrant the expense," the lessee was to have secured to him and there was to be given:

"The exclusive right of extracting and taking for his own use and benefit all royal or other precious metals from, in, under or upon the said tract of land."

There is no limitation of process in this second recital, but a reason given for the getting all. What would be left to the free miner to get out of his location if full force and effect were given to the plain meaning of these words?

How can operative effect be given to both of these claims? To prevent misunderstanding, however, the operative clause of this demise makes it "subject to the rent, covenants, provisoes, exceptions, restrictions and conditions thereinafter reserved and contained."

There are over twenty provisions set forth. The third is careful to make the demise "subject to the rights or claims of all persons who may have acquired the same under the regulations of any order of the Governor-General in Council up to the date of the lease."

Surely that was designed to protect those enjoying such rights as respondent and intended to be a legal boundary to the rights given by the lease.

But following that and many others, is the following:

"Provided also that this demise is subject to all other regulations contained and set forth in said order in council of the 3rd day of December, A.D. 1898 (initialed J.S.S.), as amended by subsequent orders in council as fully and effectually to all intents and purposes as if they were set forth in these presents."

When we turn to the amendments made in the regulations by an order of the 25th of August, 1900, which prohibits as follows:

"No application for a lease for hydraulic mining purposes, however, shall be entertained for any tract which includes within its boundaries any placer, quartz or other mining claims acquired under the regulations in that behalf or in the immediate vicinity of which placer, quartz or other mining claims have been discovered and are being profitably operated"; and also "that the gold commissioner shall, in addition to furnishing the above reports referred to, be required to furnish a certificate that the location applied for does not contain any such placer, quartz or other mining claim, nor have any such claims been granted in the immediate vicinity of such locations."

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

How can it be possible to give the effect claimed for this lease in the face of that prohibition contained by construction in this lease?

How can it lie to the mouth of appellants to override so plain a statutory provision and thereby deprive respondent of his rightful expectations?

And if we bear in mind the principles approved in this recent case of *City of Vancouver* v. *Vancouver Lumber Company* (1911), A.C. 711, and cases cited therein in regard to grantees of any kind under the Crown and the implied duty in all cases resting on a grantee to observe just such facts as doubtless were open to the eyes of the lessee herein, unless blinded when getting this lease, we do not need to rely even on this statutory prohibition if it could be taken out of consideration by the argument addressed to us relative to the operation of section 3 of the regulations of the 3rd of December, 1898.

If I understand that argument aright it is, that because an amendment of March, 1900, substituting a new clause for section 3 as it stood originally, refers to claims made in future or in respect of future entries, it must be implied that the original remained in force to give vitality to the inchoate negotiations which had preceded it and the amendment.

In truth the suggestion seems to be impalpable and the argument has no foundation to rest upon.

The amendment of March is substituted for the original of December, and with later amendments such as of August, 1900, when consolidated with the remaining original sections form a code of regulations which may and must get a rational interpretation and one that will, however the words looking to futurity may be capable of being read; and be so read that everybody's rights will if possible be preserved even including those of the appellant if and so far as founded on these regulations.

I think the appeal should be dismissed with costs.

Anglin, J.: In my opinion the orders in council of the 2nd of March, 1900, and of the 25th of August, 1900, apply *proprie vigore* to the appellants' lease of the 5th of November, 1900. I cannot read the order of the 2nd of March, 1900, otherwise than as providing for the substitution of its concluding paragraph for clause No. 3 of the regulations made by the order in council of the 3rd of December, 1898, as amended by the order of the 24th of October, 1899. The effect of these combined regulations must be either to render the defendant's lease void, as having been issued in contravention of them or to exclude from it so much of the territory covered by the description of the demised lands as under them could not be demised to a hydraulic lessee. While it is not necessary now to determine which is the correct view, since in either the plaintiff is entitled to succeed, I incline that it should be held that the lease was issued subject to these regulations rather than that the Minister acted in contravention of them. The presence in the lease itself of the provision that the demise is:

"Subject to all other regulations contained and set forth in said order in council of the 3rd of December, 1898, as amended by subsequent orders in council as fully and effectually to all intents and purposes as if they were set forth in these presents,"

COURT OF APPEAL

1921

March 1.

BOYLE v. SEGUIN

not only tends to support this view, but also furnished a strong argument in support of the respondent's contention that the parties were expressly contracting subject to the amending regulations of the 25th of August, 1900, and that by the very terms of their contract they should therefore be deemed to have excluded from the demised premises the territory covered by the quartz mining claim of the plaintiff.

For this reason I would dismiss this appeal with costs.

Duff, J.: After most carefully considering the able argument of Mr. Congdon, I think the appeal should be dismissed. The last provision of clause eighteen of the lease in question introduces the regulation of the 25th of August, 1900, in so far at least as the application of the regulation is not inconsistent with the validity of the lease itself. The effect of that regulation is to prohibit the leasing for hydraulic mining of any area embraced within the boundaries of a quartz claim; and the incorporation of the regulation in the lease in question consequently excluded all such areas from the limits of the land demised.

MEMO:—The Chief Justice and Brodeur, J., agreed to dismiss the appeal with costs.

REX v. MEEHAN.

MACDONALD, J. (In Chambers)

1925

March 5.

REX v. MEEHAN

Taxation—Income War Tax—Return not made for 1920—Time within which information must be made—Summary conviction—Certiorari—Costs—R.S.C. 1906, Cap. 51, Sec. 135; Can. Stats. 1917, Cap. 28, Sec. 8; 1920, Cap. 49, Sec. 11—Criminal Code, Sec. 1142—R.S.B.C. 1924, Cap. 62.

An information for failing to make a return of income within 30 days after demand under section 8 of The Income War Tax Act, 1917, as amended by section 11, Cap. 49 of 1920, must be laid within six months from the day or days as to which the accused is charged with being in default, section 1142 of the Criminal Code being applicable thereto.

Section 135 of the Inland Revenue Act does not apply to proceedings based on an infraction of any of the provisions of The Income War Tax Act, 1917.

Where a magistrate dismissed a charge punishable by summary conviction and is reversed by appeal to the County Court the accused may seek redress by *certiorari*.

Where such a charge is not laid by the Crown the Crown Costs Act does not apply and if on *certiorari* proceedings the order of the County Court judge allowing the appeal from the magistrate is quashed, costs may be given the accused.

MACDONALD, J. (In Chambers)

1925

March 5.

REX v. MEEHAN

APPLICATION by way of *certiorari* to quash an order of the County Court allowing an appeal from a magistrate who dismissed a charge that accused failed to make a return of his income for the year 1920 as required under section 8 of The Income War Tax Act, 1917, and amendments. Heard by MACDONALD, J. in Chambers at Vancouver on the 29th of January, 1925.

Dickie, for the application.
Saunders, contra.

5th March, 1925.

MACDONALD, J.: J. P. Meehan was summarily tried before the deputy police magistrate of Vancouver, on a charge laid by F. C. Saunders, on behalf of the Crown, that on the 1st of November, 1922, and on the 2nd of November, 1922, he "did fail to make a return of his income for the year 1920," required to be made by section 8 of The Income War Tax Act, 1917, and amendments.

The charge, on the ground of the lack of territorial jurisdiction, was dismissed. The Crown did not, as had been suggested at the trial before the magistrate, obtain a case stated, but as an "aggrieved person" appealed to the County Court. Upon trial by the judge of that Court, Meehan was fined $50 and costs. He now seeks, through *certiorari* proceedings, to have the order imposing such penalty, reviewed and reversed on various grounds.

Judgment

In *Rex* v. *Beamish* (1901), 5 Can. C.C. 388, it was held that the decision of a County Court on appeal from a summary conviction is final and conclusive, and that a superior Court has no jurisdiction to interfere by *habeas corpus*. This decision was based upon section 752 of the Criminal Code (then 881) as follows:

"When an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this Part, the Court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or order."

It was coupled with the statement, that being a final judgment of a judge of the County Court, it was thus the judgment of a "Court of Record." While such decision might, by analogy, to

some extent be applicable to this application, still, it is capable of distinction upon the facts, as in that case the applicant for the writ of *habeas corpus* had already exhausted by an appeal, one of the remedies open to him upon conviction before the magistrate. Here, Meehan, who was successful before the magistrate, seeks redress by *certiorari* against a decision rendered against him upon an appeal by the complainant to the County Court.

The first ground alleged for reversing the judgment of the County Court judge, was that there was a lack of territorial jurisdiction proved to entitle the magistrate to try the case, and that this defect operated, so as to debar the appeal from being heard by the County Court judge. I think that while the want of such jurisdiction may have existed in the trial before the magistrate, still, it was only a failure of evidence to support the prosecution in this respect, and that upon the re-hearing in the County Court, on appeal, such evidence could be, and was supplied, to destroy any defect that may have existed in the previous trial.

Then it was alleged that, on the face of the proceedings, it was apparent that the charge was laid more than six months after the time when the matter complained of arose, and was thus contrary to the provisions of section 1142 of the Code, as follows:

Judgment

"In the case of any offence punishable on summary conviction, if no time is specially limited for making any complaint, or laying any information, in the Act or law relating to the particular case, the complaint shall be made, or the information shall be laid, within six months from the time when the matter of complaint or information arose."

The side-note referring to this section summarized the enactment as follows:

"Limitation of prosecutions of offences punishable on summary conviction."

The information in this case was laid on the 24th of January, 1924, and alleged that the accused on 1st November, 1922, and on 2nd November, 1922, failed to make the return referred to. The particular case, forming the subject of the prosecution was, for an alleged failure of Meehan to comply with the demand of the minister of finance to make a return under section 8 of The Income War Tax Act, 1917, as amended by Cap. 49, Sec. 11

MACDONALD, J. (In Chambers)

1925

March 5.

REX v. MEEHAN

of 1920, after 30 days had elapsed. It was provided by the following section 9, subsection (1), that:

"For every default in complying with the provisions of the next preceding section, the persons in default shall each be liable on summary conviction to a penalty of $100 for each day during which the default continues."

There is no special limit in the said last mentioned section, as to the time within which a remedy should be sought to recover the penalty in a summary manner, and there is no law outside such statute creating the liability against a party so being in default. It is quite apparent that the information laid on the 24th of January, 1924, was for an offence, stated to have been committed in November, 1922. If so, is it not contrary to the limit of the six months, prescribed by said section 1142 of the Code, within which complaints shall be made or informations laid for offences punishable on summary conviction? I do not think that section 135 of the Inland Revenue Act (R.S.C. 1906, Cap. 51) is applicable to the proceedings taken and a conviction based upon an infraction of any of the provisions of the said Income War Tax Amendment Act.

Judgment

This would be a defect appearing on the face of the record. The County Court judge, whether possessing the power or not, did not amend the information, as to time or otherwise, nor was any application made for that purpose. In hearing the case on appeal *de novo,* he must necessarily have considered the charge as laid, and imposed a penalty accordingly, for the two specific days in which Meehan was in default.

Paley on Summary Convictions, 8th Ed., 139, refers to the necessity of proving every material fact supporting the charge, and assigning a specific date and place to the offence. The evidence should also fix a certain date to the offence in respect of time, *viz.*:

"As a certain time is usually limited by statute for a summary prosecution before justices of the peace, it was necessary, on that account also, to fix the offence to a certain date, in order that the proceeding might appear to be within the prescribed period; for if that was not shewn either by positive proof of the day, or by express reference in the evidence to a date previously mentioned, the conviction could not be supported."

Rex v. *Woodcock* (1806), 7 East 146, is cited as one of the cases supporting this proposition. In that case, through an over-

sight, the year was not stated in which the offence was committed, and the head-note sums up the law to be that—

"Where a penalty is to be sued for before justices of the peace within a certain time after the offence committed, upon a conviction for such offence returned by *certiorari* into B.R., it ought to appear on the face of the evidence stated in such conviction that the prosecution was in time."

The necessity for the prosecution being within the time limited, is emphasized in England by the passage of 11 & 12 Victoria, Cap. 43, section 9, by which it was enacted that a variance between the information and the evidence as to the time of committing the offence was not to be deemed material "if it be proved that the information was in fact laid within the time limited by law for laying the same": see Paley, p. 140.

As to an application of section 1142, of the Code, as to the limited time for taking summary proceedings under the "Post Office Act," see *Rex* v. *Gourlay* (1916), 26 Can. C.C. 23.

No formal conviction, imposing the penalty upon Meehan, was signed by the County Court judge, as there would have been, by the magistrate had he ordered the payment of a penalty. Assuming, however, that the order allowing the appeal is to be read with the information so as to form the "record" and shew the disposition of the case, then the defect as to the limit of time within which summary proceedings should have been taken was apparent on the face of the record. Such defect is fundamentally irremediable and destroyed the right of the County Court judge to adjudicate. The result is that the conviction should be quashed.

Judgment

Another ground submitted, as warranting a reversal of the decision of the County Court judge, was, that *mens rea* was lacking on the part of Meehan, and that this was an essential, in order to render him liable to the penalty imposed by the statute. This contention, while of considerable weight, was not presented to the County Court judge for consideration nor passed upon by him in his reasons for judgment. Consideration of this contention would involve discussion, as to what documents constitute the record in an appeal before a County Court judge, where he gives reasons for his decision, and also as to whether the *Nat Bell* case (*Rex* v. *Nat Bell Liquors Ld.* (1922), 2 A.C. 128) applied and affected the position. This course, however,

MACDONALD, J. (In Chambers)

1925

March 5.

REX v. MEEHAN

Judgment

would seem needless in the view which I have taken, as to the information being laid against Meehan, beyond the time prescribed for a summary proceeding under the Criminal Code.

In the appeal to the County Court, the appellant was awarded costs. The proceedings against Meehan were not instituted by the Crown and the Crown Costs Act of the Province does not apply. I see no reason why I should not give costs to Meehan upon this application (arising out of a proceeding under the Criminal Code), so the order of the County Court judge, allowing the appeal from the magistrate, is quashed with costs.

Application granted.

MACDONALD, J. (In Chambers)

1925

March 12.

IN RE BERQUIST

IN RE ALBERT BERQUIST.

Certiorari—The Canada Shipping Act—Wreck commissioner—Decision of—Master of ship fined and certificate suspended—Not given fair trial—Excess of jurisdiction—Preliminary investigation not necessary—R.S.C. 1906, Cap. 113, Sec. 801—Can. Stats. 1908, Cap. 65, Secs. 37 and 38.

The decision of a wreck commissioner sitting as a "Court" under Part X. of the Canada Shipping Act suspending and fining the master of a ship was quashed as being in excess of the jurisdiction of said Court on the ground that the captain had not been given a fair trial as the nature and form of the charges against him were such as prevented him from presenting a complete defence.

A formal investigation may be held by a wreck commissioner sitting as aforesaid in which power of cancellation or suspension of the certificate of a master may be exercised, although a preliminary investigation has not been held.

APPLICATION by way of *certiorari* to quash the decision of J. D. Macpherson, Dominion wreck commissioner, upon the investigation in connection with the loss by fire of the steamship "Trebla" on the 1st of May, 1924, at the conclusion of which the certificate of competency of Berquist as a master mariner was suspended for six months and a fine of $100 imposed.

Statement

Heard by MACDONALD, J. in Chambers at Vancouver on the 28th of January, 1925.

MACDONALD, J. (In Chambers)

1925

March 12.

IN RE BERQUIST

Griffin, and *Sidney A. Smith,* for Berquist.
Russell, K.C., and *F. R. Anderson,* for Macpherson.

12th March, 1925.

MACDONALD, J.: Albert Berquist seeks by *certiorari* proceedings, to quash a decision or judgment of John D. Macpherson, Dominion wreck commissioner, sitting as a "Court" hearing a formal investigation, under Part X. of the Canada Shipping Act (R.S.C. 1906, Cap. 113) and regulations thereunder, in connection with the loss by fire of S.S. "Trebla" on 1st May, 1924. The certificate of competency of Berquist, as a master mariner, was, upon conclusion of such investigation, suspended by the Court for a period of six months, and a fine of $100 imposed upon him.

Counsel for the department of marine and fisheries objected that a reversal of such decision or judgment is only obtainable, through appeal to the minister of such department, and that redress to the Supreme Court by *certiorari* proceedings is barred by statute. The sections of the Canada Shipping Act, applicable on this point, are as follows:

"806. The Minister may order the case to be reheard by the Court by which the case was heard in the first instance, or may appoint another commissioner and select the same or other assessors to rehear the case.

Judgment

"806A. There shall be no appeal from any decision of a Court holding any formal investigation under this Act, except to the Minister for a rehearing under the provisions of section 806.

"2. No proceeding or judgment of a Court in or upon any formal investigation shall be quashed or set aside for any want of form, nor shall any such proceeding or judgment be removed by *certiorari* or otherwise into any Court; and no writ of prohibition shall issue to any Court constituted under this Act in respect of any proceeding or judgment in or upon any formal investigation, nor shall such proceeding or judgment be subject to any review except by the Minister as aforesaid."

Berquist was not disposed to apply for a rehearing, but submitted that the decision or judgment should be reversed on the ground that there was a want of jurisdiction, or excessive jurisdiction in the Court which thus deprived him, for the time being, of his right to pursue his calling.

In *The Colonial Bank of Australasia* v. *Willan* (1874), L.R.

MACDONALD, J. (In Chambers)

1925

March 12.

IN RE BERQUIST

5 P.C. 417 at p. 442, the effect of a statute, purporting to prevent *certiorari* proceedings being taken, is referred to as follows:

"It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of *certiorari* to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a *certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

If the Court was competent to decide the question and impose the penalty referred to, I am debarred from exercising a discretionary power and quashing the adjudication, without assuming the functions of a Court of Appeal, so that I must determine that, in order to accede to the application there was want of or excessive jurisdiction existing in the Court whose decision is complained of. The inferior Court is the sole judge of the weight of evidence, though "it may well be that error as to the law of evidence, like any other error of law, if it is apparent on the record, is ground for quashing the order made below": *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128 at p. 144.

Judgment

Still, if the decision of the inferior Court which is sought to be corrected, proceeds upon evidence which might be criticized, and perchance discarded, this is not an error in law, but only an error of judgment, which does not affect the question of jurisdiction. The object thus, in *certiorari*, "is to examine the proceedings in the inferior Court to see whether its order has been made within its jurisdiction": *Nat Bell* case, *supra*, at pp. 154-5. In that case, the practice in some of the Provinces of Canada for a superior Court, to inquire whether there was any evidence upon which the tribunal below should act, was fully discussed, and the course pursued that where no evidence was forthcoming, deciding that it was an error of law, of which the superior Court was bound to take notice, and quash the conviction, was overruled. A number of authorities were cited along this line, as to the superior Court not considering the evidence of the Court below, even in one case refusing to interfere, where the justices, in making their order, had acted on hearsay evidence:

"The Court of Queen's Bench nevertheless, having decided that there was jurisdiction, declined to interfere. . . . . A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. . . . . It cannot be said that his conviction is void, and may be disregarded as a nullity, or that the whole proceeding was *coram non judice*. To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong":

Nat Bell case, *supra*, pp. 151 and 152.

Then again, in this important judgment, the case of *Rex* v. *Mahony* (1910), 2 I.R. 695, is referred to, as containing a full and able discussion of all the authorities upon the question of the evidence in the Court below, and the case of *Ex parte Hopwood* (1850), 15 Q.B. 121, is remarked upon as follows (p. 152):

"In that case *certiorari* having been taken away by statute, the Court could only interfere if the justices had convicted without having any jurisdiction at all."

So applying *Nat Bell* case and giving it due effect, the point to determine here is not, whether there was any evidence, to support the decision or judgment of the Court holding the formal investigation into the circumstances attendant upon the loss by fire of the steamship "Trebla"; but whether such Court had jurisdiction to give its decision in the terms mentioned.

Judgment

The first ground taken, was that the Court was not properly constituted, through certain preliminary essentials not having been complied with, and was thus not vested with the power to suspend the certificate of Berquist or impose the fine. Section 788 of the Act was referred to, reading as follows:

"Whenever a formal investigation is likely to involve a question as to cancelling or suspending the certificate of competency or service of any master, mate, pilot, or engineer, he shall be furnished with a copy of the report or statement of the case upon which the investigation has been ordered."

It was contended that the "copy of the report or statement of the case" referred to, is the one required to be sent to the master on a preliminary inquiry, under section 780. This section provided that the officer or person holding such preliminary inquiry, should, upon its conclusion, "send to the

MACDONALD, J. (In Chambers)

1925

March 12.

IN RE BERQUIST

minister a report containing a full statement of the case, and of his opinion thereon." The result would be, if this contention prevailed, that a preliminary investigation would always require to be held, before a certificate of competency could be cancelled or suspended through the holding of "a formal investigation." Such a course would curtail the power vested in the Court holding the formal investigation and is contrary to section 782A, which provides that:

"It shall not be necessary to hold a preliminary investigation before a formal investigation is held."

The similarity of the wording, in referring to the "statement of the case," in said sections 780 and 788, certainly creates an arguable point, but considering the whole purview of the legislation, I do not think it destroys the specific power vested in the Court, holding a formal investigation under section 801, to cancel or suspend the certificate of a master, mate, pilot, or engineer.

In my opinion, it is not necessary to hold a preliminary investigation, before a formal investigation may be held, in which the power given to such tribunal of cancellation or suspension of a certificate may be exercised.

Judgment

It was then contended that the letter and spirit of subsection 3 of said section 801, had been disregarded. It reads in part as follows:

"A certificate shall not be cancelled or suspended by a Court under this section, unless . . . . . the holder of the certificate . . . . . has had an opportunity of making a defence."

This statutory provision, affording protection to a master mariner, when his certificate is in jeopardy, is only natural justice and should receive "a fair, large and liberal construction and interpretation."

Before dealing further with the grounds, upon which Berquist rests this application, it might be well to discuss some of the facts surrounding the investigation or trial. They may be summarized as follows: Berquist, as master and owner of the steamship "Trebla" was, on the 12th of September, 1924, served with a notice, by the assistant deputy of marine and fisheries, that a formal investigation had been ordered by the minister of marine and fisheries, into the circumstances attending the

abandonment and loss of the S.S. "Trebla," and attached to such notice, there was a "statement of the case and the report" upon which the investigation had been ordered. It was pointed out, in such statement, that the Court had power to suspend or cancel the certificate of such master or mate, as might be found in fault, and impose such fines and costs as were provided by the Canada Shipping Act. Also, that it would depend on the evidence adduced, whether the blame would be laid upon the person mentioned in the last question, of the list of questions, submitted for the opinion of the Court. Such questions were eight in number. The first five related to the loss by fire of the S.S. "Trebla," the insurance effected upon her, and the cause of and measures taken to extinguish the fire; question 6, related generally to the cause of the loss of the vessel and question 8 was as follows:

"Was the loss of the S.S. 'Trebla' caused by the wrongful act or default of the Master?"

With the copy of the report, as to the investigation being ordered, was enclosed a letter, signed by "A. S. Mathew & Co. Ltd.," insurance agents, addressed to the said Captain John D. Macpherson, wreck commissioner. It was dated 3rd September, 1924, and suggested that the fire, which had destroyed the S.S. "Trebla" on the 10th of May, 1924, was very suspicious, and sought a stringent inquiry into the loss of the vessel. Reference was made to the amount of insurance, and that the boat was grossly over-insured—"and so insured having a specific purpose." Berquist, at the same time, also received a notice from the said Macpherson, stating that he had been authorized by the minister of marine and fisheries, to hold a formal investigation into the causes which led to the loss of the S.S. "Trebla," and that "it will depend on the evidence adduced whether the blame will be laid on you or not for this casualty" and advising him to employ counsel to look after his interests. The formal investigation authorized proceeded before the said Macpherson, who had associated with him, Captain Dixon Hopcraft, R.N.R., and John T. Edmunds, as nautical assessors. It commenced on the 13th of October, 1924, and was concluded on the 15th of October, 1924. Mr. A. W. Morris, then, at the request of the Court, at the conclusion of the evidence, on behalf

Judgment

MACDONALD, J. (In Chambers)

1925

March 12.

IN RE BERQUIST

of the department of marine and fisheries, without amendment or amplification, submitted the question for consideration of the Court, of which Berquist had received a copy, at the time when he was notified of the proposed investigation. He did not specify any acts of misconduct upon which the opinion of the Court was desired. The Court immediately gave its answers to such questions, the only ones of importance being as follows:

In answer to question 5, as to whether prompt, proper and sufficient measures were taken to extinguish the fire, the Court stated:

"No, owing to culpable paucity of crew."

In answer to question 6, as to what was the cause of the loss of the vessel, the Court stated:

"that it was fire, which it appears was impossible to be controlled or checked, due not only to the vessel being wrongfully shorthanded, but also to the fact that it was found impossible to use steam also."

In answer to question 8, as to whether the loss of the S.S. "Trebla" was caused by the wrongful act or default of the master, the Court stated:

"By the default of the master inasmuch as he deviated from his course, anchored, and then left the vessel inadequately manned for any emergency that might arise. . . . . ."

Judgment

Following consideration of such questions and answers, the Court gave its judgment, stating that after it had carefully inquired into the circumstances attending the casualty, it found in accordance with the answer to the last-mentioned question and thereupon suspended the certificate of Berquist, as a master mariner for a period of six months from the date of the investigation, and fined him the sum of $100 for fraudulently tampering with his certificate.

It was submitted that the statutory defence, afforded by statute, should have had ample opportunity for presentation. Further, that along these lines and supplementing them;—that Berquist did not receive a fair trial; that the Court did not function nor act properly as a judicial tribunal, and that the conduct of the trial was such, as to destroy any jurisdiction possessed by the Court; that he had not an opportunity of meeting charges properly laid; that the Court did not afford him a defence to charges which would support the findings of wrongful acts and defaults of which he was found guilty.

That Berquist was entitled to a fair trial, would be a right he possessed under all the circumstances, but should be especially evident in this matter, in view of the fact that the investigation was initiated by the insurance companies, many months after the fire, and not by the department of its own volition in the public interest. Has this fundamental principle, that every one is entitled to a fair trial, been overlooked? If so, is his only redress under the Canada Shipping Act? Such principle was applied in *Re Sing Kee* (1901), 8 B.C. 20, where the right of *certiorari* had been taken away by statute. MARTIN, J. there decided that "where there has been improper conduct of the magistrate or the fundamental principle entitling the party to a fair trial has been overlooked" *certiorari* will lie and conviction be quashed. In that case, the magistrate, after hearing oral evidence, had viewed the place, where the liquor was alleged to have been sold to an Indian. The learned judge refers to the conduct of the magistrate being "really an inherent defect in the course of legal procedure, something not warranted by law—which voids the conviction even though the course taken by the magistrate was with the best intention."

Judgment

The manner in which persons, who are not judges, should exercise a judicial or *quasi*-judicial authority and observe certain conditions, essential to a fair trial, was discussed by Jessel, M.R. in *Russell* v. *Russell* (1880), 14 Ch. D. 471 at p. 478; 49 L.J., Ch. 268. Referring to the judgment in *Wood* v. *Wood* (1874), L.R. 9 Ex. 190; 43 L.J., Ex. 153, he said:

"I must say it contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than judges who have judicial functions to perform, ... The passage I mean is this, referring to a committee: 'They are bound, in the exercise of their functions, by the rule expressed in the maxim, *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

This necessity for a fair hearing, especially as to the charges being defined, which a person had to meet, even in proceedings to expel a member from the enjoyment of club privileges, was long ago outlined in the judgment of Lord Denman in *Innes* v.

MACDONALD, J. (In Chambers)

1925

March 12.

IN RE BERQUIST

Wylie (1844), 1 Car. & K. 257 (70 R.R. 786) at p. 263 as follows:

"The society was, in my opinion, wrong in removing him without giving him distinct and positive notice that he was to come and answer the charge that was made against him, and I hold that he should have been told what the charge was, and called on to answer it, and told that it was meant to remove him if he did not make his defence. No proceeding in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so. As no such notice was given here, I think that the removal is altogether a void act, and I am therefore of opinion that the plaintiff is still a member of the society."

While the investigation was, ostensibly, for the purpose generally of inquiring into the loss of the S.S. "Trebla," still, it is quite evident from the course of such investigation that the main object was to find if such fire resulted from misconduct on the part of Berquist. The institution of the investigation caused by the insurance companies, was based upon the belief of their agents that the crime of arson had been committed. Viewed in the light of a trial involving such serious consequences to Berquist, the proceedings upon the trial were, to say the least, somewhat peculiar. A certain procedure was prescribed by the rules under the Canada Shipping Act, but it was not followed. According to such rules, the evidence, on the part of the department is first to be produced, and then further evidence may be tendered by parties interested. Berquist, although as it were on trial, was sworn and examined, at great length, as a witness, at the outset, by the Court, after an adjournment had been sought by his counsel, on account of an action then pending against the insurance companies in connection with the fire, had been refused. Counsel for the insurance companies opposed the adjournment and subsequently, after the Court had ceased its examination of Berquist, sought to further examine him in connection with the loss by fire. There is no doubt, as to the view taken by the Court, that Berquist was on trial. Mr. Macpherson expressed himself to that effect, stating that Berquist was "a certificated man and had to do what he was told and that he is the one on trial, as you might say." Considering the fact that Berquist was thus on trial with the danger of a dire result, he also, as a judge called on to determine the guilt or

Judgment

otherwise of the accused, took a somewhat singular view of his position. After he had examined Berquist at length and the question arose, as to the right of counsel for the insurance companies to cross-examine, he stated that such counsel was not a prosecutor in any sense and regretted that there was no Crown counsel appointed, and then added, "as a matter of fact if any one is the prosecutor it is the Court here." Then after the conclusion of the investigation and imposition of the period of suspension of the certificate, accompanied with a fine, he discovered that such imposition of a fine was clearly unauthorized. His letter, so informing Berquist, bore out, to some extent, the view of his position, expressed during the trial. He intimated in such letter that while the fine could not be imposed some other action might be taken against Berquist under the Canada Shipping Act.

I do not think, however, that a lack of proper procedure being followed and the views expressed by the Court below would, of themselves, have prevailed, so as to render the decision void, in view of the *Nat Bell* case, *supra,* and authorities there referred to. Still, it has some bearing upon the other and more important feature of the case, that Berquist was not enabled, on account of the nature and form of the charges, to present his defence. It is self evident that a person, in order to defend himself against a charge, must know the nature of the charge. In such charge there should not, in the words of Lord Alverstone, C.J. in *Smith* v. *Moody* (1902), 72 L.J., K.B. 43 at p. 46, be

Judgment

> "any departure from the rules requiring fair information and reasonable particularity as to what is charged against a man."

It was strongly urged that these rules were not followed, and that the "questions" which formed the charges, upon which Berquist was tried, were not "positive and certain," so that "he might see by the information [the questions] how to direct his evidence": Paley on Summary Convictions, 8th Ed., p. 96.

Further, that, aside from the statutory protection afforded to Berquist, that the rule of natural justice referred to in Paley at pp. 95-6 "that the accused should have an opportunity of being heard before he is condemned," had not been observed. This rule is indispensably required in all proceedings of a

MACDONALD, J. (In Chambers)

1925

March 12.

IN RE BERQUIST

summary nature by justices of the peace—see *Reg.* v. *Dyer* (1703), 1 Salk. 181; 6 Mod. 41. "It is an invariable rule of law"—Lord Kenyon in *Rex* v. *Benn and Church* (1795), 6 Term Rep. 198. It would apply upon the trial of Berquist. In this connection, Mr. Baron Parke, in delivering judgment in *Bonaker* v. *Evans* (1850), 16 Q.B. 162 at p. 171, said:

"No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary."

This rule has been applied to cases other than those which are, in the strictest sense, judicial, *per* Erle, C.J. in *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180. Here the Shipping Act expressly requires, that notice should be given and a defence afforded to a party where the question of his certificate of competency is involved. An example of the necessity that the conviction for an offence should be founded upon an information alleging specifically such offence, is shewn by the case of *Reg.* v. *Brickhall* (1864), 33 L.J., M.C. 156. There the party accused was summoned, for assaulting a police constable in the execution of his duty, and was convicted of the lesser offence of common assault. He had not been charged with that offence, and Crompton, J., considered the conviction to have been made without jurisdiction and void. It was held that although the right to *certiorari* had been taken away by statute, this did not apply, as there had been an excess of jurisdiction. Reference was made, with approval, to *Martin* v. *Pidgeon* (1859), 1 El. & El. 778, where the accused person was convicted of being drunk under one statute though he had been summoned for being drunk and riotous, under another statute, and the conviction was on that account held bad.

Judgment

Berquist was not in terms found guilty of a "wrongful act" causing a loss of the S.S. "Trebla," but of the "default" mentioned bringing about the disaster. From the form of the questions served upon him, he could not, especially in view of the more serious charge, have known that he was being tried on the charges, that he deviated from his intended course, then anchored, and left his vessel inadequately manned. He might

have suspected from his examination that those matters were in the mind of the Court, but he was not "charged" with them as being acts either wrongful or of default. Nor when Mr. Morris, on the behalf of the department, submitted the questions for the opinion of the Court, in accordance with the rules, were such acts of omission and commission presented to the Court for its consideration. Berquist was thus not given an opportunity of meeting any such allegations of default nor presenting a defence. He should have been afforded a full and complete defence to charges of which the precise nature had been stated. He was deprived of this right, and as far as the findings of default are concerned, he had not notice, that he was on trial, and was condemned unheard. The "questions" constituting the "charges" to be investigated were not sufficiently specific to warrant the findings upon which decision was based. This is a defect apparent upon the face of the "record," and in the way the trial was held not remediable, even if resort were had to the evidence, to shew what occurred in the investigation. This latter course might be admissible, as not at variance with the *Nat Bell* case, *supra,* if the purpose was not to determine the nature and extent of the evidence but, for example, to see if the indefinite and general charges had been extended or specified before the Court and presented to Berquist for his defence and thus might support its decision. As I have mentioned, this was not done. In a case, in which the unfairness of the trial can hardly be said to be involved, Madden, C.J. in *The Queen* v. *The Court of Marine Inquiry* (1897), 23 V.L.R. 179 at p. 180, expressed himself as follows:

Judgment

> "Although the point here is a technical one, the salutary rule that in a charge affecting a man's life, liberty, or property precision should be insisted upon is to be enforced, and that he should be informed with particular exactness the precise nature of the charge against him."

In my opinion, the decision or judgment complained of by Berquist was in excess of the jurisdiction of the Court and thus void. It should be quashed both as to the suspension of the certificate and the imposition of the fine. In coming to this conclusion, I should add that I am not unmindful of the desirability, that the Department of Marine and Fisheries, vested by Parliament with the duty of conferring the right to persons to

MACDONALD, J. (In Chambers)

1925

March 12.

IN RE BERQUIST

have charge of life and property on the sea, should not have its powers restricted by the Courts, on any grounds which might be deemed technical or trivial. I feel, however, that the objections here are of such a substantial nature, as to warrant the course I have pursued. There will be an order accordingly without costs.

Application granted.

MACDONALD, J.

1925

March 18.

BRITISH COLUMBIA HOP CO. *v.* CORPORATION OF KENT

BRITISH COLUMBIA HOP COMPANY LIMITED v. CORPORATION OF THE DISTRICT OF KENT.

Real property—Cloud on title—Highway—Right to open municipality—Agreement with former owner to substitute—Lapse of time—Estoppel.

Under and by virtue of a survey made in 1872 the defendant Municipality claimed the right to open up a public road through the plaintiff's property. When the old survey was made the land was a pre-emption and on the issue of a Crown grant no reservation was made for a road nor was it even used as such since the formation of the defendant Municipality in 1895. A former owner of the land had agreed to give the Municipality another strip for a road in lieu of portion set off for that purpose in the old survey and in accordance with this agreement a road was constructed and has been continuously in use as a public highway. The assertion of the right to open the road in accordance with the old survey the plaintiff contended was a cloud on the title which should be removed.

Held, that irrespective of whether the Municipality had the power to make the exchange when the present road was built it is a highway used by the public and in view of the length of time which has elapsed since the old survey was made the Municipality is estopped from opening up a road in accordance with the old plans.

Statement

ACTION to remove a cloud on the title to district lot 305, in the Municipality of Kent. A survey made in 1872 and gazetted in 1879 reserved a certain portion of the lot for a public highway. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 2nd of March, 1925.

Reid, K.C., and *Gibson*, for plaintiff.

A. H. MacNeill, K.C., and *G. E. Martin*, for defendant.

18th March, 1925.

MACDONALD, J.

1925

March 18.

BRITISH COLUMBIA HOP CO. v. CORPORATION OF KENT

MACDONALD, J.: Plaintiff seeks to remove a cloud on its title to district lot 305, in the Municipality of Kent, British Columbia. It arose through a claim made by the Municipality, that it has a right to open up and construct a public road 30 feet in width across such property. Although there does not appear to be any present intention, on the part of the Municipality, to fully exercise such a right, still, it has been pointedly asserted, by a survey for that purpose. It is important to the plaintiff, that the question, as to whether such right exists or not, should be decided, as its ownership and right to possession of the land through an indefeasible title, would not prevail against a public highway. If it were opened up and used, it would, aside from the valuable cultivated land thus occupied, divide the hop fields of the plaintiff and appreciably affect the proper carrying on of its extensive and important industry. Defendant contends that such a highway has existed since 1879, though not used, subsequent to the incorporation of the Municipality in 1895.

It appears that in 1872, Mr. E. Stevens surveyed a road across said district lot 305, which was then a pre-emption, held by one John Walker, and that subsequently on the 18th of March, 1879, this surveyed road was gazetted by the chief commissioner of lands and works. To this extent it became a highway, but there is no evidence to shew that it was laid out or public moneys spent upon it. Subsequently, the Crown grant issued in 1884 for the pre-emption to Walker, without any reservation of such highway. Nor did the field notes, upon which such Crown grant was issued, make any reference to the road in question. It is a fair presumption that the road thus surveyed was not indicated on the maps in the office of the proper department at Victoria. I am satisfied that, following the survey of the road and the gazetting referred to, there was a road which might be more aptly termed a "trail" across the property in question. The existence of such a road was recognized for some years and then, after the advent of the railroad, it fell into disuse and was completely blocked by fences, constructed from time to time.

Judgment

It is contended that the Crown grant having issued without any reservation, that the land forming the highway, as surveyed,

MACDONALD, J.

1925

March 18.

BRITISH COLUMBIA HOP CO. v. CORPORATION OF KENT

Judgment

became vested in Walker and his successors in title. The argument submitted to the contrary is, that "once a highway always a highway." See Halsbury's Laws of England, Vol. 16, p. 69. Further, that non-user does not destroy the right of the public to enjoy a highway, once it has been properly established. See *Cameron et ux.* v. *Wait* (1878), 3 A.R. 175 at p. 183. In this connection, it is worthy of mention, that while a road was surveyed across the property, which might be called the "Stevens Road," still the survey and field notes were not accurate. The surveyors engaged by the Municipality and plaintiff disagree in locating the line run by Stevens, but coincide in their opinion, as to the inaccuracy and that the land intended to be utilized for the highway could not be clearly defined upon the ground. This difficulty might have been overcome. No remedy, however, is sought against the Crown and it is needless to discuss the effect of the Crown grants and these points further. The plaintiff properly admitted at the trial that it could not obtain any remedy in this action, which would affect the Crown. It must necessarily apply to the Municipality. It was conceded that it could not, without the Attorney-General of the Province being added as a party, representing the Crown, determine the ownership of that portion of the land, which had been surveyed and was proposed by the Municipality to be used as a highway.

The plaintiff contended that in 1895, after the Municipality had been organized, events occurred which entitle it to successfully resist the claim of the Municipality, to open up the road in question. It was shewn that James McDonald, acting on behalf of his mother, Amanda McDonald, after various interviews with the Municipal Council in that year, eventually came to an agreement with such Council that, in lieu of any right which might be possessed by the Municipality or the public generally to the use of a highway across district lot 305, that a road would be established along the Clear-water or Agassiz slough. In order to construct such road he agreed to move back the fences on the property for the requisite distance. This arrangement was arrived at, in good faith, between the parties. It was fully completed and a road established which has been used ever since as a public highway. The Municipality has

improved and repaired this road, as occasion required, and it was only recently that the claim was made, as to opening up the old abandoned road across the property. I find, as a fact that an exchange was intended to be made in 1895 and that for all intents and purposes, so far as the use of the property is concerned, this intention was then carried into effect. It was submitted, even if the Court should find that, while physically such an exchange may have taken place, and was intended, still, it could not be legally effected and that the lapse of years would not operate to destroy the right of the Municipality to use the "Stevens Road." This contention is based upon the proposition that if a corporation has not the power to perform a certain act, it cannot be deemed to have performed it, by applying the principle of estopel. It cannot, in other words, extend its powers by the application of the principle. Fry, L.C., in *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (1887), 18 Q.B.D. 714 at p. 719, succinctly stated the law as follows:

"No corporate body can be bound by estoppel to do something beyond their powers."

Judgment

It was contended that the Municipality had statutory power to effect such an exchange of land, but I do not think it existed. Subsection (133) of section 104 of the Municipal Act, 1892, was not applicable. There was, in my opinion, no provision in the Municipal Act, which would enable its accomplishment. So the principle of estoppel cannot be called into operation to effect an "exchange." The only remedy, in this respect, as to change of ownership would appear to be by an application to the Lieutenant-Governor in Council under subsection (22) of section 54 of the Municipal Act of 1914.

Had the Municipality then any powers at the time which might have been exercised without question and thus enabled plaintiff to acquire, or, at any rate, obtain for the future the use of whatever land had been surveyed by Stevens for a highway? If such right were possessed by the Municipality, then should the principle of estoppel be applied against the Municipality, so as to effect this benefit to the plaintiff?

While the plaintiff, sought, by its pleading, to obtain a judgment declaring that the portion of land, which would have been

MACDONALD, J.
1925
March 18.

BRITISH COLUMBIA HOP CO. v. CORPORATION OF KENT

Judgment

utilized for the "Stevens Road," is its property in fee simple, it has, in view of the Crown not being a party to the action, properly abandoned the attainment of this objective and seeks, in any event, to have it declared upon the facts, that the "Stevens Road" should not be closed by the Municipality. In support of this contention, counsel refers to the power vested by by-law in the council of a municipality, at the time when the exchange took place, under subsection (107) of section 104, of the Municipal Act, then in force, being Cap. 33 of B.C. Stats. 1892. It provided, in part: "For opening . . . . altering . . . . or stopping up roads . . . . . within the boundaries of the municipality or the jurisdiction of the Council, and for entering upon, expropriating, breaking up, taking or using any real property in any way necessary or convenient for the said purposes . . . . . subject to the restrictions" providing for compensation, etc. Thus while the defendant Municipality had not, in 1895, the power to make "exchange" of properties, it could by by-law have "stopped up" the "Stevens Road," and taken the necessary land to establish the McDonald or No. 9 Road. It would not have been necessary to take any expropriation proceedings, to obtain the necessary land for the latter purpose, as the owner to supplement the arrangement could have given a proper conveyance to the Municipality of the necessary land. This course might, and should, in good faith have been pursued in 1895. Can the Municipality now, in 1925, take advantage of the neglect occurring so many years ago, especially when all interested parties have in the meantime treated the arrangement for exchange as binding and reaped the benefit therefrom? The McDonald Road is a highway used by the public and the arrangement could not now be rescinded, so far as McDonald and his successors in title are concerned. Then, again, should the Municipality obtain the benefit of the McDonald Road, without bearing the burden, if it might be so termed, of having the Stevens Road closed in the future, as in the past. The facts found by Riddell, J. in *Pirie and Stone* v. *Parry Sound Lumber Co.* (1907), 11 O.W.R. 11 at p. 19 fit into the circumstances of this case, and with slight changes are appropriated as my view of the facts as follows:

"I find the facts as being that [McDonald] did lay out a new and public road on his own land in lieu of the original road allowance—that this was accepted by the municipality, and the land was first appropriated by the owner and then by the municipality—in any sense of the word, except that which makes it like 'convey,' an equivalent for 'steal'—'as a public road in place of such original allowance.' That being so, I think [M] was entitled to this original road allowance."

It must be borne in mind that the ownership of the fee simple, in the road and highways, does not vest in the Municipality, so the judgment here, could not go as far as it went in that case. Would it not, however, be inequitable to allow any such claim for a roadway, as is now asserted by the Municipality, to be set up, to the detriment of the plaintiff's right to use of the property. I think the facts call for the application of the principle of estoppel, in so far as the powers of the Municipality could have been exercised to effect the intention of the parties. This principle is referred to, in 3 C.E.D. at p. 494 as follows:

"Any positive acts by municipal officers which may have induced the action of the adverse party, and when it would be inequitable to permit the corporation to stultify itself by retracting what its officers have done, will work an estoppel."

Mather, C.J., in *Portage La Prairie* v. *Cartier* (1924), 1 D.L.R. 775 at p. 788 says:

"A municipal corporation may be estopped by its conduct just as any other corporation or a private individual may: Meredith's Municipal Manual, p. 8; *Township of Pembroke* v. *Canada Central R.W. Co.* (1882), 3 Ont. 503; *Winnipeg Electric R. Co.* v. *City of Winnipeg* 4 D.L.R. 116, (1912), A.C. 355; [(1910)], 20 Man. L.R. 337."

Judgment

It was held to the like effect in *Town of Rat Portage* v. *Citizens Electric Co. of Rat Portage* (1902), 1 O.W.R. 44 and *Toronto* v. *Toronto Electric Light Co.* (1904), 3 O.W.R. 825; (1905), 10 O.L.R. 621, that a municipal corporation is bound by acquiescence and may be estopped. The Municipality should be precluded, as a private individual would have been, under like circumstances, from denying, as against the plaintiff, a successor in title to McDonald, that the road in question should continue to be closed. This was the intention of the parties and should be implemented by the Council of the Municipality, in so far as its power extends. Upon the facts in this case, I feel no hesitation in thus applying the principle of estoppel and giving a declaratory judgment. The effect of the judgment will be to prevent the defendant Municipality from opening up what has been termed the "Stevens Road," across the property of the plaintiff. Order accordingly in apt form. Plaintiff is entitled to costs.

Order accordingly.

MURPHY, J.

1925

April 20.

F. W. WOOLWORTH CO. LTD. v. POOLEY

F. W. WOOLWORTH CO. LIMITED v. POOLEY *ET AL.* (No. 2).

Sale of land—Action for rescission—Vendors executors of an estate—One of purchaser's solicitors executor of estate—Knowledge of purchaser—Evidence—Price a reasonable one—No damages.

The plaintiff, a trading company with head office in Toronto, desirous of acquiring a new location for a branch store in Victoria, its general manager, in 1921, made a brief inspection of lots 418 and 419 View Street, and called on the defendant Jones one of the executors of the Vernon Estate to which the lots belonged regarding the price. The plaintiff then engaged the defendant solicitors Pooley, Luxton & Pooley by telegram from Toronto to negotiate for the purchase of the property which was vested in the defendants Jones and Luxton as trustees and executors of the Vernon Estate. The solicitors did not disclose to the plaintiff that one of the firm was the same person as the trustee, but it was stated that Jones, the other trustee, had himself verbally mentioned to the plaintiff's general manager that his co-trustee was a man named Luxton. The negotiations resulted in an offer by the trustees at $150,000 and an option later at $140,000, which amount the plaintiff after attempting to reduce, paid early in 1922, and thereafter made extensive alterations to the existing building and erected a new building. Later, the plaintiff, on hearing that the solicitors had always acted for the estate, and that one of the firm was also one of the trustee vendors, brought this action for rescission of the sale, or alternatively for damages for the non-disclosure by the solicitors and the trustees of the above and other facts as to the financial condition of the estate and as to taxes.

Held, on the facts, that the plaintiff's general manager had knowledge before the sale was actually completed in February, 1922, of the fact that the member of the firm of solicitors was also one of the trustee vendors, such knowledge being deduced from the circumstances of his name being on the printed letter-heads of the firm and from the name being an unusual one and from the tenor of telegrams sent by the plaintiff before closing the sale.

Held, further, that in any event the price of $140,000 was a fair price for the property in question.

Held, further, that even if a technical right of action existed against the solicitors for non-disclosure of their relationship with the vendors, still no damages had accrued to the plaintiff therefrom.

Held, further, that the plaintiff by the alterations to the building and by giving leases had elected to ratify the sale, and could not make *restitutio in integrum*.

Statement

ACTION for rescission of a sale of land as against the defendants Jones and Luxton as trustees of the Vernon Estate and

for damages against the defendants Pooley, and Mrs. Luxton as legal representative of her deceased husband. The facts are set out fully in the reasons for judgment. Tried by MURPHY, J. at Victoria on the 24th of March to the 3rd of April, 1925.

J. R. Green, for plaintiff.

Harold B. Robertson, K.C., for defendants Jones, Pooley, and Luxton Estate.

Craig, K.C., for executors of Vernon Estate.

20th April, 1925.

MURPHY, J.: In so far as this action is based upon actual fraud, it is dismissed. I hold that Pooley, Luxton and Jones, each and all, acted honestly and in good faith throughout the transaction in question. There is no fiduciary relationship asserted in the pleadings as having existed between Jones and plaintiff or between A. W. Jones Ltd. and plaintiff, nor does the evidence shew the existence of any such relationship. Neither Jones nor A. W. Jones Ltd. owed any legal duty to plaintiff. The action against Jones in his personal capacity and against A. W. Jones Ltd. is therefore dismissed with costs. There remain the action for rescission against Jones and Luxton as trustees of the Vernon Estate and the action for damages against Pooley and Mrs. Luxton as legal representative of her deceased husband. Judgment

To deal first with the latter action. I find the facts in reference thereto to be as follows: Pooley and Luxton had been for many years prior to the events giving rise to this litigation, and continued to be throughout their occurrence, partners in the practice of law in Victoria under the firm name of Pooley, Luxton & Pooley. Luxton was, and had been since 1911, or thereabouts, one of the trustees of the Vernon Estate, owners of the property in question herein, hereinafter referred to as the Vernon-Victoria property, consisting of lot 419, upon which was a three-storey building fronting on Douglas Street and an adjoining vacant lot 418 fronting on View Street. The defendant A. W. Jones was the other trustee. The firm of Pooley, Luxton & Pooley did all the legal work for the Vernon Estate. This work was done almost exclusively by Luxton, although Pooley did make two declarations in connection with

MURPHY, J.

1925

April 20.

F. W. WOOLWORTH CO. LTD. v. POOLEY

registering the title of the Vernon-Victoria property in the names of the trustees. The Vernon Estate consisted in the Fall of 1921, when negotiations for the sale in question herein began, mainly of the Vernon-Victoria property, a piece of waterfront property in the City of Vancouver, sold in 1922 for about $200,000, and some shares in two companies, also of some value. It owned other parcels of real estate not without value, as shewn by the fact that some of them have since been sold. The Vancouver property was unincumbered. It had been sold previous to the war but the purchaser had defaulted, and in 1921 there were arrears of taxes against it of some $30,000. These arrears were explained in part by the moratorium legislation of the Province, which prevented the clearing up of the matter of the agreement of sale. The estate had, however, always paid sufficient of these taxes to keep the property out of tax sale. To do this, it had in 1920 been forced to borrow on lot 419 of the Vernon-Victoria property a sum of $20,000. Apart from this mortgage the Vernon-Victoria property, in the Fall of 1921, was not encumbered except that the current year's taxes had not been paid. The interest on the mortgage was also overdue, and the mortgagee was pressing for it and for the payment of the taxes. In September, 1921, a payment on the taxes on the Vancouver property had to be made else it would go into the tax sale list. The trustees sold Great West Life shares in Winnipeg, the property of the estate, for sufficient money to make this payment. The money, however, did not arrive in Victoria in time and the trustees borrowed it, but this loan was repaid in a few days out of the proceeds of the Great West Life shares. The Vernon Block, situate on lot 419 of the Vernon-Victoria property, was not a modern building, and was greatly in need of repairs and of being modernized. The trustees had applied to the mortgagee, Sayward, on his pressing them for interest and taxes, for a further loan on the property, which he had declined to make. The rentals of the Vernon Block had sunk to a low ebb in the years 1918, 1919 and 1920, but there had been a very marked improvement in the year 1921. I find that in the autumn of 1921 the estate was in a serious position, but was by no means insolvent. Money to

Judgment

carry it until some sales could be made could undoubtedly have been obtained, though probably at a rather heavy cost. The Vernon-Victoria property is intrinsically one of the most valuable in Victoria, situate as it is in the heart of the business centre. Indeed for retail business purposes it occupies probably the best strategic position in that City. I find that at the price paid for it by the plaintiff, $140,000, it would have been a good buy for anyone, and that it was an excellent bargain for plaintiff because of its intention to use it in part of its large retail business. Its own valuation of the building is shewn by the fact that after purchasing it it increased the insurance from $30,000 to $70,000. I, therefore, hold that plaintiff suffered no damage through making the purchase. In October, 1921, one Fox approached the trustees for an option on the Vernon-Victoria property. No formal document was drawn up but he was verbally informed by Jones that $140,000 would be accepted. Mrs. Furber is the life tenant of the Vernon Estate with remainder to her children. On hearing of Jones's action, she strongly objected, insisting that $150,000 should be the lowest figure for the Vernon-Victoria property. On November 9th, 1921, Connables, the man in control of plaintiff's affairs in Canada, came to Victoria. He was called as a witness at the trial and justice compels me to state that he did not impress me as being frank in his testimony. He arrived in Victoria by the morning boat and within about two hours of his landing he was in Jones's office inquiring as to the leasing or purchase of the Vernon-Victoria property, or at any rate of the vacant lot and about one-half of the other lot and half the building upon it. This portion of the Vernon-Victoria property is hereinafter referred to as the "L" shaped parcel. In the interval he had breakfasted with his family and, according to his evidence, examined the location of the Vernon-Victoria property as well as two or three other corners, "talked with Jew merchants along the street," made a check of passers-by and formed the conclusion that the Vernon-Victoria property was his first choice for the new location of his firm's business. The plaintiff had been conducting for years a large retail business on Government Street in Victoria. Their lease for these

Judgment

MURPHY, J.

1925

April 20.

F. W. WOOLWORTH CO. LTD. v. POOLEY

premises had still some three years to run at a rental of $1,200 per month. The main business centre of Victoria had within the three or four years prior to the autumn of 1921 shifted from Government to Douglas Street, on which the Vernon-Victoria property was principally situate. Connables had not been in Victoria for a period of five years prior to the visit of November 9th, 1921, and his previous visit had been of a casual character in so far as consideration of a locality for retail business was concerned. His evidence was that he had had no communications from plaintiff's Victoria manager or from anyone in that City in reference to a new location. The matter was one for his own decision exclusively, and he purposely refrained from discussion regarding it with any Victoria employees of plaintiff and indeed with anyone except "Jew merchants" on Douglas Street. To my mind, it seems unlikely that such an important decision, involving a large sum of money and the future success of plaintiff's business in Victoria, would have been made in such a short period of time and with only such inquiry and investigation as Connables states he made. According to his evidence, he resolved to acquire the property when he found he could not lease it. He learned this at the outset of his talk with Jones on November 9th, 1921. My doubt is strengthened by reading Exhibit 117 sent by Connables on December 16th, 1921, to Hennessey, plaintiff's manager in Victoria. Connables reached Jones's office about 10.30 of November 9th, 1921, and began enquiring from Jones in reference to the Vernon-Victoria property. He desired to lease but was told the trustees would consider a sale only. He then enquired the price. Jones said the property was under option —a reference to the Fox negotiations—and that he was not at liberty to deal for a couple of days, when such option would expire. Jones informed Connables that the option price was $140,000, but added that he was but one of two trustees and the other, whom he named, Luxton, would have to be consulted. Finally, he told Connables to return at 2.30 and that possibly in the meantime he, Jones, might be able to get in touch with the holder of the option. Connables did so return and seems to have been told that the Fox deal was off. Connables was on

Judgment

his way to California, and remained in Victoria only one day. Before leaving he wrote Jones again asking for a lease or failing that for the price of the "L" shaped parcel. He requested a reply to his Toronto office. Jones replied, reiterating the refusal to lease and fixing the price of the "L" shaped parcel at $100,000. Connables replied under date of December 6th, 1921, to the effect that the matter would be submitted to plaintiff's board of directors. It was, in fact, never so submitted, though Connables says he spoke to directors individually. He had full authority to make the deal personally without reference to any board. He describes himself, in my opinion correctly, as the "Czar" in reference to plaintiff's business in Canada. On December 15th, 1921, Connables wired to Jones asking cash price for property corner Douglas and View Streets and conditions regarding title. Jones attempted to get in touch, by telephone, with Mrs. Furber, who was in Vancouver, but got only her husband. On the same day, Connables sent Exhibit15 to Pooley, Luxton & Pooley instructing them to call on Jones for description of the property and to search title and write full details concerning property. Connables had enquired from his Toronto solicitors for the name of a reputable firm of solicitors in Victoria whom he could employ to act for plaintiff, and they had named the firm of Pooley, Luxton & Pooley. Pooley, on receipt of Exhibit 15, went to see Jones. It is complained that Pooley, to his knowledge, had a full description of the property in his office and that, therefore, this visit was unnecessary and is a proof of fraud. I do not agree. Jones is a real-estate agent and might well have listed in his office other properties, "corner of Douglas and View." It is also complained that Pooley divulged to Jones plaintiff's name as being the party for whom he was making inquiry. I do not see how he could carry out his instructions otherwise, as there would be no other means of determining what property was in question. Further, Connables had by sending Exhibit 38 given Jones this information. Pooley, as an experienced solicitor, realized that, as Luxton was his partner and was also trustee of the Vernon Estate, these facts should be made known to plaintiff. He therefore, on hearing from Jones what property was in question, in-

Judgment

MURPHY, J.

1925

April 20.

F. W. WOOLWORTH CO. LTD. v. POOLEY

quired from Jones as to whether plaintiff was aware that such was the case, and was convinced by what Jones told him of his interview with Connables on November 9th, 1921, that Connables had such knowledge. I find that Pooley honestly believed this to be the position. Having ascertained from Jones what property was in question, Pooley searched the title and sent Exhibit 16 to plaintiffs, which he confirmed and amplified by Exhibit 39. I hold that Pooley thereby fully and faithfully carried out the instructions contained in Exhibit 15. He made one slight error in stating that all tenancies were monthly. There was one that required a 60 days' notice to vacate. He was led into this by an inadvertent statement made by Jones. The error was of no importance in the ultimate outcome and has no bearing on the issues herein. Jones did not reply at once to Exhibit 38, owing to his failure to reach Mrs. Furber personally. She having heard, through her husband, the purport of Jones's telephone message and having received Exhibit 194, written by Jones, the morning of December 16th, 1921, went to consult her solicitor, L. J. Ladner, at his office in Vancouver, as to the price to be put upon the "L" shaped parcel. Whilst in his office, she received a 'phone call from Jones that Pooley, acting for plaintiff, was enquiring the price for the whole Vernon-Victoria property. Connables, on December 16th, 1921, not having had reply from Jones sent Pooley Exhibit 17, asking him to ascertain from Jones lowest cash price for the entire Vernon-Victoria property. Pooley had gone to Jones's office and made such enquiry. Hence Jones's telephone message to Mrs. Furber. On receipt of it, she determined to go to Victoria with Carmichael, a law-student in Ladner's office. Arrived there on December 17th, 1921, she had a conference with Jones as to price. Luxton was ill at this time. He had been consulted by Jones and had taken the stand that he would only agree to such price as was satisfactory to Mrs. Furber, doubtless because of her attitude in connection with the Fox deal. At the conference with Jones, Mrs. Furber stated her price to be $150,000. Jones thereupon informed her that he had mentioned to Connables that the amount of the Fox option was $140,000. Mrs. Furber was much incensed at this dis-

Judgment

regard of her instructions given in October, that no price must be quoted for any estate properties unless approved by her. It was, however, feared that the damage had been done. All parties to the conference were aware of the financial condition of the estate. It was, therefore, decided to ask $150,000 but to come down to $140,000 rather than lose the sale. I accept this as true the more readily because after the sale was made Mrs. Furber demanded that Jones reduce his commission by one-half because of his having mentioned the amount of the Fox option after her October instructions. He refused but compromised the matter by giving her a cheque for $750. Jones, following this conference, gave Pooley the price of $150,000 and Pooley thereupon, on December 17th, 1921, wired it to the plaintiff by Exhibit 18 and wrote Exhibit 41. I hold that Pooley fully and faithfully carried out his instructions as set out in Exhibit 17.

On December 20th, 1921, Connables wrote Pooley, Luxton & Pooley, Exhibit 43, asking them to get an option on the entire property, and pointing out that Jones had stated to Connables that Vancouver parties had the refusal of the property for $140,000. Connables further stated that plaintiff's proposal was cash and that therefore plaintiff was entitled to a price as good as Jones was considering from the Vancouver people, whose proposal was, as Connables understood, only either for $40,000 or $50,000 cash down. Connables followed this up by a wire from Toronto dated December 27th, 1921, to Pooley, Luxton & Pooley, requesting them to wire when option obtained, and reiterating that there was no reason why Jones should raise the price. On December 27th, 1921, Luxton was ill at home. Pooley, on receipt of Exhibit 43, saw Jones and pointed out to him that he had told Connables of the option price at $140,000 and that he had in a way given his word that such would be the figure. Jones got in touch with Luxton on the 'phone and Luxton seems to have felt that the figure having been mentioned it was hopeless to expect to get more. Jones thereupon went to Pooley's office. In the interval Pooley had received Exhibit 19. Jones stated to Pooley he was willing to sign an option for $140,000 cash. Pooley had Exhibit 46 immediately drawn up

Judgment

MURPHY, J.

1925

April 20.

F. W. WOOLWORTH CO. LTD. v. POOLEY

and signed by Jones. Jones communicated the fact that he had signed the option to Luxton, and Luxton agreed to also sign the following morning. Jones, in signing his name, added the words "Executors of Estate of late F. G. Vernon." Pooley thereupon wired Exhibit 20 to plaintiff informing it option signed and confirmed it by Exhibit 21, in which he explained how he had obtained the price of $140,000, why $150,000 had been asked and added that the trustees anticipated trouble with the *cestui trust* over accepting the $140,000. The completed option was forwarded December 28th, 1921, by Exhibit 47. I hold that Pooley fully and faithfully carried out his instructions contained in Exhibit 43 and Exhibit 19, and thereby succeeded in getting the price lowered by $10,000. I am further of opinion that plaintiff would have paid $150,000 for the property if they could not have obtained it for less. On December 28th, 1921, Connables wrote Exhibit 48 to Pooley, Luxton & Pooley, informing them that Maynard, their construction superintendent, was leaving that day for Victoria to fully inspect the property and that he might possibly call on them. He arrived in Victoria early in January and spent several days in examining the building. Whilst there Pooley saw him, had lunch with him, and states he told him that Luxton, trustee for the Vernon Estate, was his law partner, the conversation in reference to Luxton arising out of the fact that Luxton had been forced to go to the hospital on January 2nd, 1922. Maynard returned to Toronto and reported the Vernon Block would require some $10,000 to be spent on it in repairs. The option would expire on January 30th, 1922. On January 21st, 1922, Connables wrote Pooley, Luxton & Pooley, enclosing cheque for $10,000 which, according to the option, had to be paid before its expiry date (Exhibit 50). Connables, as shewn by this exhibit, had decided to take the property at $140,000, but it occurred to him that because of the extensive repairs required he might get a further reduction of $5,000. The option time, however, would be about up by the time this letter reached Victoria, and he did not wish to imperil the completion of the purchase. He, therefore, wrote a letter addressed to Pooley, Luxton & Pooley asking for the reduction of $5,000

Judgment

(Exhibit 51), which he enclosed with Exhibit 50 for presentation to the trustees of the Vernon Estate. Attached to Exhibit 51 was a memo. by Connables that he left it to the judgment of Pooley, Luxton & Pooley whether to use this letter or not. He further instructed them in Exhibit 50 not to present Exhibit 51 to the trustees if, in their judgment, doing so would in any way prejudice the closing of the deal. In Exhibit 51 he also requested Pooley, Luxton & Pooley to inform him to whom cheque for balance should be made. On January 23rd, 1922, and therefore whilst Exhibit 50 and Exhibit 51 were in the mails *en route* to Victoria, Connables wired Exhibit 23 to Pooley, Luxton & Pooley, informing them of Maynard's report and stating directors favoured buying entire property for spot cash if vendors would allow $5,000 toward restoring building. Pooley saw Jones, Luxton being still ill. Jones communicated with Mrs. Furber, who refused any further reduction. Jones so informed Pooley, stating as a reason for refusal that the condition of the building had been taken into consideration in fixing the price of $140,000. Pooley thereupon advised plaintiff by wire, Exhibit 24, dated January 24th, 1922, and confirmed it by Exhibit 25. Plaintiffs replied by Exhibit 26, dated January 25th, 1922, directing Pooley, Luxton & Pooley to complete the matter at option price. This they confirmed by Exhibit 27. I hold that Pooley in good faith did all within his power to obtain the reduction asked for and that no one at that stage of the negotiations could have obtained it for plaintiff. On January 27th, 1922, Pooley having received Exhibits 50 and 51, wired as therein requested that balance of purchase price be made out in two cheques, one to Pooley, Luxton & Pooley for $20,000 to pay off mortgage, "remainder to A. P. Luxton and A. W. Jones." He also, on same date, wrote Exhibit 53, in which he states that owing to wires hereinbefore referred to he has not handed Exhibit 51 to Jones and mentions that "the other trustee A. P. Luxton has been ill for some time."

Judgment

On January 28th, 1922, Connables wrote Pooley, Luxton & Pooley, Exhibit 54, enclosing two cheques, one for $20,000 payable to Pooley, Luxton & Pooley, and the other he states is "made out to A. P. Luxton and A. W. Jones, Trustees." This

MURPHY, J.

1925

April 20.

F. W. WOOLWORTH CO. LTD. v. POOLEY

latter cheque is Exhibit 32 and is in fact made out to "A. P. Luxton & A. W. Jones Executors of F. G. Vernon Estate." These cheques were acknowledged by Pooley on February 2nd, 1922, Exhibit 57, in which he states Mr. Luxton is still ill. The matter was closed up and plaintiff so advised by Exhibit 58, dated February 6th, 1922. Pooley, Luxton & Pooley continued to act for plaintiff in notifying tenants to vacate and in doing anything else necessary. Throughout the whole transaction the firm had continued to act when necessary for the Vernon Estate, both in clearing up the title and in connection with the trust. Plaintiff took possession on April 1st, 1922, and engaged in extensive building operations, alterations and repairs, costing in the aggregate some $115,000. These were carried on from their inception by Harrington, building superintendent for plaintiff, who came from Toronto for that purpose. On May 6th, 1922, by letter, Exhibit 102, to Pooley, Luxton & Pooley, Connables first stated in connection with a claim he was making in the Vernon Estate for removal of some ashes that it was not until the deal was closed that plaintiff discovered that the firm of Pooley, Luxton & Pooley were the active executors of the property plaintiff was buying. By letter, Exhibit 104, to Connables, dated May 11th, 1922, Pooley set out Luxton's full position and stated that he thought that Connables knew all along that Luxton was one of the trustees for the Vernon Estate. Plaintiff at this time had made some fairly large contracts for buildings and repairs in connection with the property, but after this date it engaged in further expenditure, to which it was not then committed, aggregating more than half of the $115,000 expended. On completion of its building operations, it moved its retail business into the premises and is still carrying it on there. It has granted leases of a part of the premises for a term of years, and stand ready at the present time to grant further such leases if it can find tenants desirous of same.

Judgment

As I have held plaintiff suffered no damage, the action against the defendants Pooley and Mrs. Luxton, representative of her deceased husband, in substance fails. It may be, however, that unless they can prove that Connables, and therefore

the plaintiff, knew before the deal was closed that Luxton was a trustee of the Vernon Estate, plaintiff has a technical right of action. This fact, in my opinion, these defendants, owing to their fiduciary relationship to plaintiff, were bound to communicate to plaintiff unless plaintiff was aware of it. Pooley, as stated, honestly believed Connables knew it, but assuming such technical right of action to exist, such belief on Pooley's part would not be a defence if Connables did not in fact possess such knowledge. I express no opinion as to whether there is such technical right of action or not, because my view of the facts renders my doing so unnecessary. As a result of anxious deliberation I have concluded that Connables did know Luxton was a trustee as aforesaid, at any rate, before the deal was consummated. He denies such knowledge but such denial weighs little with me owing to the impression he made upon me as a witness. What has given me pause is the fact that Connables wrote Exhibits 50 and 51 and sent Exhibit 23 to Pooley, Luxton & Pooley. Such action, at first blush, seems inconsistent with the knowledge I am imputing to him. On the other hand, I have the following facts: Jones told Connables that there was another trustee named Luxton. The name is rather uncommon. On Connables employing Pooley, Luxton & Pooley, as solicitors on the recommendation of his Toronto solicitors, correspondence ensued. The name of A. P. Luxton appears printed on the letter head of all letters received by Connables from defendants. The option is signed A. P. Luxton. As stated, I accept Pooley's evidence that he apprised Maynard fully of Luxton's position, not, I take it, with a view to Maynard telling Connables, for Pooley believed Connables already knew, but in the course of conversation arising out of the fact that Luxton had become so ill that he had to go to the hospital. Of course, it would not necessarily follow that Maynard told Connables. If the matter rested there, I would not make the finding I have made. What with me is the deciding factor is Connables's own evidence. When he was first examined for discovery, the cheque, Exhibit 32, was not in the possession of defendants' solicitors. Connables was asked why he made this cheque out to A. P. Luxton and A. W. Jones, the reply was: "Well, I thought then that

Judgment

MURPHY, J.

1925

April 20.

F. W. WOOLWORTH CO. LTD. v. POOLEY

the two parties to the deal would have to agree before it was cashed, Luxton to represent us and Mr. Jones the other." It is true that following this, when his attention is called to the wire of Pooley, Luxton & Pooley, requesting that the cheque be made out to A. P. Luxton and A. W. Jones, he gives this request as the reason, but he reverts to the original position in 341 and 342, in explaining what he thought was the reason for Pooley, Luxton & Pooley making it. If this is so, he knew not only that A. P. Luxton, to whom the cheque was made out, was a member of the firm of Pooley, Luxton & Pooley, but he believed, erroneously it is true, that Luxton was the man actually looking after plaintiff's interests. When the cheque was produced it proves to have been made out not as requested by Pooley, Luxton & Pooley, but with the words "Executors of F. G. Vernon Estate" added to the name of A. P. Luxton and A. W. Jones. As this cheque was signed by Connables, he knew that this A. P. Luxton was an executor of the Vernon Estate, and in the letter, Exhibit 54, which he wrote forwarding the cheque to Pooley, Luxton & Pooley, he states erroneously that it is made out to A. P. Luxton and A. W. Jones, trustees. If his discovery examination is to be accepted, therefore, he knew that the A. P. Luxton to whom the cheque was made out was a member of the Pooley, Luxton & Pooley firm. The cheque itself shews that he knew that A. P. Luxton to whom it was payable was one of the executors of the Vernon Estate, and his letter (Exhibit 54) shews that he knew that person was a trustee of said estate, if under the circumstances the distinction is of any importance, though I do not think it is. Finally, Connables was utterly unable to explain when, where and how he actually obtained the knowledge, which he certainly had on May 6th, 1922, of the identity of Luxton the lawyer with Luxton the trustee. The evidence discloses nothing that would give him this knowledge after the deal was closed that was not available to him before that date.

Judgment

As to Exhibits 50 and 51, it is possible that he had not the knowledge I impute to him when he wrote them but acquired it subsequently, and thereupon sent Exhibit 23. He would remember that Pooley, Luxton & Pooley had succeeded in obtain-

ing for him the reduction of $10,000 from the trustees, one of whom he now knew to be Luxton, a member of the law firm, and he might well have thought that the firm would decline to act on receipt of Exhibit 50 and Exhibit 51 and he therefore sent Exhibit 23, their previous success possibly leading him to believe that they were more likely to obtain the desired additional reduction than anyone else whom he might employ. Its tenor differs materially from the contents of Exhibits 50 and 51 inasmuch as in it he is not leaving the matter of asking the $5,000 reduction to the discretion of Pooley, Luxton & Pooley, but is making a straight request from the vendors for such reduction.

Such being my view of the facts, I dismiss the action with costs as against Pooley and Mrs. Luxton, as representative of her deceased husband. Possibly I should refer to some other alleged facts, the non-disclosure of which is put forward as a further basis for this damage action.

First, that Pooley knew that an improvement tax would be levied in 1922 and did not inform plaintiff. Pooley denies such knowledge and I accept his statement. Marchant, I think, correctly stated the condition of the public mind in Victoria in January and February, 1922, on this question. It was realized that new sources of revenue must be found but the people at large were strongly opposed to an improvement tax. They had twice emphatically so expressed themselves by plebiscite vote and had in January, 1922, elected Marchant as mayor, it being well known he was a strong opponent of the proposed tax. What was really hoped in January and February, 1922, was that the Government would come to the rescue of the City. It was not until March, 1922, that this hope vanished and the imposition of an improvement tax began to be seriously considered. The tax was not in fact legally authorized until May, 1922.

Next, it is said Pooley did not communicate to plaintiff the straightened financial condition of the Vernon Estate. I have hereinbefore set out my view of what that condition really was. I accept Pooley's denial that he had no knowledge on this point. Luxton, of course, knew, but he had such knowledge as a trustee not as a solicitor, and therefore I think such knowledge cannot

MURPHY, J.

1925

April 20.

F. W. WOOLWORTH CO. LTD. v. POOLEY

be imputed to Pooley as his partner. Further, I think that there was no legal compulsion on Luxton to impart such knowledge to plaintiff under the circumstances. Luxton might have been bound to do so had the firm of Pooley, Luxton & Pooley undertaken the task of negotiating the price with the Vernon Estate trustees. But Connables states emphatically that such negotiation was a matter he kept in his own hands. All that he asked Pooley, Luxton & Pooley to do was to make two requests for a reduction and, as stated, I hold Pooley faithfully carried out such instruction.

Next, it is urged that Pooley did not inform plaintiff of the valuations sworn to by him in registering the property in the names of the trustees. These valuations were the result of errors, as explained by Pooley, which explanations I accept as true. The fact that he had made these declarations never occurred to him in connection with plaintiff's purchase. If they had and if whether they did or not, he was under any legal compulsion to communicate them to plaintiff, he would be bound in common honesty to state the errors through which they came to be made.

Judgment

As to the action for rescission against Luxton and Jones as trustees of the Vernon Estate, on my findings of fact it must fail. It is dismissed with costs. If I am wrong in my conclusions of fact, then I think the rescission action fails on two grounds:

First, because plaintiff with full knowledge of all the facts elected by its conduct to ratify the purchase, and, second, because it is impossible to place both parties in the positions they occupied before the deal. To order the Vernon Estate to repay the purchase price of $140,000 and a further sum of $115,000 in exchange for a return of the property, would be equivalent to holding that the estate could be legally improved out of the ownership of the Vernon-Victoria property.

Action dismissed.

REX v. LEE.

MURPHY, J. (In Chambers)

1925

April 8.

REX v. LEE

Criminal law—Summary conviction—Habeas corpus—Possession of opium—Plea of accused—Statement of police officer not under oath—Can. Stats. 1923, Cap. 22, Sec. 4(d)—Criminal Code, Sec. 721.

Section 721 of the Criminal Code does not authorize the interrogation of a prisoner by the magistrate other than to ask if he has any cause to shew why he should not be convicted. This can be done by asking "what does he say, guilty or not," but if his reply is not a clear admission of all the elements of the crime, the magistrate must proceed to inquire into the charge without further questioning.

A statement of a police officer not under oath is not evidence.

APPLICATION for a writ of *habeas corpus*. The accused was convicted by the police magistrate at Victoria for unlawfully having drugs in his possession, namely, opium, contrary to The Opium and Narcotic Drug Act, 1923, and was sentenced to six months' imprisonment and a fine of $200, and to a further term of imprisonment of three months if the fine was not paid. The proceedings before the magistrate as appeared by the affidavits in support of the motion were as follows: The charge was read over to the accused through a Chinese interpreter.

"THE COURT: What does he say, guilty or not?

"Mr. Yipp: He says he used to smoke opium and he get those pills to take so that he could work.

"THE COURT: Does he admit they are opium pills?

"Mr. Yipp: Yes."

Statement

The following statement was then made by Thomas Heatley, sergeant of police, he not being under oath:

"At 8.40 p.m. last night, in company with Constable Foster, we went to a room in the rear of No. 511 Fisgard Street. The door was standing open. We walked in and saw accused and two other Chinamen. This is a well-known opium joint. It has strong doors and the windows are barred. About a week ago I found about six boxes of opium in the same place. Accused had his coat and vest off and it was hanging on the wall. Constable Foster searched in the pockets of the vest and he found 13 pills of opium. At first the accused denied that the coat and vest were his, but he later admitted that they were and he put them on.

"THE COURT: What are those pills?

"Witness: Opium pills, made up in small pills, thirteen.

"THE COURT (to the Interpreter): Ask him if he has anything to say.

"Mr. Yipp: He was walking on the street and some friends invited him to dinner and the policeman found these pills on him.

MURPHY, J. (In Chambers)

1925

April 8.

REX v. LEE

"THE COURT: Can he tell me anything about these pills?

"Mr. Yipp: He says when he does heavy work he has to take some pills in order to give him some strength.

"THE COURT: Tell him he is sentenced to six months' imprisonment and must pay a fine of $200, and to a further term of imprisonment for three months if the $200 is not paid."

Heard by MURPHY, J. in Chambers at Victoria on the 3rd of April, 1925.

Argument

Lowe, for accused: The conviction was made without jurisdiction: see *Rex* v. *Richmond* (1917), 29 Can. C.C. 89; *Rex* v. *Barlow* (1918), *ib.* 381; *Rex* v. *Long Wing* (1923), 39 Can. C.C. 75; and *Rex* v. *Swett* (1914), 23 Can. C.C. 272.

N. W. Whittaker, for the Crown, referred to *Rex* v. *Yee Fong* (1921), 34 Can. C.C. 278.

8th April, 1925.

Judgment

MURPHY, J.: Although the notice of motion asks only for an order *nisi* for a writ of *habeas corpus* and says nothing about *certiorari* in aid, the matter, as I understand, was argued by counsel on the basis that all necessary preliminary steps had been taken and that I was to treat the record produced as a return to a writ of *certiorari.* This being so, in my opinion, this conviction must be quashed for want of jurisdiction.

I think the Court can have regard only to the answer made by the accused to the question: "What does he say, guilty or not?" That answer falls far short of an admission of the charge. I think the putting of the next question was improper. Section 721 of the Code does not authorize any interrogation of a prisoner by the magistrate other than to ask if he has any cause to shew why he should not be convicted. This can be done, I hold, by asking: "What does he say, guilty or not?" But, if the reply is not a clear admission of all the elements of the crime, the magistrate must proceed to inquire into the charge without further questioning. If I am wrong in this, I am of the opinion that taking everything said by the prisoner, as shewn by the record produced, there is not that clear admission of guilt necessary to obviate the taking of evidence proving the charge. The statement of the police officer not under oath is, of course, not evidence.

Conviction quashed.

REX v. IACI.

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

1925

April 14.

REX v. IACI

Criminal law—Habeas corpus—Right to apply again to same judge after refusal—Imprisonment—Time when "out on bail"—Not to count in term of imprisonment although improperly made—R.S.B.C. 1924, Cap. 245, Sec. 70(2).

The dismissal of *habeas corpus* applications is not a bar to making further applications for *habeas corpus* before the same judge.

Cox v. *Hakes* (1890), 15 App. Cas. 506 followed.

Where a prisoner is out on bail under an order made at his own request, the time cannot be reckoned as part of his term of imprisonment, even though such order be *ultra vires*.

APPLICATIONS for writs of *habeas corpus*. Both the accused were convicted by H. O. Alexander, stipendiary magistrate at Vancouver, on the 28th of January, 1924, for keeping liquor for sale and sentenced to six months' imprisonment. On applications for writs of *habeas corpus* orders absolute were refused by MORRISON, J. on the 28th of April, 1924. On the 1st of May following orders were made by MACDONALD, J. admitting the prisoners to bail pending an appeal from the orders of MORRISON, J. of the 28th of April, 1924. Both accused were again taken into custody on the 16th and 17th of January, 1925, on the said convictions when applications for writs of *habeas corpus* were again made. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 8th of April, 1925. Statement

Brougham, for the applications.

W. M. McKay, and *Orr, contra.*

14th April, 1925.

HUNTER, C.J.B.C.: *Habeas corpus* applications by two bootleggers.

As to Mr. *McKay's* preliminary objection that inasmuch as previous *habeas corpus* applications were made to me on March 4th last, and refused, I have no jurisdiction to consider any fresh application, I think this must be overruled. The writ of *habeas corpus* is most frequently used to protect the subject against illegal imprisonment, especially at the hands of inferior tribunals, and accordingly it has been held from the earliest times, and is now, Judgment

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

1925

April 14.

REX v. IACI

I think, incontestibly settled by *Cox* v. *Hakes* (1890), 15 App. Cas. 506 that the subject can take the opinion of every judge who has jurisdiction to issue the writ until he has exhausted all the judicial power. It therefore follows, that the principle involved in the doctrine of *res judicata* has no application to that class of case, and therefore, if he may go from one judge to another, there is no reason why he may not apply again to the same judge. The circumstances may have been altered, as for example, by a retrospective Act, or the judge on the first application may have overlooked some material matter, or it may not have been brought to his attention. There being no *res judicata,* there is no reason why he should be disabled from again considering the matter any more than any other judge. I think, therefore, that it is the duty of the judge to hear the new application, and if he is convinced that the applicant is entitled to his discharge, he should decide accordingly.

But I think the ground now raised by Mr. *Brougham, viz.,* that the order of a Supreme Court judge admitting the prisoners to bail pending their appeal to the Court of Appeal from the order of MORRISON, J. was *ultra vires,* and that therefore their term of imprisonment has by law expired notwithstanding their being at large under the order, must be decided against them. It was Mr. *Brougham* himself who secured the order now impugned, and it is familiar law that one who obtains an order of the Court and accepts the benefit of it, cannot be allowed to turn around when it suits his purpose and allege that it was improperly made or was void.

Judgment

Moreover, it is expressly enacted by the Summary Convictions Act, Sec. 70, Subsec. (2), that "no time during which the accused is out on bail, shall be reckoned as part of the term of imprisonment to which he is sentenced." The statute does not say "legally out on bail," but "out on bail," and I have no right to qualify plain and unambiguous language. There can be no doubt that the prisoners were "out on bail," that is, they were at large under and by virtue of an order for bail made at their request. Whether it was a nullity or not is immaterial for the purpose of computing the time of imprisonment.

The applications are refused.

Applications refused.

ABBOTSFORD LUMBER, MINING & DEVELOPMENT COMPANY, LIMITED, *ET AL.* v. STEVENSON *ET AL.*

MURPHY, J.

1925

April 25.

ABBOTSFORD LUMBER, &C. CO. v. STEVENSON

Company—Memorandum of association—Assignment of moneys in bank—Collateral security for credit of another company—Validity.

Where a company makes an assignment of a sum of money deposited in its name in a savings account in a bank as collateral security for a credit arranged for another company its validity depends on whether express authority to make the assignment can be found in the memorandum of association.

ACTION for a declaration that a certain assignment in writing of the 27th of November, 1923, made by the defendant the Dominion Lumber Sales, Limited, to the defendant Kenneth Stevenson of $6,000 on deposit in the name of Dominion Lumber Sales, Limited, in a savings account in the Bank of Nova Scotia, Vancouver, be declared to be *ultra vires* and void as against the creditors of the Dominion Lumber Sales, Limited. The assignment recited that it was given to Stevenson as collateral security for a certain credit arranged by Stevenson on behalf of a corporation known as Rainbow Shingle Company, Limited, and was to constitute a continuing security so long as either the said Dominion Lumber Sales, Limited, or the Rainbow Company were indebted to Stevenson, and Stevenson was to reassign said moneys as soon as said companies had discharged all liability to him, Stevenson to have the right during the currency of the security subject to the consent of the Bank to obtain said moneys and apply same on any existing indebtedness of either company. The memorandum of association of the Dominion Lumber Sales, Limited, contained, *inter alia,* the two following clauses:

Statement

"(p) To enter into partnership or into any arrangement for sharing profits, union of interest, co-operation, joint adventure, reciprocal concessions, or otherwise, with any person or company carrying on or engaged in, or about to carry on or engage in, any business or transaction which this Company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as, directly or indirectly, to benefit

MURPHY, J.

1925

April 25.

ABBOTSFORD LUMBER, &c. CO. v. STEVENSON

this Company; and to lend money to, guarantee the contracts of, or otherwise assist any such person or company, and to take or otherwise acquire shares and securities of any such company, and to sell, hold, or otherwise deal with the same";

"(t) To borrow or raise money for any purposes of the Company, and for the purpose of securing the same and interest, or for any other purpose, to mortgage or charge the undertaking or all or any part of the property of the Company, present or after acquired, or its uncalled capital."

Statement

At the time the assignment was executed there was on deposit in the Bank of Nova Scotia in a savings bank account $6,000 held by the Bank as security for moneys from time to time advanced by the Bank to Dominion Lumber Sales, Limited, which money was and still is the property of the Dominion Lumber Sales, Limited. Dominion Lumber Sales, Limited, is indebted to the Abbotsford Lumber, Mining & Development Company, Limited, in the sum of $3,144.18 and to Thurston-Flavelle, Limited, in the sum of $620. Tried by MURPHY, J. at Vancouver on the 21st of April, 1925.

Wood, for plaintiff.

Douglas, for defendant.

25th April, 1925.

Judgment

MURPHY, J.: Admittedly the validity of Exhibit 3 depends on whether express authority for its execution can be found in the memorandum of association, Exhibit 1. Paragraphs (p) and (t) of section 3 are relied upon as furnishing such authority. As to (p) my construction of it is that it confers a power of guarantee or assistance not generally but subject to two limitations. First, such guarantee or assistance can only be given for the benefit of a company carrying on or engaged in or about to carry on or engage in any business or transaction which the Dominion Lumber Sales, Limited, was authorized to carry on or engage in or any business or transaction capable of being conducted so as directly or indirectly to benefit the Dominion Lumber Sales, Limited, and, second, only if the Dominion Lumber Sales, Limited, had entered into partnership or into any arrangement for sharing profits, union of interest, co-operation, joint adventure, reciprocal concessions or otherwise with a company fulfilling the requirements of the first limitation. That I consider to be both the grammatical and the

logical effect of the use of the words "such" in line ten of (p.) Further, to hold otherwise would be to make the Dominion Lumber Sales, Limited, although primarily a lumber merchandising and lumber manufacturing company, a financing company. So long as any company fulfilled the requirements of the first limitation, the Dominion Lumber Sales, Limited, were this view adopted, could devote the whole of its capital to loaning money to such company or to guaranteeing its contracts or otherwise assisting it. Doubtless this could be legally done were the provisions of the memorandum of association broad enough, but such object could be accomplished only by the use of clear and apt language in framing them, as shewn by a long line of decisions, of which *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653 is an outstanding example.

Then it is argued the facts shew that the first limitation above referred to exists here. I cannot agree. The only relation between the Dominion Lumber Sales Co. and the Rainbow Shingle Co. was that of vendor and purchaser. True, the Sales Company purchased practically the entire output of the Rainbow Company, but it did so outright and at market price. There was no compulsion on either company to buy or sell to each other. The identity of the shareholders of both companies has no bearing on the matter. The companies are distinct legal entities. The facts here are very different from those in the case of *Bank of Ottawa* v. *Hamilton Stove and Heater Co.* (1918), 46 D.L.R. 706, strongly relied upon by the defence. That case, as I read it, did not raise the point in question here, because it was held, on the evidence, that the connection called for by the first limitation set out above existed between the guaranteeing company and the company on whose behalf the guarantee was given.

Judgment

If my view of paragraph (p) is correct, then paragraph (t) does not assist the defendant Stevenson. Judgment for the plaintiff.

Judgment for plaintiff.

MARTIN, J.A. (In Chambers)

1925

May 20.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

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

Practice—Court of Appeal—Costs—Appeal from registrar—Attending on taxation—Expenses, Vancouver to Victoria—Counsel fees.

Upon the taxation of a bill of costs upon an appeal to the Court of Appeal the registrar disallowed a charge of $15 for "paid expenses Vancouver to Victoria, attending on taxation."

Held, on appeal, that the registrar adopted the proper course by making only such an allowance as would have been made if the solicitor's agent in Victoria had attended.

The hearing of the appeal occupied one hour of the first day, all of the next three days and a little over half of the fifth day, and the registrar allowed $500 for senior, and $325 for junior counsel.

Held, that in the circumstances the view taken by the registrar should not be disturbed.

Statement

APPEAL by plaintiffs from the disallowance upon taxation by the registrar at Victoria of two items in his bill of costs on the appeal to the Court of Appeal. Argued before MARTIN, J.A. in Chambers at Victoria on the 20th of May, 1925.

H. W. R. Moore, for appellants.

Cosgrove, for respondents.

20th May, 1925.

Judgment

MARTIN, J.A.: This is an appeal by the plaintiffs from the disallowance upon taxation by the registrar at Victoria of two items in plaintiffs' bill of costs upon the appeal to this Court.

First, the charge of $15 for "paid expenses to Victoria" in attending on taxation was wholly disallowed. This charge for attendance was founded on the fact that the plaintiffs' solicitor instead of instructing his agent to attend upon taxation in the usual way, preferred to come himself to Victoria from Vancouver for that purpose. I think the registrar adopted the proper course by making only such an allowance as would have been made if the agent had attended. There is no item in the tariff to justify such charge, nor any practice in this senior registry to warrant it. If a solicitor is of opinion that the

circumstances warrant the adoption of the unusual course of making a journey to attend in person upon taxation instead of instructing his agent in the usual way, then that charge must be paid by his own client and not by the opposite party. The situation of special letters to agents, if necessary, is adequately covered by items 209-12, under the heading "Letters," in the tariff of costs of 15th July, 1920, which items are to be read with items 199-200, under the heading "Attendances" in said tariff.

Second, as to counsel fees at the hearing of the appeal. The items charged were $2,500 for senior counsel and $750 for junior counsel, in all $3,250. The registrar allowed $500 for senior and $325 for junior counsel, in all $825. The hearing occupied one hour on the first day, all of the next three days, and a little over half of the fifth day, a total of something under four full days. The registrar's allowance might therefore be worked out, as near as may be, thus: for senior counsel, $150 for the first day and $125 for subsequent days, and for junior, $100 for the first day and $75 for subsequent days. For the appellant only one counsel appeared.

Judgment

Counsel fees of this kind are covered by items 214-7 of the said tariff as follows:

"Fees to Counsel.

"214.	Brief on trial or hearing, or before arbitrator, or upon appeal, or rehearing before the Court of Appeal or on motion for trial	$100.00
"215.	And to junior counsel	65.00
	To be reduced by the taxing officer, in his discretion, to a sum not less than, to senior counsel	50.00
	And to junior counsel	35.00
	"Provided that the registrar may, in his discretion, disallow a fee to junior counsel in any case not of an important nature, and shall not allow to any one party more than two counsel fees in any case except by the direction of a judge.	
"216.	If the argument, trial, or hearing last more than one day, for each subsequent day, not to exceed, to senior counsel	100.00
	And to junior counsel	65.00
"217.	Brief on assessment appeal, appeal from County Court, etc.	
	"In all the above enumerated cases mentioned in items 214, 215, 216 and 217, the registrar shall have power to award fees higher than those mentioned, but either party may appeal from the registrar's decision to the judge, who may either increase or reduce such fee."	

MARTIN, J.A. (In Chambers)

1925

May 20.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

Judgment

It therefore appears that the registrar has already exercised his discretion in materially increasing the fees ordinarily chargeable, and it is to be noted that there is no appeal from the registrar to the judge until he has exercised the power to still further "award higher fees," without limitation, beyond and above the primary discretion to reduce them that he is empowered to exercise within specified limits and amounts. I draw attention to these greatly increased powers of the registrar beyond those conferred by the old tariff of 1906, items 228-30; the present tariff begins with a maximum of $100 and $65 respectively, subject first to a discretion as to reduction and then as to increase, and after that to an appeal to a judge: the old tariff, *per contra,* had a minimum of $35 and $25 respectively, and the "power to award higher fees" primarily has been transferred from the judge in 1906 to the registrar in 1920. These changes are all-important in reviewing the registrar's discretion, and I apprehend that only in an extreme case would a judge now be justified in overruling the exercise of a discretion which does not conflict with the principles upon which counsel fees are allowed; those which have long guided me are to be found in *Bryce* v. *Canadian Pacific Ry. Co.* (1907), 14 B.C. 155. After a careful consideration of the circumstances of the present appeal I do not feel justified in disturbing the view taken by the registrar. If I had been taxing the bill I, very probably, should have allowed a higher fee to senior counsel and a lower to junior, but I only give this as an illustration of one varying point of view which would not warrant interference.

This appeal, therefore, should be dismissed with costs to the respondent, to be set off against costs taxed by appellant.

Appeal dismissed.

IN RE ESTATE OF SOPHIA LUNN, DECEASED.

COURT OF APPEAL

1925

Jan. 14.

IN RE ESTATE OF SOPHIA LUNN, DECEASED

Succession duty—Legacy to beneficiary—Death of beneficiary in England before receipt of legacy—Probate in England—Petition for resealing in British Columbia—Liability of legacy to succession duty—R.S.B.C. 1924, Cap. 244, Secs. 5(1) (a) and (d), 21, 22 and 43.

F. died in British Columbia and by his will left one-third of his residuary estate to L. F.'s executors paid all the succession duty on his estate but L. died in England before her share of F.'s estate was delivered over. After probate was issued to her executor in England he petitioned for the resealing of the probate in British Columbia. This was refused until succession duty was paid upon the portion of F.'s estate that was bequeathed to her.

Held, on appeal, affirming the decision of MORRISON, J., that under the Succession Duty Act of British Columbia succession duty was payable on the sum to be received by L.'s executor from F.'s estate.

APPEAL by the petitioner E. A. Lunn from the decision of MORRISON, J. of the 19th of December, 1924, declaring that the Crown is entitled to succession duty on the share of the residuary estate of the late William Fernie to which the late Sophia Lunn was entitled and to which the petitioner is now entitled as executor of the will of the said Sophia Lunn. William Fernie died in Oak Bay Municipality on the 15th of May, 1921, and probate of his will was issued on the 10th of September, 1921. He devised to Sophia Lunn two-sixths of his residuary estate. The executors of the estate of the said William Fernie paid in respect of the residuary estate so bequeathed to Sophia Lunn for succession duty and probate duty $8,667.21. Sophia Lunn died in England on the 10th of December, 1922, and E. A. Lunn of Basingstoke, England, is sole executor of her estate under her will and probate was issued to him on the 19th of February, 1923. Sophia Lunn's share in the Fernie estate was not paid to her during her lifetime but was passed under her will to the petitioner. A petition was lodged for the resealing of the said probate of Sophia Lunn's will but said probate has not been resealed as the Government claims to be entitled to succession duty for that portion of Wm. Fernie's

Statement

COURT OF APPEAL

1925

Jan. 14.

IN RE ESTATE OF SOPHIA LUNN, DECEASED

estate that was bequeathed to her. The petitioner claims that owing to the failure to distribute the said portion of Wm. Fernie's estate and to the fact that Sophia Lunn never actually received it during her lifetime the Government had no right to claim succession duty in respect thereof on the death of Sophia Lunn. It was held that the Crown was entitled to succession duty in respect of the transmission to the petitioner of said share to which the estate of Sophia Lunn was entitled.

Statement

The appeal was argued at Victoria on the 14th of January, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Maclean, K.C., for appellant: The succession duty was paid on this legacy and before the money is paid over to the beneficiary the beneficiary dies and the legacy then passes to her executor. Under these circumstances the Crown is not entitled to again collect succession duty on this legacy as she never received it: see *Rex* v. *Lovitt* (1912), A.C. 212 at p. 223; *Prescott* v. *Crosby* (1922), 32 Man. L.R. 108.

Argument

A. D. Macfarlane, for the Crown: They have applied for ancillary probate. Sophia Lunn was the beneficiary and the fund is subject to succession duty on her death: see *In re Succession Duty Act and Estate of Joseph Hecht, Deceased* (1923), 33 B.C. 154; *In re Succession Duty Act and Estate of Edward H. Grunder, Deceased, ib.* 181; *Smith* v. *The Provincial Treasurer for the Province of Nova Scotia and the Province of Quebec* (1919), 58 S.C.R. 570.

Maclean, in reply: We took these proceedings only to get before the Court.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. This is the case of a person dying in England, possessed of property here; whether it be in her own name, or in the hands of an agent, or in the hands of an executor, makes no difference. Her executor must pay succession duty here, or abandon the application for the resealing of the letters.

MARTIN, J.A.

MARTIN, J.A.: I am of the same opinion. As to whatever aspect the case might present under other circumstances, had the application not been made to the Court under section 43,

I have nothing to say; I am only dealing with it as it is now, and as it is now, I am in accord with what the Chief Justice has said.

GALLIHER, J.A.: I agree in putting it on the ground that it has already been put on; and I have not much doubt that it could be supported on the other ground.

MCPHILLIPS, J.A.: I am in some doubt on the point, in view of the decision of the Court of Appeal in Manitoba in *Prescott* v. *Crosby* (1922), 32 Man. L.R. 108. In this particular case, though, the application has been made for resealing of the letters from England, and it may be that this differentiates the case. I am not prepared to formally dissent from the judgment proposed. Certainly section 5, subsection (1) (*d*) of Cap. 244, R.S.B.C. 1924, being the Succession Duty Act, is sufficiently forceful to support the contention put forward by the Crown, unless perhaps it could be said that no aidance is required from the Probate Court here. However, in this case that aid has been asked and granted. No doubt what is aimed at by the legislation is the levy of succession duty at each time of transmission of the estate. That is, the scope of the Act is to deal with every transmission. MCPHILLIPS, J.A.

Extraneous to the legal point involved, I oftentimes have thought that it would be a fair thing that a limit should be put upon the exaction of succession and probate duty; that is, that it should not be exacted save say once within a period of ten years; however, that is for the Legislature. Undoubtedly the frequent exaction of the impost means the destruction of estates.

MACDONALD, J.A.: The Government are exacting succession duty here in respect of two deceased persons. The latter died in England and has personal property here; and it is therefore within section 5, subsection (1) (*a*) of the Succession Duty Act. MACDONALD, J.A.

Appeal dismissed.

Solicitors for appellant: *Elliott, Maclean & Shandley.*
Solicitor for respondent: *A. D. Macfarlane.*

COURT OF APPEAL

1925

Jan. 14.

REX v. PENNY.

Criminal law—False pretenses—Sale of shares in lumber company—False statement in prospectus—Purchaser of shares becomes a director and manager of company's sawmill—Criminal Code, Secs. 405 and 414.

REX v. PENNY

Upon the trial of an indictment for obtaining money under false pretenses it was proved that the prosecutor upon the faith of certain representations made to him by the prisoner, purchased a number of shares in a lumber company and then became a director of the company and manager of one of its sawmills on a salary.

Held, that in the circumstances a conviction could not be sustained.

APPEAL by accused from the conviction by MORRISON, J. and the verdict of a jury on a charge of having obtained from one George J. Johnson the sum of $5,000 by false pretenses contrary to section 405 of the Criminal Code. The false pretenses alleged were that Penny shewed Johnson a prospectus of the Premier Timber & Trading Company from which it appeared that the Company owned certain timber limits when in fact the Company did not own them. On the 8th of June, 1921, Johnson entered into an agreement with the Company whereby he was appointed local manager of the sawmill operations at Hilliers at $400 a month in consideration for which he agreed to invest $5,000 in stock of the Company. Johnson then purchased the shares giving a cheque for $5,000 payable to the Company to Penny in the office of the Company for which he received the shares. The cheque was then deposited to the Company's credit. Johnson was made a director of the Company and went to Hilliers as manager of the sawmill on the 1st of July and remained there until the end of August. Upon the conviction of accused a certificate that the case was a fit one for appeal was given by the trial judge.

Statement

The appeal was argued at Victoria on the 13th and 14th of January, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Killam, for appellant: There are three grounds of appeal: (a) improper admission of evidence; (b) interruption of

counsel on his examination of witnesses; (c) improper charge. The main point is that the evidence shews Penny never received the money in question. He must obtain the money for himself before the indictment can be upheld: see *Garrett's Case* (1853), Dears. C.C. 232 at p. 242. In fact the false pretenses alleged did not induce Johnson to subscribe. It must be shewn that the complainant was deceived by the prospectus. Johnson put up his money on the strength of obtaining a job. He immediately became a director and manager of one of the sawmills at a salary. He cannot in such circumstances prosecute: see *Reg.* v. *Watson* (1857), 27 L.J., M.C. 18; 7 Cox, C.C. 364. There were continuous interruptions and improper admissions of evidence: see *Allen* v. *The King* (1911), 44 S.C.R. 331; *Rex* v. *Tyman and Carson* (1923), 39 Can. C.C. 409.

Argument

Brown, K.C., for the Crown: Under section 405 it is just as much a crime if the money is paid to the company: see *Reg.* v. *Kerrigan* (1864), 33 L.J., M.C. 71; *Rex* v. *Leverton* (1917), 28 Can. C.C. 61; *Rex* v. *Lyons* (1910), 16 Can. C.C. 152; *Rex* v. *Martel* (1916), 27 Can. C.C. 316.

Killam, replied.

MACDONALD, C.J.A.: I think the appeal should be allowed. The charge is for obtaining money under false pretenses. It was admitted by Mr. *Killam,* when he was pressed, that there was a false pretense in this case, in that the prospectus contains statements which were false; and upon the strength of which Mr. Johnson advanced his $5,000 and became a shareholder. If the matter had stopped there the conviction would have been perfectly good—apart, of course, from the other question as to whether the indictment was properly laid or not. But it goes further. He became a shareholder, he immediately became a director, he took part in the operation of the mill; and, after several months, he concluded that he would resign as a director, but still continue as a shareholder; more, he offered his shares for sale.

MACDONALD, C.J.A.

In *Reg.* v. *Watson* (1857), 27 L.J., M.C. 18, where the circumstances were somewhat similar, the Court said that it was not a proper case for a criminal prosecution. He might, if he

COURT OF APPEAL

1925

Jan. 14.

REX v. PENNY

had not concluded himself by his conduct, sue to recover back his money paid under misrepresentations. He was not content to do that, he brought this criminal proceeding; and succeeded in getting a verdict of the jury against the prisoner. It looks very much like using the criminal Court for the purpose of either enforcing a civil right or getting revenge for a civil wrong. That the Courts will not countenance. It would not countenance it in *Reg.* v. *Watson*; and I do not think that we ought to do it here, particularly after the lapse of so long a time. In *Reg.* v. *Watson* the prosecutor had obtained an interest in the partnership, and he enjoyed that interest as far as it went. Here he did the same, in effect. He acquired an interest in the company, became an officer of the company. In those circumstances I think the conviction must be set aside and the prisoner discharged.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree that the appeal be allowed and the conviction quashed. The facts of the case bring it within the principle of *Reg.* v. *Watson* (1857), 27 L.J., M.C. 18. It is unnecessary, in my opinion, to say anything more, except that we have been asked to invoke certain powers in the new section 1016, subsection 2, in order to substitute another offence for that which the jury has convicted the accused. I express no opinion whatever upon the scope or effect of that new and important section. But I do say that, whatever may be its effect, the discretion we have thereunder would not be properly exercised by allowing a conviction to be substituted under section 414, as the counsel for the Crown has requested.

MARTIN, J.A.

GALLIHER, J.A.: The case of *Reg.* v. *Watson* (1857), 27 L.J., M.C. 18 seems to me to cover this, although I find a little difficulty in concluding what effect the words that are used there by Chief Justice Cockburn have, or how far they form a basis of the judgment; that is, that the party did not repudiate but in effect confirmed by offering his shares for sale to another party. I say it is not abundantly clear to me just how far their judgment is based, or to what extent, if any, based on those words. However, we have here the fact that this man was offering his shares for sale; and to that extent it was within

GALLIHER, J.A.

that part of the *Watson* case. I feel, therefore, that I cannot distinguish the facts in this case from the facts in the *Watson* case. And that being the judgment of an able Court I feel like following it.

COURT OF APPEAL
1925
Jan. 14.
REX v. PENNY

McPHILLIPS, J.A.: I am in entire agreement with the reasons for judgment of my brother the Chief Justice. I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal allowed.

Solicitors for appellant: *Killam & Beck.*
Solicitors for respondent: *Ellis & Brown.*

CORSINI v. PALM *ET AL.*

COURT OF APPEAL
1925
March 5.
CORSINI v. PALM

Mortgage—Payment of principal and interest—Agent—Authority to pay.

The plaintiff, holding a mortgage for $1,000, called at the mortgaged premises shortly before principal and interest were due, when he was told by one of the mortgagors that the interest and part of the principal would be paid in a few days and the balance in the fall of the year. The mortgagor then made the suggestion that the payment should be made to one S. to which the mortgagee agreed. The interest and part of the principal were paid shortly after to S. who, after deducting his commission, paid the balance over to the mortgagee. In the fall of the year the balance due on the mortgage was paid in two payments to S. without further authorization from the mortgagee and a few days later S. absconded without paying the mortgagee. An action for foreclosure by the mortgagee was dismissed.

Held, on appeal, reversing the decision of BARKER, Co. J. (MARTIN and MACDONALD, JJ.A. dissenting), that as it was at the mortgagor's suggestion that he should pay S. the money, S. was his nominee and if his nominee did not pay it over to the mortgagee the mortgagor is responsible and must pay the mortgagee the balance that he had not received.

APPEAL by plaintiff from the decision of BARKER, Co. J. Statement

COURT OF APPEAL

1925

March 5.

CORSINI v. PALM

of the 28th of January, 1925, in an action to recover the balance due on a mortgage dated the 3rd of April, 1922, on certain lands owned by the defendant in Ladysmith to secure a loan of $1,000 at 9 per cent. interest, the principal and interest being due and payable in one year. On the 6th of April, 1923, $490 was paid in principal and interest leaving a balance of $600. The defendant claims that there is nothing owing on the mortgage as he paid one John Stewart as plaintiff's agent $312 on the 5th of July, 1923, and $306.75 on the 2nd of October following. Corsini went to the premises mortgaged shortly before the mortgage was due and saw Thomas who said he could not pay that day but expected to pay the interest and part of the principal in a few days and the balance in the fall. He suggested to the plaintiff that he should make the payment to Stewart and the plaintiff agreed to this. A few days later Thomas paid $490 to Stewart who after charging his commission paid the balance over to the plaintiff. Shortly after Thomas made the 2nd and 3rd payments to Stewart, Stewart disappeared and the question arose as to whether the mortgagors were entitled to make these payments to Stewart. The trial judge held there was an authorization from Corsini to pay the whole amount to Stewart.

Statement

The appeal was argued at Vancouver on the 5th of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Arthur Leighton, for appellant: Plaintiff only authorized that the first payment be made to Stewart, and the other two payments were made to him at their peril. The onus is on the mortgagor to shew that he was authorized to pay someone other than the mortgagee: see *In re Tracy* (1894), 21 A.R. 454; *Wilkinson* v. *Candlish* (1850), 5 Ex. 91. An extension of a year was given for payment and they paid these two sums before the year was up. If they do this it is at their peril.

Argument

Craig, K.C., for respondents: It is clear from the evidence that the whole sum due was to be paid to Stewart. The plaintiff authorized that the payments be made to him. Where the authority of an agent is given verbally it is construed liberally:

see Bowstead on Agency, 7th Ed., p. 77, Art. 35; 31 Cyc. 1380.

Leighton replied.

COURT OF APPEAL

1925

March 5.

CORSINI v. PALM

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed. The circumstances which strongly influence me in that opinion are these: first, it is admitted by Thomas that he himself suggested he would pay the money to Stewart, that is, he would leave the money with Stewart. Now, that is not making Stewart the agent for the plaintiff, but Stewart was his own nominee, just as if he had said "I will send the money to the bank and you can get it there."

It does not make any difference in that view of it whether the whole of the money was to be sent to Stewart in that capacity, or only part of it, if Stewart misappropriated the money and did not pay it over, that is the loss of the defendants. If their trustee or nominee had not paid it over to the plaintiff, and plaintiff had not received it, that was not the plaintiff's fault. Stewart was the nominee of the defendants. In that view of it, of course, only that money which Stewart accounted for to the plaintiff can be said to have been paid to the plaintiff.

Appeal allowed.

MARTIN, J.A.

MARTIN, J.A.: With all respect for any other contrary opinion, I am of the view that this appeal should be dismissed, substantially for the reasons given by the learned trial judge, which, I am pleased to say, are unusually clearly and satisfactorily expressed, and the learned judge had the benefit in this case of fact where there is an undoubted conflict of evidence that he could satisfy himself of the credibility of these parties by watching their demeanour in the witness box, and I think the only safe thing to do is to follow the rule which we have adopted for our guidance, *viz.*, that we must be prepared to say the learned trial judge was clearly wrong before reversing him, and I am very, very far from being able to say such a thing in this case.

The matter is one which I think should be viewed in the light of the supplementary evidence which was before the learned trial judge, as cited by Mr. *Craig*, shewing, to my mind, that on the facts this should not be regarded as of matter of solicitor

COURT OF APPEAL

1925

March 5.

CORSINI v. PALM

and client authority, but simply as one of an ordinary agency upon ordinary business principles, just the same as if the plaintiff had directed the principal to be paid into a bank or trust fund.

Being of this opinion, I think we should abide by the ordinary rule and allow the judgment below to stand.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the reasons of the learned Chief Justice, and just want to say in addition that the learned judge seems to have laid stress in his judgment upon the fact that as he construed the evidence the plaintiff had said to pay the money to Stewart, that he had nominated Stewart. He refers to that on the second page of his judgment and again at the end, and as I read it that conclusion cannot be drawn from the evidence, I do not feel embarrassed by drawing my own conclusion and deciding as I do.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same opinion as my brother the Chief Justice, and merely wish to add that clearly this is a case where the onus is upon the defendants to establish that they made the payment which entitled them to a discharge of this mortgage, and in that, for the reasons given by the learned Chief Justice, they most certainly have failed, and the learned judge himself appreciated that; and that he had to have more than merely the statement of the defendants is clear, he was aware of the onus because he refers to corroboration, that is, that it is corroborated in the evidence of the plaintiff, that is, the defendants' story is corroborated. With the greatest respect, I cannot agree in this conclusion; there was no corroboration by the plaintiff whatever in that respect, and I am of the same view as my learned brother GALLIHER when he says he is unembarrassed by the judgment of the Court below, because as a matter of fact the learned judge in the Court below misdirected himself.

The case which supports the view which I believe should be the judgment of the Court, that is, that the appeal should be allowed, and well within the *ratio decidendi* thereof, is *In re Tracy* (1894), 21 A.R. 454 referred to by Mr. *Leighton*. The judgment is that of a singularly strong Court composed of

Hagarty, C.J.O., Osler and Maclennan, JJ., the latter learned judge afterwards going to the Supreme Court of Canada. To the layman no doubt that would appear to be a very extreme case. The solicitor was in possession of the mortgage and had collected the interest, and was authorized to collect it, yet the inference could not be drawn that payment of the principal due under the mortgage was permissible of being effectively made to the solicitor and binding on the mortgagees.

Now, the learned referee who first passed upon the matter in the above case rightly held that the onus was upon the executors and devisees to prove that O'Leary, the solicitor, had authority, and this counsel contended had been established, both directly and inferentially. We find, though, at page 462, Chief Justice Hagarty saying:

"I can see no evidence of any direct authority to O'Leary to bind Robertson by his receipt of the money, [and here there is no direct authority to Stewart] and the case equally fails to shew any general authority to receive principal moneys, so as to make the payment equivalent to payment to the mortgagees."

MCPHILLIPS, J.A.

And we find Maclennan, J.A. at p. 465 saying:

"While there is nothing to prevent a mortgagee from authorizing another person to receive the mortgage debt, although he is not also authorized to discharge the mortgage or to reconvey the estate; yet I think such authority ought in all cases to be proved by clear and satisfactory evidence, and ought not to be readily inferred."

So, if it is found that there is no evidence to sustain the validity of the payments to Stewart, as I have found upon perusal of the evidence, there is nothing to support the judgment of the learned judge in the Court below, and it follows that he went wrong. I say this with great respect. Our duty is to pronounce the judgment that the Court below should have pronounced, and that should be for the plaintiff and not for the defendants. The judgment below should be reversed and the appeal allowed.

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

MACDONALD, J.A.

There are contradictory statements in the defendants' evidence. That would place on the trial judge the duty of deciding where the truth lay, viewing the evidence as a whole. It is not a question of drawing inferences from undisputed facts. It is

COURT OF APPEAL

1925

March 5.

CORSINI v. PALM

rather a question of weighing the evidence, a function that can better be discharged by the trial judge. It is clear that his mind was directed to the point in issue and having reached a conclusion on a pure question of fact, I cannot say as I should be able to say to reverse him that he was clearly wrong.

Appeal allowed, Martin and Macdonald, JJ.A. dissenting.

Solicitors for appellant: *Leighton & Meakin.*
Solicitor for respondents: *G. T. S. Saundby.*

COURT OF APPEAL

1925

March 19.

HUGHES v. THE SUN PUBLISHING CO.

HUGHES v. THE SUN PUBLISHING COMPANY LIMITED.

Libel—Court proceedings—Newspaper report — Apology — Payment into Court — Judge's charge — Misdirection — New trial — Limitation of reasons for judgment—R.S.B.C. 1924, Cap. 140, Sec. 3; Cap. 101.

A husband and wife having separated the wife applied for custody of their adopted child under the Equal Guardianship of Infants Act, and she filed an affidavit in support, in which she charged her husband with misconduct and cruelty. The husband did not file an affidavit denying the statements made by his wife, relying on the objection that there was no jurisdiction to hear the application and on this ground it was dismissed. On the following day the defendant published in its newspaper a substantial repetition of the charges made in the wife's affidavit and this publication was the subject of this action for libel. On the trial the learned trial judge told the jury that they were to take into consideration the fact that the plaintiff had not denied the statements made by the wife in her application for custody of the child.

Held, on appeal, reversing the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that the husband was entitled to rely on the point that the Court had no jurisdiction to hear his wife's application and refrain from putting in any material in answer to her affidavit; that there was error in charging that because he had failed to file affidavits in answer he was subject to the comments which had been made in the alleged libel and there must be a new trial.

Per MACDONALD, C.J.A. and MARTIN, J.A.: When a verdict is being set aside, it is not desirable that the judges who take part should make

any observations about what the effect of the evidence was or what course should be pursued because such observations are likely to prejudice the trial which may come on afterwards.

COURT OF APPEAL

1925

March 19.

HUGHES v. THE SUN PUBLISHING CO.

APPEAL by plaintiff from the decision of MORRISON, J. of the 12th of November, 1924, in an action for damages for libel published in the "Evening Sun" of Vancouver of Friday, the 27th of June, 1924, a daily newspaper of the defendant Company. The plaintiff was married in 1904 in Seattle. Having no children he and his wife adopted a girl five years of age in 1912. Husband and wife quarrelled and on two occasions the wife started actions for judicial separation but both were withdrawn. The wife was put in a mental hospital in New Westminster in 1920. In 1921, at the instance of the wife, an order was made for a payment by the husband to the wife of $10 per week and the husband made the payments in accordance with the order. Mr. Hughes was an electrician having taken an electrical course at the University of Pennsylvania, and was chief inspector of the electrical department of the Board of Underwriters for 18 years in the United States. He became city electrician for Vancouver in 1910 and in 1911 went into business for himself as a manufacturer of electrical supplies. In 1923, Mrs. Hughes escaped from the asylum and went to Seattle. Later she returned to Vancouver and in June, 1924, applied for an order for the custody of the adopted child, or in the alternative that she be given access to the child. Affidavits of Mrs. Hughes and Mr. C. N. Haney, Barrister, were filed in support. The application was dismissed and on the following day (June 27th, 1924) there appeared an article in the "Evening Sun" setting out substantially the statements made by Mrs. Hughes in her affidavit filed in support of the motion, namely, that she was wrongfully sent to the asylum after an automobile accident that was engineered by her husband, who brought the automobile to a stop between the tracks and jumped himself to avoid a collision with a street-car; that he sent her to the asylum in spite of assurance from doctors that she was sane; and that he was cruel both to herself and adopted daughter. His action for libel was dismissed.

Statement

The appeal was argued at Vancouver on the 17th and 18th

COURT OF APPEAL

1925

March 19.

HUGHES v. THE SUN PUBLISHING CO.

of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. A. MacInnes, for appellant: On the question of misdirection as to the right to refer to the amount of damages claimed see *Watt* v. *Watt* (1905), A.C. 115 at p. 118; *Dickinson* v. *The World Printing & Publishing Co.* (1912), 17 B.C. 401. On the question of privilege see *Reis* v. *Perry* (1895), 64 L.J., Q.B. 566. An apology is never a complete answer: see *Hoste* v. *Victoria Times Publishing Co.* (1889), 1 B.C. (Pt. 2) 365 at p. 366; Odgers on Libel and Slander, 5th Ed., 613. The verdict is perverse. Where the article is libellous on its face an apology is no answer. A verdict for the defendant must be supported by evidence. The plaintiff has made out a case, a dismissal is therefore a perverse verdict: see Odgers on Libel and Slander, 5th Ed., 640; *Levi* v. *Milne* (1827), 4 Bing. 195; *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769; *Sley* v. *Tillotson and Son* (1898), 14 T.L.R. 545. Where there is an admission of libel and money is paid into Court by the defendant in addition to an apology the plaintiff must have a verdict: see *Peters* v. *Edwards* (1887), 3 T.L.R. 423 at p. 424; *Maclaren and Sons* v. *Davis* (1890), 6 T.L.R. 372; *Green* v. *The World Printing and Publishing Co.* (1908), 13 B.C. 467.

J. W. deB. Farris, K.C., for respondent: We say (a) there was never an admission; we deny liability; (b) it was a fair report of a judicial proceeding; and (c) it was fair comment. As to admission see *Parks* v. *Edmonton Journal Company Ltd.* (1911), 3 Alta. L.R. 359. The trend of the trial governs as to the issues: see *Hepburn* v. *Beattie* (1911), 16 B.C. 209 at p. 213; *Macdougall* v. *Knight* (1889), 58 L.J., Q.B. 537; *Victoria Corporation* v. *Patterson* (1899), A.C. 615; *Banbury* v. *Bank of Montreal* (1918), 87 L.J., K.B. 1158. We were within section 3 of the Libel and Slander Act, and the article did not go outside the affidavits used on the motion and the learned trial judge did not so misdirect the jury that there should be a new trial. On the question of perverse verdict see *Hope* v. *Sir W. C. Leng and Co. (Sheffield Telegraph) (Limited)* (1907), 23 T.L.R. 243 at p. 244; *Hepburn* v. *Beattie* (1911), 16 B.C. 209; *Sydney Post Publishing Co.* v. *Kendall*

(1910), 43 S.C.R. 461 at pp. 469 and 470; *Wilson* v. *London Free Press Printing Co.* (1918), 45 D.L.R. 503. That the Court should not disturb the finding of the jury see *Alteman* v. *Ferguson* (1919), 47 D.L.R. 618; *Ex parte Bellott in re Lingard* (1817), 2 Madd. 259; 56 E.R. 330. The justification is that it was a privileged occasion.

19th March, 1925.

MACDONALD, C.J.A. (oral): I would allow the appeal and order a new trial. I deal only with one point in the case, because where a new trial is ordered it is always desirable to say as little about the facts as possible so as not to embarrass the Court and jury in the new trial.

The ground upon which I have come to the conclusion that the judgment must be set aside is misdirection on the part of the learned trial judge. With respect, I think he practically told the jury that they were to take into consideration the fact that the plaintiff had not denied the statements made by the wife in her application for equal guardianship. The plaintiff did what he had a right to do, and what he was perfectly right in doing as well: he relied upon the legal point. He was satisfied that the Court had no jurisdiction to hear the application at all. Relying upon that he put in no material. If there was any risk in that course it was his risk, but he took the risk; and the only risk which he could reasonably be expected to take was that if his objection to the jurisdiction failed he would be then left without a defence, but he took that risk, and as the result has shewn he made no mistake in taking it. The learned judge in effect told the jury that because plaintiff had not filed affidavits in answer to the affidavits put in by the wife in the proceeding in which the Court had no jurisdiction, as it turned out, that therefore he was liable to the comments which had been made in the alleged libel, and that, if he had wanted to put his case before the Court, the proper time to do it was at the hearing of the motion under the Equal Guardianship of Infants Act. Now I think that was error.

MACDONALD, C.J.A.

There are other grounds upon which I think the judgment might be set aside, but one ground is sufficient. The appeal is

COURT OF APPEAL

1925

March 19.

HUGHES v. THE SUN PUBLISHING CO.

allowed, and a new trial ordered. The costs will follow the event.

MARTIN, J.A.: I agree that there should be a new trial in this matter, and I confine myself to the one clear-cut point which has been mentioned by my brother the Chief Justice. In so doing I continue to follow the long-established practice laid down by the House of Lords in *Jones* v. *Spencer* (1897), 77 L.T. 536 at p. 537, where Lord Chancellor Halsbury said that in cases of this description where a new trial is granted it is the practice of the Court that evidence should not be canvassed or any observations made as to the course that should have been adopted, because these observations are likely to prejudice the trial which may come on afterwards.

Confining myself, then, to the one point, I share the opinion expressed by the Chief Justice, that, most unfortunately, the plaintiff was very seriously prejudiced in the trial in this action by the observations made by the learned trial judge as to the course of conduct the plaintiff ought to have pursued upon the motion to the Court in proceedings relating to the adopted child. I have not forgotten to consider the suggestion put forward by Mr. *Farris,* that the effect of these observations was cured by the subsequent remarks of the learned trial judge; but I am taking the view that the situation in which the plaintiff had been wrongly placed by the observations of the trial judge was not adequately cured by the subsequent observations of the same learned judge. Therefore, being of that opinion, I shall refrain from saying anything about the other points raised, though I have not failed to attach very considerable weight to the concise and effective way in which Mr. *Farris* presented his view of the case to the Court.

MARTIN, J.A.

GALLIHER, J.A.: I am in agreement that a new trial should be granted in this case on the one point, namely, misdirection by the learned judge below.

GALLIHER, J.A.

MCPHILLIPS, J.A.: With great respect to the opinions of my brothers who have preceded me in giving judgment, I take the contrary view, and would dismiss the appeal. A libel action

MCPHILLIPS, J.A.

is essentially one which, under our jurisprudence, is ordinarily determined by the constitutional tribunal provided, that is, the jury. In this country, under our practice, there is no compulsion that the trial should be had before a jury, but it is a right which either of the parties has. Here the right was insisted upon, no doubt, because a jury sat in this case.

Now, from time immemorial, practically, it may be said that in a case of this kind what the jury says is really the turning point, and must be especially in a case of this character where reputation was before the jury and where the plaintiff submitted himself to the scrutiny of the jury, and withstood, perhaps not well, a very severe cross-examination—a cross-examination, though, which is a test of credibility.

In a libel case, certainly, the plaintiff should come into Court with clean hands. I do not propose to canvass the evidence in detail, but I must, in the discharge of my judicial duty here, make certain general observations. I now first address myself to the charge, which my brothers have thought in law was in error, and upon that ground they are of the opinion that a new trial should be had, centering the whole error upon one observation of the learned trial judge. With the greatest of deference to the contrary opinion of my brothers, I am of the opinion that it is almost extraneous to the issue. The plaintiff laid great stress, apparently, upon his being besmirched before the public by the imputations contained in the article. All that the learned judge did was to say that he had not been vigilant in meeting these aspersions, which he ought to have assumed would appear in the public press, a hearing having been had in Court, a public hearing, the story told was that of his wife, he failed to make any response and that he thereby lost an opportunity he then had of placing his story clearly before the public. Now that is the extent to which the learned trial judge went, in my opinion, in referring to the subject. He said in effect, well, you had an early opportunity to put your case before the public, you did not take advantage of it; but no, you come to the Court and, as the learned counsel apparently for the plaintiff put it, it was $10,000 that was wanted, not vindication of character in any other sense. There-

MCPHILLIPS, J.A.

COURT OF APPEAL

1925

March 19.

HUGHES v. THE SUN PUBLISHING CO.

fore I do not, as I say, with great respect, lay any stress whatever upon that observation.

Then, taking the charge as a whole, which we must do, I do not consider that the learned trial judge, a judge of long experience in trials, did anything but his bounden duty, and that was in compliance with the statute—to give to the jury a full and accurate charge upon the law and the facts. The learned trial judge was disentitled to pass over this, he had to make and deliver a full, complete and accurate charge to the jury upon the evidence adduced and led at the trial.

I have carefully examined the charge and I have no hesitation in saying that it was an accurate charge. Under our jurisprudence judges and juries are censors, and it was quite within the province of the learned trial judge to express his opinion. He might even have said to the jury, which he did not, in what way the verdict should be rendered. That the learned judge indicated in his charge his opinion is no fault; and I consider in this case, filled with so many sordid features, that the learned judge discharged his duty well; because it will not do that any community should have occurrences and happenings such as were detailed without careful scrutiny and in proper cases animadversion thereon.

MCPHILLIPS, J.A.

Then, according to my opinion, there being no error in the charge to the jury, the next question arises, and that is, as to whether or not the verdict itself should stand, or whether it should be deemed perverse, as was submitted by the learned counsel for the appellant. The jury did not answer questions, the jury brought in a general verdict. The jury are not called upon to give reasons. In this case they did not give them. The general verdict imports that all material issues have been found for the party who has the verdict. In this case the defendant has the verdict, therefore all the material issues have been found for the defendant.

I have scanned the evidence and weighed it, and I think it was perfectly within the province of the jury to bring in that verdict. As Lord Loreburn said in the House of Lords (*Kleinwort, Sons, and Co.* v. *Dunlop Rubber Co.* (1907), 23 T.L.R. 696), what you have to look for in a trial where a jury is present is to see

that the jury has had the assistance of the Court in giving them a full, true, accurate and complete statement of the law and the facts; then if the jury bring in a reasonable verdict, that verdict should not be attempted to be disturbed by the Court of Appeal. In this case I believe that was fully carried out. He further said if the verdict be sensible, why of course that was an indication that the jury fully understood all that was said to them, and I have no hesitation in saying that this verdict was a sensible one.

I might point out that the Master of the Rolls in *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177 said that where the jury gave a general verdict, as here, and no reasons, it would be impossible for the verdict to be disagreed with.

There is one circumstance that I do not wish to overlook in this case, and that is this—which no doubt may have influenced the jury to a very large extent—the newspaper published an apology; it also paid $200 into Court. The plaintiff refused apparently to accept the apology or take the money out of Court. Well, he was perfectly entitled to do that. He went to trial, but he went to trial with its accompanying risks. He went to trial and instead of the jury valuing his besmirched reputation at $200, or anything like it, they valued it at not even the smallest coin of the realm—one cent. In my opinion, the plaintiff would have been well advised to have accepted the apology and taken the $200 out of Court; and I am still of the opinion, with a new trial directed, that he would be well advised to accept the apology and take the money out of Court.

MCPHILLIPS, J.A.

Now, one observation with regard to the alleged libel itself. As Lord Shaw 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."

Newspapers, after all, discharge a very high duty in the community. What would we do without newspapers after all? and I am not going to be unduly censorious of what appears in newspapers, because in these very busy days news has to be gathered quickly, often by the young and inexperienced reporter. Of

COURT OF APPEAL

1925

March 19.

HUGHES v. THE SUN PUBLISHING CO.

course, there are accompanying risks. All businesses have their accompanying risks, and I might say the newspaper in this case admitted its responsibility by its apology and by its payment into Court. The young man, very likely bright, as reporters usually are or they are no use in journalism, searches the Court records and in this particular case it was seen what had been sworn to by the wife—nothing upon record at all from the husband; and, it has not to be forgotten that there is a special statute under which newspapers may comment on proceedings occurring publicly in Court, and there was put in what was thought to be a true summary of the evidence that had been adduced; the husband failing to tell his story, why, of course, his side of the story could not be told. Now, the public were entitled to know of these occurrences. Today we see in the greatest newspaper of the British Empire, the Times of London, accounts of occurrences that take place there in the Divorce and other Courts. The people are entitled to the censorship which exists through public journalism. A good deterrent for men to live rightly is to know that if they do not live rightly and comport themselves correctly that their names may perchance appear in the public press. It has an influence upon public men, it should have an influence on men in private life; I do not think that the newspaper at all exceeded its right, and that is evidenced by the verdict of the jury. The verdict of the jury is that the newspaper did nothing more than it was entitled to do, because that must be the effect of the verdict; and having achieved that verdict it is a constitutional right that the defendant be preserved in that position. The appellant has gone to a jury and the jury has found against him. It is only where there has been a miscarriage of justice that the verdict should be disturbed. I fail to see any miscarriage of justice in the present case. For that reason I dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.

MACDONALD, J.A.: I agree that there should be a new trial for the reasons stated by the majority of my learned brothers.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *MacInnes & Arnold.*

Solicitors for respondent: *Russell, Hancox & Anderson.*

PETER v. YORKSHIRE ESTATES CO. LTD.

MORRISON, J.

1925

April 2.

PETER v. YORKSHIRE ESTATES CO.

Damages—Personal injuries—Action to recover—Plaintiff not an employee of defendant — Travelling salesman — Meaning of — Workmen's Compensation Act—Order of Board that plaintiff comes within the Act—Application to dismiss action—R.S.B.C. 1924, Cap. 278.

An employee of tenants in a building, brought action against the owners thereof for injuries sustained through the falling of an elevator. On an application to dismiss the action on the ground that it is barred by the Workmen's Compensation Act:—

Held, that it is a matter of defence which should not be decided on a motion to dismiss the action.

MOTION by defendant that the action be dismissed on the ground that it is barred by the provisions of the Workmen's Compensation Act. The plaintiff who was an employee of tenants of a building of the defendant Company brought action for injuries sustained through the falling of an elevator in the building. On the application of the defendant the Workmen's Compensation Board made an order declaring that the plaintiff was at the time he sustained the injuries a salesman exposed to the hazards incident to the industry in which he was employed; that the accident arose out of and in the course of his employment and was one in respect to which he has a right to compensation under the Act. Heard by MORRISON, J. at Vancouver on the 27th of March, 1925. Statement

McPhillips, K.C., for the motion.
Alfred Bull, contra.

2nd April, 1925.

MORRISON, J.: The plaintiff was an employee of Wilkinson & Co., who are tenants of a building owned by the defendant, The Yorkshire Estates Co. Ltd., in which there is an elevator used by the tenants as well as the public. The plaintiff sustained rather serious injuries whilst in the elevator when it fell down several storeys. He has brought an action in the Supreme Court for damages against the defendant. In the meantime, the Workmen's Compensation Board has made an order on the application of the defendant declaring that the plaintiff was at Judgment

MORRISON, J.

1925

April 2.

PETER v. YORKSHIRE ESTATES CO.

the time he sustained his injuries a salesman exposed to the hazards incident to the industry in which he was employed, etc.; that the accident arose out of and in the course of his employment and that the accident was one in respect of which he has a right to compensation under the Act.

The defendant now applies to have the plaintiff's action dismissed on the ground that it is barred by the Workmen's Compensation Act, R.S.B.C. 1924, Cap. 278, and relying on the above order of the Board. It seems to me that the jurisdiction of the Board depends upon whether the plaintiff is a "salesman." Section 4, subsection (*a*), enacts that the Act shall not apply to a person who is engaged as a "travelling salesman" and who is not exposed to the hazards incident to the nature of work carried on in the industry. From the material filed, it would appear that Wilkinson & Co. are merely dealers in wire rope (sales agents) and are not manufacturers of that article. Their business office is in the defendant's building. From the literal meaning of the word, I would imagine that the firm are not engaged in any industries to which hazards are incidental other than that which might be attached to, say, a bank. The plaintiff was the kind of salesman whose duties required him to travel constantly in the city and vicinity doing "outside work."

Judgment

I do not think the Board can assume jurisdiction by postulating that the business of Wilkinson & Co. is an industry within the list of those enumerated in section 4, Part I., of the Act, and that the plaintiff is a "salesman" as distinguished from a "travelling salesman." *Regina* v. *Bolton* (1841), 1 Q.B. 66 at p. 72. If I may venture a loose definition of these terms I would think the Act meant by "salesman" an employee whose duties required his presence on the premises where the industry was carried on and to the hazard of which he was obliged to be exposed. For instance, if the firm manufactured wire rope and the salesman was required to be in and about the place to solicit and demonstrate to customers the excellence of their products and whilst so engaged he would be subject to hazard. Whereas if his work did not necessitate his being on the premises where the work was carried on and not exposed to the incidental hazards he would come within the exception (*a*) of section 4

as not being exposed to the hazards incident to the nature of the work carried on in the industry, which industry must be one of those enumerated in the previous part of the section. In other words, he is a salesman who is in the same category as "out-workers and members of the family of the employer," who are considered to be beyond the ambit of those hazards contemplated by the Act. From the material filed, I do not find any ground for holding that either the firm is within the Act or that if it is that the plaintiff is other than a travelling salesman who is in no way subject to any hazard or risk of a physical nature as incidental to the proper discharge of his assigned duties and over whom the Board has no jurisdiction. There is no doubt that the Act is of the widest possible scope as regards matters within its jurisdiction. This is not the case of a workman suing his employer. In subsection (1) of section 11 of the Act, if the workman meets with an accident "in the course of his employment" entitling him to an action against some person other than his employer he may, if he is entitled to compensation, either claim compensation or bring his action. Subsection (4) goes on to provide that such a claimant shall not have any right of action in respect of such accident against an employer in any industry within the scope of Part I. of the Act. It does not appear that the defendant Company are "employers" in any of the industries enumerated in section 4, *supra,* or that they have come in or have been swept within its scope by the Board.

Judgment

Having regard to all these important phases of the present application, I refrain from acceding to Mr. *McPhillips's* submission that the action is barred by the order of the Board, and without expressing any opinion further than I have done (and even that may be considered gratuitous) I find that the question as to whether the right of action is taken away by the Workmen's Compensation Act is strictly a matter of defence or exception—*per* Duff, J. in *The Dominon Canners Ltd.* v. *Constanza* (1923), S.C.R. 46 at p. 54. If I am right in this respect, then the whole important question can be gone into thoroughly at the trial without prejudice to the defendant.

Motion dismissed.

MORRISON, J.

1925

April 15.

SINCLAIR v. LAND SETTLEMENT BOARD.

Contract—Implied—Plans for reclamation scheme—Substantial adoption—Liability for payment.

SINCLAIR v. LAND SETTLEMENT BOARD

Where a Board has adopted and used plans for a reclamation scheme submitted by an engineer and the object of the work has been effectively accomplished by their use, although there is no express contract therefor, the engineer is entitled to payment for his plans.

Statement

ACTION for payment of plans submitted by the plaintiff to the defendant Board and adopted and used by it. The facts are set out fully in the reasons for judgment. Tried by MORRISON, J. at Vancouver on the 18th of February, 1925.

J. W. DeB. Farris, K.C., and *Sloan*, for plaintiff.
Mayers, and *Killam*, for defendant.

15th April, 1925.

Judgment

MORRISON, J.: It may be postulated that the defendant and its predecessors had the necessary contractual powers in the premises.

The plaintiff is a civil engineer of long and tried experience in his particular avocation. He has been engaged as engineer with some of the largest concerns and undertakings on the Pacific Coast. The work in which he was at one time employed, having particular reference to the *locus in quo* in this action, was as one of the engineers in the service of the Great Northern Railway, which then was being projected and now traverses territory near Sumas Lake. Whilst thus employed he became acquainted with the conditions as they then existed and was aware of the proposed project of reclamation of these lands. I deem it unnecessary to go into any detailed history of the various stages of development of the schemes originated and submitted from time to time. Suffice it is to say that the plaintiff, as well as several other well known engineers, looked into the possibilities of successfully draining the area in question and made reports, all of which are now

and were at the different periods available to the plaintiff for perusal, if he so desired.

As far back as 1913, the plaintiff, who had thus practical knowledge of the district and had made a study of the problems of reclamation of Sumas Lake area by a dyking and drainage scheme, prepared and worked out a detailed preliminary plan with a view to its subsequent adoption by the Government or its deputed authority. In the fall of 1916, he opened negotiations with the Government and with the Sumas Dyking Commissioners relative to the utilization of his scheme of reclamation, looking to the acceptance of his plans by the Board and for the payment by the Board to him for these plans if used by them. This submission by the plaintiff's counsel is based partially upon letters from Mr. Cresswell, who was then chairman of the Board of Commissioners, running from December 10th, 1916, to February 9th, 1917, and the letter of August 23rd, 1919, from Sinclair to Mr. Nelems, chairman of defendant Board. I may say parenthetically that the defendant was created a body corporate pursuant to the provisions of the Land Settlement and Development Act, B.C. Stats. 1917, Cap. 34, and were appointed Commissioners of the Sumas Dyking District under section 15 of the Drainage, Dyking and Development Act of 1913, and section 43 of the Land Settlement and Development Act, *supra,* by orders in council dated the 12th of January, 1918. So that in February, 1918, the Land Settlement Board succeeded the old Commissioners as the Sumas Dyking Commissioners. The plaintiff continued his negotiations with the new Board and his plan, which had been forwarded to the public works engineer, was submitted to and left with them. During the negotiations, it was suggested by the Board to Sinclair that he procure a company that would undertake the work at a stated figure. In accordance with this suggestion, Sinclair secured a letter from the firm of Cameron & Davidson in which they stated they had inspected his preliminary report, etc., and that they believed his plan to be feasible and that the work could be done for $1,100,000. They also thought exhaustive surveys and examinations should be made before finally determining on the enterprise. This they esti-

Judgment

MORRISON, J.

1925

April 15.

SINCLAIR v. LAND SETTLEMENT BOARD

mated would cost $10,000, and they offered to bear half the cost. This letter was submitted to the Board by the plaintiff by letter dated March 30th, 1918. The Board did not accept this proposition but decided to appoint its own engineers to make independent surveys and examinations, and for this purpose paid a sum of $10,000. It appointed Messrs. Brice & Smith, who had before them the Sinclair report and plan, as well as the plans and reports previously made by other engineers, including LeBaron and Schuyler, who had made reports for the B.C. Electric Railway Company, and of L. M. Rice & Co., who had also submitted plans to the Board, whereupon the plaintiff wrote on May 30th, 1918, expressing his desire to withdraw his offer of March 30th in view of what the Board had determined to do, in the course of which he states:

"I am prepared at any time to make a proposal covering the reclamation project provided the Land Settlement Board agree to have tenders submitted covering the entire project on a competitive basis. It being understood that the proposals to be submitted shall include a preparation of plans, specifications and the financing of the project to completion by the payment of Provincial Government bonds."

Judgment

On August 15th, 1918, the plaintiff wrote the Board commenting on the fact that the Board's engineers were doing more than investigating, and were to undertake the delineation of the plans, and he proceeds:

"May I ask what arrangement has been made to protect our interest? As you know, I have devoted practically my entire time for several years to the forwarding of this project as well as the investment of considerable cash and I can assure you it will work a great hardship on me to lose my interest. We feel that if your Board has extended the programme to the extent of getting out plans which are to be submitted to consulting engineers we should be represented in the field as well as on the consulting board."

It would appear he was apprenhensive that the Board's engineers were appropriating his plans in the production of a new scheme. Early in 1919 the engineers sent in a preliminary report to the Board. The plaintiff, upon perusal, concluded that it closely resembled his plan. At that time he was employed by the Northern Pacific Railway Company at Tacoma. He came to British Columbia, saw Mr. Brice, who admitted their plan resembled his and advised him to interview the Board, which he did on March 6th, 1919. He told them:

"I want to know where I stand in the matter. I think that if the Brice-Smith plan has copied any of my features—the features of my plan rather

—that I should be compensated for it or should be in some way represented on the Board as I could establish or have the privilege of establishing that my plan was the plan to use."

On March 10th, the plaintiff was offered a position on the engineering staff at $200 a month, which he accepted, but I do not hold that he thereby relinquished his claim to be paid for what he calls his plans. He then had an interview with the chairman, Mr. Nelems, who told him that he and the other members of the Board had great confidence in his plans, adding:

"It is up to you to go into the field and prove to the Board that you have the best plan for the reclamation of Sumas."

The plaintiff then went into the field relying upon that statement. He accordingly gave up his position in Tacoma and took up his work with the Board. He prepared a plan and report. At the same time working in the field was another engineer, Mr. W. C. Smith, who was also asked apparently to prepare a report. The two reports were submitted to the Board on July 9th. The report of Mr. Smith was rejected. The Sinclair plan was accepted after having been passed upon and approved on October 18th, 1919, by Mr. Cartwright, C.E., as consulting engineer. Mr. Cartwright reported that the Sinclair plan, as accepted, was in reality the finished form of the 1913 Sinclair plan. He also stated that in passing upon the Sinclair plan he had before him the 1913 and 1919 maps and reports, and he considered the one the logical development of the other. At the trial, in this, Mr. Cartwright was strongly supported by Mr. Dutcher, C.E., and Mr. Swan, C.E., both well-known engineers with special knowledge of the Sumas area, whose evidence impressed me most favourably. In substance they said the 1913 plan and report were adequate preliminary plans; that the difference between the 1913 and the finished plan was only such as was usual in such cases; that the two were remarkably similar, and that the one was only the finished product of the other. As against this evidence was offered that of Mr. W. C. Smith, C.E., who prepared the rejected plan; of Mr. Moe, who worked under Sinclair and afterwards superseded him on the work, and Mr. Muckleston, whose knowledge of the matter was derived from inspecting the various reports and plans. Mr. Sinclair's evidence of what took place at his

Judgment

MORRISON, J.

1925

April 15.

SINCLAIR v. LAND SETTLEMENT BOARD

interview with the Board, on 6th March, 1916, is not contradicted by any member of the Board as then constituted.

On August 23rd, 1919, and before his plan had been passed upon by Mr. Cartwright, he sends the chairman of the Board a copy of the letter written him by Cresswell as chairman in 1916, and says:

"I am sending you this so that you may be advised as to the agreement made by Mr. Cresswell at that time."

Immediately after that, on the 27th of August, the chairman, without repudiating this statement of the agreement, advised the plaintiff that steps were being taken to have him appointed engineer under the Act, and adds:

"As soon as your appointment has been made it will be necessary to have the plans signed here by the Board and deposit the same in the Land Registry office. We will then advertise the meeting of the property owners."

On October 28th, 1919, the chairman wrote him as follows:

"F. N. Sinclair, Esq.,
"Engineer, Sumas Reclamation Scheme,
"Court House,
"New Westminster, B.C.

"Dear Sir:

Judgment

"At a meeting of the Commissioners for the Sumas Dyking District held in my office today, you were regularly appointed engineer for the Sumas Dyking District in accordance with the motion as hereunder:

"The chairman having produced a letter from the Hon. the Minister of Lands, approving of the appointment of Frederick Nigel Sinclair as Engineer, as provided under Sec. 19 of the Drainage, Dyking & Development Act, a motion was duly moved, second and carried unanimously that Frederick Nigel Sinclair be hereby appointed Engineer to make a survey and prepare plans in duplicate shewing such of the lands in the Sumas Dyking District as in his opinion will be benefited by the proposed works, and to carry out such other duties as the Commissioners may require with reference to the said Sumas Dyking District, and that the remuneration of the said Frederick Nigel Sinclair shall be at the rate of $200 per month.

"Please be governed accordingly.

"Yours faithfully,
"M. H. Nelems,
"Chairman,
"Land Settlement Board."

My interpretation of this letter is that the words "proposed works" is the base from which he, as engineer thus engaged, was to work, and that that base means the scheme or plan previously originated and developed by Sinclair and accepted by the Board.

In December and March of the same year he writes to the Board pointing out that the project is now assured and his plans had been adopted. He asks to be appointed the engineer on construction at a salary of $7,500 a year and that the remuneration for his plans be fixed at $25,000. These letters were not answered in writing, but apparently verbal negotiations were continued. In my opinion, there was here an acquiescence amounting to an acceptance.

On May 21st, 1919, Sinclair was notified in writing that his appointment, as engineer, was to be made at a salary of $5,000 a year, and on May 25th he replied, again pointing out that no settlement had been made as to the amount to be paid him for his plans, and he stated:

"Following our failure to come to something definite I asked Mr. Barrow, the minister, to make me a counter proposal anticipating that he would take into consideration the obligation of the Government respecting their promise as to the plans and which has been understood by every one concerned from the start."

These were followed up by letters of June 14th, July 9th, July 29th and 31st, and a further letter dealt with the payment of the plans and that the amount should await the completion of the work. In the meantime, his appointment as "chief engineer" was formally confirmed August 12th, 1919.

Judgment

During the period from March, 1919, until the end of February, 1920, Mr. Nelems was chairman of the Board. He was succeeded by Col. Davies, who had been connected with the Board since the previous July. Mr. Nelems has since died, and Colonel Davies stated that Mr. Nelems had been a member of the Land Settlement Board prior to his chairmanship from the district in which the Sumas area was situated, and as such had most to do with the undertaking. He stated that he had been present at many interviews between the plaintiff and Nelems in which the question of payment for the Sinclair plans was discussed. He stated that at no time had Mr. Nelems ever repudiated liability for the plan, but, on the contrary, it was always assumed that there was an obligation. The only question was as to the amount due. Then it will be seen that the plaintiff was constantly in touch with every step taken by the defendant and never relinquished his claim for payment for his plans.

MORRISON, J.

1925

April 15.

SINCLAIR v. LAND SETTLEMENT BOARD

The defence submits that the plan in question was paid for by the monthly salary of $200, and that there was no agreement, expressed or implied, to pay him more; that the plan accepted was not the original Sinclair plan; that in any event the dyke was located in the wrong place and that the plans were valueless. Considerable evidence was also introduced by the defence to shew that many reports had been made on this Sumas scheme before the 1913 plan of Sinclair's; that the resemblance of the Sinclair plan to these plans was obvious, and that it offered nothing new in principle; that the plans were supplied to the Board by the B.C. Electric Railway Co. in 1918, and that the Sinclair plans were very inadequate and of no benefit to the Board. Sinclair on March 26th, 1918, wrote Mr. Murrin, then assistant general manager of that Company, pointing out the use that was being made of their data in regard to his plans.

In my opinion, the only question left to be now determined is the amount to be paid the plaintiff for his plans.

Judgment

Were it not for the learned and abstruse submission by counsel, on behalf of the defendant, that the parties herein had not come to an agreement respecting the payment for the plans, as claimed by the plaintiff, I would have little difficulty or trouble in dealing with what, after all, only entails a review of the elementary law of contract. I quite agree that in order to form the basis of a binding enforceable contract the parties thereto must come to some determination and to the same determination; and it must be disclosed. This determination may be manifested by written or spoken words or by other signification of intention from which an implication of law or an inference of fact or both may arise.

I further agree that there can be no contract during the period of non-determination, and that there must be a contemplation to create a legal obligation between the parties. It has been repeatedly declared that "the intention of the parties governs the contract." From the slipshod, careless, equivocal manner in which parties often express themselves or from their lack of felicity, or facility or exactitude in the employment of words, it is frequently a matter of great difficulty to ascertain whether the parties have reached a point common to and understood

by both. A contract being a manifestation of intention, it is a matter of the greatest difficulty at times, where there is a dispute, to find out what the true intention was, involving the inherent difficulties inseparable from all enquiries into disputed facts. I do not agree, however, that this is a case in which I am asked to decide a matter that has been left in doubt by the parties. One is met at once with the inquiry, did the defendant excite the expectations of the plaintiff? If so, were the engagements into which it is alleged it was drawn contemplated and intended by it? Was the intention carried out in the terms of its expression and the expectation fulfilled? It is alleged that the plaintiff made an offer to the defendant which was accepted: that the plaintiff by doing the work made the offer: that the other party by permitting him to do the work, and acquiescing in it, completed the acceptance. The sense in which that offer is to be taken is the sense in which the offerer believed that the offeree accepted it. I must decide what is the legal obligation which has been created by that offer and acceptance, and therefore the determination of what that sense is rests with me. In so doing, I must put upon the terms, as disclosed, my own interpretation, basing my conclusions upon principle, aided by the interpretation of the respective parties as well as that of disinterested witnesses and the surrounding circumstances. The intention is then presumed from the sense which I may fairly extract from all those aids which, of course, may be more or less adventitious. That presumed intention for the purposes of this case at any rate is the real intention. It is strongly urged that there is not here even an implied contract. Yet there may be an inferred contract. The difference between an implied and an inferred contract is that a contract implied by law is not a real contract but only a *quasi*-contract—a relation having the semblance of a contract—whereas an inferred contract is a true contract by the conduct of the parties. Now, on the words and conduct of the parties, can it be reasonably said that it is impossible to determine what was really intended as between them? In my opinion, in the facts of this case there appear, as the bookmen put it, all "the phenomena of agreement," and so the defendant ought not now to be heard to say

Judgment

MORRISON, J.

1925

April 15.

SINCLAIR v. LAND SETTLEMENT BOARD

that it has not agreed to anything. The conduct of the defendant, as appears by the evidence, is quite inconsistent with any other reason than that they intended and agreed to pay for the plans. It is difficult for me to be satisfied that the lay gentlemen who composed the Board of Drainage Commissioners, at the various stages of this business, read all the reports and perused the numerous plans and specifications understandingly. Perhaps having at all times expert aid at their disposal, it might not have been necessary for them to do so. However, that may have been, they did have Mr. Cartwright's report favouring, if I may use the term, the Sinclair plans, and it would appear the Board were abundantly satisfied with Mr. Cartwright's very able and full expression of his opinion. In justification of their adoption of the Sinclair plans, there is also the evidence of other eminent engineers, such as Messrs. Swan and Dutcher. Without being at all invidious, I think they were what may be termed independent, disinterested witnesses. On the other side, Messrs. Smith and Moe were, and Mr. Moe still is, interested, and to an important degree, in the matter of these plans. That is a factor that cannot be overlooked in estimating the value of conflicting testimony. Doubtless this work does not differ from most large undertakings in regard to the body of happenings of unforeseen incidents and accidents during the course of performance of the main contract, and to which it does not answer in terms, and which though within the sphere of the relationship established thereby it may be somewhat difficult to be dealt with on such evidence as may be available at the trial in order to determine the issues.

Judgment

The diversity of opinion in the various reports is very striking. Take, as an example, what Mr. Schuyler has to say of Mr. LeBaron. These engineers made reports for the B.C. Electric Railway, and which it is submitted by the defendant formed the basis of Mr. Sinclair's plans, but with which submission I do not agree. Mr. Schuyler, in his report, under the rubric "ground storage," proceeds:

"Mr. LeBaron states in three different places, pages 9, 16 and 17, that underneath the district there exists a great underground reservoir with a capacity in round numbers of 'nine trillion cubic feet of water' which will be gradually delivered to the pumps. In dealing with such large quantities

the cubic foot is a small unit, and one can grasp them better if converted into the larger unit, such as acre-foot, the unit commonly used in describing irrigation reservoirs. Nine trillion cubic feet (or 9,000,000,000,000 expressed in figures), reduced to acre-feet, amounts to 206,600,000 enough to cover 3,200 square miles over 100 feet deep. That is certainly a pretty large reservoir. I have written a book on reservoirs, and know something about them, but I have never heard of one quite so large as this. The Assouan dam on the Nile, makes a reservoir of 863,000 acre-feet capacity, which is the largest in the world, but this one discovered by Mr. LeBaron is 240 times larger. With such a reservoir as this we would not need any pumping plant for some time to come, as this would take a constant flow of 400 sec.-ft., over 700 years to fill it. We could turn the Sumas River into it, and also the Chilliwack, and still not have any water to pump for several generations to come! There is evidently some mistake about this, and I suspect the statement of capacity is 1,000 times larger than was intended. I could not refrain, however, from joking at Mr. LeBaron's expense on the extravagance of these figures, and I beg his pardon for doing so. If he had only shewn a diagram of this reservoir, I would quote from his report where he criticises Mr. Binkley's discharge diagrams as follows:

"'Now I have the highest appreciation of this admirable method of illustration, but all such diagrams must be based on correct premises. If the premises are wrong, the diagrams must be wrong, and are then only misleading.'"

Judgment

It would be instructive to know what Mr. LeBaron thought of Mr. Schuyler's report. However, this sort of material enables one to appreciate the wide scope a thorough investigation of this undertaking must involve. That not only must the topography of vast and indeed remote areas be considered, such as the watersheds as far afield as the upper reaches of the lengthy Fraser River, but as well the subterranean condition in the vicinity of the proposed reclamation. For an engineer of standing and repute (who had given his time and devoted his energies, ability and money to investigating all the necessary conditions and assembling the factors which enter into the preparation of plans) to be expected to accept a salary of $200 per month, or even the stipend usually attached to the position of consulting engineer or engineer of construction, ample as it may be, for the services rendered in lieu of compensation for such plans, is to my mind unreasonable, and in this case is not justified by evidence. There is evidence of what some of the engineers, who submitted reports and plans, received or at least claimed ranging up to $40,000.

MORRISON, J.

1925

April 15.

SINCLAIR v. LAND SETTLEMENT BOARD

Judgment

Surely the proof of the pudding is in the eating. The Hon. Mr. Barrow, called for the defence, now the minister under whose department of Government the reclamation of the Sumas Lake area is administered, through the defendant, and who at all times material to the issues was either in a representative capacity or as landowner within Sumas district, declared at the trial that the dyke which was assailed in the pleadings was effective and well-built, thus assuaging any fears that might have arisen in the minds of land occupiers within its protective walls. That large sums are still voted and asked for and expended for the maintenance and preservation of this work is, in my opinion, no sufficient answer to the plaintiff's present claim. Theory and contingencies enter so largely into matters of this kind that to expect exact invariable results would be setting up an impossible standard. Had any or all of the engineers, who have been indentified with the Sumas Lake reclamation, made their reports before the unprecedented conditions of 1894 appeared and dykes had been constructed on their plans and specifications, the result would have been disastrous. No human being can accurately or safely anticipate the vagaries of the climate of a mountainous region such as we find here. Lest it might be made to appear open to comment that a great department of the Government should permit a dispute over an engineer's account to be brought before the Courts, it may be permissible for one to say that it was their duty, where a substantial sum of money is in dispute, and failing a reasonable friendly adjustment, to let the matter take the usual course and have the plaintiff in public, and on oath, state his case. Whether the work has cost too much, and the end of expenditure of public moneys on it is yet remote, does not alter the fact that the lands, according to the preponderance of evidence, are efficiently and effectively reclaimed, and that the reclamation was effected by the use of the plaintiff's plans. That there were, and will be, great divergence of opinion, as to the cost of proposed works, is only another way of saying that to err is human, meaning thereby honourable. Why that concession is never allowed a government, as it is so often to ordinary folk, is difficult to explain.

The plaintiff did agree at one time to accept $25,000 plus a position as engineer at $7,500 a year. Having regard to the value attached by other engineers who had submitted plans of the work in question up to $40,000, I think the plaintiff should get $35,000 and there will be judgment accordingly with costs.

Judgment for plaintiff.

THE W. H. MALKIN COMPANY LIMITED v. SHERMAN.

Guarantee—Suretyship—Husband and wife—Wife as surety—Knowledge of facts—Extension of time for payments—Forbearance from compelling payment—Right of release of surety.

In 1918, S. managed the D. Company of which his wife was a majority shareholder. In April, 1919, the D. Company was wound up, its debts not being paid. In July, 1919, S. formed the A.H.S. Company his wife holding substantially all the shares. In 1921, the A.H.S. Company requiring money, S. approached the plaintiff for a loan, the D. Company having been indebted to the plaintiff in $2,636.66 at the time of its winding-up. An agreement was entered into signed by S. his wife and the A.H.S. Company for a loan of $9,000, the plaintiff to retain $1,000 of this on account of the D. Company debt and S. and his wife were to give a promissory note for the balance of D. Company debt payable in four semi-annual instalments. The promissory note was signed by S. and the A.H.S. Company and Mrs. S. was an endorser. An action for the balance due on the promissory note was dismissed as against Mrs. S.

Held, on appeal, reversing the decision of RUGGLES, Co. J., that on the evidence Mrs. S. understood the nature of the document she was signing and the promissory note, and that when at the instance of S. (who was unable to make the second semi-annual payment) the plaintiff agreed to accept the payment in monthly instalments it was not on a basis of an extension of time so as to release the surety from liability.

Per MACDONALD, C.J.A.: Where there are two grounds on either of which the action could be dismissed and the trial judge gives no reasons for dismissing the action the Court of Appeal is free to find the facts unembarrassed by any finding in the Court below.

APPEAL by plaintiff from the decision of RUGGLES, Co. J. of the 29th of December, 1924, in an action to recover $1,000, Statement

COURT OF APPEAL

1925

April 8.

THE W. H. MALKIN CO. LTD. v. SHERMAN

Statement

the balance due on a promissory note made on the 15th of July, 1921, for $1,636.66 payable in four equal instalments on the first days of April and September in the years 1922 and 1923. The facts are that in 1918 Mr. and Mrs. Sherman carried on the business of the Defiance Packing Company, Mrs. Sherman holding 15,003 shares of a total of 19,000 in the Company. On the 17th of April, 1919, the Defiance Company wound up without paying anything to its creditors. On the 19th of July, 1919, the Shermans formed the A. H. Sherman Company, Mrs. Sherman holding 9,998 of a total of 10,000 shares in the Company. In July, 1921, the Sherman Company requiring money, Sherman approached the plaintiff Company for a loan. At the time it went into liquidation the Defiance Company owed the plaintiff Company $2,636.66 and an agreement was arrived at whereby the plaintiff would loan the Sherman Company $9,000, and the plaintiff was to retain $1,000 of the loan in part payment of the debt of the Defiance Company and the Shermans were to give a promissory note for the balance of the debt (*i.e.*, $1,636.66) payable as above set out. Mrs. Sherman merely endorsed the note. When the second instalment came due the plaintiff agreed with Sherman to allow its payment in four monthly instalments. The learned trial judge dismissed the action as against Mrs. Sherman.

The appeal was argued at Vancouver on the 7th and 8th of April, 1925, before MACDONALD, C.J.A., GALLIHER and MACDONALD, JJ.A.

Argument

McMullen, for appellant: We have the evidence of Mr. Griffin that he explained the whole transaction to Mrs. Sherman. She was the main shareholder in both companies and knew the history of both companies from the beginning. The plea of *non est factum* must fail. On the defence that there was an extension of time to the principal debtor, we submit that there was mere forbearance. The necessary legal elements were not there so as to create an actual extension of time.

Mayers, for respondent: There was failure to properly advise the wife of the transaction and the plea of *non est factum* prevails: see *McLean* v. *Maze* (1924), 3 W.W.R. 9 at p. 10; *Canada Furniture Co.* v. *Stephenson* (1910), 19 Man. L.R.

618 at p. 627; *Chaplin & Co., Limited* v. *Brammall* (1908), 1 K.B. 233 at p. 237; *Turnbull & Co.* v. *Duval* (1902), A.C. 429 at p. 434; *Howes* v. *Bishop* (1909), 2 K.B. 390 at p. 402; *Talbot* v. *Von Boris* (1911), 1 K.B. 854; *Bank of Montreal* v. *Holoboff* (1923), 3 W.W.R. 645; *Bank of Montreal* v. *Stuart* (1911), A.C. 120 at p. 138. On the question of extension, having agreed to accept monthly payments is sufficient to bring the case under this rule: see Halsbury's Laws of England, Vol. 15, p. 554, note (*r*); *Bellingham & Co.* v. *Hurley* (1908), Times of April 4th reversing S.C. (1907), 52 Sol. Jo. 131; *Clarke* v. *Henty* (1838), 3 Y. & C. 187.

Argument

McMullen, in reply, on question of extension of time, referred to *Philpot* v. *Briant* (1828), 4 Bing. 717; *McManus* v. *Bark* (1870), L.R. 5 Ex. 65; *Fleming* v. *McLeod* (1907), 39 S.C.R. 290 at p. 298; De Colyar on Guarantees, 3rd Ed., 422-4; *Wright* v. *Western Canada Accident and Guarantee Ins. Co.* (1914), 20 B.C. 321.

MACDONALD, C.J.A.: I think the appeal should be allowed. There are two principal questions involved in this appeal: Firstly, whether or not the plaintiffs discharged their duty to Mrs. Sherman to explain to her clearly what she was doing when she signed the guarantee in question. I accept Mr. Griffin's evidence on that. I am satisfied from his evidence that she was given to understand the nature of the document she was asked to sign and of the promissory note. She so far understood the whole transaction as to refuse to sign the note as maker, which she was right in doing since the agreement or guarantee recited that she was to endorse. Therefore, she must have understood the transaction very well when she refused to sign as maker and signed as endorser only.

MACDONALD, C.J.A.

As regards the other point, namely, whether the arrangement which was made between Sherman and Munton amounted to a valid extension of time so as to release the surety and prevent the surety from suing the principal debtor immediately, I am satisfied that the transaction did not amount to an extension of time. There is a conflict of evidence on that point. It may be (I do not say it is so, in fact, I would be rather doubtful of it)

COURT OF APPEAL

1925

April 8.

THE W. H. MALKIN CO. LTD. v. SHERMAN

MACDONALD, C.J.A.

that on Sherman's evidence there was an agreement which amounted to an extension of time. I prefer again to accept the evidence of Malkin and Munton on this point. I think what Mr. Sherman wanted was simply time. He could not make the payment of the second instalment on time, and he wanted to know if the plaintiffs would accept the payments monthly. They were quite agreeable to accept the payments monthly, but not on the basis of an extension of time. Mr. *Mayers* agreed that if they had that intention they concealed it and confirmed the arrangement deposed to by Sherman and denied by Mr. Munton by accepting the monthly instalments. They were willing merely to allow the matter to rest as it was so long as the payments were made. Malkin and Munton absolutely repudiate any suggestion of extension of time, and say that the payments were received in that way as a favour to Mr. Sherman and there was no intention at all of extending the time. But if there was any doubt upon that point, I am convinced the arrangement to accept the monthly instalments was confined to the second instalment of the note, and had no application at all to the third and fourth, so that in any case the appeal would have to be allowed as to the third and fourth instalments of the note; but as I say I am satisfied the arrangement was not a binding arrangement to extend the time even of the second instalment, therefore the appeal in full should be allowed with costs.

I just want to add to what I have said a matter I neglected to mention, as to the submission by Mr. *Mayers* that he has a finding of the trial judge upon either or both of these points; first, that the trial judge dismissed the action on the ground that the plaintiffs failed to perform their duty to inform Mrs. Sherman of the true nature of the transaction. If he had come to that conclusion he could have dismissed the action. Again, it was open to him to dismiss the action on another ground, namely, that there had been an extension of time and the surety was thereby released. On either ground he could have dismissed the action. It was not necessary to come to a conclusion on both. Unfortunately for Mr. *Mayers* he has not given any reasons. He has not said, "I find there was in fact an agreement to extend the time and dismiss the action on that ground," or "I

find that in fact the plaintiffs did not discharge their duty to Mrs. Sherman by explaining the nature of the document which they were seeking to have her sign." In view of that omission on the part of the learned judge this Court is left entirely in doubt as to whether the judgment is based on one ground or the other or on both. There is no finding of fact. He may have found either one or the other or he may have found both, but that is not indicated and this Court cannot say that the learned trial judge has made a finding on one point or the other, therefore the Court is free to find the fact unembarrassed by any finding on the part of the trial judge.

MACDONALD, C.J.A.

GALLIHER, J.A.: I am of opinion, under all the circumstances of this case, that Mrs. Sherman was sufficiently aware of the transaction she was entering into. On the second ground I would say I am not so clear as my learned brothers, but as they have indicated to me they are satisfied on the point and are quite clear, I will not request that the matter be postponed or reserved, as mine would only in any case be a dissenting judgment. I do not say I dissent from what my learned brother has said or the conclusion he has come to, but I only say I am not sufficiently clear on the point I have mentioned to express a decided opinion at the moment.

GALLIHER, J.A.

MACDONALD, J.A.: On the first branch Mr. *Mayers's* chief point was that the defendant in reality was guaranteeing payment of a non-existing debt and that full explanation and disclosure of the true situation was not made to the defendant. The position was, however, that practically the same people, after reorganizing, approached a creditor of the old company to secure a loan. I think the Shermans would be surprised if a loan for $9,000 could be obtained from this particular creditor without providing for payment of the old debt.

As to whether the onus of fully explaining the true situation to the wife was fully discharged I prefer, under the circumstances of this case, to give full effect to the evidence of Mr. Griffin that he explained the "purport" of the arrangement, giving full significance to that word.

COURT OF APPEAL

1925

April 8.

THE W. H. MALKIN CO. LTD. v. SHERMAN

On the second branch I reach my conclusion by drawing inferences of fact from all the evidence. I do not think the accommodation granted in respect to part only of the total debt constituted a binding contract to extend payment for a definite period, thereby releasing the surety.

Appeal allowed.

Solicitor for appellant: *W. Martin Griffin.*
Solicitor for respondent: *G. L. Fraser.*

COURT OF APPEAL

1925

April 16.

PRAT v. HITCHCOCK

PRAT v. HITCHCOCK.

Practice—County Court—Dispute note withdrawn—Judgment—Taxation—Notice not necessary.

Where the defendant enters a dispute note in a County Court action but subsequently by leave of the Court withdraws it, the plaintiff upon entering judgment may proceed to have his costs taxed without notice to the defendant.

APPEAL by plaintiff from the order of GRANT, Co. J. of the 3rd of February, 1925. The defendant's solicitors had entered dispute notes but subsequently withdrew them after having obtained an order of the Court to be allowed to do so. The plaintiff then obtained judgment and the costs were taxed without notice to the defendant's solicitors. The defendants then applied to set aside the taxation and on the 3rd of February, 1925, an order was made setting aside the taxation and referring the matter back to the registrar for taxation upon notice being given the defendant's solicitors.

Statement

The appeal was argued at Vancouver on the 14th and 15th of April, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

Woodworth, for appellant: There was no other document for

the defence except the dispute note and on order of the Court that was withdrawn. This amounts to a default judgment and Order XXII., r. 2, does not apply. He should have got a direction from the Court if he wanted to be present. If the registrar does not direct notice to be given I am not bound to give it.

St. John, for respondent: The defendant by his solicitors was on the record and I am entitled to notice. Order XXIII., r. 3, settles the whole matter; see also Order IX., rr. 2 to 8. Argument

16th April, 1925.

MACDONALD, C.J.A. (oral): In my opinion, this is a default judgment and therefore notice of taxation was not necessary.

There was a dispute note but the defendant wanted to withdraw that, and for that purpose it was necessary for him to get leave from the judge. This was duly obtained. When the dispute note was withdrawn there was no dispute at all, and the plaintiff was at liberty to enter judgment for default and therefore no notice of taxation was necessary. Order XXII., r. 2, is relied upon; it provides that the registrar may direct notice, and fix the length of it, or the person who is to be served with it. We look at Order XXII., r. 2, and we find that it has reference to a case which has been tried or a finding made. In this case there has been no trial and no finding of any kind, and the rule is therefore inapplicable to it. No other rule was cited to us which is applicable to the case. Therefore, my conclusion is that the judgment is in fact a default judgment, and that the taxation could have taken place without any notice to anybody. MACDONALD, C.J.A.

The appeal is dismissed, with costs in this Court and the Court below.

MARTIN, J.A. (oral): I am of the same opinion as the learned Chief Justice, and as he has so clearly stated the matter, and I am so much in accord with him, I shall not add anything to what he says except just a word as to the alternative submission made by Mr. *St. John* that he ought to have been allowed, assuming he was the solicitor on the record, to have a review of taxation. Before such a thing as that could be done a very strong MARTIN, J.A.

COURT OF APPEAL

1925

April 16.

PRAT v. HITCHCOCK

case would have to be made out. I do not wish to say that under no circumstances could a judge review a taxation of the registrar on a default judgment, but I do say that in order to obtain such an unusual ruling a corresponding strong case would be necessary. In this case there was no material before the judge that would justify him in making such an order.

GALLIHER, J.A. (oral): I must say, with all respect, that I do not entertain quite the whole of the views of the majority of the Court in this matter. I am not going to go into it in detail, but I do not regard this as strictly speaking a default judgment. If that was for a liquidated demand you could enter judgment without getting the order of the judge had no dispute been filed. Here the order of the judge was necessary to have the dispute note withdrawn. This was obtained by consent, and the judgment signed was, I think, a consent judgment. In that respect at all events it departs from the ordinary default judgment. There were costs incurred in the proceedings as far as they went which would not be incurred in a default judgment at all. I quite agree with my brothers in regard to Order XXII., r. 2, but apart from that altogether what is the assumption in a case of that kind, because unless you bring it in as strictly a default judgment the assumption is that the defence has been withdrawn, and whatever the costs incurred should be, you would have to pay these costs up to that time. Now, is not the assumption that these were costs which you could properly tax, and is not the person against whom these costs are to be taxed interested and entitled to notice? He is not entitled to notice under a default judgment because he has never submitted himself to the Court at all.

GALLIHER, J.A.

MACDONALD, J.A. (oral): I agree with the learned Chief Justice.

MACDONALD, J.A.

Appeal allowed.

Solicitor for appellant: *C. M. Woodworth.*
Solicitors for respondent: *Noble & St. John.*

REX v. BURKE.

MORRISON, J. (In Chambers)

1925

April 7.

REX v. BURKE

Criminal law — Intoxicating liquors — Procuring liquor for constable — R.S.B.C. 1924, Cap. 146, Sec. 28.

While two constables were associating with the accused one of them expressed a desire for a bottle of liquor the outcome of which was that one of the constables gave accused $10 with which to buy intoxicating liquor. The accused went off and returned with a bottle of whisky which he gave to the constable with $4 change. The accused was convicted of unlawfully selling liquor.

Held, on appeal, that the accused acted as a purchasing agent for the constable, using his money and was therefore wrongfully convicted.

Rex v. *Berdino* (1924), 34 B.C. 142 distinguished.

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid heard by MORRISON, J. in Chambers at Vancouver on the 27th of March, 1925. Statement

W. C. Ross, for the application.

J. Ross, contra.

7th April, 1925.

MORRISON, J.: On the 6th of February last, the petitioner was convicted by Richard Hirtz, justice of the peace, for selling intoxicating liquor to one Constable Heard, a Provincial police constable at Elko, and sentenced to pay a fine of $300 or in default of payment to three months' imprisonment.

The accused is now serving the three months' sentence. The prisoner had been associating with two constables during which a desire was expressed by the constables for a bottle of liquor. The outcome was that Constable Heard gave the prisoner $10 with which to buy intoxicating liquor. Burke went off and returned with the bottle of whisky which he gave to the constable together with the $4 change out of the $10 belonging to the constable. In due course the prisoner was convicted. Counsel for the Crown sought to support the conviction on the authority of *Rex* v. *Berdino* (1924), 34 B.C. 142. The cases are clearly distinguishable. In the *Berdino* case the prisoner procured the liquor, brought it to the informant who paid the Judgment

MORRISON, J. (In Chambers)
1925
April 7.
REX v. BURKE

price asked by the prisoner. There was a sale by the prisoner direct to the informant. In the present case the prisoner acted as purchasing agent for the informant, using the informant's money, and was therefore wrongfully convicted. There will be the usual protection clause as to the magistrate.

Conviction quashed.

GREGORY, J.
1925
April 22.
HOUGHTON v. EVANS

HOUGHTON v. EVANS.

Contract—Covenant not to engage in certain business—Restraint of trade—Validity—Injunction.

The plaintiff and defendant who were in business together as engravers and manufacturers of dies, and stencils, dissolved partnership, the plaintiff buying out the defendant's share in the business. In the dissolution agreement the defendant covenanted that for five years he would not carry on or be engaged in the "business of an engraver or manufacturer of dies, stencils, seals, signs and rubber stamps, or any other articles of a similar kind."

Held, that the covenant was not an unreasonable one nor was it against public policy and the defendant who had admitted breaking it should be enjoined from committing a further breach, but the injunction should cover only such articles as the firm manufactured or made during its existence.

Statement

ACTION for an injunction. The plaintiff and defendant had carried on a business in partnership as engravers and manufacturers of dies, stencils, etc. The partnership was dissolved, the plaintiff taking over the business upon paying the defendant $4,500. Under the dissolution agreement the defendant covenanted that for a period of five years he would not be engaged in any way in said business of engraver or manufacturer of dies, etc. The defendant having been guilty of a breach of this covenant the plaintiff brought action for an injunction to restrain him from engaging himself in any way in said business. Tried by GREGORY, J. at Vancouver on the 9th of April, 1925.

Reid, K.C., and *Bole,* for plaintiff.
G. Roy Long, for defendant.

22nd April, 1925.

GREGORY, J.: The plaintiff and defendant carried on business in partnership as engravers and manufacturers of dies, stencils, etc. The partnership was dissolved and the plaintiff took over the assets and goodwill of the business, paying the defendant therefor the sum of $4,500. In the dissolution agreement entered into between them, the defendant covenanted that he would not, for the period of five years, "directly or indirectly and either as principal, clerk or agent, carry on or be concerned or engaged in the said business of an engraver or manufacturer of dies, stencils, seals, signs and rubber stamps, and any other articles of a similar kind in the Province of British Columbia." This restrictive covenant follows exactly word for word the statement in paragraph 1 of the agreement of the business carried on by the parties.

The work of the firm was performed in the City of Vancouver, but their business covered the whole of the Province of British Columbia, and they did work for municipalities and persons in all parts of it.

Judgment

The defendant admits that he has been guilty of a breach of the covenant, and that he only obtained legal advice on the matter after the writ herein was served upon him.

It is now contended that the covenant is not binding upon him as being unreasonable, against public policy and oppressive, and prevents the defendant from earning a livelihood, that he cannot even make painted or cotton signs, which he is quite capable of doing.

The principles governing cases of this kind are clearly stated in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (1894), A.C. 535; 63 L.J., Ch. 908, cited by plaintiff's counsel. Admittedly the restriction must be reasonable in reference to the interests of the parties concerned and in reference to the interests of the public, and be so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed and yet not injurious to the public.

The restrictions imposed here are, I think, reasonable. Five

GREGORY, J.

1925

April 22.

HOUGHTON v. EVANS

years, it is said, is too long a period, but in the absence of evidence I cannot say that it is. The partnership existed nearly that length of time.

The true intent of the covenant only restricts the defendant from the manufacture of the same kind of dies, signs, stencils, etc., that the firm had been manufacturing, and is not at all enlarged by the words "and any other articles of a similar kind" so as to include painted and cotton signs; those words are part of the said business as set out in paragraph 1 describing the business carried on by the firm.

It must not be forgotten that the contract here is between a vendor and purchaser and not between an employer and his apprentice, as in *Herbert Morris Lim.* v. *Saxelby* (1915), 84 L.J., Ch. 521, also referred to by plaintiff's counsel, but in that case, at p. 522, the trial judge said that the covenant there in question would have been enforced as between a vendor and purchaser; and on appeal Cozens-Hardy, M.R. at p. 525 refers us to the language of Lord Macnaghten in the *Nordenfelt* case, *supra,* where he says different considerations must apply in cases of apprenticeship . . . . and cases of the sale of a business or dissolution of a partnership.

Judgment

In *E. Underwood & Son* v. *Barker* (1899), 1 Ch. 300, the covenant included Great Britain and other countries, but the Court by a majority granted the injunction and restricted its operation to Great Britain. This case was decided since the *Nordenfelt* case, which was not only referred to by counsel but was stated by Lindley, M.R. to be a most accurate statement of the law on the subject. He also states, at p. 306, that it was pointed out in *Dubowski & Sons* v. *Goldstein* (1896), 1 Q.B. 478 that "the contract must be construed with reference to the business of the plaintiffs which it was the object of the parties to protect."

I would like to recommend to the defendant a thoughtful consideration of the following language of the Master of the Rolls in the same case at p. 305:

"If there is one thing more than another which is essential to the trade and commerce of this country it is the invoilability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then repudiate it

and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country."

GREGORY, J.

1925

April 22.

HOUGHTON v. EVANS

The defendant is no apprentice or immature youth—he knew what he was about and in the very paragraph of the contract complained of presumably caused the following words to be added:

"Provided, however, that nothing herein contained shall be construed so as to prevent the said Shirley V. Evans from carrying on his trade of die sinking, which is defined to mean the sinking of jewellers' dies, medal dies, badge dies and dies for stationery."

Judgment

There will be judgment for the plaintiff with costs. The defendant will be enjoined from committing a further breach of the covenant, but in drawing up the injunction it is to be made clear that it covers only such articles as the firm actually manufactured or made during its existence.

There will be a reference to the registrar to ascertain the damages sustained by the plaintiff, if that cannot be agreed upon by the parties.

Judgment for plaintiff.

REX v. COOPER.

COURT OF APPEAL

1925

May 1.

REX v. COOPER

Criminal law—Sale of liquor to Indian—Conviction on charge under Government Liquor Act (Provincial)—Conflict with provision of Indian Act (Dominion)—Validity—R.S.C. 1906, Cap. 81—R.S.B.C. 1924, Cap. 146, Sec. 28.

Section 135 of the Indian Act (Dominion) enacts that everyone who sells intoxicating liquor to an Indian, shall, on summary conviction be liable to imprisonment and fine. The Provincial Government Liquor Act prohibits the sale of liquor to any person for breach of which the offender on conviction may be imprisoned or fined. On appeal from the quashing of a conviction for the sale of liquor to an Indian on a charge under the Provincial Act:—

Held, affirming the decision of YOUNG, Co. J., that the Provincial statute does not apply to a sale of liquor which is within the terms of the Indian Act and the conviction was properly quashed.

APPEAL by the Crown from the decision of YOUNG, Co. J. of the 30th of October, 1924, quashing a conviction for selling

Statement

COURT OF APPEAL

1923

May 1.

REX v. COOPER

liquor to an Indian contrary to section 26 of the Government Liquor Act, B.C. Stats. 1921, Cap. 30. The conviction was quashed on the ground that the accused cannot be convicted for selling liquor to an Indian under the Provincial Government Liquor Act as he should have been tried under section 135 of the Indian Act.

Statement

The appeal was argued at Victoria on the 9th of January, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Carter, D.A.-G., for the Crown: These Acts only overlap to a certain extent. As to the effect, see *Rex* v. *Martin* (1917), 41 O.L.R. 79. The Acts have different objects in view: see *Re Rex* v. *Scott* (1916), 37 O.L.R. 453; *Reg.* v. *Stone* (1892), 23 Ont. 46 at p. 49; *Reg.* v. *Wason* (1890), 17 A.R. 221; *Attorney-General* v. *Lockwood* (1842), 9 M. & W. 378; *Lohse* v. *Taylor* (1922), 1 W.W.R. 808 at p. 810; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at p. 361; *In re Reciprocal Insurance Legislation* (1924), 2 W.W.R. 397 at p. 407. The legislation is different in its scope. It is not parallel legislation the object not being the same.

Gonzales, for respondent: That the man to whom the sale was made was an Indian see *Rex* v. *Martin* (1917), 39 D.L.R. 635 at p. 637; *Rex* v. *Hill* (1907), 15 O.L.R. 406. An Indian off the reserve is subject to Provincial legislation provided the Dominion is not in the field: see *Tennant* v. *Union Bank of Canada* (1894), A.C. 31 at p. 45; *Rex* v. *Garvin* (1908), 13 B.C. 331; (1909), 14 B.C. 260 at p. 265. It is a question how far one Act gives way to the other: see Clement's Canadian Constitution, 3rd Ed., 465; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348. As long as both Acts prohibit the sale of liquor to an Indian there is conflict and the local Act must give way: see *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907), A.C. 65.

Carter, in reply, referred to *Reg.* v. *Gilmore* (1882), 15 Cox, C.C. 85.

Cur. adv. vult.

1st May, 1925.

MACDONALD, C.J.A.: The accused was charged and convicted under the Government Liquor Act, a Provincial statute, of selling liquor to an Indian. He appealed to the County judge, who quashed the conviction on the ground that the Provincial statute does not apply to a sale of liquor which is within the terms of the Indian Act, a Dominion statute. From this decision the Crown appeals.

Section 135 of the Indian Act, being Cap. 81, R.S.C. 1906, enacts that everyone who sells intoxicating liquor to an Indian, shall, on summary conviction, be liable to imprisonment and fine.

The Government Liquor Act of the Province prohibits the sale of liquor to any person, and for breach of this prohibition the offender, on conviction, may be imprisoned or fined. The penalties in the two Acts are not identical in severity, but I think this has no bearing on the case. The Crown contends on this appeal that the prohibition of the sale to any person includes prohibition of the sale to an Indian. Therefore we have the Dominion Act and the Provincial Act each purporting to deal with precisely the same offence.

MACDONALD, C.J.A.

Rex v. *Martin* (1917), 41 O.L.R. 79, was much relied on by the appellant in support of his appeal. The contention there made was that the Provincial Legislature had no power to legislate in respect of Indians. It was held that Indians, like others, were subject to the general laws of the Province, including the Ontario Temperance Act. If that case is in conflict with my conclusion in this case, with great respect, I cannot follow it. The question here is not are Indians subject to the general laws of the Province, but the Dominion having prohibited the sale of liquor to Indians, and provided for its punishment as a crime, no matter where the sale may have taken place, whether on a reserve or off a reserve, occupied the field or part of the field so as to exclude Provincial legislation from it to the extent aforesaid. I think there is no question of the jurisdiction of the Dominion to pass section 135 of the Indian Act, under its powers in respect to the peace, order and good government of Canada. There is also no doubt that the Province may, in the

COURT OF APPEAL

1925

May 1.

REX v. COOPER

absence of Dominion legislation, pass a prohibitory law under its powers in respect of matters of a merely local or private nature in the Province. But when the two jurisdictions come in conflict, and to the extent of the conflict, I think it is settled law that the Dominion legislation excludes the operation of Provincial law.

The assertion of the right by two distinct Legislative bodies to make the same act an offence and subject the offender to a double penalty, is, I think, contrary to the accepted principles of our law and contrary to the British North America Act. No doubt that result may sometimes be brought about indirectly, but there is no case in the books which goes the length of holding that when the Dominion has created a particular act a crime the Province may for its purposes create the same act a crime.

MACDONALD, C.J.A.

I think, therefore, the appeal should be dismissed.

MARTIN, J.A.: I agree that this appeal should be dismissed, and I only note that our decision does not affect those "Indians" who do not come within the prohibition imposed by the Federal Indian Act. The case I regard as being within the principle of *Tennant* v. *Union Bank of Canada* (1894), A.C. 31, and a complete occupation *ad hoc* by the Federal Parliament of this particular field. The decision of *Rex* v. *Martin* (1917), 41 O.L.R. 79, is limited to the facts therein which do not extend to the question at Bar; there, amongst other differences, the conviction was one of an Indian for having intoxicants in his possession; here it is for selling liquor to an Indian.

MARTIN, J.A.

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

Where the Dominion have entered the field, as they have here, in the case of sale of liquor to Indians, to that extent their legislation is paramount.

GALLIHER, J.A.

The prosecution here, in my opinion, should have been had under the Dominion Act.

MCPHILLIPS, J.A.

MACDONALD, J.A.

MCPHILLIPS and MACDONALD, JJ.A. would dismiss the appeal.

Appeal dismissed.

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

COURT OF APPEAL

1925

May 1.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

Contract—Repudiation—Damages—Report of registrar — Reasons — Argument on appeal—Rule as to reply.

When damages are to be based on anticipated profits particularly those of a speculative and uncertain undertaking such as that of logging with all its vicissitudes of changing markets, fire risks, labour troubles and changing costs of labour and equipment, the safer and better way of arriving at the result is upon evidence of persons skilled and experienced in the trade and on the sale and disposal of timber berths as to what, at the time of breach, was the market value of the contract, or if the contractors had special skill or facilities for carrying on the works what it was worth to them. The registrar's report as to damages in such a case should not be disturbed unless shewn to have been come to upon wrong principles or that it otherwise appears to be clearly wrong (GALLIHER and MACDONALD, JJ.A. dissenting, holding that there should be a substantial reduction in the estimated damages).

The registrar upon a reference to ascertain what damages had been sustained by reason of the wrongful termination of a contract is not bound to give reasons for his findings and an application to send back the report for further consideration on the ground that it did not set out reasons for his findings was refused.

The rule of reply in an argument before the Court is that counsel for the appellant opens on a subject which he is supposed to exhaust as far as he is concerned then counsel for respondent answers and if he brings up anything new in the answer appellant's counsel in reply has a right to explain.

APPEAL by defendants from the findings of the deputy district registrar at Vancouver made on the 21st of October, 1924, upon a reference held by him to assess damages suffered by the plaintiffs pursuant to the judgment of MURPHY, J. of the 29th of May, 1922, as altered and confirmed upon the recommendation of the Judicial Committee of the Privy Council whereby the said deputy district registrar found damages for the plaintiffs in the sum of $233,343 and from the order of MACDONALD, J. of the 13th of December, 1924, giving leave to enter judgment for said sum and from the judgment of the Court of the same date entered in pursuance thereof. The facts will be found in the report of the appeal to the Court of Appeal from the original judgment (31 B.C. 401).

Statement

COURT OF APPEAL

1925

May 1.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

The appeal was argued at Victoria on the 14th to the 20th of January, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Davis, K.C., for appellants: This is an appeal from the deputy district registrar to whom the matter was referred to determine the market price and the cost of production of the timber referred to in the two contracts in question. He has given no reasons for his findings and this Court should refer the matter back to the registrar for his reasons for finding as he did: see *Mellin* v. *Monico* (1877), 3 C.P.D. 147 at p. 148.

Mayers, for respondents: Reasons by the registrar are not necessary: see Chitty's King's Bench Forms, 15th Ed., 845. We objected to the registrar and asked that damages be assessed by the Court: see *J. A. McIlwee & Sons* v. *Foley Bros.* (1917), 24 B.C. 532 at p. 552; *Clausen* v. *Canadian Timber & Lands Ltd.* (1923), 3 W.W.R. 1072 at p. 1077. He is not bound to give findings: see *Miller* v. *Pilling* (1882), 9 Q.B.D. 736. The finding of an officer of the Court is equivalent to the finding of a jury: see *Dunkirk Colliery Company* v. *Lever* (1878), 9 Ch. D. 20 at pp. 23 and 28; *Fusarelli* v. *Ioco Townsite Co.* (1922), 1 W.W.R. 1238; *In re Keighley, Maxsted & Co. and Durant & Co.* (1893), 1 Q.B. 405 at p. 409; *Simpson* v. *Inland Revenue Commissioners* (1914), 2 K.B. 842 at p. 846. That there is an appeal see *Dunlop Pneumatic Tyre Company, Limited* v. *New Garage and Motor Company, Limited* (1913), 2 K.B. 207.

Argument

Davis, in reply: This is largely for the convenience of the Court: see *Mellin* v. *Monico* (1877), 3 C.P.D. 147. It is not the same as a jury's verdict as in case a jury is wrong there is a remedy: see *Walker* v. *Bunkell* (1883), 22 Ch. D. 722 at p. 726.

Per curiam (GALLIHER, J.A. dissenting): The rules and authorities preclude the Court from sending the case back to the deputy district registrar for his reasons.

Judgment

Davis, on the merits: As to the measure of damages see *Beatty* v. *Bauer* (1913), 18 B.C. 161; *J. A. McIlwee & Sons*

Argument

v. *Foley Bros.* (1917), 24 B.C. 532. There were 23 licences. Two of the limits had been worked out. Clausen never pretended to cruise the limits and they were to work only the merchantable timber.

Mayers: He is entitled to be placed in the same position as he would have been if the contract had been performed: see *Wertheim* v. *Chicoutimi Pulp Company* (1911), A.C. 301 at p. 307; *J. A. McIlwee & Sons* v. *Foley Bros.* (1917), 24 B.C. 532 at p. 538; *McMahon* v. *Field* (1881), 7 Q.B.D. 591 at pp. 595-7; *Waddell* v. *Blockey* (1879), 4 Q.B.D. 678; *W. L. Macdonald & Co.* v. *Casein, Ltd.* (1918), 26 B.C. 204. On remoteness of chances of profitably handling timber see *Chaplin* v. *Hicks* (1911), 2 K.B. 786 at p. 796. To set aside the findings on the ground of misdirection it must be shewn that on no ground can they be supported: see *Miller* v. *Pilling* (1882), 9 Q.B.D. 736 at p. 739; *Garrard* v. *Lund* (1921), 1 W.W.R. 329. We cut six and a half million feet and made $17,000. He cannot set up a term of the contract he repudiates: see *Municipal Council of Johannesburg* v. *D. Stewart & Co. (1902), Limited* (1909), S.C. 860; *Jureidini* v. *National British and Irish Millers Insurance Company, Limited* (1915), A.C. 499 at p. 505.

Argument

Davis, in reply: On damages for loss of future profits see *Findlay* v. *Howard* (1919), 58 S.C.R. 516.

[MACDONALD, C.J.A.: I understand the rule of reply to be that you open on a subject, and are supposed to exhaust it as far as you are concerned, then your opponent answers, and if he brings up anything new in the answer you have a right to explain.

MARTIN, J.A.: That is what I understand our rule to be.]

It should have been noted that the defendants had been logging and that when the plaintiffs started everything was in logging order. The plaintiffs were relieved of the great expense of preparing for operations.

Cur. adv. vult.

1st May, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The defendants repudiated their con-

COURT OF APPEAL

1925

May 1.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

tract with the plaintiffs and thereby incurred liability to them for damages, if any, sustained by reason thereof.

The plaintiffs had operated under said contract for about a year, and this fact must have given some assistance to the registrar in arriving at the damages sustained over the whole period of the contract. When damages are to be based on anticipated profits, particularly those of a speculative and uncertain undertaking, such as that of logging with all its vicissitudes of changing markets, fire risks, labour troubles and changing costs of labour and equipment, the result may be little better than a guess. In my opinion much the safer and surer way of arriving at the result is upon evidence of persons skilled and experienced in the trade and in the sale and disposal of timber berths as to what, at the time of breach, was the market value of the contract, or if the plaintiffs had special skill or facilities for carrying out the same, what it was worth to them. I regard it as having been almost a hopeless task to estimate, with any degree of certainty, the value of the contract, upon evidence of the character given here. One might as well endeavour to fix the rental of a shop by evidence that certain profits, over a long period of years, might be made by using it in business. But if the damages are to be guessed at, then the registrar's guess is as good as mine and ought not to be disturbed unless shewn to have been come to upon wrong principles, or that it otherwise appears to be clearly wrong.

MACDONALD, C.J.A.

In view of the character of the evidence one must consider, in connection with it, the probabilities of the case. The defendants, who now claim that the contract was worthless, valued it at the time at between $300,000 and $400,000, since they would receive in stumpage payments such a sum. It is reasonable to assume that both parties thought that the plaintiffs should make a reasonable profit for themselves, and a profit of $2 per thousand feet would not appear to have been beyond the contemplation of the parties. The contract covered a long period, with many risks to the plaintiffs, and I think defendants, if they were honest, did not intend to make an unconscionable bargain. The plaintiffs claimed half a million dollars damages, but the registrar disallowed more than half that claim. We

are left in ignorance of the principles upon which he arrived at his conclusion; he has given no reasons nor was he bound to do so. Then, is the bald finding that the damages are assessed at $233,343.45 *prima facie* unreasonable?

There are two questions which appear to me to require special consideration, the agreement in the contract to pile the brush and the admission of evidence in respect of what was called the government timber, which was not embraced by the contract, but which the plaintiffs, and defendants as well, thought could have been acquired but which was not acquired by the plaintiffs. This evidence was let in without objection, was cross-examined upon, but is not referred to by the registrar. I do not think we can assume that it influenced his report. If it were not admissible, objection to it should have been taken at the time the evidence was tendered.

As to the agreement to pile the brush, clause 11 of the contract provides that it should be piled and should be burned in manner provided by the Forest Act. I read this to mean that the brush must be piled in any event, but should be burned only as provided by the Forest Act. During the time the contract was in existence, it is admitted that the brush was not piled. It or part of it was burned without piling, and no objection was made by defendant to this mode of disposing of it. I do not find that there was a waiver of this term of the agreement, but so little attention was paid to it, coupled with the fact that no time for doing it had been specified, and that it was not the ground upon which defendant assumed and claimed the right to rescind, leads me to think that it cannot be relied on now. It is relied on by the defendants, because Julius Carlos Clausen, one of the plaintiffs, said:

"It would be a very expensive operation [the piling of the brush]? Nobody could log under those conditions."

If that had been a real issue between the parties and it had been proved that plaintiffs were in default, the registrar would have been bound to consider the clause as affecting the value of the contract and therefore as affecting the damages.

The appeal should be dismissed.

MARTIN, J.A. (oral): In this case I am of opinion we

COURT OF APPEAL

1925

May 1.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

should not be justified in disturbing the judgment of the learned judge appealed from which confirms the report of the registrar.

GALLIHER, J.A.: I think the course adopted by my brother MACDONALD, after the best consideration I can give the matter, meets the situation fairly.

The clause, as to piling and burning, in so far as it imposes a burden outside the Act, is somewhat drastic and does not seem to have been acted upon by either party.

This, of course, would not necessarily be a complete answer, but when one considers that there was practically acquiescence in the manner in which operations were being carried on and that when it came to putting an end to the contract no mention is made of this, I do not think it is going too far to assume that had matters gone smoothly in other respects this bone of contention might never have been raised.

GALLIHER, J.A.

Mr. *Davis* argued, with his usual forcefulness, that this clause rendered the contract of no value, and that it should be allowed to prevail even now, and had it been the cause assigned for breach it might have been difficult to resist the argument, but to give it effect at this stage, after the contract was put an end to upon another ground, which did not warrant it, and when everything is at an end, would not seem to me equitable.

In the case of *Jureidini* v. *National British and Irish Millers Insurance Company, Limited* (1915), A.C. 499, the Lord Chancellor says at p. 505:

> "Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced."

After analyzing the evidence carefully, I have concluded that my brother MACDONALD has (as nearly as one reasonably can) arrived at a just estimate of the damages and one which can be supported upon the evidence, and, viewing the evidence as I do, the nature of the contract, and the conditions disclosed, I fail to see how the registrar could on any reasonable basis arrive at the amount certified to.

I am, therefore, in agreement with MACDONALD, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The judgment under appeal is the assess-

ment of damages which followed the judgment of the Privy Council which reversed the judgment of this Court dismissing the action (*Clausen* v. *Canada Timber & Lands Ltd.* (1923), 1 W.W.R. 1072), it being held on appeal that the plaintiffs in the action (the respondents in this appeal) were entitled to damages as and for breach of contract, in the words of Lord Sumner at p. 1077 (1923), 1 W.W.R.: "All damage, if any, which the plaintiffs have sustained." The assessment of the damages accorded under the judgment of their Lordships of the Privy Council was had upon a reference to the registrar of the Supreme Court at Vancouver. The reference was a long one and the evidence is very voluminous indeed, and its perusal well demonstrates that the relevant questions to ascertain the damages were fully exhausted and the evidence the registrar had before him was sufficiently ample to warrant the finding of damages as made by the registrar, being in amount $233,343.45, a very much larger sum was claimed by the respondents, and it may be, in my opinion, safely said that upon the evidence a very much larger sum might well have been allowed.

MCPHILLIPS, J.A.

Upon the opening of the appeal before this Court, the learned counsel for the appellants, Mr. *Davis,* pressed strongly that as the registrar had made his finding of the damages without giving any reasons therefor that this Court should, under the circumstances of the case, direct that the registrar give reasons for his finding. This submission was not acceded to by the Court, and the argument proceeded. I think that it is perfectly plain upon the authorities and the practice that the report of the registrar is equivalent to the verdict of a jury. In *Dunkirk Colliery Company* v. *Lever* (1878), 9 Ch. D. 20 at p. 23, James, L.J. said:

> "I am of opinion that the Court has no jurisdiction to alter or vary the report of the referee, any more than it has power, except by arrangement at the trial, to alter or vary the verdict of a jury finding the amount of damages."

In the present case, the learned judge in the Court below adopted the report of the registrar. It is therefore necessary upon this appeal for the appellants to establish a case similar to that where there is an appeal from a judgment following a general verdict by a jury, no questions being answered or reasons

COURT OF APPEAL

1925

May 1.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

given. The force of a verdict so given was referred to by the Master of the Rolls in *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177 at p. 179:

"Now if the jury had simply given a general verdict his Lordship thought they could not have interfered."

We also have Sir Arthur Channell, in delivering the judgment of their Lordships of the Privy Council in *Toronto Power Company, Limited* v. *Paskwan* (1915), A.C. 734 at p. 739, saying:

"It is unnecessary to go so far as Middleton, J. did in the Court below and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable."

The appeal was argued at great length, and very ably by counsel on both sides, and with every deference to the particularly able presentment of the case for the appellants by Mr. *Davis,* I cannot persuade myself that it was at all made out that the registrar arrived at a conclusion which, upon the evidence, can be said to be unreasonable.

The question of the requirement to give reasons or details shewing how the amount allowed has been arrived at, came up for consideration in this Court in *J. A. McIlwee & Sons* v. *Foley Bros.* (1917), 24 B.C. 532, and at p. 552 I had this to say:

MCPHILLIPS, J.A.

"In the present case MORRISON, J. has not in his judgment entered into details, but this in no way detracts from the fact that he reasonably gave the closest attention in detail to the calculations . . . . . and contrasted them with the evidence led by the appellants as to the actual cost of the work as carried out by the appellants and was unable to accept the appellants' case as against that of the respondents' supported by the evidence led by them and so clearly worked out. . . . . ."

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

"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."

In the present case the evidence of the respondents in this appeal was well worked out before the registrar, there was "rival evidence" in the case, and the learned judge adopted the report of the registrar. Here we have a case that was most elaborately gone into and evidence led with evident care from

both sides relevant to the issues to be determined. There was, of course, variance of opinion, and there had to be, of necessity, a great deal of opinion evidence when damages were to be arrived at as and for a breach of contract, the timber still standing, and no positive or actual evidence available as to what would necessarily be the cost of the operations and the profits derivable therefrom, but the Court must do its best under the circumstances. The principle governing was dealt with by Lord Moulton in the Privy Council, in *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309:

"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 from such a 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."

In the present case, of course, the learned judge did not see the witnesses, but the registrar did, and the learned judge evidently found no cause to disagree with the finding of the registrar.

Lord Loreburn, in *Lodge Holes Colliery Co., Lim.* v. *Wednesbury Corporation* (1908), 77 L.J., K.B. 847 at p. 849, said:

"When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons."

Now, in the present case, there was, of course, a very great difference of opinion as to the cost of the work if the timber had been taken out in compliance with the terms of the contract, but the respondents' evidence met that led by the appellants, and it cannot be said that it did not reasonably meet it and evidently, in the opinion of the registrar, was overborne by the

COURT OF APPEAL

1925

May 1.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

evidence led by the respondents. Lord Buckmaster in *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96, in delivering the judgment of their Lordships of the Privy Council, said:

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

Considerable argument was directed to the question that the registrar may have, in allowing what he found as damages, taken into consideration the contention put forward by the respondents, that they would have been enabled to cut Crown timber in the immediate neighbourhood of the timber area covered by the contract and made a considerable profit as well, in this way (as it was the practice and usual to get leave from the Crown) paying, of course, the usual royalty therefor to the Crown, and this does seem reasonable. However, the registrar so reduced the respondents' claim that it may well be said that any such claim was disallowed. The reduced amount allowed as against the claim of the respondents and supported by the evidence admits of the disallowance of the major portion of the appellants' contentions. There remains one further point, though, that was pressed strongly, and that was that there was the requirement to pile all tops, limbs, branches and refuse, and burn the same as required by statute, and that to do so would have rendered the contract valueless, *i.e.*, no profit could have been earned. It is true, apart from the contract, there is the statutory requirement to do this, but the Crown has never exacted compliance with the statutory requirement. It may be well said the condition in the contract was to protect the owners (appellants) if the Crown called for performance of the statutory requirement. The owners did not exact this requirement, and the Crown not exacting it, can it now be reasonably advanced to defeat the respondents' claim for damages, and as the appellants press it, it would absolutely destroy the value of the contract? I cannot view the matter in this way. In my opinion this is a provision that was waived, and must be considered in the circumstances to have been waived, and there never was the

MCPHILLIPS, J.A.

intention to insist upon its compliance. There is some evidence as well that the Crown was objecting to burning taking place as likely to give rise to forest fires. Lord Buckmaster in *Creelman* v. *Hudson Bay Insurance Co.* (1919), 88 L.J., P.C. 197, had to consider a question of perhaps a somewhat remotely analogous character, where it was pressed that the agreement for sale could not be required to be specifically performed because the land had been illegally acquired by the company contrary to Dominion legislation, but their Lordships of the Privy Council did not give effect to the contention made there, as here, the Crown had taken no steps in the matter. Lord Buckmaster, at p. 198, said:

"Nor, in their Lordships' opinion, will the rights of the Dominion Legislature be in any way interfered with by this conclusion. It is impossible to assume that the officer in charge of the registration will not do his duty in investigating titles before he issues the certificate, and if in this case the certificate was issued inadvertently, it would still have been competent for the Attorney-General of the Dominion, while the company remained upon the register, to have taken steps, had he thought fit, to have had the register rectified. It might also have been competent for a shareholder of the company to take similar proceedings, but upon this it is unnecessary for their Lordships to express any decided opinion."

In the present case the appellants are the owners of the timber agreed to be sold under Provincial Government (British Columbia) timber licences, not owners of the soil, and the timber being logged off, the appellants would have no further interest in the lands upon which the timber stood, so that the timber being withdrawn from the lands the appellants would suffer no damage through the failure to pile and burn. The Government of British Columbia could at any time during the operations have compelled this being done, but it would not appear to be present policy to do so. In the *Creelman* case the Dominion Government could have taken steps to have it declared that the land was illegally acquired—so could a shareholder—nevertheless, having title to the land the vendee was compelled to accept the same and perform the contract. In the present case it would be highly unreasonable and inequitable to construe the contract, in view of the circumstances, as being admantine in its nature when the appellants did not insist upon the term, in fact, waived it, and the Crown on its part not invoking the

COURT OF APPEAL

1925

May 1.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

MCPHILLIPS, J.A.

statutory requirement, in fact, altering its policy in the matter. Upon full review of the whole case and the submissions of counsel made at this Bar, I am completely satisfied that the case is not one which should be disturbed. The report of the registrar founded upon an elaborate enquiry, agreed with by the learned judge, is the basis for the judgment under appeal, and the evidence upon which the judgment proceeded is ample in its nature to entitle judgment being entered for the respondents, that is, it is reasonable, and that being the position, it is quite impossible to reverse it. The necessary conclusion to entitle a reversal would be that it was wholly wrong, a conclusion that I cannot persuade myself is possible in this case.

MACDONALD, J.A.

MACDONALD, J.A.: The deputy district registrar, after hearing evidence for twelve days, assessed damages at $233,343.45, without stating the grounds upon which he based his findings. This is unfortunate. He should have given the basis, if any, upon which he made his computations. In their absence, we must either deal with the matter *de novo,* or, on the other hand, accept his conclusions blindly on the assumption that there is enough evidence to support it, a course I do not feel should be pursued. It was argued that we must sustain his finding if any method of calculation will support it. My deduction from all the evidence is that he wrongly included the Government timber in his estimates. Further, he did not take into consideration certain features which would add to the cost of production. On the whole, I am satisfied that the evidence was misconceived and an unwarranted conclusion reached. When, after a careful study of the evidence, I have reached the conclusion that he awarded over $125,000 more in damages than he reasonably could find, I am justified in assuming that he not only misconceived the evidence but proceeded upon wrong principles.

The basis upon which damages were to be assessed by the original judgment, *viz.,* "the difference between the market price and the cost to the said plaintiffs of production of the quantities and species of timber comprised in the two contracts in the pleadings mentioned" was changed by the Judicial Committee

of the Privy Council to "all damage, if any, which the plaintiffs have sustained," their Lordships point out that although the former basis is not necessarily wrong "it may possibly be misapprehended as laying down a measure of damages different from that which the ordinary law would apply." I take it that although the first basis might, under certain circumstances, be the proper one, the latter would admit the consideration of other elements in arriving at the amount.

The probable cost to the plaintiffs of production, *i.e.*, had they, with their experience and the diligence already shewn, been allowed to complete, is an important element. On the other hand, any difficulties they might encounter, either from the nature of the ground, remoteness of operations, inaccessibility of timber, except at great cost, or from the terms of the contract itself (should it contain onerous terms) must be taken into consideration. In a sense, with the exception of the reference to onerous terms, this is really a repetition of the first proposition. It all goes to cost. I doubt if it can be better expressed than to speak of it as "the value of the contract to the plaintiffs," meaning the amount the plaintiffs would probably have made if the contract had not been broken. Necessarily it can not be ascertained with mathematical precision. I think, too, that all reasonable presumptions should be made in favour of the plaintiffs against the wrong-doers.

MACDONALD, J.A.

In reference to the Government timber not included, unless by inference, in the contracts, I think it is altogether too remote to be considered. True, where the breach of a contract occasions a special loss within the contemplation of the parties it should be taken into account. This was, however, no more than an expectation. The Government was not obliged to permit this timber to be cut, and might not put it up for sale during the life of this contract, or at all. If A has a contract to clear B's land which is contiguous to C's, also in need of clearing, and a breach occurs, it is rather remote to estimate the loss which would follow on the assumption that C would have A do his work. I am assuming that it would be more convenient and less expensive for C to engage A than any one else, and that other contractors might not feel inclined to clear A's land

COURT OF APPEAL

1925

May 1.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

by itself. The damages should be the natural consequences of the specific breach of the specific contract in question. The Government timber, although referred to incidentally, is no part of the broken contract. It should, therefore, be eliminated.

It was further suggested that the contract contained onerous terms and, in one respect at least, could be terminated at once, thus avoiding payment of damages. A jury could consider this feature. The plaintiffs undertook to put in the river 5,000,000 feet of logs during the year 1921, and at least 15,000,000 in subsequent years. In 1921 they put in approximately 4,060,470 feet. I think a jury would say that there was not such a substantial failure as would likely induce the defendants to take advantage of it. The contract was hardly under way and reasonable allowances would doubtless be made at this early stage if relations were otherwise harmonious. I would not therefore consider this feature.

MACDONALD, J.A.

Plaintiffs, too, were obliged to pile all tops, limbs, branches and refuse on the lands logged and burn same in the manner provided by the Bush Fire Act or amending Acts, also to comply with the Forest Act and any amendments thereto or substitutions. The plaintiff Clausen testified that they did not at any time pile and burn as provided for in the agreement, and added that "nobody could log under those conditions." Mr. *Davis* suggests therefore that the contract would be valueless, containing as it did this onerous term. It was in existence less than a year before repudiation, but long enough to indicate to a jury whether or no plaintiffs would likely insist upon the performance of this condition, assuming they had the right to do so. When we have a broken covenant deliberately overlooked by parties who, in search of grounds for repudiation, select another ground, which it was thought would effectually terminate it, a jury would be justified in believing that this covenant, if effective, would not be insisted upon, and that the only source from which interference might come would be from Government officials under the Provincial statutes. The Forest Fires Act, which was doubtless misdescribed as the Bush Fire Act, was repealed in 1912 and the Forest Act substituted. Under it, burning could not be done during the close season

(which might be extended by proclamation) without first obtaining a permit, and outside the close season it would be difficult to do it effectively. The private contract would not displace the requirements of a public Act, although it might go beyond it. The only effective feature of this part of the contract is clause 14 requiring compliance with the Forest Act, and the fact that this provision is in the contract is immaterial; the obligation was created by statute in any event. Plaintiffs therefore would only be required to pile and burn "on the demand of any officer authorized by the department" (B.C. Stats. 1919, Cap. 45, Sec. 10). It is suggested that clause 11 would, in any event, require piling, an onerous condition, as the Act does not interfere with the parties imposing such a term. Reasonably, however, "piling and burning" must be read together. It is "pile and shall burn," etc. Evidence was given (I think properly admitted) as an element in deciding if this was in reality an onerous term, to shew that during the past five years the department "try their best to keep us from burning." There was also evidence which would appear reasonable that where the timber is located at the head of an inlet, there is more moisture and higher humidity than elsewhere, thus lowering the fire risk. My view is that a certain sum should reasonably be allowed for fire risks and loss and for other features affecting the value of the contract, but not because of clauses 11 and 14 of the contract.

Dealing now with *quantum,* my conclusion, from a careful perusal of the evidence, is that 155,000,000 feet would be a fair estimate of the timber left on the ground covered by both contracts. Tuller's cruise, which was accepted as the basis when the contracts were made, disclosed a total of 156,549,410 feet. Clausen claims an over-run on that amount of 15 per cent. Viewing the whole evidence, that is not a reasonable conclusion. It can only be an approximate estimate at best. The logs already cut at the time of the breach amounted to 6,820,000 feet. This, of course, should be deducted. I would allow this latter figure for over-run, leaving the total on the ground as suggested, 155,000,000 feet. For convenience of calculation, I am going to place the amount at 156,549,410 feet, being the grand total of Tuller's cruise as shewn in Exhibit 2.

COURT OF APPEAL

1925

May 1.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

Dealing with the cost of production, it must be borne in mind that the plaintiffs' figures are based upon a cut of 200 million, not 155 million. The cost would be somewhat higher on the smaller amount. A comparative statement of logging costs is shewn on Exhibit 14. It is the result of defendants' accounting but, as I recall it, Mr. *Mayers* based his argument on the same document. We have, therefore, common ground to start with. The cost of operations by the plaintiffs themselves in 1921 was $13.61 per M.; in 1923 the cost by another company was a little over $16. The best basis should be the actual cost before the breach. In 1920 costs were so high that no profit would be shewn. In 1921, as stated, the actual cost, as compiled in this exhibit, was $13.61. Mr. *Davis* suggested it should be $14.27 or probably a little more. In 1923 it was $16.98. We must keep in mind the contention that it is the cost which the plaintiffs would incur had they been permitted to continue, that is the governing factor. It is not reasonable, however, to say, with higher costs by others in 1920 and 1923, with the increasing cost as time went on through remoteness of operations, with the additional cost if they attempted to log parts shewn to be difficult of access, that the figure of $13.61 would be maintained throughout. I think a fair basis would be to accept part of the additional costs, which it was urged by Mr. *Davis* should be added to $13.61, and place it at $14. It is reasonably clear that, in view of the features referred to, the low cost of $13.61 could not be maintained throughout the life of the contract.

MACDONALD, J.A.

Dealing with the selling price, I base my conclusions on the evidence of Mr. Hamilton, plaintiffs' witness. He dealt, in Exhibits 11 and 12, with records of actual sales covering a period of from five to eight years, not, of course (with perhaps a small exception), from the limits in question, shewing the prices realized on different species. He states, however, that the Toba River logs were a little below the average. He also professed to have personal knowledge of this fact.

"And as a matter of fact, from what you saw of them yourself you found that they were not an average didn't you? I suppose so.

"Well at any rate, taking everything into consideration the camp logs from Toba River were below the average? Yes."

He is there referring to all species, although particular reference was made to the higher priced cedar, a very small proportion of which was Number 1 in his opinion. Mr. Hamilton's prices, from 1917 to 1921 inclusive, shew an abnormal increased price in 1919 and 1920 (except for hemlock). Some deduction, therefore, must be made from the average prices given by Mr. Hamilton in his statement. His figures relate to better timber. Besides a five-year average is not a fair basis when for two or three years the price is abnormally high. I think it would be fair to substitute for his highest prices in 1920 the prices shewn for 1921, when the contracts in question were made. Referring therefore to the first page of Exhibit 11, I would accept Mr. Hamilton's figures with the variation that for the 1920 prices in each of the species I would substitute the 1921 prices. I do so throughout except for spruce, where the prices for two years only are given, *viz.*, 1917 and 1920, and I would take the average of these two years. The quantity of spruce is comparatively small in relation to the other species. It may be that a larger price should be allowed for spruce, but it is more than offset by accepting Hamilton's 1920 prices for the other species. This will give an average price for the five-year period of cedar $16.64, fir $13.23, hemlock $10.79, spruce $19.95. Tuller's cruise of 156,549,410 feet is made up of:

Cedar, 60,796,000 ft. at $16.64	$1,011,645.44	
Fir, 55,443,000 ft. at $13.23	733,510.89	
Dead and down Cedar, 868,000 ft. (placing this at lowest price of) $13.15	11,414.20	
Hemlock, 18,364,000 ft. at $10.79	198,147.56	
Spruce, 14,745,000 ft. at $19.95	294,162.75	
Fir Piling, 243,360 ft. at $13.23	3,219.65	
Cedar Poles, 16,390,500 ft. at $16.64	27,273.79	
		$2,279,374.28
As no price is given for the comparatively small quantity of Balsam and Cottonwood, I am eliminating it from the calculations both as to cost of production and price received. The cost of production of 156,549,410 grand total of Tuller's cruise less the Balsam and Cottonwood amounting to 4,451,000 ft. or 152,098,410 ft. at $14.00 per M.		2,129,377.74
		$ 149,996.52

COURT OF APPEAL

1925

May 1.

CLAUSEN v. CANADA TIMBER AND LANDS LTD.

MACDONALD, J.A.

In dealing with the cost of production, I have already taken into account increased costs due to (a) the cut being 155 million not 200 million, (b) remoteness of operations as time went on, (c) logging parts difficult of access. In addition to these features, however, I think an allowance should be made for the general exigencies of such operations over so long a period. Part of the timber doubtless would prove unloggable except at prohibitive prices. The value of the contract over the whole period would be affected by fire risk and resulting loss. Logging roads would have to be constructed. For these reasons, I would make a further deduction of $42,587.55, being equivalent to an increase of cost of production by 2 per cent., which I think is justified under the circumstances, leaving the damages suffered by the plaintiffs in round numbers at $107,409, and vary the registrar's findings accordingly.

Appeal dismissed,
Galliher and Macdonald, JJ.A. dissenting.

Solicitors for appellants: *Burns & Walkem.*
Solicitors for respondents: *Phipps & Cosgrove.*

MCDONALD, J.

1925

May 14.

CANARY v. COHN

CANARY v. COHN.

Husband and wife—Separate property of wife—Motor-car—Agreement for sale signed by husband and wife—Execution against husband—Interpleader — Evidence — Contradicting written agreement — Admissible against stranger.

Both husband and wife signed a lien agreement as purchasers of a motor-car, the wife made the cash payment and signed promissory notes for the deferred payments which were endorsed by the husband. He paid the instalments under an agreement with his wife to repay her in this way for a loan she had previously made to him. The car was seized under an execution against the husband and was claimed by the wife. On an interpleader issue:—

Held, that the car was the property of the wife.

In the case of ownership of a motor-car purchased under a conditional sale agreement, as between the purchaser and a stranger to the contract the real facts may be shewn in evidence although contradicting the terms of the agreement.

MCDONALD, J.

1925

May 14.

CANARY v. COHN

INTERPLEADER issue as to the ownership of certain household furniture, a motor-car and other articles. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 4th of May, 1925.

A. H. MacNeill, K.C., and *Fleishman,* for claimant.

J. A. MacInnes, for defendant.

14th May, 1925.

McDONALD, J.: This is an issue in which Nellie Cohn, the wife of the judgment debtor, Lesser H. Cohn, is claimant (plaintiff) and George Canary (judgment creditor) is defendant.

The plaintiff claims certain household furniture, a motor-car, a phonograph and a piano which the defendant has seized under an execution against the plaintiff's husband.

As to the furniture, the plaintiff's uncontested testimony is (and I see no reason for disbelieving her) that the same was purchased by her out of moneys which she had saved from wages paid to her, first, by the B.C. Cleaning & Dyeing Works and, later, by the B.C. Towel Supply Company, in both of which she was employed and was an equal partner with her husband. It is contended by Mr. *MacInnes* for the defendant that, on this evidence, the plaintiff cannot succeed, by reason of the construction which the defendant seeks to place upon section 8 of the Married Women's Property Act. The contention is that the words in that section,—

Judgment

"Any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband,"

do not include earnings acquired by her in an employment, trade or occupation which she carries on in partnership with her husband. After careful consideration, I am quite unable to take that meaning from the words of section 8. In my opinion, if one were to fill in all the words which are plainly understood, the language would read as follows:

"Any wages, earnings, money, and property gained or acquired by her in any employment, trade or occupation in which she is engaged, or gained or acquired by her in any employment, trade or occupation which she carries on separately from her husband."

I am unable to read any other meaning into the words used in the statute. If this construction be correct and if the

MCDONALD, J.

1925

May 14.

CANARY
v.
COHN

plaintiff's evidence is believed, as I think it ought to be, the plaintiff ought to succeed on this item.

As to the motor-car, it was purchased under a conditional agreement for sale signed both by the plaintiff and her husband. The actual sale, however, was made to the plaintiff. The cash payment was made by her out of her own moneys and the promissory note and renewals thereof given for the remainder of the purchase-money were made by her and endorsed by her husband. It is contended that neither the plaintiff nor her husband can be heard to say, in the face of the agreement, that the plaintiff was the real purchaser. As against the vendor that may be so, but as between the plaintiff and her husband's creditors, I think it is not so but that the real facts may be shewn. The instalments of the purchase-money, other than the cash payment, were made by the husband at the rate of $100 per month under an agreement by which he agreed to repay to his wife in this way a loan of some $2,000 previously made by her to him, the fact of such loan having been made not being open to serious question. The licence for the car has remained throughout in the name of the plaintiff, and the insurance policy thereon has also throughout been in her name. I think, on the whole of this evidence, the automobile is the property of the plaintiff.

Judgment

The phonograph was purchased by the plaintiff out of her own moneys and belongs to her.

The piano was presented to the plaintiff by her husband as a birthday present many years ago at a time when the husband was not in financial difficulties and when he had a perfect right to present his wife with a piano if he saw fit. Some point is made as to the actual words used by the husband when making the presentation, but I think it is quite clear that there was an intention to make the gift and that an actual gift was made. The piano, in my opinion, belongs to the plaintiff. As a matter of fact this very piano was included in a chattel mortgage given in 1912 by the plaintiff and her husband to the present defendant.

There will accordingly be judgment for the plaintiff in the issue.

Judgment for plaintiff.

WILLIAMS AND WILLIAMS v. FRASER.

MURPHY, J.

1925

Feb. 6.

COURT OF APPEAL

April 21.

WILLIAMS v. FRASER

Practice—Plaintiffs resident abroad—Evidence—Refusal of foreign witnesses to attend trial—Application by plaintiff for commission—Grounds in support—Discretion of judge.

It is a fundamental rule of jurisprudence that witnesses shall give their evidence *viva voce* in open Court and an order for a commission to examine witnesses abroad will only be granted where there is such evidence before the judge as would enable him to come to the conclusion that it is in the furtherance of justice to do so.

APPEAL by plaintiffs from the order of MURPHY, J. of the 6th of February, 1925, dismissing an application for leave to issue a commission for the examination of witnesses in the United States. James Alexander and Abbie L. Alexander (*nee* Williams) were drowned having been passengers on the Princess Sophia when wrecked on the Alaskan Coast on the 26th of October, 1918. The defendant J. A. Fraser who resides at Atlin, B.C., was granted administration with will annexed of the estate of the late James Alexander on the 8th of July, 1919, said will having been executed on the 8th of May, 1913. The plaintiffs who are the brothers of Mrs. Alexander claim to be her sole heirs at law and next of kin. They allege that Mr. and Mrs. Alexander were married on the 28th of April, 1914, in the State of Illinois and that at the time of their death they were without issue. The defendant, as administrator of the estate, is the registered holder of the Engineer Group of mineral claims, a very valuable property in the Cassiar District. The plaintiffs claim that the said will of James Alexander was cancelled by his marriage to their sister in 1914, and that as sole heirs of Mrs. Alexander they are entitled to at least a one-third interest in the estate. Two essential issues are: (1) The marriage of James Alexander and Abbie L. Williams; and (2) the relationship of the plaintiffs to them. The application was for the examination of five witnesses in Chicago, three witnesses in Milwaukee and a witness who lived in Detroit, but who could be examined in Chicago. On account of the loss of time and

Statement

MURPHY, J.

1925

Feb. 6.

COURT OF APPEAL

April 21.

WILLIAMS v. FRASER

expense, these witnesses refused to go to Vancouver as witnesses on the trial.

Killam, for the motion.
Mayers, contra.

6th February, 1925.

MURPHY, J.: The principle governing this application is laid down by MCPHILLIPS, J.A. in *Stewart Iron Works Co.* v. *B.C. Iron, Wire and Fence Co.* (1914), 20 B.C. 515 at p. 519 as follows:

> "There has to be such evidence before the judge as would enable him to arrive at a conclusion that it [the order for commission to examine witnesses abroad] is in the furtherance of justice."

I am not so satisfied on the material before me. As to R. Williams, he is a plaintiff and the material falls so far short of above requirement that the application was abandoned so far as he was concerned. The fact, however, that it was made and that he made an affidavit in support is not to be lost sight of. As to Bessie Williams, she is the wife of one of the plaintiffs and certainly more under her husband's control, to my mind, than was the witness Joseph under the plaintiffs' control in the case cited. As to Edna Porter, her evidence, as outlined in her affidavit, would, I think, be in the main inadmissible. Her action in writing to defendant's solicitor under date of September 16th, 1924, convinces me that it would not be in the furtherance of justice but the contrary to allow her evidence to be taken on commission.

MURPHY, J.

As to the other proposed witnesses, I am not satisfied, on the evidence filed, that they will refuse to attend the trial. Mr. *Beck's* affidavit does state that they refuse to come to British Columbia, but he does not give the source of his information. As I understand our practice, a statement in an affidavit, which obviously cannot be a matter of personal knowledge, must give the source of information upon which it is founded. The remaining affidavit, that of Foley, actually states that witnesses "whose names are not definitely known or cannot be located" have refused to come to Vancouver. I decline to take such an affidavit seriously. The application is dismissed.

From this decision the plaintiffs appealed. The appeal was argued at Vancouver on the 21st of April, 1925, before MACDONALD, C.J.A., MARTIN and MACDONALD, JJ.A.

MURPHY, J.

1925

Feb. 6.

COURT OF APPEAL

April 21.

WILLIAMS v. FRASER

Killam, for appellants: These witnesses are not within the jurisdiction and they refuse to come to Vancouver. There are ten witnesses and the expense and time wasted is almost prohibitive. We submit it is, in all the circumstances, a reasonable application and should be granted. The evidence required is of a formal character: see Annual Practice, 1925, p. 634. The case in our Courts on this question is *Stewart Iron Works Co.* v. *B.C. Iron, Wire and Fence Co.* (1914), 20 B.C. 515. See also *Light* v. *Governor and Company of the Island of Anticosti* (1888), 58 L.T. 25; *Berdon* v. *Greenwood* (1880), 20 Ch. D. 764; *Hunt* v. *Roberts* (1892), 9 T.L.R. 92.

Argument

Mayers, for respondent, was not called on.

MACDONALD, C.J.A.: I would dismiss the appeal. There are two factors contributing to this. In the first place, as I stated a moment ago, the jurisprudence of this country is that witnesses shall give their evidence *viva voce,* in open Court, that is the fundamental rule. There are cases in which the Courts depart from that rule, but that is a power which we exercise with very great caution. It is essential to consider the circumstances of the particular case—whether or not they are free from suspicion. If they are, one can see that a commission might very safely issue.

MACDONALD, C.J.A.

In other cases the circumstances may be such that the Court, to avoid a miscarriage of justice, refuses to depart from the general rule. In this case the Court of first instance considered all the evidence which is before us now, and came to the conclusion, exercising its judicial discretion, that the commission ought not to issue. We are asked to reverse that. Now, I say, for myself, that if I had been the judge of first instance, then on the evidence before us and in all the circumstances brought to our notice, I should have done exactly what the learned judge did here: refused the order. But in any case, unless I felt very strongly indeed that the circumstances justified it, I should have great hesitation in overruling the learned judge. But as

MURPHY, J.

1925

Feb. 6.

COURT OF APPEAL

April 21.

WILLIAMS v. FRASER

MARTIN, J.A.

I say I should have come to the same conclusion as he did, and therefore I cannot entertain the appeal.

MARTIN, J.A.: There are some peculiar, not to say suspicious, circumstances in this case. We have before us all the material that was before the learned judge—material of an unconvincing nature—upon which he, in the exercise of his discretion, reached the conclusion that it would not be necessary for the purpose of justice (to quote the words of the rule) to grant the commission, and no good ground has been shewn, in my opinion, for our disturbing that discretion, which this Court, by the cases cited, is always chary in doing, and in cases of this suspicious kind we should proceed with corresponding caution.

MACDONALD, J.A.

MACDONALD, J.A.: There is no good ground for interfering with the discretion of the learned judge in Chambers. Like the Chief Justice, I would be of the same opinion if I were dealing with it in the first place.

Appeal dismissed.

Solicitors for appellants: *Killam & Beck.*
Solicitors for respondent: *Whealler & Symes.*

LOANE v. THE HASTINGS SHINGLE MANUFACTURING COMPANY LIMITED AND BLACK.

COURT OF APPEAL

1925

March 3.

LOANE v. THE HASTINGS SHINGLE MFG. CO.

Jury—Trial by—Not sufficient jurymen—Parties agree to proceed with one less than the statutory number—Verdict—Right of appeal—"Extra cursum curiæ"—R.S.B.C. 1924, Cap. 133, Sec. 49.

On a trial with a special jury when seven men were on the jury the panel became exhausted and the parties agreed to go on with the trial with the seven jurors. On appeal, objection was taken by the respondent that as the Jury Act requires eight jurors, the jury that rendered the verdict must be regarded as arbitrators from whose verdict no appeal can be taken.

Held, McPHILLIPS, J.A. dissenting, that although the judge and seven juymen as arbitrators had with the consent of the parties jurisdiction over the subject-matter, the proceedings are "*extra cursum curiæ*" and there is no appeal.

APPEAL by defendant Black from the decision of MACDONALD, J. of the 30th of April, 1924, and the verdict of a jury in an action for a declaration that a $12,000 shortage in the cash account of the defendant Company on the 30th of November, 1923, was due to withdrawals of cash by the defendant Black from the funds of the Company, as against the defendant Black for damages for deceit, fraud, slander and for breach of warranty of authority, and as against the defendant Company damages for wrongful dismissal. The defendant Black was the managing director of the Company. The plaintiff Loane was the treasurer and one Menzies the bookkeeper. The plaintiff entered the employ of the Company in 1905, and became secretary-treasurer in 1914, when he had charge of the cash. His statement is that in 1916, Black, who was his superior officer, took $200 from the cash for which he gave an I.O.U. and instructed him to carry the I.O.U. in the cash-box as petty cash. Black continued to take cash from the cash-box from time to time for which he gave I.O.U.'s and on the 29th of January, 1920, the total sum taken was $6,000 for which Black gave an I.O.U. The borrowing by Black continued in the same way until the 31st of May, 1923, when the total sum borrowed was $12,000

Statement

COURT OF APPEAL

1925

March 3.

LOANE v. THE HASTINGS SHINGLE MFG. CO.

Statement

and Black delivered Loane his I.O.U. for that amount. He further states that at about this time Black personally made entries in the books of account of the Company purporting to charge the said sum of $12,000 against operating expenses. At the same time Black delivered Loane the Company's promissory note for $12,000 payable in six months to cover the amount behind in the cash account. Loane further stated that in November, 1923, the Company's books were mutilated to the extent of the pages being removed in which Black had made the entries charging the said $12,000 against operating expenses. Shortly afterwards in November, 1923, the Company's auditors discovered the shortage of $12,000 and Black accused the plaintiff of having stolen the $12,000 and the plaintiff was dismissed as an employee of the Company. On the trial the jury found that the dismissal of Loane by the Company was justified and he had no claim for wages; that Black was responsible for the shortage of the Company's funds; that the imputation against Loane by Black at the directors' meeting was unjustified and the plaintiff was entitled to damages against Black in $1,000. The trial took place with a special jury but owing to the number of challenges they only had seven jurymen left and the parties agreed without prejudice to the defendant Black's challenge to the array, to proceed with the trial with seven jurymen. On the appeal the respondent took the preliminary objection that there was no appeal as notwithstanding the agreement to proceed with seven jurymen a civil jury according to the practice must be composed of eight jurors and the seven jurors must be regarded as arbitrators from whose verdict there is no appeal.

The appeal was argued at Vancouver on the 25th, 26th and 27th of November, 1924, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Davis, K.C., for appellant.

Argument

J. A. MacInnes (*Arnold*, with him), for respondent, raised the preliminary objection that the proceeding was in the nature of an arbitration and therefore there is no appeal. When seven men were on the jury the panel was exhausted and the parties agreed to go on with seven jurymen. This jury of seven so agreed to by the parties amounts to an arbitration or a *quasi-*

privilege. These two men alone know and if the jury finds against the statement of one as false it is not privileged: see *Sornberger* v. *Canadian Pacific R.W. Co.* (1897), 24 A.R. 263 at p. 272. As to the objection to the array see *Rex* v. *Johnson* (1735), 2 Str. 1000; *Rex* v. *Burridge* (1723), 1 Str. 593; *Bank of B.N.A.* v. *Robert Ward & Co.* (1902), 9 B.C. 49; *Ross* v. *B.C. Electric Ry. Co., Ltd.* (1900), 7 B.C. 394; *Shaw* v. *McDonald* (1921), 29 B.C. 230. He consented to seven jurors; that precludes him from objection to the array. He cannot bargain with the Court.

Davis, in reply: Nothing will take the sting out of counsel's statement unless he says it was untrue: see *Hyndman* v. *Stephens* (1909), 19 Man. L.R. 187; *Hallren* v. *Holden* (1913), 18 B.C. 210; *British America Paint Co.* v. *Palitti* (1920), 29 B.C. 162. The authorities shew it is not necessary to take objection at once. If the evidence of Sprott (expert on handwriting) is believed we must succeed: see *Whelan* v. *The Queen* (1868), 28 U.C.Q.B. 2 at p. 97; *Reg.* v. *Sonyer* (1898), 2 Can. C.C. 501 at p. 503.

Argument

Cur. adv. vult.

3rd March, 1925.

MACDONALD, C.J.A.: This is an appeal from the judgment in an action of slander. At the trial it was found that the eight men necessary to make up the jury could not be obtained. The parties agreed, without prejudice to defendant Black's challenge to the array, to proceed with the trial with seven jurymen, who found a verdict in favour of the plaintiff against Black, upon which judgment was entered. The defendant Black now appeals, and the plaintiff's counsel takes the objection that in the premises there is no appeal, that the jury must be regarded as arbitrators from whose verdict no appeal can be taken.

MACDONALD, C.J.A.

Mr. *Davis,* for the appellant, argued that the parties merely agreed to go on with seven jurors and to regard them as a legally constituted jury. That is quite true, but the question is, what was the effect of it on the right of appeal? He referred to three authorities: *Andrews* v. *Elliott* (1856), 25 L.J., Q.B. 336. There the parties by verbal agreement waived the statutory formalities for dispensing with a jury and concluded to have it

COURT OF APPEAL

1925

March 3.

LOANE v. THE HASTINGS SHINGLE MFG. CO.

tried by the judge. An appeal was taken to the Exchequer Chamber, when a preliminary objection was taken that the proceedings must be regarded as having been an arbitration and that there was no appeal. The objection was overruled. The Court thought a verbal consent sufficient. What could have been done regularly was done irregularly and the objection could be waived. There is nothing in that case which has much bearing upon this, except the *dictum* of Pollock, C.B., that:

"It often happens that parties consent verbally to try a case with a jury of ten or eleven, and the trial is good."

Quite so, the trial is good, but what of an appeal?

In *Groom* v. *Shuker* (1893), 69 L.T. 293, Mathew and Wright, JJ. held that the case was not *extra cursum curiæ*, because the parties agreed to accept, after a disagreement of the jury, the majority verdict. There, there was a legal jury.

In *Pisani* v. *Attorney-General for Gibraltar* (1874), L.R. 5 P.C. 516, the parties consented to an amendment in order to enable the Court (there being no jury) to decide all questions as between the several defendants. It was admitted that this could be done only by consent. On appeal to the Privy Council the objection was taken that this consent put the judge below in the position of an arbitrator and that there was therefore no appeal. The Privy Council said (p. 522):

MACDONALD, C.J.A.

"The Court [below] had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question."

They entertained the appeal.

In the case at Bar, while the Court and jury had jurisdiction over the subject-matter, it was necessary to its jurisdiction that there should be a jury—not a collection of individuals without legal *status*.

Turning now to the cases cited by the respondent: In *The Canadian Pacific Railway Company* v. *Fleming* (1893), 22 S.C.R. 33, a case from New Brunswick, where the jury were the proper body to pass upon the facts, the parties by consent dispensed with the jury and agreed that the whole case should be decided by the Court. On appeal it was held that the Court was in the position of an arbitrator and that no appeal would lie. In this Province the parties may, it is true, dispense with a jury by consent, but they have not done so. That was proposed

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COURT OF APPEAL

1925

March 3.

LOANE v. THE HASTINGS SHINGLE MFG. CO.

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and rejected; they consented to substitute for a jury a body of men who were to play the part of a jury in the trial. As so constituted, the Court, I think, had no jurisdiction over the subject-matter. The judge and the seven other arbitrators undoubtedly had, but the proceeding was *extra cursum curiæ*, the assumption of the duty of another tribunal, *viz.*, the Court and jury were involved.

In *Burgess* v. *Morton* (1896), A.C. 136 at p. 138, Lord Halsbury, L.C., said:

"My Lords, it has been held in this House that where with the acquiescence of both parties a judge departs from the ordinary course of procedure and, as in this case, decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have then an alternative mode of proceeding and to treat the matter as if it had been heard in due course."

And in the same case, Lord Watson, at pp. 142-3, points out the ground on which *Bickett* v. *Morris* (1866), L.R. 1 H.L. (Sc.) 47, was decided, namely, that the person then objecting was estopped by having himself taken an intermediate appeal.

MACDONALD, C.J.A.

The facts of *Burgess's* case were that the parties had agreed to submit to a Divisional Court, a case stated, by which the Court was asked to find the facts. The Divisional Court, while pointing out the defect, heard the case. It was held that the Divisional Court acted as an arbitrator.

Some other cases were referred to, but I have reviewed the most authoritative cases, and the conclusion I have come to is, that though the parties did not intend it, they nevertheless got themselves out of Court and cannot now for the purpose of appeal get in again.

The preliminary objection prevails.

MARTIN, J.A.: I agree.

MARTIN, J.A.

MCPHILLIPS, J.A.: This appeal of the defendant Black, in my opinion, should succeed and a new trial should be directed. The first question that arose upon the argument at this Bar was the contention upon the part of the plaintiff (respondent) that there was no jurisdiction in this Court to hear the appeal in that the case went to trial before a jury of seven, when a civil jury according to the practice is to be composed of eight jurors. It

MCPHILLIPS, J.A.

COURT OF APPEAL

1925

March 3.

LOANE v. THE HASTINGS SHINGLE MFG. CO.

certainly is somewhat surprising as a matter of ethics that where counsel consent to a trial being had with a jury of seven that later and in this Court exception is taken. It is, of course, quite true that if the point be one that goes to the jurisdiction of the Court, the Court would be at liberty to take the point, and there are cases in which it is said that it is the duty of the Court to do so. This, in my opinion, is not such a case. I cannot see any insuperable difficulty here or that there is a want of jurisdiction in this Court to hear the appeal. Many authorities have been referred to, but no authority has been cited, in my opinion, which disturbs the well-known and long continuing practice of the Court acting upon consent in civil cases as to the constitution of the jury. In truth, it may be said that forensic history is against counsel at the trial taking one position then shifting that position in the Court of Appeal. The contention put forward is that the jury being only seven in number, notwithstanding that it was a matter of consent, brought about a condition of *coram non judice*. In *Andrews* v. *Elliott* (1856), 25 L.J., Q.B. 336, Willes, J. said:

MCPHILLIPS, J.A.

"There is nothing on this record to shew that anything wrong has been done. The case comes within the rule, that consent takes away error."

In *Thomas* v. *Exeter Flying Post Co.* (1887), 56 L.J., Q.B. 313, Wills, J., at p. 315, said "the Courts will not allow their proceedings to be made use of dishonestly."

Here, the plaintiff took his chances before a jury and succeeded, but when an appeal is brought this exception to jurisdiction in defiance of consent is taken. It is interesting to consider what the course of action would have been if the plaintiff had failed. It is to be noticed also that Wills, J., in the *Thomas* case, said at p. 314:

"One of the parties had taken the benefit of an agreement, and then had proceeded to violate it in its spirit and in its terms: and it hardly seems necessary to add that a party should not be allowed *uno flatu* to ratify and nullify such an agreement."

In *Pisani* v. *Attorney-General for Gibraltar* (1874), L.R. 5 P.C. 516, it was held that an appeal was not waived when a consent was given, which it was contended was not binding because the parties were infants and could not consent. I would refer to what Sir Montague E. Smith said at pp. 522-25.

In *Groom* v. *Shuter* (1893), 69 L.T. 293 (before Mathew and Wright, JJ.), we have Mathew, J., at p. 294, saying:

"This case is perfectly clear. Two questions were left to the jury, and the jury disagreed. The parties agreed to accept the verdict of the majority of the jury. Now what is the meaning of that compact between the parties? It is said that the parties agreed to treat this verdict as binding for all purposes. It does not seem to me to be so. The judge here held that there was no evidence on which the verdict of the majority could reasonably be given, and on that he directed a new trial. Mr. Scott Fox had argued that he was precluded from doing so by what has taken place. The case was put to him that the withdrawal of a juror by consent did not necessarily under all circumstances put an end to the case, but that it depended on the intention of the parties. Then the further case was put that when a jury are discharged by consent the suit is not necessarily at an end. There was no answer to these cases, and no authority was cited by him in support of his contention. That being so, this appeal must be dismissed with costs."

The governing matter is the intention of the parties. Here the learned trial judge had the power to try the case independent of a jury, and it is from the judgment of the learned trial judge that the appeal is taken. It is true the learned trial judge proceeded upon the verdict of the jury, but that was consented to. Here there never was the intention of either party that there should be no appeal and the course of the trial shews this. Sir W. M. James, L.J., in *In re Durham County Permanent Building Society. Ex parte Wilson* (1871), 7 Chy. App. 45 at p. 47 said:

MCPHILLIPS, J.A.

"I am of opinion that we have no jurisdiction in this matter. The parties have agreed to have the questions between them decided in a summary way by the judge acting in the matter of the winding-up. I understand that to mean the judge personally. It seems to me that an appeal was just what they wished to avoid. I wish it, however, to be understood that I decide this on the intention of the parties expressed in this agreement. It would have been different if they had submitted generally to have the questions decided by the Court of Chancery in the winding-up. The appeal must be dismissed with costs."

(Also see *Royal Bank of Canada* v. *Skene and Christie* (1919), 59 S.C.R. 211). I am satisfied that there is no insuperable jurisdictional question in the way and this Court is entitled to hear the appeal. I do not propose to in detail canvass the evidence, as it is somewhat voluminous, and the case had some very extraordinary features. There was, apparently, apart from the action of slander tried out, the question of the liability for

COURT OF APPEAL

1925

March 3.

LOANE v. THE HASTINGS SHINGLE MFG. CO.

the shortage of certain moneys of the Company. It would seem that irregularities, if not more, occurred in the business of the Company and moneys of the Company were not forthcoming, which the audit finally made clear, although it is singular that the deficiency of cash was not previously found out. The evidence shews that the plaintiff Loane and Black each blamed the other. Black, of course, was in higher authority, but would not necessarily be as conversant as to the cash balances as Loane, the treasurer. Then there was an inquiry and at this inquiry statements were made to and fro between Loane and Black, and the jury found $1,000 as damages in favour of Loane against Black for slander. It is claimed that the statements upon which this slander is based were made upon a privileged occasion, *i.e.*, at the inquiry. In this I agree, I cannot see how a slander action can be based upon anything that was said on such an occasion unless malice be shewn, and the onus rested upon the plaintiff to shew this, and that onus, in my opinion, was not discharged. If I should be in error in coming to the conclusion that the statements were made on a privileged occasion and that there was an absence of malice, then there is, at the very least, the right to a new trial, as the course of the trial shews that there was miscarriage by the wrongful admission of evidence and statements of counsel that went to the jury as if given in evidence, that is, discrediting statements of counsel as affecting a witness and his good faith and credibility. If counsel wished to give this evidence and it was at all material, he should have retired from the case and given his evidence in ordinary course. Then the learned judge, with great respect, erred in placing the *onus probandi* upon the defendant Black instead of upon Loane, the plaintiff. It was for the plaintiff to make out his case, and the case of slander could only be made out by discharging that onus and establishing malice in all the circumstances, and the learned judge in this matter misdirected the jury. I do not propose to at length go through all that took place in this very extraordinary case, unique in character, in that if there be a new trial it is better that little be said bearing upon the facts. I also think the declaration made that the shortage of $12,000 cash was due to

MCPHILLIPS, J.A.

withdrawals of the defendant Black was not a declaration that was at all permissible, and if permissible the declaration as set forth in the judgment is beyond the finding of the jury, the jury's finding merely being that the defendant Black was responsible for the shortage, not imputing that the shortage was due to withdrawals by him. Finally, I might say, without hesitancy, the whole trial, in its course, exhibited extraordinary features and several causes of action would seem to have been involved, but with no exact division or particularity. The only safe course to adopt, at least that is my opinion, would be to direct that a new trial be had. I would, therefore, allow the appeal to the extent of directing a new trial.

COURT OF APPEAL
1925
March 3.
LOANE v. THE HASTINGS SHINGLE MFG. CO.
MCPHILLIPS, J.A.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. E. Bull.*
Solicitor for respondent: *C. S. Arnold.*

JENNINGS v. CANADIAN NORTHERN RAILWAY COMPANY.

COURT OF APPEAL
1925
March 4.
JENNINGS v. CANADIAN NORTHERN RY. CO.

Practice—Courts—Appeal to Supreme Court of Canada—Motion to Court of Appeal for leave—Rule as to—Can. Stats. 1920, Cap. 32, Secs. 35 to 43.

Where the question involved in an action is one of inference of fact to be drawn from undisputed evidence, and there is no question of conflict between the Court of Appeal and the Court below, and no question as to the general law affecting other Provinces as well as British Columbia, special leave to appeal to the Supreme Court of Canada will not be granted.

MOTION to the Court of Appeal for leave to appeal to the Supreme Court of Canada. The action was for damages for an assault committed upon the plaintiff by a conductor of the defendant Company: see (1924), 33 B.C. 516 and on appeal (1925), 35 B.C. 16. It appeared from the evidence that the conductor struck the plaintiff while in the act of collecting his ticket, or immediately afterwards, and the question was

Statement

COURT OF APPEAL

1925

March 4.

JENNINGS v. CANADIAN NORTHERN RY. CO.

whether the assault was committed by the conductor in the course of his employment.

The motion was heard at Vancouver on the 4th of March, 1925, by MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, for the motion: Leave should be granted on two grounds: (a) it being a matter of public interest; and (b) there is an important question of law to be decided: see *Channell* v. *Rombough* (1924), 34 B.C. 52. The sum involved is under $1,000.

F. G. T. Lucas, contra: The law is quite clear when the Court has once found on the evidence that collecting the ticket and the assault were all one act. This is not a case of public importance: see *Doane* v. *Thomas* (1922), 31 B.C. 457; *Lake Erie and Detroit River Co.* v. *Marsh* (1904), 35 S.C.R. 197; nor is it a question of general importance: see *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234; 67 D.L.R. 476; *Miller* v. *O'Neill-Morkin Machinery Co. et al.* (1921), 16 Alta. L.R. 521.

Mayers, in reply: There is divergence in cases as to what is the scope of employment. The amount at issue should not influence the matter.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would refuse leave. I do not think it is a proper case. As I have already expressed it, the question involved is simply one of inference of fact to be drawn from undisputed evidence. One learned judge draws one inference and another another.

MARTIN, J.A.

MARTIN, J.A.: This case raised a nice question, mainly for the ascertainment of what the real principle is, and for that reason it gave me a good deal of difficulty because of the law as to the liability being in some ways progressive and unsettled as shewn by the cases I cited in my judgment; and a case which gives the ratio of the matter in the right light is the judgment of Lord Chief Baron Palles in the Irish case (*Farry* v. *Great Northern Railway Co.* (1898), 2 I.R. 352).

Then there is *Seymour* v. *Greenwood* (1861), 7 H. & N. 355,

which caused me most certainly to think that the distinction arose in the evidence as suggested by counsel for the respondent, and I was unable to see there was anything to restrict this Court from applying herein the principle of the *Seymour* case, and that being the primary aspect of this case this is not, in my opinion, an appeal in which we should give leave to go further. If it had been shewn by counsel in support of the motion that there had been a preponderating opinion of this Court on the secondary and wider aspect of the case it might well go to the Supreme Court of Canada, but that view in the circumstances will be still open to argument when the facts of another case warrant it, and could be reviewed in that event.

MARTIN, J.A.

McPHILLIPS, J.A.: I would not think it a proper case in which to grant leave. I have already intimated, with very great respect, that the Supreme Court decisions do not affect this Court, which is a sovereign Court under the Act of the Parliament of Canada, and should we be disposed to grant leave, we are not, in arriving at that conclusion, necessarily bound by the reasons that seem to control the Supreme Court in granting leave. If we grant leave there is no review; the Parliament of Canada has made us sovereign where we grant leave.

MCPHILLIPS, J.A.

In regard to granting leave, I always will advise myself of what in each case is the interests of justice.

MACDONALD, J.A.: I agree.

MACDONALD, J.A.

Motion refused.

COURT OF APPEAL

1925

March 6.

HARRISON BAY COMPANY LIMITED v. GAUTHIER.

Timber—Boomed logs scattered by freshet—Unmarked logs—Seized and sold by Government—Right of original owners on identification of logs —R.S.B.C. 1924, Cap. 93, Secs. 77 and 85.

HARRISON BAY CO. v. GAUTHIER

Where the Crown has seized and sold scattered timber in a certain area under section 85 of the Forest Act, the presumption arises that the sale was regularly made until the contrary is shewn.

Timber cut on Dominion Crown lands being within the scope of matters of regulation, is subject to the terms of the Forest Act and must be marked before it is put in the water.

APPEAL by defendant from the decision of MURPHY, J. of the 23rd of December, 1924, in a replevin action for logs alleged to have been wrongfully taken and detained by the defendant. The plaintiff Company had timber limits adjoining Harrison River and in the spring of 1924 they put their logs in Harrison River intending to take them down to the lake and to the saw-mill at Harrison Mills. Owing to extreme freshets their booms were broken and the logs were carried into the lake and scattered. The logs were not marked in accordance with section 77 of the Forest Act. On the 26th of July, 1924, the local Government deputy district forester acting under section 85 of the Forest Act sold the defendant all unmarked and undesignated drift timber in that portion of Harrison Lake lying north of the Dominion Railway Belt. The defendant proceeded to put the logs within this area in booms and on the 22nd of September following when the defendant had about 130,000 feet boomed the plaintiff brought this action. The plaintiff having given satisfactory bonds to the sheriff they took possession of the logs under a writ of replevin. The trial judge found in favour of the plaintiff.

Statement

The appeal was argued at Vancouver on the 6th of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C., for appellant: We say, first, they did not prove satisfactorily the logs were theirs; and secondly, even if they

Argument

COURT OF APPEAL

1925

March 6.

HARRISON BAY CO. v. GAUTHIER

did they were not marked and we had acquired ownership under section 85 of the Forest Act. They say no one else lost logs but there is evidence to shew this is not the case. It is because they have broken the law that they were successful below. The logs were not marked and there was seizure and sale by the Government under section 85 of the Act. The logs should be marked before they are put in the water. When the Crown acts the burden is on the other to shew they did not do what was required: see Broom's Legal Maxims, 8th Ed., 739.

Argument

Whiteside, K.C., for respondent: Section 85 requires a seizure and section 77 requires marking. The logs were never seized and this question was never raised until now. All our logs are Dominion logs taken from an Indian reserve so that the stamping is not required. They were carried from our control by an unusual freshet. We have shewn that without question they are our logs and this is sufficient to establish our title: see *Waterhouse* v. *Liftchild* (1897), 6 B.C. 424; (1 M.M.C. 153); *Schomberg* v. *Holden et al.* (1899), *ib.* 419; (1 M.M.C. 290).

Craig, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal must be allowed. There was the right of Mr. *Whiteside's* client to question the regularity of the sale, and they have not done so; that is to say, they have given no evidence which shews that the proceedings leading up to the sale were not entirely regular, and in the absence of such evidence we must hold the sale to have been regular.

It has been suggested, but not very strongly argued, that as the timber was cut from Dominion Crown lands it is not subject to Provincial legislation. I do not think there is anything in that contention, because the Province is not attempting to collect a royalty on this timber; the royalty would be paid to the Dominion and not to the Province, but for the purpose of their regulations, the Provincial Government say you must not leave your timber, or put out any logs unless duly marked, because it would lead to confusion and to dispute, and therefore they say as a matter of regulation you must mark the timber before

COURT OF APPEAL

1925

March 6.

HARRISON BAY CO. v. GAUTHIER

putting it in the water, and if you do not do so the penalty is that your timber may be sold by the Government.

I think the appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: I am of the opinion that this being a sale by the Crown it was not necessary for the defendant in this action, a replevin action, where he was in possession of the property (he states in his evidence he was the owner), to do more than prove his title from the Crown Provincial by producing the proper document evidencing sale to him under section 85 of the Forest Act, just as he would be entitled in certain circumstances to justify his possession by the production of some document from the Crown Federal shewing him to be the owner of this property. The position in regard to these special Crown titles is somewhat analogous to that arising out of the way title to a mineral claim is proved by the production of the record and certificate of a free miner, as pointed out in *Waterhouse* v. *Liftchild* (1897), 1 M.M.C. 153, and as cited by myself in the case of *Schomberg* v. *Holden et al.* (1899), at p. 290. That the plaintiff was apprised of this defence is proved by the fact that the document itself was produced to the Court, and that constituted notice to him that such a defence was being raised, and if he wished to go on and reply to that defence it was his duty to do so, but nothing of the kind was done. I am assuming, in saying this, that it would be proper to dispossess the defendant of his title under the Crown sale by so doing. In regard to any question as to the rights of the Provincial or Federal Government as to marking timber I need only say I can see nothing of that kind raised by the pleadings herein and so I express no opinion on it.

GALLIHER, J.A.

GALLIHER, J.A.: I have come to the conclusion the appeal should be allowed, but the natural feeling at times is that one would like to assist in a case of hardship, which this is, to the man who cut the timber in the first instance, and by reason of what you might term an act of God perhaps or by some circumstances beyond their control at the time, the timber got out in the lake. However, we find ourselves very often unable to do what we might in a case of that kind to relieve against such

circumstances, and therefore we are bound to decide the case on the facts, and the law. I have nothing to add in that respect to what my learned brothers who have just delivered their reasons have said, any more than perhaps to say—of course one does not criticize the Government nor do I offer any criticism —but it seemed to me it was a case in the first instance, if they were aware of the circumstances under which these logs got into the river unmarked, some consideration might have been given, but that is neither here nor there and does not in any way affect the judgment.

GALLIHER, J.A.

McPHILLIPS, J.A.: In my opinion the appeal must succeed. At the outset I wish to point out that in an action such as this, if there be any doubt at all, that doubt ought to be resolved as to ownership in favour of the defendant who is in possession of the goods. The learned trial judge's judgment would appear to indicate that he was in some doubt as to whether the plaintiff had made out his ownership. He said:

"The onus is, in my opinion, on plaintiff to prove ownership of the logs it claims. On the whole, though not without some doubt, I conclude this onus has been satisfied."

Now where the facts are that the defendant was in possession of these logs, that in itself imports title, *i.e.*, a *prima facie* case that title was in the defendant. It was necessary for the plaintiff to make out its case, not to rely upon any frailty of title in the defendant. That is, it was necessary on the part of the plaintiff to make out a good title to the logs—to dispossess the defendant in a replevin action. It follows that the action should stand dismissed because the one in possession is presumed by law to be entitled to the property unless title be displaced, which the plaintiff has failed to establish.

MCPHILLIPS, J.A.

There is some evidence of complexity and some of nicety in that apparently the timber was cut off Dominion lands and at the outset the standing timber was the timber of the Crown Dominion, but when the timber was cut the property passed (see *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462) and the Provincial Forest Act would apply, being within the jurisdiction of the Province, *i.e.*, "property and civil rights"—the Province then had jurisdiction over these particular

COURT OF APPEAL

1925

March 6.

HARRISON BAY CO. v. GAUTHIER

logs. That being so section 77 of the Forest Act would apply, which required timber markings and that not being complied with, it would be a transgression of the law of the Province, and the Province would be entitled under section 85 to take the timber and sell the timber, and apparently that is what was done. I base my judgment in the main upon this, that the defendant was in possession of the logs, and that the plaintiff did not make out a case of ownership of the logs, quite apart from the sale to the defendant by the Province of these logs.

MACDONALD, J.A.

MACDONALD, J.A.: I would like to reach a different conclusion, but it is quite impossible to do otherwise than allow the appeal. I think it regrettable that the product of another man's labour should be sold in this summary way, but unfortunately we cannot deal with that aspect of the matter.

Appeal allowed.

Solicitor for appellant: *P. E. Pierce.*
Solicitor for respondent: *Henry L. Edmonds.*

COURT OF APPEAL

1925

April 28.

REX v. NEW DOMINION CLUB.

Criminal law—Sale of liquor—Conviction—Exceptions not negatived in information or in the evidence—Burden of proof—R.S.B.C. 1924, Cap. 146, Secs. 28, 85, 90, 91 and 92; Cap. 243, Sec. 30.

REX v. NEW DOMINION CLUB

On a charge of keeping liquor for sale contrary to the provisions of section 28 of the Government Liquor Act, the Crown is not bound to negative the exceptions contained in said section, as by section 92 thereof the burden is cast upon the prisoner to prove that he comes within the exceptions.

Per MARTIN, J.A.: Where section 85 of the Government Liquor Act and section 30 of the Summary Convictions Act are read together it is not arguable that it is incumbent upon the Crown to negative the exceptions.

Statement

APPEAL by accused from the judgment of MORRISON, J. of the 4th of March, 1925, dismissing an appeal by way of case

stated from the conviction of accused by the police magistrate in Vancouver on the charge of unlawfully keeping liquor for sale. The case stated was as follows:

"1. On the 7th of January, 1925, an information was laid against the New Dominion Club charging it with unlawfully keeping liquor for sale between the 1st of October, 1924, and the 3rd of January, 1925, contrary to the provisions of section 28 of the Government Liquor Act.

"2. The said charge came on for hearing before me at Vancouver, B.C., on the 15th of January, 1925, when a plea of 'not guilty' was entered.

"3. It was proved before me that the New Dominion Club was a club within the definition of the said Government Liquor Act and also that the said Club was keeping liquor for sale contrary to the provisions of section 28 of the Government Liquor Act.

"4. At the close of the case for the Crown, counsel for the appellant stated that he was calling no evidence. He thereupon asked for a dismissal of the charge on the ground that the Crown (not having negatived or specified such exceptions in the information as are in the Government Liquor Act provided) had not proved in evidence that the appellant was not within such exceptions and had failed in consequence thereof to prove that the appellant had not the right to lawfully keep liquor for sale.

"5. I found as a fact that the exceptions were not specified or negatived in the information, and I further found as a fact that such exceptions were not negatived in the evidence. Statement

"6. I found on the evidence that the said appellant was guilty of the offence whereof it had been charged and convicted it accordingly.

"The question submitted is:

"Was I right in holding that it was unnecessary for the Crown to adduce evidence to shew that the appellant did not have the right to keep liquor for sale?"

The appeal was argued at Vancouver on the 28th of April, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Sloan, for appellant: "Club" is defined in section 2 of the Government Liquor Act and a club may keep liquor for sale: (a) under the exception in section 25; (b) if it is a jockey club where a veterinary may keep liquor for sale; (c) in the case of a home for the aged. The Crown must prove that this club is not within the exceptions and section 85 of the Government Liquor Act does not relieve them. The first section in this regard is section 44 of Cap. 31, Can. Stats. 1869, followed in section 717 of Cap. 146, R.S.C. 1906. On the interpretation of this section see *Rex* v. *Boomer* (1907), 15 O.L.R. 321. In 1909 an amendment was passed to meet this decision: see also Argument

COURT OF APPEAL

1925

April 28.

REX v. NEW DOMINION CLUB

The King v. *Pratten* (1796), 6 Term Rep. 559; *Rex* v. *Jukes* (1800), 8 Term Rep. 542; *Thibault* v. *Gibson* (1843), 12 M. & W. 88 at p. 95; *Taylor* v. *Humphries* (1864), 17 C.B. (N.S.) 539; *Davis* v. *Scrace* (1869), 33 J.P. 439; *Morgan* v. *Hedger* (1870), 35 J.P. 280; *Reg.* v. *Strauss* (1897), 5 B.C. 486. Section 85 of the Government Liquor Act casts the burden on the informant when the exceptions are not negatived in the information.

Argument

W. M. McKay, for the Crown: When the Crown has made the mistake of putting the exceptions in the information it does not change the onus of proof: see *Rex* v. *Somers* (1923), 32 B.C. 553. If there is any question as to section 85 of the Government Liquor Act, section 30(1) of the Summary Convictions Act settles the matter. These are relieving sections. The accused could not possibly come under any of the exceptions. There are in fact about 25 exceptions that would have to be set out if his contention is correct. My contention is that sections 90, 91 and 92 of the Government Liquor Act put him out of Court.

Sloan, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal must be dismissed. The finding of the learned trial judge is that the club was keeping liquor for sale contrary to the provisions of section 28. We must accept that as a fact. We cannot inquire whether it is or not. It is the fact stated and upon that fact the learned judge submits the question of law, *viz.*: Was the Crown bound to negative the exceptions or provisoes contained in section 28? When we look at section 92 of the Act we find that the burden of proof (contrary to the rule at common law) is cast upon the prisoner to prove that he comes within the exception. The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: I am also of the opinion that the appeal should be dismissed, and that the learned judge took the right view in refusing to interfere with the view taken by the police magistrate. I base my decision primarily upon section 85 of the Government Liquor Act, which is a very unusual section and completely changes what the common law rule was. It states that it is not necessary to specify or negative exceptions; but

even when you do so in order, as counsel for the respondent submits, if you find you have made a mistake, even then you are not called upon to submit any proof of your averment. The more you consider that, it is remarkable how far it goes and what a complete upsetting it is of the former state of affairs. But not only that: this is a conviction under the Summary Convictions Act, which must be invoked in order to carry out its provisions and enforce the penalties therein provided; and section 30 of that Act, subsection (1), has a provision which is very similar, and this, as the Chief Justice pointed out, being a matter of procedure it follows that when you get into a proper Court for the purpose of enforcing a statute you must conform to the statute upon the procedure of that Court, and so here you must rely on section 85 of the Government Liquor Act and section 30 of the Summary Convictions Act; and when those two are read together it is really not arguable that there can be any suggestion at this stage that it is incumbent upon the Crown to negative exceptions. Upon that ground alone I concur in the judgment of the Chief Justice.

MARTIN, J.A.

GALLIHER, J.A.: I dismiss on both grounds.

GALLIHER, J.A.

MACDONALD, J.A.: I agree.

MACDONALD, J.A.

Appeal dismissed.

Solicitors for appellant: *Farris, Farris, Stultz & Sloan.*
Solicitors for respondent: *McKay & Orr.*

MCDONALD, J. (In Chambers)

1925

May 4.

CONDS v. KABOTA

CONDS v. KABOTA.

County Court—Action for wrongful dismissal—Jurisdiction—Mandamus to compel hearing.

A County Court judge having heard an action and dismissed it *mandamus* does not lie.

Statement

APPLICATION for a *mandamus* to compel a County Court judge to again try an action that he had dismissed on the ground that he had no jurisdiction. Heard by MCDONALD, J. in Chambers at Vancouver on the 1st of May, 1925.

Bray, for the application.
Craig, K.C., contra.

4th May, 1925.

Judgment

MCDONALD, J.: The plaintiff brought an action in the County Court of Vancouver claiming unstated damages for wrongful dismissal. The learned judge, as appears by the record of proceedings, dismissed the action, and it is common ground that his reason for doing so was that he had no jurisdiction. The plaintiff now moves for a *mandamus* to compel the learned judge to hear the case. The answer briefly is, that the case has been heard and the action dismissed.

Inasmuch as nothing appeared on the face of the proceedings to shew that there was jurisdiction in the County Court, it would appear that the learned judge, at least in so far as the authorities in British Columbia go, was right in the decision reached: see *In re Nowell and Carlson* (1919), 26 B.C. 459; *Camosun Commercial Co.* v. *Garetson & Bloster* (1914), 20 B.C. 448.

But even if the learned judge were wrong, it would still appear that, he having finally disposed of the case by dismissing the action, *mandamus* does not lie. Without considering the older cases this seems clearly to be the result of the following decisions: *The Queen* v. *Justices of Middlesex* (1877), 2 Q.B.D. 516; *In re Burns* v. *Butterfield* (1854), 12 U.C.Q.B. 140 and *Williamson* v. *Bryans* (1862), 12 U.C.C.P. 275.

In my opinion, therefore, notwithstanding Mr. *Bray's* strenuous argument to the effect that under the statute it was the duty of the learned judge to strike out the case rather than to dismiss the action, still there is no power in this Court to grant the application.

Application dismissed.

SCHWARTZ v. HARTFORD ACCIDENT & INDEMNITY COMPANY.

Insurance—Burglary, theft or larceny—Goods stolen—Proof of.

In an action on an insurance policy against loss by burglary, theft or larceny, the plaintiff's evidence was that on the day previous to the theft her husband, a commercial traveller, left home on business and on the morning of the next day she with her brother left their suite locked and when they came back a little after six o'clock in the evening they found the door open, the rooms ransacked and the articles in question missing.

Held, that the evidence was sufficient to prove that the goods in respect to which the claim of loss was made had been stolen.

ACTION upon a policy of insurance whereby the defendant Company agreed to indemnify the plaintiff for the loss by burglary of any of accused's property situate in suite No. 32, Manhattan Apartments, in the City of Vancouver. Tried by MCDONALD, J. at Vancouver on the 30th of April, 1925. Statement

Soskin, and *Levin*, for plaintiff.
McPhillips, K.C., for defendant.

5th May, 1925.

MCDONALD, J.: This is an action upon a policy of insurance in force from May 29th, 1924, to May 29th, 1925, whereby the defendant agreed to indemnify the plaintiff "for all loss by burglary, theft or larceny of any of the assured's property" Judgment

MCDONALD, J.

1925

May 5.

SCHWARTZ v. HARTFORD ACCIDENT & INDEMNITY CO.

situate in suite No. 32 of the Manhattan Apartments in the City of Vancouver.

The defence is that the plaintiff has not proven that the goods, in respect of which she sues, were stolen. There can be no doubt that as a condition precedent to the plaintiff's right to recovery under this policy, she must satisfy the onus which is upon her of proving that she suffered a loss by burglary, theft or larceny. In my opinion, such fact may be proven as may any other fact, that is, either by direct evidence or by reasonable inference from other facts proven. The plaintiff states (and I accept her evidence without hesitation) that her husband, a commercial traveller, having left home on business a day previously, she, with her brother, who resided temporarily with her, left the suite locked on the morning of 19th August, 1924; that on her return with her brother, somewhat after six o'clock on the same evening, she found the door open, the rooms shewing evidence of having been ransacked, various articles lying around the floor and the articles in question missing. Her brother corroborates her statement, and testifies as to a suit of clothes belonging to him which was among the missing articles. No other witnesses were called for the plaintiff, except a clerk who notified the defendant of the loss.

Judgment

It is contended that the plaintiff ought to have called the elevator man, who was summoned and entered the premises with the plaintiff and her brother; the plaintiff's husband, who was not in the city when the occurrence took place; a young girl who had been employed in the place until two days prior to the happening in question; and the police officers who were called to view the scene. Why the plaintiff should feel it necessary to call either her husband or the nurse-girl to give evidence, as to an occurrence as to which there is no reason to suppose they had any more knowledge than any man on the street could have, I am unable to understand. So far as the elevator man and the police are concerned they were subpœnaed by defendant and were in Court and were not called by either party. I take it that, if the evidence of these persons could have been of any assistance to the party which subpoenaed them, they would have been called. However that may be, I am

unable to see that it was any part of the plaintiff's case to call these witnesses. She gave her evidence in a manner which was entirely satisfactory, at least to me, and I have no difficulty in holding that she is entitled to recover under this policy for the loss sustained; the reasonable inference, from the facts proven, being that the goods in question were stolen.

There is some question as to the value of the lost articles. The plaintiff has given her best opinion as to this, and I think she gave her opinion honestly and that she is a woman of experience in business who would be able to form a reasonable estimate of the values. The witness called for the defendant, in regard to values, did not impress me. He had never seen the goods in question, and yet was prepared to place a value of only $500 on them, and that without being aware that among the articles in question was included a diamond ring which had been sworn to have cost in 1912 $465. This sort of evidence shews either an utter disregard for the truth or a very serious carelessness in the consideration by the witness of the evidence he is giving. On the whole, I think justice will be done by giving judgment for the plaintiff for $1,500, this to include $45 as the value of the suit of clothes belonging to her brother, which loss is covered by the policy. In so reducing the plaintiff's claim, I am not imputing to her any dishonesty or attempt to exaggerate, but, having regard to the whole of the evidence and to the fact that she can only recover the actual value of the goods lost and not their replacement value, I think a fair allowance, under all the circumstances, will be the amount above mentioned.

Judgment

Judgment for plaintiff.

COURT OF APPEAL

1925

June 4.

BROWN v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Negligence—Damages—Paid by insurance company—Assignment—Equitable —Action in name of assignor.

BROWN v. B.C. ELECTRIC RY. CO.

Where insurers have paid the amount of the loss occasioned by the smashing of an automobile in a collision with a street-car they may maintain an action in the name of the assured against those responsible for the collision.

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 4th of December, 1924, in an action for damages for negligence. The plaintiff, a chauffeur, was driving a jitney on the 16th of November, 1924, at about 4.15 p.m. on Kingsway towards New Westminster, the afternoon being very foggy. He was preceded by an automobile and 2 trucks. He turned to his left onto the single track of the defendant Company to pass these vehicles but when about opposite the middle one a street-car loomed up going in the opposite direction (westerly towards Vancouver) and being unable to turn to the right where the road was blocked he stopped his car and a head-on collision resulted. The plaintiff recovered $1,965 damages.

The appeal was argued at Vancouver on the 22nd and 23rd of April, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

McPhillips, K.C., for appellant: The insurance company has paid the loss and the action should have been brought in the name of the insurance company: see *Ryan* v. *Anderson* (1818), 3 Madd. 174; *Sayer* v. *Wagstaff* (1843), 2 Y. & C.C.C. 230. In case of an equitable assignment both should be parties: see *Marchiori* v. *Fewster* (1921), 30 B.C. 251 at p. 254; *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1905), A.C. 454; *Performing Right Society, Ld.* v. *London Theatre of Varieties, Ld.* (1924), A.C. 1 at pp. 2, 8 and 13. The case of *Deisler* v. *United States Fidelity & Guaranty Co.* (1917), 24 B.C. 278 and affirmed in the Supreme Court of Canada

((1917), 3 W.W.R. 1051) appears to be against me but it can be distinguished; see also *Seear* v. *Lawson* (1880), 16 Ch. D. 121 at p. 123. The plaintiff said the insurance company was bringing the action. He was guilty of contributory negligence as he tried to pass the three other cars in the fog at considerable speed and in any case when he saw the street-car he should have turned out to his left where it was clear.

COURT OF APPEAL
1925
June 4.
BROWN v. B.C. ELECTRIC RY. CO.

Housser, for respondent: There was a terrific impact. The judge found we had stopped before the impact. The street-car must therefore have been moving at a terrific rate of speed and this was the real cause of the accident: see *Ewing* v. *Toronto Railway Co.* (1894), 24 Ont. 694; *Gosnell* v. *Toronto Railway Co.* (1894), 21 A.R. 553. On the question of subrogation see MacGillivray on Insurance 734; *Union Assurance Co.* v. *B.C. Electric Ry. Co.* (1915), 21 B.C. 71 at p. 76; *Simpson* v. *Thomson* (1877), 3 App. Cas. 279 at p. 284; *Wealleans* v. *Canada Southern R.W. Co.* (1894), 21 A.R. 297; *King* v. *Victoria Insurance Company* (1896), A.C. 250.

Argument

McPhillips, in reply, referred to *Simpson* v. *Thomson* (1877), 3 App. Cas. 279 at p. 285; and *Mason* v. *Sainsbury* (1782), 3 Dougl. 61.

Cur. adv. vult.

4th June, 1925.

MACDONALD, C.J.A.: The preliminary objection was raised by Mr. *McPhillips* that the insurers who had paid the loss, and who are by law, subrogated to the rights of the assured, and who in addition have an equitable assignment of those rights, were themselves necessary parties.

In *Mason* v. *Sainsbury* (1782), 3 Dougl. 61, the Court had before it for decision almost the identical case we have here. The head-note, so far as applicable, reads:

MACDONALD, C.J.A.

"Where insurers have paid the amount of the loss occasioned by the demolition of the house by rioters, they may maintain an action in the name of the assured."

Lord Mansfield, at p. 64, said:

"The insurer uses the name of the insured. The case is clear: the act puts the Hundred, for civil purposes, in the place of the trespassers."

The three other justices sitting with Lord Mansfield were of the same opinion. But we have a much more recent authority

COURT OF APPEAL

1925

June 4.

BROWN v. B.C. ELECTRIC RY. CO.

MACDONALD, C.J.A.

against Mr. *McPhillips's* objection in *Deisler* v. *U.S. Fidelity Co.* (1917), 3 W.W.R. 1051. We read from the head-note:

"Where an assignment can operate only as an equitable assignment, action upon it by the assignee should be brought only in the name of the assignor, or, if an action be pending, can be continued only in the name of the assignor."

In *King* v. *Victoria Insurance Company* (1896), A.C. 250, it was held by the Privy Council that although the insurers could not by mere force of subrogation, sue in their own name, yet that in this case the right to do so was conferred by assignment from the insured, aided by section 5, subsection 6, of the Judicature Act of Queensland, which corresponds with the English Judicature Act. There the plaintiffs, the assignees, were able to sue in their own name because of the combined effect of the assignment and of the statute, otherwise they would have had, I think, to sue in the name of the assignor. No doubt there may be cases in which the presence of the assignee on the record is required to enable the Court to do justice in the particular case, but this is not one of them. The objection therefore fails, and on the merits, I think there was evidence to sustain the judgment of the trial judge. The case was not easy of decision. There was a great deal of conflicting evidence, and the trial judge was bound to, and I think did, his best to arrive at a just conclusion. There was evidence of visibility for a distance of 60 feet, and there was the best of evidence that the plaintiff had complete control of his car. Therefore, assuming that when he was passing other vehicles ahead of him, he was going at twelve miles per hour, the conditions which obtained at that time coupled with the control of his car, were sufficient to entitle the learned judge to say that he was not guilty of contributory negligence. On the other hand, there was evidence which would justify him in concluding that the defendant was guilty of negligence, and had not, in the dangerous circumstances, the tram-car under control.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: Assuming that the finding of negligence against the defendant for the excessive speed of its tram-car should not be disturbed, yet, with all due deference to contrary

opinion, I am forced to the conclusion that there is no answer to the submission of the defendant's counsel that upon the plaintiff's own statement he was guilty of contributory negligence in that he left the line of vehicles in which he was safely progressing at about five miles an hour, and essayed to pass in front of them despite the very heavy fog which obscured his vision, at a rate of twelve miles an hour, and in so doing necessarily running upon the tram track when he had reason to expect that at any time he would confront a tram thereupon coming in the opposite direction. *Ex facie* such a speed in such circumstances is, to my mind, negligence, and it is not sufficient answer to say that when he did suddenly, but not unexpectedly, come upon a tram looming out of the fog, then he stopped his motor-car promptly, because he had by his excessive speed unsafely progressed and wrongfully invaded, so to speak, the space or distance within which the tram motorneer would have been able to stop his tram in time to avoid the accident. Looked at in the most favourable way for the plaintiff the situation, in brief, is that both tram and motor-car were proceeding through a very heavy fog at an excessive speed, and it was that common excess of speed that was the "real cause of the accident"—*Winch* v. *Bowell* (1922), 2 W.W.R. 1031 at p. 1034; 31 B.C. 186 at p. 191; *Skidmore* v. *B.C. Electric Ry. Co.* (1922), 2 W.W.R. 1036; 31 B.C. 282.

MARTIN, J.A.

This being my view of the matter I think the action should be dismissed and the appeal allowed on the merits, and so it is not necessary to consider the other point of substance raised by Mr. *McPhillips,* respecting the right of the plaintiff to maintain the action.

GALLIHER, J.A.: Mr. *McPhillips,* counsel for the appellant, raised the point that the plaintiff cannot recover without adding the insurance company as a party. The short answer to that is this: there is no evidence before us of an assignment either legal or equitable, and the insurance company must depend upon subrogation. Having settled the plaintiff's claim under the insurance policy, it is by law, subrogated to his rights, but that subrogation does not enable it to sue the defendant

GALLIHER, J.A.

COURT OF APPEAL

1925

June 4.

BROWN v. B.C. ELECTRIC RY. CO.

in its own name. Action must be brought in the name of the insured, who is the plaintiff on record. But Mr. *McPhillips* urges that Brown has disclaimed bringing the action, and says it is the insurance company who is bringing it, and as the insurance company is not a party, and the plaintiff says he is not bringing the action, there is no person against whom judgment can be signed. We would have to put a narrow construction on his words to accede to that argument. As to a portion of his claim for loss of use of his car, he is properly a plaintiff, and as to the balance of the claim, it seems clear to me that what he means is, that having been settled with by the insurance company, the company is the party interested and that it, not he, is bringing the action, and in his name. There is no difficulty in the suggestion by Mr. *McPhillips* that they might be called upon to pay a second time should the judgment be sustained. The Courts would treat the plaintiff as a trustee for the company in anything he might recover.

GALLIHER, J.A.

On the merits, while something might be said as to the learned trial judge not giving sufficient weight to the evidence of the nurse (Margaret Glenn), yet the uncertainty surrounding a collision under the conditions prevailing (a thick fog) and the different impressions that would naturally prevail as to exact locality and manner of occurrence, would make it very difficult for a Court of Appeal to interfere with his findings.

I would, therefore, dismiss the appeal.

MACDONALD, J.A.: On the facts, I would not disturb the findings of the learned trial judge. In view of the fog, it was possibly not prudent, on the plaintiff's part, to attempt to pass the motor-cars ahead of him. It would be better to trail them until he got beyond the street-car line. This, however, does not conclude the matter. He had a right to assume that, if a street-car did appear, it would be under proper control and travelling at a reasonable rate of speed. There is evidence that notwithstanding the fog, there was visibility for about 60 feet. We would not be justified in rejecting that virtual finding of fact by the learned trial judge. It is clear he accepted that evidence. Had the street-car been travelling at a reasonable speed under

MACDONALD, J.A.

proper control the motorman should be able to stop it within that distance less the distance the plaintiff's car would travel in the meantime. Further, the complete wreckage of the car testifies to the force of the impact and the rate of speed. All these facts shew that the real cause of the accident was the negligence of the defendant.

The further point was urged that because the main part of the amount recovered was for damages to the plaintiff's car, which was insured in a company (the name of which was not disclosed), he could not maintain this action. It was alleged that the plaintiff stated that (apart from the amount recovered for loss of time, etc.), it was not his action; that the insurance company was the real plaintiff and should be on the record. It was, therefore, submitted that, as on the face of the proceedings there is nothing to shew whose action it is and no evidence of any assignment—simply a statement by the plaintiff that the car was insured—the judgment is really in favour of a company whose name we do not know, and cannot stand.

The insurance company replaced the plaintiff's car. When that fact was elicited, counsel for defendant insisted that it should be added as a party plaintiff. The unnamed insurance company has a right by subrogation to receive, to the extent it indemnified the plaintiff, the benefit of the latter's claim against the defendant. Upon payment of the indemnity, the plaintiff's remedies against the defendant must be exercised for the benefit of the insurers. This right of subrogation arises as soon as the claim is paid as an equitable charge. It exists without an assignment. But the plaintiff's right to sue is not affected though he must account to the insurer. The legal right to sue remains in the assured, and the action is properly brought in his name. In these circumstances, the defendant is not concerned with the relations between the insurer and the insured.

MACDONALD, J.A.

Simpson v. *Thomson* (1877), 3 App. Cas. 279 at p. 284; *Union Assurance Co.* v. *B.C. Electric Ry. Co.* (1915), 21 B.C. 71; MacGillivray on Insurance, 733 *et seq.*

It was submitted that the contract of insurance, if disclosed, might contain a clause excluding any right of subrogation, thus shewing the necessity of joinder and of disclosing all

COURT OF APPEAL

1925

June 4.

BROWN v. B.C. ELECTRIC RY. CO.

material facts. Again the defendant has no concern with that possibility. Its liability rests solely on breach of duty towards the plaintiff. I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *L. G. McPhillips.*
Solicitors for respondent: *Walsh, McKim & Housser.*

COURT OF APPEAL

1925

June 4.

PURCELL v. HENDRICK

PURCELL v. HENDRICK.

Will—Gift of residuary estate to sister or her heirs—Sister domiciled in Massachusetts—Adopted child—Sister dies before testator—Foreign law—Proof—R.S.B.C. 1924, Cap. 6, Secs. 7 to 10.

A testator who died domiciled in British Columbia, by will, made in British Columbia, bequeathed the residue of his estate, consisting of personal property, to his sister Annie who was domiciled in Massachusetts, U.S.A., "or her heirs." Annie died intestate during the testator's lifetime but she and her husband had adopted a daughter under the law of Massachusetts, who survived. The evidence disclosed that under the laws of Massachusetts "an adopted child is an heir of the adopting parents and has the rights and *status* of a child born in lawful wedlock."

Held, on appeal, reversing the decision of MORRISON, J. (GALLIHER and MACDONALD, JJ.A. dissenting), that the question is one of *status*, that the adopted daughter has by the law of Massachusetts the requisite *status* of heir or next of kin and is entitled to the residuary estate.

Statement

APPEAL by defendant from that part of the order of MORRISON, J. of the 24th of January, 1925, whereby it was declared that the bequest of the residuary estate of Daniel McGillivray, deceased, unto Annie Ferden, or her heirs, as contained in the will of said Daniel McGillivray, deceased, had lapsed by reason of the death of said Annie Ferden prior to the decease of Daniel McGillivray and that he died intestate in so far as the residuary estate is concerned. Daniel McGillivray died a bachelor on the 10th of May, 1923. At the time of his death he had two brothers

and five sisters living. Annie Ferden, a deceased sister of the testator adopted as her child the defendant Regina Ferden Hendrick in 1891, in accordance with the laws of the Commonwealth of Massachusetts, U.S.A., where she and her husband lived.

The appeal was argued at Vancouver on the 5th and 6th of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

C. L. McAlpine, for appellant: The sister died and her heir takes by substitution: see *Gittings* v. *M'Dermott* (1833), 2 Myl. & K. 69. Brothers and sisters are "heirs" which includes "next of kin": see *Doody* v. *Higgins* (1852), 9 Hare (App.) xxxii.; *Finlason* v. *Tatlock* (1870), L.R. 9 Eq. 258. As to "or" being changed to "and" see *In re Whitehead, Whitehead* v. *Hemsley* (1920), 1 Ch. 298; *In re Philps' Will* (1869), L.R. 7 Eq. 151. By the law of Massachusetts an adopted child is in the same position as one born in lawful wedlock: see *Enohin* v. *Wylie* (1862), 10 H.L. Cas. 1; *In re Andros. Andros* v. *Andros* (1883), 24 Ch. D. 637 at p. 639. As to *status* of adopted child see *Ross* v. *Ross* (1880), 129 Mass. 243. On burden of proof see *Robertson* v. *Ives* (1913), 13 E.L.R. 387. As to analogy between an adopted child and legitimacy see *In re Goodman's Trusts* (1881), 17 Ch. D. 266. An adopted child has *status* of next of kin: see *In re Lee Cheong, Deceased* (1923), 33 B.C. 109.

Argument

Whiteside, K.C., for respondent: Our Act deals with the adoption of children. As to "next of kin" see Theobald on Wills, 7th Ed., 334. You must read into the Adoption Act something that is not there. The word "being" is applicable only to lands. The testator was domiciled in British Columbia where the will was made: see *In re Fergusson's Will* (1902), 71 L.J., Ch. 360; *In re Stannard* (1883), 52 L.J., Ch. 355; *In re Whitehead, Whitehead* v. *Hemsley* (1919), 89 L.J., Ch. 155. The cases referred to by appellant are all questions of legitimacy.

McAlpine, replied.

Cur. adv. vult.

COURT OF APPEAL

1925

June 4.

PURCELL v. HENDRICK

4th June, 1925.

MACDONALD, C.J.A.: The testator died domiciled in this Province. By will made here, he bequeathed a legacy and a residue consisting of personal property, to Annie Ferden, domiciled in Massachusetts, or her heirs. Annie Ferden died in the testator's lifetime; the bequest, therefore, is to the heirs of Annie Ferden, and the only heir, except collaterals which she left, was a daughter adopted under the law of Massachusetts, whereby this adopted daughter became Annie Ferden's heir under that law. This heir now claims the said gifts as against the next of kin of the testator, being brothers and sisters and their descendants.

There can be no doubt that the adopted child under the laws of Massachusetts has the *status* of heir to Annie Ferden. This is sworn to by a competent witness in the following words:

"An adopted child is an heir of the adopting parent and has the rights of a child born in lawful wedlock, and occupies the same *status* towards the adopting parent as if born in wedlock."

MACDONALD, C.J.A.

The question here is not one of inheritance, nor of succession to personal property under the Statute of Distributions. If the appellant, Regina Ferden Hendrick, be entitled to the gifts aforesaid, she is so as purchaser in the sense in which that term is applied to those who take gifts by will. Such cases as *Birtwhistle* v. *Vardill* (1835), 2 Cl. & F. 571 are therefore not in point. There it was held that the person claiming to inherit land in England as the eldest son of his father was not entitled because, though legitimated by the law of his parents domiciled elsewhere and therefore deemed legitimate in England, he was required to go further and shew that he was born in lawful wedlock, that that was the law of England in respect of inheritance of English land founded on the Statute of Merton. But this essential to inheritance of land has been held not to extend to succession to personalty, or even to gifts of land by will—*In re Grey's Trusts* (1892), 3 Ch. 88. Here we have gifts to the heirs of Annie Ferden. Who are the heirs of Annie Ferden? Or to put it more accurately, in relation to the property bequeathed, who are the next of kin of Annie Ferden? Bryne, J. in *In re Fergusson's Will* (1902), 71 L.J., Ch. 360, said that that ought to be ascertained by construction of the will.

No doubt there was a question of construction here, but it has been well settled by previous cases, namely, that "heirs" in a gift of personalty must be construed "next of kin." He held, however, that the words "next of kin" used in that will must be construed as meaning the nearest of blood in the ascending and descending line, thus excluding those entitled under German law. He held that the class was to be ascertained by construction of the will, not by the law of the domicil of the ancestor.

Bryne, J. concedes that a gift to a person who by the law of England, had he been born there, would have been illegitimate, but who by the law of his father's domicil was subsequently legitimated by the marriage of his parents, would, in English Courts, be deemed to have the *status* of a legitimate child, and so be entitled to succeed to personalty under the Statute of Distributions as being nearest of blood. He, nevertheless, held that the half blood, who by the law of England, was the nearest of blood, should be held entitled to gifts under an English will to the exclusion of the nephews and nieces, who would succeed under German law. I think, with great respect, that too much importance has been attached to the common law definition of next of kin when foreign *status* is concerned. An illegitimate child is not next of kin in any legal sense to its father, it is not of his blood in the eye of the law. When legitimated by foreign law it is the foreign law which gives him the *status* to inherit and succeed, a *status* recognized in all countries which adhere to the law of nations; *In re Goodman's Trusts* (1881), 17 Ch. D. 266.

MACDONALD, C.J.A.

So in the case of adoption, I think it is the foreign law which fixes the *status* of the adopted child, it creates a capacity to inherit and to succeed to personalty, and that *status* once fixed remains so, no matter where the child may subsequently reside.

In *In re Andros* (1883), 24 Ch. D. 637, Kay, J. said at p. 639 that:

"A bequest in an English will to the children of A, means to his legitimate children, but the rule of construction goes no further. The question remains who are his legitimate children? That certainly is not a question of construction of the will. It is a question of *status*. By what law is that *status* to be determined? That is a question of law. Does that

COURT OF APPEAL

1925

June 4.

PURCELL v. HENDRICK

comity of nations which we call international law apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it."

The subject is much discussed in *In re Goodman's Trusts, supra,* by Cotton and James, L.JJ., who were of opinion that so far as legitimacy is concerned, the law of the father's domicil at the time of the birth of the child and at the time of the marriage of its parents determines its *status* and its right to take under an intestacy.

I cannot see any reason in principle for holding that while in a gift to the children of a foreigner, the children are to be ascertained by foreign law, yet that in one to the "heirs" of a foreigner, the heirs are to be ascertained by English law. It is conceded that the appellant on the death intestate of Annie Ferden would succeed to her personal estate in Massachusetts. To the question who is the heir of Annie Ferden? the answer, in Massachusetts, must be Regina Ferden Hendrick.

It may be worth noticing that the technical term "next of kin" was not used by the testator. It is by construction that that term comes into the case. I do not, however, attach much importance to this, but would found my opinion on the broader ground, that the question is one of *status,* and that the appellant has, by the law of Massachusetts, the requisite *status* of heir or next of kin.

MACDONALD, C.J.A.

Lord Justice James, in *Goodman's* case, *supra,* pp. 296-7, said:

"What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity, and international law. According to that law as recognized, and that comity as practised, in all other civilized communities, the *status* of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born."

As the right to assume the *status* of children and thereby to succeed to property of the ancestor by foreign legitimation is conferred by the foreign law and not by English law, so is the rights of an adopted child. If our Courts are to be consistent, they, having yielded the point of birth out of wedlock, must, I think, in cases of adoption also yield the point as to "nearest of blood." The rule of the common law defines children as those born in wedlock; it defines next of kin as those nearest of blood.

If we have abandoned the one in deference to international comity, why cling to the other?

Chief Justice Gray, a very eminent American judge, who considered the question exhaustively in *Ross* v. *Ross* (1880), 129 Mass. 243, could see no reason why we should do so.

Mr. Dicey, at p. 850 of The Conflict of Laws, 3rd Ed., said:

"The fact, therefore, that a legitimated person may succeed to his father's movable property under the law of his father's domicil no more proves that our Courts recognize a legitimated person as legitimate, than the fact that an adopted child may, under the law of the deceased's domicil, succeed to movable property in England as an adopted son proves that English law recognizes relationship by adoption."

And in note (*o*), referring to *Ross* v. *Ross*, he observed:

"Strictly speaking there is no logical difference between the two cases. The recognition of legitimation and adoption has recently been contemplated in England."

The English Parliament has not enacted laws permitting legitimation or adoption in England, but English Courts recognize the foreign *status* by legitimation acquired elsewhere, and in analogy ought to recognize the *status* acquired by adoption elsewhere.

MACDONALD, C.J.A.

This Province has enacted laws in respect of each.

We are asked for a declaration as to the effect of the words "or her heirs" in said will. There was no suggestion in argument that should the Court hold that the child by adoption was included in the said words, that there were other heirs than Regina Ferden Hendrick. But if there be any such, the summons asks for an enquiry. If counsel ask for an enquiry, it should be directed to the proper officer.

The appeal should be allowed and a declaration in accordance with these reasons should be made.

MARTIN, J.A.: It is conceded that the language in the will of Daniel McGillivray in favour of "my sister Annie Ferden or her heirs" is, for the present purpose, equivalent to the "next of kin" of that woman, who pre-deceased the testator and left an adopted daughter her surviving, who is now known as Mary Regina Hendrick (having been married in 1920 at Watertown, Mass.), and claims to be the heir or next of kin of the said Annie Ferden. It appears that the adoption took place in

MARTIN, J.A.

COURT OF APPEAL

1925

June 4.

PURCELL v. HENDRICK

1891 in the State of Massachusetts, under a decree of the Probate Court of that State, wherein Annie Ferden and her husband were domiciled, and by the law of that State, as is deposed to without contradiction, the effect of such adoption was to confer upon the adopted child "all the rights of a child born in lawful wedlock." This gives such an adopted child the same *status* as an heir of the blood in the land of its adoption, and as the only property involved is personal in its nature, *i.e.*, cash, the *status* of the adopted child for the purposes of this inheritance is to be determined by the law of the domicil of her adopted parents, and I am unable to take the view that if a duly-adopted child is by statute (the supreme authority) declared to be in all legal respects the same as one born in lawful wedlock, nevertheless that full and complete *status* of inheritance can be curtailed. The general principles that we lately considered in the case of a Chinese marriage—*In re Lee Cheong, Deceased* (1923), 33 B.C. 109—largely apply here, and the decision of the Supreme Court of Prince Edward Island in *Robertson* v. *Ives* (1913), 13 E.L.R. 387, is particularly in point, being based on a decree of adoption from the same State of Massachusetts, and the reasoning therein is given additional force in this Province because of our recent Adoption Act, Cap. 6, R.S.B.C. 1924 (though not applicable to the present circumstances), passed in accordance with modern humanitarian views, which, *inter alia,* confers upon adopted children all the rights of inheritance and succession by blood both as to real and personal property, subject to certain exceptions.

MARTIN, J.A.

There is here no doubt about the continuous domicil of Annie Ferden, and so the case is brought within the rule laid down in the leading case of *In re Goodman's Trusts* (1881), 17 Ch. D. 266, wherein Lord Justice Cotton said, p. 291:

> "It was urged in support of the decision of the Master of the Rolls that the law of England recognizes as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who at the time of the children's birth are domiciled in England. But the question as to legitimacy is one of *status*, and in my opinion by the law of England questions of *status* depend on the law of the domicil."

And Lord Justice James in a celebrated passage said, p. 296:

> "I concur in the judgment of Lord Justice Cotton, both in the conclusion and reasoning. According to my view, the question as to what is the

English law as to an English child is entirely irrelevant. There is, of course, no doubt as to what the English law as to an English child is. We have in this country from all time refused to recognize legitimation of issue by the subsequent marriage of parents, and possibly our peculiarity in this respect may deserve all that was said in its favour by Professor, afterwards Mr. Justice Blackstone, the somewhat indiscriminate eulogist of every peculiarity and anomaly in our system of laws. But the question is, what is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognized, and that comity as practised, in all other civilized communities, the *status* of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born."

I have not overlooked the decision of Mr. Justice Byrne in *In re Fergusson's Will* (1902), 71 L.J., Ch. 360, wherein he deals with the case of a bequest of a domiciled Englishman to a German lady and a conflict between her English sister of the half blood and her nephews and nieces of the whole blood in Germany, and the learned judge was of opinion that the principle in *Goodman's Trusts* did not extend to such a situation, and construed the legacy in favour of the nearest blood relation in England, the sister of the half blood, as against the "next of kin," the nephews and niece of the whole blood, according to German law. The distinction he draws is fine, and, with all respect, doubtful, but it differs essentially from the case at Bar because here we have to deal with a situation in which the Legislature has conferred upon a child by process of adoption all the rights of a birth in lawful wedlock, and I can see no real distinction in legal result between such a situation and the local transformation by the foreign Legislature of an illegitimate child, according to English law, into a legitimate one by foreign law, but still illegitimate in blood and otherwise if the parents had been domiciled in England: "a stranger in blood and in law, and a bastard, *filius nullius,*" as Lord Justice James plainly puts it, p. 298. In Burn's Justice of the Peace (1764), cited in the Oxford Dictionary (*sub verb.* "Bastard"), it is said:

MARTIN, J.A.

"The word bastard seemeth to have been brought unto us by the Saxons; and to be compounded of *base,* vile or ignoble, and *start,* or *steort* signifying a rise or original."

If the English testator's intentions can be thus expanded to include as his next of kin one who would be a bastard in his

COURT OF APPEAL

1925

June 4.

PURCELL v. HENDRICK

MARTIN, J.A.

own country, however repellant that unexpected result might be to him, because of the *status* such a child has acquired *ex juris,* I am unable to perceive why the same result should not follow in the case of a duly adopted child who has had conferred upon it all the rights of blood relationship as well as others: in both cases the Court is recognizing a child born out of wedlock, and unless it can be put upon the ground that the Court will regard blood, whether base or pure, as the test of foreign legislation, the distinction cannot be legally sustained, and I have been unable to find authority to support that view, though I am disposed to welcome it.

I note, moreover, that Mr. Justice Byrne says in his conclusion, that his view is "subject . . . . . to the question of *status* should any question of that kind arise." It does, in my opinion, arise here, and therefore the appeal should be allowed.

GALLIHER, J.A.: Daniel McGillivray, of Mission City, B.C., by his will, dated July 11th, 1921, after making certain bequests, gave to his sister, Annie Ferden, or her heirs, "all the residue of my estate not hereinbefore disposed of." The only estate left was personal property, consisting of cash in the bank.

McGillivray died a bachelor on or about the 10th of May, 1923, at New Westminster, B.C., his domicil being in British Columbia at the time of making his will and at the time of his death.

GALLIHER, J.A.

The said sister, Annie Ferden, predeceased the testator, dying intestate in the State of Massachusetts, where she was then domiciled, on the 23rd of June, 1922, and her husband, Thomas Francis Ferden of Watertown, in the State of Massachusetts, to whom she was married at Boston, Massachusetts, on June 8th, 1890, was duly appointed administrator of her estate.

The said Annie Ferden left no issue, but on May 14th, 1913, she and her husband adopted Mary Regina O'Neill as their daughter in accordance with the laws of Massachusetts, she being given the name of Mary Regina Ferden. Mary Regina Ferden on the 6th of October, 1920, married James Augustine Hendrick, at the town of Watertown, in the State of Massachusetts, and is the appellant herein, described as Regina Ferden Hendrick.

An application by way of originating summons was made by the plaintiff Edward Purcell, as executor of the will of Daniel McGillivray, deceased, asking the Court to determine, among other things, (1) whether or not the bequest of $1,000 to Annie Ferden has lapsed and fallen into the residuary estate; (2) the construction of that part of the will whereby the residuary estate is bequeathed unto Annie Ferden or her heirs, and for a declaration as to the effect of the words "or her heirs" in view of the death of the said Annie Ferden prior to the date of the testator's death; (3) as to what persons are the heirs of Annie Ferden within the meaning of the will, if it should be decided that the heirs of Annie Ferden are entitled to the residuary estate by way of alternative bequest.

The learned trial judge found that the bequest to Annie Ferden of $1,000 had lapsed and fallen into the residuary estate, and also that the bequest of the residuary estate to Annie Ferden had lapsed by reason of her death prior to that of the testator, and that the testator died intestate in respect of his residuary estate, and so ordered; and further ordered that the determination of the other matters and things set out in the originating summons be adjourned to a date to be fixed.

GALLIHER, J.A.

The appellant appeals against said order in so far as it declares the bequest of the residuary estate lapsed, and asks for an order that she is entitled to the residuary estate under the will. By the laws of the State of Massachusetts she would be so entiled by virtue of her adoption.

In *In re Goodman's Trusts* (1881), 17 Ch. D. 266, it was held *per* Cotton and James, L.JJ., Lush, L.J. dissenting, that a child born before wedlock of parents who were at her birth domiciled in Holland but legitimated according to the law of Holland by the subsequent marriage of her parents, was entitled to share in the personal estate of an intestate dying domiciled in England as one of her next of kin under the Statute of Distributions. The case is a very interesting one, and the authorities are very fully discussed, but the effect of the decision is, that where the question of *status* arises that *status* is to be determined in accordance with the law of the domicil of origin.

In *Andros* v. *Andros* (1883), 24 Ch. D. 637, Kay, J. held

COURT OF APPEAL

1925

June 4.

PURCELL v. HENDRICK

that a bequest in an English will to the children of a foreigner must be construed to mean to his legitimate children and by international law as recognized in England those children are legitimate whose legitimacy is established by the law of their father's domicil. It would appear from these authorities that wherever the *status* of children as to their legitimacy comes in question, that legitimacy is determined by the law of their parents' domicil whether it be under the Statute of Distributions or under a bequest in a will.

In a later case, *In re Fergusson's Will* (1902), 71 L.J., Ch. 360, Byrne, J., held that in the absence of any question of *status* that may arise, the words "next of kin" in an English will which contains a legacy to the next of kin of a deceased foreign subject, must be construed according to English law, and the learned judge says in his concluding words, at p. 362:

"In my opinion, the next of kin are to be ascertained according to English law, subject, as I have already indicated, to the question of *status*,"

which he held did not arise. This is in no way in conflict with the other decisions I have referred to, if the learned judge was right in holding that the question of *status* did not arise.

GALLIHER, J.A.

In *Whitehead* v. *Hemsley* (1920), 1 Ch. 298, it was held by Sargant, J. that as regarded personalty, the persons to take under the gift to heirs were the statutory next of kin, also that the words "or other heirs" were words of substitution.

Gittings v. *M'Dermott* (1833), 2 Myl. & K. 69, the words "or heirs" implies a substitution and there is, therefore, no lapse.

Coming now to the construction of the clause of the will, the subject of appeal before us, had the appellant been the illegitimate child of Annie Ferden, afterwards legitimated by marriage in a country recognizing such legitimacy, I would hold upon the authorities, first, that the bequest of the residue had not lapsed, and second, that she was the person entitled under the bequest in the will.

Is a case of an adopted daughter to be dealt with in the same way? In *Robertson* v. *Ives* (1913), 13 E.L.R. 387, Fitzgerald, J. dealt with the question. That was a case under the Statute of Distributions. The learned judge, at p. 389, says:

"We are here only dealing with personal property, and of kinship, and the Statute of Distributions; not of heirship and the descent of land, or with a bequest by will. It is I think well settled that kinship is a question of international comity and international law, under which the *status* of a person claiming such kinship is determined by the law of the country of his origin—the law under which he was born. It is also well settled that the Statute of Distributions applies universally to persons of all countries and races, so that the next of kin of a person would be his next of kin if he has a *status* as such under the law of his domicil, no matter where that may be. *Birtwhistle* v. *Vardell* [(1840)], 7 Cl. & F. 895. *In re Goodman's Trusts* [(1881)], 17 Ch. D. 266, and *In re Grove* [(1888)], 40 Ch. D. 216.

"These cases are, it is true, all cases of legitimacy. They establish the law that such *status* can only be acquired in the case of a child legitimate in a foreign country, but illegitimate under our law by reason of its birth before marriage, when the father, is domiciled in a country which allows the child's legitimacy by subsequent marriage, both at the time of the birth—which gives a capacity to the child of being legitimate—and at the time of the marriage—which gives the *status* of legitimacy to the child. *In re Grove.*

"No decisions as to *status* by adoption were cited before me. I see no good reason however, for not applying the principle of the above decisions to the case of an adopted child, providing such child has a like capacity, and the adopting parent a like domicil at the time of adoption."

GALLIHER, J.A.

It will be noted that he says he was not dealing with a bequest by will, but in *Andros* v. *Andros, supra,* the bequest was to the sons of a named person, and Kay, J. says, at p. 638:

"It must now be treated as settled that any person legitimate according to the law of the domicil of his father at his birth, is legitimate everywhere within the range of international law for the purpose of succeeding to personal property."

So that according to that authority where the question of *status* arises, it would appear that the doctrine is not confined to the Statute of Distributions.

There is this difference between that case and the case at Bar —that there the bequest was direct to the children of a named person, while here the bequest is to a named person or her heirs. In the *Andros* case, on the death of the testator, the question submitted to the Court was, in effect, did the illegitimate grand nephew, afterwards legitimated, share with the children born after wedlock, and it was held that he did. Here, the bequest is to Annie Ferden or her heirs, and we have to construe the meaning of those words "or her heirs."

The ones to take personalty as heirs mean statutory next of

COURT OF APPEAL

1925

June 4.

PURCELL v. HENDRICK

kin (*Whitehead* v. *Hemsley, supra*), and statutory next of kin means nearest blood relations in the ascending and descending line, including those of the half blood. Now, the children of a named person would be interpreted by English law to mean legitimate children, and by applying the foreign law which makes illegitimate children legitimate, you have then a child who answers the requirements of the English law. But next of kin imports blood relationship under our law in interpreting a will made here, and while the law of Massachusetts gives the appellant the rights there of a blood relation, it cannot and does not create her a blood relation in fact, and if it is necessary under an interpretation by our law that she should be such, she cannot succeed.

GALLIHER, J.A.

In the cases of illegitimate children, they are blood relations in fact, though debarred from taking by reason of their illegitimacy, but when that is remedied by applying the international law which declares them in fact legitimate, then, the interpretation "legitimate children" is met. Here, the adoption law of Massachusetts does not in fact declare them blood relations, and in my view there lies the difference between the two lines of cases.

Who are the next of kin must be interpreted by our law—that law says they are blood relations. I think it must be more than giving them rights as such—they must actually be such.

We were referred to our own Adoption Act, Cap. 6, R.S.B.C. 1924, Secs. 7, 8, 9 and 10, but these as I interpret them, are of no assistance to the appellant here.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The appellant, Regina Ferden Hendrick, appeals only in respect to that part of the order declaring that the bequest of the residuary estate to "Annie Ferden or her heirs" lapsed by reason of her death before the testator's decease, creating an intestacy in so far as the residuary estate is concerned. The clause in question reads:

"All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my sister Annie Ferden or her heirs."

In 1891 the appellant, when an adult, was adopted by Annie Ferden in the State of Massachusetts in accordance with the laws of that State, under which an adopted child

"Is an heir of the adopting parent and has the rights of a child born in lawful wedlock and occupies the same *status* towards the adopting parent as if born in wedlock. General Laws, chapter 410, section 7."

This residuary bequest consists of personalty only and the sole question arising is whether or no the adopted daughter (appellant) is within the description "or her heirs." To be within it she must in law be regarded as "next of kin" or natural born daughter. If she can be so regarded, then she takes by substitution on the decease of her mother. The word "heirs," the property being personalty, does not mean "heirs at law," but the statutory next of kin.

As the testator was domiciled in British Columbia, the will must be construed according to local law. This would be undisputed if the appellant were the adopted daughter of the testator; it is no less true because she is the adopted daughter of a legatee domiciled abroad. It is proven that by the laws of Massachusetts an adopted child occupies the same *status* towards the adopting parent as if born in wedlock. The appellant might, therefore, under the foreign jurisdiction, be regarded in law as next of kin to the residuary legatee. Does it follow that she is the statutory next of kin according to our law? Bearing in mind that we are construing a will made in British Columbia by a testator domiciled here, it cannot be treated as if we were deciding how the personal property of Annie Ferden, who lived abroad, would pass in case of her intestacy. The words "or her heirs" must be construed according to our law, and, meaning as it does the statutory next of kin, does the appellant answer that description? To do so, she must by law be regarded as the nearest blood relative in an ascending or descending line. In *In re Fergusson's Will* (1902), 71 L.J., Ch. 360. Then a question of *status* arises. If, by our law, this adopted daughter must be regarded as a blood relative, the gift over to her is valid. It was argued that because by the law of Massachusetts an adopted daughter has all the rights of one born in lawful wedlock, and as our Adoption Act, Cap. 6, R.S.B.C. 1924, shews that a similar policy of recognizing adopted children prevails

MACDONALD, J.A.

COURT OF APPEAL

1925

June 4.

PURCELL v. HENDRICK

here, the *status* of an adopted child is one known to our law. This is reversing the true order of viewing the question. Because "next of kin" is determined by our law, it must be established by considering the law of British Columbia in this respect. Our Adoption Act was passed in 1920. It relates only to the adoption of minors. The appellant was an adult when adopted according to the laws of the State of Massachusetts. Whether the adoption of a minor, under our Act, confers the *status* of a child born in wedlock is not the point. Certainly our Act does not confer that *status* on an adult adopted by foreign parents. This is obvious when we keep in mind that we must, in the first instance, look to our law in construing the will and not, as suggested by the appellant, look first at the foreign law, decide that under it she is in law a blood relation, and then by a second step seek to establish that she has the same *status* here because our law is not repugnant thereto. Even if that method of reaching a conclusion could be adopted, there is repugnancy in our law because we do not recognize the adoption of adults. Section 9 of our Adoption Act would not assist the appellant as it only relates to cases of intestacy. The appellant cannot, therefore, be regarded in British Columbia as a blood relation, or the next of kin of her deceased mother.

MACDONALD, J.A.

It was urged, however, that because by the authorities a child born before wedlock of parents domiciled abroad, but legitimated according to foreign law by subsequent marriage, is entitled to share in the personal estate of an intestate dying domiciled in England as one of the next of kin (*In re Goodman's Trusts* (1881), 17 Ch. 266), the analogy is equally applicable to a child adopted under foreign law seeking to share in personalty in British Columbia. The principles, however, governing the recognition of children legitimated by subsequent marriage rests upon a different basis. These principles are not applicable for the purpose of permitting succession to real estate for reasons based on the English system of heirship. But as to personalty, there is such recognition. It is in accordance with the tenets of Christianity to recognize the *status* of children thus legitimated; it would be iniquitous to hold otherwise. As James, L.J. says at p. 297, in *In re Goodman's Trusts*:

"The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once clearly constituted by the law of any civilized country, should be respected and acknowledged by every other member of the great community of nations."

It might be said that the same principle should be applied to adopted children. There is a distinction, however. They are not blood relations. To withhold its application from children adopted abroad does not carry any stigma nor does it offend against the sanctity of family life. It follows that the bequest of the residuary estate to "Annie Ferden or her heirs" lapsed on her death, and the appeal should be dismissed.

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

Solicitors for appellant: *McAlpine & McAlpine.*
Solicitors for respondent: *Martin & Sullivan.*
Solicitors for all other defendants: *Whiteside, Edmonds & Whiteside.*

REX v. KINNON.

Criminal law—Wages for women—Minimum wage—Girls taking course of training in hairdressing—Application of Act—R.S.B.C. 1924, Cap. 173, Secs. 2 and 8.

The accused is manager of an establishment known as the Moler Beauty College where girls and women are trained in hairdressing, massage, etc. Girls agreed to pay $75 for a course of tuition lasting from three to four months when they would obtain a diploma shewing their proficiency. The method of teaching was that the girls would practise by working on customers of various hairdressing schools which were open to the public who were charged about one quarter of the ordinary charge at a hairdressing shop for the same services, to cover actual expenses, the work being done under experienced instructors. The girls were credited with 25 per cent. commission of the moneys received from customers served by them. A charge of an infraction of the Minimum Wage Act was dismissed.

HUNTER, C.J.B.C.

1925

April 1.

REX v. KINNON

Held, on appeal, by way of case stated, that in the circumstances these girls cannot be styled as employees and the fact that they received some remuneration does not alter the relationship.

APPEAL by way of case stated from the decision of J. A. Findlay, deputy police magistrate, Vancouver, dismissing a charge against the accused for employing girls at wages less than the minimum wage fixed by the Minimum Wage Act. The case stated is as follows:

"On the 16th of January, 1925, an information was laid against the defendant (respondent) charging him with, being an employer within the meaning of the Minimum Wage Act, did unlawfully employ Miss M. Sawyer, Miss Butchart and Miss W. Sullivan, employees for whom a minimum wage was then fixed under the Minimum Wage Act, for less than the minimum wage so fixed, contrary to the provisions of section 8 of the Minimum Wage Act, and contrary to the order of the minimum wage board governing personal service occupation, which came into force the 15th of September, 1919.

"The said charge was disposed of by me on the 18th of February, 1925, when I dismissed the information.

"I find the following facts:

"1. The defendant (respondent) is the manager of an establishment known as the Moler Beauty College, where girls and women are trained in the business of hairdressing, massage, etc., and has been engaged in a like business in the City of Vancouver since the year 1909.

"2. The girls mentioned in the information had all agreed to pay the defendant $75 for a course of tuition in the said college, sometimes a tuition fee was paid in advance, sometimes part cash and part by instalments.

Statement

"3. The method of teaching the business of hairdressing is briefly as follows: The girls get actual practice by working on customers of the various hairdressing schools run by the defendant in connection with the college. These schools are open to the public and the prices charged to customers by the defendant are about 25 per cent. of the ordinary price charged by hairdressing shops performing similar services with experienced operators. This charge was to cover actual costs of operating. Experienced instructors are employed to instruct students only.

"4. The course of tuition was to last on the average from three to four months, after which the students, if qualified, would get diplomas shewing them to be proficient in the particular work they were learning, and the defendant would then assist them to get employment in regular hairdressing shops.

"5. Part of the contract with the defendant was that the girls would receive a 25 per cent. commission on the moneys received from customers served by them; and I also find that the defendant advertised that the girls would be paid from the start, but there is no evidence that these

advertisements were brought to the notice of the girls mentioned in the information.

"6. When tuition fees were owing by the girls, commissions accruing to them would be applied by the defendant in payment of notes given for the balance of tuition.

"7. The girls mentioned in the information had been attending the college from three to five months, but none had as yet graduated, *i.e.*, passed final tests.

"8. At the dates mentioned in the information none of the girls was receiving commissions from the defendant equal to the minimum wage set for employees in the personal service occupation under which designation hairdressing is included in the order made by the minimum wage board.

"I came to the conclusion that they were not there under employment. They were there for the purpose of learning something as students and paid a tuition fee, and that, therefore, the Minimum Wage Act did not apply.

Statement

"The question submitted for the judgment of this Honourable Court is:

"Was I right in holding that the relationship of employer and employee did not exist within the meaning of the Minimum Wage Act?"

Argued before HUNTER, C.J.B.C. at Vancouver on the 1st of April, 1925.

Orr, for appellant: The girls employed are in receipt of compensation and are employees. They are doing the same work as persons employed in a regular barber shop.

Maitland, for respondent: The defendant is employed to teach, and the girls are not under his direction or control, nor is he responsible to them for any wages. They do not come under the apprentice sections.

Argument

HUNTER, C.J.B.C.: I think the magistrate was right. It is impossible to say that these girls should be styled as employees. The fact that they received some remuneration does not alter the relationship.

Judgment

Appeal dismissed.

COURT OF APPEAL

1925

March 26.

DAVIDSON v. NORTH WESTERN DREDGING CO.

DAVIDSON AND VANCOUVER TERMINAL GRAIN COMPANY, LIMITED v. NORTH WESTERN DREDGING COMPANY, LIMITED, AND VANCOUVER HARBOUR COMMISSIONERS.

Injunction—Damage to elevator through blasting—Interim order—Various views of experts as to effect of blasting—Dissolved on defendant's application—Appeal.

The plaintiff Company having constructed an elevator on the Vancouver City waterfront contracted with the Vancouver Harbour Commissioners for shipping facilities in the way of the construction of a jetty in front of the elevator. The work required considerable dredging which included underwater blasting. The elevator was nearly completed when the defendants commenced blasting and shortly after cracks appeared in certain parts of the elevator. The blasting stopped for a short time and when the defendants proposed to continue the blasting the plaintiffs obtained an *interim* injunction restraining them from proceeding with this work. The defendants moved to dissolve the injunction and several experts on both sides made affidavits as to the effect of the blasting on the elevator and they were cross-examined upon them. The *interim* injunction was dissolved.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that where there are a number of experts on both sides all eminent men expressing opinions as to the effect of blasting, one set saying that it had no injurious effect on the elevator, and the other set expressing opinions to the contrary, creating a position in which there would be great difficulty in deciding which is right, it would be wrong to interfere with the ordinary rights of one of the parties from proceeding with the business they have in hand.

Per MARTIN and MCPHILLIPS, JJ.A.: That there is undisputed evidence that the damage done to the elevator as evidenced by cracks can be attributed to the blasting and an interlocutory injunction should be granted restraining the defendants until the hearing of the action from carrying on blasting in such a manner as to injure the elevator.

The Court being equally divided the appeal was dismissed.

Statement

APPEAL by plaintiffs from the order of MORRISON, J. of the 19th of March, 1925, dissolving an injunction of MACDONALD, J. of the 19th of January, 1925, in an action for damages to an elevator under construction by John L. Davidson for the Vancouver Terminal Grain Company, Limited, on lot 1, block

1, subdivision "E," district lot 183, in the City of Vancouver and close to the water's edge of Vancouver Harbour. The defendants, the Vancouver Harbour Commissioners had a contract with the Vancouver Terminal Grain Company to supply certain shipping facilities and it was necessary to construct a shipping jetty in front of the elevator. This work required considerable dredging of which blasting was a necessary part. Construction of the elevator was commenced in March, 1924. The foundation work, workhouse, and track-shed were completed on the 1st of August, 1924, and the superstructure was completed to the roof on the 29th of August following. In September following, the defendants moved their drill-scow to the site of the jetty and commenced blasting and the plaintiffs complained that there was a crack in the north basement wall of the track-shed that extended two-thirds of the way across the track-floor slab and later another crack appeared on the east basement wall of the track-shed. In the beginning of October the drill-scow moved away but it came back again on the 20th of October and renewed the blasting when new cracks appeared in the basement slab and the track floor where it joins the workhouse. The blasting continued to the 7th of November when the drill-scow was moved away and after its removal no more cracks appeared in the elevator. The blasting up to this time was more than 150 feet away from the elevator but the defendants proposed to continue the blasting until within 35 feet of the elevator and on the plaintiff's application an *interim* injunction was granted by MACDONALD, J. on the 19th of January, 1925. Affidavits were filed by several experts on both sides as to the effect of the blasting and they were all cross-examined on their affidavits. On the 19th of March the injunction was dissolved by MORRISON, J. and the plaintiffs appealed to the Court of Appeal. As the defendants threatened to go on with the blasting at once the plaintiffs applied *ex parte* on the 19th of March to the Court of Appeal for an *interim* injunction pending the hearing of the appeal and this was granted.

Statement

The appeal was argued at Vancouver on the 24th, 25th and 26th of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

COURT OF APPEAL

1925

March 26.

DAVIDSON v. NORTH WESTERN DREDGING CO.

Mayers (*W. S. Lane,* with him), for appellants: The Grain Company have a lease for 99 years and the elevator was completed on the 20th of January, 1925. There are three parts. The storage building, the workhouse, and the track-shed. It is the track-shed where the damage is done. When the tide is full it washes the north side of the building and there are jetties on each side. The cracks appeared during the blasting but when it ceased no more cracks appeared. Damages are not an appropriate remedy: see *Gross* v. *Wright* (1923), S.C.R. 214 at pp. 230-2; *Shelfer* v. *City of London Electric Lighting Company* (1895), 1 Ch. 287. On the question of continuing injunction until trial see *Miller* v. *Campbell* (1903), 14 Man. L.R. 437 at p. 446; *Thompson* v. *Baldry* (1912), 22 Man. L.R. 76; *Wood* v. *Sutcliffe* (1851), 2 Sim. (N.S.) 163 at p. 166. Granting the injunction will not put the defendants in serious difficulties: see *Pinchin* v. *London and Blackwall Railway Co.* (1854), 5 De.G.M. & G. 851 at p. 860; *Attorney-General* v. *Sheffield Gas Consumers Co.* (1852), 3 De G.M. & G. 304 at p. 320; *Cory* v. *The Yarmouth and Norwich Railway Company* (1844), 3 Hare 593 at p. 602.

Argument

J. W. deB. Farris, K.C. (*Sloan,* with him), for respondents: We have had the opinion of experts on both sides and it is a matter of grave doubt as to the cause of the cracks in the elevator. The Court should not interfere in such a case; it should be left for disposal at the trial: see *Mogul Steamship Co.* v. *M'Gregor, Gow, & Co.* (1885), 15 Q.B.D. 476 at p. 485; *Playter* v. *Lucas* (1921), 51 O.L.R. 492. In order to succeed they must shew (1) that the damages would be irreparable; (2) that there is a threat on our part to do the damage: see *Playter* v. *Lucas, supra,* at pp. 495-7; *Canadian-Klondyke Power Co.* v. *Northern Light, Etc. Co.* (1916), 27 D.L.R. 134.

Mayers, in reply, referred to *Seattle Construction Co.* v. *Grant Smith & Co.* (1916), 22 B.C. 433; *Centre Star* v. *Iron Mask* (1898), 6 B.C. 355; 1 M.M.C. 267; *Saunby* v. *City of London Water Commissioners and City of London* (1905), 75 L.J., P.C. 25.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The first question to be considered is

whether or not the applicant for the *interim* injunction has made out his case, and in order to view that in its proper light, one must look at the authorities on the question. Mr. *Mayers* cited to us the judgment of Killam, C.J. in *Miller* v. *Campbell* (1903), 14 Man. L.R. 437. It will be seen in the first place that the learned judge to whom the application was first made thought it a proper case for the granting of an injunction. On appeal the Court refused to disturb the order and held that the discretion exercised by the judge was rightly exercised.

Mr. Justice Killam at p. 448 says:

"It appears to me that a case was presented which called for the consideration by the learned judge of the question whether, balancing the evidence for and against the probability of injury and the relative inconvenience and loss to the parties by interposing or refusing to interpose, an injunction should be granted. I do not think it necessary that each member of the Court should now determine individually whether he would or would not have decided to grant the injunction."

I refer next to *Mogul Steamship Co.* v. *M'Gregor, Gow, & Co.* (1885), 15 Q.B.D. 476. Lord Coleridge, C.J., in delivering the judgment of the Court, said this at p. 483:

"Now, it is to be observed that this is an application for an interlocutory or *interim* injunction before the trial of the action. It is certainly conceivable that such a conspiracy,—because conspiracy undoubtedly it is,—as this might be proved in point of fact: and I do not entertain any doubt, nor does my learned brother, that, if such a conspiracy were proved in point of fact, and the *intuitus* of the conspirators were made out to be, not the mere honest support and maintenance of the defendants' trade, but the destruction of the plaintiff's trade, and their consequent ruin as merchants, it would be an offence for which an indictment for conspiracy, and, if an indictment, then an action for conspiracy, would lie."

MACDONALD, C.J.A.

In the case of *Playter* v. *Lucas* (1921), 51 O.L.R. 492, I am reading now from page 497 a quotation which was made from the judgment of Mr. Justice Moss of the Court of Appeal in *Dwyre* v. *Ottawa* (1898), 25 A.R. 121 at p. 130; it was said:

"'Where the legal right is not sufficiently clear to enable the Court to form an opinion it will generally be governed in deciding an application for an *interim* injunction by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the order.'"

Treating this case as a substantive motion, which it is, and not as an appeal from Mr. Justice MORRISON, we have to be satisfied that the applicant has made out a case for an *interim* injunction. An *interim* injunction interferes and is intended

COURT OF APPEAL

1925

March 26.

DAVIDSON v. NORTH WESTERN DREDGING CO.

to interfere with the exercise of civil rights. In this case it is the civil right of the Vancouver Harbour Commissioners to excavate in the harbour. *Prima facie* they had that right. It is admitted that there are limitations to the right; they must not excavate to the injury of others, and therefore the question always arises, when an injunction is applied for, have the applicants for the injunction made out that what the defendants are doing is injurious to them? That is a question of fact. We must draw our inferences from the evidence. We must not interfere with the ordinary course of the exercise of legal rights unless we are satisfied that the damage which is anticipated, or which has occurred is attributable to the exercise of those rights.

Now we have a number of experts on both sides, all eminent men in their profession, expressing opinions as to the effect of the blasting complained of. One set of experts say that it has had no injurious effect on this building; the other experts express opinions to the contrary, and I must confess that if I were trying this action, on the evidence now before me, I should have very great difficulty in deciding which side is right. Now in that state of mind, it would be very wrong indeed to interfere with one party and to enjoin him from proceeding with the business in hand for the protection, or alleged protection, or supposed protection of the other.

MACDONALD, C.J.A.

Apart from this, I think, the balance of convenience is in favour of the defendants. They are conducting, not exactly a public work, but one in the nature of a public work, a public utility. They have contracted to give to the plaintiff the facility which this excavation will lead to, and in pursuance of that contract, they have undertaken this work. It is very true, that if it were clear that they were actually damaging the building, that would be no answer, but I am not satisfied that injury is being done. The witnesses of the plaintiff have made out a very strong case, in a sense, by attempting to exclude all other causes, and to lay it to the cause complained of. On the other hand, the witnesses for the defendants have given just as positive evidence that the blasting operations could not have affected the building.

With regard to the case of *Miller* v. *Campbell* (1903), 14

Man. L.R. 437 I have this further observation to make. It has been relied upon by Mr. *Mayers*. It is a judgment of the highest Court of Manitoba, and was delivered by a most eminent judge, Chief Justice Killam, but when one reads that judgment he will find that the learned Chief Justice bases it entirely upon this: he says that the judge before whom the application came in the first instance, and from whom the appeal was taken, had a wide discretion in matters of this kind and that he exercised that discretion. In this case the first injunction was dissolved. The same question comes before us on substantive motion, while not quite that concise it is nearly so.

MACDONALD, C.J.A.

When one comes to analyze *Miller* v. *Campbell*, one finds that it is not an authority against what I think ought to be done in this case. The motion should be dismissed. Costs to follow the event.

MARTIN, J.A.: With great respect to those of the contrary opinion, I think the applicant here, or one of them at least, has brought himself within the principle for granting an *interim* injunction of this nature.

I have looked into a number of the statements of those principles, and I found them nowhere so well laid down as by Chief Justice Killam, in *Miller* v. *Campbell* (1903), 14 Man. L.R. 437, where he gave the judgment of the Full Court of Manitoba.

MARTIN, J.A.

While it is perfectly true, as my brother pointed out in that particular case, it came before that Court in a different way from that in which this applicant comes before us, and that the learned Chief Justice did say that he thought it was not a case where the Appellate Court would be justified in disturbing the view of the judge below, yet in dealing with that particular situation he made some observations as to the principles, rather I should say not observations, but citations of the established rules and principles upon which the Court would act in general in such cases and how his own Court should conduct itself in the consideration of them. After having examined that case very carefully and noting that the facts are different, yet I do not hesitate to say that the facts in this case are stronger than those in the case in Manitoba, because here we have evidence that

COURT OF APPEAL

1925

March 26.

DAVIDSON v. NORTH WESTERN DREDGING CO.

since blasting began, undisputed evidence, that serious damage has been done to this building in the shape of cracks, attributed by their respective sizes to varying causes, whereas in the Manitoba case, the Chief Justice pointed out that admittedly there was no visible sign of any injury being done to the plaintiff's building by vibration; and then he went on to lay down the principle that should be applied to such a state of affairs as this, *viz.*: that where there was a reasonable expectation of injury being attributed to it, that would really dispose of the matter: he says, p. 448, that "It appears to me that a case was presented which called for the consideration by the learned judge" (that is, was presented to the judge below, just as the case was presented to us here) "of the question whether, balancing the evidence for and against the probability of injury and the relative inconvenience and loss to the parties by interposing or refusing to interpose, an injunction should be granted." That was the question for the Court below in Manitoba, and is the question for us today.

MARTIN, J.A.

Therefore, upon the facts, I can only say I consider the case at Bar considerably stronger than the Manitoba case, and I have no doubt if this matter had come before me *solus,* I should have felt warranted, on the application of the principle, not the facts, but of the principle, in the Manitoba case, to grant this injunction.

Just a few words as to the *Mogul Steamship Co.* case, which I mention because of the great stress laid upon it by the learned counsel for the respondent, opposing the motion. That case is a very peculiar one in every respect, and Lord Coleridge, C.J., in giving the judgment (there were only two judges in the Queen's Bench Division), points out that he does so on all the grounds before him, and one to which he draws very considerable attention is this very remarkable one which alone would have been sufficient to prevent the plaintiff succeeding: he points out on p. 486 that for six years the applicant for the injunction had known of the state of affairs, yet had never taken any steps to correct them. When I said that it was a very unusual case, I did it on the authority of the learned Chief

Justice himself, when he said "it is admitted that this is a novel application"—p. 487.

I have only to add, in regard to the suggestion that the contractor here should not be merely in occupation of the premises under the contract but should have the same basis for his application as if he were the owner himself, that, with all respect, how can that be possible when the owner on the record is supported by the same counsel on this application? I am unable to see how it can. It could not be said that when two people are pulling in the same legal boat towards the same port that they are pulling different strokes, though represented by the same counsel who says their interests are identical, and support them upon that ground. I cite two cases for that: *Pwllbach Colliery Company, Limited* v. *Woodman* (1915), A.C. 634, where a butcher who was only a lessee brought an action against the colliery company because it allowed dust to escape from the mine which injured his goods. The other is *Hoare & Co., Lim.* v. *Sir Robert McAlpine, Sons & Co.* (1922), 92 L.J., Ch. 81, wherein an action by the lessee of a hotel in London was supported, and wherein he got damages for the vibration caused to his hotel. There the application for the injunction fell to the ground because during the course of the proceedings the excavation and building of the adjacent house which caused the vibration became so serious that the hotel building was so damaged that it had to be torn down and there was no question of an injunction for the reason for it had disappeared, but the lessee stood fully in the shoes of the landlord so far as the assertion of his rights were concerned, even though the landlord's shoes were not within the Court. That is the point I make on that.

MARTIN, J.A.

I have only to add that in *National Telephone Company* v. *Baker* (1893), 2 Ch. 186 (in relation to what was said as to the desirability of tests being taken by the trial judge if he saw fit) a test of that kind was taken by the trial judge upon the consent of the parties in respect of the rights of the National Telephone Company and the Tramway Company of Leeds. For those reasons, I am of opinion that the grounds for this motion have been satisfactorily established, and it should be granted.

COURT OF APPEAL

1925

March 26.

DAVIDSON v. NORTH WESTERN DREDGING CO.

GALLIHER, J.A.

GALLIHER, J.A.: In my opinion the evidence is not sufficient to warrant me granting the application.

I agree to a great extent with what the Chief Justice has said in his reasons for judgment, and it is not necessary for me to repeat them. I, moreover, think that under all the circumstances of this case, that the contractor is really in the realm of damages, and, the actions and statements of the owner himself are indicative of this, as I view it, that he expects his building to be replaced if it is damaged. He is not looking for anything else.

I have not, of course, had time to examine the cases. I am not in a position to say just how far the facts in those cases apply to the facts in this case, because, after all, cases are decided; each case is practically decided on its own facts. One of them referred to was a case of damage to goods of a tenant by dust, and the fact as to whether he owned the place or did not, and whether he was the tenant or not does not seem to enter into it. I am not going so much upon that as I am on the other ground, and to my mind I would not be justified in holding up or stopping this work without being more satisfied than I am that the damage that has been caused here was caused by the blasting that has taken place.

Now, moreover, if the blasting starts again and it is clearly shewn that at once after the blasting commences, other cracks appear, then certainly it would strengthen the plaintiff's case, and strengthen his reasons for an injunction.

In my opinion, the application should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of opinion that the motion should be acceded to.

There are certain fundamentals in jurisprudence, one of which is that a man shall not be affected in his property, or his property injuriously affected, except only where there is statutory authority, *i.e.*, that which is paramount.

We have here interference with property. The question is, has there been that which is termed a *prima facie* case made out? In this particular case, certain things have happened; certain damage has accrued; the cracks have been observed by

engineers and passed upon, and testimony given in respect of that. The occurrences that are taking place are well known, and the whole matter now is, whether adding all these things together a *prima facie* case has been made out of possible irreparable damage? The Court of Chancery never required that the case should be made out beyond the question of a doubt, much less than that, reasonable apprehension of danger or threat made would suffice.

Now in that connection I would like to refer to the evidence of Mr. Burwell, an engineer of eminence in the City of Vancouver; there is no question about his standing nor his independence as a professional man, one who is thoroughly acquainted with the local conditions, and I pay a great deal of attention to what he said, especially as he is called by the defendants, and, presumably, they are introducing evidence which they think will help their case. What did he say?

"We don't know what the strata is, but those things all have a bearing on the effect caused or the shock created. That is right, isn't it? Yes.

"We have referred to the cracks in the track-floor slab and the cracks in the basement floor, and the cracks down the north wall? Yes.

"In addition to that there are a series of cracks in the girders? Yes.

MCPHILLIPS, J.A.

"We will take the girders, they are shewn on the plan running across? Yes.

"And these girders, a great many of these girders are cracked? Yes.

"It would appear that perhaps 50 per cent. of them at least are cracked? Yes.

"You have made an examination of these cracks? Yes.

"What do you say caused those cracks? On account of their uniformity, it looks to me; the cracks on the girders at each end towards the wall are on the underside of the girders. The cracks in the centre portions, in the girders, are generally on the top side of the girders, and the cracks increase as you get from the east wall towards the centre of the building over here. The cracks in these girders are larger than in the girders to the east.

"That is the cracks nearest to—— Nearer the central portion of the unloading shed building.

"The cracks nearest the south wall of the girders are larger? No.

"This is the north wall here? I am referring to the north and south wall; the cracks in these walls are on the underside of the girders.

"Yes, and in the centre? And in the centre portion they are on the top side of the girders.

"How do you account for them being open at the bottom towards the ends; how do you account for that? It looks like an upward lift in the centre portion of the floor slab. It would indicate an upward lift in the central portion of the floor slab.

COURT OF APPEAL

1925

March 26.

DAVIDSON v. NORTH WESTERN DREDGING CO.

"There is a thrust from underneath somehow or other? Yes, I think I stated before that the cracks in the central girders are larger than the cracks on the girders towards the east wall."

To my mind, there has been given in this way the most material evidence that it is an upward thrust that has caused this damage. What would be the upward thrust, when you consider the local circumstances? It might be, it is true, an earthquake, but there is no evidence of there having been an earthquake. What was it, then? It would not be the sinking of the building. It is all put on the upward thrust, and the upward thrust would reasonably and naturally be the explosion acting on the strata and material that exists in the harbour.

The true application of the rules of jurisprudence is to act in the interests of justice, and if there is reasonable apprehension of irreparable damage an injunction is proper.

If there is likely to be any great hardship worked the Court can put the parties on terms to speed the action, and maintain the injunction in the meantime. It would be a monstrous thing that the blasting should go on, and in its result bring about the destruction of this property, because one of the defendants happens to be the Vancouver Harbour Commissioners does not entitle them to any different consideration unless they are able to say here, as I have said at the outset, that there is some statutory right or immunity enjoyed by the Harbour Commissioners.

MCPHILLIPS, J.A.

We have the evidence that it was required that these plaintiffs, this Company, the Vancouver Terminal Grain Company, Limited, should expend no less than a million and a half dollars, and bring about the construction of a modern and up-to-date elevator. The capital was introduced, and induced to come here upon the representations made and a lease was granted, and the lease has in it a covenant for quiet enjoyment, which means that the lessors, the Harbour Commissioners, can do nothing upon their part to interfere with that quiet enjoyment, and there was the right to come to this Court *simpliciter* under the covenant for quiet enjoyment and obtain an injunction to restrain the Harbour Commissioners from doing anything which would bring about a breach of that covenant.

We had a case right in the City of Vancouver some years

ago where an injunction was granted and afterwards made perpetual. The case went on appeal to the Supreme Court of Canada, and there was an attempt to appeal to the Privy Council, but it was refused. That was the case of *Champion & White* v. *City of Vancouver* (1916), 23 B.C. 221.

A sea-wall was authorized by Parliament to be constructed in this City at False Creek, and in so doing, they were affecting the proprietors of a wharf, the statute giving no immunity from damages. It had the effect of practically cutting them off from their access to their wharf. That action was tried here, and an injunction was obtained from the Chief Justice of British Columbia. The Supreme Court of Canada sustained the view of the Chief Justice, and a perpetual injunction was granted. I have before me the report of the case in the Supreme Court of Canada ((1918), 1 W.W.R. 216) and in the head-note we have the statement which effectively meets the suggestion that in any case it is only a question of damages:

"In such a case there is no discretion in the Court to award damages only in lieu of injunction."

MCPHILLIPS, J.A.

Similarly, in this case, there is no discretion in the Court to allow damages in lieu of injunction. Mr. *Farris* strongly pressed that the Harbour Commissioners were a body who could pay the damages, and that the building could be thrown down and rebuilt, and thrown down and rebuilt. That might be. It is the people's money, I suppose, and the people may be called upon in the annual budget. I do not think that ought to influence us; the Harbour Commissioners must proceed as other reasonable men must proceed, and be restrained if they proceed wrongly. As I intimated a little ago, if the Harbour Commissioners can produce an Act of Parliament which entitles them to do what they are doing, that is, proceed with their work irrespective of damage to property of others, then that is the end of it; no injunction would be permissible.

In *Saunby* v. *City of London Water Commissioners and City of London* (1905), 75 L.J., P.C. 25, Lord Davey, who delivered the judgment of their Lordships, said this (p. 27):

"It was contended by Mr. Aylesworth that at any rate the Court, in the exercise of its discretion, should have given the appellant a judgment for damages only, and not for an injunction. The acts complained of

COURT OF APPEAL

1925

March 26.

DAVIDSON v. NORTH WESTERN DREDGING CO.

in the present case are an illegal taking of the appellant's land, and an interference with the free use by him of his property, and the damages have been found to be of a substantial character. It has been frequently pointed out that to refuse an injunction in such a case would be to enable the defendant to expropriate the plaintiff without statutory authority, or without following the procedure pointed out by the statutory authority (if any)."

From out of the folds of their own case the defendants, through their principal expert, has had to admit, as I have intimated a little ago, that the damage which is apparent, and was inspected by himself over a considerable period of time, was because of an upward thrust.

MCPHILLIPS, J.A.

Now, what was the upward thrust? From the evidence before me, I have come to but one conclusion, the Court must proceed upon evidence and that evidence establishes that the blasting is the cause of the injuries to the building. The Court should preserve the *res,* not have it demolished, and let some order be made if need be, that the parties proceed to trial within a few days if possible, and in the *interim* the injunction be granted. That would be the order I would make.

The Court being equally divided the appeal was dismissed.

Solicitors for appellants: *Lane, Wood & Company.*
Solicitors for respondents: *Farris, Farris, Stultz & Sloan.*

IN RE (MRS.) MARY ANN McADAM.

MACDONALD, J.

1925

June 16.

IN RE MARY ANN McADAM

Testator's Family Maintenance Act—Application to adopted daughter—Domiciled in State of California—Application of Act—R.S.B.C. 1924, Cap. 256, Sec. 3.

Section 3 of the Testator's Family Maintenance Act provides, *inter alia*, that if any person dies leaving a will and without making therein, in the opinion of the judge before whom the application is made, adequate provision for a child, the Court may, in its discretion, on an application being made, order that such provision as the Court thinks adequate, just, and equitable in the circumstances, be made out of the estate of the testator for the child.

A. and his wife resided in the State of California where they adopted a girl in compliance with the laws of that State. A. died, and his wife moved to British Columbia, the child having in the meantime married, remaining in California. The wife died in the City of Vancouver in 1923, and by her will bestowed her property on relatives and strangers asserting that her husband had made ample provision for the child. In the meantime the daughter through bad investments lost her money and her husband having little business capacity she had to earn money by outside work to maintain her family. On an application by the daughter under section 3 of the Testator's Family Maintenance Act:—

Held, that in order to effect a proper legal adoption there should be a substantial compliance with all the essential requirements of the statute in force in the country where the adoption takes place, the burden of proof resting upon the party asserting it, and this burden was fully satisfied, this position being indicated by the fact that when her adopted father died intestate she inherited under the laws of California one-quarter of his estate.

Held, further, that the rights and liabilities of an adoption are based upon the law of the locality in which it occurs and such rights are not lost through her adopted mother leaving California and taking up her residence in British Columbia.

Held, further, that an alien non-resident child is entitled to utilize the provisions of the Testator's Family Maintenance Act.

PETITION by an adopted daughter of the late James McAdam and the late Mrs. McAdam for such provision as the Court deems adequate and just out of the estate of the late Mrs. McAdam under section 3 of the Testator's Family Maintenance Act. Mr. and Mrs. McAdam lived in the State of California, where they adopted a daughter, Pearl Ellen, an only child, under the laws of the State of California, who sub-

Statement

MACDONALD, J.

1925

June 16.

IN RE MARY ANN MCADAM

Statement

sequently became the wife of William H. Seybold. After the death of Mr. McAdam, his widow moved to British Columbia and the daughter continued to reside with her husband in California. Mrs. McAdam died in the City of Vancouver on the 23rd of December, 1923, leaving a net estate of $33,000 and by her will gave her estate to relations and strangers leaving nothing to her adopted daughter, asserting as a reason that the daughter had been sufficiently provided for by her late husband. Mrs. Seybold had in the meantime lost all her money through bad investments by her husband and was required to earn wages by outside work to maintain her family. Heard by MACDONALD, J. at Vancouver on the 19th of May, 1925.

A. E. Bull, for the petitioner.
Housser, for the executors.

16th June, 1925.

MACDONALD, J.: Mrs. McAdam, widow of James McAdam, died on the 23rd of December, 1923, at Vancouver, B.C., leaving real and personal estate. The net amount of her estate, after deducting debts and liabilities, was approximately $33,000. Her only child, was an adopted daughter, Pearl Ellen Seybold, the wife of William H. Seybold of Pasadena, California. Mrs. McAdam, by her will and codicils, bestowed her property upon relatives and strangers, but did not give any appreciable portion of it, to her adopted daughter. She asserted as a reason that she considered Mrs. Seybold "has been amply provided for out of the estate of my late husband, James McAdam." Mrs. Seybold, under these circumstances, now invokes the provisions of the Testator's Family Maintenance Act, R.S.B.C. 1924, Cap. 256, and particularly section 3 thereof, reading as follows:

Judgment

"3. Notwithstanding the provisions of any law or statute to the contrary, if any person (hereinafter called the "testator") dies leaving a will and without making therein, in the opinion of the judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may, in its discretion, on the application by or on behalf of the wife, or of the husband, or of a child or children, order that such provision as the Court thinks adequate, just, and equitable in the circumstances shall be made out of the estate of the testator for the wife, husband, or children."

She applies to the Court under this legislation for an order directing proper provision in her favour.

It is contended by counsel for the executors, and most of the beneficiaries under the will, that the statute is not applicable, and affords no relief to the petitioner, as she was only an adopted child of Mrs. McAdam, and is an alien residing in California.

The law of England, strictly speaking, knows nothing of adoption, and does not recognize any rights, claims or duties arising out of such a relation, except as the outcome of an express or implied contract. Eversley on Domestic Relations, 3rd Ed., 174; *Cf. Blaybourough* v. *Brantford Gas Co.* (1909), 18 O.L.R. 243 and cases there cited, also *Re Quai Shing* (1898), 6 B.C. 86.

While adoption is thus unknown to the common law, still it has been recognized and so created by legislation, that the legal relationship of parent and child fully exists. In order to effect proper legal adoption, there should be, at least, a substantial compliance, with all the essential requirements of any statute in force in the country where adoption takes place. The burden of proving such compliance rests upon the party asserting it, even though the tendency of the Courts may be, not to insist upon a strict compliance with such further statutory requirements, I find that this burden has been fully satisfied. There was proper evidence to that effect, and the position of Mrs. Seybold, as an adopted child of Mr. and Mrs. McAdam and having the same rights, as if she were their natural born child, existed in California, where they were all domiciled. This position is not proved but indicated, by the fact, that when her adopted father died intestate, she inherited, under the laws of California, one-quarter of his estate. I think the rights and liabilities of an adoption are based upon the law of the locality in which it occurs. Once legal adoption takes place, it cannot be lightly destroyed. It is binding upon all parties concerned. So, if, as I have found, the adoption of Mrs. Seybold was legal in California, it thereby gave her the same standing and rights, as if she were the natural born child of her adoptive parents, no matter where they might reside in the future. She did not lose such rights through Mrs. McAdam leaving California and taking up her residence in British Columbia. In coming to a conclusion on this point, I refer to the judgments of the majority

Judgment

MACDONALD, J.
1925
June 16.
IN RE MARY ANN MCADAM

of the judges, recently rendered, by the Court of Appeal, in *Purcell* v. *Hendrick* (not yet reported*) and the cases there cited.

Then it is contended that the Testator's Family Maintenance Act does not apply to the appellant, as she has always been an alien, residing in California. It is common ground that she was born in that State, and has been residing there ever since. Does this fact destroy the effect of the legislation, enacted in this Province, conferring upon the Court power to make adequate provision for the children of the testator, where the will is not effectual for that purpose? Did the obligation resting upon Mrs. McAdam while living in California cease to exist when she came to reside and make her home in British Columbia? In support of the contention that the Act is not applicable to an alien non-resident, a passage from Maxwell on the Interpretation of Statutes, 6th Ed., p. 257, reading as follows, is cited:

"In the absence of an intention clearly expressed or to be inferred either from its language, or from the object or subject-matter, or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom."

Judgment

Also the case of *Jefferys* v. *Boosey* (1854), 4 H.L. Cas. 815 is referred to, in support of the contention, as to the non-applicability of the Act. This case, as well as the reference to Maxwell, are referred to, in *Krzus* v. *Crow's Nest Pass Coal Company, Limited* (1912), A.C. 590. By analogy, it appears to me, that such case effectually destroys the contention that the Testator's Family Maintenance Act cannot be utilized, for the benefit of an alien non-resident child. In that case, it was contended that the British Columbia Workmen's Compensation Act did not afford any redress, by way of compensation, to the widow of an alien workman, who lost his life by an accident, while in employment in British Columbia, notwithstanding the fact that such widow was residing in a foreign country at the time of both of the accident and the death. She was, however, held entitled to the benefit of such Act. In thus construing the Act in question, I may have given it a liberal construction, but in so doing, I have considered that the purpose of the legislation

* Since reported, *ante* p. 516.

was to assist a class of persons who had not been fairly dealt with by a testator, and that the applicant came within its scope.

I have borne in mind the provisions of the Interpretation Act as to the rules to be applied in construing our statutes, as follows:

"Every Act and every provision or enactment thereof shall be deemed remedial . . . . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning and spirit."

Mrs. Seybold, in my opinion, thus being entitled to utilize the provisions of the Act, the point to be determined is, whether provision should be made for her out of the estate of Mrs. McAdam, and, if so, to what extent?

The application of Mrs. Seybold under the Act, for an order that adequate provision be made for her proper maintenance and support out of the estate of the late Mrs. McAdam, is well founded. I do not think that she is deprived of this right, by the fact that she was married in 1917 and has not been supported by either of her parents since that time. Nor has the reason given by Mrs. McAdam in her will for depriving her adopted daughter of any share in her estate any effect. If the will had come into operation through death, at the time when Mrs. Seybold was in possession of and enjoying the share of her father's estate, which she had acquired through his death, then such acquisition might have been a ground for contention that she did not require assistance, and the provisions of the Act might not have been successfully invoked. The property that she had thus received had, however, at the time of the death of her mother, been lost in the meantime, in a great measure through bad investment and mismanagement. Her husband apparently was, to a great extent, if not entirely, the cause of this result. He was a baker by trade but had launched extensively into business with the assistance of money supplied by his wife. The venture proved so disastrous that he had been required to take part in bankruptcy proceedings on two occasions. Of late he has turned his attention to selling real estate, but if one were to judge from results, he has very little business capacity. There is no doubt that Mrs. Seybold was, at the time of her mother's death, and still is, clamant. She is in need "of proper

Judgment

MACDONALD, J.
1925
June 16.
IN RE MARY ANN MCADAM

maintenance and support." This is borne out, not only by her own statement to that effect, but is emphasized by the fact that in addition to her household duties, in order to assist the family, she earns wages, by work outside of her home. In this connection, it is worthy of remark that the husband has not been so successful in contributing to the family exchequer.

The Act in question, is not intended to redistribute, as it were, the property of the testator or, in the words of Stout, C.J. in *Allardice* v. *Allardice* (1910), 29 N.Z.L.R. 959 at p. 969, in referring to the statute of that Dominion, from which our legislation is taken:

"The Act is not a statute to empower the Court to make a new will for the testator."

The difficulty arises as to the rule that should be adopted by the Court in utilizing the legislation and thus interfering with the wish of the testatrix, in disposing of property. No set rule could well be formulated, as each case must necessarily depend upon its own circumstances and be left to judicial discretion, to be exercised as well as possible. Considerable assistance is obtained, however, from the decisions in New Zealand, particularly the case of *Allardice* v. *Allardice, supra,* where this difficulty was discussed. The Chief Justice thought that in considering claims made by children, the manner in which they have been maintained in the past should not be overlooked. But where a situation exists, as in this case, this observation is not applicable. It might pertain to the maintenance of Mrs. Seybold in the past, before her marriage. Then, again, a child who had maintained himself or herself and perchance accumulated means might be expected to fight the battle of life without any extraneous aid. The judgment then adds:

Judgment

"But even in such a case, if the fight were a great struggle, and some aid might help, and the means of the testator were great, the Court might, in my opinion, properly give aid. The whole circumstances have to be considered. Even in many cases where the Court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the Court alter the testator's disposition of his property. The first inquiry in every case must be what is the need of maintenance and support; and the second, what property has the testator left."

The amount that should be allowed in that case to four daughters, all married, was then discussed, and reference made

to the fact that the husbands of three of these, were not well off, but no claim had been made for one of them. The Court allowed one of the daughters £60 a year, and the other two, each £40 a year, to be payable in monthly instalments from the date of the death of the testator. Provision was made for securing the payment of these sums, without power of anticipation. Then in the same judgment, Edwards, J., in referring to the general principles, upon which the Act should be administered, considered that the duty of the Court in this respect might be best expressed, as follows:

"It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it. In the discharge of that duty the Court should never lose sight of the fact that at best it can but very imperfectly place itself in the position of the testator, or appreciate the motives which have swayed him in the disposition of his property, or the justification which he may really have for what appears to be an unjust will. Especially is this so in considering the claims of (children) sons."

This case was appealed to the Privy Council ((1911), A.C. 730), "and the general view taken by the Court below, as to the proper scope and application of the powers conferred by the Act" was approved. It was stated, that the matters of fact considered by the judge in the Court below and the circumstances and condition in life of each of the claimants

"are essentially questions for the discretion of the local Courts who are entrusted with the administration of the Act . . . . . and their Lordships would be slow to advise any interference with the discretion founded upon such knowledge."

It is contended that the Courts of New Zealand have, since the judgment in that case, placed a still more liberal construction upon the Act in that Dominion. With the assistance, however, afforded by the considered judgments in *Allardice* v. *Allardice, supra,* and prior thereto, I have come to the conclusion that Mrs. McAdam, assuming that her affection for her adopted daughter had disappeared, failed in her duty "which as a just but not a loving mother" she owed towards Mrs.

MACDONALD, J.

1925

June 16.

IN RE MARY ANN MCADAM

Seybold, and further that she should not have lost sight of this duty at the time she was thus disposing of her property or at any rate should have rectified her error before her death, even though her adopted daughter had been married for some years and was no longer living with her mother. What then would be adequate, just and equitable provision to make under the circumstances to Mrs. Seybold? I do not think that it is of any moment, that she was the only child of Mrs. McAdam nor as to the extent of the property she would thus have received, had the testatrix made no testamentary disposition of her estate. It was submitted that I should apply the provisions of section 4 of the Act, reading as follows:

> "4. The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order under this Act,"

and that the character or conduct of the applicant was such as to disentitle her to the benefit of the Act. There was, however, no proper evidence adduced in support of this position. Some, so-called, evidence was given but, as mentioned during the argument, I reserved the right and now discard it. See *Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13.

Judgment

As to the allowance which should be made out of the estate, counsel for the applicant seeks to have same allotted in a lump sum. This requires consideration. If an amount were so given to the applicant, there is the danger that it would, as in the past, come under the control of a husband and soon be dissipated. While the Act allows apportionment to be made in this form, still the object of the legislation would, in that event, be destroyed, as the "proper maintenance and support" would disappear. I think, in the meantime, the better course to adopt would be to set aside a certain amount of the estate, as the property of Mrs. Seybold. A fair and reasonable amount to be allotted for the desired purpose, would be $6,000. Then the order should provide that this sum would be segregated from the rest of the estate and placed at interest upon proper security, and that the principal, with the interest which may accrue from time to time, be paid to Mrs. Seybold in payments at the rate of

$100 per month, until the principal and interest are exhausted. The sum thus set aside is the property of Mrs. Seybold, and held in trust by the trustees for the time being, but without power of anticipation. The trustees may apply, if they see fit, to be relieved of such trust and provisions used for its execution.

In taking this amount out of the estate there will necessarily be a deduction from the parties, who otherwise would receive unimpaired the benefits conferred by the will and codicils. Argument was presented as to the way in which such deductions should take place, but I think it would be fair to have the incidence of the payment follow the course outlined in the Act, and fall rateably upon the whole estate of the testatrix. The wish of the testatrix, so plainly expressed in the codicil, dated the 28th of May, 1921, in favour of her brother, Stewart Musgrove, however, should not, I think, be affected by the payment to Mrs. Seybold, and the portion of the estate bequeathed and devised in such codicil to Stewart Musgrove is exonerated from the payment to Mrs. Seybold.

In drawing attention to the provision that the Court may discharge, vary or suspend the order for maintenance and support, I think it not out of place to also refer, with approval, to the remarks of Edwards, J. in *Allardice* v. *Allardice* (1910), 29 N.Z.L.R. 959 at p. 973, as follows:

Judgment

> "I desire to add that the duty cast upon the Court by this statute is one of extreme difficulty and delicacy, in the discharge of which the most careful and impartial men may well differ. It is, in my opinion, a duty which can be far better performed by several judges in consultation with each other than by a single judge."

The duty could not, of course, be thus performed without amendment to the statute.

The costs of all parties should be paid out of the estate.

Order accordingly.

MCDONALD, J.

1925

June 15.

KING v. KING.

KING
v.
KING

KING v. KING.

Husband and wife—Separation agreement—Covenant not to sue or molest one another—Subsequent adultery—Petition for judicial separation—Refused.

Husband and wife separated under the provisions of a deed whereby it was agreed, *inter alia*, that neither of them should take proceedings against the other for restitution of conjugal rights or molest, annoy or interfere with one another in any way, the wife agreeing that as long as the husband duly performed all obligations upon his part under the agreement she would not have any further claim upon him except as specified in the agreement. Three years later the wife filed a petition for a decree of judicial separation on the ground of her husband's adultery.

Held, that as this petition was obviously brought so that a petition for alimony may be founded on the decree which is sought it should not be granted.

Gandy v. *Gandy* (1882), 7 P.D. 168 applied; *Miller* v. *Miller* (1914), 19 B.C. 563 distinguished.

Statement

PETITION by the wife for judicial separation and for alimony. The parties were married at Vancouver on the 20th of December, 1909. On the 22nd of August, 1922, they entered into a separation agreement. Heard by MCDONALD, J. at Vancouver on the 13th of May, 1925.

Argument

Maitland, for petitioner, referred to *Morrall* v. *Morrall* (1881), 6 P.D. 98; *Gandy* v. *Gandy* (1882), 7 P.D. 168; *Bishop* v. *Bishop* (1897), P. 138; Halsbury's Laws of England, Vol. 16, p. 486, par. 997; *Miller* v. *Miller* (1914), 19 B.C. 563.

J. A. MacInnes (*Hume B. Robinson*, with him), for respondent, referred to *Scholey* v. *Goodman* (1823), 8 Moore 350; *Rose* v. *Rose* (1883), 8 P.D. 98; *Wasteneys* v. *Wasteneys* (1900), A.C. 446.

15th June, 1925.

Judgment

MCDONALD, J.: Petition by a wife for a decree of judicial separation on the ground of her husband's adultery. On the 26th of August, 1922, the parties entered into a separation agreement containing, *inter alia*, the following clauses:

"1. The parties hereto shall henceforth live separate from each other and neither of them will take proceedings against the other for restitution of conjugal rights or molest or annoy or interfere with the other in any manner whatsoever."

"4. The said Elmira King agrees that so long as the said Dan King shall duly perform all obligations upon his part under this agreement, she shall not have any further claim upon him except as in this agreement specified."

In *Gandy* v. *Gandy* (1882), 7 P.D. 168 it was decided by the Court of Appeal composed of Jessel, M.R., Cotton and Lindley, L.JJ. that where, after the husband had been guilty of adultery to the wife's knowledge, the wife covenanted in a separation deed not to take any proceedings to compel the husband to allow her a larger amount than that agreed upon by way of alimony, the wife could not afterwards claim an inquiry as to her husband's means with a view to obtaining increased alimony. The effect of such a covenant was fully considered, and I understand the effect of the judgments to be that such a covenant is binding upon the wife even though the husband, after the covenant has been entered into, is again guilty of adultery. This case was considered by MURPHY, J. in *Miller* v. *Miller* (1914), 19 B.C. 563, but in the latter case no such covenant existed as is to be found in the agreement now under consideration. In the present case, there is no direct proof that prior to the execution of the separation agreement the husband had been guilty of adultery, but it was owing to the wife's strong suspicions of his infidelity that the separation took place. The case is not, therefore, identical with either of the cases above mentioned, but it seems to me that the principle laid down in *Gandy* v. *Gandy* must be applied. It follows that inasmuch as this petition is obviously brought so that a petition for alimony may be founded upon the decree which is now sought, this petition ought not to be granted. The wife is, however, entitled to her costs, as the action was brought in good faith.

Judgment

Petition dismissed.

COURT OF APPEAL

1925

July 6.

McQUEEN v. VANCOUVER ISLAND POWER CO.

McQUEEN v. VANCOUVER ISLAND POWER COMPANY, LIMITED.

Arbitration—Attendance on hearing with witness—Adjournment asked for —Granted on payment of costs of attendance of opposite party— Witness fees refused—Appeal—Supreme Court Rules, 1906, App. M, item 240—Consolidated Rules, 1912, p. 300.

On an arbitration, one McQueen, who was one of the parties, attended the hearing with ten witnesses. After one of the witnesses had been examined in chief, counsel for the opposite party asked for an adjournment which was granted upon the terms that he should pay "the costs of the attendance of the said McQueen in any event." Subsequently the arbitrators in their award referred this item of costs as "costs of the attendance of the said McQueen at the hearing on the 20th of November, and which the said Company agreed to pay." On an application to enforce the award the submission of counsel for McQueen that this direction included the costs of the ten witnesses was overruled.

Held, on appeal, affirming the decision of McDONALD, J., that were it not for the more definite language of the arbitrators in their award, the appellant would have a strong case to support his submission that it was their intention that the respondent should pay the costs of attendance of appellant's necessary witnesses as well as his own, but the exact intention of the arbitrators is left so uncertain by their final language that it is fairly open to two constructions in which case it is not proper to disturb the one adopted by the learned judge below.

Statement

APPEAL by George McQueen from the order of McDONALD, J. of the 24th of April, 1925, to enforce an award of arbitrators appointed to settle the differences that arose between the parties hereto as to compensation in respect to two power-line easements over the lands of the said McQueen being lot 75, Renfrew District, claimed by the Vancouver Island Power Company under the provisions of the Water Act. Under the award McQueen was to receive $300 in respect to the easements and all damage done the property, $125 for his costs exclusive of arbitrators' fees and "the costs of the attendance of the said McQueen at the hearing on the 20th of November, 1924, which the said Company agreed to pay." It appeared that the first hearing before the arbitrators took place on the 20th of November, 1924.

McQueen attended with his ten witnesses and after one witness had been partially heard counsel for the Company asked for an adjournment and this was granted upon his agreeing to pay "the costs of the said McQueen in any event." On the application for the order to enforce the award, counsel for McQueen contended that he was entitled to costs of attendance at the first hearing of McQueen and his ten witnesses. Upon it being held that the arrangement only applied to his own costs McQueen appealed.

The appeal was argued at Victoria on the 19th of June, 1925, before MARTIN, GALLIHER and MACDONALD, JJ.A.

F. C. Elliott, for appellant: McQueen and his ten witnesses were in attendance at the first hearing. One of his witnesses was examined in chief, then Mr. King who attended on behalf of the Power Company said he was not prepared to cross-examine them and asked for an adjournment. I asked for the costs of the adjournment and this was consented to. This I submit includes the costs of the witnesses. In the award the words are "costs of the attendance of the said McQueen at the hearing on the 20th of November which the Company agreed to pay." These witnesses were all brought in on the Jordan River stage-line at McQueen's expense. It is included in the costs of the day. The hearing after the adjournment lasted four days.

Argument

Harold B. Robertson, K.C., for respondent: There was another case on at the same time at which these witnesses were heard. Unless the Court finds the judge was clearly wrong, he should not be reversed.

Elliott, replied.

Cur. adv. vult.

On the 6th of July, 1925, the judgment of the Court was delivered by

MARTIN, J.A.: Were it not for the more definite language employed by the arbitrators in their award of the 29th of December, 1924, the appellant would have a strong case to support his submission that it was their intention that the

Judgment

COURT OF APPEAL

1925

July 6.

McQUEEN v. VANCOUVER ISLAND POWER CO.

Judgment

respondent should pay the costs of the attendance of the appellant's necessary witnesses as well as his own personal attendance, when the adjournment of the 20th of November, 1924, was granted, since it would be proper so to include them if they were to be regarded as "costs of the day" (see Tariff of Costs of 1897, Item 236, and Appendix M, of Supreme Court Rules, 1906, item 240, and the same item in Consolidated Rules, 1912, p. 300), but the exact intention of the arbitrators is left so uncertain by their said final language that it is fairly open to two constructions, and in such case we do not think it proper to disturb that one which was adopted by the learned judge below, and therefore the appeal must be dismissed. Though this is the only result open to us in strict justice, yet we have noted with approval the effort made by Mr. *Elliott* on behalf of the appellant to settle so small a matter at an early and inexpensive stage by consenting to ask the arbitrators to define their meaning, and we express our regret that this effort was rejected by the respondent's solicitors.

Appeal dismissed.

Solicitors for appellant: *Courtney & Elliott.*
Solicitor for respondent: *Atwell D. King.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

CLAMAN v. CLAMAN (p. 137).—An Appeal to the Supreme Court of Canada was quashed, 9th October, 1925. See (1926), S.C.R. 4.

REX v. BOAK (p. 256).—Reversed by Supreme Court of Canada, 18th June, 1925. See (1925), S.C.R. 525; (1925), 3 D.L.R. 887.

Cases reported in 34 B.C., and since the issue of that volume appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council:

ATTORNEY-GENERAL OF CANADA AND THE CITY OF VANCOUVER, THE v. CUMMINGS (p. 433).—Reversed by Supreme Court of Canada, 20th October, 1925. See (1926), 1 D.L.R. 52.

ATTORNEY-GENERAL OF CANADA AND THE CITY OF VANCOUVER, THE v. GONZALVES (p. 360).—Reversed by Supreme Court of Canada, 6th May, 1925. See (1926), 1 D.L.R. 51.

LEW v. WING LEE (p. 271).—Decision of the Supreme Court of Canada reversing in part the decision of the Court of Appeal, affirmed by the Judicial Committee of the Privy Council, 11th May, 1925. See (1925), A.C. 819; (1925), 3 D.L.R. 1009.

PAINLESS PARKER v. KOGOS (p. 207).—Reversed by Supreme Court of Canada, 8th May, 1925. See (1925), S.C.R. 513; (1925), 3 D.L.R. 337.

TAXATION ACT AND ANDERSON LOGGING CO., *In re* (p. 163).—Decision of the Supreme Court of Canada reversing the decision of the Court of Appeal, affirmed by the Judicial Committee of the Privy Council, 24th November, 1925. See (1926), A.C. 140; (1926) 1 D.L.R. 785.

INDEX.

RAILWAY—*Injury to passenger—Limitation of action—B.C. Stats. 1896, Cap. 55, Sec. 60.*] Section 60 of the Consolidated Railway Company's Act, 1896, provides that "all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within 6 months next after the time when such supposed damage is sustained." The plaintiff recovered judgment in an action for damages for injuries sustained while a passenger by reason of the negligence of the servants of the defendant Company. The accident took place on the 26th of December, 1922, and the writ was issued on the 17th of September, 1923. On appeal on the ground that said section 60 was a bar to the action:—*Held*, MCPHILLIPS, J.A. dissenting, that the section does not apply to a case based on the Company's duty to carry the plaintiff safely. [Reversed by the Judicial Committee of the Privy Council.] PRIBBLE V. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. - - - - - - - - - **46**

RAILWAY COMPANY—*Carriage of goods—From United States into Canada—Polo ponies—Injured in Canada in transit—Condition limiting liability for loss—Classification—Can. Stats. 1919, Cap. 68, Sec. 322(4).*] The plaintiff shipped four valuable polo ponies from New Westminster to Portland, State of Oregon, and after being used there for exhibition purposes were shipped back to New Westminster. On reaching New Westminster junction the car in which the ponies were shipped was placed temporarily on a side track and while there was run into by a Canadian Northern train in a fog. The polo ponies were very severely injured. The shipment was under a uniform live stock contract (prescribed by the Interstate Commerce Commission) by which the ponies were to be carried by

RAILWAY COMPANY—*Continued.*

the Railway and connecting lines to place of delivery. One of the conditions endorsed on the back of the contract was that when a lower value than the actual value is represented in writing by the shipper as the released value of the stock as determined by the classification or tariffs upon which the rate is based such lower value plus freight charges shall be the maximum amount to be recovered in case of loss and the shipper declared over his signature that the shipment covered by the bill of lading was ordinary live stock and under the consolidated freight classification the standard or basic value of each pony is $150. The plaintiff succeeded in an action to recover the total loss sustained. *Held*, on appeal, reversing the decision of MACDONALD, J., that section 322(4) of The Railway Act, 1919, authorizes the contract of carriage and as there was nothing to shew that the Board of Railway Commissioners had made any regulation, order or direction to the contrary, the parties were competent to make the contract and the plaintiff could only recover $150 per pony. *Per* MCPHILLIPS, J.A.: With the respondent's declaration that the value of the ponies was $150 per head, he induced the Company to accept them for shipment. It is impossible that he should now be allowed more than the full value so declared. See *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1918), 26 B.C. 397 at p. 413; (1919), 89 L.J., P.C. 17 at p. 21. SPORLE V. GREAT NORTHERN RAILWAY COMPANY. **232**

REAL PROPERTY—*Cloud on title—Highway—Right to open municipality—Agreement with former owner to substitute—Lapse of time—Estoppel.*] Under and by virtue of a survey made in 1872 the defendant Municipality claimed the right to open up a public road through the plaintiff's property. When the old survey was made the land was a pre-emption and on the issue of a Crown grant no reservation was made for a road nor was it even used as such since the formation of the defendant Municipality in 1895. A former owner of the land had agreed to give the Municipality another strip for a road in lieu of portion set off for that purpose in the old survey and in accordance with this agreement a road was constructed and has been continuously in use as a public highway. The assertion of the right to open the road in