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 XXXVI.

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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. 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.

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DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

CRAIG AND CRAIG v. HAMRE AND YOUNG.

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Negligence—Damages—Evidence—Wrongful admission of—Objection not taken until after verdict—Too late.

In an action for damages owing to a collision between two automobiles, the plaintiff when relating the circumstances stated that the defendant Y. (who was driving a stage owned by the defendant H.) said that he was in the wrong, that the car was insured and he would pay the damages, and the plaintiffs' son gave the same evidence. This evidence was given early in the trial without objection and although subsequently commented on by defendants' counsel, the question of its admissibility was not brought to an issue until after the verdict. The jury brought in a verdict for the plaintiffs but the trial judge dismissed the action.

Held, on appeal, reversing the decision of MURPHY, J. (MARTIN, J.A. dissenting, and holding that there should be a new trial), that objection to the admissibility of the evidence should have been taken at once and the matter not being brought to an issue until after the verdict, it was then too late, and judgment should be entered in accordance with the verdict.

Statement

APPEAL by defendants from the decision of MURPHY, J. of the 14th of January, 1925, in an action for damages. On the 5th of January, 1925, at about two o'clock in the afternoon the defendant Hamre's stage, driven by the defendant Young, a

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servant, proceeding easterly on Kingsway, on reaching the intersection of St. Catherines Street, ran into the plaintiff Craig's car who was driving northerly on St. Catherines Street. On the plaintiff giving his evidence he said that after the collision Young came up and said, "I am in the wrong," and then he said his car was insured and he would pay all damages. No objection was taken at the time, but before defendant's evidence was submitted his counsel referred to the wrongful admission of this evidence and he did so again before addressing the jury, but the point was not fully argued and brought to an issue until after the verdict. The jury found in favour of the plaintiffs and the judge then decided there was a mistrial and that there should be a new trial.

The appeal was argued at Vancouver on the 20th and 21st of April, 1925, before MACDONALD, C.J.A., MARTIN and MACDONALD, JJ.A.

Argument

Craig, K.C., for appellants: We submit, first, that the learned judge was wrong in the view he took as to the effect of it being brought out that the defendants carried insurance; and secondly, that the evidence was introduced for a sinister purpose, namely, to influence the jury. We contend, first, that the evidence was properly received; secondly, if any wrong was done it was cured; and third, he did not take objection in the way he should: see *Loughead* v. *Collingwood Shipbuilding Co.* (1908), 16 O.L.R. 64; *Hyndman* v. *Stephens* (1909), 19 Man. L.R. 187; *Mitchell* v. *Heintzman* (1913), 9 D.L.R. 20. We contend the evidence is irrelevant and is not a substantial ground for a new trial. That objection should have been taken at once it being too late after verdict: see *Sornberger* v. *Canadian Pacific R.W. Co.* (1897), 24 A.R. 263; *Brooks* v. *B.C. Electric Ry. Co.* (1919), 27 B.C. 351; *Nevill* v. *Fine Art and General Insurance Company* (1897), A.C. 68 at p. 76. When objection is taken to evidence it must be specific: see Phipson on Evidence, 6th Ed., 688; *Williams* v. *Wilcox* (1838), 8 A. & E. 314 at p. 337; *Bain* v. *Whitehaven and Furness Junction Railway Company* (1850), 3 H.L. Cas. 1 at p. 15.

Mayers, for respondents: When a matter of this nature comes out it is incurable. On the question as to when objection

was taken see *Iverson* v. *McDonnell* (1904), 78 Pac. 202 at p. 204; *Skeate* v. *Slaters, Limited* (1914), 2 K.B. 429 at p. 438; *Winsor* v. *The Queen* (1866), L.R. 1 Q.B. 289 at p. 309 and on appeal 390 at p. 394; Halsbury's Laws of England, Vol. 18, p. 255, par. 626. He put in evidence, under my objection, a by-law that is invalid. The verdict was in the teeth of the plaintiff's own admission and one of his witnesses. He was not a competent driver.

Argument

Craig, in reply, referred to *Widder* v. *The Buffalo and Lake Huron R.W. Co.* (1865), 24 U.C.Q.B. 520 at p. 533.

Cur. adv. vult.

4th June, 1925.

MACDONALD, C.J.A.: This was an action for damages suffered by the plaintiffs in a collision with the motor-stage of the defendant Hamre, driven by the defendant Young. The jury found a verdict for the plaintiffs. The judge, however, declined to enter judgment upon it, holding that the trial was abortive because of the wrongful admission of certain evidence, which was incidentally brought out in the plaintiffs' case. The objectionable evidence was to the effect that the defendant Hamre was insured against the damage caused to the plaintiffs, and it was contended that this evidence was calculated to prejudice the jury in the plaintiffs' favour.

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We were referred to several authorities in which a new trial had been ordered because of the admission of such evidence. I do not question these on their facts, but they make it clear that each case must depend upon its own facts, and that the Court should order a new trial only if satisfied on the facts of the particular case that the defendants had been substantially prejudiced. I see no difference between the jurisprudence of our Courts in the manner of dealing with evidence of this sort and with any other evidence which is irrelevant; the same principles apply to the granting of relief. If evidence be led which is inadmissible, the opposite party should promptly object, and in the absence of objection, it is not in general open to him afterwards to complain.

The plaintiff was being examined in chief as to what took place at the time of the occurrence, he said:

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"He [defendant Young] says: 'I am in the wrong and if anybody is hurt'—I couldn't say for sure whether he was to call the ambulance or I was to call it—'send her [Mrs. Craig] to the hospital'—his car was insured, and he would pay all damages."

And the plaintiffs' son when examined in chief, relating the same circumstance, said:

"He [defendant Young] asked me my name and I told him, and he said, 'Well,' he says, 'this is my fault, the stage is insured and if there is anybody hurt send for an ambulance.'"

After the plaintiffs' case was closed, Mr. *Mayers,* counsel for the defence, said:

"Your Lordship will permit me to go into my case, stating all my objections.

"THE COURT: Go ahead, Mr. *Mayers,* I suppose I cannot overrule your objections when I have not heard them even. However, you had better go on with your defence."

No objection was formulated by defendants' counsel to the said statements of plaintiff and his son until the defendant Hamre was being examined in chief, when his counsel said:

"Mr. *Mayers*: The question I am going to ask now, my Lord, I wish leave to ask subject to my objection which I am going to press later on.

"Was the stage-coach insured?

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"Mr. *Black* [counsel for defendant]: I would object to that.

"THE COURT: I think it is objectionable, Mr. *Mayers.*

"Mr. *Mayers*: I had better state my objection now, my Lord, my friend brought that out in his own evidence.

"THE COURT: Yes.

"Mr. *Mayers*: That alone is ground for a new trial.

"THE COURT: I think so.

"Mr. *Mayers*: And I am going to press that and preserve that objection, it is surely open to me to use the same question."

He then went into the matter of insurance.

Now, it is to be noted that no objection whatever was taken until long after the answers first above quoted were elicited, and that those answers came out only at part of the narrative of what took place at the time of the collision; they were of the *res gestæ.* There is nothing to indicate that they were brought out in bad faith with the intention of influencing the minds of the jurors. They were made early in the trial. Nothing other than the above was said until just before counsel addressed the jury, when this was said, speaking of the above and of an objection to the admission of a by-law:

"Mr. *Mayers*: It seems to me that these two things do disqualify the trial, but your Lordship will permit me to go on and reserve all rights.

"THE COURT: I will hear argument if there is a verdict against you, on both questions."

I feel bound to say, with deference, that the course pursued was most unusual and calculated to lead to confusion, injustice, multiplicity of proceedings and unnecessary cost. If what had occurred justified the discharge of the jury, objection should have been taken at once and a motion made for the discharge of the jury by the party complaining. Had that been done, I have no doubt the learned judge would have acted upon it, and if of opinion that the circumstances required it, have then discharged the jury and saved the cost and delay, which if appellants are right, the further proceeding before that jury has occasioned. That was not done either then or thereafter. It is true that much later counsel said that the presence on the record of this evidence would entitle him to a new trial, and still later that it "disqualified" the trial, but it was not brought to an issue until after verdict. In my opinion, it was then too late.

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A motion to dismiss an action for want of legal evidence to support it, may and is frequently reserved until after verdict, but I know of no authority, and if there be any, I think it is unsound, for what was done here. I must confess that I have never known of a question affecting the admissibility of evidence, or the question of whether the jury should be discharged, because of what occurred in the trial, being reserved until after verdict.

The course adopted is open to this further objection. The jury's verdict was perfectly intelligible; on its face it was a good verdict, and under our jurisprudence, I think, with great deference to the learned judge, that it was his duty to enter judgment for the plaintiffs, leaving the defendants, if so advised, to move the Court of Appeal for a new trial on the grounds aforesaid. No doubt, the learned judge might have discharged the jury before verdict, though, in my opinion, he would not have been justified in doing this in the present case, but after verdict he should have acted upon it. If trial judges may, after verdict, declare the trial abortive because of some irregularity, such as wrongful admission or rejection of evi-

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dence, then, they could in effect, bring about a new trial in every case in which such irregularities had occurred.

The defendants also objected to the admissibility of a city by-law, the contention being that it was in conflict with the statute in respect of the rate of speed to be observed by drivers upon the public highway. That was a question of law to be decided by the trial judge. It was necessary that the by-law should be before him to enable him to properly direct the jury as to the rate of speed to be observed. I think he did instruct the jury clearly on this question of law; he directed them that the law was that drivers of motor-vehicles must not exceed a speed of 15 miles an hour within the city. This is the statutory limit, and in so directing them, he, in effect, excluded from the case the by-law which was in conflict. There is nothing in the verdict to indicate that the jury did not understand the law as given to them. They were not concerned with the by-law, but were obliged simply to take the law from the learned judge. Moreover, the evidence clearly shews that apart from any question of the rate of speed, the defendants were clearly guilty of negligence in driving on the wrong side of the highway.

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The appeal should be allowed, the verdict restored, and judgment entered accordingly.

MARTIN, J.A.: That there was evidence given by two witnesses on behalf of the plaintiffs from which the jury would infer that the defendants were insured against the consequences of the accident is, to my mind, beyond question, but strange to say, no one objected, or even referred to it at the time, though all concerned must have been aware of the "dangerous" (to use the word employed by the learned trial judge) situation thereby created, which should have been dealt with at the time, preferably, and, in any event, later when the case went to the jury. But it is clear that the defendants' counsel did later that same day distinctly raise the objection during his defence, when he proposed to give evidence in answer to that of the plaintiffs respecting the said insurance and, as to that evidence, submitted: "That alone is ground for a new trial," to which the Court replied, "I think so"; and after further discussion gave this

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ruling, upon the objection of the plaintiffs' counsel to admitting defendants' said evidence in reply:

"THE COURT: Well, I will allow it, because the jury at present undoubtedly, as I have, have the impression that this car was insured."

"Mr. *Mayers*: Of course I am not waiving my objection at all.

"THE COURT: No, I understand your position, Mr. *Mayers*, that the trial is a mistrial now; but subject to that, that you are going to put this question, I am going to allow it. Later on I will hear argument on the matter of the mis-trial."

After this unmistakable warning, the plaintiffs' counsel proceeded further at his peril if nothing adequate was done to remedy the situation he had created by his witnesses, but he did not make any attempt to withdraw or otherwise nullify the harmful effect of their testimony, being desirous, the only inference is, to profit by it at the expense of the defendants, whose evidence on the point, in answer to his, he endeavoured to exclude. Nor did he later recede from this position of unfair advantage, as I regard it, when the defendants' counsel again repeated his objection at the close of the evidence just before addressing the jury, saying:

"Mr. *Mayers*: My Lord, I submit that the trial has been disqualified in two ways; in the first place by the evidence which was given with regard to insurance; and secondly, by the fact of my friend putting in what appears to me to be a by-law passed beyond the competence of the City of Vancouver. . . . . MARTIN, J.A.

"THE COURT: Yes, but I think, Mr. *Mayers*, that I will take the verdict of the jury anyway and hear arguments with regard to the by-law. I will endeavour to clear it up in my charge. I think you are correct in that—I thought so at the time it was put in.

"Mr. *Mayers*: It seems to me that these two things do disqualify the trial, but your Lordship will permit me to go on and reserve all rights.

"THE COURT: I will hear argument if there is a verdict against you, on both questions.

"Mr. *Mayers*: (Addresses jury)."

In his charge to the jury the learned judge made no reference to the evidence that had been given upon the insurance, and on a subsequent day he heard the reserved motion upon the objections of defendants' counsel, and in reply to the objection of plaintiffs' counsel that a motion to discharge the jury had not been made but that the defendants' counsel "went on and took his chances," the learned judge said, "that was not the position," and in regard to a question about the stenographer's notes, said:

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"THE COURT: Well, I am not sure about that having been taken down, but undoubtedly Mr. *Mayers's* position was that I should discharge this jury. Now, whether it was formulated in exact language, I do not pretend to remember.

"Mr. *Mayers*: I moved twice, once before I gave evidence and once before I addressed the jury.

"THE COURT: If it was not done, Mr. *Davis*, it was I who prevented it, because I indicated to Mr. *Mayers* that I would take the verdict of the jury subject to his action, so that whether it is formally there or not—if it is not there it is my fault, because I took that attitude, and I know that Mr. *Mayers's* attitude was clear cut to me at any rate that I should dismiss that jury. It may not be on the notes, but that is the real history so far as my mind is concerned.

"Mr. *Davis*: If that is so, why there is no use of me arguing that particular ground.

"THE COURT: No."

This state of affairs, so clearly stated by the Court itself, must be accepted by this Court as correct, and so whatever may be said about the failure of the defendants' counsel to object during the hearing of the plaintiffs' witnesses, his position shortly thereafter when he did press his objection upon the Court so that it was clearly apprehended (and what more is required?) is, in my opinion, unassailable in law in the pre-

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servation of his rights, and free from criticism. I share the views expressed by my brother the Chief Justice as to the erroneous course (with every respect) pursued by the learned trial judge in not ruling upon objections to the evidence before the case went to the jury, because objections of that kind cannot be reserved, the jury being entitled to know definitely before they consider their verdict, whether or not what they have heard the witnesses say (or statements that appear in documents laid before them) is legal evidence upon which they should act. The novel course pursued here of leaving all the evidence to the jury, subject to various objections, and then proceeding, in effect, to order a new trial after verdict, on the ground that "the trial of this action is a mistrial" because the verdict was not what it was expected to be, is something unknown to our practice and not supported by rule or statute, and in its consequences usurps the powers conferred upon this Court. The adoption of such a course is quite distinct from the power of a judge to discharge a jury during the trial and proceed no further with it before them, and if he had adopted that course in the exercise

of his judicial discretion it would be most difficult, if not impossible, to review it, seeing that there were materials for its exercise, for the reasons set out in our recent decision in *Rex* v. *Chong Sam Bow* (1925), 1 W.W.R. 240, but at the same time the authorities cited in that case shew that we are at liberty for future guidance to express an opinion upon the propriety of the course that was adopted.

I do not wish, therefore, to be understood as saying that in the present case it would have been proper for the learned trial judge *ex mero motu,* or otherwise, to discharge the jury after hearing the said evidence of plaintiffs' witnesses upon the insurance; on the contrary, I am of opinion that the justice of the case would have been met by a proper caution to the jury to disregard that evidence, as was done by the trial judge in *Loughead* v. *Collingwood Shipbuilding Co.* (1908), 16 O.L.R. 64 at p. 71, as pointed out by Mr. Justice Anglin, whose opinion I prefer, with all respect, to that of the other learned judges, despite the affirmative, without reasons, of their judgment by the Court of Appeal in (1908), 12 O.W.R. 697: I only note, in precaution, that the course advised by Mr. Justice Anglin (p. 72) to be adopted in Ontario in certain circumstances, of the judge dismissing the jury and trying the case himself (under, I assume, section 56 of the Ontario Judicature Act, Holmested, 4th Ed., 215) is not authorized, so far as I am aware, by our practice—apart from consent—*Cf. Denmark* v. *McConaghy* (1878), 29 U.C.C.P. 563. I am likewise unable, with every respect, to accept the decision, as I understand it, of the Manitoba Court of Appeal in *Hyndman* v. *Stephens* (1909), 19 Man. L.R. 187, founded upon the *Loughead* case, and American cases cited, that the mere asking of a question about insurance necessitates the discharge of the jury; such an extreme view is not consistent with the later decision in Ontario of the Divisional Court in *Mitchell* v. *Heintzman* (1913), 23 O.W.R. 763, wherein the true principle relied upon by Mr. Justice Anglin is again affirmed, *viz.*, has any substantial wrong or miscarriage been occasioned at the trial? and unless that question can be answered in the affirmative the verdict should stand.

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Applying this principle to what occurred below in this case, I am of opinion that such substantial wrong was occasioned to the defendants originally by the giving of improper evidence, which would almost inevitably prejudice the jury, and later by the omission to give that adequate instruction to the jury (*e.g.*, as set out in the *Loughead* case, *supra*, 71), which would have remedied the wrong, by removing that prejudice. There are some cases where the harm done by the improper admission of evidence is incurable, *e.g.*, a confession of guilt—*Reg.* v. *Sonyer* (1898), 2 Can. C.C. 501, but this one is not, to my mind, in that category. It follows, therefore, that, in my opinion, this appeal of the plaintiffs to have judgment entered in their favour should be dismissed, but the formal judgment in the way it was entered cannot stand and must be vacated for lack of jurisdiction, the direction for the new trial coming properly from this Court alone. The result is that the appellants have gained a nominal success only, and whatever may be said about the costs below prior to the first objection being taken belatedly as above, all those occasioned thereafter are largely attributable either to the course unfairly persisted in by plaintiffs' counsel or to the action of the learned judge in continuing the trial without disposing of so serious an objection upon the first notice thereof, or at least before giving the case to the jury. In such very unusual circumstances, I am of opinion that there is "good cause" for ordering (under section 28, Court of Appeal Act) that there should be no costs of appeal to either party and that those of the former trial should abide the result of the new. If the respondents' counsel had confined himself to asking for that cautionary instruction to the jury which I think would have met the justice of the case, the respondents would be entitled to the costs of the appeal; the matter is complicated by the fact that the learned judge below eventually made an order after verdict for a new trial (*viz.*, "that this action may be set down for trial again"), yet as the jury had already been discharged after verdict that order cannot be construed or given effect to as a *nunc pro tunc* (though nevertheless second) discharge of the same jury before verdict, because once a jury is discharged from Court it cannot be

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summoned again though it might have been properly discharged originally, so a difficult and unprecedented situation has been created which is hard to deal with in complete justice in all respects.

I only add that I do not think it was necessary for the respondents' counsel to have objected to the charge, because his sweeping and fundamental objection already twice made, that the trial had been invalidated, covered all lesser matters arising therefrom and gave sufficient notice and warning to the Court and opposite party that a most serious situation had been created by the plaintiffs, which it was for them to cure or have adequately dealt with by the Court.

MARTIN, J.A.

MACDONALD, J.A.: The learned trial judge refused to enter judgment on the jury's verdict for the plaintiffs because one of them stated in evidence that the defendant Young, the driver of the car, told him that it was insured. This, it was held, vitiated the trial. The statement was made immediately after the accident in a conversation between Craig and Young, when the former testified (referring to Young):

> "Well," he says, "I am in the wrong and if anybody is hurt—I couldn't say for sure whether he was to call the ambulance or I was to call it—his car was insured and he would pay all damages."

No objection was taken when this evidence was given nor was a request made at that time to discharge the jury. Another witness (a son of the plaintiff) also referred to this conversation with Young, and again it was allowed to pass without objection. The plaintiffs' case closed and the defence proceeded to call witnesses, without, so far as the record shews, taking the point that there had been a mistrial. It is true that in argument some days after the trial, counsel for the defendants claimed that he twice moved to discharge the jury, and the learned trial judge, speaking from memory, stated that he was under the impression either that he did so, or if not it was only because he was prevented from doing so by the Court. The notes do not bear out this recollection. In any event it would not affect the judgment I have formed.

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The next reference to the incident occurs when in examina-

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tion of one of the defendants, his counsel put this question to him:

"I wish leave to ask, subject to my objection, which I am going to press later on, was this stage-coach insured?"

When plaintiffs' counsel objected, Mr. *Mayers,* for defendants, made the statement "that alone is ground for a new trial," adding "and I am going to press that and preserve any objection." He then subject to preserving his rights, asked the defendant, if the car was in fact insured, and the answer received would leave the jury in doubt on that point. In fact, it would probably lead them to believe that there was no liability on the part of the insurance company. Certainly a jury would not be convinced that an insurance company was the real defendant. The harm, therefore, was at least partially cured.

At the conclusion of the trial, and before the case was submitted to the jury, the following colloquy took place:

"Mr. *Mayers*: It seems to me that these two things [the reference being to the insurance and to a certain by-law later referred to] do disqualify the trial but your Lordship will permit me to go on and reserve all rights."

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"THE COURT: I will hear argument if there is a verdict against you on both questions."

If in fact this evidence vitiated the trial, there was, with deference, no justification for proceeding with it after it was given.

The question now arises, Was the learned trial judge justified on the foregoing state of facts in declining to enter the verdict of the jury in favour of the plaintiffs? There is no hard and fast rule by which such evidence at once vitiates the trial. It is simply, as Falconbridge, C.J. stated in *Loughead* v. *Collingwood Shipbuilding Co.* (1908), 16 O.L.R. 64 at p. 66, an "inherent power in the Court to prevent an unfair advantage on the part of plaintiff or defendant." Such a statement might lead the jury to display an antipathy to insurance corporations and give the plaintiffs damages knowing that the defendants would not have to pay them. For that reason the Court may, in its discretion, discharge the jury or try the case without a jury. It is not material to the issue, therefore inadmissible evidence, and because of its possible effect may be regarded as ground for a new trial.

In *Mitchell* v. *Heintzman* (1913), 9 D.L.R. 20, a new trial was not granted where in a damage action plaintiff's counsel elicited the fact that a doctor, who examined the plaintiff, did so on behalf of the Travellers' Insurance Company. It was not made clear that the defendant was insured in this company, but from the questions asked and the further fact that plaintiff's counsel, in addressing the jury, referred to the matter the conclusion appears clear that, the jury might, at all events, have received that impression. It was thought that no substantial wrong accrued from the incident. I do not think any substantial wrong occurred in the case at Bar. The objectionable evidence was not deliberately introduced. It was elicited while the witness, in answer to a proper question, stated the whole of the conversation with one of the defendants, all of which, except the reference to insurance, was unobjectionable. There was, I am satisfied, no intention to influence the jury in this case, although I quite understand that a witness might be purposely instructed to include it in an answer.

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As the matter should be dealt with solely on the ground of the inherent power of the Court to prevent either party being prejudiced by references not material to the issue, which might lead to an improper verdict, every case should be decided on its own facts. The discretion of the learned trial judge should not be interfered with if exercised on proper grounds. He, however, regarded it as incurable, holding that the trial was vitiated. The fact is that it is simply a rule of caution to prevent injustice. The discretion, therefore, having been exercised upon wrong grounds is reviewable. Further, the incident was not acted upon when it arose, counsel for the defence toyed with it, keeping it as a string to his bow to be used only in certain eventualities. All the facts and surrounding circumstances, therefore, lead me to the conclusion that the verdict as found should have been entered.

In reference to the admission of the by-law to which objection was taken, it should merely be treated as a case of wrongful admission of evidence. Its admission did not *per se* cause a mistrial. The mischief, too, was cured by the learned trial judge, in correctly instructing the jury on the law in respect

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to the points upon which the by-law might otherwise mislead them.

It was further argued that the evidence, in any event, did not warrant the jury's verdict. I cannot agree with this submission, having in view the governing principles in such cases. I would allow the appeal and direct that the verdict of the jury for the plaintiffs be entered.

Appeal allowed, Martin, J.A. dissenting.

Solicitor for appellants: *P. E. Pierce.*
Solicitors for respondents: *McQuarrie & Cassady.*

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SOSTAD v. WOLDSON: AMERICAN SAVINGS BANK AND TRUST COMPANY, THIRD PARTY.

Practice—Third-party notice—Service out of jurisdiction—Jurisdiction of Court—Claim for indemnity—Marginal rules 64(e) and 71(a) and (d).

The plaintiff, a resident of Vancouver brought action against the defendant, a resident of Spokane, Washington, for a commission for bringing about the sale of a group of mineral claims in British Columbia to the Granby Consolidated Mining, Smelting and Power Company Limited. The American Securities Corporation Limited of Vancouver was the registered owner of the claims and substantially the whole of the stock of this company was owned by the American Savings Bank and Trust Company of Seattle, its president, one Gleason, holding the stock in trust for the company. The defendant had advised Gleason that the plaintiff wanted to bring about a sale of the property for which he would expect a commission. Gleason by letter agreed to this provided the property was bonded for $200,000. The defendant then wrote Gleason that the plaintiff had gone to Anyox to negotiate a sale and Gleason again by letter acquiesced in this. The defendant claimed indemnity against the plaintiff's claim from the American Savings Bank and Trust Company and obtained an order to issue and serve said Bank with a third-party notice. An application to set aside said order was refused.

Held, on appeal, affirming the order of HUNTER, C.J.B.C., that it should be supported on the ground that the facts and circumstances are in terms

within the scope of Order XI., r. 8. That the granting of the order is now almost entirely a matter of discretion and as there was ample material for the due exercise of that discretion interference would not be warranted.

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APPEAL by third party from the order of HUNTER, C.J.B.C. of the 22nd of April, 1925, dismissing an application to set aside an order made by himself on the 3rd of April in which he gave the defendant leave to issue a third-party notice to the American Savings Bank and Trust Company, claiming indemnity against said company and to set aside the service of the third-party notice effected pursuant to said order. The action was brought for a 10 per cent. commission on the sale price of certain mineral claims known as the "Outsider Group" situate on Maple Creek in British Columbia. On the 7th of January, 1925, an order was made for service of notice of writ of summons herein on the defendant in Spokane, State of Washington. The defendant entered an appearance and claimed indemnity against the plaintiff's claim from the American Savings Bank and Trust Company of Seattle, in the State of Washington. The American Securities Corporation Limited, with head office in Vancouver, British Columbia, was the registered owner of the "Outsider Group" aforesaid and the whole of the share capital of said company is owned and controlled by the American Savings Bank and Trust Company, 94 per cent. of the shares in the American Securities Corporation Limited being registered in the name of one James P. Gleason of Seattle, the president of the American Savings Bank and Trust Company, and he holds the shares in trust for the said Company. In July, 1920, the defendant who lived in Spokane wrote Gleason that the plaintiff Sostad wished for an opportunity to sell the "Outsider Group" to the Granby Consolidated Mining, Smelting and Power Company Limited for which he would expect a commission. Gleason immediately wrote back saying it was agreeable to him if the property could be bonded for $200,000. In November the defendant wrote Gleason saying that Sostad had gone to Anyox for the purpose of negotiating a sale and Gleason again replied that it was agreeable to him on a $200,000 basis for which a commission would be paid.

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The plaintiff claims that as a result of his efforts the defendant later sold the said group of claims to the Granby Consolidated.

The appeal was argued at Vancouver on the 29th and 30th of April, 1925, before MARTIN, GALLIHER and MACDONALD, JJ.A.

Griffin, for appellant: The affidavit used in the Court below does not disclose facts essential to support a third-party order: see *The Hagen* (1908), P. 189 at p. 201; Palmer's Company Precedents, 12th Ed., 27. A company is a distinct entity and is not an agent or trustee for subscribers or members: see *Societe Generale de Paris* v. *Dreyfus Brothers* (1885), 29 Ch. D. 239 at p. 243. On the question of discretion to grant leave see *Watson and Sons* v. *Daily Record (Glasgow) Limited* (1907), 96 L.T. 485. As to whether it can be supported under Order XI., r. 1(*e.*) see *Bell & Co.* v. *Antwerp, London and Brazil Line* (1891), 1 Q.B. 103; *Comber* v. *Leyland* (1898), A.C. 524 at p. 528. The contract must be performed within the jurisdiction: see *Anger* v. *Vasnier* (1902), 18 T.L.R. 596.

Argument

Same rule applies as in service of a writ: see *In re Aktiebolaget Robertsfors and La Societe Anonyme des Papeteries de L'Aa* (1910), 2 K.B. 727; see also Annual Practice, 1925, p. 82; Yearly Practice, 1925, pp. 95, 96 and 223; *Atkins* v. *Thompson* (1922), 2 I.R. 102; *Thomas* v. *The Dowager Duchess of Hamilton* (1886), 55 L.T. 385.

Symes, for respondent: All we have to do is to make out a *prima facie* case. The matter is finally determined when leave to serve is given: see *Preston* v. *Lamont* (1876), 45 L.J., Q.B. 797. The new rule was passed solely for cases of this kind: see *McCheane* v. *Gyles* (1901), 71 L.J., Ch. 183.

Griffin, replied.

Cur. adv. vult.

4th June, 1925.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, I think, be dismissed, the learned judge below having reached the right conclusion which, though he gave no reasons therefor, may be supported on the ground that the facts and circumstances of the case are in terms within the scope of the new rule 8 of Order XI., pro-

mulgated on 13th April, 1923, which clothes the Court or a judge with an additional power to that conferred by rule 64 (1), and it does not conflict with that provision of rule 170, which relates to the mere way or manner in which the service of a third-party notice is to be effected, *i.e.*, "according to the rules relating to the service of writs of summons."

The authorities that have been cited do not support that restricted construction of the new rule which is submitted by the appellant's counsel, and the granting of the order is now almost entirely a matter of discretion, and as there were ample materials before the learned judge for the due exercise of that discretion in the interest of justice and convenience, our interference therewith would not be warranted.

MARTIN, J.A.

GALLIHER, J.A.: Prior to English Rule 8a, substituted for the former Rule 8a, by R.S.C. (No. 3), 1920, r. 5, the authorities cited by Mr. *Griffin* would seem to bear out his contention that the order appealed against here should not have been granted.

Under the provisions of our Supreme Court Act, His Honour the Lieutenant-Governor in Council, directed that the Supreme Court Rules, 1906, be amended as follows:

"That Rule 8 of Order XI. is hereby repealed, and the following rule substituted therefor:—

"'8. Service out of the jurisdiction may be allowed by the Court or a judge of the following processes, or, of notice thereof, that is to say:— (I quote only two sub-heads (*a*) and (*d*).)

GALLIHER, J.A.

"'(*a*.) Originating summonses under Order LIV.A, or LV., Rule 3 or 4, in any case where, if the proceedings were commenced by writ of summons, they would be within Rule 1 of this Order.

"'(*d*.) Any summons, order, or notice in any proceedings duly instituted, whether by writ of summons or other originating process as aforesaid.'"

This is word for word in its enacting clauses with the substituted rule 8a in the English Rules, 1920, above referred to.

We were not referred to any decision as to the scope of this new rule, nor have I been able to find any, but the learned authors of the Annual Practice, 1925, in discussing the scope of the rule at pp. 110 and 111, dealing with the decision *In re Aktiebolaget Robertsfors and La Societe Anonyme des Papeteries de L'Aa* (1910), 2 K.B. 727, where it was held *per* Lord

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Alverstone, C.J., Pickford and Lord Coleridge, JJ. that the service of a summons, order or notice contemplated by Rule 8a of Order XI., is subject to the limitations which surround the service of a writ, said (p. 111):

"The effect of this decision is expressly preserved as regards documents specified in sub-head (*a*) of the present rule, but it would seem to be no longer applicable to cases falling within sub-heads (*b*), (*c*) and (*d*)."

See also Yearly Practice, 1925, pp. 96 and 97.

Sub-head (*d*) is the one invoked here and in the absence of authority, and as well because my own views are in accord therewith, I do not think sub-head (*d*) is subject to the restrictions in Order XI., r. 1.

It is contended that the contract under which it is sought to make the third party liable was one between two foreign subjects resident in a foreign country, made in a foreign country, and to be performed, or which might be performed, there. Here, there is no consent of the parties to have it tried in the British Columbia Courts, and it is argued that there is no jurisdiction to compel a dissenting foreign subject, under such circumstances, to come into our Courts and litigate as to his liability to indemnify in an action to determine whether a commission should be paid by defendant to plaintiff, against which payment the defendant claims to be indemnified by the third party. If it were between subjects of our country, resident here, it would be both right and desirable to have the matter all tried out at once, to prevent multiplicity of actions. If we were dealing with such a contract I would, as at present advised, be inclined to take that view. But whether there was such a contract or not, the defendant is not claiming under it. He says, as agent of you (the third party, which I find he was) I was empowered to make arrangements with the plaintiff and to pay him a commission, and as such agent I am entitled to be reimbursed for any outlay I may have made, and any commission I may be called upon to pay. That is given to him by law and there is no need of a contract to reimburse so long as he has acted within the scope of his authority, with his principal's consent—the letters shew that he did.

GALLIHER, J.A.

The position then is this: he enters into an agreement with the plaintiff to procure on behalf of his principals, a purchaser

for certain mining properties in British Columbia, and to pay a commission. The purchasers dealt with are in British Columbia, and the work done by the plaintiff is done in British Columbia, and for this work he is claiming his commission from the defendant. Such being the circumstances, and the defendant claiming to be indemnified as agent, in my opinion, the learned Chief Justice was right in refusing to set aside his order for service out of the jurisdiction.

GALLIHER, J.A.

The appeal should be dismissed.

MACDONALD, J.A.: Apart from the allegation that the defendant and third party are both beyond the jurisdiction, and the contract of indemnity, if any, was made, and was to be performed beyond the jurisdiction, there is no question that a *prima facie* case was disclosed for issuing a third-party notice. As the third party's liability will doubtless be contested, it is preferable not to deal with that aspect further. There is no doubt that where both parties are foreigners, jurisdiction should not be assumed unless clearly within the rules. They should not be compelled to submit questions arising between them to settlement in what to them is a foreign jurisdiction. Under Order XI., r. 1 (*e*) it is necessary to shew that the contract (here the alleged contract of indemnity) must in express terms, or by implication, be performed within the jurisdiction. It is only within that limit that the processes of our Courts can be extended to subjects residing abroad. To be within the rules the third party, if held liable, must be obliged to pay the defendant the amount of the judgment against him in this Province, even although the defendant resided abroad. It was submitted that as the plaintiff's contract, entitling him to a commission, was to be performed in this Province, and as he is entitled to be paid by the defendant where the liability is established, the third party must also discharge his liability, if established, at the same place. In other words, if the relation of principal and agent exists between the third party and defendant (and an agent is entitled to be indemnified by his principal) the principal is in the same position as the agent in so far as discharging that liability is concerned. The agent is his *alter ego*. In promising

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to pay a commission the defendant spoke for his principal, the third party. Therefore, if the agent must discharge his liability in British Columbia, the principal, on his part, must likewise do so.

The learned Chief Justice in the exercise of his discretion allowed the third-party notice to issue. It should not be interfered with unless thought clearly wrong, or wrong in law. A *prima facie* case has been established which entitles the defendant to the order obtained. It is equitable on the facts of this case that the defendant's right to indemnity should be decided in the original action rather than by independent action at a later stage and as, in my judgment, the new rule is broad enough to warrant the order, I do not think we should interfere.

Appeal dismissed.

Solicitors for appellant: *Griffin, Montgomery & Smith.*
Solicitors for respondent: *Wilson, Whealler & Symes.*

CAYLEY, CO. J.

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WOODWORTH v. ALLAN

WOODWORTH v. ALLAN.

Solicitor and client—Consultation—Scope of term.

In the course of a solicitor's business a consultation means either advising a client as to a course of action or receiving instructions to act for the client in a certain matter.

Where a vendor named in an agreement for sale of land on which default had been made by the purchaser, enters a solicitor's office and asks him how much he would charge for clearing his title, but not getting a satisfactory answer leaves him and engages another solicitor to do the work, the solicitor first mentioned is not entitled to charge a consultation fee.

Statement

ACTION by a solicitor to recover $10 consultation fee and $1 for attending telephone to either send or receive a message from the defendant's residence. The facts are sufficiently set out in the reasons for judgment. Tried by CAYLEY, Co. J. at Vancouver on the 13th of June, 1925.

Plaintiff, in person.

Defendant, in person.

26th August, 1925.

CAYLEY, CO. J.: The plaintiff is a solicitor and sues for $10 consultation fee and $1 for attending at the telephone to either send or receive a message to or from defendant's residence. The defendant is the vendor named in an agreement for sale of land on which default had been made by the purchaser, and his defence is that he went to the plaintiff's office to inquire how much the plaintiff would charge him for clearing title and that, failing to get a definite answer from the plaintiff, he left him and engaged another solicitor to take the necessary steps.

In a matter like that each party may be said to be right from his point of view. In order to quote a price the solicitor would necessarily ask for full information, and this might be interpreted by him as a consultation. On the other hand an intending litigant might very well call on a solicitor with a view to inquiring what his charge would be for doing a certain piece of work, and failing to come to an agreement as to terms might decide not to engage that solicitor but have the work done elsewhere. Can an intending litigant be charged for making such an inquiry? I think not. A consultation, I think, means either advising a client as to a course of action, or receiving instructions to act for the client in a certain matter. Neither of these characteristics attaches to an inquiry as to what a particular solicitor would charge for work if the intending litigant decided to engage him. I think the action fails. The $1 item is a mere adjunct to the other and cannot be allowed for.

Judgment

Action dismissed.

Action dismissed.

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FRASER VALLEY DELTA CO-OPERATIVE ASSOCIATION v. KLINE, SAVAGE & HOOPER

FRASER VALLEY DELTA CO-OPERATIVE ASSOCIATION v. KLINE, SAVAGE & HOOPER.

Damages—Breach of warranty—Sale of spring seed wheat—Implied warranty as to fitness—R.S.B.C. 1924, Cap. 225, Secs. 3, 21 and 22—Can. Stats. 1923, Cap. 27, Sec. 3.

Section 21 of the Sale of Goods Act provides "that there is no implied warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except, *inter alia*, where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to shew that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose."

In an action for damages for breach of warranty the plaintiff claiming that he had contracted with the defendant for the purchase of a supply of spring seed wheat suitable for the purpose of being sowed as seed but the wheat supplied was not spring wheat but fall wheat and unfit for seeding purposes, he neglected to prove in his evidence in chief that "it was in the course of the seller's business to supply seed wheat" and was allowed to put this evidence in in rebuttal the defendant not being given an opportunity to answer it.

Held, on appeal, reversing the decision of RUGGLES, Co. J., that the defendant was prejudiced by the refusal of the learned judge to call evidence to answer that given by the plaintiff in rebuttal upon a crucial point and a new trial should be granted.

APPEAL by defendants from the decision of RUGGLES, Co. J. of the 6th of January, 1925, in an action to recover $1,000 damages for breach of warranty. The plaintiff Association deals in grain for the use and benefit of its members and in February, 1924, contracted verbally with the defendants for the purchase of 4,730 pounds of wheat fit and suitable for the purpose of being sowed as seed, it being purchased for the purpose of being resold by the plaintiff to its various members as spring wheat suitable for seeding purposes, and the plaintiff claimed the defendants warranted that the said wheat was spring wheat reasonably fit for the purpose for which it was required, it having been a sale by description and by sample. The wheat supplied was resold by the plaintiff to its various

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members with a warranty that it was spring seed wheat and afterwards claims were made by the various members for breach of warranty as the wheat supplied was fall wheat and unfit for the purpose for which it was supplied.

The appeal was argued at Vancouver on the 24th and 27th of April, 1925, before MARTIN, GALLIHER and MACDONALD, J.J.A.

Craig, K.C., for appellants: They neglected to prove that it was in the course of the seller's business to supply spring seed wheat and they were allowed to put evidence of this in in rebuttal and the defendants were not allowed to answer this. In fact we are flour and feed merchants and do not sell wheat for seeding. To get the benefit of the implied warranty they had to shew we were dealers in seed wheat. We say this was a sale by sample. Our witness says seed wheat was never mentioned and in fact the wheat was sold at feed wheat prices, feed wheat being $42 and seed wheat $50. No one of the conditions of section 3 of the Federal Seed Grain Act was complied with and the sale by the plaintiff to its members without complying with said Act precludes them from obtaining damages. The Court will not enforce an illegal contract: see *The Consumers Cordage Company* v. *Connolly* (1901), 31 S.C.R. 244; *Brown* v. *Moore* (1902), 32 S.C.R. 93; *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297.

Argument

Oliver, for respondent: This is a clear breach of warranty. It was a sale by description and by sample: see Phipson on Evidence, 6th Ed., 40; Halsbury's Laws of England, Vol. 13, p. 453; *Budd* v. *Davison* (1880), 29 W.R. 192; *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57. Not only the sample but the bags must be marked: see *Randall* v. *Raper* (1858), El. Bl. & El. 84. As to non-compliance with the statute see *Wallis, Son & Wells* v. *Pratt & Haynes* (1911), A.C. 394; *Ward* v. *Hobbs* (1878), 4 App. Cas. 13; *Long* v. *Zlatnick* (1922), 3 W.W.R. 687; *Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284. As to sale by description see *Bowes* v. *Shand* (1877), 2 App. Cas. 455; *Preist* v. *Last* (1903), 2 K.B. 148; *Manchester Liners, Ld.* v. *Rea, Ld.* (1922), 2 A.C. 74. That

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there was an implied condition that the wheat was fit for the purpose for which it was purchased: see *Bristol Tramways, &c., Carriage Company, Limited* v. *Fiat Motors, Limited* (1910), 2 K.B. 831; *Hammond & Co.* v. *Bussey* (1887), 20 Q.B.D. 79; *Agius* v. *Great Western Colliery Company* (1899), 1 Q.B. 413.

Craig, replied.

Cur. adv. vult.

4th June, 1925.

MARTIN, J.A.: It was strongly objected that the learned judge below should not have allowed the so-called evidence in rebuttal of Brauer to be given, and also that he should have allowed the defendants to answer it, and that it was not really rebuttal but a splitting of the plaintiff's case. After carefully reading the evidence and proceedings I am of opinion that these objections are all well taken, it appearing that the plaintiff's counsel expressly stated that he was calling witnesses to "shew that these people were in the seed grain business," and therefore having elected to prove that fact the practice is clear that he should have supported it, in chief, by all the evidence thereupon. In *e.g., Jackman* v. *Jackman* (1889), 14 P.D. 62, where two eminent counsel were concerned, *viz.*, Sir Edward Clarke, S.G., and Inderwick, Q.C., the latter took the objection against the course proposed to be adopted by his learned friend that:

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"He cannot split up his case into two parts as he now proposes. There is no distinct authority on the point, but the respondent's contention is in accordance with invariable practice.

"Sir E. Clark, S.G., for the petitioner, expressed his willingness to adopt whichever course the Court held to be regular."

And the Court ruled:

"Butt, J.: I have no hesitation in ruling in favour of Mr. Inderwick's contention, that if the petitioner is asked now as to adultery, his witnesses in support of that denial must be called as part of his original case. On the other hand, the question of his adultery may be reserved altogether for a rebutting case after the respondent's witnesses have been called."

It would have been well if plaintiff's counsel here had brought the matter to the notice of the Court and obtained the necessary leave, which will be given in proper cases, *e.g.*, in *Faldo* v. *Lovett* (1897), 77 L.T. 220; many authorities are conveniently cited in Phipson on Evidence, 6th Ed., 39. But though the

evidence was not properly rebuttal, there is no authority for granting a new trial on that ground alone, because a trial judge has very wide discretion in the reception at any time of relevant evidence (as this was) at his own request or otherwise—*Budd* v. *Davison* (1880), 29 W.R. 192—and the fact that he admitted it at the wrong time upon an erroneous view of its exact nature does not make it any the less relevant, and if the other side is not prejudiced by the course taken no real harm has been done: I note, in this connexion, that the learned judge very fully exercised his powers of interrogating certain witnesses. But if such an unusual degree of latitude has been given one party it would not be "in fairness," as Vice-Chancellor Malins said in *Budd* v. *Davison, supra,* to refuse the other party the fullest opportunity to answer or explain evidence so belatedly introduced, and I am of opinion that the defendants were unwittingly prejudiced by the refusal of the learned judge to call evidence to answer that given by Brauer upon a crucial point, and therefore a new trial should be granted.

MARTIN, J.A.

In coming to this conclusion I have not overlooked the fact that the defence in law was submitted to us that under the Federal Seed Grain Act of 1923, Cap. 27, Sec. 3, this was an illegal transaction upon which the plaintiff could not recover, but on a point of this importance, and the application of the statute to the facts, I should like to hear a fuller argument than we have had before reaching a final conclusion. Moreover, the point seems to have received little, if any, attention below, therefore I am of opinion that it would be more desirable in these somewhat unusual circumstances to have a decision upon the facts based upon all the relevant evidence before further considering the effect of the said statute, should that be necessary.

GALLIHER, J.A.: As all members comprising the Court at the hearing of this appeal are agreed that there should be a new trial, on the ground of the wrongful admission of evidence in rebuttal, which plaintiff should have adduced in chief, which evidence was objected to, and defendants though requesting leave to call evidence in answer thereto, were denied that privilege, I refrain from making any observations in respect of my views on the case generally.

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MACDONALD, J.A.

MACDONALD, J.A.: It was submitted that, in any event, a new trial should be ordered because the respondent in rebuttal was permitted to call a witness to contradict a statement made by Kline, a witness for the appellants, and testify that seed wheat was sold to another party. It was part of the respondent's case to shew that the appellants dealt in that commodity. This evidence should not have been allowed in rebuttal, although the Court in its discretion might hear it, in which case an opportunity to reply should in fairness be given to the other side.

It is true that the learned trial judge based his judgment on the evidence of Perran and apparently ignored the evidence thus improperly introduced. I am of the view, however, on reading the whole evidence and noting the course of the trial that the rebuttal evidence referred to was a factor in the decision of the learned trial judge. It was on a point very material to the issue.

I would direct a new trial.

New trial ordered.

Solicitors for appellants: *Walsh, McKim & Housser.*
Solicitor for respondent: *Joseph Oliver.*

MURPHY, J.

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June 10.

WESTERN ASSURANCE CO. *ET AL.* v. CANADIAN GOVERNMENT MERCHANT MARINE.

Shipping—Bill of lading—Carriage of goods—Deviation—Liberty to deviate from specified voyage.

WESTERN ASSURANCE CO. *v.* CANADIAN GOVERNMENT MERCHANT MARINE

Goods were shipped from Vancouver to Yokohama under a bill of lading one of the conditions in which gave the ship the privilege of deviation without qualification. On leaving Vancouver the ship proceeded towards Portland, Oregon, for the purpose of completing her cargo before going across the Pacific but was lost on Willapa Spit at the mouth of the Columbia River.

Held, that although general provisions in a bill of lading must be construed so as to be consistent with the contemplated voyage, the object of the deviation clause was to enable the ship to complete her cargo at ports within a reasonable distance from Vancouver, and Portland being within such reasonable distance the action should be dismissed.

MURPHY, J.

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WESTERN ASSURANCE CO. *v.* CANADIAN GOVERNMENT MERCHANT MARINE

ACTION to recover the amount paid in insurance on goods lost on the steamship Exporter when wrecked off the mouth of the Columbia River on the grounds that the ship was unseaworthy and that she had deviated from the course agreed upon. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 27th of April, 1925.

F. G. T. Lucas, and *E. A. Lucas,* for plaintiffs.
Mayers, and *A. R. MacLeod,* for defendant.

10th June, 1925.

MURPHY, J.: Plaintiffs base their action on two contentions, that the ship was unseaworthy and that she deviated from the agreed voyage. Unseaworthiness is predicated because it is said the standard compass and its equipment were defective, because of the drunkenness of the chief officer at the time of the stranding, because the crew was inexperienced and because proper charts and books of sailing directions were not on board. In my view of the evidence, no one of these contentions was established at the trial. The compass was a standard make, had been properly adjusted and recently inspected, and, as shewn by the record of some six hundred observations, had shewn no more than average deviations. Whilst it is true that the azimuth mirror was apparently not made for the compass, this I hold, on the evidence, introduced no element of uncertainty in the correctness of the observations taken, provided due care and skill were utilized in taking them.

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It is also true that the chief officer was incapacitated by liquor when the Exporter sailed from Vancouver. I hold, however, that on the Sunday morning watch which he kept, and during which the stranding took place, he was sober and not suffering from the after effects of indulgence in alcohol. He kept his regular watch on Saturday afternoon and wrote up the log. The captain saw and conversed with him about an hour before the stranding, and evidently detected nothing to arouse his suspicions. The chief officer took an active part in the operations which followed upon the stranding, and again wrote up the log some three hours after that event. An inspection of his Saturday and Sunday entries therein strengthens my view. On the

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other hand, there is but one bit of evidence that he had anything to drink after the vessel sailed, and I accept his explanation that this was not liquor.

There were on board, even excluding the chief officer, the complement of officers and able seamen required by law, and I find on the evidence that such complement was sufficient for the proper and safe navigation of the ship.

A proper chart, a British Admiralty chart, was on board. I hold that in the hands of an ordinarily careful and prudent captain nothing else was necessary to enable the voyage to be made in safety. It is not proven that books of sailing directions were not furnished, since the package of stationery was not opened. But if they were not, whilst it would undoubtedly have been better that they should have been, as stated, my view is that the admiralty chart was sufficient.

If I am wrong in any of these findings, I hold that unseaworthiness as set out under any of these heads had nothing to do with the loss of the vessel. That loss I find was occasioned by errors made by the captain and the mate. The captain should have acquainted himself before he sailed from Vancouver —as he had every opportunity of doing—with the currents and other navigation problems likely to be encountered on the voyage to Portland. Not having done so, he should have carefully checked his position before he set his course for the mouth of the Columbia. Then, being off an unknown coast, he set this course too fine. As set, his chart, had he examined it, would shew him that the ship must skirt the 50 fathom line. The evidence seems clear that such depth ought to have been regarded as the minimum of safety. A prudent mariner would, I hold, on the evidence, have either made allowance for the existence of inshore currents, or, in the absence of ability to obtain a "fix," would have ordered soundings from time to time. The order left by the captain to the chief officer, as to altering the course landward at 4 a.m. if the ship was more than ten miles off shore, was, under the circumstances, an improper one. Though the chief officer did not obey this until after 5 a.m., he made a grave error in obeying it at all when he had no definite idea of the ship's location and without even casting the

Judgment

lead. Further, I think the captain, under all the circumstances, erred at 6 o'clock on Sunday morning, when informed the course had been altered, in not enquiring on what data that decision had been made. In my opinion, therefore, the plaintiffs' first contention is not substantiated.

The second point has given me more concern. The ship did, I think, in fact deviate from the voyage agreed upon. I am fortified in this finding because the Court of Appeal took a similar view in *Chartered Bank of India, Australia and China* v. *Pacific Marine Insurance Co.* (1923), 33 B.C. 91, where the same question arose as to the voyage in question herein. Indeed, counsel for the defence, if I understood him aright, did not contend otherwise. His argument was that the terms of the bill of lading gave the ship the privilege of deviation. Condition one thereof does confer this privilege without qualification. Such cases, however, as *Glynn* v. *Margetson & Co.* (1893), 62 L.J., Q.B. 466 shew that such general provisions must be construed in reference to the contemplated voyage. The test to be applied is, I think, laid down by Lord Haldane in *Attorney-General* v. *Benjamin Smith & Co.* (1918), 87 L.J., K.B. 1045 at p. 1049, where he says:

Judgment

"The language conferring liberties on the vessel must, I think, be read as signifying that, although these liberties are expressed to be wide, they are not to be such as to destroy the character of what was bargained for."

What was bargained for in the case at Bar? The face of the bill of lading shews that lumber placed on the Exporter lying in the Port of Vancouver is to be carried unto the Port of Yokohama, subject to the conditions on the face and back thereof. It is to be observed that there is no statement that the Exporter is bound directly for Japan. Clearly, however, what was bargained for was the carriage of lumber from Vancouver to Yokohama. Ordinary experience would indicate that this was to be done for an agreed freight rate and that such rate would be ordinarily fixed on the basis of a prospect that the ship would have a full cargo. Keeping in mind the surrounding circumstances, I am of opinion that condition one did operate in this instance to authorize a deviation to Portland to complete the cargo. The line to Japan was something of a new venture. So far as the evidence shews there would be but one port inter-

MURPHY, J.

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mediate between Vancouver and Japan—the Port of Victoria. General knowledge of the amount of export trade between the northwest coast of America and Japan, and where such trade would be likely to originate, may fairly, I think, be imputed to persons engaged in such trade, as was the firm to whom this bill of lading was issued, and may likewise be imputed to any transferee of the bill of lading. Reasonable effect must be given to condition one subject to the qualification above set out. Any exporter of goods to Japan seeing this bill of lading would, I think, conclude that the object of the deviation clause was to enable the ship to complete her cargo at ports within a reasonable distance from Vancouver. Portland, I hold, to be within such reasonable distance. Such deviation would not defeat the main object of the venture. On the contrary, it would conceivably be the only way in which such service could be obtained at the agreed rate of freight. The alternative for a shipper would be to charter a vessel, a course likely to be more costly. I conclude, therefore, not without hesitation, that plaintiffs' second condition likewise fails. The action is dismissed. Costs must follow the event.

Judgment

Action dismissed.

THE PASCHENA v. THE GRIFF.

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

1925

Aug. 21.

THE PASCHENA v. THE GRIFF

Admiralty law—Practice—Value of scow—Appraisers—Fees—Application for fiat for increase.

Under a commission of appraisement issued to the marshal, M. was appointed by the marshal at the joint request of the parties as that officer's substitute in the execution of the commission of appraisement in Prince Rupert and with his appointment he received a letter signed by the solicitors of both parties asking him to substitute the marshal and appraise the scow in question in company with the plaintiffs' appraiser and the defendant's appraiser. M. did in fact participate in the appraisement of the scow and signed the certificate of appraisement. On an application under Part VI. of the Table of Fees for a fiat for an increased fee for M. as appraiser in appraising the value of said scow:—

Held, that in the circumstances this should be regarded as a special arrangement to meet unusual conditions and the objection that in fact he was the marshal's substitute should not be allowed to prevail against his application for a moderate remuneration for services rendered in good faith and at the request of both parties.

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

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Aug. 21.

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APPLICATION by defendant under Part VI. of the Table of Fees, for a fiat for an increased fee for two persons who acted as appraisers in appraising the value of the defendant's scow at Prince Rupert under a commission of appraisement issued to the marshal in form No. 44 in the Appendix to the Rules. The facts are set out fully in the reasons for judgment. Heard by MARTIN, LO. J.A. in Chambers at Vancouver on the 21st of August, 1925.

Statement

Mayers, for the application.
Davis, K.C., contra.

21st August, 1925.

MARTIN, LO. J.A.: This is an application by the defendant, under Part VI. of the Table of Fees, for a fiat for an increased fee for two persons who acted, it is alleged, as appraisers in appraising the value of the defendant's scow at Prince Rupert, B.C., under a commission of appraisement issued to the marshal in the ordinary form, No. 44 in the Appendix to the Rules. It is now conceded that, as regards Captain Stanley Cullington, who was appointed by the marshal at the request of the defendant, he did duly act in that capacity and that there is no objection to his fee being increased to the authorized limit, *viz.*, $30.

Judgment

But as to the employment of Jarvis H. McLeod, it is objected that he cannot be deemed to be an appraiser, even though he undertook to act as such, because he was appointed by the marshal at the joint request of the parties (as per their lettergram of the 25th of April, 1924) as that officer's substitute in the execution of the said commission of appraisement, and so the only fee that he could be allowed is that authorized to be charged by the marshal under Part V. of said Table of Fees, *viz.*, "For executing any warrant or attachment . . . . 4.00."

The situation is unusual because of the special arrangement made by the marshal at Victoria at the request of both parties,

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in order to save expense and facilitate matters at Prince Rupert, by the appointment at that port of the said McLeod as his substitute for the execution of the said commission. The way that arrangement was presented to McLeod appears by the said joint lettergram sent to him direct, as follows:

"Jarvis H. McLeod, Esq.,

"Prince Rupert, B.C.

"Please act as substitute of marshal and appraise scow Griff in company with plaintiffs' appraiser John McCoskrie and defendant's appraiser Stanley Cullington [stop] Griff will be available for appraisement on Twenty-sixth instant and appraisement should be made then [stop] Your appointment as substitute and marshal's acceptance of nominations of appraisers being forwarded by post [stop] Each appraiser must be duly sworn by you.

"E. C. Mayers

"Solicitor for the defendant.

"E. P. Davis & Co.

"Solicitors for the plaintiffs.

"Chg. Mayers, Stockton & Smith."

This notification was followed up by the formal appointment of the marshal, as follows:

"I the undersigned Marshal of the Court of Admiralty for the British Columbia Admiralty District do hereby appoint Jarvis H. McLeod of Prince Rupert, in the Province of British Columbia as my substitute to execute the commission of appraisement issued herein and dated the 15th of March, 1924, in company with John McCoskrie and Stanley Cullington as appraisers, and I authorize the said Jarvis H. McLeod to administer the oath to the said appraisers.

Judgment

"Dated at Victoria this 25th day of April A.D. 1924.

"F. G. Richards,

"Marshal of the Court of Admiralty for the British Columbia Admiralty District.

"Approved

"S.L."

There can, I think, be no doubt that upon the receipt of these special documents a layman would regard himself as being required by all concerned to "appraise the scow Griff in company" with the other nominated appraisers, and it appears by the affidavit of Cullington of 2nd June, 1924, that McLeod did in fact actively participate in the appraisement, as is moreover stated in the certificate dated the 29th of April, 1924, signed by the said three persons after they had "proceeded to the Prince Rupert Drydock . . . . . and examined" the vessel "for this particular purpose, for appraising said vessel for valuation,"

and "upon completion of examination . . . . . we the undersigned arrived at a valuation as follows: $10,000 value of the Scow Griff; $3,213 value of the cargo of coal."

Having regard to all these circumstances, I am unable to regard the matter, in the light of fairness and reason, as other than a special arrangement to meet unusual conditions (unnecessary to detail further), and therefore the objection to the capacity in which the said McLeod did in fact reasonably act, upon the said joint request, should not now be allowed to prevail against his application for a very moderate remuneration for services rendered in good faith in pursuance thereof. Such being my view of the special conditions, it is unnecessary to consider what would have been the remuneration of the applicant if he had merely acted in the usual way in the strict discharge of the marshal's duty in executing such a commission, as to which *Cf.* Williams & Bruce's Admiralty Practice, 3rd Ed., 313 *et seq.*; Roscoe's Admiralty Practice, 4th Ed., 305-10; and Mayers's Admiralty Law and Practice, 282-4.

Judgment

Fiats will therefore be granted for increased fees of $30 each to the said McLeod and Cullington; costs of this application to the defendant: it is not necessary that a formal order be taken out upon applications of this kind, unless special circumstances should require it.

Order accordingly.

COURT OF APPEAL

1925

June 8.

REX v. COY.

Criminal law—Keeping common gaming-house—Evidence—Admissibility—Articles seized on premises—Absence of proper warrant—Criminal Code, Secs. 228, 985 and 986.

REX v. COY

Two constables entered a premises under a warrant issued under the Government Liquor Act. They found no liquor but eleven men were in a back room, five of them sitting around a table on which were two packs of cards only. They also found on the premises packs of cards, poker chips, dice, a round cloth-covered table, a board from which one could, upon payment of 10 cents, pull a collar button beneath which was a number and if the number was one of a selected number it drew a prize. The proprietor was convicted by a police magistrate for keeping a common gaming-house under section 228 of the Criminal Code.

Held, on appeal, affirming the conviction, that apart from any evidence as to an alleged confession there was enough evidence applicable to section 986 of the Criminal Code to justify the convicting magistrate's decision.

APPEAL by accused from a conviction by T. A. Pope, police magistrate for the District of Penticton, on the 3rd of January, 1925, on a charge of unlawfully keeping a common gaming-house contrary to section 228 of the Criminal Code. The accused had charge of a premises in Penticton, known as the Emperor Club. At five o'clock on the morning of the 30th of December, 1924, two constables with a search warrant entered said premises. There were eleven men present, five or six of them sitting around a table and the others seated in chairs appearing to be watching a game that had been in progress. There were two packs of cards on the table. The police found

Statement

on the premises unused cards, six boxes of poker chips, boxes of chocolate, two "bombs" containing liqueur decanters and glasses, punch board, a set of dice, and a board with writing on it. On this board as explained by the accused to the constables were collar buttons that could be pulled out and under each was a number. If the number was the same as one of the selected numbers on the board he would win a prize. By payment of 10 cents any person could try for a prize by pulling out a collar button. No liquor was found and no chips were on the table. Accused was convicted and fined $50.

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The appeal was argued at Vancouver on the 3rd of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Orr, for accused: There was evidence of card playing but no suggestion of stakes being played for and no liquor was found. The search warrant was for liquor only. They had no right to search except for liquor. A statement made by accused must be free and voluntary and not under threat: see *Rex* v. *De Mesquito* (1915), 21 B.C. 524 at p. 527. The board as described can be considered but not the statement by the prisoner.

Matheson, for the Crown: Assuming what counsel for accused says is correct, the conviction must be sustained under sections 985 and 986 of the Code. The constable was lawfully on the premises: see *Rex* v. *Cessarsky* (1920), 1 W.W.R. 536; *Rex* v. *Honan* (1912), 26 O.L.R. 484; *Rex* v. *Ah Sing* (1920), 3 W.W.R. 629.

Argument

Orr, in reply, referred to *Rex* v. *Jung Lee* (1913), 22 Can. C.C. 63; *Rex* v. *Hung Gee (No. 1)* (1913), 21 Can. C.C. 404 and annotations in 25 Can. C.C. at p. 137.

Cur. adv. vult.

8th June, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This conviction, under Criminal Code section 228, should, I think, be sustained. Apart from any evidence in the alleged confession (which, during the argument, we ruled should be excluded), there is enough evidence applicable to section 986 to justify the convicting magistrate's decision. I adopt the view of that section taken by the Appellate Court of Alberta in *Rex* v. *Cessarsky* (1920), 1 W.W.R. 536; it is quite distinct from section 985 in its application and does not depend upon an entry by warrant. It is unnecessary to go into the evidence which properly satisfied the magistrate that the premises were "found fitted or provided with any means or contrivance for playing any game of chance or any game of mixed chance or skill, gaming or betting," under section 986, but the box of punch boards and the large board with collar

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buttons, produced with other articles suitable for gaming, carry their own inference and, in the circumstances, need no description or explanation by witnesses: "punch board" is to be found in evil association in the expression "dice game, shell game, punch board, coin table or . . . . . wheel of fortune" in section 236 (*e*) relating to lotteries.

I would therefore dismiss the appeal.

GALLIHER, J.A.: I would dismiss the appeal. Section 985 of the Criminal Code is invoked. This section, in so far as is essential, is in the following words:

"When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any game of chance or any mixed game of chance and skill are found in any house, room or place suspected to be used as a common gaming-house, and entered under a warrant or order issued under this Act . . . . . it shall be *prima facie* evidence, on the trial of a prosecution under section 228 . . . . . that such house, room or place is used as a common gaming-house."

Under this section it would appear necessary that the entry should be under a warrant or order issued under the provisions of the Criminal Code or in respect of some offence under the Code. Here the entry was made under a warrant to search for liquor issued under the Summary Convictions Act of British Columbia.

GALLIHER, J.A.

I also think some stress should be laid on the words "suspected to be used as a common gaming-house."

But section 986 is also invoked by the Crown. By Cap. 13, Sec. 29 of 1913, section 986 of the Criminal Code was repealed and the following substituted:

"986. In any prosecution under section two hundred and twenty-eight or under section two hundred and twenty-nine it shall be *prima facie* evidence that a house, room or place is a disorderly house if any constable or officer authorized to enter any house, room or place is wilfully prevented from or obstructed or delayed in entering the same, or any part thereof; and if any house, room or place is found fitted or provided with any means or contrivance for unlawful gaming or betting or for opium smoking or inhaling, or with any device for concealing, removing or destroying such means or contrivance it shall be *prima facie* evidence that such house, room or place is a common gaming-house, common betting-house or opium joint as the means or contrivance may indicate."

This was further amended by section 5 of Cap. 16, 1918, by striking out the words "unlawful gaming" in the eighth and

ninth lines thereof and substituting the words "playing any game of chance or any mixed game of chance and skill." As section 986 originally stood in the Code (1906) it dealt with prosecutions for keeping a common gaming-house, or for playing, or looking on only. It is now wider and includes, betting-house and opium joint as well as bawdy-house.

We then have in brief: In a prosecution for keeping a gaming-house it is *prima facie* evidence, under the second portion of 986, that the house is such if it is found fitted or provided with any means or contrivance for playing any game of chance, or any mixed game of chance and skill. What was found on the premises in question here were cards, poker chips, dice, a round cloth-covered table, a board from which one could, upon payment of 10 cents, pull a collar button, and under the collar button was a number, and if you drew one of a selection of numbers you received a prize. These would come within section 986, under the words "provided with any means or contrivance," etc.

GALLIHER, J.A.

I am not called upon here to decide whether an entry under this part of 986 must be under a warrant or other authority, as the officer in this case was authorized under a warrant though issued for another purpose. That point I do not decide.

MCPHILLIPS, J.A.

MACDONALD, J.A.

McPHILLIPS and MACDONALD, JJ.A. would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *McKay, Orr, Vaughan & Scott.*
Solicitor for respondent: *Mackenzie Matheson.*

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1925

June 4.

KENWORTHY v. BISHOP

KENWORTHY v. BISHOP *ET AL.*

Water and watercourses—Board of investigation—Power to adjust former records—Water Act, R.S.B.C. 1924, Cap. 271, Sec. 312.

The plaintiff and defendant owned ranches in Empire Valley that of the defendant being about half a mile above the plaintiff's on China Creek which flowed through both ranches. The defendant's predecessor in title obtained two records in 1875, one for 200 inches of water for irrigation purposes from Little Churn Creek (on a separate watershed from China Creek) to be taken by a ditch across the divide to China Lake which was at the source of China Creek and about three miles above his ranch. This record included all springs naturally flowing into the ditch between Little Churn Creek and China Lake, the other to store the water taken from Little Churn Creek by a dam at the lower end of China Lake and to take it to his ranch through China Creek. The plaintiff's predecessor in title obtained two records one in 1877 for 100 inches of water for irrigation purposes on his ranch to be taken from Brown's Lake (situate between the two ranches in the course of China Creek), the other in 1886 to construct a dam at the outlet of Brown's Lake and store water during spring freshets. In 1918 the Board of Investigation under the Water Act made an order directing the comptroller of water rights to issue a conditional licence to the defendant in substitution of the other two, which did not include the springs referred to in the original record. In an action for damages the plaintiff claimed that under its conditional licence the defendant was only entitled to the water that he brought by ditch from Little Churn Creek and that having taken and stored in addition China Lake water he deprived the plaintiff of the natural flow of water from China Lake through the creek into Brown's Lake to which he was entitled under his records. The plaintiff was awarded damages.

Held, on appeal, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A. dissenting), that the Board of Investigation has the power to readjust water privileges under the Water Act, that Little Churn Creek (the source of the defendant's water supply) being on a different watershed than China Lake, and the seepage and springs on the China Lake watershed which flowed into the ditch carrying the water from Little Churn Creek to China Lake having been omitted from the Provincial licence issued to the defendant by the Board of Investigation, defendant's right to water is confined to what he takes from Little Churn Creek, he is therefore subject to any damage caused the plaintiff by reason of his having taken China Lake water.

Statement

APPEAL by defendants from the decision of GREGORY, J. of the 6th of November, 1924, in an action for damages for wrong-

fully depriving the plaintiff of water which she claims under certain water records for irrigation purposes on certain lots in the Lillooet District. On the 20th of November, 1875, one Brown, a predecessor of the defendants in title acquired two records, one for 200 inches as owner of lot 225 to divert from Little Churn Creek by ditch to China Creek including all springs naturally discharging into said ditch, and the other to store the water taken from Little Churn Creek by a dam at the lower end of China Lake and to take it to his ranch through China Creek. Subsequently Anthony Bishop obtained lot 225 and the records appurtenant thereto and he and his predecessors constructed all necessary works in connection therewith. On the 21st of September, 1915, the Board of Investigation under the Water Act of 1914, directed the comptroller of water rights to issue a conditional water licence (No. 2907) and storage licence (No. 2908) to Anthony Bishop, owner of lot 225 the first to be taken from Churn Creek by the Chinese ditch and the second to store water in China Lake, all for use at lot 225. Anthony Bishop managed affairs until 1920 when he died and John Bishop, junior, then took charge. The plaintiff's predecessor who owned lot 365, which was below lot 225 and below Brown's Lake the upper end of which is adjoining lot 225, obtained a first water record in 1877 of 100 inches from Brown's Lake for irrigation on lot 365, and on the 23rd of August, 1886, a record of right to construct a dam at the outlet of Brown's Lake to retain water during spring freshets so as not to flood others lands and subsequently Mrs. Kenworthy obtained conditional licences Nos. 2905 and 2906 on the 24th of January, 1918, granting the right to take water from Brown's Lake and to store water in said lake. The plaintiff claims that the defendants in taking all the water from China Lake without any right prevents it from flowing in its natural course into Brown's Lake.

Statement

The appeal was argued at Vancouver on the 18th to the 23rd of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

A. H. MacNeill, K.C., for appellants: We had the first water record from Little Churn Creek. This we carried through what

Argument

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was known as the Chinese ditch to China Lake and we had a record to dam the water at the lower end of China Lake our grant including all springs flowing into the Chinese ditch. We submit this included all water above the dam as the Chinese ditch substantially ran down to the dam. Having these rights there is no section of any Act giving the right to anyone to take away from us anything we have under these original records and we have the right to store the water in the lake. On the question of costs the defendant was entitled to costs on the issue as to putting obstructions in the Creek on which he was successful, and the action being dismissed as against him in his representative capacity he is entitled to full costs of the defence: see *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1919), 26 B.C. 560. They had no right to raise their dam at the bottom of Beaver Lake and flood our property.

Argument

Hossie, for respondent: On the jurisdiction of the Board see *Rucker* v. *Wilson* (1923), 32 B.C. 401; *The Western Canadian Ranching Co.* v. *Department of Indian Affairs* (1921), 30 B.C. 25; *In re Evans and McLay* (1913), 18 B.C. 191. Bishop's crop in 1922 was four times that of the plaintiff's and in his calculations Matheson did not allow for seepage. We tried to arbitrate. On the question of damages see *In re Raybould. Raybould* v. *Turner* (1900), 1 Ch. 199; *Benett* v. *Wyndham* (1862), 4 De G.F. & J. 259.

MacNeill, in reply, referred to Halsbury's Laws of England, Vol. 28, pp. 430-2, pars. 859 to 862.

Cur. adv. vult.

4th June, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The action arises out of conflicting claims to the use of water for purposes of irrigation, and the consequential claim of the plaintiff to damages for her wrongful deprivation by the defendants of water to which she was entitled. The plaintiff is the holder of two licences, the one entitling her to take water from Brown's Lake for irrigation purposes, the other to store water in that lake. She therefore claims all water up to the amount mentioned in her licences which would come in its natural course into Brown's Lake, *i.e.*, all the water

coming to the lake from China Creek which supplies it, including the water originating in the watershed to that creek.

The defendants are the holders of two licences also, the one to take water from the south branch of Little Churn Creek, conduct it through an artificial ditch to China Lake, thence through China Creek to their land, the other to store water taken from the said branch of Little Churn Creek in China Lake, and to take it to their land through China Creek.

The defendants' licences are prior in date to the plaintiff's, but I think this has no bearing on the case since each pair of licences deal with distinct and unrelated waters. The south branch of Little Churn Creek does not receive any of its water from the watershed of China Creek.

There is another minor fact which I may as well mention now. The defendants' records, for which the said licences were afterwards substituted, gave them the right to water in the China Creek watershed which might seep into the said ditch. This right is omitted from the licences. The Water Board is given the power to readjust water privileges, and I think we must accept the licences as the measure of the defendants' rights.

As the matter now stands, the defendants have been given the right to divert, and to divert and store, water from one original source only, namely, from the south branch of Little Churn Creek, "to be carried through Chinese ditch to China Lake, thence from China Lake in the natural channel of China Creek" to their land. In their storage licence, the same source of the water to be stored is named. They were given no right whatever to the water of China Lake, which flowed into it from its own watershed, nor in the waters of China Creek which, with China Lake, is the source from which Brown's Lake is supplied.

The plaintiff claims that during the seasons mentioned in the pleadings, the defendants unlawfully diverted from China Creek water to which she was entitled; in other words, that the defendants did not confine their diversion from this channel to waters which they had themselves put into it from the south branch of Little Churn Creek, but diverted water which had its origin in the watershed of China Lake and China Creek.

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It is well settled that when one is given the right to divert water from a stream or lake, unauthorized persons cannot be allowed to divert water from the immediate sources of supply thereof to the prejudice of the licensee. The defendants, it is true, were authorized to make use of China Lake, but only for the purpose of storage and as part of the conduit which carried down the water from the south branch of Little Churn Creek; they were authorized to use China Creek as another part of such conduit; but they were not authorized to diminish the natural flow in China Creek of water coming from its own watershed.

The defendants not only claim in this action the right to use such water, but they have actually diverted it during the seasons aforesaid, thus depriving the plaintiff of a large quantity of water which she otherwise would have had in Brown's Lake and was authorized by her licence to use.

In cases like the present it is difficult to assess the damages caused by interference with rights to the use of water with any degree of certainty. The learned judge has, however, estimated the damages as best he could, and, in my opinion, the evidence upon which he has done this, if believed, and he believed it, is sufficient to sustain his findings.

MACDONALD, C.J.A.

There remains to be disposed of some questions of costs in the trial Court. The judgment is against the defendant John Bishop, junior, personally. The action was dismissed as against him in his representative capacities, and as against his co-executor, with such costs as were occasioned by their joiner. An appeal against this disposition of the costs is included in the notice of appeal, the full costs of the defence of these successful defendants being claimed.

The interests of the defendants were practically identical. It may even be that John Bishop, junior, who was managing the estate, may be entitled to indemnity from his co-defendants against the costs he was ordered to pay to the plaintiff, but however this may be, there was no excuse for defending separately.

John Bishop, junior, also includes in his appeal, a claim that he should be allowed the costs of what he calls the "issue" in

respect of the placing of certain obstructions in the Creek. This was not, in my opinion, a separate issue in the accepted sense of that term as used in respect of the distribution of costs. A claim is also made for costs of the proceedings before the Water Board, and on an appeal therefrom, and for loss of potatoes, but they were not seriously pressed and need not be further noticed.

The result is that the appeal is dismissed with costs.

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

MARTIN, J.A.

GALLIHER, J.A.: I am in entire agreement with the reasons for judgment of the Chief Justice.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should succeed. The learned judge at the opening of his reasons for judgment said:

"If the matter rested on the old record, I would have no hesitation whatever in finding that Mr. Bishop was entitled to the springs which are tributary to China Lake, and I take that from the language of the record of November 20th, 1875, being Water Record Number 45, and Exhibit 43 in this case. Bearing in mind the language of Mr. Justice Gwynne in *Carson* v. *Martley* ((1886), 1 B.C. (Pt. 2) 189, 281; (1889), 20 S.C.R. 634) that these records are made by men with not too much education, and they are pioneers and are right on the ground, they must be interpreted liberally. It seems to me if I read this record, I must come to the conclusion that Mr. Pope, the Commissioner, treated all the land lying between the beginning of Chinese Ditch and Little Churn Creek, up to the dam, as part of that ditch, because he says, 'Right to the water through a ditch from the first south branch of Churn Creek, through a ditch to the Onion Bar, China Dam.' He says: 'All springs to be included that have their natural discharge into said ditch.' The only ditch he has named, or signified in any way, is the ditch, or land lying between Little Churn Creek, and China Dam; but I think I have no right to refer to that record."

MCPHILLIPS, J.A.

With the greatest respect to the learned trial judge, my opinion is that the correct decision of the case is to be based upon this old record. I can see nothing in all that took place later that in terms or by implication displaced the full force and effect of the record which was enjoyed and the waters actively used for 50 years by the appellants and their predecessors in title. No apt words are to be found that can by any stretch of imagination be said to destroy or invade the impregnable position which, in my opinion, the appellants have to the use of the water in question. The later conditional licences in no way

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affect the original vested right to the water, and all the legislation governing is careful in its terms not to invade or authorize the invasion of water duly recorded and beneficially used which is the undoubted position of the appellants. Licences of later date which could be read to the contrary (but I fail to find any) would be void and of no effect, and the appellants would be entitled to disregard them. I do not propose to in detail travel over the voluminous evidence and canvass it. It seems to me that the case is in very narrow compass, the onus being upon the respondent to make out her case, which I am satisfied she wholly failed to do. To read this record concludes the case. It reads as follows:

"The right to 200 inches of water from the first south branch of Churn Creek, through a ditch to the Onion Bar China Dam for the purpose of irrigation on Onion Bar farm & Empire Ranch & Meadow, all springs to be included that naturally discharge into the said ditch."

The conditional licence later, of date the 14th of January, 1918, further recognizes and continues the right to the water, the beneficial user thereof and the right to store water in China Lake. It cannot be at all disputed, as I view matters, that the appellants are entitled to all the waters that in natural course originate in or are brought to China Lake, inclusive of rain water and water from springs. The evidence also is overwhelming that the appellants' right is the storage of water. There is no limitation placed thereon, and when stored it is water that the appellants only are entitled to, using it all beneficially. The legislation that has been enacted in all its terms admits of the original record being always referred to and the priority of rights preserved. The interference with the original records could only be affected in one way, by adjudication thereon at a hearing duly had, all parties being heard. That I cannot find ever took place. Further, there has not been even an attempted adjudication that could be said to affect the appellants in any way in their right to the water or anything done which called upon the appellants, in my opinion, to take notice of or called for any appeal being had or taken by them.

MCPHILLIPS, J.A.

The claim advanced by the respondent that she is entitled to the waters of the springs at China Lake, which are specifically granted to the appellants, cannot be said to be other than idle

contention founded upon no record whatever. The truth of the matter is that when there are no freshet waters and especially in dry seasons, no water whatever passes down the gulch to Brown's Lake, originating at or about China Lake and outside of the China Lake reservoir of the appellants, and as to the water authorized to be stored at China Lake the property in that water is solely in the appellants.

In my opinion the respondent wholly failed to make out her case. The appellants on their part have had by themselves and their predecessors in title the absolute right to store water in China Lake, inclusive of the springs, and there has been the continuous user of the water so stored for more than half a century, and I fail to see in what way that right has been disturbed. The conditional licences held by the respondent do not in terms displace the title of the appellants to the water in question, and if they could be said to even by implication have that effect, they would be void and of no effect. It is not the case of a hearing being had by the Board of Investigation and an adjudication arrived at, all parties being heard. The learned trial judge would appear to have so viewed the case. With great respect, the learned judge, in my opinion, arrived at a conclusion which was wholly wrong. I therefore am of the opinion that the judgment under appeal should be reversed and the action dismissed.

MACDONALD, J.A.: The defendants' predecessor in title acquired a record in 1875 for 200 inches of water from Little Churn Creek to be taken through a ditch to what was then called the Onion Bar China dam, thence for irrigation purposes to the Empire Ranch. This record included all springs naturally discharging into the ditch from Little Churn Creek. In 1877, the plaintiff's predecessor in title recorded 100 inches of water for irrigation purposes to be taken from Beaver Lake, now called Brown's Lake. In 1886 John Clinton Brown recorded 100 inches of the surplus water from Little Churn and China Creeks for use on land not in question in this action except indirectly. In the same year, the plaintiff's predecessor obtained the right to construct a dam at the outlet of Brown's

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Lake to retain the waters therein during spring freshets without, however, raising its surface to overflow other lands.

On the 14th of January, 1918, the Board of Investigation constituted under the Water Act, 1914, made an order, No. 6289, finding that the defendants' predecessor had a valid record to take and use water from Little Churn Creek, for irrigation and domestic purposes, and the comptroller of water rights was directed to issue a conditional licence in respect thereto subject to certain conditions, *viz.* (among others), "that the source of supply is first south branch of Little Churn Creek, a tributary of Little Churn Creek." No direction was given to include the springs referred to in the old record as a source of supply. This conditional licence was to have precedence from the 20th of November, 1875, the date of the original record. By a term of the order, the water might be carried through the Chinese ditch to China Lake, thence from China Lake through the natural channels of China Creek to intakes "F" and "G," thence by ditches to the place of user. A conditional licence was issued to the defendants on the same date pursuant to this order.

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In view of the powers given to the Board of Investigation under the Water Act, 1914, we must look solely to the foregoing order and the conditional licence issued thereunder to ascertain the rights of the defendants. Not only is that the scheme of the Act, but the conditional licence itself declares that the rights in and to the use of the waters held under the old record of 1875 shall be "such as are set out" in the order referred to. There is no ratification of the old record in the sense of re-granting all it formerly conveyed. Mr. *MacNeill* referred to the statutes from 1877 down, in an effort to shew that existing rights under old water records were preserved in later legislation. Consideration satisfies me, however, that the new licences issued in 1918, after investigation, replace the old records. The Board is given power to prescribe the terms upon which new licences may be issued replacing records under former Acts. Far from being bound by the terms of former records, they have power, by section 312, to order their cancellation. The Board, therefore, being within their rights in making the order referred to, and in directing the comptroller to issue a conditional licence in

conformity therewith, it is not necessary to refer to the old record of 1875 in determining the defendants' rights.

The Board, on the same date, issued an order reciting that the defendants were granted, under the old record, the right to store water in China Lake and to take and use 300 acre feet per annum from the south branch of Little Churn Creek. The order then directs the comptroller of water rights to issue a conditional licence for storage purposes, again subject to certain terms, *viz.* (among others), "the source of the water supply is the first south branch of Little Churn Creek and the reservoir is China Lake." This right to store was to have precedence from the 20th of November, 1875. By clause (e) of the order it was provided that

"the maximum quantity of water which may be stored under the licence, estimated for the time being at 160 acre feet per annum, is such quantity as together with the quantity of natural flow water used under the diversion licence or record will be necessary to secure to the licensee the quantity to which he is entitled under the said diversion licence or record."

As directed, the water comptroller issued a conditional licence to the defendants for storage purposes on the terms of the order. It is equally clear that if the Board were acting within its rights one must look solely to this order and licence to determine the storage rights of the defendants.

MACDONALD, J.A.

Clause (e) referred to requires consideration. The plaintiff contends that the defendants were entitled to store in China Lake only such water as they captured from Churn Creek, and could only take out of this reservoir for their use the quantity put in from the source referred to. In other words, that the natural flow of water from spring freshets, rainfall and watersheds was not available for defendants' use; on the contrary, it formed part of the watershed contiguous to Brown's Lake and could not be intercepted from flowing into that natural reservoir, in which the plaintiff had a storage licence and from which she had a licence to take and use water for use on her property, lot 365. It was further urged, that if by reason of the construction of a dam at the lower end of China Lake, some of the water which otherwise would go to Brown's Lake was intercepted, the defendants must measure the amount they put into the reservoir from Little Churn Creek and take out, at their points of diver-

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sion, only the quantity measured, leaving the balance so intercepted to be carried to Brown's Lake for the plaintiff's use. By measuring devices at the head waters or point of diversion in Little Churn Creek, and again at points "F" and "G," where it is taken from China Creek to the defendants' land, it could be established that only the quantity from Little Churn Creek put into the reservoir was taken out at said points. That is the plaintiff's claim. She alleges that the defendants being limited to the water from Little Churn Creek, took in fact very little water therefrom but instead filled China Lake with the natural flow above referred to which properly belonged to Brown's Lake.

In support of the defendants' right to natural flow water, in addition to that taken from Little Churn Creek, clause (e), above referred to, was relied upon. What is meant by the words "together with the quantity of natural flow water used under the diversion licence or record"? Clearly the record referred to is the one issued in 1875. There is no other record it can refer to. But the only "natural flow water" mentioned in the old record is that from "all springs . . . . . that naturally discharge into the said ditch," meaning the ditch between Little Churn Creek and the reservoir of China Lake. The ditch does not wholly connect these two points. There is a swamp at the end near the reservoir through which the water flows. Proof that the Board, by order 6290, did not intend to exclude the springs is found in section (1), subsection (b), of the order, where it is recited that a valid record was formerly held by the owner of lot 225 "to store water in China Lake," not "to store water from Little Churn Creek." Plaintiff's answer to the suggestion that the defendants are entitled to store the natural flow from any springs which would naturally flow into the ditch, in addition to Little Churn Creek water, is that the source of supply is named as "the first south branch of Little Churn Creek." Had it added "and all springs," etc., there would, of course, be no difficulty. I do not think, however, that because they set out what was unodubtedly the main source of supply, it excluded the springs in view of the language of clause (e). Again, in the order dealing with the maximum amount that may be stored they add "together with the quantity of natural flow

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water used under the diversion licence or record," and as these springs were included under the old record, it is not possible to resist the inference that the right to their use was continued. I am not unmindful of the fact that the new licences entirely displace the old. That does not prevent the Board from referring to the old records and incorporating some or all of its conditions in the new licence.

The plaintiff claims the right to store and use the natural flow from the watershed which, had a dam not been constructed at China Lake, thereby intercepting part of it, would naturally percolate or flow to Brown's Lake. The defendants, on the other hand, contend that a record can only be granted on a stream or lake; that the flow in or from a watershed cannot be recorded, and that therefore the plaintiff has no right to all the water which would flow into Brown's Lake when a large part of it is diverted to the China Lake reservoir, not by an unlawful act, but by the authorized construction of a reservoir and dam. I cannot accept that view. "Storage" implies the storing of something taken from another place. It is not a reservoir to gather all water which naturally finds its way into it. The defendants are permitted to store certain specified water. That water must come from Little Churn Creek and the springs, if any, which naturally flow into the ditch between Little Churn Creek and the China Lake reservoir. The right is purely statutory and the licences must be read literally. If defendants are permitted to construct a storage basin, and it intercepts some of the water destined naturally for Brown's Lake, they must see that this water so intercepted, the right to which they do not possess, is not used for their own purposes. The water they may store for their own use is ear-marked. If intermingling takes place by the construction of works for their own benefit and water intended for the beneficial use of others finds its way into their reservoir, they must measure the water stored therein at the sources from which it may be lawfully drawn and by further measuring at points "F" and "G," see that they take out of the reservoir, after allowing for seepage, etc., only the quantity put in. The burden of proof is on the defendants to shew that they took out at points "F" and "G" for their own use in the years

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1921, 1922 and 1923, only the quantity put into China Lake from their own sources of supply.

It was also urged that if the defendants had no right to the flow from the watersheds neither had the plaintiff. That does not follow. Brown's Lake is a natural reservoir. It remains a lake only because of the inflow from the watersheds and from China Creek. No one can interfere with the plaintiff's rights by cutting off the sources without which the lake would disappear partially or completely.

In view of my conclusion that the defendants are entitled to store, in addition to water from Little Churn Creek, the waters of all springs naturally flowing into the ditch, it is necessary to ascertain if these springs, along with the Little Churn Creek water, in reality was furnished by the water in the storage basin at China Lake in the years referred to. Mr. *Hossie* contended that these springs do not discharge into the ditch at all. The learned trial judge does not dispose of this feature. He says, if he were governed by the old record, he would find the defendants entitled to the springs tributary to China Lake but thought he had no right to refer to that record. It may be referred to, however, not that it governs, but to shew what the later licence includes. Looking at the map, Exhibit 26, it would not appear that the two springs there shewn discharge their flow into the Chinese ditch at all, nor have we been directed to any evidence shewing that they do so. They would appear to discharge into China Lake or the swamp. The witness Underhill refers to "a couple of springs which help to make it swampy." They do not naturally discharge into the Chinese ditch. Unfortunately, therefore, the defendants are not assisted by my conclusion that they have the benefit, if any, of these springs. I am not overlooking Mr. *MacNeill's* claim that "the ditch" means and includes the whole course, artificial and natural, from Little Churn Creek to China Lake. I cannot agree. The swamp is not part of the ditch. The ditch ends where the swamp begins.

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We have, therefore, a situation where water belonging to both the plaintiff and defendants was stored behind the dam in China Lake, *i.e.*, assuming that a certain part, if not the greater part,

came through the Chinese ditch from Little Churn Creek to China Lake. Under these conditions Mr. *MacNeill* contended that the plaintiff's proper course was to arbitrate under the sections of the Act relating to joint storage. These sections, however, are not applicable. He also urged that all the plaintiff was entitled to was freshet water (referring to the old record to Boyle in 1886), and with that the defendants did not interfere. The later licence which determines plaintiff's rights, however, have no such restriction. He also attempted to shew non-interference with plaintiff's rights by pointing out that the defendants had under irrigation 86 acres, that they were entitled under their licence to two and a half acre feet or 215 acre feet for this 86 acres. The storage capacity of China Lake is 228 acre feet, of which 215 is required for defendants' own use, the balance of 13 acre feet being more than taken up by loss from seepage between the dam and points of diversion. It is by this method of reasoning that the defendants erroneously conclude that they were only taking the quantity that their licences gave them, and that if there was any surplus it might pass on below for the plaintiff's benefit. That would be true if China Lake contained only their own water from Little Churn Creek. They seemed to believe, and to act upon the belief, that any water caught by the dam belonged to them. That view is fallacious.

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Defendants also resist the plaintiff's claim on the ground that the evidence shews that the effect of permitting more water to be stored in Brown's Lake would be to flood portions of lot 225; in other words, that the plaintiff cannot ask the defendants to permit water, to which she is otherwise entitled, to enter Brown's Lake if the result would be to flood lot 225, without, at all events, first taking steps to arrange for the payment of compensation as it is alleged the Act provides for in such cases. This alleged defence was not pleaded. In any event it is without merit. The sections of the Act referred to deal with special cases where a licensee enters upon the lands of private owners for the construction, maintenance and operation of proposed works, "in, upon, over, through or under such lands." That is not this case. There was no entry by a licensee on the defendants' lands for the purposes aforesaid. If the plaintiff in the

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exercise of rights to water legally conferred so uses it or stores it in a negligent manner, as to cause loss or damage to others, she would be responsible in damages. Here there is no counter-claim for damages.

The defendants contend, however, that even if they stored water behind their dam not properly theirs, the plaintiff suffered no damage by reason thereof. Proof of loss, it was urged, was not given—guessing was resorted to. The evidence of Kavanagh, the plaintiff's manager, shews that there was less rainfall and snowfall in 1921, 1922 and 1923 than in the previous year. He testified, however, that from casual notice, passing along the defendants' land, it was all irrigated in those years, whether sufficiently or not he did not say, while the plaintiff's land suffered from lack of water. Sanders, a government official, who was on the ground in July, 1923, testified that the defendants on lot 225 had "away better crop" than the plaintiff had on 365.

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In 1922 she said she had hardly any hay, while the defendants had four times as much. Kavanagh testified that in 1921, the crop on lot 225 was better than on lot 365, and that the same situation prevailed in 1922 and 1923. In 1922 lot 225 had lots of hay and lot 365 very little. Sanders gives similar evidence as to one of these years. This of itself would mean nothing if it were by reason of using their own water that the defendants got better crops. But that was not the situation. They suggest that the real trouble was that these three years were particularly dry and all suffered. This, however, is denied. Kavanagh testified that subsequent to 1915, when there was a heavy rainfall, the succeeding years were very similar. In 1920 the plaintiff grew 298 tons of hay on lot 365; in 1921 this was reduced to 220 tons; in 1922 a further reduction to 87 tons, and 94 tons were grown in 1923. There was a loss, too, in potatoes. There is sufficient evidence of damage traceable to shortage of water caused by the wrongful acts of the defendants in taking water which otherwise would go to the plaintiff. The findings of fact are, therefore, supported by the evidence.

A question of costs was raised. I would not, however, inter-

fere with the disposition thereof made by the learned trial judge. I would dismiss the appeal.

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Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Hunter & Davidson.*

Solicitors for respondent: *Davis, Pugh, Davis, Hossie & Ralston.*

THE KING AND THE ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE VANCOUVER LUMBER COMPANY *ET AL.*

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Lessor and lessee—Short forms lease—Incorrect title of Act recited—Effect of—Default in rent—Relief from forfeiture—"Renewal," meaning of—R.S.B.C. 1924, Cap. 53, Sec. 52; Cap. 135, Sec. 2(14)—R.S.B.C. 1897, Cap. 117.

On the 14th of February, 1899, a lease of Deadman's Island in Vancouver harbour was granted The Vancouver Lumber Company by the minister of militia and defence in pursuance of an order in council of the 10th of February, 1899. The lease was expressed to be made "in pursuance of the Act respecting short forms of leases" and "for a term of 25 years renewable." On the 4th of April, 1900, the minister of militia endorsed on said lease an amendment whereby, *inter alia*, it was provided that at the expiration of the said term of 25 years and after each renewal term of 25 years the lease should be renewed for a further term of 25 years. Receipt for the first payment of rent was declined because an action had been brought by the Province against the Company, the Dominion being added as a party, for a declaration that Deadman's Island belonged to the Province. This action was finally dismissed by the Privy Council in 1906 (see (1906), A.C. 552).' In 1909 the City of Vancouver laid claim to the island and forcibly ejected Theodore Ludgate, the then owner and manager of the Company from the island. The Company then brought action for possession and it was finally decided in the Company's favour by the Privy Council on the 4th of July, 1911 (see (1911), A.C. 711). In 1912, the Dominion brought a further action against the Company for a declaration that the endorsement of the 4th of April, 1900, on the lease was of no effect on the ground of want of authority and the Privy Council finally decided this action in favour of the Dominion in October, 1919. After

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the disposition of the first action in 1906, the Company commenced to pay rent as provided in the lease and continued to do so regularly until March, 1914. Ludgate then died and no further rent was paid. The present action was brought on the 15th of November, 1919, for possession of the island upon the ground that the lessee forfeited its lease by reason of non-payment of rent. It was held by the trial judge that relief against forfeiture for non-payment of rent should not be granted where the lessee has been in default for many years, is still in default and has never expressed any willingness, or disclosed any ability to pay the rent in arrear (see 33 B.C. 468).

Held, on appeal, affirming the decision of MCDONALD, J., that notwithstanding the fact that the defendants have been harrassed with lawsuits and disturbed in their possession for a period of nine years, when it appears that the rent has not been paid since 1914, and there has been no tender or offer to pay, it would at least be necessary that they should first put themselves in good standing by payment or tender of arrears of rent owing for so many years, before the Court could seriously consider granting relief against forfeiture.

APPEAL by defendants from the decision of MCDONALD, J. of the 29th of February, 1924 (reported 33 B.C. 468), in an action to recover possession of Deadman's Island. By an indenture of lease of the 14th of February, 1899, and expressed to be made pursuant to the Act respecting short forms of leases, being Cap. 117, R.S.B.C. 1897, the plaintiff acting through the then minister of militia and defence demised to The Vancouver Lumber Company for a term of 25 years from the 1st of March, 1899, at the yearly rental of $500, payable half yearly, first payment being due and payable on the 1st of September, 1899, subject nevertheless to a proviso that if the rent thereby reserved shall be unpaid for fifteen days after any of the days on which any of the same ought to have been paid (although no formal demand shall have been made thereof) then it shall be lawful for the lessor at any time thereafter to enter upon the said demised premises, repossess and enjoy as of their former estate. The lease became forfeited by reason of non-payment of rent due on the 1st of September, 1913, and no further rent was ever paid. It was held by the trial judge that the lease was made pursuant to the Leaseholds Act, R.S.B.C. 1897, and that relief from forfeiture should not be granted where the lessee has been in default for many years, and has never expressed any willingness nor disclosed any ability to pay the rent in arrear.

Statement

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The appeal was argued at Vancouver on the 10th, 11th and 12th of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

R. S. Lennie (*G. S. Lennie,* with him), for appellants: On the question of forfeiture, this is not a statutory lease so all provisions must be strictly complied with. If section 210 of the Common Law Procedure Act, 1852, is in force (now found in section 52 of the County Courts Act, 1924), it must be shewn there was not sufficient goods to levy distress before forfeiture. If it is not in force they did not carry out the necessary common law demands prior to re-entry. A formal demand must be made: see *Thomas* v. *Lulham* (1895), 2 Q.B. 400 at p. 403; Woodfall's Landlord and Tenant, 20th Ed., pp. 389-391; Halsbury's Laws of England, Vol. 18, p. 535, par. 1042. It must be remembered we never obtained possession that we could hold until 1911 owing to the City's litigation: see *City of Vancouver* v. *Vancouver Lumber Company* (1911), A.C. 711. As to relief when so deprived of our rights see section 2(14) of the Laws Declaratory Act; *Newbolt* v. *Bingham* (1895), 72 L.T. 852 at p. 854. Assuming there was forfeiture, relief should be given. On the question of the Attorney-General being a party see *Esquimalt and Nanaimo Railway Company* v. *Wilson* (1919), 89 L.J., P.C. 27; (1920), A.C. 358; *Dyson* v. *Attorney-General* (1911), 1 K.B. 410 at p. 417; *Guaranty Trust Company of New York* v. *Hannay & Company* (1915), 2 K.B. 536. On the effect of the word "renewal" see *Lewis* v. *Stephenson* (1898), 67 L.J., Q.B. 296. They cannot say we are limited to 25 years: see *The King* v. *Vancouver Lumber Co.* (1919), 50 D.L.R. 6. That point is *res judicata* as same parties are before the Court and same documents: see *Wahl* v. *Nugent* (1924), 2 W.W.R. 1138; *Henderson* v. *Henderson* (1843), 3 Hare 100 at p. 115; *Ord* v. *Ord* (1923), 2 K.B. 432; *Rex* v. *Paulson* (1921), 1 A.C. 271; *Attorney-General to the Prince of Wales* v. *Collom* (1916), 2 K.B. 193 at p. 204; *Boulay* v. *The King* (1910), 43 S.C.R. 61 at p. 77.

Argument

A. B. Macdonald, K.C., for respondent: On the question of the short form there was an error in the title but the lease refers

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Argument

to the Leaseholds Act of 1897, and the lease should be so construed: see *Lee et al.* v. *Lorsch* (1875), 37 U.C.Q.B. 262; *Davis* v. *Pitchers* (1875), 24 U.C.C.P. 516 at pp. 521-2; *Shore* v. *Green* (1890), 6 Man. L.R. 322. On the question of relief from forfeiture see *Nichol* v. *Nelson* (1911), 1 W.W.R. 423 at p. 427; *Re Hulbert & Mayer* (1917), 1 W.W.R. 380; *Barrow* v. *Isaacs* (1890), 60 L.J., Q.B. 179; *Balagno* v. *Le Roy* (1913), 18 B.C. 127; *Edwards* v. *Fairview Lodge* (1920), 28 B.C. 557; *Ferguson* v. *Troop* (1890), 17 S.C.R. 527; *Huntting* v. *MacAdam* (1908), 13 B.C. 426. On the question of the necessity of a fiat for the counterclaim see *Hettihewage Siman Appu* v. *The Queen's Advocate* (1884), 9 App. Cas. 571; *Hosier Brothers* v. *Derby (Earl)* (1918), 2 K.B. 671; *The British American Fish Corporation* v. *The King* (1918), 18 Ex. C.R. 230. On the question of a petition of right see *Saxe and Archibald* v. *The King* (1921), 21 Ex. C.R. 60; *Graham* v. *Public Works Commissioners* (1901), 2 K.B. 781 at p. 789; *Secretary of State for War* v. *Easdale* (1893), 27 I.L.T.R. 70; Robertson on Civil Proceedings by and against the Crown, p. 35.

Lennie, in reply: We are entitled to counterclaim when we are sued by the Crown: see *Regina* v. *Grant* (1896), 17 Pr. 165; *Regina* v. *Fawcett* (1900), 13 Man. L.R. 205. As to a declaratory judgment see *Hanson* v. *Radcliffe Urban Council* (1922), 2 Ch. 490 at p. 507; *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ld.* (1921), 2 A.C. 438 at p. 447.

Cur. adv. vult.

4th June, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the learned trial judge came to the right conclusion and would dismiss the appeal.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: I am sensible of the manner in which, from the beginning, the defendants have been harrassed, and deprived of the possession and enjoyment of the property covered by their lease, by prolonged litigation, initiated by the Provincial

Government, which, after running the gamut of the Courts, was decided against them by the Privy Council, and also by the action of the City of Vancouver in forcibly ejecting the defendants from the premises, necessitating an action being brought against the City for possession and for damages, the Privy Council eventually deciding against the City.

The first of these actions extended over a period of 7 years, 1899 to 1906. The second action against the City, brought in June, 1909, after forcible dispossession by the City, was not finally disposed of until the 4th of July, 1911. It will be seen, therefore, that with the exception of 3 years, 1906 to 1909, the defendants had no quiet or peaceable possession of the property from the date of the lease in 1899 to July, 1911.

I do not wish to be understood as casting any reflection on the acts of the Provincial Government, or the City of Vancouver, except as to the act of the City in using the strong arm and not the law in ejecting the defendants. They were perfectly justified in litigating their supposed rights, and I have referred to them only because the result was that the defendants were harrassed and disturbed in their possession for some 9 years, and would dispose me favourably to granting relief, if I could do so on proper principles.

GALLIHER, J.A.

I listened with great interest to the able and forcible argument presented by Mr. *Lennie,* of counsel for the appellants, but at the close of the argument, there was only one feature (relief against forfeiture) that I had any serious doubts about, and upon a careful consideration and reading of the authorities, I have come to the conclusion that the learned judge below was right.

The rent is in arrears for years, there has been no tender or offer to pay, and though the original term of the lease has expired, we are, in effect, being asked to decide the meaning of the word "renewable" in the lease, without their having first put themselves in good standing by payment or tender of the arrears of rent which, owing to the long lapse of years, it is overdue, would, I think, be necessary before we could consider seriously granting relief against forfeiture. If we do not relieve

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against forfeiture, the lease is gone, and with it the necessity of dealing with the question of renewal.

Realizing the hardships suffered by the appellants to the fullest extent, I yet cannot conclude that a proper case for relief has been made out, guided as I must be by the principles upon which such relief is granted.

MCPHILLIPS, J.A.: This appeal was very ably argued by the learned counsel for both parties, being very elaborately gone into. However, in my opinion, it becomes quite unnecessary to in detail canvass the facts or refer particularly to the numerous authorities cited, in that the whole question would appear to be simply, whether it can be rightly said that the forfeiture of the lease was permissible, and the judgment of the learned trial judge was right in adjudging that the respondent should recover possession of the land as against the appellants? Unquestionably there was default in payment of rent for a period of nearly ten years, with no good and sufficient excuse established for the non-payment thereof. I cannot, upon the facts, although greatly sympathizing with the appellants for the disturbance of possession and difficulties met with, attribute any of these happenings to any act or acts chargeable to the respondent, there was nothing done by the respondent in the way of interfering with the quiet enjoyment of the land (and the term of the demise has now, in fact, expired) with no equities which would at all appear to me to be of such a cogent nature as would admit of relief being granted against the forfeiture (*Barrow* v. *Isaacs* (1890), 60 L.J., Q.B. 179).

MCPHILLIPS, J.A.

Then with regard to the appellant's claim that there is the right of renewal of the demise for a further period of 25 years; if the forfeiture be valid, that would fall to the ground, but if I were in error as to this and the forfeiture is not supportable, even then the claim to a renewal of the demise is not sustainable, as the provision for the renewal was in excess of the authority of the minister of militia and defence, not having the requisite order in council to support it (*The King* v. *Vancouver Lumber Co.* (1920), 50 D.L.R. 6; see also *Mackay* v. *Attorney-General for British Columbia* (1922), 1 A.C. 457; 91 L.J., P.C. 193).

I have said that I sympathized with the appellants in that there was long disturbance of possession and protracted litigation destroying utterly, at a time when the demised premises could have been put to profitable use, any opportunity to quietly enjoy the demised premises. This, though, could not be in any way attributed to the Crown Dominion—it was the Crown Provincial and the Corporation of the City of Vancouver.

In view of these happenings, it is really along the line of equitable treatment that a renewal provision should be capable of being invoked, and no doubt the minister of militia and defence, in good faith and in the belief that he had authority to so provide, executed the amending document of the 4th of April, 1900, the original lease being under date the 14th of February, 1899. However, as we have seen, this was an ineffective act by the minister of militia and defence. The situation of matters was, of course, capable of being cured by the Government of Canada but apparently this was not done, and as to questions of policy, they are not proper subjects of inquiry by the Court. It may, though, be not unfitting to say that where the subject contracts with the Crown with all the solemnity that goes with such an action, and a responsible minister of the Crown presumes to execute documents under seal, with the subject, that the discovery by the subject that the contracts are of no effect is, to say the least, to the lay mind, very startling. At this time in the neighbouring republic, the United States of America, a world wide known transaction (the Teapot Dome Oil Leases) is under review, affecting oil reserves of almost incalculable value, and so far it has been held against the Government of the United States which contends that the leases are void, being executed in excess of authority; that the secretary of the interior was fully authorized to lease the Wyoming Naval Oil Reserves because of President Harding's order transferring jurisdiction over the reserves to the department of the interior; that the executive order was legal, the leases properly executed, and that there was no conspiracy to defraud the Government. This decision is now under appeal.

MCPHILLIPS, J.A.

In the present case no question of conspiracy or fraud arises.

It will always be a serious question for governments, where

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there is the absence of fraud, to insist upon the invalidity of contracts, owing to what would appear, to the laity at least, to be nothing but technicality. Here, of course, there was the duty to see to it that the minister of militia and defence had the requisite authority, and there is some evidence that representations were made to that effect, but careful search in the official files fails to produce the needed order in council. It will not do to outrage public opinion, and it is not understandable by the people unadvised that contracts which would be effective between subject and subject are ineffective as between the Crown and the subject, owing to the lack of authority, although the minister of the Crown is held out to the people as having authority, and in all solemnity executes documents under seal purporting that he is vested with all necessary authority. In the march of democratic governments care at least should be taken that the statute law should be in terms sufficient to authorize the acts of responsible ministers of the Crown in transactions which come ordinarily within the ambit of administration committed to the department over which they preside, otherwise the subject in dealing in good faith with the Crown is placed in unwarrantable peril and liable to suffer possible irreparable damages with no legal recourse. The two cases last referred to are cases in point. It was Lord Shaw who was impelled to say something in a most striking way that perhaps may be said to be somewhat of an analogous matter of thought with that of which I have been treating. In *Attorney-General for Nigeria* v. *Holt & Co.* (1915), 84 L.J., P.C. 98 at p. 105, he said:

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> "The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce* v. *Hay* ([(1852)], 1 Macq. H.L. 305), by Lord St. Leonards, Lord Chancellor, who observed (p. 312): 'The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind.'"

Sir W. Scott in *The Charlotta* (1814), 1 Dod. 387 at p. 393, said:

> "If the Government of that country has fallen into an error, and has followed a course of practice which may have led its subjects into error, then, between them *communis error facit jus.*"

The Solicitor's Journal, Vol. 66, at p. 17, has this to say, dealing with contracts with the Crown, and well indicates the care needed in dealing with the Crown:

"Now the weakness of the suppliant's case, when it came to trial, was one which constantly proves an obstacle to persons dealing with the Crown. He could not prove that either (1) his offer had in fact been accepted finally by the Ministry of Munitions, or (2) that an official duly authorized to act for the Minister had accepted it, or (3) that one or more officials held out as authorized had accepted it, or (4) that the Crown was estopped by its normal routine of business from denying the due acceptance by the Crown. In other words, Crown agents and servants have essentially a limited agency, and the other contracting party is put on enquiry, as a matter of course, to see that they do possess authority. In private business, on the other hand, unless an agent's authority is limited by custom or by express notice, a contractor can regard him as duly authorized to do acts which he is apparently held out to do; and, if the other contracting party acts through a variety of departmental agents, he can treat these collective acts as a single act of acceptance; *London Freehold and Leasehold Property Co.* v. *Baron Sheffield* (1897), 2 Ch. 608. The fact that one of a number of officers or agents took a step in mistake as to the facts would not be such a mistake as to invalidate the contract. But the decision on which we are commenting refused to apply this reasoning to the case of a series of co-ordinate officers of the Crown, and therefore the suppliant failed to prove a binding contract."

The Court, though, is utterly powerless in the present case. The highest judicial authority is clear upon the point that there was excess of jurisdiction in making the renewal provision upon the part of the minister of militia and defence, and that being so the Crown is in no way bound. Upon the whole case, I am of the view that the judgment of the learned judge cannot be disturbed, and should be affirmed. I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Lennie & Clark.*
Solicitors for respondent: *Cowan & Cowan.*

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THE DEPARTMENT OF INDIAN AFFAIRS v. BOARD OF INVESTIGATION UNDER WATER ACT, AND CROSINA.

Water and watercourses—Application by Indian agent for record for reserve —Record issued—Provision as to Indian reserves not complied with—Conditions precedent—R.S.B.C. 1897, Cap. 190, Secs. 4 and 35; 1924, Secs. 308 and 337.

THE DEPARTMENT OF INDIAN AFFAIRS *v.* BOARD OF INVESTIGATION UNDER WATER ACT

Section 35 of the Water Clauses Consolidation Act, 1897, provides that "The chief commissioner of lands and works, with the approval of the Lieutenant-Governor in Council, may upon such terms and conditions as to compensation to persons affected as the chief commissioner may think proper to impose, authorize the record for the benefit of all or any of the Indians located on any Indian reserve, of so much and no more of any unrecorded water," etc. On the application of an Indian agent a water record was issued by the assistant commissioner of lands and works on the 15th of August, 1899, authorizing the diversion of one hundred inches of water from Five Mile Creek for use upon the Williams Lake Indian Reserve. No authority was obtained from the chief commissioner for the issue of the record and there was no approval thereof by order in council until the 30th of May, 1908. Two water records for the same creek were issued to the respondent Crosina subsequent to the issue of the above record but prior to the order in council of 1908. It was held by the Board of Investigation under the Water Act that Crosina's records had priority.

Held, on appeal, affirming the decision of the Board of Investigation (McPHILLIPS, J.A. dissenting), that the authority of the chief commissioner and the approval of the Lieutenant-Governor in Council are conditions precedent to the power of the commissioner to make the record. The Indian agent's record was therefore a nullity until the passing of the order in council in 1908 and the Crosina records issued prior to that date take precedence.

APPEAL by the Department of Indian Affairs from the decision of the Board of Investigation under the Water Act, of the 4th of October, 1924, whereby the said department was granted a water licence out of Five Mile Creek in the Lillooet District for 672 acre feet for irrigation and 12,000 gallons per day for domestic purposes for use on Williams Lake Indian Reserve with priority as of the 2nd of June, 1908. The facts are that record No. 48 was granted by the assistant commissioner

Statement

of lands and works to the Indian agent on the 15th of August, 1899, purporting to authorize the diversion of 100 inches of water from Five Mile Creek for use upon the Williams Lake Indian Reserve and the water was used from year to year in varying quantities in accordance with the record. Record No. 236 was granted by the assistant commissioner of lands and works to Louis J. Crosina on the 5th of December, 1904, for 100 inches of water from Five Mile Creek for use on lots 195-196, Cariboo District, and on October 9th, 1906, another record (No. 288) was granted Crosina for 100 inches from the same creek to be used on the same lots, and the water was used from year to year under both these records. Record No. 48 was never approved by the Lieutenant-Governor in Council until the 2nd of June, 1908, and Crosina never had notice of, nor was he aware of the requests made by the Department of Indian Affairs in 1906, 1907 and 1908 to the chief commissioner of lands and works to have the granting of record No. 48 formally approved by the Lieutenant-Governor in Council and no notice of the intention of the Lieutenant-Governor in Council to pass the required order in council was given Crosina. The total flow of Five Mile Creek is not sufficient to satisfy the requirements of said licences.

Statement

The appeal was argued at Vancouver on the 4th and 5th of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Ellis, K.C., for appellant: The right of appeal is under section 337 of the Water Act. The record was obtained under the consolidation of 1897. The investigation is under section 308 of the present Water Act. We obtained our record in 1899 but it was not approved by order in council until 1908. The order in council is not a condition precedent and we submit we are entitled to priority from 1899: see *Regina* v. *Hart* (1887), 2 B.C. 264.

Argument

Stuart Henderson, for respondent: An application for a record for Indians on a reserve is specially provided for by section 35 of the Act of 1897. The chief commissioner, with the approval of the Lieutenant-Governor in Council may authorize such a record. This was never done until 1908.

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The consent must be added before it is a record. They had nothing until 1908. In the meantime we obtained our records and they take precedence.

Ellis, in reply, referred to *Quinn* v. *Beales* (1923), 3 W.W.R. 561; *Western Canada Mortgage Co., Ltd.* v. *O'Farrell* (1921), 1 W.W.R. 121 and on appeal (1921), 2 W.W.R. 626; *Scott* v. *Tremblay* (1923), 1 W.W.R. 1259 at p. 1263.

Cur. adv. vult.

4th June, 1925.

MACDONALD, C.J.A.: In my opinion the appeal cannot succeed. The Indian agent applied, in 1899, to the commissioner for a record of water out of the stream in question, and after complying, as I shall assume, with all the provisions of the Water Clauses Consolidation Act, R.S.B.C. 1897, Cap. 190, on his part to be observed, he became, subject to the approval of the chief commissioner of lands and works, and the Lieutenant-Governor in Council, entitled to a water record in pursuance thereof. It was at that time the duty of the commissioner to make a report on the application of the Indian agent (see section 35(2) (*d*)) to the chief commissioner, and should the latter be satisfied that a record should be made, and upon obtaining the approval of the Lieutenant-Governor in Council, he might authorize the same.

MACDONALD, C.J.A.

I will assume, though there is nothing in the case to shew it, that the commissioner made such report in this case. The water record, however, appears to have been made on 16th August, 1899, but there is nothing in the case to shew any authority therefor from the chief commissioner, and it is admitted that there was no approval by order in council, until the 30th of May, 1908, when the order in council was made confirming the record as from its date. Other records having been made between these dates, the respondent, the Water Board, held that these intervening records were entitled to priority over that of the Indian agent, and it is from this decision that the appeal is taken.

The record could not have been made except upon the authority of the chief commissioner, and then only with the

approval of the Lieutenant-Governor in Council. Both which conditions were absent until 1908. It is clear to me that the executive cannot make the approval and authorization retroactive, if on the true construction of the statute, the acts aforesaid are, as I think they are, conditions precedent to the power of the commissioner to make the record. It cannot be assumed that the chief commissioner authorized the making of the record in 1899 without the approval of the Lieutenant-Governor in Council. I think such authorization, if given, would be ineffective. It was not the chief commissioner's duty to authorize the making of the record until the approval of the Lieutenant-Governor in Council had been obtained. As the commissioner made it without the authority of the chief commissioner, it was a nullity. It must, therefore, be considered to have been made only when the requisite power to make it was bestowed, *viz.*, in 1908. The statute, section 17, declares that the record shall speak from the day on which it was made.

MACDONALD, C.J.A.

The appeal should be dismissed.

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

MARTIN, J.A.

GALLIHER, J.A.: My sympathies are all with the Indians in this contest; they on their part, or through their representative, having done what was required of them, and having enjoyed their rights which they assumed had been properly granted them for a period of five years before Crosina procured his first record, they afterwards find that no order in council, as provided for in the Act, had been passed approving of the granting of the record. This order in council was not passed until 1908, four years after the grant of the first record to Crosina (December, 1904), No. 236, and two years after the second record (October 9th, 1906), No. 288.

GALLIHER, J.A.

So far as the records before us shew, the matter does not seem to have been taken up by the superintendent of Indian affairs (Mr. Vowell) with E. Bell, Indian agent at Clinton, until October 25th, 1906, nine days after the granting of the second record to Crosina. Mr. Vowell then took the matter up with the chief commissioner of lands and works, at Victoria, by letter on 3rd December, 1906—see letter of April 12th, 1907.

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GALLIHER, J.A.

Notwithstanding several letters and personal interviews passed between Mr. Vowell and the department of lands and works, the order in council was not passed until June 20th, 1908. No explanation of this is forthcoming and I imagine it would be hard to find one, but be that as it may, the first question that confronts us is, was the approval of the Lieutenant-Governor in Council a condition precedent to the issuance of a record to Indians? If so, that ends the matter, as no record could be deemed to have been issued, at all events, until the order in council above referred to was passed, and only from the date of such passing.

I have read and reread the Act and have examined such authorities as seemed to have a bearing on the question, but have found myself (with regret) unable to conclude that this is not a condition precedent. The appeal must, therefore, be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is one from the determination and order of the Board of Investigation under the Water Act, and is an appeal brought by the Department of Indian Affairs. The decision was given on the 14th of October, 1924.

The determination and order under appeal admits

"that a valid water record affecting the said claim was made under the authority of an Act passed prior to the 12th day of March, 1909, and that, under the said water record, the Williams Lake tribe or band of Indians was granted a right to take and use water from Five Mile Creek, a tributary of Williams Lake, for irrigation and domestic purposes on the Sugar Cane or Williams Lake Indian Reserve, being Reserve No. 1 of the said tribe or band."

The admitted record No. 48 was granted by the assistant commissioner of lands and works, J. Bowron, to E. Bell, Indian agent, on August 15th, 1899, and the beneficial user of the water has ever since been enjoyed by the Indians, and the water is vital and necessary to the Indians. That in the years 1904 and 1906, two further records were made by the same assistant commissioner, each for 100 inches from the said Five Mile Creek. The fact now is that the water available is not sufficient to satisfy the requirements of all the licences.

The respondent, Lewis J. Crosina, before the Board of Investigation, objected to the licence to the Indians having

priority to the licences issued to them in that the approval of the Lieutenant-Governor in Council was not obtained for the licence until the 2nd of June, 1908, a date subsequent to the licences held by him, and it would appear that the Board of Investigation in its determination and order held that the licence issued to the Indians in 1899 should only take precedence from the 2nd of June, 1908, thereby displacing the record and rendering it subsequent to the records of the respondent Crosina, they being given precedence respectively the 5th of December, 1904, and the 9th of October, 1906, the result being that the prior record granted to the Indians, *viz.*, in 1899, is rendered valueless owing to insufficiency of water—for records obtained in one case five years after and in the other, seven years after the record made to the Indians, of which the respondent Crosina must be held to have had notice.

Now, the short point is this: did the Board of Investigation arrive at a proper conclusion in holding that the record granted to the Indians was only entitled to be given effect upon the date of the approval of the record, *viz.*, on the 2nd of June, 1908?

The section of the Act which governs in the consideration of the point is section 35, of the Water Clauses Consolidation Act, 1897. The order in council granting approval of the record to the Indians reads as follows: [The learned judge here set out the record and continued].

The record may be made by the chief commissioner of lands and works, or, as here, by the assistant commissioner, who has equal authority (see section 2, interpretation section of the Act). A multitude of matters have to be gone into and examinations had. This had to precede the approval by the Lieutenant-Governor in Council. It was only after all this was done that the approval could be applied for. That there was delay in obtaining the approval did not really work any injury to anyone. The record being made, the water has been used by the Indians for years. This was a matter of general public knowledge and unquestionably was known to the respondent, Crosina; in any case, he was affected with notice, the record being made by the proper officer and of record in the public office. The objection taken is one absolutely without merit, and with no equity to

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support it. Further, the deprivation of the right to the water so long enjoyed by the Indians, works grave injury to them. It is, therefore, a case calling for the application of the strictest principles of law, as the decision arrived at by the Board of Investigation in its result is destructive, upon the facts, of natural justice. The approval of the Lieutenant-Governor in Council would be obtained upon the motion of the chief commissioner of lands and works, not the motion of the Indian department, and it might well be that the Indian department would reasonably assume that the requisite approval was in due course obtained. That it was not obtained until the 2nd of June, 1908, was not the default of the Indian department. The question is, as I have above indicated, whether the approval is confirmatory of the record in favour of the Indians made on the 15th of August, 1899? In my opinion it is. The approval cannot be said to be at all a condition precedent to the record being made, as of necessity it must follow the making of the record, and the statute is silent as to when the approval of the Lieutenant-Governor in Council must be obtained. I know of no authority which holds that in a situation such as this, where a bare approval is to be obtained, that the approval may not be obtained at any time. Had the Legislature enacted that the approval should be obtained within a stated time after the making of the record, then there would be no question of the necessity for approval within that time. Here, however, the statute is silent. Only two cases were referred to upon the argument at this Bar bearing upon the point, and they would both appear to be helpful, if not determinative, of the point against the respondent. In *Regina* v. *Hart* (1887), 2 B.C. 264, Mr. Justice MCCREIGHT, a most eminent and learned judge, held that where an appointment was to be made by a municipal corporation subject to the consent of the Lieutenant-Governor in Council, that it was immaterial whether the assent of the Lieutenant-Governor in Council was obtained before or after the resolution of the municipal council. At p. 267, the learned judge said:

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"It seems to me the resolution was complete before such assent was given, but I think further that it is immaterial in what order the action

of the Council and of the Lieutenant-Governor took place. What is required is the consent of both."

Here we have the record duly made and later it is true, six years later, the approval.

When local conditions are considered and the vastness of this Province, it may well be said that what is looked to is, first, the record and that is notice to the world; the approval being obtained will complete the matter, but surely the record being made is not to be defeated by delay in obtaining the approval, a matter subsequent, and one unquestionably of delay under the best of conditions. In *Quinn* v. *Beales* (1923), 3 W.W.R. 561, there is some analogy. The head-note well indicates the effect of the decision. It reads as follows:

"The omission to obtain leave to commence action, as required by *The Drought Area Relief Act, Alta.*, 1922, Ch. 43, Sec. 8, which provides 'that no action . . . . . shall hereafter be taken or continued without the leave of a judge,' does not necessarily make the proceedings taken before leave is obtained a nullity. The judge may grant such leave at trial so as to give effect to the proceedings already taken and such leave may be so given by a Supreme Court judge. The circumstances in question were held to be such as to warrant such leave being given by the Supreme Court judge on application therefor at trial of the action. (*Western Canada Mortgage Co. Ltd.* v. *O'Farrell* ([(1920)], 16 Alta. L.R. 429; (1921), 1 W.W.R. 121; (1921), 2 W.W.R. 626; *Scott* v. *Tremblay* (1923), 1 W.W.R. 1259; *Snowden* v. *Baker* (1922), 3 W.W.R. 1002; *Vanstone* v. *Wiles* (1923), 1 W.W.R. 832, cited)."

MCPHILLIPS, J.A.

To graphically portray the matter, if the decision under appeal is correct, then this in illustration might have been the fact and the record in favour of the Indians defeated: A applies on the 16th of August, 1899, the day after the Indians' record, and is given a record. Plainly the approval of the Lieutenant-Governor in Council could not have been obtained by then, the record being in distant Cariboo, nevertheless, if this was the fact A's record would have precedence. This result cannot have been the intention of the Legislature, it would be manifest absurdity. In *The Duke of Buccleuch* (1889), 15 P.D. 86, Lindley, L.J., at p. 96, said:

"You are not so to construe the Act of Parliament as to reduce it to rank absurdity. You are not to attribute to general language used by the Legislature, in this case any more than in any other case, a meaning that would not only carry out its object, but produce consequences which to the ordinary intelligence are absurd. You must give it such a meaning as will carry out its objects."

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In my opinion the record in favour of the Indians, having received the approval of the Lieutenant-Governor in Council, was and is effective from the date of the record, *viz.*, from the 15th of August, 1899; the determination and order of the Board of Investigation in so far as precedence in the licence to the Indians is stated to be of the 2nd of June, 1908, should be reversed and the date of precedence in the licence should be amended to read the 15th of August, 1899.

The appeal, in my opinion, should be allowed.

MACDONALD, J.A.

MACDONALD, J.A.: The original water record (number 48 for 100 inches of water from Five Mile Creek) was, if valid, issued on August 15th, 1899, pursuant to section 35 of Cap. 190, R.S.B.C. 1897. Under that section, the chief commissioner of lands and works, with the approval of the Lieutenant-Governor in Council, might authorize the issuance of a record. Statutes often confer on the minister of a single department authority to do certain acts on his own initiative. Other statutes, in the express limitation of that power, require the assent of the executive council as evidenced by an order in council before a valid exercise of a power can be made. When we have such a statutory requirement it must be strictly followed, otherwise the act of the chief commissioner has no legal effect. No valid water record, therefore, was authorized in 1899. It was not possible either for the appellant to acquire title to the water by user for a number of years. That right being purely statutory, could only be acquired in the manner laid down by the statute.

An order in council was passed in 1908 purporting to validate this alleged water record as of the date of issuance. In the meantime, however, the respondent Crosina obtained two valid water licences for the diversion of 100 inches of water from the same creek. The total flow is insufficient to satisfy the requirements of the appellant under this so-called record number 48 and of the respondent under the licences referred to. This order in council not only had nothing to operate on, as it purports to validate a record in name only, but there was in fact no statutory authority for passing it. Even if it may be looked

upon as a belated order, meant to take the place of the order which should have been obtained in the first instance under section 35 of Cap. 190, R.S.B.C. 1897, it could not remedy an omission in the nature of a condition precedent. Possibly if the respondent had not acquired rights in the meantime this order in council might validate the original record from the date of its issuance, *i.e.*, 1908, but it is not necessary to decide that point. The respondent's rights were acquired at a time when there was no valid prior record standing in his way. I would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Ellis & Brown.*
Solicitor for respondent: *Stuart Henderson.*

PETER v. YORKSHIRE ESTATE COMPANY LIMITED AND THE YORKSHIRE AND CANADIAN TRUST LIMITED.

Workmen's Compensation Act — Damages — Personal injuries — Action to recover—Order of Board that plaintiff comes within Act—Application to dismiss action—Refused—Appeal—R.S.B.C. 1924, Cap. 278, Secs. 4, 11(4), 12(3) and 74(j).

The plaintiff, who was employed as a salesman by a company occupying offices as tenants in a building, was injured through the falling of one of the elevators in said building after leaving his employer's offices. He brought action for damages against the owners of the building. On the application of the defendants the Workmen's Compensation Board made an order declaring that the accident was one in respect to which the plaintiff has a right to compensation under the Act. An application by the defendants for dismissal of the action on the ground that it is barred by the Workmen's Compensation Act was dismissed.

Held, on appeal, reversing the decision of MORRISON, J., that under the Act the Board has exclusive jurisdiction to inquire into and determine the facts and the law and the Board did determine that the plaintiff's right

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to compensation came within the Act, and the appeal should be allowed and the stay granted.

APPEAL by defendants from the order of MORRISON, J. of the 2nd of April, 1925, dismissing an application that the action be dismissed being barred under the provisions of the Workmen's Compensation Act: see 35 B.C. 431. The plaintiff was an employee of one of the tenants of a building belonging to the defendant Company and he brought action for injuries sustained through the falling of an elevator in said building. After the commencement of the action the Workmen's Compensation Board, on the application of the defendants 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.

Statement

The appeal was argued at Vancouver on the 28th and 29th of April, 1925, before MACDONALD, C.J.A., MARTIN and MACDONALD, JJ.A.

McPhillips, K.C., for appellants: There is inherent jurisdiction to stay proceedings: see Annual Practice, 1925, p. 413; *The Dominion Canners* v. *Costanza* (1923), S.C.R. 46. That the Court has jurisdiction to review see *Shackleton* v. *Swift* (1913), 2 K.B. 304. Under the Act the Board has exclusive jurisdiction.

Alfred Bull, for respondent: At the outset we took objection to the jurisdiction: (1) The plaintiff is not a workman but an employee; (2) the injuries were not sustained during the course of his employment; (3) the Board has jurisdiction only in a case where the workman was suing his employer and not where he is suing a third party. Leaving a building after work is not "in the course of employment": see *St. Helens Colliery Co.* v. *Hewitson* (1924), A.C. 59. We never came within section 74, it is a case where the Board was never intended to have jurisdiction. The Court will be slow to deprive the Courts of their ordinary jurisdiction: see *Balfour* v. *Malcolm* (1842), 8 Cl. & F. 485 at p. 500; *Oram* v. *Brearey* (1877), 2 Ex. D.

Argument

346 at p. 348; *Toronto Railway Company* v. *Toronto City* (1920), A.C. 455 at p. 461; *Jacobs* v. *Brett* (1875), L.R. 20 Eq. 1; Maxwell on the Interpretation of Statutes, 6th Ed., 149 and 235-6; *Blackwood* v. *The Queen* (1882), 8 App. Cas. 82 at p. 94; *Cookney* v. *Anderson* (1863), 1 De G.J. & S. 365; *Regina* v. *Bolton* (1841), 1 Q.B. 66 at p. 72; *The Queen* v. *Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313 at p. 319.

McPhillips, replied.

Cur. adv. vult.

4th June, 1925.

MACDONALD, C.J.A.: Part I. of the Workmen's Compensation Act, Cap. 278, R.S.B.C. 1924, Sec. 4, brings enumerated classes of industries within its scope, among them being the operations of warehouses and of passenger elevators. The same section excludes from the operation of this Part "travelling salesmen." Section 12(3) empowers the Compensation Board, when an action has been brought, to determine on the application of any party thereto "whether the action is one, the right to bring which, is taken away by the Act." By section 11 (1) the workman is given the right, when the injury was caused by one not his employer, to elect whether he will sue the wrong-doer or take compensation under the Act, but by (4), when such other is an employer within the scope of the Act (though not the injured person's employer), the workman cannot sue him but must proceed for compensation.

The plaintiff's employers are within the scope of the Act. They operate a warehouse. The defendants are also within the scope of the Act. They operate a passenger elevator, upon which the plaintiff was injured. The plaintiff at the time of the injury was employed as a salesman. The question whether he was a "travelling salesman" was, I think, for the Board to determine.

Section 12 (3) enacts:

"Where an action in respect of an injury is brought against an employer by a workman or dependant, the Board shall have jurisdiction upon the application of any party to the action to adjudicate and determine whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive; and if

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the Board determines that the action is one the right to bring which is taken away by this Part the action shall be for ever stayed."

The Board did, on defendants' application, determine that the plaintiff's claim was within the scope of Part I. of the Act. The defendants then moved a judge of the Supreme Court for a perpetual stay of the action. This motion he dismissed, and from that dismissal this appeal has been taken.

In addition to the finality declared by said section 12 (3), section 74 gives the Board power to determine (1) (*h*), whether or not any industry or any part, branch, or department of any industry is within the scope of this Part, *i.e.*, Part I., and (*i*), whether or not any workman in any industry is within the scope of this Part, and entitled to compensation thereunder. It further declares that the decision of the Board thereon shall be final and conclusive, and that it shall have exclusive jurisdiction to inquire into, hear and determine the facts and the law.

MACDONALD, C.J.A.

We have been referred to a number of authorities upon the construction of statutes, but, in my opinion, there is really no room for construction here; there is nothing ambiguous which calls for construction. The Board must be held to have determined decisive questions of fact and law; that the plaintiff was not a "travelling salesman," that his employer was within the scope of the Act, if that were necessary to be determined, and that defendants were within the scope of the Act.

The appeal should be allowed and the stay granted.

MARTIN, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: We are asked to reverse the order of the Workmen's Compensation Board, in staying an action brought by the respondent against the appellants under the circumstances disclosed in evidence. Reading the sections we were referred to, it would appear clear that the Board had exclusive jurisdiction to finally determine all the questions of law and fact involved and to make the order complained of. Since the decision of the Supreme Court in *The Dominion Canners* v. *Costanza* (1923), S.C.R. 46, where sections of the Ontario Act, not differing in material points from our own, were considered, the matter is beyond dispute. Mr. *Bull* contended that

the Board had no jurisdiction to stay the action on these grounds: (a) That respondent being a travelling salesman was not a workman within the scope of Part I. of the Act; (b) that in any event it is only when the accident occurs in the course of employment that the Board have jurisdiction and here the accident occurred in an elevator after leaving his work; (c) that it had jurisdiction only when the workman was suing his employer, not as here a third party with whom he had no relations whatever.

Questions of fact are involved in these objections and it was argued that the Board cannot give itself jurisdiction by wrongly deciding facts which, if rightly decided, would shew that they had no jurisdiction at all. For example, they cannot in an arbitrary fashion say that the respondent is not a travelling salesman when the evidence clearly shews that to be his occupation; nor can they say that injuries were received in the course of employment when in fact and in law they were not. The argument appears plausible, but its answer depends upon the construction of the pertinent sections of the Act and the intention of the Legislature. The respondent is within section 12, subsection (3). He brought action against not "his employer" but "an employer," *viz.*, the appellants. Therefore, the Board can determine, upon the application of one of the parties, "whether the action is one the right to bring which is taken away by this Part." Turning to section 74, we find the Board have exclusive jurisdiction "to inquire into, hear, and determine all matters and questions of fact and law arising under this Part." If, therefore, the question of fact and law involved in this action are covered by sections of the Act found in Part I. the Board have exclusive jurisdiction to determine all such questions of fact and law, and whether they decide rightly or wrongly the Court cannot interfere. The Board have exclusive jurisdiction in this regard. It was argued by the respondent that the facts in the case at Bar do not bring him within the ambit of section 74. Reading section 74, and subsections (*i*) and (*j*) there can be no doubt that this contention is not sound. They have exclusive jurisdiction under section 74, subsection (1) (*i*) to determine "whether or not any workman in any in-

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dustry within the scope of this Part is within the scope of this Part and entitled to compensation thereunder." The industry in which respondent worked is within section 4 of the Act, while under section 74, subsection (1) (*j*), the Board determine "whether or not any person, firm, or body corporate is an employer within the scope of this Part." Turning to section 11, the appellant is "an employer." It is "an employer" within the scope of this Part (section 11 (4)). The Act contemplates just such a case as we have here.

As to whether or not respondent is a "travelling salesman," and therefore beyond the reach of the Act, that is another question of fact. The Board might wrongly decide such a question, but the Legislature thought fit to enact that such a finding "shall not be open to question or review in any Court" (section 74).

MACDONALD, J.A.

It was argued that section 74 only covers questions arising "under this Part" of the Act, and did not give authority to the Board to deal with a matter in the Courts. Section 12, subsection (3), answers this contention.

I would allow the appeal.

Appeal allowed.

Solicitor for appellants: *L. G. McPhillips.*
Solicitor for respondent: *Alfred Bull.*

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IN RE LEGAL PROFESSIONS ACT AND A. E. BECK

IN RE LEGAL PROFESSIONS ACT AND A. E. BECK, A SOLICITOR.

Solicitor and client—Disputed retainer—Evidence of solicitor's services being accepted to end of litigation — Implied contract — Shifting of burden of proof—R.S.B.C. 1924, Cap. 136, Sec. 85.

Where a client has accepted a solicitor's services and has sought to be benefited thereby, an implied contract is created that he should pay the solicitor according to the fees chargeable by a solicitor, and this implied contract can only be destroyed by satisfactory evidence that the usual fees are not payable, the burden of shewing that the usual result would not follow from such employment resting on the client (MARTIN, J.A. dissenting).

Statement

APPEAL by W. H. Gallagher from the order of MACDONALD, J. of the 5th of January, 1925, allowing the appeal from the

registrar's report made in pursuance of an order of HUNTER, C.J.B.C. of the 17th of March, 1924, at the instance of A. E. Beck, a solicitor, whereby it was ordered that the solicitor's bill of costs be taxed reserving to the client the right to dispute such taxation and retainer. The registrar concluded there was only a qualified retainer, that Mr. Beck had been paid in full and he did not tax the bills submitted. In May, 1917, Gallagher was sued by one Shaw and he instructed Beck to act temporarily as his solicitor until he retained another solicitor. Beck acted for him in the case and Gallagher made a payment of $50 to him in December, 1918, and a further payment of $50 in November, 1919. Then on consultation, it was decided to employ W. S. Deacon as counsel and Mr. Deacon was paid $600 for his services. Gallagher did not employ any other solicitor and Beck continued to act for him to the end of the case when Gallagher paid him another $200. Beck claimed a balance due him of $2,208.08 of which $1,547.18 was for services in connection with the case of *Shaw* v. *Gallagher*. It was held by MACDONALD, J. that there was a general retainer, that Gallagher had accepted Beck's services throughout the litigation, that an implied contract had been created whereby he should pay Beck according to the fees chargeable by a barrister and solicitor, and that the burden of shewing the usual result would not follow was on the client.

Statement

The appeal was argued at Vancouver on the 15th and 16th of April, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Mayers, for appellant: The work was concluded in 1919, and Gallagher paid Beck $200 which was accepted as payment in full. It was not until 1924 that Beck put in this bill that he claims he is entitled to under a full retainer. There was no written retainer in which case the client's evidence should be accepted: see *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241; *Re Paine* (1912), 28 T.L.R. 201; *Pickup* v. *Thames Insurance Co.* (1878), 3 Q.B.D. 594 at p. 600.

Argument

Bucke, for respondent: Beck acted for Gallagher from the beginning to the end of this case with his assent. He never employed another solicitor. He is entitled to be paid for his

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services and the burden is on Gallagher to shew he is not: see *Woodworth* v. *Gold,* Nov. 16, 1915, not reported. Where a professional person is engaged there is the presumption that he is to be paid for his services: see Halsbury's Laws of England, Vol. 28, p. 868, par. 1532. By section 85 of the Legal Professions Act he is entitled to the fees prescribed in the tariff. There is ample evidence in this case to bring it within *Macdonald* v. *Bellhouse* (1920), 1 W.W.R. 597.

Mayers, replied.

Cur. adv. vult.

4th June, 1925.

MACDONALD, C.J.A.: It appears that one, W. H. Gallagher, intending to employ another solicitor to defend an action, asked Mr. Beck, who was his general solicitor, to defend the action pending the employment of such other solicitor. This Mr. Beck did, but Gallagher did not employ another solicitor, and by his conduct permitted matters to go along as they had commenced, with Mr. Beck acting as his solicitor in the action all the way through.

The registrar appears to have been under the impression that Mr. Beck was acting, as he put it, "nominally," and on that assumption accepted Gallagher's evidence of a settlement at $200. There is no evidence at all to support this. The $200 was paid and accepted on account merely. The situation was, as stated above, that the solicitor was originally acting not nominally but temporarily, and that the retainer was continued to the end of the litigation and became a complete retainer. There is no contention at all that Gallagher was not to pay the fees of a solicitor, and under the circumstances above recited, Mr. Beck being the only solicitor, the necessary inference from their relationship and from the evidence shewing it, is, that he was to receive the fees to which a solicitor would be entitled under the tariff. On appeal to a judge, the appeal was allowed, and, I think, rightly so.

MACDONALD, C.J.A.

Some stress was laid upon Mr. Beck's delay in presenting and insisting upon payment of his bill, but a creditor is not to lose his right by delay, short of the bar of the Statute of Limitations.

MARTIN, J.A.

MARTIN, J.A.: With every respect for the contrary opinion

of my learned brothers, I nevertheless think this appeal should be allowed and the finding of the registrar (set out in his certificate upon the reference to him) which was reversed by the learned judge appealed from, restored, because, having regard to the onus which lay upon the solicitor to prove the retainer he sought to recover upon, he had failed to do so to the proper satisfaction of the registrar. The matter, undoubtedly, was a difficult one to deal with, but I see no justification for disturbing the result reached by the registrar who, upon the evidence adduced before him, was warranted in finding as he did, in effect, that the matter was covered by the special arrangement set up by the client in substitution for the original retainer which was intended as a temporary arrangement only and not as one to confer authority to conduct the proceedings to a conclusion.

MARTIN, J.A.

GALLIHER, J.A.: I think the learned trial judge came to the right conclusion. I also agree in the view taken by the Chief Justice, whose reasons I have read.

The appeal should be dismissed.

GALLIHER, J.A.

MACDONALD, J.A.: Further examination confirms the view I held at the close of the argument, that the appeal should be dismissed.

The point in issue is, did the solicitor receive a retainer entitling him to solicitor and client fees as against W. H. Gallagher, for whom he was acting, or were his services subject to a special contract for a limited amount which has been paid? The registrar fell into error in saying:

MACDONALD, J.A.

"I am of opinion that the onus was on Mr. Beck to prove a general retainer to do the work the subject-matter of the bill of costs for the usual fees and that he had not done so."

He is right as to the onus in the first instance, but should have found that it was fully discharged by the evidence given by Mr. Beck. It then devolved upon Mr. Gallagher to prove the special contract alleged. It is true that where there is no written authority weight must be given to the denial of the party against whom the account is rendered rather than the affirmation of the solicitor. *MacGill & Grant* v. *Chin Yow You*

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(1914), 19 B.C. 241. But the evidence does not disclose a specific denial of the retainer nor a definite assertion of a special contract for limited services. Apart from Mr. Gallagher's actions, which were only consistent with the usual employment, he did not say that he arranged at the outset for a special contract at a specified amount. The nearest approach in his evidence to such a contract of service is where he testified that Mr. Beck said to him, "I will act nominally and help you out." What he meant by that expression (if he used it) is not clear, but this passing remark certainly does not disclose a concluded contract of a limited nature. Mr. Gallagher's evidence shews that Mr. Beck was to act nominally for him until he could select counsel—that is, that he should do the work of both and, after counsel was engaged, continue, as he did continue to act, as solicitor and junior counsel at the trial. No where does he assert that there was a special arrangement for less than the regular fees.

MACDONALD, J.A.

While weight must be given to the denial of the client, yet it must be a specific denial, not a series of statements which, taken as a whole, are, in effect, consistent with the solicitor's claim. It was suggested that the fact that Mr. Beck did not render his bill for over three years after the work was completed supports the claim that he had been paid in full, in pursuance of a special arrangement. Dilatoriness in rendering accounts is not proof that the services charged for were not performed. He was asked by counsel for Mr. Gallagher for an explanation of the delay, and when proceeding to explain was interrupted by another question on a different point. On the whole, I am satisfied that the registrar came to his conclusion upon wrong principles.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Hamilton Read & Paterson.*
Solicitors for respondent: *H. W. Bucke & Co.*

APEX LUMBER COMPANY LIMITED v. JOHNSTONE.

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Bankruptcy—Claim as secured creditor—Contract for supply of timber—Moneys advanced—Purchaser's lien—Bill of sale—Right of appeal—Can. Stats. 1919, Cap. 36, Sec. 74.

The plaintiff entered into a contract in July, 1923, with T. & V. for delivery of 300,000 feet of lumber at a certain price, and at the same time advanced T. & V. moneys to carry on the work said moneys being secured by promissory notes. On the 13th of August, 1923, T. & V. gave the plaintiff a bill of sale for 100,000 feet of lumber and on the 13th of September following T. & V. assigned for the benefit of their creditors without delivery of the lumber. The trustee in bankruptcy refused to recognize the plaintiff's claim as a secured creditor and on an issue it was held that the plaintiff had a purchaser's lien upon the lumber in question.

Held, on appeal, reversing the decision of McDONALD, J., that the moneys were advanced as a loan to enable T. & V. to carry out the contract which is inconsistent with the claim for a lien; further the taking of a bill of sale as security and claiming to rank as a secured creditor by reason thereof is also inconsistent with the claim for a lien.

Levy v. *Stogdon* (1898), 1 Ch. 478; and *Rose* v. *Watson* (1864), 10 H.L. Cas. 672 distinguished.

A judge in bankruptcy allowed the plaintiff's appeal from the denial of the authorized trustee of its right to rank as a secured creditor with respect to a contract with the assignees for the purchase of lumber and advances made thereunder. On appeal by the trustee to the Court of Appeal a preliminary objection that there was no jurisdiction to entertain the appeal was dismissed (MACDONALD, C.J.A. and MACDONALD, J.A. dissenting).

In re Motherwell of Canada (1924), 5 C.B.R. 107 distinguished.

APPEAL by defendant (trustee of Tuplin & Van Buskirk) from the decision of McDONALD, J. of the 28th of August, 1924. On the 4th of July, 1923, Messrs. Tuplin & Van Buskirk entered into a contract to deliver the Apex Lumber Company Limited 300,000 feet of soft pine at a certain price. In order to assist Tuplin & Van Buskirk to carry out the contract the Apex Lumber Company Limited advanced them $1,684.50 for which Tuplin & Van Buskirk gave promissory notes aggregating that amount. On the 13th of August, 1923, Tuplin & Van Buskirk gave the Apex Lumber Company Limited a bill of sale

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Statement

for 100,000 feet of the lumber. On the 13th of September following Tuplin & Van Buskirk assigned for the benefit of their creditors. The trustee in bankruptcy concluding the bill of sale was invalid sold the logs, and refused the Apex Lumber Company's preferential claim for $1,801.07. On the application of the Apex Lumber Company Limited it was ordered that the parties proceed to trial on the issues: (1) whether the 100,000 feet of lumber was the property of the Apex Company; (2) whether said company was entitled to specific performance of the contract of the 4th of July, 1923; (3) whether said company was a secured creditor in respect of moneys advanced. It was held by the trial judge that the company had a purchaser's lien upon the 100,000 feet of lumber and the taking of the bill of sale had not the effect of invalidating or releasing the lien.

The appeal was argued at Vancouver on the 12th, 13th and 16th of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C., for appellant.

Mayers, for respondent, raised the preliminary objection that there was no appeal. This case is the same as *In re Kamloops Copper Co. and City of Kamloops* (1925), 35 B.C. 243, where the Court divided so that decision is not binding: see *Stanstead Election Case* (1891), 20 S.C.R. 12 at p. 20. We submit that *In re Motherwell of Canada* (1924), 5 C.B.R. 107 should be followed. The total assets are less than our claim, and if we are not secured we get nothing.

Argument

Craig, contra: The *Motherwell* case is entirely distinct: see *Re Cecilian Co. Limited* (1922), 51 O.L.R. 649; *Re F. E. West & Co.* (1921), 50 O.L.R. 631; *Re Auto Experts Limited. Ex parte Tanner* (1921), 49 O.L.R. 256; *Re Morris* (1923), 53 O.L.R. 36; *Re Goldstein, ib.*, 60; *Re Specialty Bags Co., ib.*, 355; *Re Lipson, ib.*, 399 and on appeal (1924), 55 O.L.R. 215. As to following a judgment on an equal division of the Court see *St. Lawrence Underwriter's Agency of the Western Assurance Company* v. *Fewster* (1922), 63 S.C.R. 342.

MACDONALD, C.J.A.: An affidavit must be filed before it can

be used and notice at least must be given the other side. Judgment reserved on the preliminary objection.

Craig, on the merits: Tuplin & Van Buskirk assigned before the delivery of the lumber and it was held the Apex Lumber Company Limited had a purchaser's lien on the lumber. The contract is inconsistent with the right of lien and he cannot set up a right of lien: see *Chase* v. *Westmore* (1816), 5 M. & S. 180; *Crawshay* v. *Homfray* (1820), 4 B. & Ald. 50. The money advanced by the Apex Company was advanced as a loan; it never became purchase-money. If they had a lien they lost it by accepting a bill of sale: see *In re Morris* (1908), 1 K.B. 473; *Mason* v. *Morley* (*No. 1*) (1864), 34 Beav. 471; Halsbury's Laws of England, Vol. 19, p. 28, par. 44. Next, the lien was lost by the course of conduct of the parties. The lumber has been sold and the lien is gone. After claiming under the bill of sale he cannot then claim under a lien which is inconsistent: see *Boardman* v. *Sill* (1808), 1 Camp. 410(n.); *Weeks* v. *Goode* (1859), 6 C.B. (N.S.) 367; *Parsons* v. *Equitable Investment Company, Limited* (1916), 2 Ch. 527.

Argument

Mayers: The Apex Lumber Company furnished all the money from the inception. The bill of sale strengthens our position. We have a lien on the whole of the logs: see *Holroyd* v. *Marshall* (1862), 10 H.L. Cas. 191 at p. 209; *Macdonald* v. *Eyles* (1921), 1 Ch. 631 at p. 638; *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342; *Swainston* v. *Clay* (1863), 32 L.J., Ch. 503 at pp. 506-7. The trustee is in the same position as the bankrupt: see *In re Stucley. Stucley* v. *Kekewich* (1906), 1 Ch. 67 at pp. 75 and 83. In case of purchaser's lien on personal estate see *Levy* v. *Stogdon* (1898), 1 Ch. 478. He cannot take a higher position than the bankrupt: see *Ex parte Holthausen. In re Scheibler* (1874), 9 Chy. App. 722 at pp. 726-8; *Pearce* v. *Bastable's Trustee in Bankruptcy* (1901), 2 Ch. 122 at p. 125. The principles of possessory liens do not apply. On the question of waiver of lien see *Fisher* v. *Smith* (1878), 4 App. Cas. 1 at p. 6; *Angus* v. *McLachlan* (1883), 23 Ch. D. 330; *Bank of Africa* v. *Salisbury Gold Mining Company* (1892), A.C. 281 at p. 284; *In re Morris* (1907), 77 L.J., K.B. 265.

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A bill of sale may be good although not within the Act: see *Greenburg* v. *Lenz* (1905), 12 B.C. 395.

Craig, replied.

Cur. adv. vult.

4th June, 1925.

MACDONALD, C.J.A.: The plaintiffs claim to be entitled to rank on the bankrupt's estate as preferred creditors. This claim was disallowed, whereupon they appealed to a judge of the Supreme Court who accepted their contention.

The authorized trustee now appeals. A preliminary objection was taken that no appeal would lie since, as contended, no sum of money is involved in the appeal.

This question came before us for decision in *In re Kamloops Copper Co. and City of Kamloops,* not yet reported*, but the Court being equally divided in opinion the question was not then settled. In that case I thought the objection well taken, and now see no reason for changing my opinion. The decision of the Appellate Division of the Supreme Court of Ontario in *In re Motherwell of Canada* (1924), 5 C.B.R. 107, was relied upon in support of the objection. The report of that case does not make it very clear as to what was the ground of the decision —whether it was based merely upon the fact that the appeal was to set aside an order substituting a creditor for the trustee, a preliminary to an appeal on the main question, or whether it went to the principal question, the right to prosecute an appeal in view of section 74 of The Bankruptcy Act.

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I think the case most nearly in point, and one which no doubt the Court had in mind in giving its decision in *Cushing Sulphite-Fibre Co.* v. *Cushing* (1906), 37 S.C.R. 427, is *Toussignant* v. *County of Nicolet* (1902), 32 S.C.R. 353. There the *proces-verbal* would impose an obligation upon the appellants amounting to over $2,000. Mr. Justice Taschereau, delivering the judgment of the Court, at p. 354, said:

"The fact that the *proces-verbal* attacked by the appellant's action may have the result to put upon them the cost of the work in question, alleged to be over $2,000, does not make the controversy one of $2,000. There is no pecuniary amount in controversy; in other words there is no controversy

*Since reported, 35 B.C. 243.

as to a pecuniary amount or of a pecuniary nature. It is settled law that neither the probative force of a judgment, nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount."

Here there were two separate questions originally involved, the pecuniary demand—the debt; the secondary question, its rank in the distribution of the estate. It is the latter which is now in question, not the pecuniary demand.

Had this case been one of first impression, I should have held that a sum of money was involved, and that the appeal would come within section 74. Indeed, I was of that opinion in the *Kamloops Copper* case, before we were referred to the authorities, and it was only in deference to them that I relinquished that opinion.

MACDONALD, C.J.A.

As the majority of the Court are now of opinion that a sum of money is involved within the meaning of section 74, and would overrule the preliminary objection, I must then consider the appeal on its merits.

After perusing the reasons for judgment of my brother GALLIHER, and considering all the evidence in the case, I agree with him in allowing the appeal.

MARTIN, J.A.: First as to the objection to our jurisdiction. I do not, with all respect, perceive anything in the new argument we have had on this point (in view of our equal division of opinion thereupon in *In re Kamloops Copper Co. and City of Kamloops* on 4th February last) [35 B.C. 243] to change the opinion I therein expressed in favour of the appellant. Further consideration of *Re Andrew Motherwell of Canada Ltd.* (1924), 55 O.L.R. 294, confirms the view that it is clearly distinguishable, the question there arising out of the dismissal of an application to set aside an *ex parte* order, giving leave (under section 35) to appeal to the Privy Council from a decision of the Appellate Division. It was an appeal from a judgment of Mr. Justice Fisher, p. 298, declaring that

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"the creditors come within sec. 35 and have the right to appeal to the Privy Council in any action pending which might result in benefit to the estate if prosecuted by the trustee, if they gave the required security. . . . ."

In these circumstances the Appellate Division held that there

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could be no appeal from that judgment as it did not "involve future rights" under section 74 (*a*), nor was there "an amount involved in the appeal exceeding $500" under (*c*). Since the decision of Fisher, J. was only a refusal to interfere with the pending appeal to the Privy Council, I am in agreement with the Ontario Court of Appeal that an appeal from an order of that kind does not come within said section 74, and that the decision of the Supreme Court of Canada in *Cushing Sulphite-Fibre Co.* v. *Cushing* (1906), 37 S.C.R. 427 (holding that there is no appeal, under a similar section of the Winding-Up Act, from the refusal of a judge to set aside a winding-up order) applies to such a situation as arose in the *Motherwell* case, wherein the judge refused to set aside an order granting leave to appeal.

But while the *Motherwell* case and the *Cushing* case do apply to section 74 in relation to that particular question of a judge's refusal of an order, they do not apply to this case, which contains no element of that kind, but is a direct appeal by the trustee in bankruptcy from a judgment of the Court declaring

MARTIN, J.A.

that the respondent Company's claim on account of advances (to an admitted extent of $1,699) to a purchaser's lien therefor upon 100,000 feet of lumber (cut under its contract with the bankrupts) is a secured claim entitling the Company to a first charge to the full extent of said claim upon the said lumber or its proceeds in the hands of the said trustee, and for reasons already expressed in the *Kamloops Copper Co.* case, I am of opinion that such a claim and such a judgment thereupon "involves" in its true sense the recovery of the claim, and being over $500 is within said section 74 (*c*), and therefore this appeal is properly brought.

Turning then to the merits, it is to be noted that the learned judge below expressed "considerable doubt" in arriving at the conclusion that the respondent Company had acquired and not subsequently lost a purchaser's lien under the said contract, and therefore I am the more disinclined to differ from the opinion of my learned brothers that the appeal should be allowed, the contract being regarded as simply the ordinary one to supply lumber in ordinary circumstances, certain cash advances being

made by the purchaser secured by the vendors' notes, as a firm and individually, to be applied against concurrent shipments.

GALLIHER, J.A.: The trustee disallowed the claim of the Apex Lumber Company to rank as a preferred creditor, but allowed them to rank as an ordinary creditor for $1,699.07. An appeal was taken to a judge in bankruptcy (MCDONALD, J.), who allowed the appeal and ordered that the Apex Lumber Company should rank as a preferred creditor for that amount—August 28th, 1924. An appeal was taken from this order and the preliminary point is now raised that we have no jurisdiction to entertain the appeal. The same question came up in *In re Kamloops Copper Co. and City of Kamloops,* in this Court [35 B.C. 243]. The Court was equally divided, MACDONALD, C.J.A. and MACDONALD, J.A. holding there was no jurisdiction, relying on the case of *In re Motherwell of Canada* (1924), 5 C.B.R. 107, and *Cushing Sulphite-Fibre Co.* v. *Cushing* (1906), 37 S.C.R. 427, MARTIN and MCPHILLIPS, JJ.A. *contra.*

By subsection (2) of section 74 of The Bankruptcy Act, there is no appeal to the Appellate Court from the decision of a judge unless (so far as affects this case) the amount involved in the appeal exceeds $500. Here there is no question that the amount, if it can be said to be involved in the appeal, exceeds $500. In my opinion, the amount is involved, and involved directly, and not indirectly. The point before the trustee and also before the judge in bankruptcy was, shall the creditor rank as a secured or an ordinary creditor for the amount of the indebtedness? The learned judge decided that the Apex Lumber Company should rank as a secured creditor for the specific sum of $1,699.07, and from that order this appeal is taken. I must say, speaking with the greatest deference, that I find it hard to understand why this does not come within the provisions of the statute. I think the *Motherwell* case is distinguishable in the nature of the appeal there being taken. There an order had been made *ex parte* permitting the respondent to appeal to the Privy Council against a decision of the Appellate Division of Ontario. The appellant made an application to Fisher, J. to set aside that order, which application was refused, and against this refusal the further appeal was taken.

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Now, what was there being determined, both before the judge in bankruptcy and the Court of Appeal, was the setting aside of an order permitting the respondent to appeal to the Privy Council and which in the end might involve money considerations, but here the judge in bankruptcy was dealing directly with and in respect of a specific sum of money. In the *Cushing* case, *supra,* the appeal was against a judgment refusing to set aside a winding-up order. This decision seems to be in accordance with the principle enunciated in the words of Taschereau, J. who delivered the judgment of the Court in *Toussignant* v. *County of Nicolet* (1902), 32 S.C.R. 353 at p. 354:

"There is no pecuniary amount in controversy; in other words there is no controversy as to a pecuniary amount or of a pecuniary nature."

Now, can we apply those words to what was being determined in this case? What was up for decision in this case was whether the sum of $1,699.07 should be classed as a specialty debt or a simple debt. There was no controversy as to the amount, or that it was due or owing, but there was a controversy as to how a debt which involved a specific pecuniary amount was to be disposed of. The decision as to its disposal might mean the loss of the debt, or its realization, depending on how it was decided, and that seems to me in its very essence to involve a pecuniary amount. I think these cases can be distinguished and would overrule the objection.

GALLIHER, J.A.

Dealing with the appeal. In my opinion the moneys here were advanced as a loan to enable Tuplin & Van Buskirk to carry out the contract, the Apex Company to be recouped from time to time out of carload lots shipped. I think the contract in this respect is inconsistent with the idea of a lien, and hence distinguishable from such cases as *Levy* v. *Stogdon* (1898), 1 Ch. 478, and *Rose* v. *Watson* (1864), 10 H.L. Cas. 672. Moreover, the taking of the bill of sale as security and the claiming to rank as a secured creditor by reason of such, are also inconsistent with that view. The marking of the lumber was not, as I view it, an evidencing of ownership, but an identification of the lumber referred to in the bill of sale.

I would allow the appeal.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I would allow the appeal.

MACDONALD, J.A.: I agree with the Chief Justice on the preliminary objection but as we are in the minority I agree with the other members of the Court in allowing the appeal.

Appeal allowed.

Solicitors for appellant: *Savage & Roberts.*
Solicitor for respondent: *T. B. Jones.*

CRABBE v. SHIELDS.

Will—Execution—Testamentary capacity—Alcoholic dementia—Evidence of experts—Evidence of lay observers in close contact with testator—Value of.

In an action for probate of a will where the question at issue is the mental condition of the testator at the time he made his will, it is for the Court to draw inferences from the evidence, but where on the whole the testimony of the witnesses is not impugned a Court of Appeal is free to draw its own inferences.

The Court is not bound to accept the opinion of experts when it is opposed to testimony within the knowledge of observers daily coming in contact with the testator.

Held, that on the evidence the deceased was on the date of the will competent to make it.

APPEAL by plaintiff from the decision of MCDONALD, J. of the 25th of November, 1924, in an action for a decree of probate of the last will of James C. S. Shields, who died in Vancouver on the 19th of June, 1924. The plaintiffs Ray Shields and L. W. Cameron claim as executors and devisees under the last will and testament of J. C. S. Shields made on the 17th of May, 1924. The plaintiff, Blanche L. Crabbe, is the sister of deceased and claims as a devisee under his will. The defendant Ida J. Shields was the wife of the deceased and alleges that at the time her husband executed his last will he was suffering from alcoholic dementia and was not then of

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sound mind and understanding. She asked that the said will be declared invalid and that she be granted letters of administration of the estate of her deceased husband. The learned trial judge concluded that the testator was not possessed of testamentary capacity when he executed the will.

The appeal was argued at Vancouver on the 30th and 31st of March, 1925, before MACDONALD, C.J.A., GALLIHER and MACDONALD, JJ.A.

Mayers, for appellant: Quarrels with his wife and financial troubles may have induced his drinking but the evidence shews he was mentally sound. A question, the answer to which may be the decision in the case, is inadmissible; that must be left to the Court: see *McHugh* v. *Dooley* (1903), 10 B.C. 537; *Forman* v. *Ryan* (1912), 17 B.C. 130; *Standard Trusts* v. *Pulice* (Court of Appeal, B.C., Oct. 3rd, 1922, not reported); *Pare* v. *Cusson* (1921), 31 Man. L.R. 197; *Gandy* v. *Gandy* (1885), 30 Ch. D. 57 at p. 82.

Argument

J. E. Bird, for respondent: A man's insanity may in no way interfere with his business capacity, but he is nevertheless unfit to dispose of his property: see *Smee* v. *Smee* (1879), 5 P.D. 84 at p. 90; *Dew* v. *Clark* (1826), 3 Addams, Ecc. 79; 162 E.R. 410; *Broughton* v. *Knight* (1873), L.R. 3 P. & D. 64 at p. 67; *Wm. H. Wise & Co.* v. *Kerr* (1925), 35 B.C. 161; Taylor's Principles and Practice of Medical Jurisprudence, 7th Ed., Vol. 1, p. 857.

Mayers, in reply: Respondent's grounds of attack are contradictory. He says the delusions he refers to were not present when Shields was sober. The presumption is that he is sane: *Sutton* v. *Sadler* (1857), 3 C.B. (N.S.) 87; *Chambers* v. *The Queen's Proctor* (1840), 2 Curt. 415 at p. 441; 163 E.R. 457 at p. 467.

Cur. adv. vult.

4th June, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Upon a careful perusal of the evidence, which I think shews that the deceased, Shields, was quite competent to make a will at the time he made the will in question,

I am of opinion that the judgment below cannot stand, and the appeal must, therefore, be allowed.

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

The one feature which, if it had been established, might, in my view, have justified me in upholding the judgment was, had the deceased delusions regarding his wife? This is confined to what is termed accusing her as being responsible for the loss of their child. When the evidence regarding this is read and rightly understood, it is not a delusion at all. It simply amounts to this, that it was a complaint (and an unjust complaint) that, if she had not gone to France with the child, the child would not have died; that is not a delusion in any sense of the word.

GALLIHER, J.A.

MACDONALD, J.A.: This is an appeal from a judgment dismissing an action for a decree to admit to probate the will of James C. Shields, deceased, on the ground that he was not of a sound and disposing mind. The law presumes sanity, particularly when, as here, the will was prepared under the dictation of the deceased and executed in the ordinary way, and the onus is on the party alleging insanity to establish it. It is clear that the respondent's case rests upon the assumption that the mind of the deceased was controlled by certain specified delusions which destroyed his capacity to make a valid will. The principal delusion, so-called, was that the respondent, his wife, was responsible for the death of their only daughter, an event which it was said altered the whole tenor of his life. Before the daughter's death, it was said that he was a man of good business ability and of exemplary habits while afterwards he gave way to sexual immorality and to excessive drinking, resulting in chronic alcoholism. Neither of these indulgencies is *per se* evidence of insanity (if so, all libertines must be insane), unless carried to an extent that the reasoning faculties are undermined.

MACDONALD, J.A.

There is evidence of abnormal conduct and so-called delusions when indulging in excessive drinking, which, however, might well be solely referable to that condition and attributable to the delirium caused thereby. In 1914 a committee in lunacy was appointed to look after his affairs. After nine months confine-

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ment in a private hospital, the order was vacated and he was pronounced sane and competent to manage his affairs. It was anticipated, when the order was made by one of the doctors concerned, at all events, that the disorder would prove to be of a temporary nature in that it was the result of alcoholism, and that he would recover within six months. In June, 1915, when he was restored to the government of himself, and his property, Dr. Maxwell made an affidavit that he believed him wholly restored mentally. Dr. Maxwell, however, gave evidence at the trial in support of the plea of insanity, although he did not examine him personally after making the affidavit referred to. He based his view on the belief that if he resumed excessive drinking he would "very likely but not necessarily" return to his former condition. This cannot be regarded as conclusive evidence.

There is a mass of evidence by lay witnesses, whose credibility is unquestioned, that for several years before his death and shortly before he prepared the will in question, he was conducting his business affairs—often involved and of an intricate nature—in a rational way without the slightest indication of mental incapacity. On the other hand, Dr. Manchester, a mental expert, testified to his insanity in very positive terms. The will itself discloses no evidence of an irrational mind, unless it can be inferred from the disposition made of part of his property (by secret direction to his trustees) to a woman with whom he maintained relations, possibly illicit, to the detriment of his wife, from whom he was estranged. This is not, of itself, evidence of insanity, however much his conduct may be criticized. The fact that his wife instituted proceedings for a judicial separation shortly before the will was made would account for his desire to prevent her sharing in his bounty, particularly as he knew that a considerable amount of life insurance ($23,000) was carried in her favour. Nor can the fact that he committed suicide on June 19th, the month following the execution of the will, be regarded as conclusive evidence of the act of an insane man. The rational supposition is that he ended his life on account of mental depression induced by business difficulties and excessive drinking.

MACDONALD, J.A.

The learned trial judge reached the conclusion that the deceased was subject to a delusion in respect to his wife from 1914 onward, and that his act in making the will in question, omitting her as a beneficiary, and in selecting another without claim upon his bounty, was influenced, if not controlled, by this delusion. That conclusion was reached largely on the evidence of Dr. Manchester. This calls for an examination of his evidence and consideration of his opportunities for making accurate observations.

He examined the deceased on two occasions only, in September and October, 1914, when the latter was on a prolonged spree. Dr. Proctor, who was present, "considered this was only another drunken bout." Dr. Manchester testified that he found him in a "paranoiac state resulting from alcohol." He referred to a letter the deceased wrote to his sister at a later date as a "beautiful example of a paranoiac's letter." In that letter, he undoubtedly exaggerated situations in which, however, there was a basis of truth. Why it should be regarded as the effusion of a madman is not clear, unless we entirely surrender our own view and accept the doctor's conclusions unreservedly. It is apparent that throughout the doctor's opinion was based upon his conception of what the evidence, to which he listened at the trial, disclosed. He wrongly assumed that the evidence shewed no justification for the exaggerated notion expressed in this letter that his wife was "on the rampage." She had in fact instituted proceedings for a judicial separation, a circumstance that might well call forth exaggerated criticism from any man, however sane.

Dr. Manchester properly describes a delusion as a false belief. Applying that definition to the alleged delusion that the wife of the deceased was responsible for the death of their daughter, who died in France while there with her mother, what do we find? The wife testified: "I know my husband had some feeling in the back of his mind possibly if he had been there it would not have happened." If they did not have a daughter, or having one, she did not die in France while there with her mother, the delusion, or false belief, would be complete. But the incident did occur. She says he "didn't object" to the trip

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abroad. That conveys the suggestion that he was not particularly anxious that they should go. One can understand a delusion where a man conjures up an incident or state of facts which has no basis in fact, and exists only in his own disordered mind. But where coloured views or unjustified opinions in reference to proven incidents are entertained, doubly so when these views are expressed only when under the influence of alcohol, they cannot be regarded as conclusive evidence of an insane delusion. Further, it is common knowledge that a man suffering from delirium tremens may have delusions of the most grotesque character which pass away with the cause.

We might in this case, in view of the evidence of laymen, refer to *Perera* v. *Perera* (1901), A.C. 354 at p. 359, where Lord Macnaghten said:

"Having regard to all the circumstances of the case, ought the diagnosis of Dr. Fonseka and Dr. Rockwood, who were not present when the will was executed, to outweigh and prevail over the testimony of eye-witnesses based upon the evidence of their own senses?"

The Privy Council rejected the evidence of medical men of repute.

MACDONALD, J.A.

Mr. McDonald and Mr. Penn, who witnessed the execution of Mr. Shield's will, the former knowing him for twelve years, the latter for a shorter period, testified favourably as to his appearance, conduct, demeanour and rationality when he executed the will and prior thereto. From the evidence of business and professional men, who had dealings with him just prior to the execution of the will, there is no doubt that to laymen, at all events, there was no indication of mental unsoundness. McDonald and Penn were criticized for their apparent failure to notice evidence of the deceased's undoubted drinking habits. But Miss Sutherland, who did know of his drinking habits from observation, testified that he was never drunk in the office, and the evidence of McDonald and Penn may have been quite honestly given.

I do not overlook the fact that a man might be capable of attending to business affairs, even of an involved nature, and yet be subject to delusions. They must, however, be of such a nature as to control or at least influence dispositions he would otherwise make of his property. They must, too, be attributable

to a shattered mind, not to a mind temporarily unhinged by alcoholic excesses. Dr. Proctor gave evidence of men who, in that condition, were the victims of terrible delusions, but on recovery were perfectly normal. It doesn't follow that, if while in this condition, the deceased gave expression to delusions respecting his wife, that she was unfaithful, that she wished to put him in an asylum, or was responsible for their child's death, that they subverted his mind when, as at the time of making the will, he was not on one of his drinking bouts. The whole case in respect to delusions, with the exception presently noted, are inseparable from these debauches. Why when sanity is presumed, should they be attributed to any other cause?

Dr. Lang, called on behalf of the plaintiff, testified that for some months before his death, he told him—apparently while sober—that he had a number of enemies who were "digging up information about him for the purpose of ruining him socially and financially." The doctor thought that, while in a state of mental depression, he was exaggerating incidents which, to some extent, were present. For example, his wife admitted calling up at least one woman warning her that she knew of intimacies with her husband, and threatening to name her in contemplated divorce proceedings. He also had business worries driving him into serious financial embarrassment. His wife, as stated, instituted proceedings for a judicial separation. All these circumstances might really provoke a man, however sane, to express these views, regarding himself as the injured party. Dr. Lang went a step further, however, in support of the theory of lunacy in his evidence at the inquest, following the suicide of the deceased, and, as he was a witness for the plaintiff, his evidence requires explanation or acceptance. He was asked:

"Do you think he was temporarily deranged at the time this occurrence [*i.e.*, the suicide] took place, doctor? I think he has been on the border line for some weeks if not months, and I think it is an exaggerated condition of it, that is all; an acute condition."

He was asked at the trial:

"Is that still your opinion? What is—what is that, mental derangements?

"Yes, mental derangement. Well, in a sense, yes, it is."

In his cross-examination he was asked:

"And during that time [*i.e.*, the last two or three months] do you think

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he was in any position to weigh his responsibilities in regard to his relations and his connections and his duties as to any estate that he might leave and fairly apportion and weigh their respective rights one against the other as a normal man should? Well, it is rather difficult to say for this reason, that he always struck me (as one) who no matter how much ill health he had he could bring himself up to the point, if he had a certain amount of business to do, to go through with it. Now whether that nervous tension—that nervous depression and so on would affect his judgment at that time or not, I couldn't say."

And again, "What I would say about him at that time was that his views might be slightly coloured." Further, in his evidence in chief:

"It is also alleged that he was not of sound mind, memory or understanding. What do you say as to that? Well that is a difficult question to answer for this reason that I don't think his mind was normal in a sense."

"THE COURT: What? I don't think that his mind was normal in a sense, in that he was very highly emotional; but I don't think that there was any sign of any delusion there.

"Mr. *Baird*: Well, for instance, was he capable of understanding your conversations? Always, so far as I know, yes.

"And understanding the ordinary affairs of life? I would think so, yes. There was a possibility he might take a prejudiced point of view on some things."

MACDONALD, J.A.

I have referred to Dr. Lang's testimony because he was the only witness who, as his regular physician, saw him frequently since February, 1920, attending him for various ailments, including periodic drinking bouts. His evidence, at the inquest, given as evidence at an inquest often is given, with mixed motives and with less deliberation than at a trial where the issue is squarely faced, should not be taken standing alone. The whole evidence should be read together, and it is only necessary to set it out to shew that it falls far short of a declaration that the deceased on May 17th was subject to such delusions due to insanity, that he was incapable of making a will. Dr. Proctor was more explicit. He examined him in 1914 and was frequently called in afterwards. He also saw him eight or nine days before his death, when he appeared quite rational. Dr. Proctor throughout combatted the theory of insanity.

It is for the Court to draw inferences from the evidence, and as on the whole the honesty of the witnesses is not impugned, a Court of Appeal is free to draw its own inferences. The Court, too, is not bound to accept the opinion of experts when it is

opposed to testimony within the knowledge of observers daily coming in contact with the party concerned. When we see, as witnesses, chiefly in other jurisdictions, where more alienists are available, an array of experts on one side testifying to views diametrically opposed to that of an equal array of experts on the other side, the Court may well conclude that except where evidence of insanity is noticeable by intelligent lay observers by abnormalities in words or conduct, it is highly speculative to accept the views of any one, however expert, who attempts to define with precision the line of demarcation between sanity and insanity. He is there entering upon a region—the region of the mind—that so often baffles the art of man. I do not say that expert opinions should be rejected. They should, however, be carefully scrutinized and the Court should not abrogate its function of drawing its own conclusions. For the reasons mentioned, coupled with the presumption in law of sanity, until the contrary is proven, I do not accept Dr. Manchester's conclusions, more particularly as he did not see or examine the patient for a period of nine years.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *W. J. Baird.*
Solicitor for respondent: *R. M. Grant.*

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RE DEWDNEY ELECTION. SMITH v. CATHERWOOD

RE DEWDNEY ELECTION. SMITH v. CATHERWOOD. (No. 2).

Elections—Provincial—Absentee vote—Improper affidavit endorsed on eleven envelopes containing ballot-papers—Essential features of proper affidavit wanting — Condition precedent — Respondent's majority five — Result affected—R.S.B.C. 1924, Cap. 76, Secs. 106, 107 and 135.

The returning officer of the Dewdney election received 20 envelopes each containing one ballot of an absentee voter, and of these nine contained the proper affidavit in Form 27 under sections 106-7 of the Provincial Elections Act, but the other eleven envelopes each had endorsed thereon an affidavit made under the Liquor Control Plebiscites Act which did not contain essential facts required under the Elections Act. The 20 ballots were taken out of the envelopes by the returning officer and without being unfolded were put in a special ballot-box by themselves. When counted later two ballots were spoiled, nine votes were for Catherwood, six votes for Smith, and three for a third candidate. Catherwood was declared elected by a majority of five. It was held by the trial judge that the affidavits on the eleven envelopes did not satisfy the condition precedent to these voters being entitled to vote and Catherwood's majority being five the counting of these ballots may have affected the result and the petition to set aside the election should be granted.

Held, on appeal, reversing the decision of MCDONALD, J., that the making of the affidavit was a condition precedent to the right to obtain a ballot-paper, but when a public officer gives out a ballot-paper which in the course of his duty he is not permitted to do until an affidavit of the voter is sworn and delivered to him, and there is no evidence either for or against that having been done, the presumption of law is that the officer did not commit a breach of his duty in giving out a ballot-paper without first having obtained the requisite affidavit. The election was conducted in accordance with the principles of the Act. There was no fraud or collusion but by some unexplained error, eleven of the election ballots were enclosed in envelopes bearing the plebiscite affidavit, the appropriate envelopes with their affidavits endorsed thereon not being sent to the returning officer or accounted for in any way. The 20 votes were therefore properly counted by the returning officer.

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 9th of February, 1925, granting a petition 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 as required by sections 106 and 107 of the Provincial Elections Act. Of 20 ballots from absentee voters that reached the returning officer nine were in envelopes containing the proper election affidavit endorsed thereon and eleven by mistake were in envelopes that had endorsed thereon the affidavit provided for in the Liquor Control Plebiscites Act. Under the Elections Act two essential facts required 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." The affidavit under the Liquor Control Plebiscites Act did not include the facts above recited. When the ballots were taken from the 20 envelopes by the deputy returning officer they were (without being unfolded) placed in the general absentee ballot-box, and when taken out and counted at the end of the voting, two ballots were rejected as defective, nine were for Catherwood, six for Smith and three for the other candidate. It had been previously declared that Catherwood was elected by a majority of five (see 34 B.C. 244). It was held by the trial judge that the affidavit made by eleven voters under the Liquor Control Plebiscites Act did not satisfy the condition precedent to these voters becoming entitled to vote, that as Catherwood's majority was only five it may have affected the result of the election and the petition should be granted.

Statement

The appeal was argued at Vancouver on the 16th and 17th of April, 1925, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Mayers (*Maitland,* with him), for appellant: There must be some infraction of the spirit of the Act itself. This Court has already decided that the provisions of section 106 are directory: see *Re Dewdney Election. Smith* v. *Catherwood* (1924), 34 B.C. 244; *In re West Lorne Scrutiny* (1913), 47 S.C.R. 451; *Martin* v. *Erlendsson* (1917), 27 Man. L.R. 464 at p. 468.

Argument

J. W. deB. Farris, K.C. (*Sloan,* with him), for respondent: The judge deals with the ballots in the condition in which he

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Argument

finds them: see *In re Halton Election* (1902), 4 O.L.R. 345 at p. 348. If the votes in question are sufficient to change the majority no evidence or speculation as to the way they would have voted can be permitted: see *East Simcoe Case* (1884), 1 E.C. 291 at p. 313; *Rex ex rel. Tolmie* v. *Campbell* (1902), 4 O.L.R. 25 at p. 27; *Re Port Arthur Election* (1906), 12 O.L.R. 453 at pp. 477-9; *Re South Oxford Provincial Election* (1914), 32 O.L.R. 1; *Re Ellis and Town of Renfrew* (1911), 23 O.L.R. 427 at p. 433; see also *Montreal Street Railway* v. *Normandin* (1917), 86 L.J., P.C. 113 at p. 116; *Two Mountains Election* (1912), 47 S.C.R. 185 at pp. 187 and 190.

Mayers, replied.

Cur. adv. vult.

8th June, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The Provincial Elections Act, Cap. 76, R.S.B.C. 1924, Sec. 106 *et seq.,* makes provision for the casting of absentee votes, *i.e.*, the votes of persons absent from their home riding at the time of the election. These may vote in another constituency, but their votes are to be transmitted in envelopes to their home constituency and are there to be counted. It is provided that the absentee voter "upon his making an affidavit in Form 27, to be signed and sworn before the presiding officer," shall be furnished by the officer with a ballot paper; that the affidavit is to be printed on the outside of an envelope suitable for enclosing the ballot. When the voter marks his ballot he is to return it to the presiding officer, who having removed and destroyed the counterfoil, is to place the ballot in the envelope on which is endorsed the said affidavit, and having sealed and placed his official mark upon it, he is to send it to the returning officer of the riding in which it is to be counted.

In the election in question, which was a general election, voting was also had on a plebiscite respecting the sale of beer, on which absentees might vote as in the case of an election. The affidavit to be made and endorsed on an envelope was different from that to be taken by an elector and in different coloured ink, and applicable to the plebiscite vote only.

This contest arises over 20 election ballots, which reached the

returning officer in the following condition. Nine of the envelopes bore the appropriate election affidavits endorsed upon them; one of them being marked in the corner with the word "beer"; eleven were plebiscite envelopes and affidavits. When the 20 envelopes were opened by the returning officer, each contained an election ballot in addition to plebiscite ballots. Of these 20 election ballots, two were rejected as defective, and of the remaining 18, nine were counted for the appellant, Catherwood, seven for the respondent Smith, and three for a third candidate.

On the whole vote in the riding, appellant was declared (after a re-count and an appeal therefrom) to be elected by a majority of five over the respondent. Mr. Smith thereupon presented a petition pursuant to the Elections Act, and upon the hearing of it McDONALD, J. gave effect to it and declared the election void on the ground, shortly, that the ballots marked for Mr. Catherwood, might, since there was no evidence to the contrary, have been taken from the plebiscite envelopes, and were therefore, *prima facie,* cast after the voter had taken the plebiscite affidavit only, and should be rejected, while the seven votes for Mr. Smith may have been taken from the proper envelopes with the election affidavit endorsed thereon.

MACDONALD, C.J.A.

Had it appeared in evidence that the voters whose ballots were enclosed in the plebiscite envelopes, had in fact not taken the election affidavit, but only the plebiscite affidavit, I would hold the ballot so taken void. I am of the opinion that the making of the affidavit was a condition precedent to the right to obtain a ballot paper. The affidavit was a fundamental requirement, but when a public officer gives out a ballot paper which in the course of his duty he is not permitted to do until an affidavit of the voter is sworn and delivered to him, and there is no evidence either for or against that having been done, the presumption of law is that it was done; in other words, that the officer did not commit a breach of his duty in giving out the ballot paper without first having obtained the requisite affidavit. All other acts in respect of the ballots were to be performed by the presiding officer alone, and if there were any irregularities or breaches of the rules of procedure in doing these acts, then the election was not necessarily void.

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I think the election was conducted in accordance with the principles of the Act, and it is apparent on the evidence brought before us that there was no fraud or collusion in what was done, or omitted to be done, but by some unexplained error, eleven of the election ballots were enclosed in envelopes bearing the plebiscite affidavit, the appropriate envelopes with their affidavits endorsed thereon not being sent to the returning officer nor accounted for in any way. But the presumption, as I have above pointed out, is that these affidavits were duly made and delivered to the presiding officer, the ballots being lawfully cast but being irregularly forwarded to the returning officer. This irregularity would, in my opinion, not affect the result of the election, since it is plain to be seen that if the ballots were in the first place properly cast, the result is not affected by mistakes of officials and the appellant Catherwood was therefore properly declared duly elected. The result of the election would be affected only if the eleven ballots enclosed in the wrong envelopes were to be declared void.

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The principles upon which Courts ought to act in cases of this nature are expounded in many decisions to which we were referred by counsel. I shall refer only to the following. In the *Bothwell Election Case* (1884), 8 S.C.R. 676, Ritchie, C.J. at p. 701 said:

> "The secrecy of the ballot was not infringed, the ballots are unquestionably those given by the deputy returning officer to the voters, the voters have freely marked them for the parties for whom they desired to vote, the candidates have got the benefit of the votes marked for them, the public have had the benefit of the votes so cast so far as they affect the return of one or other of the candidates. On what principle, then, or with what object, should the election be set aside? The only reason alleged, as I understand the contention, is that as the ballots alleged to have been marked were bad ballots when put in the box and cannot now be identified, and so picked out, it cannot be told for whom the parties using them voted. . . . . The principles on which it is provided the election shall be conducted, prevents to a large extent the election from being jeopardized or defeated by the default or innocent action of the returning officers, which evidently was the intention of the Legislature in enacting section 80."

In *Woodward* v. *Sarsons* (1875), L.R. 10 C.P. 733 at p. 744, Lord Coleridge, C.J. said:

> "It is not enough to say that great mistakes were made in carrying out the election under those laws; it is necessary to be able to say that, either

wilfully or erroneously, the election was not carried out under those laws, but under some other method."

And again, at p. 745:

"But, if in the opinion of the tribunal the election was substantially an election by ballot, then no mistakes or misconduct, however great, in the use of the machinery of the Ballot Act, could justify the tribunal in declaring the election void by the common law of Parliament."

In *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170, the Privy Council, at p. 175, said:

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

In *Re Ellis and Town of Renfrew* (1911), 23 O.L.R. 427 at p. 433, similar principles were enunciated.

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I do not wish to be understood to intimate that in no case will the mistake or misconduct of an officer in charge of the election be held to invalidate it. What I have said has, for instance, no reference to the question of the secrecy of the ballot, which, I think, is not involved in the present case.

The appeal should be allowed and the order appealed from should be set aside.

MARTIN, J.A.: I agree with my brothers in allowing the appeal, and only wish to add a few observations upon section 136 of the Act (Provincial Elections, Cap. 76, R.S.B.C. 1924), 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, 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."

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This is not an easy section to construe, it being cast in a peculiar way, and so it has occasioned me much thought, but after considering what little relevant authority there is upon it I view it as a curative section which should not be resorted to unless the stage has been reached where it would be the duty of the Court to declare the election invalid: if the result of the evidence is merely that a position of speculation or uncertainty,

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as the result of the voting, has been created, that, in my opinion, is not sufficient to justify the invocation of the section or the application of the remedy it provides for the specified departures from the statute; in other words, the section is not a weapon for the petitioner but, in certain circumstances which harmonize with the public interest, a shield for the respondent.

GALLIHER, J.A.: My brother the Chief Justice has so well expressed my own views in this matter, that I deem it unnecessary to add anything.

The appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Hamilton Read & Paterson.*

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

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FIRST MORTGAGE INVESTMENT CO. v. NOUD

FIRST MORTGAGE INVESTMENT COMPANY v. NOUD.

Practice—Costs—Security for under section 264 of the Companies Act—Delay in applying — Past and future costs — R.S.B.C. 1924, Cap. 38, Sec. 264.

On an application for security for costs under section 264 of the Companies Act, the report of the registrar of joint-stock companies, that only four shares of the Company had been allotted, one to each of four persons, was held to be sufficient evidence upon which to conclude that the Company was one of straw and the defendants were entitled to security.

Where the application is not made promptly the judge may in his discretion confine the security to future costs.

Statement

APPLICATION by defendant for security for costs under section 264 of the Companies Act. It appeared in a letter from the registrar of joint-stock companies that only four shares of the plaintiff Company had been allotted, one to each of four

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persons, and an affidavit in support of the application recited that the deponent had made inquiries and believed that the plaintiff Company had no exigible assets and would be unable to pay the defendant's costs. Objection was taken to the order being made on account of the defendant's failure to apply promptly, the application having been made within two weeks of the trial. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 8th of June, 1925.

F. R. Anderson, for the application.
H. I. Bird, contra.

8th June, 1925.

HUNTER, C.J.B.C.: The report of the registrar of joint-stock companies that only four shares of this Company had been allotted, one to each of four persons, is sufficient for me to come to the conclusion that the plaintiff Company is one of straw and the defendant is entitled to security for costs under section 264 of the Companies Act. In view of the fact that the defendants did not apply promptly, having waited until within two weeks of the trial, I will make an order for future costs only, following *Crossman* v. *Purvis* (1915), 23 D.L.R. 883. The security is fixed at $150.

Judgment

Application granted.

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CUSACK v. DAY.

Gift—Donatio mortis causa—Evidence of donee—Corroboration—Delivery of pass-book for bank account—R.S.B.C. 1924, Cap. 82, Sec. 11.

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The plaintiff had been housekeeper for B. for six years. On the day before his death B., who was in bed, asked for his keys, and on their receipt handed them to the plaintiff saying "You keep them, they lead to everything I have got—everything I have got is yours." Shortly afterwards he said "All I have got is yours. Who has ever done anything for me but you?" On the next morning and shortly before his death he asked her if she had the keys and on her answering "yes" he said "that is right, you keep them." The keys were to the doors of his residence, his trunks, boxes and to a safe in his residence, in which he had left stock certificates, and a pass-book on the Bank of Commerce where he kept his bank account. It was held on the trial that there was a *donatio mortis causa* made by B. in favour of the plaintiff in respect of all his assets including his bank account.

Held, on appeal, varying the judgment of MORRISON, J., that there was a *donatio mortis causa* in favour of the plaintiff of all deceased's assets with the exception of the bank account, as delivery of the pass-book was insufficient to constitute a donation of the money in the bank.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 20th of December, 1924, in an action for a declaration that the plaintiff is entitled by way of *donatio mortis causa* from the late J. C. Bryant made the day before his death and on the day of his death (*i.e.*, May 12th, 1924) to all the personal property and effects of deceased as contained in his residence, Nanaimo, and all moneys in the Canadian Bank of Commerce and stock. The plaintiff was housekeeper for the deceased and had so acted for many years. On the day before deceased died he gave her his bunch of keys. It appears from the evidence that he was in bed and asked her to hand him his keys. She did so and he then handed them back to her saying "those are my keys, they lead to everything I have got, everything I have got is yours." He further said, "all I have got is yours. Who has ever done anything for me but you?" On the next day he asked her if she had the keys, and she said, "yes," and he answered "That is right, you keep them." The keys were to the

doors of his residence, his trunks, boxes, and safe in the residence in which had been left the stock certificates, and his pass-books on the Bank of Commerce where he had in deposit the sum of $2,400. It was held by the trial judge that there was a *donatio mortis causa* and that the plaintiff was entitled to everything in the house and the money in the bank.

The appeal was argued at Vancouver on the 9th and 10th of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Statement

Mayers, for appellant: A claim by way of *donatio mortis causa* requires corroboration: see *Imperial Canadian Trust Co.* v. *Winstanley* (1922), 31 B.C. 448. There is a statutory requirement here in section 11 of the Evidence Act: see *McDonald* v. *McDonald* (1903), 33 S.C.R. 145; *Ledingham* v. *Skinner* (1915), 21 B.C. 41; *Young* v. *Bentley* (1920), 1 W.W.R. 341 at p. 343. The delivery of a cheque was held not to be a good *donatio mortis causa*: see *In re Beak's Estate* (1872), L.R. 13 Eq. 489, neither is a savings bank pass-book: see *M'Gonnell* v. *Murray* (1869), Ir. R. 3 Eq. 460; *Duckworth* v. *Lee* (1899), 1 I.R. 405 at p. 408; *In re Weston* (1902), 1 Ch. 680 at p. 685. On the question of costs, if I am right, the plaintiff should pay the costs: see *Roper* v. *Hull* (1921), 30 B.C. 405. Even if there is a different view I am entitled to costs: see *Raser* v. *McQuade* (1904), 11 B.C. 161; *Legeas* v. *Trusts and Guarantee Co.* (1912), 20 W.L.R. 172; *Ideal Bedding Company, Limited* v. *Holland* (1907), 2 Ch. 157.

Argument

V. B. Harrison, for respondent: The trial judge should not be disturbed. Corroborative evidence is not necessary but we have corroborative evidence, giving the key to the safe is sufficient: see *Thorne* v. *Perry* (1900), 2 N.B. Eq. 146. Obtaining the keys is a constructive delivery: see *Veal* v. *Veal* (1859), 27 Beav. 303; *Rankin* v. *Weguelin* (1832), *ib.* 309; *Moore* v. *Darton* (1851), 4 De G. & Sm. 517; *In re Dillon* (1890), 44 Ch. D. 76; *Amis* v. *Witt* (1863), 33 Beav. 619; *Thorne* v. *Perry, supra*; *Re Farman; Farman* v. *Smith* (1887), 58 L.T. 12; *Mustapha* v. *Wedlake* (1891), W.N. 201; *Charleton* v. *Brooks* (1903), 6 O.L.R. 87; *Duffield* v. *Elwes* (1827), 1 Bligh

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(N.S.) 497. As to medical evidence and testamentary capacity see *McHugh* v. *Dooley* (1903), 10 B.C. 537 at p. 543.

Mayers, in reply: A bank-book is not the subject of a *donatio mortis causa*: see *Ex parte Gerow* (1863), 10 N.B.R. 512; *In re Weston* (1902), 1 Ch. 680.

Cur. adv. vult.

11th June, 1925.

MACDONALD, C.J.A.: It is not without regret that I am impelled to the conclusion that the appeal as to the money on deposit must be allowed. I have examined all the authorities to which we were referred by Mr. *Harrison,* but I cannot think that they support his submission. On the other hand, *Ex parte Gerow* (1863), 10 N.B.R. 512, is in principle indistinguishable from the present case. The delivery of a mere receipt, which the bank deposit book is, cannot constitute delivery of the money on deposit. *McDonald* v. *McDonald* (1903), 33 S.C.R. 145, is not opposed to *Ex parte Gerow,* since the reasons on which it is founded shew that the deposit receipt there in question, was not a mere entry in a bank pass-book, but was a document which it was necessary to produce in order to procure the payment out of the money on deposit. To the same effect are the English cases.

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The other articles in dispute, being those contained in the safe, the key of which was handed by the deceased to the plaintiff as delivery of the articles therein, I think were the subject of a good *donatio mortis causa* and passed to the plaintiff by reason of the delivery of the said key. On this issue, therefore, the respondent succeeds.

The plaintiff should have the costs of the action and the defendants the costs of the appeal.

MARTIN, J.A.: This appeal is to determine the validity of an alleged *donatio mortis causa* and several questions are raised, the principal one being whether or no the sum of about $2,400 can be so regarded, it being on ordinary deposit in the Canadian Bank of Commerce to the donor's credit and evidenced at the time of the alleged tradition solely by the ordinary pass-books of the bank which were found in the donor's safe, the keys of

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which he gave to the donee accompanied by the statements "they lead to all I have got," and "all I have got is yours," he then being *in extremis*: this is the account most favourable to the plaintiff and for the purpose of this legal point I have accepted it as the truth, though much of weight was urged against it from several aspects.

It is now beyond argument in Canada, so long as the leading decision of the Supreme Court in *McDonald* v. *McDonald* (1903), 33 S.C.R. 145 stands, that a banker's special deposit receipt may be the subject of such a *donatio*; the form of it in that case is given in the report below in (1902), 35 N.S.R. 205 at p. 212, and sets out the contract between the donor and the bank respecting the moneys held thereunder; it is obviously very different from an ordinary current account with a bank, and is referred to by Mr. Justice Davies twice times as "a special deposit receipt"—pp. 153, 157. It is very similar to that in the leading English case of *In re Dillon* (1890), 38 W.R. 369, except that it requires 15 days' notice of withdrawal to be given and the production of the receipt before withdrawal, but, having regard to the authorities, these are not distinctions in principle.

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In view of the elaborate reasons given by the Supreme Court in *McDonald* v. *McDonald,* it would be worse than superfluous to go into the question of *donatio* at large, the simple point here arising, as above stated, in the case of an ordinary pass-book as set up in the statement of claim, par. 4. It was not suggested at this Bar that the pass-books herein were anything more; if so, evidence should have been brought to prove the special circumstances, as Lord Justice Cotton points out in *Dillon's* case. In support of his submission that the principle could be enlarged to cover this case of an ordinary pass-book only the plaintiff's counsel cited a large number of cases, all of which I have examined carefully, but none of them goes to that extreme length and I share the opinion expressed by the Lord Chancellor of Ireland, Lord Ashbourne, in the leading case of *Duckworth* v. *Lee* (1899), 1 I.R. 405 at p. 407, that:

"The current of authority shews that Courts require claims resting on such gifts to be closely scrutinized, and to be made out clearly and satisfactorily, without extending the class of things which have already been held capable of transmission *mortis causa*."

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And the judgments of the other Lords Justices contain observations to the same effect, *e.g.*, Fitz Gibbon, L.J. saying, p. 410:

"*Moore* v. *Darton* [(1851)], 4 De G. & Sm. 517 [much relied on by the plaintiff herein] is a frontier case, beyond which the Court cannot go."

The *Duckworth* case, holding that an I O U cannot be a *donatio,* is a very instructive one, all the four Lords Justices being unanimous, and, speaking with all modesty, I am in entire accord with it and also of the judgment of that very learned judge, The Right Honourable John Walsh, Master of the Rolls, in *M'Gonnell* v. *Murray* (1869), Ir. R. 3 Eq. 460, which it approves, and in which it was decided that the delivery of a depositor's book in a savings bank was not a *donatio,* the learned judge saying, after reviewing many of the cases cited to us, pp. 470-1:

"Assuming these cases to have been all well decided, none of them warrant the proposition contended for before me. To extend the doctrine to a bank-book would be going very much further. I do not find in the Acts relating to Savings' Banks anything to distinguish a Savings' Bank pass-book from an ordinary banker's pass-book; and were I to decide that the book in this case is a proper subject of a *donatio mortis causa,* I do not see how I could stop short of holding not only that a bank-book but that any pass-book might be made the subject of such a gift. . . . . But the book does not embody the terms of the contract between the depositor and the Bank; the only entries to be found in it are figures or sums of money written in full, in a column for that purpose, to prevent fraud. Consistently with the theory that an actual and not a merely symbolical delivery is required, handing over a written contract must be a delivery of the thing given; and the right to assistance in enforcing the money due on it follows. A contract embodied in a writing is in a sense capable of being given; only one person can have it. But it would be going beyond any case yet decided, to hold that what is merely evidence of, or a voucher for, the debt—of which there may be several—is capable of being thus dealt with."

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In the *Duckworth* case, Lord Justice Walker supports that view, saying, pp. 411-12:

"The contention in favour of the *donatio mortis causa* goes far beyond anything that has been decided, and if it succeeded it would seem to me that it should be held that a man's balance at his banker's could be transferred by the delivery of his pass-book, or a tradesman's debts by the delivery of his pass-books with his customers when they had written acknowledging the receipt of goods invoiced.

"I am not disposed to extend the doctrine to additional loose dealings with the property of people *in extremis.*"

And he cites (p. 413) with approval the language of Vice-

Chancellor Bacon in *In re Beak's Estate* (1872), L.R. 13 Eq. 489 at p. 491:

"'I think this case is covered entirely by authority. The only circumstance that seemed at first sight to distinguish it was the delivery of the banker's acknowledgment of debt. But the difference between a deposit note, which was the document delivered over in *Amis* v. *Witt* [(1863)], 33 Beav. 619, and a pass-book is enormous. The pass-book is not in any degree in the nature of a bond or agreement.'"

In that case the delivery of a banker's pass-book did not cure the defect of the donor's accompanying cheque not being presented till after death (a stronger case in favour of the *donatio* than this one), the learned judge observing, p. 491:

"It is, no doubt, very unfortunate that the intention of the parties should have been disappointed by the death of the donor; but though I regret the result, I cannot alter the law."

Lord Justice Holmes said, in the *Duckworth* case, p. 415, on the I O U there in question:

"It is no more than a banker's pass-book written up to date, or a letter acknowledging the receipt of goods and the invoice of their price. No case has held that there can be a *donatio mortis causa* by the delivery of such documents. *Hewitt* v. *Kaye* [(1868)], L.R. 6 Eq. 198 does not touch the matter in its result, and I regard the reference by Lord Romilly to an I O U in his judgment as having fallen from him *per incuriam*. It was dissented from in *M'Gonnell* v. *Murray* [(1869)], Ir. R. 3 Eq. 460 in the following year; and has never been acted on before the present case."

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Vice-Chancellor Bacon's opinion in *Beak's* case was approved by Mr. Justice Buckley in *In re Beaumont* (1902), 1 Ch. 889, wherein he says at pp. 894-6:

"In the last case [*Beak's*] I have referred to there was the additional fact that the delivery of the cheque was accompanied by delivery of the bankers' pass-book. The pass-book may be said to be the bankers' acknowledgment of a debt due to his customer, but Bacon V.-C. held that the delivery of the pass-book was no further evidence to establish the *donatio mortis causa* than the cheque was. . . . . If *Hewitt* v. *Kaye* [(1868)], L.R. 6 Eq. 198 and *In re Beak's Estate* [(1872)], L.R. 13 Eq. 489 are to be reconsidered, it must be by some higher Court than this. . . . . All the authorities seem to be consistent with the view that where the cheque is not actually or constructively paid there is no valid *donatio mortis causa*."

Because the respondent's counsel placed much reliance on the case of *In re Mustapha* (1891), 8 T.L.R. 160, a decision of Mr. Justice Mathew, I note that the property there held to be a *donatio* was public bonds of Buenos Ayres, payable to bearer, the donee "being in the habit of tearing off the coupons attached

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to the bonds and collecting the interest" on behalf of her father for some time before his death: it was, indeed, admitted (as is unquestionable) during the argument that the bonds passed by delivery and could constitute a *donatio*, and the only question was as to whether or no the delivery of the keys of a wardrobe and safe therein constituted a tradition of the bonds in the safe.

As to *Thorne* v. *Perry* (1900), 2 N.B. Eq. 146, the facts as to the Government Savings bank pass-book are essentially different from those at Bar, and the learned judge bases his decision on their peculiarity at pp. 154-5:

"The only difficulty suggested is as to the pass-book, and it is said that such a book is not the subject of a *donatio mortis causa* so as to pass the title to the money represented by it. It must be remembered that at the time this alleged gift was made, and for a long time previous, the money in question, although belonging exclusively to the deceased, was deposited, with the defendant's knowledge, in the joint names of himself and his mother, in which case either or the survivor could withdraw on the production of the pass-book. When, therefore, the deceased delivered the pass-book to the defendant she clothed him with full authority and power to draw the whole fund from the bank and placed it entirely under his control."

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It is true the learned judge goes on to say:

"Even in cases where the money is deposited in the name of the donor such a delivery of the pass-book has been held sufficient to render the gift good as *donatio mortis causa*. See *Sheedy* v. *Roach* [(1878)], 124 Mass. 472; *Tillinghast* v. *Wheaton* [(1867)], 8 R.I. 356; *Hill* v. *Wheaton* 68 Me. 634.

"How much stronger is the case where the money is on deposit in the name of the donee and he only needs possession of the pass-book to complete his entire control over it."

In the special circumstances before him doubtless the learned judge's conclusion was right, but when he, unnecessarily, goes much further, as to ordinary pass-books in general, his view is, with all respect, contrary to the jurisprudence of this country and cannot be approved by this Court, even if the American decisions he cited supported him, the first of which (the only one available here) does not, because in it the delivery of the pass-book had been accompanied by an assignment of the whole amount to the donor's credit, the Court holding, p. 475, "as between the parties the delivery of the book and assignment is all the delivery of which the subject is capable."

Moreover, the learned judge did not, though it was cited to

him, even refer to the prior binding decision of the Court of New Brunswick *in banc* in *Ex parte Gerow* (1863), 10 N.B.R. 512, holding that an ordinary deposit receipt, *simpliciter,* was not a document that could be the subject of a *donatio;* the ordinary nature of that receipt is shewn by its description by the Chief Justice on p. 514, it was merely equivalent to a modern pass-book, being

"nothing more than a writing which would have simplified his evidence, had he been compelled to sue on a right which he had, entirely independent of it . . . . . [he] might have drawn that £300 out of the bank, by cheque, ten minutes after he had handed the deposit receipt to the donee."

The money therefore, as I read the report, "stood in the same position as a balance on an ordinary drawing account," as Lord Justice Cotton said in *Dillon's* case, it did not do under the special "deposit note" the Court therein sustained as a *donatio,* following the decision of the Irish Court of Appeal in *Cassidy* v. *Belfast Banking Co.* (1887), 22 L.R. Ir. 68, wherein Lord Chief Baron Palles delivered the judgment of the Court, holding that a deposit receipt setting out the contract with the bank (pp. 71-2) could be, and was, on the evidence, a *donatio.*

In the absence, therefore, of any weight of authority to the contrary, I am of opinion that the *donatio* before us cannot be upheld, and therefore it is not necessary to consider the evidence, as to which I observe that corroboration is necessary under the decision of the Supreme Court in *McDonald* v. *McDonald, supra,* the Nova Scotia statute therein (cited on p. 152) being in essentials similar to section 11 of our Evidence Act. I conclude with the following observations from the judgment of their Lordships of the Privy Council in *Cosnahan* v. *Grice* (1862), 15 Moore, P.C. 215 at p. 223:

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"Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations, present themselves to unscrupulous persons to pretend these deathbed donations, that there is always danger of having an entirely fabricated case set up. And, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and, by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character."

The appeal should, I think, be allowed and in so far as it affects the money covered by the said pass-books, it being con-

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ceded that the other contents of the safe did become the property of the plaintiff by the said *donatio;* the costs of this appeal should follow the event, but the plaintiff should get the costs below because she was justified in coming to the Court to assert her contested rights to said articles, other than the pass-books.

GALLIHER, J.A.: I have read the evidence through carefully and do not feel justified in interfering with the learned trial judge on the evidence as to the gift or as to corroboration.

The point that gives me some difficulty is, as to whether the part of the property claimed, and which this appeal is directed to, is the subject of a *donatio mortis causa.*

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On examination of the authorities, I am (in this particular case, with reluctance) compelled to decide that what was delivered here, *viz.,* the bank-book, is not the subject of a *donatio mortis causa. Duckworth* v. *Lee* (1899), 1 I.R. 405; *M'Gonnell* v. *Murray* (1869), Ir. R. 3 Eq. 406; *In re Beak's Estate* (1872), L.R. 13 Eq. 489.

Costs of trial to plaintiff, costs of appeal to defendant.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the reasons for judgment of my brother MARTIN.

MACDONALD, J.A.

MACDONALD, J.A.: To constitute a valid *donatio mortis causa* the gift must be made in contemplation of death; the subject-matter delivered to the donee and under such circumstances that it reverts in the event of recovery. There should be clear and satisfactory evidence of the gift itself. Although no reasons are given, the judgment appealed from must be regarded as containing findings of fact favourable to the plaintiff. I would probably have found, had I tried the case, that the evidence was not of that clear and satisfactory character which should be found in actions against the estate of a deceased person, particularly where an affirmative finding conflicts with a will. The evidence appears susceptible of two equally probable conclusions. However, the learned trial judge was in a better position to decide.

It was urged, that there was error inasmuch as he discarded the material evidence of certain witnesses who testified to the

condition of the deceased a short time before his death. The whole evidence, therefore, was not considered, at all events, in its proper light. But this is by no means clear. Difficulties will arise if evidence is admitted subject to objection (with deference, I think an unwise practice and one that should seldom be resorted to), unless the learned trial judge in his judgment shews whether or not he considered such evidence. The evidence was admitted subject to objection. It was presented to shew not that the deceased was *non compos mentis* and therefore incapable of making a gift, but that it was very unlikely in his condition that he used the words attributed to him by the plaintiff constituting the gift. I must assume that the learned trial judge considered all the material evidence as shewn on the record in its proper light and, having done so, made the findings of fact referred to. On the whole, therefore, I would not disturb these findings, nor would I find that there was not sufficient corroboration.

The question of law arises, as to whether a bank-book can be the subject of a *donatio mortis causa* conferring title in the plaintiff to the amount on deposit to the credit of the deceased. The deceased did not hand the bank-book to the plaintiff. He gave her the keys of his safe saying: "They lead to everything I have got—everything I have got is yours."

MACDONALD, J.A.

The bank-book was in the safe and I am assuming the result is the same as if he actually handed it to her, accompanying the act with the words referred to. If this act armed the plaintiff with authority to draw the amount on deposit or gave her the right to call upon the executors as trustees to do some further act to enable her to obtain it the gift would have been a valid one.

No authority was cited shewing that the giving of an ordinary bank-book operated as a *donatio mortis causa* except a case where the account was in the joint name of the donor and donee (*Thorne* v. *Perry* (1900), 2 N.B. Eq. 146), and the further case of a savings bank book where money was held in a post office savings bank (*In re Weston* (1902), 1 Ch. 680). In the latter case, it was shewn that the bank-book did more than acknowledge receipt of the money. It shewed the contract between the parties, including the conditions of withdrawal.

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1925

June 11.

CUSACK v. DAY

That is not this case. The principle in this case is similar to the many cases where bank deposit receipts were considered. Speaking generally, the subject of *donationes mortis causa* must be property, the title to which or the evidence of title to which passes by delivery (Cotton, L.J., in *Re Hughes* (1888), 59 L.T. 586). The delivery of a depositor's book in a savings bank account was held insufficient to constitute a donation of the money in *M'Gonnell* v. *Murray* (1869), Ir. R. 3 Eq. 460. The bank-book disclosed the contract, but its terms were unfavourable to the claimant inasmuch as by the rules printed thereon, payment could be made only to the depositor himself or on his power of attorney. The bank-book in the case at Bar is simply evidence of a debt. The deceased would have had no better right of action against the bank with it than without it. It would only be a simpler matter to prove his claim with a bank-book in his possession shewing the entries. A record such as this—simply evidence—cannot be the subject of a *donatio mortis causa*. The subject of such a gift must disclose the terms upon which the money is held and the contract between the parties. Its delivery, therefore, to the plaintiff did not constitute a donation of the money deposited.

MACDONALD, J.A.

Appeal allowed in part.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitors for respondent: *Harrison & McIntyre.*

ALLIANCE FINANCE COMPANY AND STANDARD MOTORS LIMITED v. SIMONS GARAGE, AND GOODCHAP.

COURT OF APPEAL

1925

June 16.

ALLIANCE FINANCE CO. v. SIMONS GARAGE

Conditional sale agreement—Lien—Purchaser leaves car at shop for repairs—Cost of repairs—Lien—Sale for cost of repairs—Injunction restraining—R.S.B.C. 1924, Caps. 44 and 156, Sec. 37.

The plaintiff S. sold a Ford car under a conditional sale agreement to the defendant G. and on the same day assigned the agreement to the plaintiff A. After using the car for a time G. brought the car to the defendant S. for repairs. The cost of repairs not being paid S. advertised the car for sale under section 37 of the Mechanics' Lien Act. The car being only partially paid for A. and S. brought action for delivery of the car and for an injunction restraining the defendants from disposing of it. On the trial judgment was given against the defendant G. but it was held that S. was entitled to the costs of repairs.

Held, on appeal, reversing the decision of RUGGLES, Co. J., that as the agreement contains a clause as follows: "and we shall not at any time [that is the purchaser] suffer or permit any charges or lien whether possessory or otherwise to exist against the said automobile" it negatives the idea that the purchaser could authorize the undertaking of the repairs in such a way as to create a lien, and the plaintiff is entitled to a return of the car without payment of cost of repairs.

APPEAL by plaintiffs from the decision of RUGGLES, Co. J. of the 25th of March, 1925, in an action for delivery over of an automobile for damages and for an injunction restraining the defendants from disposing or dealing with the car until the determination of the action. The Standard Motors sold a Ford car to the defendant Kate Goodchap on the 31st of March, 1924, for $546.16 under a conditional sale agreement which contained the following clause: Statement

"I agree that said automobile shall not at any time be used for hire or for jitney purposes and I also agree to pay for all repairs and work done and material supplied upon or in connection with, and all expenses incurred on account of said automobile forthwith from time to time as the same are made, done, supplied or incurred, and that I shall not at any time suffer or permit any charge or lien, whether possessory or otherwise, to exist against said automobile."

This agreement was assigned on the same day by the Standard

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Statement

Motors to the Alliance Finance Company. Some time after, the defendant Goodchap brought the car to the defendant Simons Garage for repairs where work was done on the car to the value of $129.38. The Simons Garage not being paid advertised the car for sale under section 37 of the Mechanics' Lien Act to realize the amount of its lien. At this time there was still owing under the conditional sale agreement the sum of $268.97. The plaintiffs paid into Court $175 to cover any damages to which Simons Garage might be declared entitled to and took possession of the car. It was held by the trial judge that the Simons Garage was entitled to the lien and the action was dismissed as against it with costs, but judgment was given against Kate Goodchap. The plaintiffs appealed.

The appeal was argued at Victoria on the 16th of June, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

J. A. MacInnes, for appellants: The question is whether the lien is absolute; whether a conditional sale agreement is subject to costs of repairs on machine. There is a clause in the conditional sale agreement that the car remains the absolute property of the vendor until paid for in full: see *Smith* v. *Campbell* (1911), 16 B.C. 505; *Gurevitch* v. *Melchoir* (1921), 29 B.C. 394; *Buxton* v. *Baughan* (1834), 6 Car. & P. 674; *Hiscox* v. *Greenwood* (1803), 4 Esp. 174; *Keene* v. *Thomas* (1905), 1 K.B. 136. What was done by the Simons Garage was several odd jobs: see *Reilly* v. *McIllmurray* (1898), 29 Ont. 167; *Jackson* v. *Cummings* (1839), 5 M. & W. 342. Simons had full notice of the claim under the conditional sale agreement. As to evidence of this see *Whitney-Morton & Co.* v. *A. E. Short Ltd.* (1922), 31 B.C. 275 at p. 278; *Dulmage* v. *Bankers Financial Corporation Limited* (1922), 51 O.L.R. 433.

J. Ross, for respondents: The contract contemplates repairs being done: see *Manchester Trust* v. *Furness* (1895), 2 Q.B. 539. We are not affected by constructive notice.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal should be allowed. I found my judgment entirely upon the provision in the contract, clause 9.

The cases to which we have been referred, which we had in mind when we gave the judgment in *Gurevitch* v. *Melchoir* (1921), 29 B.C. 394, are to the effect that a person who had done the work might have a lien, if it appeared that the owner had authorized the bailee, either expressly or by implication, to have the repairs made out of which the lien arose. In this case the parties put this clause into the agreement:

"And we shall not at any time [that is the bailee] suffer or permit any charge or lien whether possessory or otherwise to exist against the said automobile."

That negatives the idea that the bailee could authorize the undertaking of these repairs in such a way as to create a lien.

MACDONALD, C.J.A.

The appeal should be allowed.

MARTIN, J.A.: I agree.

MARTIN, J.A.

GALLIHER, J.A.: I agree, although I may say with some regret, but my expressing it does not help the matter any. I think I would have to go beyond the *Melchoir* case to give relief here to the respondent. It seems to me that the agreement itself puts a restriction on any repairs whatever; while it permits repairs being done, it distinctly states that these repairs must be done, dealt with, and settled for in such a way as not to leave any remedy that burdens the car with a possessory lien or otherwise. I do not know how we can get over that term "possessory lien."

GALLIHER, J.A.

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

MACDONALD, J.A.

Appeal allowed.

Solicitors for appellants: *MacInnes & Arnold.*
Solicitors for respondents: *Fleishman & Ross.*

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

1925

June 23.

REX v. WONG FOON SING

REX v. WONG FOON SING.

Criminal law—Charge of murder—Committed for trial—Habeas corpus—Certiorari.

Where the detention of an accused can be said to be legal which must be the case where the magistrate has any evidence at all to act upon, then the Court cannot interfere even although the Court may be convinced that the detention which is for the time being legal will turn out afterwards by reason of the subsequent proceedings to be unwarranted or unfounded.

The evidence before a magistrate on a charge of murder against a Chinaman disclosed that he was in the house where deceased was found, that blood was found on his clothing and there was evidence to repel the theory of suicide or accident. Accused was committed for trial.

Held, on an application for a writ of *habeas corpus* with *certiorari* in aid that there was some evidence upon which the magistrate might act and the application should be dismissed.

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid. The accused who was a servant in a house in Vancouver was charged with the murder of a maid who was found dead in the house with a bullet wound through the head. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 23rd of June, 1925.

Statement

J. H. Senkler, K.C., for the application.
Carter, D.A.-G., contra.

HUNTER, C.J.B.C.: In this case, I have thought it well, owing to the gravity of the matter to the accused as well as from the point of view of public justice, to allow the fullest possible discussion, both on the evidence and on the law. I have come to the conclusion, however, after having had the advantage of considering the authorities cited by the learned counsel, that I cannot interfere with the decision of the magistrate.

Judgment

Fortunately, I think there is no object in my giving a thorough analysis of the cases which were cited, because I think the matter has been settled by the principles laid down in *Rex*

v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128. That case, by the way, is a signal example of the saying that hard cases are apt to make bad law. In that case a company was convicted of keeping liquor unlawfully for sale on the uncorroborated evidence of a spy or, as he is commonly called, a stool-pigeon; that is to say, a gentleman who is hired by the guardians of the law to betray the quarry into breaking the law, and the Government by means of this evidence secured an order from the magistrate for the confiscation of a large amount of property. The case was of such a character as to invite the caustic censure of some of the judges who were concerned in it. One went so far as to characterize the seizure as a gross injustice and abuse of authority, and the Appellate Division in Alberta affirmed the decision of the lower judge who had quashed the conviction.

The decision of the Alberta Appellate Division was appealed from by the Government of Alberta to the Privy Council, so that if there ever was a case in which the principles of the law are finally settled by a controlling authority, it must be in a case of this type. The argument was that on a *habeas corpus* application, if the Court considered that a gross injustice was being done, by reason of the magistrate finding against the accused on insufficient or inadmissible evidence, there was a want of jurisdiction to do so and that it had therefore the right to interfere. That view of the matter was demolished by the judgment in the *Nat Bell* case. I refer to the passage at pages 151-2:

Judgment

"It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. 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. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that his conviction is void, and may be disregarded as a

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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; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all."

Then, further on (p. 154), there is a quotation from the well-known case of *Reg.* v. *Bolton* (1841), 1 Q.B. 66 which is that

"the question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry."

Now, there were Ontario cases cited in which the Ontario Courts have assumed the power under such circumstances to examine the proceedings, and if they consider the conviction is founded upon insufficient evidence, to set it aside. But in Ontario they claim to exercise that power by virtue of an Act which was in force at the time of Confederation and which had been passed by the old Parliament of Canada. I refer to the judgment of Riddell, J. in the case of *Rex* v. *Page* (1923), 41 Can. C.C. 59, at p. 66, where he says:

Judgment

"By the Act, 1866 (Can.), ch. 45, sec. 5, the Parliament of the Province of Canada, varying the law of England as it was in 1792, enacted that in Upper Canada, a writ of *habeas corpus* being issued, a writ of *certiorari* might issue in aid to bring up 'all and singular the evidence, depositions, convictions and all proceedings had or taken . . . . . to the end that the same may be viewed and considered by such judge or Court.'"

It is, therefore, clear enough that the decisions in Ontario have no application to the condition of the law in British Columbia, for, as I have just pointed out, the Courts there assert jurisdiction under an Act which was in force at the time of Confederation and which they consider has not been interfered with by the Criminal Code.

Now, if the principle is sound as laid down in the *Nat Bell* case that the Court has no authority to interfere with a magistrate who is proceeding to conviction and punishment under the powers conferred upon him, it is, *a fortiori*, a sound principle with respect to the case of a magistrate who is merely proceeding to a committal and not to a conviction, inasmuch as in the case where he proceeds to a conviction and punishment he not only puts a stigma upon the accused, but may possibly

commit a grave injustice, but when he is proceeding to committal only, he is merely exercising his ordinary function, which is to decide whether there is sufficient evidence to have the case further investigated by another tribunal. It is often forgotten that the remedy by way of *habeas corpus* and *certiorari* lies only against unlawful detention and that the unlawful detention must be patent upon the proceedings. For instance, if there is no jurisdiction upon the part of the magistrate to entertain the matter and that want of jurisdiction is apparent upon the face of the proceedings, then, of course, *habeas corpus* will lie, or by reason of any fact arising during the progress of the case his jurisdiction has been ousted, or if there was any misconduct by which the decision amounts to an abuse of the process, I think the Court could interfere; or again, if there was a charge which, under no circumstances, could amount to a criminal offence, as, for instance, taking the case of a charge of perjury where a man is charged with having committed perjury at a lodge meeting, and the magistrate, unwittingly, forgot that the perjury would have to occur during a judicial proceeding, and proceeded to a committal order, then in that case the Court would have power to interfere and stop the proceedings. But, wherever the detention can be said to be legal, which, I think, must be the case where the magistrate has any evidence at all to act upon, then the Court cannot interfere, even although the Court may be convinced that the detention which is, for the time being, legal, will turn out after further investigation to be unwarranted or unfounded.

Judgment

Now, here, there was some evidence upon which the magistrate might act. True, it is scanty. In view of the very searching examination of it by Mr. *Senkler,* if it stood at that point, I do not see how any tribunal could convict, but, nevertheless, there was some evidence. The Chinaman was in the house. There was blood found upon his clothing. There was evidence given to repel the theory of suicide or accident, and, under those circumstances, the magistrate saw fit to say that the matter ought to be further investigated, and that is all this committal order amounts to. Then, again, by virtue of the Code, section 690, it is provided that, "if a justice holding a preliminary

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inquiry thinks that the evidence is sufficient to put the accused on his trial he shall commit him to trial by a warrant of commitment which may be in form 22 or to the like effect." There is distinct power in the magistrate to act upon his own view of the evidence. The Code makes no provision at all, in any shape or form that I can find, to permit a judge of the Supreme Court to review that decision. The sum of the matter is that I do not see on what principle I can cut across the path of these criminal proceedings. If I were to do that I would be usurping the function of the magistrate, and of the Attorney-General, who has the right to enter a *nolle prosequi* if he thinks fit, and of the grand jury which passes upon the question as to whether there should be a trial or not. I think the only right which the accused has at the present stage of the proceedings is the right to apply for bail, and, of course, it is needless to say that upon an application of that kind, the Court would have to consider the gravity of the charge, as well as the cogency of the evidence. For these reasons, I think the application must be dismissed.

Judgment

Application dismissed.

Subsequently an application for bail was made which was approved by the Deputy Attorney-General.

HUNTER, C.J.B.C.: If there were nothing unusual in the case the Deputy Attorney-General having admitted in answer to my query that he had no further evidence or any expectation of getting any more evidence implicating the accused I would allow the accused out on his own recognizance but owing to the fact that he was kidnapped and subjected to very serious maltreatment and appears to be apprehensive of further assaults and may possibly as the result of such fears secrete himself and fail to come forward when wanted thereby causing the authorities much trouble and expense I will fix bail in four sureties at $2,500 each.

Judgment

NOTE.—The prisoner was afterwards indicted for murder but the grand jury returned no bill.

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MURPHY, J. (In Chambers)

1925

Aug. 22

REX v. GAN

Criminal law—Habeas corpus—Warrant—Misrecital of statute—Criminal Code, Sec. 723(d)—"Person or thing"—Scope of—Can. Stats. 1923, Cap. 22.

An accused was convicted of having opium in his possession. The warrant shewed on its face that the conviction was made under The Opium and Narcotic Drug Act but said Act was repealed in 1923 and a new Act entitled The Opium and Narcotic Drug Act, 1923, was substituted therefor, and is still in force. Section 723(*d*) of the Criminal Code provides "No . . . . . warrant . . . . . shall be deemed . . . . . insufficient on . . . . . the ground that it does not name or describe with precision any person or thing."

On an application for a writ of *habeas corpus* on the ground that the warrant shewed on its face that the conviction was made under an Act not in force, it was held that the language of said section 723(*d*) was sufficient to meet the objection and the writ should be refused.

APPLICATION for writ of *habeas corpus*. The accused was convicted by the police magistrate at Victoria, for having opium in his possession. Heard by MURPHY, J. in Chambers at Victoria on the 6th, 13th and 20th of August, 1925. Statement

Stuart Henderson, for the prisoner: The conviction is under a repealed Act and is invalid: see *Rex* v. *Taylor* (1924), 93 L.J., K.B. 912. Argument

A. D. Macfarlane, for the Crown: This is a case of misrecital of a statute (see *Reg.* v. *Westley* (1859), 29 L.J., M.C. 35) and section 723(*d*) of the Code is applicable.

22nd August, 1925.

MURPHY, J.: The ground of application is that the warrant shews on its face that the conviction was made under "The Opium and Narcotic Drug Act. The Act so intituled was repealed in 1923 and a new Act, intituled The Opium and Narcotic Drug Act, 1923, substituted therefor. I have already granted a writ in a case on all fours with the present one. I intimated to counsel on this application, however, that I was prepared to reconsider the matter if he had anything further Judgment

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to urge in addition to the argument on this first application. He nows calls my attention to subsection (*d*) of section 723 of the Code. It is conceded that the Court must take judicial notice of public statutes. The warrant recites a conviction for what I hold to be an offence under The Opium and Narcotic Drug Act, 1923. Subsection (*d*) of section 723 provides:

"No . . . . . warrant . . . . . shall be deemed . . . . . insufficient on . . . . . the ground that it does not name or describe with precision any person or thing."

It is argued that an Act of Parliament is neither a person nor a thing. I do not think I am called upon to enter into a meticulous discussion of the meaning of these words. Conceivably to my mind an Act of Parliament may be embraced in the term "thing," or at any rate the printed page recording it may be. The principle of construction is that this being remedial legislation it should be liberally construed. In the case of *Rex* v. *Boak* [(1925), S.C.R. 525] recently decided by the Supreme Court of Canada, the Court, as I understand the judgment, held in construing another remedial section of the Code, that notwithstanding the absence of a word which would aptly fit the case under consideration, the object of the legislation was to preclude the impeaching of (in that case) the verdict on the ground there raised, and accordingly the Court refused to do so. I think that section 723(*d*) was intended to prevent warrants being attacked on such a ground as is here set up, and utilizing that as the principle for construing it, I hold the language used sufficient to meet the objection.

Judgment

The writ is refused.

Application dismissed.

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1925

June 26.

FORD MOTOR COMPANY OF CANADA v. UNION STEAMSHIP CO.

FORD MOTOR COMPANY OF CANADA LIMITED AND THE COLONIAL MOTOR COMPANY LIMITED v. UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED.

Shipping—Contract—Bill of lading—Variance—Deck—Stowage—Agency—Statutory provisions—Can. Stats. 1910, Cap. 61, Secs. 4, 7 and 12.

The Ford Motor Company made a sale of 120 motor-cars to The Colonial Motor Company of New Zealand and negotiated with The Judson Freight Forwarding Company of Chicago for shipping space from Vancouver and on the 9th of January, 1919, an agreement was entered into whereby the Ford Motor Company accepted The Judson Freight Forwarding Company's offer of space for 160 cars for New Zealand and 40 cars for Australia at certain prices. The Judson Freight Forwarding Company having no shipping space at the time immediately negotiated with the defendant Company through its agent in Chicago for space and in the meantime the Ford Motor Company were shipping the motors to Vancouver the shipment being completed from the factory at Walkerville on the 13th of January. Eventually, on the 18th of January, a contract was entered into between The Judson Freight Forwarding Company and the defendant Company for space for 120 motor-cars on the S.S. "Waimarino" with "option carriage on or below deck" at $42.50 per ton. Bills of lading were then prepared making The Judson Freight Forwarding Company the shippers and the Ford Motor Company the consignees, but on their face there was no mention of "carriage on or below deck." The Ford Motor Company endorsed the bills of lading to The Colonial Motor Company. The 120 motor-cars on arrival in Vancouver, were shipped on the deck of the S.S. "Waimarino" and owing to a storm encountered by the ship, they were damaged by sea water. The Ford Motor Company paid The Colonial Motor Company the amount of the damages to the motor-cars in full (*i.e.*, $16,276) and took an assignment of said Company's rights as against the shipper. On an action by both companies to recover the amount of the loss from the defendant Company it was held that The Colonial Motor Company was entitled to recover but that as against the Ford Motor Company rectification of the bills of lading should be granted as they were obtained by the fraud of The Judson Freight Forwarding Company, who were entrusted with the goods to ship, to obtain the bill of lading and supervise the loading and the Ford Company is bound by the acts of the person so entrusted. On appeal by the defendant Company and cross-appeal by the Ford Motor Company:—

Held, affirming the decision of McDONALD, J. as to the appeal, but reversing his decision as to the cross-appeal, that apart from any agreement,

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stowage on deck is negligent stowage, that section 4 of The Water-Carriage of Goods Act enacts that where a bill of lading contains an agreement whereby the owner of a ship is relieved from liability for loss by negligence in the proper stowage of goods, such agreement shall be null and void, that the protection afforded by this section extends only to persons who are not parties or privy to the agreement, that neither the Ford Motor Company nor The Colonial Motor Company was privy to the "option to stow on deck." The Colonial Motor Company had therefore a good claim to damages against the defendants, that right they assigned to the Ford Motor Company and the Ford Motor Company thereby acquired a good cause of action against the defendant in the name of The Colonial Motor Company.

APPEAL by defendant from the decision of MCDONALD, J. of the 22nd of October, 1924 (reported, 34 B.C. 353) in so far as said judgment directs that the plaintiff, The Colonial Motor Company Limited recover the sum of $16,276 against the defendant and cross-appeal by the plaintiff the Ford Motor Company of Canada, Limited, for an order rescinding so much of the said judgment as directs that as against the said Ford Motor Company the bills of lading in the pleadings mentioned be rectified by inserting in a conspicuous manner on the faces thereof the words "ship to have option to carry said goods either on or below deck." The facts are sufficiently set out in the reasons for judgment of the learned trial judge.

Statement

The appeals were argued at Vancouver on the 2nd to the 7th of April, 1925, before MACDONALD, C.J.A., GALLIHER and MACDONALD, JJ.A.

Griffin (*S. A. Smith,* with him), for appellant: The cars were sold f.o.b. Walkerville, Ontario. The issue is whether we could carry the goods on deck. Under the contract we could carry on deck and it was endorsed on the bills of lading. The effect of section 4 of The Water-Carriage of Goods Act is what we dispute: see *Armour & Co.* v. *Leopold Walford* (*London*) (1921), 3 K.B. 473 at p. 476. The bill of lading is binding on all of them. If he carries out the contract there is no breach of duty. Our stowage as stowage was good. There was no want of care on our part: see *Australasian United Steam Navigation Co.* v. *Hunt* (1921), 2 A.C. 351; *Australasian United Steam Navigation Co. Ltd.* v. *Hiskens* (1914), 18 C.L.R. 646; *Fairfax* v.

Argument

New Zealand Shipping Co. Ltd. (1912), 12 S.R. (N.S.W.) 572 at pp. 593-4. You can regulate the manner of delivery by contract. The Harter Act (American) is in force and there is no suggestion that a deck option clause is in contravention of that Act. In *The Colima* (1897), 82 Fed. 665 at pp. 677 and 679 the point was that the deck load made the boat unseaworthy: see also *The Del Norte* (1916), 234 Fed. 667; *The Sarnia* (1921), 278 Fed. 459. The governing document is the charterparty or booking slip: see Carver's Carriage by Sea, 7th Ed., pp. 232-3; Scrutton on Charterparties and Bills of Lading, 11th Ed., pp. 52-4. The charter was taken in the name of Judson who we say was Ford's agent: see *Wagstaff* v. *Anderson* (1880), 5 C.P.D. 171 at p. 177; *Pyman* v. *Burt & Others* (1884), 1 Cab. & El. 207; *Rodocanachi* v. *Milburn Brothers* (1886), 17 Q.B.D. 316; 18 Q.B.D. 67. As between charterer and ship, a bill of lading is a mere receipt for the goods and does not operate as a new contract or alter the charterparty: see *Kruger & Co., Limited* v. *Moel Tryvan Ship Company, Limited* (1907), A.C. 272; *Gordon* v. *Holland C.R.* (1913), A.C. 395 at p. 415; *Jeffs* v. *Day* (1866), 35 L.J., Q.B. 99; *Bankes* v. *Jarvis* (1903), 1 K.B. 549; *Andrews* v. *Robertson* (1901), 87 N.W. 190; Falconbridge on Banking and Bills of Exchange, 3rd Ed., 654; Russell on Bills, 2nd Ed., 246; *Elder, Dempster, & Co.* v. *Dunn* (1909), 15 Com. Cas. 49. The shipper's action should be held binding: see *Valieri* v. *Boyland* (1866), L.R. 1 C.P. 382; *Delaurier* v. *Wyllie* (1889), 17 R. 167.

Argument

Mayers (*Jamieson,* with him), for respondents: There are three points involved: (1) the provisions of the bill of lading infringe on The Water-Carriage of Goods Act; (2) if there is any distinction between the contract and the bill of lading then Judson had no authority to accept any such provision (option for deck stowage) from the shipper; (3) there never was any contract proved providing for carrying on deck. There was no charterparty, the only contract that there was is in the bill of lading. The space contract in which Judson is named as consignor simply led to the bill of lading. A charterparty provides for the case of a whole ship and the cases he cited all refer to real charterparties: see *Royal Exchange Assurance* v. *Kingsley*

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Navigation Co. (1923), A.C. 235 at pp. 240 and 245; *Australasian United Steam Navigation Co.* v. *Hunt* (1921), 2 A.C. 351 at p. 356. Decisions on the Harter Act do not apply owing to the difference in the statutes. There is an implied warranty of proper stowage: see *Owners of Cargo on Ship "Maori King"* v. *Hughes* (1895), 2 Q.B. 550; *Queensland National Bank* v. *Peninsular and Oriental Steam Navigation Company* (1898), 1 Q.B. 567. He had to supply a place that was safe for their carriage and preservation. Judson had no power to render us liable on the contract. The consignee has a right of action: see *Tronson* v. *Dent* (1853), 8 Moore, P.C. 419 at p. 436. There was never any contract proved between Judson and the Steamship Company: see *In re Enoch and Zaretzky, Bock & Co.* (1910), 1 K.B. 327; *Leduc & Co.* v. *Ward* (1888), 57 L.J., Q.B. 379; Carver's Carriage by Sea, 7th Ed., pp. 69 and 192.

Argument

Griffin, in reply, referred to *Doe, Lessee of Sir Mark Wood* v. *Morris* (1810), 12 East 237; *Ryan* v. *Anderson* (1818), 3 Madd. 174; 56 E.R. 474; *The King* v. *The Vancouver Lumber Co.* (1924), 33 B.C. 468; *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1905), A.C. 454 at pp. 457 and 459; and on the question of amendment see *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26.

Cur. adv. vult.

26th June, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The substantial question argued in the appeal, and indeed the only question argued, was the effect on the plaintiff's rights of recovery of an agreement made between The Judson Freight Forwarding Company and the defendants. It was argued that The Judson Company were Ford's agents for effecting the contract of ocean carriage, and that a term in the contract giving the defendants an option to carry the automobiles on deck was binding on Ford. Whether Judson acted for Ford alone or for both parties, I think, is immaterial to the case presented to us; they were really brokers negotiating the contract of carriage. It is clear that apart from an agreement of the sort, such stowage would be negligent stowage. The Ford Company deny giving the brokers authority to

agree to such a term. It was not within the apparent authority of the brokers to include an illegal term in the contract, such as this was, as shall hereinafter appear.

The automobiles were in fact stowed on deck, and were damaged during the voyage. The bills of lading named the Fords as consignees, but they assigned them to The Colonial Motor Company Limited of New Zealand, the purchasers, who made a claim for damage suffered. The Fords paid the damages and took an assignment of The Colonial Company's rights, and thereupon brought this action in their own name and in the name of The Colonial Company to recover what they had paid.

The defence set up is, that as Ford's agents, The Judson Company had agreed to the stowage on deck, which brought about the damage, the Fords, the beneficial plaintiffs, are not entitled to recover. The option was omitted from the bills of lading, but an order was made at the trial to reform them by inserting it in the bills.

I shall now refer to The Water-Carriage of Goods Act, Can. Stats. 1910, Cap. 61. Section 4 enacts that where a bill of lading contains an agreement whereby the owner of the ship is relieved from liability for loss by negligence in the proper stowage of goods, such agreement shall be illegal, null and void. In my opinion, this section makes such a term in an agreement null and void only as against a non-concurring consignee. This construction is, I think, supported by section 12 of the said Act, which imposes a penalty upon the shipowner for contravention of section 4 only when he shall have failed to incorporate that section *verbatim* conspicuously in the bill. This would indicate to my mind that the protection afforded by section 4 is extended only to persons who were not parties nor privy to the agreement. The evidence satisfies me that neither Ford nor The Colonial Company were privy to the option to stow on deck. The Colonial Company had a good claim to damages against defendants (Bills of Lading Act, Cap. 118, R.S.C. 1906). That right they have assigned to the Fords, and in the circumstances, I think the Fords acquired a good cause of action against defendant in the name of The Colonial Company.

MACDONALD, C.J.A.

The judgment appealed from is in favour of the plaintiff

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The Colonial Company for the full amount claimed, and should, I think, be affirmed. The Fords had, under the assignment, the right to sue in the name of their assignors. *King* v. *Victoria Insurance Company* (1896), A.C. 250. They may not themselves have been necessary parties, but I think they were proper parties, since, had it been shewn that they were actually privy to the brokers' option, there might have been something to be said in opposition to their right as beneficial plaintiffs to recover, even in the name of their assignors.

At the trial the judge reformed the bills of lading so as to include the option. I think this, for reasons which, if I am right in my conclusions, must be apparent, was error. The Fords have appealed against that term of the judgment, and are, in my opinion, entitled to succeed. The option, whether incorporated in the bills of lading or not, was, in the circumstances above set out, an illegal one, and void as against both plaintiffs.

MACDONALD, C.J.A.

The result is that the plaintiffs should succeed on all issues, and as there appears to me to be no reason to consider the rights of the plaintiffs separately, they should have the costs of the action and of the appeal, and cross-appeal.

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

Whether we regard The Judson Forwarding Company as agents of Ford or as forwarding brokers contracting for and selling space, in either event the plaintiffs are entitled to succeed. If agents they would have no implied authority to contract for a class of space contrary to the provisions of The Water-Carriage of Goods Act, in any event, without the assent of the Ford Company, which they did not have, and which contract was not known to that Company. If, on the other hand, they procured the space and sold it to the Ford Company, the space the Company was entitled to was for stowage below decks, as evidenced by the bills of lading, and could not be bound by any agreement between the Shipping Company and the Forwarding Company, to which they were not parties and of which they had no knowledge.

GALLIHER, J.A.

There should be, I think, only one set of costs, as the judg-

ment in favour of the Colonial upheld is really a judgment in favour of the Fords, and the solicitor and counsel was the same for both. The Fords are entitled to succeed in their cross-appeal, with costs.

MACDONALD, J.A.: It was submitted that the automobiles were carried under what may be called the special contract arranged between The Judson Forwarding Company and the defendant, and not under the terms of the bills of lading subsequently issued. The correspondence and telegrams exchanged shew that The Judson Freight Forwarding Company, by special contract with the defendant, permitted the latter to carry the cars on deck. The Judson Company made an effort to have that term omitted from the bills of lading and were successful, at all events, in having the bills issued without this option to carry on deck being inserted prominently on the face of the bills.

The bills of lading, however, contained clauses indorsed thereon, wide enough (if valid) to permit carriage on deck. The defendant was probably aware that by reason of the prohibitions in The Water-Carriage of Goods Act (section 4), it could not escape liability for any damage which might accrue from carrying the cars in an exposed position on deck, unless possibly by a special contract. Any such clause in a bill of lading limiting the shipowner's liability to carefully stow goods and preserve them, would be void. That being so, the defendant thought it advisable to arrange (believing it had the right to do so) for a special contract with the shipper to permit by mutual agreement what the Act forbade.

In view of the object of the Act, *viz.*, to prevent shipowners from inserting in bills of lading or other documents of title (as they formerly did) clauses protecting them against their own negligence, there is much to be said in support of the view that they still may, by special contract with the shipper, on special terms, stipulate for carriage on deck, or in any other manner agreeable to the contracting parties. That it may be, would not be limiting the liability of the shipowner for his own negligence. It would perhaps be going far to say that because of section 4, the owner, for example, of an automobile could not

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contract on special terms with the master of a ship to carry it, say, between Vancouver and Victoria, on the open deck, without coming within the mischief the Act sought to remedy.

However, in view of the conclusion I have reached on the question of agency, it is not necessary to decide this point, and I do not express a final opinion thereon.

Were The Judson Freight Forwarding Company in making this special contract (assuming that it does not offend against the Act) the agents of the Ford Motor Company of Canada Limited, one of the plaintiffs, thus making it the contract of the Ford Company? It is clear from the evidence that the Ford Company in dealing with The Judson Company to secure space never authorized it to make a special arrangement for carriage on deck. The Ford Company had no intention of departing from the usual methods of shipment. That is obvious from the correspondence. It is also clear that if the Ford Company is bound it is by reason of the manipulations of The Judson Company in attempting to deal with the shipowner (the defendant) on one basis, and with the Ford Company on another basis altogether.

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The Ford Company, however, are not bound by the acts of The Judson Forwarding Company. As stated, the correspondence does not disclose agency. It shews that The Judson Company acted independently, submitting the offers obtained to the Ford Company for acceptance or rejection. As a matter of fact, The Judson Company had no contract for space arranged when it made an offer to the Ford Company, which was accepted by the latter. If The Judson Company as a mercantile agent had been given possession of the goods or of the documents of title thereto—here the bills of lading—any disposal of the goods or arrangements made by it, if acting in the usual course of business as such agent, would, as between the true owner of the goods and the Steamship Company, be just as binding as if the agent were expressly authorized, unless the Steamship Company had notice of limitation of authority. I do not gather from the evidence, however, that The Judson Company were entrusted with documents of title, notwithstanding that the ocean bills of lading were issued in its name. The bills of lading for carriage

by sea were simply exchanged for the inland bills of lading issued at the point of shipment, and the use of The Judson Company's name in the former was a mere matter of form and convenience, not at all proving that documents of title to the goods were deliberately entrusted to it by the Ford Company. The Judson Company had no authority from the Ford Company to enter into on its behalf a special contract to permit carriage of the automobiles on deck, nor can the defendant sustain the contention that the Ford Company are bound by this radical departure from the usual shipping contract. Such a special arrangement should not be regarded as within the apparent scope of an agent's authority. Even, therefore, if the special contract is valid, it does not in the final analysis relieve the defendant. The Ford Company was not a party thereto, much less its co-plaintiff, the Colonial. I hold, therefore, that the relationship of principal and agent did not exist for the purpose of making a special contract. The Judson Company were independent contractors and were dealt with on that basis.

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The Colonial Motor Company Limited had, of course, no notice of the special contract, and its rights are governed by the bills of lading duly endorsed. The judgment, therefore, in its favour for damages against the defendant must stand. True, its right of action was assigned to the Ford Motor Company, but that does not discharge the defendant's liability to The Colonial Company, who acquired the property in the goods.

There remains the question of the right, if any, of the defendant to recover the amount of the judgment against it from the Ford Motor Company of Canada Limited. The pleadings do not in apt terms disclose the grounds for indemnity as against the Ford Company, and the learned trial judge merely reserved to the defendant the right to launch a separate action, if so advised. The defendant evidently prefers, however, to have its right to relief, if any, disposed of in the present appeal, from which I assume that if a separate action were launched, no new or further evidence useful to the defendant could be adduced. I think the pleadings, while not drawn with this special claim for relief fully in view, are broad enough to enable the claim to be disposed of, and that on the authority of *Elder, Dempster,*

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& Co. v. *Dunn & Co.* (1909), 101 L.T. 578, it can be dealt with in this action. My conclusions, however, that The Judson Company (whether it acted fraudulently or not) were not the agents of the Ford Company, necessarily disposes of this claim. The Ford Company are under no liability to the defendant to recoup it for the damages sustained. It would only be liable if the defendant could say "we have to pay the consignees damages because you, through your agent, entered into a contract with us to permit carriage on deck; you are responsible for our loss." In *Elder, Dempster, & Co.* v. *Dunn & Co.*, the shipowners had to pay the consignees of a cargo of cotton damages because the bales of cotton placed on board ship did not correspond with the description of the goods as set out in the bill of lading. This was the fault of the charterers of the vessel. In so far as the principles deduced are concerned, the charterers were in the same position as the shippers in the case at Bar; they loaded the vessel and marked the bales, and the master of the ship on the charterer's request, signed the bill of lading not knowing the descriptions were inaccurate. The bill of lading imposed on the shipowner more onerous obligations than that contemplated by the charterparty. The charterers impliedly warranted to the master of the ship that the marks specified on the bills of lading corresponded with the marks on the bales of cotton. The charterer was held liable to reimburse the shipowner. Here it is suggested that the Ford Company must reimburse the defendant, because it induced it to carry goods in a way that afforded ample protection as against any claim the Ford Company might make because of the special agreement to permit carriage on deck, but not as against a claim by the Colonial. If The Judson Freight Forwarding Company, who are described as the shippers in the ocean bills of lading, were parties to the action it may be that as by its act in making a special contract which resulted in defendant having to pay damages to The Colonial Company, who were not parties to the special agreement, that the defendant might in turn secure reimbursement from The Judson Company. But that is not this case. If I am right in holding that The Judson Freight Forwarding Company made this special contract without authoriza-

tion from the Ford Company, not as agents but as independent contractors, no relief can be obtained by the defendant against the Ford Company.

An effort was made to bring the Ford Company within reach of the defendant's claim by the learned trial judge, rectifying the bills of lading to conform with the special contract by the insertion of the provision for carriage on or below deck at the ship's option. If, as I believe, the special contract, whether legal or not, was only operative between The Judson Freight Forwarding Company and the defendant, its terms can not be imported by rectification or otherwise into another contract, *viz.*, the bills of lading to which the Ford Company were parties. There should not be rectification as against the Ford Company in the absence of a finding that The Judson Company were the agents of the Ford Company to make such a special contract.

MACDONALD, J.A.

In the result the appeal of the defendant against the judgment should be dismissed, and the cross-appeal complaining of the order for rectification should be allowed.

Appeal dismissed and cross-appeal allowed.

Solicitors for appellant: *Griffin, Montgomery & Smith.*
Solicitors for respondents: *Wilson & Jamieson.*

CAYLEY, CO. J.

1925

Sept. 10.

CLAUD LOO v. SUN FAT *ET AL.*

Landlord and tenant—Proceedings to oust tenant—Appointment—Affidavit in support—Exhibits—Service of appointment with copy of affidavit in support and exhibits—R.S.B.C. 1924, Cap. 130, Sec. 21.

CLAUD LOO *v.* SUN FAT

Where a landlord has obtained an appointment of time and place for inquiry under section 20 of the Landlord and Tenant Act, the notice served on the tenant with a copy of the affidavit on which the appointment was obtained under section 21 thereof, must be accompanied by copies of all exhibits therein referred to.

Carter v. *Roberts* (1903), 2 Ch. 312 distinguished.

Statement

PROCEEDINGS before the County Court by landlord to oust tenants under the provisions of the Landlord and Tenant Act, sections 19 to 25. Objection was raised by the tenant that copies of the exhibits mentioned in the landlord's affidavit on which the appointment of time and place of inquiry was obtained, had not been served with the appointment as provided in section 21 of the Act. Heard by CAYLEY, Co. J. at Vancouver on the 8th and 14th of September, 1925.

Hossie, for plaintiff.

W. B. Cochrane, for defendant.

10th September, 1925.

Judgment

CAYLEY, Co. J.: The plaintiff is landlord of certain premises in Vancouver and seeks to oust the tenants under the provisions (sections 19 to 25) of the Landlord and Tenant Act. The tenant takes two objections, one that the hearing, being the fifth day (excluding the first) from date of service of the appointment, was too soon. This objection seemed to be overruled by the decisions; the other objection was that copies of the exhibits mentioned in the landlord's affidavit setting out the facts had not been served with the appointment as provided in section 21 of the Act.

Counsel for the landlord claimed that section 28 of the Act brought the matter within the ordinary cases dealing with the service or non-service of exhibits, and further that section 22

of the Act permitted the judge to deal with the matter summarily when the tenant put in an appearance.

I hold that all that section 22 does is to prescribe the manner of procedure at the hearing. It does not waive the necessity of complying with the conditions precedent to the case being heard at all. One of these conditions is (see section 21) that a copy of the "papers attached to" the affidavit shall be served with the notice of appointment. As to section 28, this section says:

"Service of all papers and proceedings under sections 19 to 25 shall be deemed to have been properly effected if made as required by law in respect of writs and other proceedings in actions for the recovery of land."

What is the procedure in actions for recovery of land? It applies to the method of service only and not to the papers that should be served—that is the method of service in actions for the recovery of land. Apparently section 28 deals with the service alone and cannot be relied upon as an authority for anything except the mode of service. In the case of *Carter* v. *Roberts* (1903), 2 Ch. 312, Bryne, J. says it is obviously inconvenient in the case of some exhibits to serve copies, for instance in the case of a long account. *Carter* v. *Roberts* is dealing with Order LII., r. 4, of the Supreme Court Rules. It does not lay down the law upon how I should interpret the language of section 21 of the Landlord and Tenant Act. I am left entirely without authority—to my own idea—as to how section 21 should be interpreted. I believe that the Landlord and Tenant sections from 19 to 25 offer an exceptional remedy for the removal of tenants. Where a man relies upon a statutory remedy the judge has to consider the section with extraordinary strictness. If I act under an error here, it is illusory to say, that the party against whom the decision is made has a remedy in the Courts of Appeal, because no matter what the Court of Appeal should decide, the tenant gets what he wants by the delay involved. I hold that the decision in *Carter* v. *Roberts* does not apply to section 21 of the Landlord and Tenant Act and that section 21 is peremptory, and lays it down as a condition precedent to the judge's hearing of the application that the exhibits referred to in the landlord's affidavit (that is, copies of the exhibits) should be served with the notice of appointment. At the same

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time, I do not think this application should be dismissed with costs on account of irregularity. In *Carter* v. *Roberts,* Byrne, J. said it was not necessary "to impose upon the moving party the absolute result of having his motion dismissed for irregularity in default of" serving papers that should be served. I think I will take that as a guide to me in dealing with this matter. I will not dismiss this application for irregularity in complying with section 21 of the Landlord and Tenant Act, but I will require that the papers referred to in the affidavit, namely, the exhibits, should be served upon the tenant, and that the tenant should have the five days' notice that he is entitled to, as in the case of service of the notice, and that the tenant in this matter will be entitled merely to the costs of the day. In effect this means that the notice in writing is going to be accepted as having been duly served, but that the exhibits have got to be served now in addition, and that the application will not be dismissed with costs, but shall be heard at the expiration of five days after service of the exhibits.

MURPHY, J. (In Chambers)

1925

Aug. 25.

REX v. WONG YET.

Criminal law—Habeas corpus—Summary conviction—The Opium and Narcotic Drug Act, 1923, Can. Stats. 1923, Cap. 22, Sec. 4—Warrant omitting order for costs.

REX v. WONG YET

An accused was convicted of having opium in his possession. On an application for a writ of *habeas corpus* on the ground that the warrant of commitment did not order payment of costs in compliance with section 4 of The Opium and Narcotic Drug Act, 1923:—

Held, that the only positive direction in said section 4 is that the Court shall impose both fine and imprisonment. The warrant shews this was done. This positive direction must be regarded as definitive of the word "penalties" in the negative clause of the section and the writ should be refused.

Statement

APPLICATION for a writ of *habeas corpus.* The accused was convicted by the police magistrate at Victoria, for

having opium in his possession. Heard by MURPHY, J. in Chambers at Victoria on the 20th of August, 1925.

Stuart Henderson, for the application.
A. D. Macfarlane, contra.

25th August, 1925.

MURPHY, J.: Application for *habeas corpus* on ground that warrant does not order payment of costs, whereas section 4 of The Opium and Narcotic Drug Act, 1923 (under which accused was convicted), provides that the accused, if found guilty upon indictment, shall be liable to a fine not exceeding $1,000 and costs and not less than $200 and costs, and that the Court shall have no power to impose less than the minimum penalties prescribed and shall in all cases of conviction impose both fine and imprisonment.

Accused was tried by a stipendiary magistrate under the Summary Trials provisions of Part XVI. of the Code. There is no tariff of costs fixed by The Opium and Narcotic Drug Act, 1923. The only positive direction in said section 4 is that the Court shall in all cases impose both fine and imprisonment. The warrant shews this has been done. I think this positive direction must be regarded as definitive of the word "penalties" contained in the negative clause.

Judgment

As to the point that the warrant requires payment of costs of conveyance to gaol and does not fix the amount of same, the warrant as returned follows form 41 of the Code, which is authorized by section 1152. That being so, I think the warrant good. *Ex parte Hilchie* (1906), 11 Can. C.C. 85. The proper method for the determination of these costs is set out in *Poulin* v. *City of Quebec* (1907), 13 Can. C.C. 391 at p. 392. The failure of the officer to follow the course there directed is, in my opinion, no reason for granting the writ. The indorsement is a ministerial act which can be performed at any time. Application dismissed.

Application dismissed.

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1925

June 26.

PRAT v. HITCHCOCK AND THE CANADA PAINT COMPANY LIMITED.

Practice—County Court—Charging order—Jurisdiction—Cash standing to debtor's credit in County Court—Exemptions—Judicature Act, 1873, Sec. 89—R.S.B.C. 1924, Cap. 53, Secs. 22 and 25; Cap. 83, Secs. 12 and 25.

PRAT v. HITCHCOCK

A charging order may be made by a judge of the County Court upon moneys in his Court paid in to the debtor's credit under garnishee proceedings.

A charging order upon moneys in the custody of the Court is not a "forced seizure" within the meaning of section 25 of the Execution Act and the provisions in said section as to exemption do not apply (MARTIN, J.A. dissenting).

Statement

APPEAL by plaintiff from the orders of GRANT, Co. J. of the 11th of February, 1925. On the 10th of January, 1925, The Canada Paint Company Limited recovered judgment in the County Court at Vancouver against George A. Prat and Gordon Jonah for $982.95 and nothing was paid on the judgment. In the present action in which George A. Prat is plaintiff the Bank of Montreal as garnishees paid into Court the sum of $299.88. By order of the 15th of January the defendant in this action was given power to withdraw his dispute note and it was ordered that the plaintiff be at liberty to enter judgment for the amount of the claim. In the Canada Paint Company's action against Prat and Jonah a warrant of execution was issued against the goods of the defendants and was on the 22nd of January returned *nulla bona*. On the application of The Canada Paint Company in this action an order was made on the 11th of February whereby the solicitor for the plaintiff was entitled to a charge on the fund in Court for his costs to be taxed and that the balance of the fund stand charged with the payment to the applicant of $982.95.

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.

Woodworth, for appellant: As to the charging order (1) there was no jurisdiction to make it; (2) there was exemption under the Execution Act. On the question of jurisdiction see *Brereton* v. *Edwards* (1888), 21 Q.B.D. 488 at p. 493; Halsbury's Laws of England, Vol. 14, p. 128, par. 231. Under section 12 of the Execution Act the sheriff may seize money: see also *King* v. *Lanchick. Safety Storage and Warehousing Co.* v. *Lanchick* (1922), 31 B.C. 193. On the question of exemption see *Hudson's Bay Co.* v. *Hazlett* (1896), 4 B.C. 450; Stroud's Judicial Dictionary, Vol. 2, pp. 823 and 825; *Yorkshire* v. *Cooper* (1903), 10 B.C. 65 at p. 72; *Dickinson* v. *Robertson* (1905), 11 B.C. 155; *In re Mark Sheppard* (1889), 59 L.J., Ch. 83; *Smith* v. *Cowell* (1880), 50 L.J., Q.B. 38; *Re A Debtor; Ex parte The Debtor (No. 718 of 1920)* (1921), 125 L.T. 727. There was a breach of undertaking in the proceedings.

Argument

St. John, for respondent (Canada Paint Co.): On the question of jurisdiction see section 25 of the County Courts Act, and section 89 of the Judicature Act (English) which applies here: see *Rex* v. *Selfe* (1908), 2 K.B. 121; *Martin* v. *Bannister* (1879), 4 Q.B.D. 491; *Richards* v. *Cullerne* (1881), 7 Q.B.D. 623. On the question of exemption see *Hills* v. *Webber* (1901), 17 T.L.R. 513; *Ex parte Evans. In re Watkins* (1879), 13 Ch. D. 252; *Willis* v. *Cooper* (1900), 44 Sol. Jo. 698; *Stuart* v. *Grough* (1888), 15 A.R. 299; *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 275; *Davidge* v. *Kirby* (1903), 10 B.C. 231; *Harris* v. *Beauchamp Brothers* (1894), 1 Q.B. 801.

Woodworth, replied.

Cur. adv. vult.

26th June, 1925.

MACDONALD, C.J.A.: I am quite in accord with my brother GALLIHER on the question of the jurisdiction of the County Court to make a charging order.

MACDONALD, C.J.A.

I am also in accord with the conclusion reached by him as regards the exemption, but I do not share his doubts. I am unable to convince myself that equitable execution can properly be described as a forced "seizure or sale." The word "seizure"

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has had for centuries a well-defined technical meaning in law, which I do not feel at liberty to disregard. To call a charging order upon moneys already in the custody of the Court a forced seizure, would, I think, be to strain the language of the Act, and to give a new right to judgment debtors which the Legislature has failed to give.

Moreover, I think the Full Court has already pronounced upon the question in *Hudson's Bay Co.* v. *Hazlett* (1896), 4 B.C. 450; that was an appeal from the decision of DAVIE, C.J., where it was sought to obtain equitable execution by the appointment of a receiver to receive book debts owing to the debtor. The debtor claimed the exemption given by the Homestead Act, the Act relied on here, but the learned Chief Justice refused to affirm his claim for exemption, for reasons which, I think, apply with equal force to this case. The order there made was appealed to the Full Court, and while the learned justices added some additional reasons and did not refer expressly to the reasons of DAVIE, C.J., they nevertheless expressed no dissatisfaction with them. Their reasons seem to me to support the proposition that the exemption only is given where a seizure is made by a sheriff. The same result applies to *Jonah* v. *Hitchcock,* which counsel agreed should follow the above.

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MARTIN, J.A.: As regards the power of the learned county judge to make an order of this description, I am in accord with the opinion of my brother MCPHILLIPS, expressed in *King* v. *Lanchick* (1922), 31 B.C. 193, in favour of that power.

But it is submitted that in this case the order that was made, whereby the "moneys in Court to the credit of the plaintiff" (appellant) were "charged with the payment to the applicant of the sum of $982.95 and that the same be paid out of Court to the applicant" (the respondent), could not legally be made because the plaintiff (appellant) was entitled to them as a statutory exemption under and by virtue of section 25 of the Execution Act, Cap. 83, R.S.B.C. 1924, as follows:

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> "The following personal property shall be exempt from forced seizure or sale by any process at law or in equity; that is to say, the goods and chattels of any debtor at the option of such debtor, or, if dead, of his personal representative, to the value of five hundred dollars. . . . . ."

It was in effect conceded that if this section applied, the plaintiff was entitled, as an exemption, to the moneys in Court (amounting to $299) so ordered to be paid out to the respondent Company, which had recovered a judgment against the plaintiff in another action upon which a writ of execution had issued to the sheriff but was returned by him *nulla bona,* and hence the only property of the judgment debtor that would otherwise have been "liable to seizure and sale," as sections 9-13 of said Execution Act directs, was the said moneys of the plaintiff in Court, because money and bank notes are made exigible by said section 12, which directs that the sheriff

"shall seize and take any money or bank-notes, and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the execution debtor, and may and shall pay and deliver to the execution creditor any money or bank-notes which shall be so seized, or a sufficient part thereof," etc., etc.

Since the sheriff was thus unable to seize the appellant's money because it was in the possession of the Court itself, which could not permit an execution to be levied under its own writ against itself, the execution creditor (respondent) to remove this barrier to "a seizure by process at law" applied to the Court for a "process in equity," to effectuate its inadequate "process at law," whereby the said moneys of the appellant were by "forced seizure" taken from the appellant and ordered to be delivered direct to the execution creditor, without the further intervention of the sheriff, which, in the circumstances, became unnecessary if the said impounding and paying order can be sustained, it being, it is to be noted, much more than a mere charging order.

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There can be no question that a seizure by a sheriff under a writ of execution comes within the expression in said section 25 of "forced seizure . . . . . by any process at law," the word "forced" being used in the ordinary legal sense of compulsory compliance by the debtor to the over-mastering process of the Court whereby he is deprived of his property, just as, *e.g.,* "forced sale" means—

"In practice. A sale made at the time and in the manner prescribed by law, in virtue of execution issued on a judgment already rendered by a Court of competent jurisdiction; a sale made under the process of the Court, and in the mode prescribed by law":

Bouvier's Law Dictionary, Vol. 1, p. 810.

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Now manifestly, to my mind, there can, in this connexion, be no difference in the meaning of the term "forced" as applied to "process in law" or to "process in equity," because both are directed to an identical object, *viz.*, the compulsory acquisition by the Court, through its appropriate process and officers, of the debtor's property to be disposed of according to law. In the case at Bar the ordinary process at law, the writ of *fi. fa. de bonis,* having failed of execution by the sheriff, the Court resorted to a process in equity, whereby and through the means of a charging order, so called, the moneys of the appellant in Court were impounded through the instrumentality of another officer of the Court, its registrar, being the custodian of the funds in Court, and ordered to be paid out by him, to the execution creditor in satisfaction, in part, of his judgment, and with all respect for other views, I am quite unable to see why this process in equity, which comes clearly within the words of the statute, should be inequitably, I say it with every respect, made the means of depriving a debtor of a statutory right conferred upon him for the express purpose of rescuing him when *in extremis* from the full effect of the process of the Court. See *Yorkshire* v. *Cooper* (1903), 10 B.C. 65. Once the stage is reached that a "forced seizure" has been made either at law or in equity, then the statutory right accrues, and if the present process by which this property of the debtor was seized (by being charged or impounded by the Court itself, against his will and strongest possible legal objection and resistance) is not a seizure by "process in equity" then to what kind of "process in equity" does the section apply? I confess I find myself unable to think of any, and none was suggested to us. In the jurisprudence of the civil Courts of this Province their process is of two natures only, either of law or in equity, and if the process now in question is lawful, as it admittedly is, then it must be either at law or in equity and hence within the exempting section, otherwise it is beyond the pale of legality and a mere nullity, a "thing of naught which could not be disobeyed"—*The Leonor* (1916), 3 P. Cas. 91; (1917), 3 W.W.R. 861. Therefore unless this Court is prepared to nullify the express and most comprehensive words of the statute, embracing all

lawful process, it must give effect to the clear intention of the Legislature. Since the wide language employed in terms includes the present process in equity, upon what principle is it to be rendered ineffectual?

The matter, with all respect, was erroneously treated below as though the expression in the section was merely the curtailed one of "forced seizure," whereas it is essentially different, being "forced seizure or sale by any process at law or in equity," thus specifically conferring upon the debtor not only the benefit of an exemption from ancient "seizures at law" but also from modern "seizures in equity." And be it noted that in the case of seizure of money or bank-notes they are not, by said section 12, made the subject of "sale" but are to be "paid and delivered" direct by the sheriff to the execution creditor, just as this money was ordered to be "paid and delivered" direct by the registrar to the execution creditor, which excludes from this case the consideration of the element of "sale," in relation to seizure of "money or bank-notes," which is in accordance with the alternative of exemption from "seizure or sale" in appropriate circumstances, given by said section 25: if the expression were "taken in execution" that would, having regard to legal history, at least go to support a restricted construction, but that is what the Legislature has, to my mind, evinced the clearest intention of avoiding by using language inclusive of modern remedies by way of equitable execution as it is called by very high authority, see, *e.g.*, the recent decision of the Court of Appeal, composed of Lord Sterndale, M.R., and Lord Justices Atkin and Younger, in *Re A Debtor* (1921), 125 L.T. 727, wherein it was held that moneys in the hands of the official receiver, under an order of Court, to the credit of a debtor, could be made available by charging order of the Bankruptcy Court (granted by its registrar under special statutory powers) to answer a judgment obtained against the debtor for taxed costs. The circumstances were, in legal effect, identical with those at Bar, and in respect of them Lord Sterndale, M.R. said (p. 728):

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"This order is not made under sect. 14 of 1 & 2 Vict. c. 110, because that does not give any power to deal with cash or money, but it is not made directly, but indirectly, by reason of the powers of sect. 12 of 1 & 2 Vict. c. 110, which gives the right to take in execution, amongst other

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things, moneys. It has also been decided that where the money instead of being in a place where the sheriff can get at it, is in the hands of the Paymaster-General or of an officer of the Court for the judgment debtor, then in order to prevent the execution creditor being deprived of his right under sect. 12, by reason of his not being able to levy on the moneys in the hands of an officer of the Court, or a public officer like the Paymaster-General, an order would be made that the money shall be dealt with as if it had been seized and paid to the judgment creditor. That was decided by Lord Truro in the case of *Watts* v. *Jefferyes* [(1851)], 3 Mac. & G. 372, where a sum of 500*l.* had been ordered to be paid to the judgment debtor and the cheque had been actually drawn for the purpose of paying. I do not know whether it was called in terms a charging order or not, but an order was made that that cheque should be handed over to the judgment creditor in satisfaction of the debt."

And the Master of the Rolls goes on to describe, p. 729, the order as having been properly made by the judge in the exercise of "the power and the will to assist the execution of the judgment creditor." Lord Atkin takes the same view, saying, p. 729:

"She [the judgment creditor] could not issue a legal execution against this money, because if she did that she would be interfering with the officer who was dealing with the money in pursuance of an order of the judge of the High Court, and it is plain that such an interference would not be permitted. Therefore, legal execution was impossible. Therefore, the only course she could take in order to satisfy her judgment out of money which was available to the judgment debtor and which he ought to pay to her was by some process of equitable execution. To whom ought she to go for that purpose? That there was jurisdiction to make such an order by way of equitable execution is undoubted. It has been exercised now to the knowledge of all of us for generations. . . . . ."

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And Lord Justice Younger agreed, and also pointed out that in a proper case the application could be made before issuing a *fi. fa.* because, p. 731:

"In substance it is proper and right that without the issuing of a *fi. fa.* you may get at the fund by virtue of an order and a charging order attaching to it.

"So here we have this it seems to me clearly laid down by these two decisions that, first of all, the Court in Bankruptcy, inasmuch as the fund is in the hanads of one of its officers, is the Court to which the application should be made for leave to get at this fund which would be available for the execution creditor if it were not in the hands of an officer of the Court."

In *Brereton* v. *Edwards* (1888), 21 Q.B.D. 488, cited by approval in the preceding case, Lord Justice Bowen, after instructively reviewing the historical change in the seizure of money, cash, cheques, etc., said, pp. 499-500:

"Section 12 made cheques and money available for execution, and, by

analogy, it enabled a Court of Equity to assist a judgment creditor, by means of equitable execution against money belonging to him in its own hands. . . . . But the question still remains, in what mode is equitable execution to be given to a judgment creditor as regards cash standing to the credit of the judgment debtor in the Chancery Division? It has been suggested that this can be done only by means of the appointment of a receiver. That would be the merest formality, when such an appointment would be useless or worse than useless. What could be the use of appointing a receiver of money which was already in the hands of the Court? In my opinion a charging order is quite sufficient, without the appointment of a receiver."

In the light of these decisions the only way the present process can properly be regarded is as one in equity by way of equitable execution and therefore within the express terms of said section 25. In answer to them, the respondent's counsel relied upon the decision of the old Divisional Court in *Hudson's Bay Co.* v. *Hazlett* (1896), 4 B.C. 450, but that case, wherein I was counsel for the appellant, when properly understood, does not assist the respondent but the appellant, so far as it is applicable. The only point argued or decided was whether or no book debts could be the subject of exemption, and it was decided they were not because, as Chief Justice DAVIE put it below, p. 454, "unless 'goods and chattels' are such as might be seized or sold, they are not exempt," and this view was adopted on appeal, Mr. Justice MCCREIGHT saying, p. 458:

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"The test is whether the thing in question is capable of larceny, that is of being physically seized and taken away."

Mr. Justice DRAKE agreed and said, p. 459:

"A consideration of the language of this Act shews that tangible goods only were intended to be exempt."

And he also points out that though the Act of 1838 of 1 & 2 Vict. Cap. 110, Sec. 12 (similar to our said section 13 of the Execution Act) did not include book debts yet power was by it first given to the sheriff to seize money, bank-notes, cheques, etc., which is the case at Bar, and it is beyond question that if money had been seized in the *Hudson's Bay Co.* case, as here, the exemption must have been allowed, and it is to be noted that in that case no one suggested, either from Bench or Bar, that the appointment of a receiver of the book debts therein, "which operates as equitable execution" (*vide Westhead* v. *Riley* (1883), 25 Ch. D. 413, cited by the Chief Justice) was not a seizure of them by "process in equity" within section 25.

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It follows, therefore, that in the very apt language of Lord Sterndale above cited, the money of the execution debtor in Court "shall [should] be dealt with as if it had been seized and paid to the judgment creditor," but in case of such "seizure" in this country the right of exemption immediately arises under section 25 as aforesaid and the judgment creditor can only get the excess over that amount; and herein the money being less than the exemption, the creditor can get nothing from the fund in Court, so the order appealed from should be discharged and the appeal allowed.

GALLIHER, J.A.: The first question to consider here is, has the County Court judge power to make a charging order on moneys in his Court paid in under garnishee proceedings.

The learned judge below relied on section 22 of the County Courts Act, which reads as follows:

"Every County Court shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before the Court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the Supreme Court."

This is, in effect, the same as section 89 of the Judicature Act, 1873.

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In *King* v. *Lanchick* (1922), 31 B.C. 193, the matter came up in this Court, but owing to the view taken by the majority of the Court it did not become necessary to decide the point. My brother MCPHILLIPS, however, being of a different view, did decide the point, and I am in agreement with his judgment in that respect. Section 89 of the Judicature Act has been interpreted in several cases in England. In *Pryor* v. *City Offices Co.* (1883), 52 L.J., Q.B. 362, the words "in any proceeding" were interpreted to mean "in any action." And in *In re Mark Sheppard* (1889), 59 L.J., Ch. 83, it is said "equitable execution" may be more properly termed "equitable relief," and my brother MCPHILLIPS has dealt with other English decisions in the *Lanchick* case. Then in 1908, in *Rex* v. *Selfe* (1908), 2 K.B. 121, it was held, *per* Lord Alverstone, C.J., and

Lawrence and Sutton, JJ., that a County Court judge has jurisdiction under section 89 of the Judicature Act, 1873, to appoint a receiver of an equitable interest in land by way of equitable execution.

It was next objected that even if the County Court judge had jurisdiction these moneys are exempt under section 25 of the Execution Act, R.S.B.C. 1924, Cap. 83. Section 25 reads as follows:

"The following personal property shall be exempt from forced seizure or sale by any process at law or in equity; that is to say, the goods and chattels of any debtor at the option of such debtor, or, if dead, of his personal representative, to the value of five hundred dollars: Provided that nothing herein contained shall be construed to exempt any goods or chattels from seizure in satisfaction of a debt contracted for or in respect of such identical goods or chattels: Provided further that this section shall not be construed so as to permit a trader to claim as an exemption any of the goods and merchandise which form a part of the stock-in-trade of his business."

Had these moneys been in the possession of the judgment debtor the sheriff could have seized them, and I think the debtor would, under section 25, be entitled to them as exempt to the extent of $500. The moneys being in Court could not be seized under legal execution, but were made available by charging order an equitable remedy.

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It is true that by reason of the equitable relief granted the moneys were made available as effectively as if they had been seized under execution and in effect, it is a substitution of equitable execution for execution at law.

Proceeding upon equitable principles, it would seem that where exemption would be granted if the goods were seized by legal process, it would be only just that where legal seizure cannot be had, as here, and where by equitable process the goods are made exigible to satisfy the creditors' judgment the same right of exemption should exist. But we have to determine that not upon equitable principles but upon the construction of section 25 of the Execution Act, above set out.

I confess I have experienced some difficulty in coming to a conclusion. Take the words "forced seizure or sale by any process at law or in equity." In the case of forced seizure or sale by process at law, there is no difficulty and the Act goes on to pro-

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vide the necessary steps, etc., all of which pertain to such a seizure, but is silent as to a process in equity. One would think that the words "process in equity" were intended to be applicable to something, and I can not at the moment think of anything to which they would apply, unless it be the appointment of a receiver, or in the case of moneys in Court, the granting of a charging order.

The sheriff by seizure under legal process, impounds the goods of the debtor for the benefit of the execution creditors—the seizure is in effect an impounding. Moneys are in Court in a cause. When the Court charges those moneys in favour of a certain person by charging order, do they not in the same sense impound them? In other words, have they not said, "we take those moneys and we allocate them." They have, as it were, laid their hands upon them—seized them. It would seem to me that that is not an unreasonable view to take, but I think I have still to consider whether we can gather from the Act itself

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that such was in the contemplation of the Legislature. The reading of the whole Act would not, I think, support that view, as none of the provisions of the Act regulating proceedings with regard to exemptions are applicable to charging order process, so that while I cannot fix the words "process in equity" as referable to anything if not to the process I have outlined (and that is what creates doubt in my mind), still I should not strain construction to supply what may have been a *casus omissus*, or in arriving at the intention of the Legislature.

Again we have to further consider whether such is a forced seizure within the meaning of the Act, and while I am not free from doubt, I think the better conclusion is that it is not.

I would dismiss the appeal.

It was agreed that the case of *Jonah* v. *Hitchcock* should be governed by the decision in this case.

MACDONALD, J.A.

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

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *C. M. Woodworth.*
Solicitors for respondent: *Noble & St. John.*

ST. ELOI v. ENO.

MCDONALD, J.

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ST. ELOI v. ENO

Moneys had and received—Action for—Plaintiff and defendant lived together for 25 years—Never married—Children born to them—Plaintiff handed over earnings to defendant when living together—On plaintiff going to hospital defendant leaves him—She keeps proceeds of their joint savings—Right to an accounting.

The plaintiff and defendant lived together as man and wife for 25 years, children being born to them. The plaintiff during that period handed the bulk of his earnings to the defendant who with moneys earned by herself in sewing and baking invested in a home and purchased a ranch upon which she carried on dairying for a time. At the end of the 25 years she sold both the home and the ranch and taking all the proceeds left the plaintiff who brought an action for moneys had and received to his use. It was held that in the circumstances the defendant must account to the plaintiff for the moneys that she had received from him.

ACTION for moneys had and received to his use. The facts are sufficiently set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 18th of June, 1925. Statement

A. B. Macdonald, K.C., for plaintiff.
D. Donaghy, and *Gurd,* for defendant.

30th June, 1925.

McDONALD, J.: This is a most unfortunate case and one which has given me the greatest concern. Sometime in the year 1898, the plaintiff, who is a man of some 60 years of age, came from North Bay, Ont., to McLeod, Alberta, where he was engaged as a labourer. He was followed a few months later by the defendant whom he had known in North Bay and who was with child to him. When the defendant arrived in McLeod, the parties had an interview. She expressed a wish that they be married but he, while not absolutely refusing, deferred marriage. He was admittedly without funds, while she claims that she had $300 which had been given to her by her aunt before she left North Bay. He states that he gave her $5 to go from McLeod to Calgary. There her child was born and she returned to McLeod, where they agreed to live together as man and wife. Judgment

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They did live as man and wife from that time until 1923, a period of some 25 years, during which time four other children were born to them. They left McLeod in 1898 and went to Cranbrook, B.C., where, during the whole of their life together, they lived as man and wife, save for short periods now and then when they lived at Moyie, Creston and Jeffray, at which points plaintiff was from time to time engaged in lumbering work.

Shortly after their arrival in Cranbrook, the defendant, with the consent and approval of the plaintiff, purchased a lot for $200 upon which she made an initial payment of $10, and thereafter small monthly instalments were paid. Inasmuch as during the whole of their lifetime together the plaintiff kept no record and no bank account, I am dependent upon the defendant for evidence as to moneys expended in respect of this lot and the "ranch property" hereinafter mentioned. A small house was erected on the lot in Cranbrook and this house was improved from time to time until something over $700 was expended upon it. The family occupied it until 1901 when they left Cranbrook for a period of some three years, during which period the house was rented at $21 per month. In the year 1903, the house was burned. The defendant collected $700 insurance and proceeded to erect another building at a cost of some $500, which house also was rented at $21 per month until the year 1913, when it was sold for some $400.

Judgment

Somewhere about the time the house was burned, though the date was not definitely fixed, the "ranch property" was purchased. It consisted of about four acres of land at the outskirts of Cranbrook. A small "shack" was erected thereon and later a larger house. The land had been cleared and culitvated and was rented to some Chinamen at an annual rental varying from $170 per annum at first to $140 in 1923, when the "ranch property," including the house thereon, was sold for $3,000. During all these years the plaintiff was employed as a lumber cruiser and as a general utility man by the Canadian Pacific Railway. He states that except for small amounts, which he retained for his personal expenses and which he occasionally used in paying household accounts, all of his earnings were handed over to the defendant who kept the family purse, and

received all moneys accruing due by way of rent. Beyond question the defendant, who is now a woman of some 47 years of age, was a hard-working, industrious and frugal woman who performed her household duties properly and did all she could in the way of saving money. During the few months they lived in McLeod, before going to Cranbrook, the defendant took in sewing, at which she said she made about $3 a day; when they were at Creston in the year 1901 or 1902, while plaintiff was engaged in taking out a "drive of lumber," in addition to performing her household duties, she worked at baking and states that she made some $10 a day. She says that this went on for about a year, while the plaintiff states they lived in Creston only about three months, during which period he was engaged on the drive. After the "ranch property" in Cranbrook was bought a cow was purchased and later other cows were acquired and the defendant ran a small dairy, out of which she also made a profit. Except as to the profits made in these three enterprises, which I have mentioned, all moneys which came in to the family came from the plaintiff's earnings. No suggestion is made that the defendant made any attempt to keep separately the moneys received from the plaintiff and the moneys which she said she originally had and the moneys which she afterwards acquired from sources other than from the plaintiff.

Judgment

The defendant suggests that the plaintiff was indolent, that he drank to excess, and that he gambled and that he worked on the average only about five months of the year. These facts, in my opinion, she has failed to establish. While it was obviously difficult to prove the exact number of days or months that the plaintiff worked in each year, we have distinct evidence of an employment with the Canadian Pacific Railway; that during one period extending over about two years, plaintiff worked as a trainman and was sober and industrious and, as one witness put it, "was always on the job." Pay cheques of the Canadian Pacific Railway were put in by the defendant covering a period extending during the years 1918, 1919 and 1920, which shew that in many months during that period the plaintiff was earning as high as $200 a month. The plaintiff states that for 20 years he was a teetotaler and the defendant admits that this condition

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did exist for at least ten years. I think the reasonable conclusion, on the whole of the evidence, is that up until at least the year 1922 the plaintiff was hardworking and industrious and did turn over to the defendant the main portion of his earnings, which earnings would certainly average more than $100 per month. Unfortunately, however, for some months prior to the sale of the "ranch property" in 1923, plaintiff had taken to drinking to excess and he was abusive to his wife and daughter. When the "ranch property" was sold he was told by the defendant that they must all vacate the property at once as the property had been sold, and he at once moved out, making no protest and making no claim to share in the proceeds of either the "ranch property" or the house property which had been sold some years previously. He states (and I believe him) that the reason he made no claim or protest at that time was that he was a man in vigourous health, able to work and to get work, and that he wanted no trouble because everyone in the community believed that he and the defendant were man and wife, and he did not wish to bring exposure upon the family. An obvious answer to this is that if he had wished to maintain the honour of the family he ought to have married the defendant long years before. Nevertheless it does account for his not having made any claim when the "ranch property" was sold. The defendant, immediately the "ranch property" was sold, went to Vancouver possessed of $4,937.32. He is now broken in health, has spent a long period in the hospital, is without funds, and the defendant has refused to advance him any money for hospital expenses or any other purpose. Under these circumstances, he sues the defendant for money had and received to his use, and, in bringing his action, limits his claim to the sum of $2,500.

Judgment

I have tried in the above to sketch as briefly as I can the salient facts in this case. I have not been referred to nor have I been able to find any case which is identical in its facts. Counsel in arguing the case I gathered to be of opinion that the rights of the parties must be ascertained on the same basis as if they were actually man and wife, save in this respect, that counsel for the plaintiff contends (and it seems to me that he is right in this) that whereas any advances made by a husband to

his wife would be deemed *prima facie* to be by way of gift, no such presumption would arise in the case of advances made by this plaintiff to this defendant.

I have examined cases cited by counsel, such as *Wakshinsky* v. *Wakshinsky* (1924), 2 W.W.R. 1174; *Barrack* v. *M'Culloch* (1856), 3 K. & J. 110; *Birkett* v. *Birkett* (1908), 98 L.T. 540; *McKissock* v. *McKissock* (1913), 18 B.C. 401, and *Johnstone* v. *Johnstone* (1913), 12 D.L.R. 537, but it seems to me that none of them is precisely in point. The plaintiff over a period of 25 years entrusted the defendant with the care of his household and the bringing up of his children, and he handed over to her his earnings to a very large extent. With the moneys so handed over, it was understood that she would carry out her part of the arrangement, make such investments by way of purchasing a place to reside as they might jointly decide upon, and to be responsible to account to the plaintiff for what in the end might be saved. The defendant, under such circumstances, must account to the plaintiff. It is impossible that she should make a full accounting as no complete accounts were kept, but the plaintiff, having limited his claim to $2,500, I think he is entitled to ask the defendant to account to him for at least that amount, and there will be judgment for the plaintiff for $2,500 and costs.

Judgment

Judgment for plaintiff.

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July 6.

PRAT v. HITCHCOCK. (No. 2).

Costs—County Court—Notice of appeal—Motion to strike out portions thereof—Dismissed with costs—Appeal therefrom dismissed with costs—Application of section 122(1) of County Courts Act—R.S.B.C. 1924, Cap. 53, Sec. 122(1).

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The plaintiff appealed from the dismissal of his action in the County Court. The defendant's (respondent) motion to a judge of the Court of Appeal to strike out portions of the notice of appeal was dismissed with costs to the appellant in any event. The defendant (respondent) then moved the Court of Appeal to discharge the above order which was dismissed with costs to the plaintiff in any event. The costs of both orders were taxed and the defendant (respondent) then moved before the same judge of appeal for an order to review the taxation on the ground that the costs of both motions should be treated as costs within the meaning of section 122(1) of the County Courts Act. The motion was dismissed. On motion to the Court of Appeal that said order be discharged:—

Held, affirming the order of MACDONALD, J.A., that both motions should be regarded as collateral and apart from those "costs of such appeal" which are restricted in amount by section 122(1) of the County Courts Act.

Statement

MOTION to the Court of Appeal to review the order of MACDONALD, J.A. of the 5th of May, 1925, dismissing the application of the defendant (respondent) for an order to review the registrar's taxation of the 27th of April, 1925, under two orders, one of the 20th of February, 1925, of MACDONALD, J.A. dismissing the defendant's (respondent) motion to amend the notice of appeal with costs to the plaintiff in any event, and the other of the 3rd of March of the Court of Appeal dismissing with costs to the plaintiff in any event the defendant's (respondent) motion for an order that the above mentioned order of MACDONALD, J.A. of the 20th of February be discharged.

The motion was heard at Victoria on the 4th of June, 1925, by MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

St. John, for the motion: It was held he had a right to tax

the costs on the two motions. We say the costs are subject to the provisions of section 122(1) of the County Courts Act confining the costs to $50.

Woodworth, contra: Both orders directed that we should have the costs in any event. They are entirely distinct from section 122(1).

Cur. adv. vult.

On the 6th of July, 1925, the judgment of the Court was delivered by

MARTIN, J.A.: In my opinion our brother M. A. MACDONALD took the right view of the matter in regarding it (as he informed us he did, during the hearing of the motion to review his order) as a collateral motion, which is apart from those "costs of such appeal" which are restricted in amount by section 122 of the County Courts Act, and that restriction is preserved by section 28 of the Court of Appeal Act, Cap. 52, R.S.B.C. 1924, which section must be read with 122 in considering the latter's effect. The expression "costs of such appeal" therein is certainly no wider in scope than the expression "costs of and incident to appeals" which are directed by section 28 to "follow the event," and yet under the latter expression we have decided that the costs of all motions are in our discretion as not being included in the statutory disposition of those costs which constitute "the event." There is nothing, in my opinion, to prevent the application of the same ruling to all appeals from County Courts, because the costs of appeals in general (subject to stated exceptions) are controlled by "the event" and appeals of this present kind are not taken out of the ordinary statutory disposition consequent upon "the event," but only the restricted amount that may be taxed upon the event is differentiated. This view is not only in accord with the established practice but is based upon reason and equity, because to hold otherwise would result in, *e.g.*, the respondent being given a free hand immediately upon the "bringing of the appeal" (by notice under section 14 (5) of the Court of Appeal Act) to launch with impunity all sorts of motions of an experimental kind, being

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innovations upon the practice, such as this is, or otherwise, including, *e.g.*, those caused by his own errors or negligence; but before being driven to a conclusion so oppressive, we should require clear authority to justify it.

This view recognizes that there may be regular and proper motions in the ordinary way to this Court or in Chambers, which should be regarded as being "costs of such appeal" within the true intent and meaning of the section, but should such motions be necessary the costs thereof should be specially considered at the time in regard to "the event" and in the light of the said special provisions pertaining thereto.

It follows that the order made by our brother should, I think, be sustained and the motion to review the same dismissed with costs.

Motion dismissed.

RICE v. BURCKHARDT AND BURCKHARDT.

MURPHY, J.

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RICE v. BURCKHARDT

Agreement—Cannery—Purchase of—Option—Portion of payments made—Assignment of option — Purchase completed by assignee — Liability under agreement made by original purchaser.

The Lummi Bay Packing Co., of which the plaintiff was a large shareholder, owned a cannery on Vancouver Island. The Company being indebted to the Royal Bank executed a trust deed covering its assets under which a debenture was issued for $200,000 which was given to the Bank as collateral security, the Bank holding as further security, the plaintiff's guarantee for $150,000. In 1922, at the instance of the plaintiff, a debenture holder's action was started and a receiver appointed who, with the plaintiff as manager, operated the cannery for that season at a profit. In the following year an order for sale of the assets was obtained but no sale was made as the plaintiff paid the receiver $9,000. The plaintiff then, with the assistance of an American attorney, secured control of the outstanding shares of the Company and entered into an arrangement with the defendant Otto Burckhardt whereby Burckhardt was to purchase the cannery from the receiver and form a company to which he would transfer the cannery and the plaintiff was to receive one-third of the capital stock of the company. Burckhardt obtained an option from the receiver for the purchase of the cannery for $100,000 upon which he paid $35,000. The plaintiff, on Burckhardt not being able to obtain the balance of the purchase price, interested Burckhardt's brother Charles in the purchase advising him of the arrangement between the plaintiff and his brother. Charles took an assignment of his brother Otto's option, paid the remainder of the purchase price and formed a company (National Packers Limited) to which he turned over the cannery. In an action to recover one-third of the shares in the Company as provided in his agreement with Otto:—

Held, on the facts, that there existed an implied contract between the plaintiff and the defendant Charles Burckhardt that he would carry out the bargain made between his brother Otto and the plaintiff and there is consideration for this in the assent given by the first company to the original option and in the plaintiff assenting to the assignment of the original option by Otto Burckhardt to his brother Charles, and the plaintiff is therefore entitled to one-third of the shares in the new company.

ACTION to recover a one-third interest in a company formed for the purpose of taking over a cannery under an agreement made with the original purchaser who, after making certain payments assigned his option to another who completed the

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purchase. The facts are set out fully in the head-note and reasons for judgment. Tried by MURPHY, J. at Vancouver on the 29th of June, 1925.

J. W. deB. Farris, K.C., and *Sloan,* for plaintiff.
Higgins, K.C., for defendant F. Otto Burckhardt.
Douglas, for defendant C. A. Burckhardt.

7th July, 1925.

MURPHY, J.: Plaintiff was a large shareholder in the Lummi Bay Packing Co. which owned a cannery on the west coast of Vancouver Island. The Company got into debt, mainly to The Royal Bank of Canada, and eventually executed a trust deed covering its assets, under which a debenture for $200,000 was issued. This debenture was given to the Bank as collateral security. The Bank held, as further security, the guarantee of plaintiff and one Williams for $150,000. In 1922, at the solicitation of plaintiff, a debenture holders' action was started and a Mr. Montgomery appointed receiver. The receiver considered Williams's guarantee of no value. The appraised value of the Company's assets was well over $200,000. The receiver operated the cannery during the season of 1922 with plaintiff as manager and a profit was made. In June, 1923, an order for sale was obtained, more in the hope of compelling plaintiff to make a payment than in the expectation that the assets could be sold for sufficient to liquidate the indebtedness to the Bank. Plaintiff did in fact pay some $9,000 to the receiver in that year. The receiver operated the cannery during the year 1923 season, but did not employ plaintiff as manager. The season's operations failed to yield an appreciable profit. Plaintiff became anxious to get the cannery out of the receiver's hands, if possible. With that end in view he employed Kendall, an attorney of Bellingham, Wash., to secure control of all the outstanding shares of the Company other than those held by himself. Kendall succeeded in effect in doing this and now holds, and held at the time the events leading to this litigation occurred, either the actual share certificates endorsed in blank or was and is in a position to obtain and control such as he has not in his possession. It is not clear on the record on what terms this

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was accomplished. Plaintiff seems to have thought that the other shareholders had made a gift of their shares to him. It may be, however, that he is a trustee for such shareholders. In my view, the matter is of no importance in this action. What is vital is, that he, through Kendall, had absolute control of the Company. Armed with this authority, he next attempted to induce someone to purchase the cannery from the receiver. He intended, however, that such purchaser should not become absolute owner but should give the plaintiff an interest in the property. He finally interested the defendant Otto Burckhardt, who resides in Seattle, Wash. I find the bargain made between plaintiff and defendant Otto to have been as follows:

Otto was to purchase the cannery from the receiver at a price which it was hoped would not exceed $60,000. Otto was then to transfer it to a company to be incorporated for the share capital. One-third of this share capital was to be given to plaintiff. In pursuance of this agreement, plaintiff and defendant Otto came from Seattle to Vancouver early in February, 1924, to interview Montgomery. On arrival here, however, plaintiff suggested to defendant Otto that as there had been some friction between plaintiff and Montgomery the wiser course would be to approach Montgomery through a solicitor. Plaintiff had had Mr. *Wendell Farris* previously employed as his solicitor. Mr. *Farris* was also solicitor for the Company and was conversant with all details. Defendant Otto agreed. On *Farris's* interviewing Montgomery it was found the cannery could not be purchased for less than $100,000, as the receiver had made large purchases of material with a view to operating the cannery during the 1924 season. Finally defendant Otto obtained an option negotiated by *Farris* to purchase at $100,000 and $5,000 was paid down. This option, at the price fixed thereon, I hold was obtained because the receiver was aware that plaintiff was a consenting party to its being given. Some difficulties not material to the issues herein arose in connection with this option (Exhibit 2), and another (Exhibit 8) was given. A further option was granted on March 26th (Exhibit 21), when defendant Otto paid a further sum of $30,000. The Company was a consenting party to this document. Both

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options (Exhibit 8 and Exhibit 21) were confirmed by Court orders (Exhibit 10 and Exhibit 22). Both orders shew the Company as consenting thereto. Plaintiff made an attempt, when the first option was given, to be relieved from his guarantee, but the Bank refused. Defendant Otto was aware of these facts. Defendant Otto was also aware at the time the negotiations for the first option took place that plaintiff had nothing to sell, that title to all assets could be obtained from the receiver, but that plaintiff might prove a source of trouble if he opposed any deal proposed by the receiver. A further sum of $20,000 was to be paid on May 26th, 1925. From the time when plaintiff first succeeded in interesting defendant Otto in the cannery in February up to the execution of Exhibit 21 on March 26th, 1924, plaintiff had been actively collaborating with defendant Otto in endeavouring to interest others to put money into the proposition, but without success. Plaintiff during this period kept both the receiver and Kendall advised of what was going on. Subsequent to March 26th, 1924, plaintiff and defendant Otto visited the cannery. Defendant Otto seems to have become dissatisfied and began an action against the receiver for rescission and to recover the $30,000 paid, alleging misrepresentation. Examination for discovery took place in this suit, and as a result defendant Otto was apparently convinced that he could not succeed. Plaintiff and he, therefore, conferred on the situation. By this time the date for the further payment of $20,000 had passed, and the $35,000 already paid had by the terms of the option been forfeited to the receiver. Plaintiff and defendant Otto decided to apply for help to defendant Charles, a brother of defendant Otto, and also resident in Seattle. Strained relations existed between the brothers, but an interview was arranged. More than one interview occurred between plaintiff and defendant Charles. Where there is a conflict in the evidence in relation to these interviews, I accept the evidence of plaintiff. Plaintiff advised the receiver of his negotiations with defendant Charles. I find that at this interview between defendant Charles and plaintiff defendant Charles was made fully aware of the terms of the bargain made between defendant Otto and plaintiff.

Judgment

The inferences I deduce from these findings are that defendant Charles so spoke and so acted at these interviews as to lead plaintiff to believe that defendant Charles intended to take over defendant Otto's deal in its entirety and that defendant Charles intended that plaintiff should so believe. Although defendant Otto's option had lapsed defendant Charles took an assignment of it. With this he came to Vancouver and after vainly trying to induce the receiver to return the payments made by defendant Otto—or at any rate part of them—he made an agreement with the receiver that the original option to Otto should be regarded as not lapsed and that he should stand in Otto's shoes. Otto's suit against the receiver was to be abandoned. This agreement was carried out, and defendant Charles paid the balance of the option price and obtained the agreement (Exhibit 26) from the receiver. This agreement was approved by a Court order (Exhibit 31). Notice of application for this was served on *Farris,* who did not appear at the hearing. Defendant Charles subsequently incorporated the National Packers Limited, which company purchased the agreement (Exhibit 26). On these facts, I hold that plaintiff is entitled to receive from defendant Charles shares in the National Packers Limited equal in par value to one-third of the authorized capital of that company. If my view of the facts is correct, there exists an implied contract between plaintiff and defendant Charles that Charles would carry out the bargain made between defendant Otto and plaintiff. There is consideration for this in the assent given by the Lummi Bay Packing Co. to the original options, as evidenced by its counsel appearing and consenting to the orders approving these orders being made. There is further consideration in plaintiff assenting to the assignment of the original option from Otto to Charles thereby enabling defendant Charles to deal with the receiver on the basis that $35,000 had already been paid, and in the action of the Lummi Company in allowing the order confirming the deal between the receiver and defendant Charles to go unopposed.

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It further follows from my view of the facts that it does not lie in the mouth of defendant Charles to question whether plaintiff, in making the contract with him, was acting personally

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or as a trustee. No question of the Statute of Frauds can arise. The subject-matter was shares and the contract has been fully carried out. To allow defendant Charles to retain the shares, to which I hold plaintiff to be entitled, would, if I am correct in my findings and inferences, be tantamount to allowing the statute to be made an instrument of fraud. There will be judgment against defendant Charles for delivery of shares as hereinbefore set forth. Plaintiff is entitled to his costs against him. On my view of the facts I, as at present advised, doubt that plaintiff is entitled to judgment as against defendant Otto. This phase of the case may be set down for further argument on the first available day after vacation.

Judgment

Judgment for plaintiff in part.

HUNTER, C.J.B.C.

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FIRST MORTGAGE INVESTMENT CO. v. NOUD

FIRST MORTGAGE INVESTMENT COMPANY v. NOUD. (No. 2).

Timber licences—Sale of—Commission—Assignment of right of action for —Assignment to company without assets—Champertous bargain—Colourable sale—Can. Stats. 1919, Cap. 36, Sec. 20.

A bankrupt's trustee declined to sue on an alleged oral agreement by the vendor to pay the bankrupt a commission in the event of the sale of certain timber licences as he did not wish to be responsible for costs in case the action failed. With the consent of the inspectors he assigned the claim to the plaintiff Company the consideration being the Company's note for $250 (the claim for commission being $16,000). The plaintiff Company had no assets and prior to the action the bankrupt's wife acquired all but the odd qualifying shares in the company for the consideration of $1.

Held, that the assignment was either a genuine or a collusive transaction. If genuine it is illegal and void on the ground that there was in reality a champertous bargain as the consideration was a promise to pay which all parties knew could only be made good in the event of a substantial recovery on the claim, there being no assets. On the other hand this sale to a bubble company, whose working capital consisted of a complete lack of assets, is not a sale which the statute authorized the trustees to make, even with the consent of the inspectors, as it is

only in the event of a recovery by the Company that the creditors would receive even a fraction of it whereas they should receive the whole of it. The sale being either champertous or colourable either of which is illegal, prevents any recovery by the assignee.

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ACTION to recover a commission on the sale of certain timber licences. A certain bankrupt was alleged to be entitled to the commission under an oral agreement with the vendor to pay him a commission (the amount not being specified) in the event of the sale of the timber licences. The bankrupt's trustee declined to bring the action on the ground that he did not wish to be in a position where he would be responsible for costs if the action failed. He then with the consent of the inspectors assigned the bankrupt's claim to the plaintiff Company. The facts are set out in the head-note and reasons for judgment. Tried by HUNTER, C.J.B.C. at Victoria on the 25th to the 29th of June, 1925.

Statement

H. I. Bird, for plaintiff.
Russell, K.C., for defendant.

3rd September, 1925.

HUNTER, C.J.B.C.: In this case a bankrupt's trustee declined to sue on an alleged oral agreement by the vendor to pay the bankrupt a commission (the amount not being specified), in the event of the sale of some timber licences, on the ground that he did not wish to be responsible for costs if the action failed. He therefore, with the consent of the inspectors, assigned the bankrupt's claim to the plaintiff Company, the consideration being the Company's promissory note for $250 payable on demand, although the amount claimed as commission was $16,000. Before the action was brought, the bankrupt's wife had acquired all but the odd qualifying shares for the alleged consideration of $1, so that it would follow in the event of recovery that, with the possible exception of the $250, the amount recovered would not go to the creditors, but to the bankrupt's wife, as the Company had no assets. Although the Company is merely an incorporated ghost with no tangible substance, nevertheless, it is in law a distinct entity and therefore a stranger in interest. Now the assignment was either a genuine or a collusive trans-

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action. If it was genuine, then it is illegal and void on the ground that there was in reality a champertous bargain, as the consideration was a promise to pay, which all parties knew could only be made good in the event of a substantial recovery on the claim, there being no assets. The law has of late years gone very far in the way of recognizing the validity of assignments of choses in action and of the right of the assignee to sue, but I do not think it has gone so far as to sanction gambling in speculative litigation.

Again, looking at the matter from the other angle, I am of the opinion that this sale to a bubble company, whose working capital consisted of a complete lack of assets, is not a sale which the statute authorized the trustee to make, even with the consent of the inspectors, as it is only in the event of a recovery by the Company that the creditors could obtain even a fraction of the amount, whereas they ought to receive the whole of it, and this, assuming that the Company did not at once distribute the whole amount recovered to the shareholders and thereby defraud the creditors. If it were otherwise it is obvious that a bankrupt could, by such a process, re-acquire his property from a blind or collusive trustee. In other words, the statute authorizes only a genuine, and not a thimble-rigging or colourable sale. Thus the dilemma that the sale was either champertous or colourable, either of which is illegal, prevents any recovery by the assignee.

Judgment

In this view, it becomes unnecessary to decide the point that the failure to take out a real estate agent's licence barred any action.

If, however, any Appellate Court should hold that this sort of thing is permissible, and that the plaintiff has a good cause of action, then in order, if possible, to save the expense of a new trial, I find that there was a promise by Thomas Noud, as agent for his father, to pay Jenkins a commission, but that no sum was agreed on, and that on a *quantum meruit* 2 per cent., *i.e.*, $3,200 would be a reasonable sum to allow, as all that Jenkins did was to furnish the name of the owner and the description of the parcels, the negotiations having been conducted by the parties themselves. There was a statement made by two witnesses that in like circumstances, ten per cent. was the usual

commission, but I attach no weight to this, as no concrete instances of similar sales were given. As to the promise by Noud that he would see Jenkins paid, this was a guarantee only and, not being in writing, is not enforceable.

An application was made at the trial to add the trustee as co-plaintiff or defendant, which was refused. The avowed reason for the trustee not suing, was that he did not wish to run the risk of having to pay costs, and there was no ground suggested on which he could be added as defendant. After the trial, and pending judgment, the application was renewed, it being alleged that the trustee was now willing to be added as a co-plaintiff. Apart from any objection on the ground of election, I cannot grant it. No doubt there are cases where several causes of action, some legal and others illegal, are brought together in the one action in which the Court may, in its discretion, allow those which are legal to proceed, but in this case the only one presented is illegal and the Court ought not to assist those who promote a wholly illegal claim in any way, but dismiss it *simpliciter,* which is now ordered with costs.

Judgment

Action dismissed.

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Sept. 9.

KEENE v. COOLEY.

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v.
COOLEY

Parliament — Sitting member — Disqualification — Interested in contracts with Crown—Action for penalties—Former judgment—Bar to present action—R.S.B.C. 1924, Cap. 45, Secs. 24 and 31.

An action being brought against a sitting member of the Legislative Assembly of British Columbia under section 31 of the Constitution Act to recover penalties for sitting and voting as a member of said assembly when he was disqualified from so doing, being interested in three contracts made between himself and His Majesty the King in the right of the Province, it appeared that a writ had previously been issued against the defendant under the same section for the recovery of penalties for sitting and voting on the same day for which penalty is sought to be recovered in this action, and one of the contracts alleged in this action as having existed is the same as the contract alleged in the former action.

Held, that provided the former action was not a collusive one it was a bar to this action and on the evidence the proceedings in the first action were honestly undertaken with a view to determining the question of the defendant's disqualification and were honestly carried out.

ACTION against the defendant who is a member of the Legislative Assembly of British Columbia, under section 31 of the Constitution Act to recover penalties for sitting and voting as a member of the said Assembly when he was disqualified from so doing by reason of his interest in contracts made between himself and His Majesty the King in right of the Province of British Columbia. The facts are fully set out in the reasons for judgment. Tried by MURPHY, J. at Victoria on the 1st of September, 1925.

Statement

Harold B. Robertson, K.C., for plaintiff.
Maclean, K.C., for defendant.

9th September, 1925.

MURPHY, J.: Defendant is a member of the British Columbia Legislative Assembly, and is a supporter of the present administration. This action is brought against him under section 31, of Cap. 45, R.S.B.C. 1924, to recover penalties for sitting and voting as a member of said Assembly at times when, it is alleged,

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he was disqualified from so doing because he was interested in contracts made between him and His Majesty the King in right of the Province of British Columbia. Three separate contracts are alleged in the statement of claim. The writ herein was issued on April 2nd, 1925.

On February 24th, 1925, a writ was issued by one Drake against the defendant herein under the same section for recovery of penalties for sitting and voting, *inter alia,* on the day for which penalty is sought to be recovered by the plaintiff herein.

One of the contracts alleged as having existed by the statement of claim herein is the same as the contract alleged in the Drake action. In the amended statement of claim herein, however, two other contracts are set up which were not in question in the Drake action. It is true that one of them was referred to in argument at the trial of that action but, as I understand the record, the judge refused to consider it inasmuch as its existence had not been pleaded. The Drake action duly came on for trial at Kamloops on May 26th, 1925, and after the taking of evidence was dismissed. It is now argued on the authority of a line of cases culminating in *Forbes* v. *Samuel* (1913), 82 L.J., K.B. 1135, that this present action is barred because of the prior action of *Drake* v. *Colley,* assuming for the moment the Drake action not to have been collusive. I am forced to hold that such is the effect of the decisions. Counsel for plaintiff tried to distinguish them on the ground that in this action two contracts not in question in the Drake action are alleged. As I understand the decisions, however, they proceed upon the ground that as the statute imposes but one penalty for each day on which a disqualified person sits and votes there is but one cause of action for each such day and that assuming no collusion in reference to the first suit that penalty belongs to the person who issues his writ for it, who thereby attaches or appropriates it to himself.

Judgment

Counsel for plaintiff next argues that even if this view is correct, the Drake action was collusive in the sense expounded in *Girdlestone* v. *Brighton Aquarium Co.* (1879), 48 L.J., Q.B. 373. As I read that decision Brett, L.J. does not consider fraud in the sense of *mala fides* necessary to render an action collusive

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to a degree sufficient to prevent it being a bar to a subsequent action for the same penalty. The other two Lords Justices apparently do not go so far. The actual grounds of the decision are, I think, two: first, that the prior action in question therein was a sham action in which defendant was in reality both plaintiff and defendant, and second, that as admittedly the object of the prior action was to protect defendants from being forced to pay the statutory penalty, as a result of subsequent suits (plaintiff in the prior action having agreed not to enforce his judgment) the proceedings were collusive in the sense above set out. On the best consideration I can give the matter I do not think the facts herein bring this case within either of these principles. It is true, I think, that the Drake proceedings were what might be termed a friendly action. Colley, having seen articles in the press alleging that he was disqualified, went to Victoria from Kamloops, where he resides, and laid the position before the Attorney-General. The Attorney-General thereupon sent for Mr. Clearihue, a Victoria barrister, who had been a candidate at the recent election in the Liberal interest (*i.e.*, as a supporter of the present administration) and directed him to bring an action against Colley under said section 31. This was done in Colley's presence. Clearihue agreed to do so and agreed to find a plaintiff. I do not think, this direction of the Attorney-General to Clearihue makes the Drake proceedings an action by the Attorney-General in his official capacity as urged in argument. The Attorney-General, however, might well have thought proceedings under said section 31 was the simplest means of having the question of Colley's disqualification judicially passed upon. My view is that this was the prime motive of both the Attorney-General and of Colley in what was done. The fact that Colley travelled from Kamloops to Victoria to consult the Attorney-General, in my opinion, clearly indicates this to be so. If Colley were primarily concerned about penalties, there was no reason for this trip. He could have consulted a solicitor in Kamloops. The Attorney-General might well be concerned as to the question of Colley's disqualification since Colley was a supporter of the administration, but the matter of penalties incurred by Colley could not be of any vital interest to him, as I think Colley would well know.

Judgment

Clearihue met Drake casually on the street and proposed that Drake should be plaintiff in the contemplated proceedings. Drake declined unless further particulars were given him. For that purpose he went with Clearihue to see the Attorney-General. Colley was not present at this interview. Drake insisted that the suit must be *bona fide* else "he would not lend his name to it." On having the details stated to him and on receiving the assurance that all evidence possible to obtain would be submitted, he agreed to be plaintiff. It is this act of Drake's that, in my opinion, differentiates this case from the first *ratio decidendi* in the *Girdlestone* case. As Brett, L.J. states the facts in that case the plaintiff Rolfe, in the prior action in question in the *Girdlestone* case, exercised no control, instructed no one, became liable to no one, did not know the course of the action, did not apparently in fact know whether the action was brought or not. Here the only construction that can be placed on what occurred between Clearihue, Drake and the Attorney-General, is, I think, that Drake instructed Clearihue to take the proceedings and thereby became liable for the costs thereof. He exercised control in that, after going into the facts and receiving assurance that all possible evidence would be adduced, he deliberately chose to be made plaintiff.

Judgment

True, he did not supervise the proceedings as does a plaintiff in ordinary litigation, but he could not well do so as he knew nothing of the facts. But he had provided for such supervision by the promise of full disclosure given him, not only by the solicitor but by the Attorney-General. The facts were by their nature such as could be ascertained by the Attorney-General, since they related to acts done by Government employees. I hold, on the evidence before me, that the promise so given was fully carried out. The Drake action was tried out in open Court, and counsel for Drake utilized the assistance of counsel, who, at the trial, held a watching brief for the political party opposed to Colley. Under these circumstances, I hold the Drake proceedings cannot be said to have been a sham affair wherein Colley was both plaintiff and defendant. True, the language used by Drake in his cross-examination, as to lending his name, taken alone, might indicate the contrary, but, in my opinion,

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regard should be had to what was actually done. Moreover, the passage hereinafter cited from the judgment of Brett, L.J. in the *Forbes* case shews that, in his opinion, much more than merely borrowing a person's name as plaintiff might be done and yet the proceedings might be valid.

There remains the second question. Were the Drake proceedings taken to protect Colley from penalties incurred for sitting whilst disqualified? There is no direct evidence of such intention. There was no agreement, as there was in the *Girdlestone* case, not to enforce the judgment. Brett, L.J. in his decision says:

"If he [defendant's solicitor] had asked Rolfe to bring the action, and if Rolfe had instructed a solicitor to bring the action, and he had brought it, although he had bound himself, as it is said, in honour not to insist on execution for the penalty, in the absence of a finding of any fraud by the jury, I should have thought that that was a valid judgment."

Judgment

There is no question of fraud here. My view is that the Drake proceedings were honestly undertaken with a view of determining the question of Colley's disqualification, and that they were honestly carried out. So far as the evidence before me shews, the penalty matter does not seem to have received consideration. Certainly there is no evidence of any contract in relation thereto or of any understanding that the object of the Drake proceedings was to prevent any other person from suing for penalties. In this respect the case at Bar does not go nearly the length that Brett, L.J., in the passage cited, states would be allowable. I, therefore, hold that this action is not maintainable. Such being my view, defendant is entitled to costs, including the costs of the summons to amend the statement of claim.

Action dismissed.

IN RE LEONORA CLAPHAM, DECEASED. MINISTER OF FINANCE v. BURKE-ROCHE.

MURPHY, J.

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IN RE LEONORA CLAPHAM, DECEASED

Succession duty — Enforcing payment — Summons to shew cause — Judge persona designata—R.S.B.C. 1924, Cap. 244, Secs. 34 and 40.

A judge who issues a summons under section 34 of the Succession Duty Act is acting as *persona designata* and the hearing on the return to the summons must be before the judge who issued it.

Chandler v. *City of Vancouver* (1919), 26 B.C. 465 followed.

MOTION on the return of a summons issued under section 34 of the Succession Duty Act to shew cause why certain duty should not be paid. Heard by MURPHY, J. at Vancouver on the 9th of September, 1925. Statement

Killam, for the Crown.
Mayers, for defendant.

10th September, 1925.

MURPHY, J.: In my opinion, I am not concerned herein with the construction of section 40 of Cap. 244, R.S.B.C. 1924, for the reason that these proceedings were not initiated by an order to shew cause made by a judge. Under said section 40 before such order can be made, it must be made to appear to a judge that duty accruing due under the Act has not been paid according to law. Nothing of that sort occurred.

The proceedings were obviously meant to be taken under section 34 of the Act, although the steps taken are not such as the section directs. Section 34 empowers a judge of the Supreme Court to issue a summons. In my opinion, I am bound by authority to hold that the judge under section 34 is *persona designata. In re Vancouver Incorporation Act* (1902), 9 B.C. 373; *Chandler* v. *City of Vancouver* (1919), 26 B.C. 465. I am fortified in this view by a study of the section itself. Proceedings in the Supreme Court are not initiated in any instance that I am aware of by a judge issuing a summons. Further, section 34 provides that the procedure applicable to such an application shall be the procedure governing applica- Judgment

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tions to and orders made by judges in Chambers. The section, therefore, creates a special method whereby a judge is to initiate proceedings and lays down a code of practice to be followed. Why all this if the judge is not *persona designata?*

Further, the practice designated is Chamber not Court practice.

If this view is correct, then I am bound under the *Chandler* case, *supra,* to dismiss this application. So ordered.

Motion dismissed.

LAMPMAN, CO. J. (In Chambers)

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Sept. 18.

TILLICUM ATHLETIC CLUB v. BURICK.

Practice—County Court—Reply to dispute note—No provision for—Garnishee order—Affidavit in support insufficient—Motion to set aside—R.S.B.C. 1924, Cap. 17.

TILLICUM ATHLETIC CLUB v. BURICK

There is no provision in the County Court Rules or in the practice authorizing a reply of the plaintiff except in the case of a counterclaim.

Notwithstanding Form C in the Schedule to the Attachment of Debts Act the affidavit verifying the cause of action in support of a motion for a garnishee order before judgment, which is founded on information and belief should recite that they are so founded and also give the source of deponent's information.

MOTION to set aside garnishee order and to strike out reply to the defendant's dispute note. The plaintiff obtained from the deputy registrar of the County Court a garnishee order attaching certain moneys of the defendant in the Bank of Montreal, the only material in support of the order being an affidavit of one William Thomas Straith. Heard by LAMPMAN, Co. J. at Victoria on the 11th of September, 1925.

Statement

Lowe, for the motion: The deponent's address and description should be clearly set forth in the affidavit and inasmuch as certain allegations of facts are founded on information and belief only, the affidavit should state the source of information: see *Tate* v. *Hennessey* (1901), 8 B.C. 220; *The King* v. *Licence*

Argument

Commissioners of Point Grey (1913), 18 B.C. 648; *Joe* v. *Maddox* (1920), 27 B.C. 541; and Annual Practice, 1922, p. 780. The County Court Rules and the practice do not provide for a reply to a defendant's dispute note, the only reply filed in the County Court being a reply to a counterclaim.

W. T. Straith, contra: The affidavit is in accordance with the form provided for in the Attachment of Debts Act, and it must be taken that I was aware of the indebtedness of the defendant to the plaintiff by virtue of the fact that the plaintiff brought me as his solicitor the cheque sued on.

Argument

Lowe, in reply, referred to *In re J. L. Young Manufacturing Company, Limited* (1900), 2 Ch. 753.

18th September, 1925.

LAMPMAN, Co. J.: I have already ruled that the reply of the plaintiff to the dispute note must be struck out, as there is no provision in the County Court Rules or in the practice of the County Court authorizing a reply, save and except in the specific case of a counterclaim. As to the garnishee order before judgment, it is founded on an affidavit of William Thomas Straith, and objection is taken that it does not give the deponent's occupation and address and that the statement in it verifying the cause of action does not purport to be founded on information and belief. There is no statement in the affidavit that deponent is aware of the facts deposed to. Generally affidavits which are founded on information and belief should so state, and the source of information should be given, but it is contended that the form is in accordance with Form C in the Schedule of the Attachment of Debts Act. The form is not a very complete one and is no doubt confusing, but I do not think that the affidavit when made by one not a party is sufficient unless it states that it is founded upon information and belief or that the deponent has knowledge of the facts. There is enough stated in the affidavit probably to get over the objection as to occupation and address, but the objection I have indicated is, I think, fatal and the order must be set aside.

Judgment

Order set aside.

MCDONALD, J. (In Chambers)

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REX v. ROYAL

REX v. ROYAL.

Criminal law—Vagrancy—Loose, idle and disorderly person—Conviction—Stated case—Criminal Code, Sec. 238(a).

On a charge of being a loose, idle and disorderly person or vagrant under section 238(a) of the Criminal Code, it is the general trend of the life of the accused that is to be looked at, the sort of character he is exhibiting and in the circumstances of this case the accused's appeal was dismissed.

Regina v. *Bassett* (1884), 10 Pr. 386 applied.

Statement

APPEAL by way of case stated from a conviction by the deputy police magistrate at Vancouver on a charge of vagrancy under section 238(a) of the Criminal Code. Argued before MCDONALD, J. in Chambers at Vancouver on the 15th of September, 1925.

J. E. Bird, and *H. I. Bird,* for the appeal.

Orr, contra.

18th September, 1925.

Judgment

MCDONALD, J.: The accused was convicted by the deputy police magistrate of the City of Vancouver with being a loose, idle and disorderly person or vagrant, who not having any visible means of maintaining himself lived without employment, in contravention of section 238(a) of the Criminal Code. A case has been stated for the opinion of this Court, in which the magistrate asks whether he erred in holding, on the evidence, that there was some evidence on which the accused might be found guilty of the offence charged.

It was shewn in evidence that the accused had been known to the police for about six years; that he had never been known to do any work; that he had about five years ago been convicted of robbery with violence and allowed out on suspended sentence; that he consorted with "confidence" men and prostitutes; that he had recently given bail for a well-known "confidence" man named Hebeau who forfeited his bail; that he had been on at least one occasion driven out of the city by the police; that on the day of his arrest he was loitering about a pool-room endeavouring to persuade two men (who, unknown to him, were detectives) to go out to the races on what the detectives called

the usual "bunko" game; that adjoining this pool-room was a room with three entrances where a "bunko" game had been complained of; that the accused had been in that room at least twice on the day of his arrest; that when arrested he had on his person a roll of papers with the edges singed to make it look like a bank roll; and that in the room adjoining the pool-room was found another roll of papers fixed up to look like one thousand dollar bills and a number of hats and caps, which are used by "confidence" men to change their appearance from time to time, and that when the police arrived to make an investigation the other occupants of the room escaped. When the accused, before his arrest, was asked by the police to account for himself, he stated that he had an interest in two horses at the race tracks, but he was unable to give the names of the horses or the names of the persons who were interested with him. On the other hand, it was shewn that the accused had in his possession $286 and that he had been driving about town in an automobile which he said he had brought here from the United States. In the face of this evidence, the magistrate called upon the accused for his defence, and the accused did not offer any defence, whereupon the magistrate convicted.

Judgment

I think the magistrate was right. I do not think his decision in any way conflicts with any principle laid down in *Rex* v. *Sheehan* (1908), 14 B.C. 13; and it is quite in line with the decision of the Court of Appeal for Ontario in *Rex* v. *Munroe* (1911), 19 Can. C.C. 86. As stated by Mr. Justice Osler in *Reg.* v. *Bassett* (1884), 10 Pr. 386, it is the general trend of the life of the accused that is to be looked at, the sort of character he is exhibiting.

While it is, of course, important to preserve the liberty of the subject, it is, I think, equally important that the Courts should, perhaps more carefully in these days than at any time in the past, have in mind the protection of the public, and should (of course within the law) assist the police in ridding the country of people possessed of a character such as that of the accused, and should not be too astute in seeking some technical ground upon which the accused may escape.

Appeal dismissed.

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Sept. 23.

RICE v. BURCKHARDT AND BURCKHARDT. (No. 2).

Practice—Costs—Successful defendant—Right to costs—"Good cause" for disallowance—Marginal rule 976.

RICE v. BURCKHARDT

Where an action has been dismissed as against a defendant who by his conduct occasions or increases the cost of the litigation, that is "good cause" for his being deprived of his costs.

Statement

ACTION for specific performance of an agreement with Otto Burckhardt that the plaintiff was to receive a certain portion of the shares in a company to be formed for taking over a cannery formerly owned by the Lummi Bay Packing Company. Otto Burckhardt entered into an agreement for the purchase of the cannery from the receiver of the old company, and after making certain payments assigned the agreement to his brother Charles who completed the purchase. On making the assignment to his brother he made no provision for the protection of the plaintiff's interest as aforesaid. On the action being dismissed as against Otto (see *ante*, p. 161), the question arose as to whether there was "good cause" for depriving him of costs. Tried by MURPHY, J. at Vancouver on the 17th of September, 1925.

J. W. deB. Farris, K.C., for plaintiff.
Higgins, K.C., for defendant F. Otto Burckhardt.
Douglas, for defendant C. A. Burckhardt.

23rd September, 1925.

Judgment

MURPHY, J.: In reference to the costs of defendant Otto Burckhardt as against whom I dismissed the action, I am of opinion that, in my view of the facts, I must refuse him costs on the authority of such cases as *Huxley* v. *West London Extension Railway Co.* (1889), 14 App. Cas. 26; *Dominion Fire Insurance Co., Ltd.* v. *Thomson* (1923), 3 W.W.R. 1265; and *Ritter* v. *Godfrey* (1920), 2 K.B. 47.

I think these cases decide that where a party by his conduct occasions or increases the cost of litigation that is "good cause"

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requiring that he be deprived of his costs. Here, I think, it was the duty of defendant Otto, when he assigned the option to defendant Charles, to make express provision for plaintiff's protection in case defendant Charles exercised said option, as he subsequently did. Instead of so doing, matters were so left that plaintiff could not safely decide which of the two defendants he should sue.

Judgment

The action as against defendant Otto is dismissed without costs.

Action dismissed.

ABBOTSFORD LUMBER, MINING & DEVELOPMENT COMPANY LIMITED AND THURSTON-FLAVELLE LIMITED v. STEVENSON, DOMINION LUMBER SALES, LIMITED, AND BANK OF NOVA SCOTIA.

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Oct. 6.

ABBOTSFORD LUMBER, &C., CO. v. STEVENSON

Companies—Memorandum of association—Powers—Guarantee—Authority.

Under its memorandum of association the Dominion Lumber Sales, Limited, was empowered to enter "into any arrangement for sharing profits, union of interests, 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 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, or any security of any such company and to sell, hold or otherwise deal with the same."

The Dominion Lumber Sales, Limited, assigned to the defendant Stevenson, a sum of money to secure the repayment of moneys owing to him by the Rainbow Shingle Company, Limited.

Held, affirming the decision of MURPHY, J., that the power to give a guarantee under the above clause is dependent upon a prior or contemporaneous agreement between the guarantor and the company whose debt is guaranteed. No such relationship was entered into between the Dominion Lumber Sales, Limited, and the Rainbow Shingle Company, Limited, the assignment was therefore made without compliance

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with a condition precedent to the assignor's power to make it and was invalid.

APPEAL by defendant Stevenson from the decision of MURPHY, J. of the 25th of April, 1925 (reported 35 B.C. 405), in an action by the Abbotsford Lumber, Mining & Development Company Limited and Thurston-Flavelle, Limited, who sue on behalf of themselves and all other creditors of the Dominion Lumber Sales, Limited, to set aside and declare null and void as against the creditors of said Company a certain assignment of the 27th of November, 1923, and made by the Dominion Lumber Sales, Limited, by which the said Company purported to assign, transfer and set over to the defendant Kenneth Stevenson all its right, title and interest in and to $6,000 or thereabouts on deposit in the name of the Dominion Lumber Sales, Limited, in a savings account in the defendant Bank of Nova Scotia at Vancouver, B.C., subject to the prior rights of said Bank of Nova Scotia and for an injunction restraining the defendants from dealing with said moneys. The above assignment was given Stevenson as collateral security for certain credit arranged by the said Stevenson on behalf of a corporation known as the Rainbow Shingle Company, Limited, and was to constitute a continuing security as long as either the said Dominion Lumber Sales, Limited, or the said Rainbow Shingle Company, Limited, was indebted to Stevenson, but when said companies were discharged of all liability to Stevenson then the assignment was to have no further force and effect and Stevenson was to reassign said moneys to the Dominion Lumber Sales, Limited. The Abbotsford Lumber, Mining & Development Company, Limited, was a creditor of the Dominion Lumber Sales, Limited, in the sum of $3,144.18 and Thurston-Flavelle, Limited, a creditor, in the sum of $620. On demand they were both refused payment. The plaintiffs claim the assignment has not been filed with the registrar of joint-stock companies. It is not under the seal of the defendant Company. The defendant received no consideration for said assignment. There was no resolution of the directors authorizing the assignment. The assignment was *ultra vires* of the Company and the defendant Kenneth Stevenson to whom the assignment was made is a large shareholder in both the

Statement

Dominion Lumber Sales, Limited, and the Rainbow Shingle Company, Limited. The plaintiffs obtained judgment on the trial.

The appeal was argued at Victoria on the 18th of June, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Reid, K.C., for appellant: It is a question of construction of the memorandum of association of the Company. The assignment is made by the Dominion Lumber Sales, Limited, the guarantee being for the Rainbow Shingle Company, Limited. In this case there is a specific power to guarantee. The two companies had the same objects in view. The memorandum of association authorizes the guarantee. Mr. Stevenson was a shareholder in both companies. The same section is in force in Ontario: see *Bank of Ottawa* v. *Hamilton Stove and Heater Co.* (1918), 44 O.L.R. 93; *Diebel* v. *Stratford Improvement Co.* (1917), 38 O.L.R. 407.

Argument

Wood, for respondents: This assignment is *ultra vires* of the Company: see *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653. The memorandum must set out the powers to identify clearly the field of business of the Company: see *Cotman* v. *Brougham* (1918), A.C. 514 at p. 517. On the interpretation of the objects of the Company see Palmer's Company Law, 12th Ed., p. 71; *Bonanza Creek Gold Mining Company, Limited* v. *Rex* (1916), 1 A.C. 566.

Reid, in reply: There is an express power: see Palmer's Company Precedents, 12th Ed., 490; *Carter Dewar Crowe Co.* v. *Bitulithic Columbia Co.* (1914), 20 B.C. 37 at p. 41.

Cur. adv. vult.

6th October, 1925.

MACDONALD, C.J.A.: I think the learned trial judge came to the right conclusion.

The Dominion Lumber Sales, Limited, assigned to the defendant a sum of money, in a bank, to secure the repayment of moneys owing to him by the Rainbow Shingle Company, Limited. This action is brought by a creditor suing on behalf of himself and other creditors to set aside that assignment, the

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ground being that the Dominion Lumber Sales, Limited, had no power in the circumstances to assign the said moneys.

By their memorandum of association, the Dominion Lumber Sales, Limited, were empowered,—

"To enter into partnership or into any arrangement for sharing profits, union of interests, 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 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."

MACDONALD, C.J.A.

No such relationship as is there authorized was entered into between the Dominion Lumber Sales, Limited, and the Shingle Company. The power to give a guarantee under that clause of the memorandum is, I think, dependent upon a prior or contemporaneous agreement between the guarantor and the company whose debt is guaranteed. Had the Dominion Lumber Sales, Limited, had such an agreement with the Rainbow Shingle Company, Limited, and had the latter been conducting a business which the former had by its memorandum power to carry on, then the guarantee could have been legally given. Now the Dominion Lumber Sales, Limited, had power to carry on the business in which the Rainbow Shingle Company, Limited, was engaged, but in the absence of an agreement between the parties to the document, such as the said clause of the memorandum contemplates, the assignment must be treated as having been made without compliance with a condition precedent to the assignor's power to make it.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: I agree that this appeal should be dismissed, the learned judge below having taken the right view of the language used in the memorandum of association.

GALLIHER, J.A.

GALLIHER, J.A.: Notwithstanding Mr. *Reid's* able presentation of his case, I am, after careful consideration, impelled to take the view that the learned trial judge came to the right

conclusion, and I agree with his interpretation of the section of the memorandum of association in question.

The appeal should be dismissed.

MACDONALD, J.A.: Reading the words literally, some support may be claimed for Mr. *Reid's* interpretation, but they must be read with due regard to the objects the Legislature had in view. Legally these two companies, separate entities, were in the same position as if they had no dealings with each other, except as vendor and purchaser. It was not intended to permit one company to give guarantees on behalf of another company with whom it had no arrangement for co-operation, profit sharing, etc. The words are susceptible of this interpretation, and to hold otherwise would lead to consequences which were not contemplated.

I would dismiss the appeal.

Appeal dismissed.

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

Solicitor for respondents: *H. S. Wood.*

COHN v. CANARY.

Husband and wife—Business in partnership with husband—Wife's share of profits—Not separate property—R.S.B.C. 1924, Cap. 153, Sec. 8.

The wife's share in the profits of a business carried on by her in partnership with her husband is not the wife's separate estate.

APPEAL by defendant from the decision of MCDONALD, J. of the 14th of May, 1925 (reported 35 B.C. 478), in an interpleader action in which Mrs. Cohn, the wife of the judgment debtor, is plaintiff, and Canary, the judgment creditor is defendant. Mrs. Cohn claimed that the furniture in her home, the automobile, the piano and the phonograph were hers; that she purchased with her own money the furniture, the automobile

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and the phonograph, and that her husband gave her the piano as a birthday present. The trial judge found she was entitled to the property and an appeal was taken by the defendant as to the furniture and the piano. She claimed that she earned her own money in partnership with her husband, first in a restaurant, and later on selling out they went into the cleaning and dyeing business. She made certain moneys and purchased the furniture, the piano being given to her as aforesaid. The question arose as to the construction of section 8 of the Married Women's Property Act.

The appeal was argued at Victoria on the 17th of June, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

J. A. MacInnes, for appellant: We are appealing only as to the furniture and the piano. A married woman's property acquired after marriage is governed by section 8 of the Married Women's Property Act. She states she was in partnership with her husband in a business and drew wages with which she purchased the furniture. Under the Act this is the husband's business and the husband's profits: see *Laporte* v. *Cosstick* (1874), 23 W.R. 131; *In re Edwardes* (1895), 43 W.R. 509; *In re Helsby; Ex parte Helsby* (1893), 63 L.J., Q.B. 261; *In re Gardiner; Ex parte Coulson* (1887), 57 L.J., Q.B. 149. As to the gift of the piano, the wife's evidence must be corroborated: see *Grant* v. *Grant* (1865), 34 Beav. 623.

A. H. MacNeill, K.C., for respondent: There is a difference between the English Act and ours. As to the Act see Lush on Husband and Wife, 3rd Ed., pp. 202-4. She is a separate legal entity and distinct at law: see *North* v. *Sicilliano* (1922), 31 B.C. 463; *Ramsay* v. *Margrett* (1894), 2 Q.B. 18 at p. 25; *French* v. *Gething* (1922), 1 K.B. 236.

MacInnes, replied.

Cur. adv. vult.

6th October, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal from the judgment in an interpleader issue. The plaintiff (claimant) and her husband commenced business in partnership, as cleaners and dyers

in 1908, and continued a somewhat similar business in partnership until this suit was commenced. Neither of them had a dollar in 1908. The husband's creditors had theretofore attached moneys coming to him. So that he was probably not only without money, but was actually insolvent at that time.

In that year the plaintiff pawned her engagement ring to buy some cheap furniture, not the furniture in question in this action, to start housekeeping with. She was asked on cross-examination:

"So we can take it, in 1908, when the cleaning and dyeing business was started, you were both broke financially, and Mr. Cohn told us in his examination he was broke financially? No, Mr. Quann endorsed for Mr. Cohn about $10,000."

On all the evidence it is apparent that they started business without any money of their own. In the partnership each worked in connection with the undertaking and drew out sums of money from time to time, which they now call wages, and with the moneys drawn as aforesaid by the plaintiff she says she bought from time to time the goods now in question, except the piano, which was a present from her husband. The plaintiff herein claims that these so-called wages were her separate property by virtue of the provisions of section 8 of the Married Women's Property Act, R.S.B.C. 1924, Cap. 153. My interpretation of that section is that it excludes from the wife's separate property, moneys gained in partnership with her husband, and I do not think it matters whether these moneys be designated wages or profits. I have always understood that the words, "or which she carries on separately from her husband," qualified the generality of the foregoing words; without that qualification the section would, I think, entitle her to claim as her separate property all gains or earnings from whatever source. It could be said that the gains in partnership with her husband were the result of contract with him and, in the absence of the qualification aforesaid, were her separate estate. If the words quoted above do not amount to a qualification of the preceding ones, what do they mean? I confess I can give no answer to that question. The moneys thus drawn by the plaintiff from the business were moneys of her husband. The Legislature doubtless made the qualification aforesaid for good reasons. To

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declare the earnings of husband and wife gained in co-partnership to be the wife's separate estate to the extent of her share therein, would open a wide door to fraud which the Legislature evidently intended to keep closed. Moreover, the evidence which, while disclosing a spirit of co-operation with her husband, or perhaps more truly, a care for her family beyond that which her husband had displayed, bear some of the ear-marks, I shall not say of fraud, but of grave suspicion. In transactions in which husband and wife are concerned, the most satisfactory evidence of the genuineness of the position taken by them in litigation of this sort, is to be insisted upon. *Koop* v. *Smith* (1915), 51 S.C.R. 554 at p. 558.

MACDONALD, C.J.A.

I think the husband was not in a position at any time since the purchase of the goods in question to make a valid gift; he was insolvent when he commenced business, and was insolvent at the end. At all events, there is no evidence of his subsequent solvency, and the inference I draw from his present difficulties and the circumstances disclosed in the evidence is, that he always was insolvent.

I think the goods in question in this appeal, claim to some having been previously abandoned by defendant, are not the goods of the plaintiff. The appeal should therefore be allowed.

MARTIN, J.A.

MARTIN, J.A.: In this case the wife and husband were partners in a certain business and the question is, can she be said, as a partner, to be one who "carries on separately from her husband" that "employment trade or occupation" within the meaning of section 8 of the Married Women's Property Act, Cap. 153, R.S.B.C. 1924? After a careful consideration of all the authorities cited, I am of opinion that in such circumstances she cannot be said to be "separate" in a business and legal sense from her husband. The furthest that any decision in her favour goes is that where the wife is the sole owner of the business and employs her husband as a manager with sole control while living with him, he as her employee in such case is "separate" from her—*In re Simon* (1909), 1 K.B. 201, a decision of the Court of Appeal and the leading case on the subject; the point is summed up at p. 204:

"Carrying on a business separately from the husband does not mean that the business must be carried on without any interference by the husband. This was the wife's business carried on by the husband for her benefit."

Here, it is a joint business, a partnership, carried on for their joint benefit. It is strange that the explanation given by Mr. Justice Vaughan-Williams in *In re Edwardes* (1895), 43 W.R. 509, of his use of the word "control" in *In re Helsby* (1893), 63 L.J., Q.B. 261; 1 Manson 12; was not noticed by the Lords Justices in *Simon's* case. The decision of the King's Bench Division in *Laporte* v. *Cosstick* (1874), 23 W.R. 131 is much in point, the test applied by Mr. Justice Blackburn is, p. 133:

"Where, as here, the husband takes such a part in carrying on the business as to make himself personally liable, there cannot be a separate trading."

And Mr. Justice Lush sets out what in that case he considered amounted to a negation of separate trading, with which I am in accord and as his observations afford a useful guide in general I cite them, p. 133: MARTIN, J.A.

"The question is, was this a separate trading or not? Now, to bring a case within the Act, I agree that there need not be a visible separation. The husband and wife may live together, but the business must be separately carried on. In this case they did live together. The furniture of the house was originally the husband's, as I infer from the fact that nothing is said in this case as to whose it was. The husband, being in ill-health, was unable to take much part in the business except in conducting correspondence, etc. But from the case it appears that he did all he could. He kept accounts, conducted correspondence, and gave orders, some in his own name, so as to make himself liable for the goods supplied. This quite negatives a separate trading. To say that this was a separate trading would enable a man, wrongfully to evade his creditors."

As the Master of the Rolls said in *Simon's* case, *supra,* the question, p. 204, "is an issue of fact depending on the evidence which has been adduced." And in the case at Bar that issue ought, I think, to be decided, on the admitted facts, adversely to the wife, and therefore the appeal should be allowed.

GALLIHER, J.A.: I agree with the Chief Justice in his interpretation of section 8 of the Married Women's Property Act, and would allow the appeal as to the furniture. GALLIHER, J.A.

As to the piano, I think it was a gift from the husband to the wife, and comes under a different category. There is no

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proof of insolvency at the time the gift was made. The appeal as to the piano should be dismissed.

MACDONALD, J.A.: I would allow the appeal, except as to the piano, to which, I think, the wife is entitled.

Appeal allowed in part.

Solicitors for appellants: *MacInnes & Arnold.*
Solicitor for respondent: *A. H. MacNeill.*

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REX v. BOAK.

Criminal law—Manslaughter—Supreme Court of Canada—Remission of case to Court of Appeal on question of misdirection—Judgment of Court of Appeal.

An accused was convicted of manslaughter. On appeal three grounds were urged: (a) misdirection; (b) illegality in the constitution of the grand jury; (c) disqualification of a petit juror through deafness. The Court of Appeal held in favour of the appellant on grounds (b) and (c), and ordered a new trial (MACDONALD, C.J.A. dissenting). On appeal by the Crown the Supreme Court of Canada reversed the Court of Appeal as to grounds (b) and (c) and remitted the case to the Court of Appeal in order that that Court might pass upon the grounds of appeal based on misdirection.

Held, by the Court of Appeal that there was no ground upon which a finding of misdirection could be based.

JUDGMENT of the Court of Appeal on remission of the case by the Supreme Court of Canada in order that said Court might pass upon the grounds of appeal based on misdirection.

Statement

The accused was convicted at the Victoria October Assizes on the 8th of October, 1924, for manslaughter, caused by the negligent driving of a motor-car whereby two pedestrians were killed. On appeal to the Court of Appeal judgment was delivered on the 3rd of March, 1925, ordering a new trial (MACDONALD, C.J.A. dissenting): see 35 B.C. 256. On

appeal by the Crown the Supreme Court of Canada delivered judgment on the 18th of June, 1925, reversing the Court of Appeal as to the grounds upon which a new trial was ordered and remitted the case to the Court as aforesaid: see (1925), S.C.R. 525.

Jackson, K.C., for the Crown.
W. J. Taylor, K.C., for accused.

6th October, 1925.

MACDONALD, C.J.A.: My judgment as pronounced in March last decided the question referred back by the Supreme Court of Canada and all other questions involved in the appeal. My refusal then to allow the appeal on any ground thereof was the disposal of the case.

I can find no error in respect of the admission or rejection of evidence to justify the setting aside of the conviction, nor in the learned judge's charge, which I then carefully considered, as I was bound to do, since I had then refused the motion for leave to appeal on the facts involved in the grounds of appeal other than those which raised a question of law only. I was then, and am now, fully satisfied that ample justice had been done the accused. The learned judge, realizing the importance of the trial as affecting the safety of the public and the liberty of the accused, approached his task with a full conception of the consequences of the jury's verdict. With great care and accuracy he defined and explained the law applicable to the case, and after doing this, reviewed with admirable thoroughness and ability, the salient features of the evidence. In this review he was not required, under our system of jurisprudence, to refer to every bit of the evidence adduced; his duty was to define the issues involved, making such references to the evidence as should enable the jury to fairly consider these issues.

MACDONALD, C.J.A.

The learned judge read section 247 of the Criminal Code, defining the duty of a person in control of anything which, in the absence of reasonable care, may endanger human life, and expounded the same fully to them. In fact, so complete was his charge on this phase of the case, that no objection was taken thereto either in the notice of appeal or in the argument of

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counsel. This section goes beyond the law as it is in England, and puts the evidence in criminal cases in this country on the same footing as in civil actions for damages.

MARTIN, J.A.: This appeal comes again before us on a limited remission by the Supreme Court of Canada, which, after allowing the appeal to it from our decision that there should be a new trial because one of the jurors was "absolutely disqualified for service as a juror" owing to his undoubted deafness (as declared by section 6 of the Jury Act), proceeded to say (*per* reasons handed down by the Chief Justice in which the other judges concurred (1925), S.C.R. 525 at p. 532):

"There remains the ground of misdirection. This was not discussed at Bar and so far as appears from the material before us was not passed upon in the Court of Appeal. Moreover the charge of the learned judge is not in the record. Having regard to the further fact that the defendant was not represented on the argument of the appeal, we think the only course open to us is to remit the case to the Court of Appeal in order that that Court may pass upon the grounds of appeal based on misdirection."

MARTIN, J.A.

It therefore becomes our duty to pass upon that question, but before doing so I think it is also our duty, as a matter of justice to the accused (in view of a possible application to the Minister of Justice under section 1022 of the Criminal Code) to draw attention to an erroneous statement of fact in a passage in the said reasons (which, I may say, only reached us when vacation was far advanced) respecting the knowledge of the defendant's counsel at the trial of the secret test of the juror's qualification that was made by the learned presiding judge; the passage I refer to is this (p. 530):

"It is thus apparent that the question of the deafness of the juror Keown was canvassed during the trial and that, with the knowledge that the learned trial judge was aware that that question had been raised and must have satisfied himself that Keown's deafness was not so great as to be incompatible with his discharge of the duties of a juror before allowing the trial to proceed with him as a member of the petit jury, counsel representing the defendant, to suit his own purposes, acquiesced in that course being taken."

The statement of fact respecting the knowledge and conduct of the defendant's counsel is that he had "knowledge" that the learned judge

"must have satisfied himself that Keown's deafness was not so great as to

be incompatible with his discharge of the duties of a juror before allowing the trial to proceed with him as a member of the petit jury . . . . ." And upon that vital, as I regard it, assumption, their Lordships went on to hold that, in all the circumstances, the defendant's counsel had, by his acquiescence, waived any objection to the jury and therefore "no substantial wrong or miscarriage of justice has actually occurred" and consequently the objection taken before us to the fundamental error in the constitution of the jury was overruled.

It is most unfortunate that the accused was not represented at Ottawa before their Lordships, because, if so, they would have been correctly informed that when the Crown counsel, during the course of his argument in this Court on the 29th of January last, asserted to us that the accused's counsel at the trial, Mr. *Maclean,* had knowledge of the said trial judge's test, and upon that statement being challenged by Mr. *Taylor,* for the accused, we, to clear up all doubt about so vital a matter, requested Mr. *Maclean* to appear at this Bar and tell us what knowledge he had, if any, of said test, and later Mr. *Maclean* came before us and said that he had no knowledge whatever of any test being held, and his statement was accepted by this Court as the truth. Such being the case, I am constrained by a sense of justice to the accused to say, on the best of authority, *viz.,* the said statement made to us at this Bar, that the assumption by the Supreme Court of Canada that Mr. *Maclean* had knowledge that the learned judge "must have satisfied himself" about the juror's deafness by means of his said test, is based upon incorrect information concerning counsel's said statement to this Court to the exact contrary, and I can only deplore the fact that so important a mistake of fact was presented to their Lordships in the absence of the accused. It is with great reluctance that I am compelled to refer to this matter, but in these most exceptional circumstances I feel that to remain silent would prejudice the accused, who is entitled to justice in every aspect of the case.

MARTIN, J.A.

I pass then to the question of misdirection remitted to us as aforesaid, and after a careful consideration of the learned judge's charge and the exceptions taken thereto, I think it only

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necessary to say that I am unable to discover anything of such substance as would warrant our coming to the conclusion that there had been any misdirection: in this consideration the decision of the Supreme Court in *Rex* v. *McCarthy* (1921), 62 S.C.R. 40 is of importance.

GALLIHER, J.A.

GALLIHER, J.A.: I must say that after reading and weighing the judge's charge and the evidence on which it is based, with the utmost care, I cannot conceive how it could be fairer to the accused. It is a long and apparently carefully weighed and considered charge, and the learned judge met every suggestion of counsel for the accused and dealt with any matters suggested by him.

I find neither non-direction nor misdirection, which, in my opinion, could possibly prejudice the accused or entitle him to a new trial on that ground.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree for the reasons given by my brother MARTIN.

MACDONALD, J.A.

MACDONALD, J.A.: I agree in the result.

Appeal dismissed.

IN RE ESTATE OF HUGH MAGEE, DECEASED.

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IN RE ESTATE OF HUGH MAGEE, DECEASED

Will—Construction—Trust fund for benefit of wife and children—Half of income to wife as hereinafter described—Trustees to pay only what in their discretion is required for maintenance—Accumulation of surplus of one-half of income after payments—Disposition of—Costs.

The testator devised certain real estate and bequeathed all his personal property to his wife. The balance of his estate he devised to his executors upon trust to dispose of same and after payment of debts to invest the proceeds in public stocks, bonds, shares or securities, and to pay the income, "one-half thereof to my wife during her life in manner hereinafter described," and later the will proceeds: "The money hereinbefore directed to be paid to my wife shall be paid by my executors only and when they are satisfied the money is required for her maintenance and support, and I give them absolute discretion as to the times when payments shall be made and these payments may be made direct to her or to others for her support or for necessaries of life supplied or to be supplied to her as my executors shall seem fit." The testator died in March, 1909, and the executors made monthly payments either to or on behalf of the wife such as in their discretion they considered she required and when these proceedings were commenced in June, 1925, there was a surplus of $7,000 on hand from one-half of the income of the estate held by the executors for the wife. On an application by the executors, it was held that the wife was absolutely entitled to one-half of the net income irrespective of whether or not the full amount is required for her maintenance, but that the time of payments shall be in the discretion of the executors.

Held, on appeal, reversing the decision of MORRISON, J., that the widow is entitled only to such payments as the executors in their discretion are satisfied is required for her maintenance and support and after such payments any balance of one-half of the income of the estate held for the widow shall fall into the estate.

Held, further, that the costs of these proceedings for all parties are to be paid out of the estate, the executors being entitled to costs as between party and party.

APPEAL by the children of the late Hugh Magee from the decision of MORRISON, J. of the 30th of March, 1925, on an originating summons for the determination of certain questions arising out of the will of the said Hugh Magee. Under the will a certain property of twelve acres in Point Grey and all his personal estate was left to his wife (his second wife). He appointed his son George, and Sir Charles Hibbert Tupper,

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K.C., his executors and all his remaining property he bequeathed to them in trust, with directions to dispose of same and after paying all debts to invest the balance in such stocks or securities as they saw fit. He then directed that the income be paid "one-half thereof to my wife during her life in manner hereinafter described" and the rest to my children, etc. Later the will proceeded: "The money hereinbefore directed to be paid to my wife shall be paid by my executors only and when they are satisfied the money is required for her maintenance and support and I give them absolute discretion as to the times when payments shall be made and these payments may be made direct to her or to others for her support or to be supplied to her as to my trustees shall seem fit." The will further provided that Sir Charles Hibbert Tupper, being a solicitor, could act as solicitor for the estate, and would be entitled to charge and be paid all professional charges for any business or act done by him in connection with the trust in addition to the charges to which the trustees are entitled. Hugh Magee died on the 9th of March, 1909, and the balance of the estate that came into the hands of the executors and which was invested by them was about $160,000. For the first five years after the testator's death the executors paid the widow's debts amounting to between $3,000 and $4,000 in each year. Then it was arranged that they should pay her $300 per month and this was continued up to the commencement of these proceedings at which time there was a balance of her half of the income (provided she was entitled to it) of $7,000. In answer to question (a) in the originating summons which was: (a) Is the widow entitled absolutely to one-half of the income of said estate irrespective of whether or not the full amount is or has been required for her maintenance and support? It was held by the trial judge that she was entitled to the full amount. The children (who were children of the testator by his first wife) appealed, an order being made that costs should be paid out of the estate. Counsel for the executors submitted on the appeal that he should be given his costs as between solicitor and client. The decision on this point was reserved by the Court.

Statement

The appeal was argued at Vancouver on the 17th of June,

1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

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Savage, for appellant: There is a balance of $7,000 over what has been paid the widow to the credit of one-half of the income of the estate, and the question is whether the widow is entitled to this under the will. We submit that she is only entitled to what the executors consider is sufficient for her maintenance and any balance of half the income of the estate there may be becomes part of the estate.

St. John, for respondent: The wife was in clear terms given half the income and this cannot be curtailed by a subsequent clause in the will: see *Thornhill* v. *Hall* (1834), 2 Cl. & F. 22 at p. 35; *Fetherston* v. *Fetherston* (1835), 3 Cl. & F. 67 at p. 75; *Home* v. *Pillans* (1833), 2 Myl. & K. 15 at p. 26; *Shipperdson* v. *Tower* (1842), 1 Y. & C.C.C. 441 at p. 459. There is no distinction between a direction to pay and a gift: see *Nicholls* v. *Judson* (1742), 2 Atk. 300; *Barlow* v. *Grant* (1684), 1 Vern. 255; *Green* v. *Spicer* (1830), 1 Russ. & M. 395; Halsbury's Laws of England, Vol. 28, p. 778, par. 1419; *In re Sanderson's Trust* (1857), 3 K. & J. 497. In such a case the legacy will not be cut down unless the surplus is expressly dealt with in the will: see *Abbott* v. *Middleton* (1858), 7 H.L. Cas. 68 at p. 82.

Argument

R. H. Tupper, for trustees: The surplus should be left for final disposition until after the death of the widow: see *Re Rispin* (1912), 25 O.L.R. 633 and on appeal 46 S.C.R. 649. The costs should in any case be paid out of the estate and the trustees are entitled to costs as between solicitor and client.

St. John, in reply, referred to *In re Carson Estate* (1921), 2 W.W.R. 273

MACDONALD, C.J.A.: I would allow this appeal. I think, to put it shortly, the meaning of the will is this, that the trustee shall pay to the wife during her life, one-half of the income of the testator's estate, but only if the money were required for her maintenance and support.

MACDONALD, C.J.A.

MARTIN, J.A.: That is my opinion. From the particular

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language of this will it appears to be the intention that the wife should receive a maintenance which should be deemed adequate in the absolute discretion of the executors, and that the balance, after her death, should be distributed to the children as the will directs.

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GALLIHER, J.A.

GALLIHER, J.A.: I am content to rest my judgment and my opinion on the reading of the whole will—that the testator's intention was, having first provided a home for his wife, that the fund should be used in the discretion of the trustees, in exercising their trust, to enable her to maintain that home. Therefore the intention of the testator was one of maintenance out of that particular fund.

MACDONALD, J.A.

MACDONALD, J.A.: The subsequent words of the will, that is, where the words "only" and "when" appear, place a limitation on the wife's life interest in the income. It is to be paid only when required for her maintenance and in the discretion of the trustee.

The will must be read as a whole to determine what the testator had in mind. After the widow's death the life interest falls into the estate.

On the 6th of July, 1925, the following judgment of the Court as to costs was delivered by

MARTIN, J.A.: In the disposition of this appeal we directed that the costs of all parties should be paid out of the estate, whereupon counsel for the executor asked that he should also be given his costs as between solicitor and client, but as an order of that kind had never before been made by this Court since its first sitting in January, 1910, we deemed it advisable to consider the matter before changing our practice, and further consideration of the history of our tariff of costs has confirmed my opinion at the time that it would not be advisable for us to sanction such an innovation, whatever may be done by other Courts in other countries under different rules, tariffs of costs, and circumstances.

Judgment

Formerly, under the old Supreme Court Rules of 1890, it was the practice to make such a distinction in taxation, rule 800 being as follows:

"The fees, costs, and charges relating to all proceedings in any civil matter or action in the Supreme Court, as between party and party or solicitor and client, shall be allowed according to the Schedule in Appendix M hereto; and no other fees, costs, or charges shall be allowed. . . . . ."

But by the statutory Rules of 1906, that state of affairs was altered by rule 983, as follows:

"In all causes and matters the fees allowed shall be those set forth in Appendix M, and no higher fees shall be allowed in any case, except such as are by these Rules provided for."

This rule (which has been carried into the present consolidated rules under the same number) authorized a tariff of costs which was substantially the same as that of 5th April, 1897, under section 83 of the Legal Professions Act, Cap. 25 of 1895, and greatly expanded in number the items in the old tariff of 1890, and added two schedules thereto, and also greatly increased in value many of said former items, the consequence being that the difference between a taxation on the party and party scale and one on the solicitor and client scale became very slight, and the general opinion prevailed in the profession (which I have shared for nearly 20 years) that taxations upon the solicitor and client scale had in effect been abolished. Such being the situation, I do not think we should alter our practice or do anything to still further increase the cost of litigation, which already constitutes, as has often been said from this Bench, a too heavy burden upon the litigating public and one which we have not the power to relieve. The order, therefore, should simply be the usual one, *viz.*, "that the costs of the executor be paid out of the estate after taxation thereof." I have not overlooked the reference to solicitor and client costs in question in rule 1002 (8) of "General Regulations" for taxations, but that is, obviously, simply taken *en bloc* from the corresponding rule in England, and would be applicable there wherein such costs are allowed in certain cases (*Cf. Andrews* v. *Barnes* (1888), 39 Ch. D. 133, and *Giles* v. *Randall* (1915), 1 K.B. 290) under different rules and tariffs from ours.

Judgment

Solicitors for appellants: *Savage & Roberts.*
Solicitor for the widow: *J. B. Noble.*
Solicitors for executors: *Tupper, Bull & Tupper.*

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REX v. VYE.

Criminal law—Charge of attempt to procure miscarriage—Conviction—Appeal—Dismissed—Formal order not taken out—Application to re-open appeal—Conviction largely based on evidence of prosecutrix—Fresh evidence of character of prosecutrix—Criminal Code, Sec. 1021—R.S.C. 1906, Cap. 145, Sec. 11.

The accused was convicted of an attempt to procure a miscarriage by means of instruments. The conviction was based largely on the evidence of the prosecutrix, the trial judge being impressed by the truthfulness of her evidence in the course of which she stated the prisoner had himself insisted upon having and did have connection with her in his office when she was in attendance there for his professional services. An appeal to the Court of Appeal was dismissed but the order dismissing the appeal was not taken out. A month later an application was made on behalf of accused to reopen the appeal it appearing that the prosecutrix again became pregnant six weeks after her miscarriage and gave birth to a male child. Shortly before the birth the doctor in attendance on her and the matron in the nursing home for girls in Vancouver where she was then staying questioned her as to who was the father of the child and she told them, saying he was the only man who had ever had connection with her and upon being further questioned she said the accused had never had connection with her. Counsel asked that the doctor, the matron, and the prosecutrix be examined but the Court made an order that the prosecutrix only be examined. On the hearing after an adjournment it appeared that the girl could not be found and counsel then asked that he be allowed to read the affidavit of the doctor who attended the prosecutrix at the birth of her child.

Held, per MACDONALD, C.J.A. and MACDONALD, J.A., refusing the motion, that had the prosecutrix appeared and denied the statement, the doctor could then be called to contradict her, but to call the doctor without the prosecutrix first having an opportunity to deny the alleged conversation would be in contravention of section 11 of the Canada Evidence Act, and this rule applies even when the prosecutrix cannot be found.

Per MARTIN and MCPHILLIPS, JJ.A.: The Court should allow the motion if they think that on any ground there was a miscarriage of justice, and in this case the Court cannot refuse to take cognizance of the doctor's affidavit, because it fully establishes a miscarriage of justice and the moment that is established it is the duty of the Court to apply the appropriate remedy, the Court not being deprived of its jurisdiction to prevent a miscarriage of justice because a witness removes herself from the jurisdiction.

The Court being equally divided the motion was dismissed.

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MOTION by the accused to reopen the hearing of the appeal for the purpose of taking further evidence. The accused was convicted by LAMPMAN, Co. J. on the 28th of July, 1924, on a charge of using upon a girl (Kathleen Carey) an instrument with intent to procure a miscarriage. The charge was made against one W. L. MacNaughton and J. P. Vye. The girl's story was that MacNaughton had had connection with her a number of times between October, 1923, and April, 1924. In January, 1924, she told MacNaughton she thought she was in the family way and he said he would arrange with Dr. Vye who would attend to her. At the instance of MacNaughton she then saw Vye a number of times, he using certain instruments upon her and in February she had a miscarriage. MacNaughton was acquitted and Vye was convicted and sentenced to one year's imprisonment the trial judge relying very largely on the truthfulness of the evidence of the girl Kathleen Carey, who, in the course of her evidence, stated that on her visits to Dr. Vye the doctor had on a number of occasions had connection with her against her will. The accused appealed and the appeal was dismissed on the 6th of January, 1925, and this application was first submitted to the Court on the 3rd of February, 1925. The evidence sought to be introduced by the accused was that of Dr. L. Macmillan of Vancouver, Miss Matheson, matron of the Presbyterian Nursing Home for Girls in the Municipality of Burnaby, and the said Kathleen Carey. The affidavit in support of the motion was made by one Mark Cosgrove who recited that he was informed by the said Dr. Macmillan that he attended Kathleen Carey professionally at the Salvation Army Hospital in Vancouver and that she gave birth to a male child on the 7th of January, 1925, that prior to her confinement she was in the Presbyterian Nursing Home for Girls in Burnaby where Dr. Macmillan attended her and in the course of examining her she made the statement to himself and the matron (Miss Matheson) that MacNaughton was the father of her child and that he was the only man with whom she had ever had improper relations, that Dr. Macmillan knowing of this prosecution, then asked her if she had ever had sexual intercourse with Dr. Vye and she stated positively that she never had and never would

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have improper relations with Dr. Vye; that Dr. Macmillan further told him that both he and Miss Matheson took notes at the time of what Kathleen Carey said. Mark Cosgrove further stated in his affidavit that he questioned Miss Matheson as to Kathleen Carey's statements but that Miss Matheson refused to inform him what Miss Carey said as she considered they were made in confidence and she would not disclose them unless compelled to do so. An affidavit of the accused was read in which he deposed that he knew nothing of this new evidence until long after the hearing of the appeal.

Statement

The motion was heard at Victoria on the 3rd of February, 1925, by MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Stuart Henderson, for accused: This is an application under section 1021 of the Criminal Code. The learned trial judge relied solely on the truth of the girl's evidence. On the 7th of January last she had a child and the evidence of Dr. Macmillan and the matron of the Girls' Home will shew that she said she never had connection with anyone but MacNaughton. This proves without question that her evidence cannot be relied on at all and in such circumstances the conviction must be quashed: see *Rex* v. *Hullett* (1922), 17 Cr. App. R. 8.

Argument

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The hearing stands over until the March sittings of this Court. The defence may in the meantime put in further affidavits.

3rd March, 1925.

Henderson: There would have been finality in this case if the order had been signed, but the formal order had not been taken out when I first moved on the 3rd of February last. On the question of further evidence being allowed now where witness admits perjury see *Rex* v. *Donovan and Hurley* (1909), 2 Cr. App. R. 1; *Rex* v. *Robinson* (1917), 12 Cr. App. R. 226.

Argument

MACDONALD, C.J.A.

MACDONALD, C.J.A.: An order is made for the girl to be examined before this Court.

2nd April, 1925.

Argument

Henderson: The girl cannot be found. Her father says she

will not be found as long as this case continues. I say she is the Crown's witness. Evidence of the character of the prosecutrix should be heard: see *Rex* v. *Greenberg* (1923), 17 Cr. App. R. 106 at p. 107.

MACDONALD, C.J.A.: The hearing will be continued at the June sittings of the Court.

5th June, 1925.

Henderson: The character of the prosecutrix is brought in issue after judgment is given. That the doctor's evidence by affidavit is admissible see *Rex* v. *Hancox* (1913), 8 Cr. App. R. 176 at p. 179; *Rex* v. *Greenberg* (1923), 17 Cr. App. R. 106 at p. 107. That he may be subjected to cross-examination see *Rex* v. *Hamilton* (1917), 13 Cr. App. R. 32. As to fresh evidence not put in at the trial see *Rex* v. *Hall* (1919), 14 Cr. App. R. 58; *Rex* v. *Hendry* (1909), 25 T.L.R. 635.

Argument

Carter, D.A.-G., for the Crown, referred to *The Queen's Case* (1820), 2 Br. & B. 284 at p. 299.

Cur. adv. vult.

29th June, 1925.

MACDONALD, C.J.A.: The prisoner was convicted in the County Court Judge's Criminal Court of an attempt to procure, by means of instruments, a miscarriage. The learned judge in a carefully considered judgment found the charge proved. He commented favourably on the evidence given by the prosecutrix, and appears to have been impressed by the consistency, frankness and truthfulness of her evidence.

MACDONALD, C.J.A.

An appeal to this Court was dismissed, MCPHILLIPS, J.A. dissenting. Owing to an unfortunate affliction in the Deputy Attorney-General's family the order dismissing the appeal was not taken out, and several months thereafter the prisoner's counsel applied to the Court to reopen the appeal on the ground that the prosecutrix had made a statement since the trial inconsistent with one made by her at the trial. In the course of her evidence she stated that the prisoner had himself insisted upon having and had connection with her in his office. This evidence, which I think irrelevant, was nevertheless not objected to, and was cross-examined upon.

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It is necessary to review some of the facts since the trial. It appears that about six weeks after the prisoner had performed the illegal operation the prosecutrix again became pregnant by the original seducer MacNaughton. At the time of the birth of the child in a hospital in Vancouver, Dr. Macmillan attended her professionally. He questioned her as to the paternity of the expected child, and she told him that MacNaughton was the father. He asked her if she were sure of that and she is alleged to have said in answer that she had never had connection with any other man in her life.

On the strength of this affidavit the Court made an order giving the prisoner's counsel leave to bring the prosecutrix into Court to be examined upon the premises. No leave was given to read the affidavit of Dr. Macmillan in the appeal.

After several adjournments for the purpose of obtaining the attendance of the prosecutrix it was finally agreed by counsel that she could not be found. Thereupon the prisoner's counsel asked to be permitted to use in the appeal said affidavit of Dr. Macmillan. This was refused on an equal division of the Court,

MACDONALD, C.J.A.

and the appeal again dismissed. My reasons for refusing to receive the affidavit of Dr. Macmillan are as follows:

The issue was, did the prosecutrix make the alleged statement to Dr. Macmillan? Had she appeared and denied it, Dr. Macmillan could then have been called to contradict her. The circumstances under which such a question may be asked of a witness were well settled by the rules of evidence, and the rule is now embodied in the Evidence Act, Sec. 11 of Cap. 145, R.S.C. 1906, as follows:

"11. If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement."

There can, I think, be no question that had the prosecutrix been asked at the trial whether she had made such and such a statement to a third person, for instance to Dr. Macmillan, the circumstances being stated, and had she answered in the negative, she might have been contradicted by that person; but not

otherwise. But it was argued that because the statement was made since the trial, and because the witness cannot be found, and there being consequently no opportunity to cross-examine her upon the matter in compliance with the said section 11, that in some way, for which I can find no authority, the evidence of Dr. Macmillan may be properly received, and, if believed, given effect to by the Court—thus disregarding one of the most salutary rules of evidence, in fact now a statutory rule of evidence. But for this rule the witness could not be contradicted at all by a witness as to previous statements. The rule enables the witness to be contradicted only in the circumstances set out there.

Moreover, apart from the rule altogether, it is exceedingly doubtful whether the cause of justice would be advanced by permitting convictions to be opened up on evidence of the sort tendered. It is altogether likely that a satisfactory explanation could be made by the prosecutrix even if she could not deny having used the words attributed to her. Her mind, no doubt, was directed to the paternity of the child and was not directed to the incident which occurred in the prisoner's office. I would require clear and unequivocal evidence impeaching her evidence given at the trial before taking the grave responsibility of reversing the trial judge. We are invited to find on evidence of the character tendered that the young girl, whose testimony made such a favourable impression on the mind of the trial judge, committed perjury. That is asking too much.

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MARTIN, J.A.: In my opinion the application, made on behalf of the appellant, should succeed, and the evidence of Dr. Macmillan be accepted, and as a consequence of that acceptance, I shall have a few words to say later.

This is a very unusual case in more than one respect, and as it is the first application we have had, under the change in the Criminal Code made in 1923, for the purpose of receiving fresh evidence after the trial, it is one which has given me much anxiety, I might say. In regard to the matter of receiving such evidence, under section 1021 as amended, the Court is given the same power to do so as "on appeals in civil matters, and [to] issue any warrants necessary for enforcing the orders or sentences" in that behalf.

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The accused was convicted on the 28th of July, 1924, by His Honour the County Judge (LAMPMAN) of the County of Victoria, and subsequently appealed to this Court, the conviction being that the accused had used unlawfully an instrument on Kathleen Carey with the intent of procuring a miscarriage. A strange thing later happened, *viz.*, that after the appeal had been heard by this Court, Kathleen Carey, the principal witness for the Crown, made a statement in the hospital at Vancouver, in the month of December, which, if believed, would very materially shake her credibility upon one of the vital points of the case. The learned trial judge, in his reasons for judgment, laid great stress upon the credit he placed upon the evidence of this girl; in three, if not four, places in his judgment he accentuates that, and begins by saying that the Crown's case rested chiefly upon her evidence, and pointed out that she herself was an accomplice in the action and therefore *particeps criminis* with the accused; and went on to say that the evidence of an accomplice must be scrutinized very carefully. He refers during the course of his judgment to the very good way in which she had stood repeated cross-examinations and as well as she did, describing it as a "most surprising fact," and he could not see any real definite contradiction in her statements, or "any place in which she told two different stories"; and he again referred later on to the very good manner in which she had given her evidence, and that she had stuck to the same story practically throughout; and finally concluded by saying that while he thought it would have been better if there had been some corroboration of her story, that nevertheless, "considering her story and the way in which it has stood the cross-examination and the manner in which she gave it" he was so favourably impressed with her credibility, and unfavourably with the accused's, that he "felt it is my duty to convict Vye."

In these circumstances, when the appeal came before us, and paying great regard to His Honour's finding as to credibility, I did not feel justified in overturning his conclusion upon the facts; and the majority of the Court took the same view, with the exception of my brother MCPHILLIPS, who was not satisfied with the complainant's evidence in the very peculiar circumstances under which the crime had been committed.

We must also remember, when we come to approach the very grave contradiction which is now put forward for our consideration, that it arises out of a charge laid by counsel for the Crown against the accused which is tantamount to rape. She deposed that during the course of her two weeks' attendance upon him for the purpose of procuring a miscarriage, and while in the very act of preparing for the performance of the usual operations for that purpose, he practically forced her to submit to carnal connection, seizing her by her hands, under circumstances which I won't detail, when he found her in a state of partial undress, and so forced himself upon her during the very time when he was otherwise attending her as aforesaid. There was very great doubt in my mind as to whether occurrences of that kind should have been brought in evidence before the learned judge, and counsel for the appellant accused pressed upon us very strongly that the evidence should not be admitted, whilst counsel for the Crown pressed upon us correspondingly strongly that it should have been admitted as part of the *res gestæ* of the offence, by, as she expressed it, the accused forcing her to pay him through her body, he not being satisfied with the payment in cash to him by the man who had brought her to that condition. Such events created a very unusual circumstance, and I expressed the opinion at the time, and it must have been the opinion of the other members of the Court, that said evidence as to these two acts of rape, if her story was to be believed, was so vitally interwoven with the major occurrences that it could not be disassociated therefrom, and therefore the application of the appellant's counsel that that evidence should not have been in the appeal book and should be rejected was overruled, though if that motion had been given effect to there must have been a new trial; but that evidence was so permitted to remain in the appeal book, and upon that whole book judgment was given by us refusing the appeal.

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Then occurred the said remarkable fact that after the appeal had been argued, and on the 2nd of December, 1924, this girl, at a time when she was in the Presbyterian Girls' Home in the Municipality of Burnaby, made an important statement to Dr. Macmillan, when, in pursuance of the rules, apparently, as the

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doctor testifies, it became necessary for the doctor in attendance to ask her how she came in the family way, which she was in when she came to the said Home, and the doctor deposes that on the said 2nd of December he had examined her and asked her certain questions for the purpose of ascertaining the paternity of the child, etc., and his affidavit, par. 4, proceeds as follows:

"During the course of the said examination I asked the said Kathleen Carey if she was married and if there was any likelihood of her marrying the father of the expected child and she answered 'No.' She then informed me that the father of the expected child was one W. L. McNaughton who was already married and in answer to a question as to whether she was absolutely sure that the said McNaughton was the father of the expected child she answered 'Yes,' she had never had sexual intercourse with any other man in her life."

And subsequently on the 7th of January the child was born. Now, of course, if that statement of hers was true it is an absolute contradiction of the most marked kind of the terrible accusation—which it is, because rape is still a capital offence—that she brought against Dr. Vye of, in effect, committing rape on the two separate occasions already referred to. If that woman having made that accusation at the trial had been then contradicted, as she could and would have been contradicted had it been made before the trial, her credibility would have been most seriously shaken, because it would have the same effect as if she had brought a false accusation. If she said and admitted before witnesses that she had brought a false accusation, as did happen once in the Court of Appeal in England in a case I shall refer to, then the conviction could not stand.

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Now such being the unusual circumstances, this Court felt that the proper course to take was to accede to that part of the motion made by the appellant's counsel praying that the girl should be brought before this Court to testify and explain, if possible, the said statements that she had made to the doctor; and it is to be here noted that the Court felt justified in taking that step upon the evidence of the doctor; and it is also to be noted that his evidence was then, and still is before us to that very substantial extent at least; and it is further to be noted that counsel for the Crown, although invited on two occasions as to whether or not he wished to cross-examine the doctor on

his affidavit, very properly told us he did not wish to do so and was prepared to accept it as being true. We have therefore the evidence of the doctor already actually before us in that unusually satisfying way, and upon which we have taken action as aforesaid. The Court then made the said order (on 3rd March last) that the witness Kathleen Carey should appear before us, as I have stated, but she did not do so and the motion was adjourned to enable her to do so on two separate occasions, but she still has not appeared before us, although the proper warrants in compliance with our said order have been issued requiring her attendance on the 31st of March last, and there is an affidavit filed by the sheriff shewing that he has been unable to find her, and the inference from the said affidavit and what both counsel tell us, is that she is now beyond the jurisdiction, and so it has been impossible so far to compel her attendance as this Court directed.

The original motion of the appellant of the 31st of January, 1925, was fourfold: (1) To take the evidence of Dr. Lachlan Macmillan, (2) of Kathleen Carey, (3) of the matron of said Home, Miss Matheson, and (4) for a new trial, or for such order or relief as to the Court might seem just, *i.e.*, under section 1014.

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Later on the "whole application" (to quote our said order) came before us, and Mr. *Henderson* renewed his application for a new trial or acquittal under said section 1014, when it became apparent that the girl was not going to obey the warrant of the Court, or that it was impossible to serve her, and was given leave to renew it again on the 2nd of April, when the hearing was adjourned to the next sitting at Victoria, and he was given leave to make such other motion as he deemed advisable. So the position of the appellant's counsel properly is that it was then and is now open to him to make his whole application as there set forth.

What he now asks us to do is this: that seeing that the witness has not obeyed the warrant of this Court to come here and contradict or explain Dr. Macmillan's true (so far) and vital testimony, or that it has become impossible to serve the warrant upon her, we should declare that a miscarriage of justice

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has occurred, and that the appellant is now entitled either to a new trial or to the quashing of the conviction with consequent acquittal. Counsel takes this ground also, that the Court cannot close its eyes to the most unusual state of affairs before it on the uncontradicted evidence of the doctor, that is to say, a contradiction of the most grave kind has unquestionably occurred, and that such being the case, the Court must act upon that already admitted evidence—which, as it stands now, is admittedly true —of the said doctor, and which, with the subsequent occurrences and proceedings before us, clearly establishes a miscarriage of justice, quite apart from and in addition to the foundation it laid for the allowance of the original motion in part as aforesaid. In my opinion, I think that a grave contradiction has, for the time being at least, been fully proved, with the result of the destruction of the credibility of the Crown's principal witness, and so the fact of a miscarriage of justice has been established by the accused.

It must not be overlooked that our section 1014 as amended in 1923 is different from the old one, and there is a clause in

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it (c) which is not in the old Act, and which says the Court shall allow the appeal "on any ground that there was a miscarriage of justice," and may quash the conviction, or (b) direct a new trial and "make such other order as justice requires," which two last provisions are not in the corresponding English Act of 1907, Cap. 23.

It seems to me to be unthinkable that justice should be frustrated and the powers and jurisdiction of this Court rendered unavailable simply by the fact that a witness has gone out of the jurisdiction. It surely cannot be that because a witness removes himself out of the jurisdiction the Court is thereby deprived of its jurisdiction to prevent a miscarriage of justice, any more than would be the case if, *e.g.*, the witness had died before our warrant was served upon her—would any one suggest that her death would exclude the doctor's evidence? Therefore, I think, with great respect to contrary opinions, and fully comprehending the various grounds on which the motion is based, that this Court cannot refuse to take further cognizance of this affidavit, upon which it has already acted, because it

fully establishes a miscarriage of justice, in my opinion, and the moment that is established then it is the duty of the Court to apply the appropriate remedy.

The meaning of the expression "miscarriage of justice" in clause (c) has not so far come before this Court, but there are numerous instances of it in England, and some will be found in Archbold's Criminal Pleading, 26th Ed., 338; I have examined all of them there cited, and their variety is very striking. But the broad principle upon which the Court acts in considering a miscarriage of justice must never be lost sight of, because it was laid down in the first case under the corresponding English Act in 1907, from which ours is taken, before the Lord Chief Justice and Channell and Lawrence, JJ., in *Rex* v. *Lee* (1908), 24 T.L.R. 627, and that principle has never been departed from to this day, and it is:

"That the Court shall allow the appeal if they think that on any ground there was a miscarriage of justice."

And the Lord Chief Justice makes this observation:

"If there is any real fear that there has been a miscarriage of justice, the verdict ought to be set aside."

In the case of *Rex* v. *Hendry* (1909), 25 L.T.R. 635, the same Court of Appeal in 1909, with one of the same judges, repeated practically the same thing. That was in regard to a jury, but the principle is this:

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"It seemed to the Court that if the whole case had been before the jury, in all probability the appellant would have been acquitted. As there was reason to suppose that there had been a miscarriage of justice, the conviction must be queshed."

Now it seems to me impossible to say that if the whole of this case had been before the jury the appellant might not "in all probability" have been acquitted, and I think it proper to say that if I had been originally dealing with it, with the contradicting unexplained statement which we have before us now, I would not have formed the opinion adverse to the accused that I expressed before upon our first hearing of it. There is nothing new in the course that I think should now be adopted, because we have several precedents for it, one in the case of *Rex* v. *Hullett* (1922), 17 Cr. App. R. 8. And there a remarkable thing occurred in the very same kind of proceeding as here, and counsel and the Court adopted the same course: there after

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the conviction the accusing girl went to the police and told them that she had given false evidence, and the Court wished to hear her, but the defence did not wish to call her, because she had been a witness for the prosecution—as in this case—but as the report says "the Court wished to hear her" (as we do), and she being available was sworn, and the Court after hearing her evidence, and finding she had given false evidence, and was "an unsatisfactory witness," quashed the conviction. That is based upon exactly the same principle as is invoked in this case, the only difference being that the girl herein instead of coming forward, or being brought forward, has left the jurisdiction. But could it possibly be contended that in *Hullett's* case the evidence of the police constables to whom she made that confession of falsity would have been rejected (and the conviction consequently sustained) if she had not gone before the Court of Appeal and admitted in person that she had given false evidence? And would her silence, if she refused to speak, prevent the Court from being otherwise satisfied of a miscarriage of justice? I think these questions carry their own answers. I refer also to the later decisions of the same Court upon the application of the same principle in *Rex* v. *Greenberg* (1923), *ib.* 106, and *Rex* v. *Berry* (1924), 18 Cr. App. R. 65; and applying them here I think it is proper and necessary for us to act upon the evidence of the doctor, who it is admitted is telling the truth. If the doctor and the matron were in Court at this moment, as they might well be, and they had said that this woman had told them that this accusation she made against Vye as regards the rapes upon her was not true, and that she had given false evidence, what would this Court have done? One thing only, surely. Then let us imagine Dr. Macmillan is here—and is he not in substance? because here is his affidavit, admitted to be true, and his attendance in person for cross-examination before us or our officers thereupon has been waived because of its verity.

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My opinion therefore is this, that his evidence should be admitted and acted upon just as though he were in person before us; and as to what should then be done in the very unusual circumstances of this case, I think that if we did not,

most fortunately, have that power to order a new trial, which the Court of Appeal has not got in England, I should be forced to the opinion that the only thing to be done was to quash this conviction and direct an acquittal under 3 (a); but as we have that power, and it would be well in this case to proceed with the greatest caution, I think that the most appropriate order to make is that there should be a new trial, for that will allow a final opportunity for this woman to be brought forward to testify against this man; but if she does not appear to testify against him and give that explanation which we directed in our order of the 3rd of March she should give in a vital particular, then in default thereof the learned trial judge would, of course, have to take the only course open upon the evidence, and as counsel for the Crown has admitted that without her evidence this conviction cannot be supported, I am at liberty in view of his own expressions, I think (but without the slightest attempt to suggest the adoption of any course that would not at any time seem proper to the learned judge), to assume that the learned judge would make that decision which he has already adumbrated in his said reasons for judgment hereinbefore cited that he would have made had he not been satisfied with the complainant's credibility.

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Finally, all I wish to say in addition in regard to miscarriage of justice is this: can it be said that there is any greater miscarriage of justice than that a man should be convicted and imprisoned on false evidence?

McPHILLIPS, J.A.: In this case I came to the conclusion that the evidence of Kathleen Carey, the chief witness for the Crown, was not credible evidence. I arrived at that conclusion by a careful analysis of the evidence, and the improbability of the truth of the story told. The story was so extraordinary that I felt that I was entitled to act just as the trial judge, with great respect, should have acted on hearing this story.

MCPHILLIPS, J.A.

This case is serious from the point of view that the accused is a medical doctor, and we all know the recognized secrecy and confidence as between the patient and the medical adviser, and doctors are placed in very dangerous positions when designing

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and unscrupulous people are met with, and are in danger of slanderous statements being made which, if believed in, will result in their names being stricken off the medical register. Kathleen Carey went to the office of the accused and his diagnosis was that she might be suffering from venereal disease. He used instruments which the other medical men called admit would have been proper enough if the diagnosis was correct. If, however, the other medical men say, it was to bring about an abortion, they would not be the instruments which the doctor would likely use—they were not the proper instruments for such purpose. That the accused, a medical man, under these circumstances, would have sexual connection with her, when his diagnosis was that she was likely suffering from a venereal disease, is so utterely improbable that at once grave suspicion is cast upon her testimony, and it is to be noted that other medical testimony called corroborates the testimony of the accused on this point, *i.e.*, the diagnosis made.

In all cases the trial judge always has this query to put to himself after hearing the witness: "Can I believe the witness?" In my opinion the learned trial judge was not entitled to believe this witness (Kathleen Carey, the principal witness for the Crown and an accomplice in crime, if her story be true). I am satisfied that she was not entitled to be believed, therefore upon the appeal I was of the opinion that the conviction should be quashed.

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This motion for the admission of new evidence arising after the trial then came on, and was heard, the order of this Court upon the appeal, affirming the conviction, not being taken out and entered (*Kimpton* v. *McKay* (1895), 4 B.C. 196).

This evidence upon affidavit, which has been referred to in detail by my brother MARTIN, was brought before us, and wholly confirms me in my view that the witness (Kathleen Carey) was not a credible witness. It is patent that she gave false testimony in the Court below. Now it is asserted that under the rules of evidence, this evidence is not admissible, on the ground that it is evidence that could only be admitted where the witness's credibility is challenged at the trial, and the time, place and circumstances are recited, when it is intended to contradict.

The Courts have on many occasions heard hearsay evidence—notably hearsay evidence is admitted contrary even to the general rule, upon the principle that were it not, no possible proof of the matters could be given, which is the present case. Here there was impossibility at the trial to examine on the point; the statement made by the witness (Kathleen Carey) was made after the trial and she would now appear to have fled the country. In my opinion, the objection taken is without force, the rule is inapplicable to the present case, the evidence is admissible and capable of being adduced by affidavit. The affidavit is produced and we can receive affidavit evidence. Dr. Macmillan has sworn that the witness (Kathleen Carey) made the statement referred to by my brother MARTIN. The doctor is subject, under the rules, to cross-examination, but the Crown, I think rightly, owing to the fact that Dr. Macmillan is a member of the medical profession, and of high reputation and standing, do not wish to cross-examine. The result then must perforce be that this statement must be taken to have been made.

I may say then that I am in complete agreement upon this motion with the reasons for judgment given by my brother MARTIN. I, of course, am still of the view that the conviction should be quashed, and if this motion does not prevail, that, of course, will still be my judgment. I think, though, that it would accomplish the ends of justice if a new trial be had; with a new trial no harm can ensue, and I understand from the learned counsel for the Crown that, whilst not willing to consent, yet the Crown would not object to a new trial.

MCPHILLIPS, J.A.

As I view the amendments to the Criminal Code (1923) in giving the further extensive powers that this Court of Appeal now has in criminal cases, I think we are entitled upon the grounds of natural justice to give heed to this evidence arising subsequent to the trial. The whole policy is to remove from the Minister of Justice and the Executive Council of Canada intricate matters of criminal law and even points that would go to shew that the conviction offends against natural justice and that miscarriage generally has occurred. It is for the Court to direct a new trial in proper cases and not leave it for a petition of mercy to the Crown (and see section 1052, Criminal Code, 1923).

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Now in this particular case, with great respect to all contrary opinion, I think that it would certainly be a miscarriage of justice—and against natural justice—that the conviction should stand, when the learned judge in the Court below based his judgment wholly and solely upon the evidence of this young woman (Kathleen Carey) and counsel for the Crown here frankly admitted at this Bar, on the question being put: Would it be possible to sustain this conviction without her evidence? That it would be impossible.

Now, it seems a most terrible thing that a man should be destroyed in his professional position, lose his livelihood, and there should be nothing to prevent this man going to gaol upon testimony which seemed to me in the first instance wholly incredible, and now I am all the more firm in that view.

MACDONALD, J.A.

MACDONALD, J.A.: On the hearing of this appeal from the judgment of His Honour Judge LAMPMAN, convicting the accused, after careful consideration this Court, my brother MCPHILLIPS dissenting, dismissed the appeal and affirmed the conviction. We are now asked to reopen the matter, set aside the conviction, and order a new trial on the ground that new evidence is available. The nature of the new evidence offered was outlined by the Chief Justice, and I need not repeat it. It is clear that the appellant must first shew that the alleged new evidence is both relevant and admissible. It is not possible to consider it at all unless it is admissible evidence. The utmost that can be said is that if the surrounding circumstances were different; if the complainant had been asked at the trial whether she made (giving time, place and circumstances) the statement in question to Dr. Macmillan, and she denied it, then Macmillan's evidence in rebuttal would be material. The usual foundation would have to be laid. That foundation was not laid. It is quite true that it was impossible to lay that foundation because the alleged statement was made to Dr. Macmillan after the trial. That circumstance, however, does not make this affidavit admissible evidence. It may be unfortunate in one aspect: it would be unfortunate if a miscarriage of justice occurred.

Under the somewhat exceptional circumstances, I would do my utmost to reach a conclusion favourable to its admission if I thought justice required it. After all, this evidence is not on the main issue; it is a collateral matter, having nothing whatever to do with the charge on which the appellant was found guilty. I doubt if the evidence which it is now sought to impugn should have been admitted at all. However, it is not necessary to decide that point.

I would refuse the application.

The Court being equally divided, the motion was dismissed.

ADAMS v. BURNS.

Master and servant—Monthly hiring—Absence through illness—Effect of—Notice of termination—Reasonable time.

The plaintiff, a farm labourer, had been in the employ of the defendant for two years on a monthly hiring at $65 a month when on the 19th of November, 1924, he was taken to a hospital with an attack of lumbago where he stayed ten days. He then went to a hotel and from there he went weekly to the farm for clothes but did not return to work. On the 17th of December he received a notice from the defendant dated the 16th of December, dismissing him. He was paid his wages up to the time he was taken to the hospital. In an action to recover wages for one month after the 19th of December, 1924, it was held by the trial judge that he was entitled to full wages up to and including two weeks after he had received notice of dismissal.

Held, on appeal, affirming the decision of GRANT, Co. J., on an equal division of the Court, that in the circumstances two weeks is a reasonable notice.

APPEAL by defendant from the decision of GRANT, Co. J. of the 20th of February, 1925, in an action for wages in respect

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Statement

of employment as a farm labourer at $65 a month from the 19th of November, 1924, to the 19th of January, 1925. On the 17th of December, 1924, the defendant dismissed the plaintiff without notice and the plaintiff claimed a further month's notice. The plaintiff commenced working with the defendant on the 15th of March, 1922, and on the 19th of November, 1924, he became ill with lumbago and went to the hospital, where he stayed for 10 days. When he came out of the hospital on the 29th of November he went to the Canada Hotel and on the 4th of December went to see Mr. Burns and on the same day he went to the farm. He continued to make periodical visits to the farm at week ends for clothes, but did no further actual work and on the 17th of December he received a letter from the defendant dismissing him on that date. The trial judge allowed from the 19th of November to the 17th of December at $65 per month and for two weeks after the 17th of December, in all $91.

The appeal was argued at Victoria on the 11th of June, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Mayers, for appellant: The plaintiff was hired at $65 a month. He went to the hospital for lumbago on the 19th of November, 1924, and was paid up to that date. He came out on the 29th of November, but did not go back to work and had no excuse for not going. On the question of terminating a monthly hiring by notice see *Johns* v. *Winnipeg Electric Ry. Co.* (1925), 2 W.W.R. 282; *Saunders* v. *Whittle* (1876), 33 L.T. 816; *Gregson* v. *Watson* (1876), 34 L.T. 143.

Argument

Clearihue, for respondent: Formal notice was not given until the 16th of December and notwithstanding his illness he was in defendant's employ up to that date. For temporary illness an employer must pay wages. On the question of absence from work or misconduct being the excuse for dismissal see *Lucking* v. *Thomas* (1919), 3 W.W.R. 585; *Lilley* v. *Elwin* (1848), 11 Q.B. 742. They were constructing a root-house when he became ill. It is only a question of reasonable notice, and custom may shew what is reasonable: see Halsbury's Laws of

England, Vol. 20, p. 97; *Re Robert and Weir* (1908), 8 W.L.R. 69; *Montague* v. *G.T.P.* (1915), 8 W.W.R. 528.

Mayers, replied.

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MACDONALD, C.J.A.: I think the appeal should be dismissed. The plaintiff was really in the employ of the defendant until the 16th of December. His wages prior to that were paid up to 15th of November. He was dismissed without notice. I think that two weeks would be reasonable notice. If there were any complaint to be made it would be that that was not long enough considering that this man was a farm foreman, occupying a responsible position, a more responsible position than that of a menial servant. But the learned judge allowed two weeks, and I think he was right in doing that. As far as the freezing of the water pipes and the roots in the pit are concerned, I think that that is not a good ground for refusing relief in this case. One looks to see what this man says himself about the pit:

"What did Mr. Burns tell you to do this year? Cover it with straw.

"You did not cover it with straw? We did not have it finished when I left. We were using it between the time. When we had time we would haul straw for the pit."

That is his excuse, and it seems to me a reasonable one. He went away in November when there was no frost; it was rainy weather, and the pit was not finished. It was his intention to haul the straw before the frost set in, but owing to his illness that was not done.

With regard to the water pipes, we have this evidence of Mr. Burns, the defendant: "I was out there," that is, speaking of an interview with plaintiff at the farm itself. "He was out there, and I arrived just at 12 o'clock and he was eating his lunch when I arrived and I asked him right before Tom Butler —we had only one man then and the Hindu at that time, that is all the regular men—I asked him if he told Tom or shewed Tom how to turn off the water before he left." This was on the 15th of December, after the plaintiff returned from the hospital. There is no evidence that he did not tell Tom on the 15th of December. There was no reason why Mr. Burns himself, if he thought it was necessary to turn the water off, should not have

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told Tom how to do it. The matter was not serious at that time. Why should we think it so now?

I think the appeal should be dismissed.

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MARTIN, J.A.: I look at this matter somewhat differently from the learned Chief Justice. Really, Mr. *Mayers* does not contest—he does not wish us to go behind—what has been done. That is to say, the payment of this amount of $65 up to the time the man left is not contested, but only in reference to the two weeks' notice. Now, in view of what is before us in the evidence, I think the employer had grounds here to complain very seriously of the plaintiff's conduct. I base my decision on the case of *Lilley* v. *Elwin* (1848), 11 Q.B. 742, which is a leading decision on that point. There was a refusal to carry out orders and this disentitles him to damages. We have the uncontradicted facts in regard to this—I am now addressing myself to the root-house and the roots put in. I agree with what Mr. *Clearihue* says that the matter of the water pipes does not establish sufficient negligence, but I do think in regard to the root-house that there was a direct breach of duty in a very specific case. There were some 40 or 50 tons of roots in that house, worth from $300 to $400, and his employer had told him to be careful to cover it up from frost. At the time he left all the 50 tons of roots were in and yet despite that specific warning he failed to complete the root-house and put it in a frost-proof state. That should have been done. Frost in this country is liable to come at any time after the early part of November, as we have in this town found. I find that this specific failure to carry out specific instructions resulted in loss to the employer of over $100, for which no excuse is given. I therefore think that the finding of the learned judge that there was no negligence is not based upon the evidence, and consequently the learned judge erred and that the employer was justified in dismissing for specific breach of duty resulting in loss.

MARTIN, J.A.

I would disallow the damages.

GALLIHER, J.A.: I would disallow the damages. On the other point I would agree with the learned Chief Justice. I would pay little attention to the shutting off of the water.

GALLIHER, J.A.

That could easily be found out by anybody, and moreover it was not to be assumed that for some time to come there would be any necessity for shutting off the water, but I do take this position: I think with regard to the roots and the root-house the plaintiff might have more correctly stated the case by saying that the roots were all in the root-house, and it was all completed except that he had not closed the entrance with straw. Now, that of course is one of the things necessary to keep it frost-proof, and one of the things that do not take very much time to do, or very much material, and when they were using and removing some of the roots and vegetables from the pit, it was an easy matter to pull out the straw and to pack it in again. The instructions to him were definite that he was to fill up with straw, and he neglected to do so and the frost came and loss was sustained. That is the reason, I think, there is justification in finding there was disobedience to orders, with plenty of time to have complied with them, and that has resulted in loss to the employer, and for that I do not think the plaintiff should have damages.

GALLIHER, J.A.

MACDONALD, J.A.: This is a contract for service for an indefinite period terminable by either party on reasonable notice. The plaintiff is entitled to reasonable notice. I have formed the opinion that the learned trial judge was justified in the position he took. The plaintiff was entitled to wages in lieu of notice, and I think the amount given is reasonable.

MACDONALD, J.A.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *McKay, Orr, Vaughan & Scott.*
Solicitors for respondent: *Mackenzie & Boyd.*

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ROBERT PORTER & SONS, LTD. v. FOSTER

ROBERT PORTER & SONS, LIMITED v. FOSTER, ARMSTRONG AND MILLER

Land—Agreement for sale—Two purchasers—Death of one—Covenant to pay—Whether joint or joint and several.

K. sold certain land to F. and M. under an agreement for sale for $10,000. An initial payment of $3,000 was made but with the exception of small payments of principal and interest no further payments were made. Shortly after the agreement was entered into K. assigned her interest in the sale to the plaintiff. Later M. died and A. and M. were appointed his executors. The agreement contained a clause that "the purchasers covenant with the vendor that they will pay to the said vendor the said sum with interest," etc., and a further clause that "the terms 'vendors' and 'purchasers' in this agreement shall include the executors, administrators and assigns of each of them." In an action for specific performance it was held that the covenant to pay was joint and several and M.'s executors were liable for payment of the balance of the purchase price after his decease.

Held, on appeal, reversing the decision of MACDONALD, J. (MARTIN, J.A. dissenting), that the first clause above is not the separate covenant of each but rather a joint obligation and the second clause does not change the character of the obligation as determined by the first.

White v. *Tyndall* (1888), 13 App. Cas. 263 followed.

[Affirmed by Supreme Court of Canada.]

APPEAL by defendants Armstrong and Miller from the decision of MACDONALD, J. of the 7th of February, 1925, in an action under an agreement for sale of land. On the 26th of March, 1913, Mary Agnes Kelly sold lot 2, section 68, Victoria District, under agreement for sale to W. W. Foster and William Miller (now deceased) for $10,000. Three thousand dollars was paid in cash, $1,500 to be paid on the 14th of March, 1924, and the vendor took a mortgage on the property for the balance of $5,500. Shortly after Mrs. Kelly assigned all her interest in the sale to the plaintiff. On the death of William Miller, the defendants, J. H. Armstrong and W. A. Miller were appointed his executors. Beyond the cash payment only small payments were made on principal and interest and on commencement of action there was due on the sale $7,173.30. The plaintiff seeks to have a vendor's lien declared in its favour on

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the property for the amount due and specific performance of the agreement for sale as well as a judgment against both defendants for any deficiency on the purchase price that may remain after sale has taken place on enforcement of lien. The defendant Foster, consented to judgment in the terms of the statement of claim reserving any rights he may have against his co-defendant for contribution. The plaintiff claims the defendants were jointly and severally bound on their covenant for payment which applied to the representatives of William Miller as the purchase was made for the purpose of making a profit on resale which constituted a partnership and created a joint and several liability and the covenant for payment in the agreement for sale was both joint and several. Further, the agreement recited that the terms "vendors" and "purchasers" shall include executors, administrators and assigns of each of them. Judgment was given for the plaintiff.

Statement

The appeal was argued at Victoria on the 19th and 22nd of June, 1925, before MARTIN, GALLIHER and MACDONALD, JJ.A.

Harold B. Robertson, K.C., for appellants: The contention that the covenant for payment of the purchase price in the agreement for sale was both joint and several and liability attached accordingly, and that further, a clause of the agreement recited that the terms "vendors" and "purchasers" shall include executors, administrators and assigns was acceded to by the trial judge. On the question of joint and several liability see *White* v. *Tyndall* (1888), 13 App. Cas. 263; *Sumner* v. *Powell* (1816), 2 Mer. 30; *Levy* v. *Sale and another* (1877), 37 L.T. 709; *Lindley* v. *Vassar* (1918), 25 B.C. 219; *Burns* v. *Bryan or Martin* (1887), 12 App. Cas. 184 at p. 187.

Argument

Maclean, K.C., for respondent: The rule is that a covenant will be construed to be joint and several according to the intent of the parties appearing on the deed: see *Sorsbie* v. *Park* (1843), 12 M. & W. 146 at p. 157; *Bradburne* v. *Botfield* (1845), 14 M. & W. 559 at p. 572; *Keightley* v. *Watson* (1849), 3 Ex. 716 at p. 720; *Palmer* v. *Mallet* (1887), 36 Ch. D. 411 at p. 421; *Tippins* v. *Coates* (1853), 18 Beav. 401 at p. 403. That the judgment of the trial judge should not be overruled see *Pugh* v. *Golden Valley Railway Co.* (1880), 49

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L.J., Ch. 721 at p. 723. This transaction was a partnership to buy land for resale at a profit. This constitutes a joint and several liability: see Halsbury's Laws of England, Vol. 22, p. 6, pars. 8 and 9; *Wells* v. *Petty* (1897), 5 B.C. 353; 1 M.M.C. 147; *Mollwo, March & Co.* v. *The Court of Wards* (1872), L.R. 4 P.C. 419 at p. 435; *International Harvester Co.* v. *Jacobsen* (1915), 24 D.L.R. 632.

Robertson, in reply, referred to *Clarke* v. *Bickers* (1845), 14 Sim. 639 at p. 642; *London Financial Association* v. *Kelk* (1884), 26 Ch. D. 107 at p. 143; *Sproule* v. *McConnell* (1925), 1 W.W.R. 609; *Donkin* v. *Disher* (1913), 49 S.C.R. 60.

Cur. adv. vult.

6th October, 1925.

MARTIN, J.A.

MARTIN, J.A.: It is desirable to determine at the outset, I think, what was the true relationship of these parties to one another, and after a careful consideration of the documents and correspondence, I can only reach the conclusion that they were partners in this particular land speculation which they entered into with the expectation of making a speedy and large profit. All the elements of such a partnership are, to my mind, present within the principle laid down in, *e.g., Coope* v. *Eyre* (1788), 1 H. Bl. 37, 48; *Dale* v. *Hamilton* (1847), 2 Ph. 266; *Kay* v. *Johnston* (1856), 21 Beav. 536; and *Wells* v. *Petty* (1897), 5 B.C. 353; 1 M.M.C. 147. The fact that Foster later undertook to dispose of his interest apart from Miller's does not affect the rights of the matter, because, as I view the case, he could not lawfully have done so without the approval of Miller who was just as much concerned in the joint sale of the property, and to share in the profits, as he was in its joint purchase and to share in the losses if the speculative adventure turned out badly, as it did. Such being the case Miller's estate is liable on this ground alone, and therefore it is unnecessary to consider the other one, and so the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: At the hearing of this appeal my impression was that Mr. *Maclean's* contention that there was a part-

nership was not well founded. After an examination of the authorities, I am confirmed in that view.

Here was an isolated transaction, the purchase of a piece of property in which each was to have a half interest. The hope was, of course, that the property would be turned over at a profit and that each would share in the proceeds. It would be a profit on the sale, it is true, but every transaction by which individuals interested may obtain a profit does not constitute a partnership. The case of *Dale* v. *Hamilton* (1847), 2 Ph. 266, is, I think, distinguishable.

GALLIHER, J.A.

As to the other point raised, as to whether the covenant is joint or joint and several, I am, with respect, of the opinion that it is joint and is covered by the case of *White* v. *Tyndall* (1888), 13 App. Cas. 263.

I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Following the decision in *White* v. *Tyndall* (1888), 13 App. Cas. 263, which I consider applicable, clause 2 of the agreement of sale in question, is not the separate covenant of each but rather a joint obligation. This appears clear reading the clause standing alone. I cannot agree that clause 8, or any other provisions of the agreement in any way change the character of the obligation as determined by clause 2. Nor can I agree that this isolated transaction, the purchase of land presumably as a speculative venture for the purpose of resale at a profit constituted a partnership, thereby creating in law the same result as if the covenant were joint and several. I agree with the learned trial judge on this point. It follows, however, that the appeal should be allowed.

Appeal allowed, Martin, J.A. dissenting.

Solicitor for appellants: *E. A. Boyle.*
Solicitor for respondent: *Sydney Child.*

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WALLINDER v. IMPERIAL BANK OF CANADA.

Banks and banking—Bills and notes—Cheque—Alteration—When valid—Right of bank to combine customer's savings bank and current accounts—Cheque in blank to cover overdraft.

WALLINDER v. IMPERIAL BANK OF CANADA

The plaintiff who was general superintendent of the Kamloops Copper Company, Inc., issued a cheque and delivered it to the manager of the defendant Bank as follows: "Kamloops, B.C., Feb. 15, 1923. Pay to the order of Kamloops Copper Co. Inc.....Dollars. Savings [sgd.] 'A. T. Wallinder.'" It was endorsed by said company to the Bank and was given to secure the company's overdraft at the Bank. The bank manager afterwards transferred all of the plaintiff's moneys in his savings account to his current account increasing his current account to $594.65. He then added the symbol "C/A &" above the word "Savings" in the cheque, filled in the amount of $593.65, charged this amount to the plaintiff's current account and used it to liquidate in part the debt owing by the Company to the Bank. In an action against the Bank to recover the amount of the cheque it was found by the trial judge that the cheque was given to the Bank to be used, if necessary, as security for overdrafts in the company's account generally, that what the bank manager did was within the scope of his authority, and he dismissed the action.

Held, on appeal, that the evidence supported the findings of the trial judge and that he properly dismissed the action.

Per MACDONALD, J.A.: To be a material alteration to a cheque the change must be made without the assent of the parties liable thereon and must be of such a character as to alter their legal position.

In the absence of any special contract to keep a customer's account separate a bank may combine his accounts in different departments of the bank for the purpose of meeting his indebtedness to the bank without notifying him or obtaining his consent thereto.

APPEAL by plaintiff from the decision of MORRISON, J. of the 12th of December, 1924, in an action to recover $593.65 being money deposited with the defendant as a banker, and $1,000 damages for wrongfully refusing to pay the plaintiff's cheques. The plaintiff was the manager of the "Iron Mask" mining claim near Kamloops and the banking business of the company was done with the Imperial Bank. The plaintiff had a personal account in the Bank both in the savings account and in the current account and on the 30th of June, 1921, the plaintiff signed and delivered to the manager of the Bank a cheque drawn on plaintiff's savings account, it being agreed

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that the cheque should be held by the manager as security for advances made or to be made by the Bank to the company (the amount was left in blank). On the 15th of February, 1923, the account of the company was changed to Kamloops Copper Company, Inc. and the plaintiff received back said cheque and gave another cheque on his savings bank account payable to the Company and endorsed it payable to the order of the Imperial Bank for credit of the Kamloops Copper Co. Inc., the cheque being left in blank. At the same time the plaintiff signed for the company a document constituting a general pledge of securities which included this cheque. On the 4th of March, 1924, the company owed the Bank $906.63. At this time the plaintiff had $422.23 to the credit of his savings bank account and $172.42 to his current account, when the manager transferred the amount of the plaintiff's savings account to his current account the total amount there then being $594.65, and he filled in the cheque for $593.65, and changed the cheque from a savings bank cheque to a current account cheque. He then charged plaintiff's current account with the amount of the cheque, crediting it to the company's debt and leaving $1 in the plaintiff's current account. The trial judge dismissed the action.

Statement

The appeal was argued at Victoria on the 10th and 11th of June, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Macrae, for appellant: The plaintiff had both a savings account and a current account in the Bank. He left with the bank manager a savings bank cheque in blank. The bank manager then transferred the balance in his savings bank account to his current account and then changed the cheque to a current account cheque and filled it in for substantially the full amount then in his current account. The intention of the parties was that the Bank could take the whole of his savings account and nothing more. There was a material alteration in the cheque and it is void: see Halsbury's Laws of England, Vol. 10, p. 411, par. 740; Maclaren on Banks and Banking, 5th Ed., 386; *Suffell* v. *Bank of England* (1882), 9 Q.B.D. 555; *Davidson* v. *Cooper* (1844), 13 M. & W. 343;

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Vance v. *Lowther* (1876), 1 Ex. D. 176; *Carrique* v. *Beaty* (1897), 24 A.R. 302; *Rolin* v. *Steward* (1854), 14 C.B. 595.

Mayers, for respondent: The alteration is not material as it did not bring about the obtaining of money by the Bank that they could not have obtained without making the change; and secondly, the contention is not open to the plaintiff on his pleadings. In any case all the accounts in a bank constitute one account and a banker can charge all the accounts with a cheque. Wallinder pledged all his accounts to meet any liability of the company: see *Garnett* v. *M'Kewan* (1872), L.R. 8 Ex. 10; *Irwin* v. *Bank of Montreal* (1876), 38 U.C.Q.B. 375 at p. 393; *Bain* v. *Torrance* (1884), 1 Man. L.R. 32 at p. 33; *Grigg* v. *Cocks* (1831), 4 Sim. 438; *In re European Bank* (1872), 8 Chy. App. 41 at p. 44. In fact the money in Wallinder's accounts was the company's money.

Macrae replied.

Cur. adv. vult.

6th October, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal; the learned judge, I think, arrived at the right conclusion.

MARTIN, J.A.

MARTIN, J.A.: If the view of the facts taken by the learned judge below can be supported, and I think it can in essentials, there can be no real doubt about the law concerning them, and so the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: The learned trial judge must have found, and I do not disagree with him, that the cheque given in blank, dated February 15th, 1923, was given for the purpose of being utilized, if necessary, in covering overdrafts in the company's account generally, and not as to any specific overdraft. The fact that it was left blank as to amount supports that view. When the cheque was signed in blank it had noted on it the word "Savings" (meaning savings account), the plaintiff having two accounts in his own name, *viz.*, savings and current. When the defendant's manager sought to make use of this cheque he filled in the amount $593.65, and added the symbol "C/A &" over the word "Savings," and debited the

amount to current account, and placed it to the credit of the Company's account which was overdrawn. This is claimed to be such a material alteration as to invalidate the cheque. The cheque having been issued in blank for the purpose of protecting overdrafts of the company account, and handed to the manager of the Bank, the reasonable inference would be that both parties understood that it was to be filled in by the manager so as to effectuate that purpose from any moneys to the credit of the plaintiff and for that purpose the manager, in my opinion, was justified in making it applicable to the current account.

GALLIHER, J.A.

The cases cited by Mr. *Macrae* which I have read, are cases of completed instruments afterwards altered, some of them by sharpers, and the principle invoked in those cases does not, in my opinion, apply to the circumstances of this case.

I would dismiss the appeal.

MACDONALD, J.A.: The appellant, on February 15th, 1923, issued a cheque in the following form and delivered it to the respondent's manager:

"Kamloops, B.C., Feb. 15th, 1923.

"Pay to the order of Kamloops Copper Co. Inc..... Dollars.

"Savings. A. T. Wallinder."

It was endorsed by the Kamloops Copper Co. in favour of the respondent Bank. Some time afterwards the symbol "C/A &" was added by the bank manager by placing it above the word "Savings," thus making the cheque after delivery chargeable to both current and savings account, and the amount involved, *viz.*, $593.65, was also added by him. At or about the same time the bank manager transferred over $400 from the appellant's savings account to his current account, making up a sufficient sum to meet the cheque and it was used by the Bank to liquidate in part the indebtedness to it of the Kamloops Copper Co. The appellant was general superintendent of said company. This signed cheque was thus given partly in blank to be held by the Bank for the purpose of meeting wholly or in part any deficiency between advances to the company and the amount received by the Bank on returns of ore shipments to the smelter.

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The appellant contends that the cheque was materially altered and therefore void, because, as stated, the respondent's manager after writing the word "Savings" on it when the cheque was given, added the said symbol "C/A &," meaning "Current Account and" when the cheque was later debited against the appellant's account. To be a material alteration the change must be made without the assent of the parties liable on the bill, and further, it must be of such a character as to alter the legal position of the parties concerned: in other words, the contract must be changed.

In the absence of any special contract to keep the accounts separate, a bank is entitled to combine the accounts of a customer held even in different branches of the same bank, and it would seem to follow, may combine two accounts in different departments of the same branch for the purpose of meeting the customer's indebtedness without any legal obligation on the bank to notify the customer or obtain his consent. See *Garnett* v. *M'Kewan* (1872), L.R. 8 Ex. 10. This case was quoted with approval in *Irwin* v. *Bank of Montreal* (1876), 38 U.C.Q.B. 375 at p. 393. See also *In re European Bank* (1872), 8 Chy. App. 41 at p. 44, where Sir W. M. James, L.J., says:

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"In truth, as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account."

The only proper inference from the evidence is that this blank cheque was given by the appellant personally, as security for any indebtedness of the Kamloops Copper Company to the Bank for unliquidated advances. There was an understanding too, that the Bank could transfer sums from his savings account to his current account (if such an understanding were necessary) and this was done dozens of times.

In any event to enable the appellant to succeed, he would have to prove a contract between him and the Bank, that only such balances as he might have in his savings account should be pledged by means of the blank cheque in question to meet the deficiencies referred to. If that were proven he would have such a special agreement as would prevent the respondent from changing sums from one account to the other. In the absence of

such an agreement, the Bank was justified in exercising the authority given it by the appellant to fill in the blank cheque with an amount representing the moneys available to the appellant in both accounts so long as it did not exceed the indebtedness of the Kamloops Copper Company to the Bank, and any addition to the cheque such as adding the symbol "C/A &" would not be a material alteration. In view of the verbal authorization and the law applicable, the rights and liabilities of the parties to the cheque were not affected by the action of the respondent.

I would dismiss the appeal

Appeal dismissed.

Solicitors for appellant: *Abbott, Macrae & Co.*
Solicitor for respondent: *E. C. Mayers.*

MORTON v. BRIGHOUSE AND MOXON.

Trusts and trustees—Rents and profits of estate—Collected and retained by nephew of deceased for some years prior to his death—Evidence of intention to make gift to nephew—Accounting—Costs.

In an action for a declaration that upon the death of his uncle, Sam Brighouse, the defendant became a trustee under the will of the said Sam Brighouse and to compel him to account for rents, profits and moneys received by him during the lifetime of his uncle for, as alleged, the benefit of the uncle, the defendant claimed that his uncle, evidenced his intention to permit the defendant, who lived with him and managed his affairs, to retain said rents and profits, free from any condition that he should be regarded as a trustee with respect thereto. Shortly after the defendant took over the management of the estate his uncle made a will in his favour but some years later he went to England and shortly before his death he made another will leaving a substantial portion of his estate to English relatives. The trial judge found in the defendant's favour on the facts and dismissed the action.

Held, on appeal, *per* MACDONALD, C.J.A., and GALLIHER, J.A., that on the facts the trial judge was not justified in finding as he did and the appeal should be allowed.

Per MARTIN and MACDONALD, JJ.A.: The evidence and surrounding cir-

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cumstances shew that the deceased did not want the rents and profits for his own use and the respondent Brighouse's evidence, corroborated by several witnesses who testified to statements by deceased that respondent should receive the rents and profits for his own benefit is inconsistent with any understanding that he should keep accounts as a trustee and the appeal should be dismissed.

The Court being equally divided the appeal was dismissed.

APPEAL by plaintiff from the decision of MCDONALD, J. of the 5th of January, 1925, in an action for an account of moneys and property received by Michael Wilkinson Brighouse belonging to Sam Brighouse prior to his death and which at the time of his death the said Michael W. Brighouse held in trust for him or in the alternative was indebted to Sam Brighouse and upon the death of the said Sam Brighouse the said Michael Brighouse held said moneys and property in trust on behalf of persons entitled to same under the will of Sam Brighouse. F. C. Morton was one of the executors and was by order of the Court appointed administrator for bringing this action. The case turns on whether there was an agreement between Sam Brighouse and the defendant Michael. Michael was a nephew of Sam Brighouse. The alleged agreement was made in 1906, and was a verbal one whereby the defendant was to consider all real and personal property of the said Sam Brighouse as his own and that he was to do as he pleased with it and that he was to be under no obligation whatever to account for any money collected under a power of attorney made on the 1st of February, 1907, whereby Michael was to collect all moneys due Sam in respect to all his interests, to settle all accounts for him and to sign cheques and notes for him and draw on any account for any sum said Sam held in any bank. On the 7th of November, 1906, he made a will and with the exception of small gifts he gave everything to Michael W. Brighouse. In 1908 Sam Brighouse had to go to a hospital for a disease affecting his mind. In 1911 he went to the Old Country and after his arrival there made another will (dated the 11th of January, 1911) whereby he left only a portion of his estate (*i.e.*, a farm alleged to be worth $200,000) to Michael and the balance to other relatives in England. Sam Brighouse died on the 31st of July, 1913.

Statement

The appeal was argued at Victoria on the 8th and 9th of June, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Craig, K.C., for appellant: The plaintiff was one of the executors and by order of the Court was appointed administrator to bring this action. The learned trial judge followed *Strong* v. *Bird* (1874), L.R. 18 Eq. 315, but it can be distinguished. Assuming there was a gift, it is a gift without legal force. It is not a gift because it is not completed. See *In re Innes. Innes* v. *Innes* (1910), 1 Ch. 188. First, on the evidence the agreement is not proceeded with ultimately and secondly, it is not enforceable at law: see *Vavasseur* v. *Vavasseur* (1909), 25 T.L.R. 250. Ordinarily when a debtor is appointed executor he is treated as having collected it and it is in his hands as part of the estate. Irrespective of the result the costs should be out of the estate.

Davis, K.C., for respondents: If he fails in his appeal the costs should not come out of the estate. The evidence is all one way. It is only a question what construction should be put upon it. What was the intention of the testator as to the understanding between them? Did Sam intend that Michael should be trustee during his lifetime? The agreement was made before the will of 1906. The understanding was that he was not to account to his uncle for the moneys. No estoppel arises and if his uncle could not ask for an accounting the estate would be in the same position. There was an action attacking the last will on the ground of insanity and the case was settled. *Strong* v. *Bird* (1874), L.R. 18 Eq. 315 is discussed in *In re Stewart. Stewart* v. *McLaughlin* (1908), 2 Ch. 251 at p. 254: see also *Goodier* v. *Edmunds* (1893), 3 Ch. 455.

Argument

Craig replied.

Cur. adv. vult.

6th October, 1925.

MACDONALD, C.J.A.: The deceased, Sam Brighouse, was, in his lifetime, the owner of a large tract of land and other assets in this Province. He was a bachelor, and having no relatives here, brought out from England, Michael Wilkinson, the son

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of his sister, afterwards known as Michael Wilkinson Brighouse, one of the defendants herein. After that event, which occurred in 1888, Michael assisted the deceased in his business, and eventually was allowed a very large measure of control over the old gentleman's affairs. In 1906, the deceased made his will leaving the bulk of his estate to Michael. In 1907 he gave Michael a power of attorney to do all things which he himself might do, but it was expressed that all acts done thereunder should be done for and on behalf of the deceased and for his sole benefit. In 1908, Sam Brighouse went to hospital here, and shortly thereafter, to England, where he died in 1913. While there he changed his will in favour of some of his English relatives, but still left a substantial part, perhaps the bulk, of his estate to Michael.

Michael had collected rents and from other sources, a sum exceeding $100,000. He now claims that his uncle agreed that he should collect these moneys for his, Michael's, own use and benefit, and he now declines to account, except for moneys received since the testator's death, or since the date of the new will, it matters not which. In support of his contention, Michael called several witnesses. To Currie, the deceased is alleged to have said, in substance—"Everything I have is Michael's, to do with as he pleases. I have made a will in his favour"; to Burdis—"Michael has authority to do anything he likes because I know that when I die Michael will get everything"; to Saurberg—"You had better go and see Michael about it, everything I have belongs to him"; to Jorgenson—"Michael has everything, and does what he wants with the money"; to Crocking—"I have made my will, anyway, everything I have got is Michael's. Michael can use anything he has got as though it were his own. Everything that Michael says is alright."

MACDONALD, C.J.A.

I need not question the *bona fides* of these witnesses, but it must be manifest that evidence of this character is practically worthless to assist Michael's contention. This evidence is quite consistent with the plaintiff's claim for an account.

Michael being dissatisfied to some extent with the new will, apparently decided to hang on to what he had collected,

persuading himself that he was entitled to do so. Even the power of attorney is explained away by the pretence that it does not mean what it says, but was given only for purposes of registration.

With great respect, I think the case relied on by the learned judge, *Strong* v. *Bird* (1874), L.R. 18 Eq. 315, is not in point.

The appeal should be allowed.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed the learned judge below having reached the right conclusion; this is not a case where the costs should come out of the estate. MARTIN, J.A.

GALLIHER, J.A.: With every respect, I cannot apply the decision in the case of *Strong* v. *Bird* (1874), L.R. 18 Eq. 315, to the facts in this case.

Giving due credence to the evidence of the several witnesses who testified to conversations with the deceased, his will having then been made in favour of the defendant, these conversations would be consistent (apart from the power of attorney) with the absolute control and management of the property during the lifetime of the deceased, which would become the property of the defendant eventually and which had actually been bequeathed to him. The intent was evidenced by the will—that intent being that upon the death of the testator the property mentioned therein should go to the defendant, and the testator's statements to the witnesses do not, in my view, carry it any further. This intent was to a considerable extent, altered by the making of a new will. GALLIHER, J.A.

Then we have the power of attorney absolutely inconsistent with the view that no accounting was to be made and, while that might not be conclusive, it so weakens the case built upon the evidence of these conversations, as to render them of little value.

I would allow the appeal and order an accounting.

MACDONALD, J.A.: Action was brought to compel the respondent, as trustee of the estate of Sam Brighouse, deceased, to account for rentals, profits and moneys received by him for as alleged, the benefit of the Brighouse estate. The defence is MACDONALD, J.A.

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that the deceased in his lifetime gave clear evidence of intention to permit the respondent, his nephew, who lived with him and managed his affairs, to retain the rents and profits referred to without any condition that he should be regarded as a trustee in respect thereto. The deceased executed a power of attorney in favour of the respondent in 1906, authorizing him to demand, recover and receive, among other things, the moneys in question for the benefit of the deceased, a power inconsistent, it is true, with the claim now set up by the respondent. According to the respondent's testimony, however, the power of attorney was given to enable him to release mortgages, sell portions of the property when necessary and complete title and for similar transactions. The learned trial judge found the facts substantially in favour of the respondent's contention and the evidence fully supports that finding. The appellant contends, however, that even if it is admitted that the deceased told the respondent that he might receive rents and profits and the proceeds of any real estate sold for his own use and benefit, it would be an agreement without legal force and effect. Further, it could not be recognized as a gift, as it was not a donation of property in a deliverable state capable of being perfected in law. These, however, are not the determining points in this appeal.

The true inquiry is as to whether or not the evidence and surrounding circumstances shew that the deceased intended the respondent to be a trustee of the moneys received by him during the lifetime of said deceased. It is not a question of contract or gift. The evidence shews clearly that the deceased did not want the rents and profits for his own use. He simply wanted whatever money he required for his personal needs from time to time and this he received. This, together with respondent's evidence, corroborated by several witnesses who testified to statements by the deceased, shewing his intention that the respondent should receive the rents and profits for his own benefit, is quite inconsistent with any understanding that the respondent should keep accounts as a trustee who might afterwards be called upon to account. In *In re Stewart. Stewart* v. *McLaughlin* (1908), 2 Ch. 251, where three bearer bonds for £500 were purchased by deceased a few days before his death

and he made the statement to his wife, "I have bought these bonds for you," but they were not delivered till after his death, and she was one of the executors under his will, it was held nevertheless that the widow was entitled to the bonds. Neville, J., in discussing the principle in *Strong* v. *Bird* (1874), L.R. 18 Eq. 315, said, at p. 254:

"The decision is, as I understand it, to the following effect: that where a testator has expressed the intention of making a gift of personal estate belonging to him to one who upon his death becomes his executor, the intention continuing unchanged, the executor is entitled to hold the property for his own benefit."

See also *In re Applebee. Leveson* v. *Beales* (1891), 3 Ch. 422.

MACDONALD, J.A.

I would dismiss the appeal.

We were asked, in any event, to allow the appellant costs out of the estate. It is true that by an order in Chambers, leave was given to commence this action, and the costs of the trial were properly made payable out of the estate. I think the appeal, however, should be dismissed, with costs payable by the appellant.

The Court being equally divided the appeal was dismissed.

Solicitor for appellant: *W. D. Gillespie.*
Solicitor for respondent M. W. Brighouse: *Ghent Davis.*
Solicitor for respondents the trustees: *D. S. Wallbridge.*

WOOD & ENGLISH v. NIMPKISH LAKE LOGGING CO. LTD. *ET AL.*

Contract—Sale of timber—Licences—"Quantity of timber"—What portion of growth this includes—Question of profit not considered.

The plaintiffs purchased timber, and timber licences from the defendants on a logging basis, a paragraph of the contract providing that the plaintiffs should log and scale a certain quantity in each year for eight years, the paragraph then reciting "in the event of the purchasers not having carried away and scaled the whole of the said trees and timber before the expiration of the eight years the purchasers shall pay to the vendor at the expiration of the eight years the balance

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of the purchase price based upon the quantity of timber on the unlogged licences or portions thereof as shewn on the cruise of the said timber licences made by one Rankine," etc. At the expiration of the eight years large sections still remained unlogged.

Held, that in construing the words "quantity of timber on the unlogged licences or portions thereof" the question of whether a profit can be made in logging said timber cannot be considered but the expression "quantity of timber" is qualified in the contract by the words "as shewn on the cruise of the said timber licences made by one Rankine," the report accompanying which settles the size and length of trees to be cruised.

Swift v. *David* (1912), 2 W.W.R. 709; 107 L.T. 71 followed.

Statement

ACTION to recover balance due under a contract for the sale of timber and timber licences. Tried by MURPHY, J. at Vancouver on the 17th of December, 1925.

Mayers, and *W. S. Lane,* for plaintiffs.
Hossie, and *Ghent Davis,* for defendant.

6th January, 1926.

MURPHY, J.: The principal question to be answered on the main issue is, in my opinion, what timber is to be included in the re-cruise which plaintiffs, exercising the rights conferred upon them, under the contract, have demanded shall be made.

The answer is I think given in the following words of paragraph 6 of the contract:

Judgment

"6. The said logging operations shall be so conducted that the purchasers shall log and have scaled at least twenty-five million feet board measure within one year from the 1st day of December, A.D. 1917, and at least forty million feet board measure in each year for seven consecutive years thereafter and in the event of the purchasers not having cut, felled, taken, carried away and had scaled the whole of the said trees and timber before the expiration of eight years from the date hereof, the purchasers shall pay to the vendor at the expiration of the said eight years the balance of the purchase price based upon the quantity of timber on the unlogged licences or portions thereof as shewn on the cruise of the said timber licences made by one John W. Rankine, timber cruiser of Shelton in the said State of Washington, in 1911."

It is to be observed that the language used here is "quantity of timber on the unlogged licences or portions thereof" and not "trees and timber upon the said lands which is accessible and of merchantable quality," which is the language used in paragraph 2. The agreement clearly contemplates the possibility of all the timber being logged off before eight years should have elapsed

and had that been done the words used in paragraph 2 would govern. As, however, large sections still remain unlogged and as the eight years have now elapsed my view is that the language of paragraph 6 quoted above now governs since it is an express provision for the present situation. I am further of opinion that I am bound by the decision in *Swift* v. *David* (1912), 2 W.W.R. 709; 107 L.T. 71, to hold that in construing the words "quantity of timber on the unlogged licences or portions thereof" the question of whether a profit can or cannot be made in logging said timber cannot be taken into consideration. The general expression "quantity of timber" discussed in *Swift* v. *David, supra,* is however, qualified in the contract now to be construed by the words "as shewn on the cruise of the said timber licences made by one John W. Rankine, timber cruiser of Shelton in the said State of Washington in 1911." True there is a provision for a recruise at the option of either of the parties to the contract and that option has been exercised by the plaintiffs. It cannot be I think, however, that such recruise is to be made without any reference to the Rankine cruise, or the principles on which said cruise was made. If such were the intention the contract would, I think, have so stated and specified in what ways the Rankine cruise was to be departed from. The Rankine cruise, as shewn by the report accompanying it, which was before the parties when the contract was made, and which, therefore, in my opinion, should be read as part of the cruise in construing the contract, settled the all important point of the size and length of the trees to be cruised. It was made "as *per* B.C. log scale and estimated as low as 32 ft. logs down to 12 in. small ends." I hold the new cruise must be made according to the B.C. log scale and estimated only as low as 32 ft. logs down to 12 inches at the small end as the timber is on the ground at the date of such new cruise. It must include all the varieties of timber set out in the Rankine cruise. It must also include all poles, spars and piling since these appear in the Rankine cruise. The element of profit is not to be considered. All timber, as above defined, that has any reasonable prospective value, must be included.

Judgment

Reading the contract as a whole I think plaintiffs, now that

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the eight years have elapsed, are bound to take not only the timber but also the licences and are therefore bound to pay the licence renewal fees as from the end of the eight years. To hold otherwise would lead to the result that plaintiffs might defer logging indefinitely and yet compel defendant meanwhile to carry the licences. Clear language I think would be required before a Court would hold that the parties intended such an extraordinary result. But likewise regarding the contract as a whole, I hold plaintiffs must not only now take the licences but must be put in a position to take the timber, as above defined, therefrom. They have purchased in the circumstances that have happened not only the individual licences but also the timber thereon as above defined. Unless defendant can give them clear title not only to each individual licence but also clear right to remove said timber thereon, plaintiffs cannot be compelled to take the individual licences affected where such clear right cannot be given. It now turns out that with regard to three of the licences prior rights unknown to the contracting parties, in the nature of mineral claims, creating a cloud on the free right to remove the timber, existed at the time the contract was made. Unless defendant can confer on plaintiffs such free right to remove this timber, I hold plaintiffs cannot be forced to take any part of said timber or the licences on which said timber is situate. From what I have said as to my view of the cruiser's duties, it follows I think that they have no judicial or *quasi*-judicial character. If so then he will not be an arbitrator although, in case the parties cannot agree, he is to be appointed under the provisions of the Arbitration Act. The costs of his services, not having been provided for by the agreement, I hold must be therefore paid by the plaintiffs at whose instance this provision of the contract was brought into effect.

Judgment

Order accordingly.

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VANCE v. DREW

Negligence—Pedestrian run down by automobile—Contributory negligence—Excessive speed—Sounding of horn—Decisive cause of accident—Right of way.

At about 6 o'clock in the evening in November, 1924, the plaintiff, who was in a store at one of the corners at the intersection of Kingsway and Knight Road, started in a hurry to go diagonally across the intersection to catch a car that had stopped at the opposite corner while on its way to Vancouver. She left the curb but before reaching the middle of the road was struck at an acute angle by defendant's automobile (which was coming from Vancouver on Kingsway) and severely injured. The lights of defendant's car were on, also the street lights, there being the common condition of a lighted street with some parts of it less illuminated than others. In an action for damages for negligence:—

Held, that it was the plaintiff's sudden stepping into the zone of danger without taking the obvious and simple precaution which the circumstances required, that was the decisive cause of the accident, and the action should be dismissed.

Held, further, that neither a pedestrian nor a driver of a car has paramount right to the use of the highway. Both have equal rights subject to the rules of the road, and any special regulation for the time being in force for the common safety.

ACTION for damages for injuries sustained by the plaintiff through the defendant's alleged negligent driving of his automobile. The facts are set out in the head-note and reasons for judgment. Tried by HUNTER, C.J.B.C. at Vancouver on the 27th of October, 1925. Statement

Hossie, and *Ghent Davis*, for plaintiff.
Housser, for defendant.

21st November, 1925.

HUNTER, C.J.B.C.: Action for personal injuries caused by being knocked over by an automobile. About a year ago, the plaintiff, a girl about 17, had called at a bakery near the junction of Kingsway and Knight Road to inquire about a position in the bakery. Being informed that it had been filled, it then being about 6 p.m., she asked the girl at the counter, a Miss Graham, if she could get the car going to Vancouver, which was Judgment

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then situate on the opposite side of Kingsway at the farther side of Knight Road, to which the answer was that she could if she ran for it. Miss Graham states she saw the plaintiff leave the shop and run towards the car but she did not see her after she reached the curb nor did she see anything of the accident. The plaintiff was evidently pursuing a path from the bakery to the street-car diagonally across the intersection of the two highways and the collision probably took place on the Vancouver side of the boundary between the two adjoining municipalities. The plaintiff and the defendant's car collided at an acute angle with the result that she received severe injuries but fortunately, according to the evidence of the surgeon in charge, she will ultimately practically wholly recover. The time was about 6 p.m., darkness had fairly set in, the street lights were on and the defendant had his lights burning on his car. There was a slight mist and, so far as I can judge, after having had a view, there was, at the place in question, the common condition of a lighted street with parts of it less illuminated than others.

Judgment

According to both the plaintiff and the defendant the accident was on them before either was aware of the other's presence, but the plaintiff's first contention is that the defendant was driving at an excessive speed and did not sound his horn, and that it was his action in so doing that inevitably caused the accident.

According to the evidence of a truckman, the defendant passed him immediately before the accident but the defendant says he has no recollection of that. The probabilities are that the truck was nearer the curb than the track at the time and Kingsway forming an elbow with Knight Road at the place in question increasing in width between the nearest rail to the curb from 20 to 45 feet that the defendant's attention was not particularly called to the truck. At any rate, he says that he followed the curve on the railway track, as he naturally would do, in order to avoid running into the jog formed by the two streets. Moreover the truckman's estimate of distances is evidently unreliable as he says he was 100 feet from the place of the accident, when the defendant passed him, and yet that it was opposite the drug store which was the place of the accident.

It also seemed to me that he felt, for some reason not disclosed, some animus against the defendant.

Assuming, however, as urged by Mr. *Hossie,* that both the truck and the defendant were close to the intersection and that the defendant was negligent in not sounding his horn as required by the by-law and in going at a higher speed than authorized by the by-law, then in force, *viz.,* 15 miles per hour (he says about 18 or 20 and there was no other evidence), I do not think that that was the decisive cause of the accident. As far as sounding the horn is concerned the by-law requires the horn to be sounded on the approach of the car to any crossing without any qualification. It is perhaps needless to point out that if its requirements were literally complied with the city would be a bedlam and that if every car driver sounded his horn as he approached the intersection of streets a person in the act of crossing would be confused rather than aided by the racket. A prudent driver will of course sound his horn when he observes that anyone may be within dangerous proximity.

With regard to the question of the speed, the by-law at the time limited the speed to 15 miles per hour. Common experience of course has shewn that this is an unnecessary limitation; in fact, if it were insisted on, it would mean that four-cylinder cars would frequently be unable to travel in high gear thereby causing a lot of unnecessary noise in the streets, and I understand that since the time of this occurrence the new regulation permits a greater speed. It was also urged by counsel that it was the failure of the defendant to observe the plaintiff as she came across the elbow in time to avoid her that was the ultimate cause of the accident and he laid stress on the illumination of the area in question by reason of the city lights and the store windows. This is merely treacherous suggestion. As the defendant followed the curve of the track the range of his lights decreased in width from its maximum until it was only about the width of the car at the time of impact, while she may well have been invisible to him by reason of the existence of the dark background beyond the elbow across which she was passing and which was not within the area illuminated by his lights. And I am informed that a red light has since been placed on the

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edge of the jog, no doubt to show it up more clearly. I do not think that the defendant could reasonably anticipate that a pedestrian would suddenly, between crossings, hurry out of the area in question into the traffic. But however all this may be, I think that neither the failure of the defendant to observe the plaintiff in time, or to anticipate that any one would attempt to hurry across the traffic at the place in question, or to sound the horn, or the so-called excessive speed was the decisive cause of the accident. I think it was the failure of the plaintiff to keep a vigilant lookout on her left side whence there was obvious possibility of danger until she had reached the middle of the street. If she had done that and proceeded carefully instead of rushing across the traffic she could not have failed to have seen the lights of the defendant's car in time to halt and allow it to pass. It cannot be denied that a person walking at a moderate pace has a relatively greater ability to stop his forward movement than has a car even when driven at a slow speed, which, when suddenly confronted with an impending collision, is practically helpless unless it can swerve its course, which it cannot do if there are other persons or objects in the way, in which case the position is analogous to that of a locomotive under way which is suddenly confronted with some person or object in its path. But Mr. *Hossie* argued that she had also to keep a lookout for anything that might be coming up behind her on Knight Road. The obvious answer to this is, that she herself created the situation and that ordinary prudence would have prompted crossing one street at a time instead of traversing both at the same time on a much travelled intersection. I think that her mind was bent on reaching the street-car as quickly as she could, possibly in order not to be late for the family dinner as she lived over two miles away, but nothing came out about that and it is really immaterial.

Judgment

It was also argued by Mr. *Hossie* that the plaintiff had an absolute right of way and that the defendant collided with her at his peril. In my opinion neither the pedestrian nor the driver has a paramount right to the use of the highway, but both have equal rights subject, of course, to the rules of the road and any special regulation for the time being in force for the common

safety. Both are under a continuing duty not only to use care but to avoid the result of each other's negligence as far as reasonably possible without doing mischief to others, and I know of no binding decision to the contrary. Much extra-provincial law was cited by the learned counsel, but I think all that the law required could be found in the decisions of our own Courts; in fact, I do not see any essential distinction between this case and that of *Skidmore* v. *B.C. Electric Ry. Co.* (1922), 31 B.C. 282. In both cases it was the sudden stepping into an obvious zone of danger without taking the simple precaution which the circumstances required that was the decisive cause of the accident. If, however, this view should utimately be held to be wrong, then, in order to save the expense of a new trial, I would place the damages at $1,000, plus the hospital and medical expenses, which by consent is to be referred to the registrar in the event of disagreement.

Judgment

I will add that it stands to the credit of the defendant that he not only took the girl to the hospital, but at once engaged the services of a prominent surgeon and volunteered to pay the medical and hospital expenses himself, as the family was in straitened circumstances.

The action must be dismissed with costs if demanded.

Action dismissed.

GREGORY, J. (In Chambers)

1925

Oct. 28.

REX v. GALLAGHER

REX v. GALLAGHER.

Criminal law—Habeas corpus—Application for—Warrant of commitment—Essential ingredient of offence charged—Criminal Code, Sec. 398.

An accused was committed for trial on a charge of bringing into the Province a gasoline launch which was obtained by theft in Alaska, United States, contrary to section 398 of the Criminal Code. On an application for a writ of *habeas corpus* on the ground that the warrant of commitment was defective in that it did not shew that the accused had obtained the launch outside of Canada:—

Held, refusing the writ, that the warrant sufficiently disclosed the offence and the reference to section 398 of the Criminal Code makes plain to the accused the offence for which he has been committed.

Statement

APPLICATION for a writ of *habeas corpus.* The prisoner was charged before J. P. Scarlett, stipendiary magistrate in and for the county of Prince Rupert, for that he did "unlawfully bring into the Province of British Columbia, a gasoline launch, known as the 'George B.' said launch having been obtained by theft in or near Hyder, Alaska, United States of America, contrary to section 398 of the Criminal Code of Canada," and was committed for trial. Section 398 provides that,

"Every one is guilty of an indictable offence and liable to seven years' imprisonment who, having obtained elsewhere than in Canada any property by any act which if done in Canada would have amounted to theft, brings such property into, or has the same in Canada."

Heard by GREGORY, J. in Chambers at Vancouver on the 28th of October, 1925.

Argument

W. C. Ross, for accused: The warrant of commitment was defective in that it did not shew that the accused had obtained the launch by theft outside of Canada, this being an essential ingredient of the offence.

Creagh, for the Crown.

Judgment

GREGORY, J.: The writ will be refused. The warrant of commitment sufficiently discloses the offence. The reference to section 398 of the Criminal Code covers any defect in the description, or rather it makes perfectly plain to the accused the offence for which he has been committed for trial.

Application refused.

CHIN YEE YOU v. LEE KAR.

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

1925

Nov. 23.

CHIN YEE YOU v. LEE KAR

Practice—Costs—Follow the event—Same rule in jury as in non-jury cases—"Good cause"—Marginal rule 976.

The rule that costs follow the event applies both to jury actions and non-jury actions, and there must be "good cause" within the meaning of the decisions which would permit any interference with this rule.

Statement

APPLICATION to deprive the successful party of the costs of the action on the ground that there was "good cause" for such an order. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 2nd and 10th of November, 1925.

Sir Charles Hibbert Tupper, K.C., and *Mellish*, for the application.

van Roggen, contra.

23rd November, 1925.

HUNTER, C.J.B.C.: It is grotesque that a judge should be entrusted with the responsibility of deciding important issues involving it may be large sums of money, but that he should be hampered in the matter of costs by a rule of Court which it is needless to say was not made or sanctioned by the judges, so that if any hardship arises by reason of the operation of the rule in question, the fault cannot be attributed to them.

Now, in England, from which our practice is mainly derived, and which therefore has the advantage of a large body of settled decisions, a clear distinction is made between the powers of a judge in disposing of the costs of a case which is tried with a jury and one which is tried without a jury. Where the case is tried with a jury the costs automatically follow the event unless the judge for good cause otherwise orders; where it is tried without a jury the judge has complete discretion to deal with the costs. The reason for the distinction is obvious. It is that where the case is tried with a jury, the jury decides as to the facts and the party in whose favour the facts are found ought ordinarily to get his costs, especially as the question as to the allowance of costs being a legal question, the jury cannot pass on it, but where the judge has complete control over the whole

Judgment

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

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case, he ought also to have complete control over the costs. Our rule, however, in effect says that he is not to be entrusted with the discretion, which he ought to have, subject of course, to appeal in proper cases. It has been in effect for a number of years and the judges have protested often enough against it but so far without avail.

Now, I do not find it necessary to come to any conclusion as to what ought to be done about the costs in this case if the English rule were in force. All I need say is that I cannot find any misconduct on the part of the plaintiff which would amount to "good cause." It was urged that the *capias* proceedings were founded on bad faith. All that needs to be said about that is, that my brother MORRISON dismissed an application to set them aside, and that his order was not appealed against.

Judgment

It was also urged that the costs ought to come out of the partnership fund. This, of course, would be *prima facie* reasonable, and is the practice adopted by the English judges under their rule which gives complete discretion over the costs, except in cases where the conduct of one or other of the partners was unconscionable. But our rule applies the same rule to a non-jury action as to a jury action, and as I have said, I cannot find there was "good cause" within the meaning of the English decisions which would permit any interference with the ordinary result. The plaintiff must therefore get the costs of the action, including the costs of this application, subject, of course, to any disallowance which the taxing officer may make for unnecessary or prolix proceedings.

Application refused.

DUNCAN & GRAY LTD. (In Liquidation) v. SILVER SPRING BREWERY LTD.

GREGORY, J.

1925

Oct. 12.

DUNCAN & GRAY LTD. v. SILVER SPRING BREWERY

Company law — Winding-up — Voluntary liquidation—Private company—Resolution—Extraordinary — Special — Companies Act, R.S.B.C. 1911, Cap. 39, Secs. 77 and 226, Subsecs. (2) and (3)—B.C. Stats. 1915, Cap. 12.

On the voluntary winding-up of a private company, all the shareholders being present, and consenting to the winding-up, the resolution stated that the company could not "by reason of the passing and enforcement of the Prohibition Act, continue its business."

Held, that the resolution was insufficient to constitute a voluntary winding-up, as this could only be effected by an extraordinary resolution when the difficulty of carrying on arises from the condition of the company's liabilities.

On the trial of an action brought by the liquidator it appeared that a confirmatory resolution had not been passed nor was there a waiver of it by the shareholders.

Held, that such confirmatory resolution was necessary, and that therefore the liquidator had no *status* to bring the action.

ACTION for debt brought by the liquidator. The facts are set out in the head-note and reasons for judgment. Tried by GREGORY, J. at Victoria on the 8th, 9th, 10th, 11th and 14th of September, 1925. Statement

F. C. Elliott, for plaintiff.

Harold B. Robertson, K.C., and *Finland,* for defendant.

12th October, 1925.

GREGORY, J.: With regret I have come to the conclusion that the plaintiff cannot maintain this action, there will therefore be judgment for the defendant.

The winding-up proceedings were taken under Cap. 39, R.S.B.C. 1911, with its amendment prior to November, 1917.

The winding-up resolution purports to be an extraordinary resolution passed under subsection (3) of section 226 of said Cap. 39. That resolution must be one to the effect that the company cannot "by reason of its liabilities" continue its business. The resolution as passed was that the company cannot "by reason of the passing and enforcement of the Prohibition Act continue its business." If this resolution was the equivalent of the statutory requirement, I would be inclined to hold it Judgment

GREGORY, J.

1925

Oct. 12.

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good, although it would have been much wiser to have followed the words of the Act. But the resolution is not by any means the equivalent, for it is quite consistent with the passing and enforcement of that Act, that the company at the time had sufficient liquid assets to discharge all its liabilities, and the enforcement of the Act would only prevent it from carrying on future business at a profit. But a voluntary winding-up can only be effected by an extraordinary resolution (which requires no confirmation) when the difficulty of carrying on arises from the condition of the company's liabilities.

It was urged that the resolution could be treated as a special resolution under the provisions of subsection (2) of the same section, and I was at first inclined to agree with this. But a special resolution must, under section 77 of the Act, be confirmed at a subsequent meeting, and there was no such confirmation, and although the company is a private company, and all the shareholders were present and voted for the resolution, the case is not helped by the amendment to section 77 passed in 1915, Cap. 12, adding subsection (7) to section 77, and making the confirmation unnecessary when the resolution is assented to by all the shareholders, for under the last clause of that amendment such confirmation is only unnecessary "Provided that the notice specifying the intention to propose the resolution, states that in case of a unanimous vote no subsequent general meeting to confirm the resolution will be necessary." The Act only provides three ways for a voluntary winding-up: (1) By ordinary resolution, when the company's charter has expired or its objects accomplished; (2) by special resolution when it wants to wind up for any reason deemed sufficient by its shareholders; and (3) by extraordinary resolution, when the state of its liabilities render it impossible to continue its business. The second method requires a confirmatory resolution, or the vote of all its members together with notice that no confirmatory resolution will be passed in the event of all agreeing. The scheme of the Act is, plainly, that when proceeding under subsection (2) of section 226, the shareholders shall have a second opportunity of forming their judgment or due notice that they will not have such second opportunity. This is a statutory

Judgment

requirement and cannot be ignored. The cases referred to by Mr. *Robertson,* for the defendant, are: *In re Bridport* (1867), 2 Chy. App. 191; *In re Patent Floor-Cloth Company* (1869), L.R. 8 Eq. 664; *In re Silkstone Fall Colliery Co.* (1875), 1 Ch. D. 38; *In re Allison, Johnson & Foster, Limited* (1904), 2 K.B. 327; *Pacific Coast Coal Mines, Limited* v. *Arbuthnot* (1917), A.C. 607.

Mr. *Elliott,* for plaintiff, referred to *In re Karamelli & Barnett Limited* (1917), 7 Ch. 203; *Browne* v. *La Trinidad Limited* (1887), 58 L.T. 137; *In re Oxted Motor Co.* (1921), 3 K.B. 32; *In re New De Kaap Limited* (1908), 1 Ch. 589; *In re Express Engineering Works, Limited* (1920), 1 Ch. 466; *Re The Union Hill Silver Company (Limited)* (1870), 22 L.T. 400; *In re Beaujolais Wine Co.* (1867), 3 Chy. App. 15; *Ho Tung* v. *Man On Insurance Company* (1902), A.C. 232; *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653.

In the *Oxted* case it is to be noted that though no notice was given the resolution was in the proper form—for an extraordinary resolution—all the shareholders had signed a minute of the resolution and the voluntary winding-up was confirmed by the creditors at a subsequent meeting.

Judgment

In the *Express Engineering Works* case, it was held that there being no fraud the company was bound by the unanimous agreement of its members. Although the meeting at which they acted was styled a directors' meeting, no statutory provision was violated, Younger, L.J., at p. 471, saying:

"In my opinion the true view is that if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed, and every competent resolution passed for which no further formality is required by statute becomes binding on the company."

In the present case the statute did require something further.

It was urged that the defendant is estopped from disputing the plaintiff's right to sue because it has already paid him money on account of the matters in dispute, but I cannot see that the doctrine of estoppel has any application to a case like this, which is merely the case of one who now ascertains that the so-called liquidator was in fact not the liquidator when the

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payment was made, and is not now; in the absence of any question of a general dispute between them and a forbearance to sue in consideration of their present payment, he can still say "I won't pay you any balance even if I owe the money, as you are not the party to whom I am indebted."

It was also urged that the hearing might be adjourned to enable the shareholders to hold another meeting, etc., as was done in one or two of the cases referred to, but that cannot be done for it could not make the resolution already passed a special resolution under the provisions of subsection (7) of section 77, Cap. 39, R.S.B.C. 1911, as amended in 1915. Nor could it rectify the resolution already passed as an extraordinary resolution, and which did not meet the requirements of the statute. It could only pass a fresh resolution in due form and the liquidator's rights would only date from the date of its passing, which would be no help to him in the present action, and a fresh action now would be barred by the Statute of Limitations.

If I am wrong in the conclusion I have arrived at, I make the following findings of fact in the hope that it will enable another Court to dispose of the case without putting the plaintiff to the expense of a new trial.

Judgment

All the moneys paid by Morton to defendant by cheques marked "Fuggle a/c," or "Fuggle int. a/c," were appropriated by Morton to that account, and they were not all placed to the credit of that account, though the great majority of them were. That the Silver Spring Brewery Ltd. and Duncan & Gray Ltd. were jointly interested in that account; that when the Silver Spring Brewery paid the plaintiff, through his solicitor, Mr. *Bass,* the sum of $825.25, by cheque dated March 7th, 1919, it improperly included in its claim of set-off, several items which were not properly chargeable to Duncan & Gray. Mr. *Bass* was not called as a witness, and from the evidence produced by the defendant I must assume that Mr. *Bass* took the cheque in full settlement of the claim then made. There was no suggestion by plaintiff, nor any evidence to justify a suggestion that the Silver Spring Brewery when claiming the set-off, knew that any of the items included in it were not properly chargeable to Duncan & Gray.

That it was never intended by either Duncan & Gray or the Silver Spring Brewery that Mr. Maynard should be personally liable on his mortgage to Fuggle, and this finding is without any reflection whatever on Mr. Miller, who I considered a trustworthy witness, but who is, I am satisfied, at this distant date, mistaken.

That the moose head improperly given away by Mr. Maynard, acting for the Brewery, was the joint property of the Brewery and Duncan & Gray, and was worth $75.00; that Duncan & Gray have a half interest in the bar fixtures now held by the Brewery.

I feel that I should also record that I find absolutely no justification for Mr. Maynard's suggestion in the dying moments of the hearing, that Mr. Morton had since the issuing of the cheques marked Fuggle a/c., so marked them. Mr. Morton gave his evidence in a much more convincing and satisfactory manner than did Mr. Maynard.

Judgment

Action dismissed.

FORSYTH v. THE IMPERIAL GUARANTEE AND ACCIDENT INSURANCE COMPANY OF CANADA.

Insurance, automobile—Conditional sale agreement—Accident—Damage to third party—Costs of action—Statutory conditions—R.S.B.C. 1924, Cap. 121, Sec. 7.

The plaintiff who held his automobile under a conditional sale agreement obtained insurance in the defendant Company against damage through his automobile causing injury to another. The policy contained a clause that "unless otherwise specifically stated in the policy or endorsed thereon, the insurers shall not be liable if the interest of the insured in the automobile is other than unconditional and sole ownership." There was nothing in the policy or endorsed thereon with respect to the conditional character of the plaintiff's ownership. The plaintiff had an accident. He was sued for damages, but the action was dismissed with costs. He then brought action against the insurance Company for the additional costs incurred by him in the action, and obtained judgment for the amount claimed.

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Held, on appeal, affirming the decision of RUGGLES, Co. J., that in an action of this nature the broad principle should be laid down that where the insured is the owner of a car subject only to a charge by way of security for a debt, he ought to be regarded as the exclusive owner, and may so describe himself to an insurance company.

The North British and Mercantile Insurance Company v. *McLellan* (1892), 21 S.C.R. 288 applied.

Statement

APPEAL by defendant from the decision of RUGGLES, Co. J. of the 15th of December, 1924, in an action to recover $668.40, on an insurance policy on his automobile. On the 17th of April, 1923, Charles Forsyth purchased a McLaughlin touring car from the Collins Taxi Limited for $1,600, under a conditional sale agreement paying $100 in cash on account of the purchase price, and on the 19th of April he took out an accident policy in the defendant Company for which he paid a premium of $85. On the 28th of December, 1923, while the car was being driven by one W. B. Orr, a chauffeur in the plaintiff's employ, Orr ran into and injured one Harry P. Lucas. One Tiderington, an adjuster of the defendant Company, attempted to settle any claim that Lucas had but failed and Lucas brought action against Orr, Forsyth, and the Collins Taxi Limited. Forsyth claimed that under the terms of the policy the Company should have defended the action. At the time the accident took place Orr was proceeding on the execution of a private matter of his own. The action was dismissed as against Forsyth, and the Collins Taxi Limited, but judgment was given against the chauffeur Orr. The action cost the plaintiff $668.40 in costs incurred by him in employing solicitors and counsel. Judgment was given for the plaintiff.

The appeal was argued at Victoria on the 23rd and 24th of June, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

Cantelon, for appellant: The chauffeur drove the car at midnight and ran one H. P. Lucas down. Orr said he was driving for himself and not for Forsyth or the Company. We refused to defend the action for three reasons: First, concealment and misstatement of fact and violation of statutory conditions in policy: see *Rockmaker* v. *Motor Union Insurance Co. Limited*

(1922), 52 O.L.R. 553; *The Western Assurance Company* v. *Temple* (1901), 31 S.C.R. 373; *Drumbolus* v. *Home Insurance Co.* (1916), 37 O.L.R. 465. Secondly, the automobile is encumbered by a lien which is in conflict with a statutory condition: see *Laforest* v. *Factories Insurance Co.* (1916), 53 S.C.R. 296 at p. 304; MacGillivray on Insurance Law, 313; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363. Thirdly, notice of the accident was not given in time, 27 days is not prompt notice: see *Merchants and Employers Guarantee and Accident Co.* v. *Parent* (1918), 48 D.L.R. 96.

E. J. Grant, for respondent: The evidence shews there was no objection or complaint of delay in giving notice as to the conditional sale agreement. There was no misrepresentation: see *Marshall* v. *Wawanesa Mutual Insurance Co.* (1924), 33 B.C. 404; *The Western Assurance Company* v. *Temple* (1901), 31 S.C.R. 373; *Rockmaker* v. *Motor Union Ins. Co.* (1922), 69 D.L.R. 177 at p. 179. The evidence shews there was no concealment and see *The Guardian Ins. Co.* v. *Connely* (1892), 20 S.C.R. 208. As to power of the agent to bind the Company see *Prairie City Oil Co.* v. *Standard Mutual Fire Insurance Co.* (1910), 44 S.C.R. 40 at p. 56; *James* v. *Ocean Accident & Guarantee Corporation* (1921), 30 B.C. 207; MacGillivray on Insurance Law, pp. 126 and 283; Holt's Insurance Law of Canada, 548.

Argument

Cantelon, in reply, referred to *Guimond* v. *Fidelity-Phenix Fire Ins. Co.* (1912), 9 D.L.R. 463.

Cur. adv. vult.

8th October, 1925.

MACDONALD, C.J.A.: The defendant insured the plaintiff against damage which might be incurred by him by reason of his automobile causing injury to a stranger. It in fact injured one Lucas, who brought action against the plaintiff for damages. The defendant declined to defend the action and plaintiff was obliged to do so himself. It was dismissed with costs and he now claims from the defendant, the costs to which he was put. The defendant disputed all liability on several grounds, only one of which I need now refer to, as I think the others are clearly not sustainable.

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The plaintiff bought the car in question under what is called a conditional sale agreement, the seller retaining the property in the car, the buyer obtaining the possession until default. The 6th statutory condition endorsed on the policy declares that,—

"unless otherwise specifically stated in the policy or endorsed thereon, the insurers shall not be liable (b) if the interest of the insured in the automobile is other than unconditional and sole ownership."

Nothing is contained in the policy or endorsed thereon with respect to the alleged conditional character of the plaintiff's ownership.

I conclude after reading the reasons for judgment in *The North British and Mercantile Insurance Company* v. *McLellan* (1892), 21 S.C.R. 288, that the Court intended to lay down the broad principle that when the insured is the owner subject only to a charge by way of security for a debt, he ought to be regarded as the exclusive owner and may so describe himself to the insurance company.

MACDONALD, C.J.A.

The distinction between ownership and the interest of the encumbrancer is clearly recognized in our Land Registry Act; the two are treated as entirely separate. Indefeasible ownership or absolute ownership may be in one person, and the right to a charge in another. The fact of this recognition, of course, does not affect the principle, it is merely an example of the adoption by the Legislature of the principle which I think is invoked in *McLellan's* case. Now, here the insured is the owner, the legal property in the automobile being retained by the seller as security for the purchase-money. The agreement is called a conditional sale agreement, but that does not make the ownership conditional, it is not different from the ownership under an ordinary agreement for sale by which the seller postpones the time for conveyance until the purchase price has been paid. Neither is it different from the ownership of a mortgagor when he has conveyed the property to the mortgagee upon a condition that the mortgagee shall reconvey when the debt shall have been paid.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: Though I am not free from doubt as to the proper disposition of this matter, yet it is not of such extent as

to induce me to dissent from the view taken by my learned brothers in declining to disturb the judgment appealed from.

GALLIHER, J.A.: At the close of the argument the only point upon which I was in doubt was as to the effect to be given to the words "sole and unconditional owner" in the policy. If one were to accept the ordinary meaning of these words, it might well be argued that the plaintiff here was not the "sole and unconditional" owner as he had purchased under a lien agreement, title not to pass until the motor-car was fully paid.

However, the Supreme Court of Canada, in *The North British and Mercantile Insurance Company* v. *McLellan* (1892), 21 S.C.R. 288, have laid down a principle which (although the facts are different in some respects) I think, governs us here. This principle is approved in *The Western Assurance Company* v. *Temple* (1901), 31 S.C.R. 373. Sir Henry Strong, C.J., at p. 375 said:

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"We are all of the opinion that the respondent was the sole and unconditional owner of the property within the meaning of the conditions of the policy, and that the interest of the assured was not untruly stated by him," citing the *McLellan* case, *supra,* and others.

The learned judge, however, has found in favour of the plaintiff and I do not think we should disturb his judgment. I would dismiss the appeal.

MACDONALD, J.A.: I agree with my brother GALLIHER, and would dismiss the appeal.

MACDONALD, J.A.

Appeal dismissed.

Solicitor for appellant: *J. F. Downs.*
Solicitor for respondent: *J. H. MacLeod.*

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IMPORTED HARDWOODS LIMITED v. ROBERTSON & HACKETT SASH & DOOR COMPANY LIMITED.

Sale of goods—Contract of sale—Implied warranty—Evidence—R.S.B.C. 1924, Cap. 225, Sec. 21(a)—Registrar—Restriction of references to.

The defendant Company, lumber manufacturer, requiring plain white oak to be used on interior finish of the main office of the Bank of Montreal, Vancouver, entered into a verbal agreement with the plaintiff, whereby, the plaintiff was to supply plain white oak to be of the grade F.A.S. which in the trade means firsts, and seconds, and suitable for said purpose. The oak was delivered and part of it was put through the dry kiln process. The defendant then started to manufacture the lumber for the interior finishings as aforesaid, when it was discovered that it was checked and honeycombed and could not be used in the bank. In an action to recover the price of the lumber it was held by the trial judge that it was understood by both parties that the oak was to be F.A.S. grade and suitable for the interior finish of the Bank of Montreal, but the oak delivered was inferior and not suitable for the purpose for which it was purchased but owing to unreasonable delay in announcing rejection of the oak the defendant had lost its right to reject and must retain the oak at its market value to be ascertained on reference to the registrar.

Held, on appeal, affirming the decision of MCDONALD, J. as to the appeal (MARTIN, J.A. dissenting in part), that the oak was sold on the implied condition that it should answer the purpose for which it was purchased, that it did not answer such purpose and there was a breach of the condition.

Held, further, reversing the decision of MCDONALD, J., as to the cross-appeal, that there was no unreasonable delay in rejecting the oak and the action should be dismissed.

Per MACDONALD, C.J.A. and MARTIN, J.A.: It is regrettable that trial judges should refer the assessment of damages to the registrar instead of assessing the damages themselves. They are far more competent to do this work and thereby save two sets of costs which are entirely unnecessary.

Statement

APPEAL by plaintiff from the decision of MCDONALD, J. of the 4th of March, 1925, in an action to recover $1,671.98, the price of goods sold and delivered the defendant in November, 1924. The goods supplied were 7,400 feet of plain white oak and 3,000 feet of quartered white oak to be used on interior finish of the main office of the Bank of Montreal, Vancouver. The defendant claims the wood was sold by sample and the

wood delivered was of an inferior quality to the sample, and it was to be of first-class quality and up to F.A.S. grade (first and second grades). They claimed the wood was honeycombed inside, heart checked and salted. The defendant further says the plaintiff knew the purpose for which the wood was required and undertook that it would be suitable for the purpose for which it was purchased. The defendant paid into Court $603.17, the sum claimed for the quartered white oak and costs. The defendant further claimed the lumber was sold with an express warranty that it was F.A.S. grade. The learned trial judge found the plain white oak was to be F.A.S. grade and suitable for the interior finish of the bank but the oak delivered was not up to grade or fit for the interior finish of the bank, but he further held that owing to unreasonable delay in announcing rejection of the lumber the defendant is bound to retain the oak but is entitled to a reduction of the price agreed upon and he ordered a reference to the registrar to ascertain its market value. The plaintiff appealed and the defendant cross-appealed claiming that the action should have been dismissed.

Statement

The appeal was argued at Victoria on the 12th and 15th of June, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Mayers, for appellant: There are three questions: (1) Whether there was a warranty; (2) whether the warranty was broken; (3) measure of damages. The highest grade of hardwood is firsts and seconds. We sold the best we could procure and we procured the grade we undertook to sell: see *Heilbut, Symons & Co.* v. *Buckleton* (1913), A.C. 30 at pp. 47-8. On the question of warranty see *Brown* v. *Edgington* (1841), 2 Man. & G. 279 at p. 292; *Wilson* v. *Dunville* (1879), 4 L.R. Ir. 249 at p. 255; *Jones* v. *Just* (1868), L.R. 3 Q.B. 197 at p. 202. The lumber was retained for a month going through tests that ruined it: see *Pioneer Lumber Co.* v. *Alberta Lumber Co.* (1923), 32 B.C. 442 at pp. 444-6-8. Section 58(3) of the Sale of Goods Act applies here.

Argument

[MACDONALD, C.J.A.: It is regrettable that trial judges

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should refer the assessment of damages to the registrar instead of assessing the damages themselves. They are far more competent to do this work and thereby save two sets of costs which are entirely unnecessary.

MARTIN, J.A.: I agree.]

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T. E. Wilson, for respondent: It is not a question of warranty but one of condition and we do not come under section 58: see Benjamin on Sale, 6th Ed., 1143. There was a specific contract for lumber that would match an old finish. The wood we got was honeycombed and checked so as to take it out of firsts and seconds and was not suitable for interior finish. The quality of the wood is a question of evidence and the trial judge found in our favour: see *Managers of the Metropolitan Asylum District* v. *Hill and others* (1882), 47 L.T. 29 at p. 35. On the question of the contract see *Manchester Liners, Lim.* v. *Rea, Lim.* (1922), 91 L.J., K.B. 504. When it is disclosed to the vendor the special purpose for which it is required see *Pinnock Bros.* v. *Lewis & Peat, Lim.* (1923), 92 L.J., K.B. 695 at p. 699; *Drummond* v. *Van Ingen* (1887), 12 App. Cas. 284 at p. 288; Benjamin on Sale, 6th Ed., 716. The damages are the estimated loss in the natural course of events and here the measure of damages is the full value of the goods as they were bought for a specific purpose: see *Nolan* v. *Emerson-Brantingham Implement Co.* (1921), 2 W.W.R. 416; *Hadley* v. *Baxendale* (1854), 9 Ex. 341; *Williams Brothers* v. *Ed. T. Agius, Limited* (1814), A.C. 510. On the question as to the date upon which damages are to be estimated see Smith & Watts's Compendium of Mercantile Law, 12th Ed., 712. As to delay in repudiating see *Bostock & Co., Limited* v. *Nicholson & Sons, Limited* (1904), 1 K.B. 725. As to a reference to assess damages see *British America Paint Co.* v. *Fogh* (1915), 22 B.C. 97.

Argument

Mayers, in reply, referred to *Slater and Another* v. *Hoyle and Smith* (1920), 2 K.B. 11.

Cur. adv. vult.

8th October, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The dispute arises out of a sale by plaintiff to defendant of oak lumber. The contract was verbal. One of the plaintiff's officials, Hulme, having become aware that

the defendant had obtained a contract for the interior finishing of an addition to the Bank of Montreal, waited upon Robertson and told him that the plaintiff company had oak suitable for such finishing. Each of them relates the conversation which led up to the contract. Robertson informed Hulme that he wanted oak of the grade F.A.S., which in the trade means firsts and seconds, suitable for the said purpose, stating it. Hulme replied that plaintiff had oak suitable for that purpose. Hulme, relating the same conversation at the trial, said:

"And he [Robertson] asked you to specially select [the oak], did he? Yes."

"And you told him you would take special care to choose the lumber for that purpose [for veneers]? Yes."

"Well, Robertson knew that the ordinary F.A.S. grade would not cut veneers? I guess so."

The evidence shews that highland and lowland oak may each grade F.A.S., but that the latter is not fit for interior finishing. The lumber delivered under the contract was lowland oak, and I think the true conclusion to be drawn from the evidence is that it was not fit for interior finishing.

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In my opinion the oak was sold on the implied condition that it should answer the purpose aforesaid, and as it is clear to me that the oak delivered did not answer that purpose, there has been a breach of the condition. I think also that the finding of the learned trial judge that the oak was not of the grade F.A.S., is quite sustainable on the evidence.

Emphasis was laid on the statement of Robertson on discovery, that he bought the oak strictly according to grade. Even so, that would not of itself exclude the implied condition, that it was fit for the particular purpose for which it was sold. Moreover, Hulme's evidence is consistent with something more than a contract based wholly upon grade.

The law on the subject of implied conditions was recently considered by the House of Lords, in *Manchester Liners, Lim.* v. *Rea, Lim.* (1922), 91 L.J., K.B. 504, Lord Dunedin saying:

"But when the article tendered does comply with this specified description, and the objection on the buyer's part is an objection to quality alone, then I think that section 14, sub-section (1) [Sale of Goods Act], settles the standard, and the only standard by which the matter is to be judged. 'There is no implied warranty or condition as to quality . . . . . except as follows.'

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"Now the requirement made essential by this section is that the buyer make known to the seller the particular purpose for which the goods are required, and then comes the additional qualification 'so as to shew that he relies on the seller's skill or judgment.'"

He agrees with the view of Salter, J. of what was held by Lord Russell, C.J. in *Gillespie Brothers & Co.* v. *Cheney, Eggar and Forrester* (1896), 65 L.J., Q.B. 552, that the statement of the purpose may in itself amount to evidence that the buyer relies on the seller's skill and judgment, but that this may be rebutted by evidence to the contrary. Lord Buckmaster in the same case said, that when the purpose is disclosed, the seller must be "assumed" to know what will satisfy that purpose.

The quartered oak was accepted and the price of it paid into Court. This leaves to be dealt with only the plain white oak. The oak was delivered on the 7th of November, and part of it was put through the dry kiln by the defendant. It was not until the defendant commenced the manufacture of it for interior finishings that its inferiority was disclosed. The defendant notified the plaintiff of this on the 2nd of December, but the plaintiff declined to recognize the objection. The lumber is still in defendant's possession. The learned judge held that owing to the unreasonable delay in rejecting the oak, defendant must keep it, subject to a deduction from the price, for damages, and referred it to the registrar to ascertain what this should be, and declared that the deduction should be the difference between the contract price and the market value of the oak on December the 2nd.

MACDONALD, C.J.A.

With respect, I think he should have dismissed the action. There was, in the circumstances, no unreasonable delay, and the cross-appeal should succeed. Damages are claimed by the defendant, but not pressed before us. The plaintiff is entitled to remove the rejected oak.

The appeal is dismissed, the cross-appeal is allowed, and the action is dismissed with costs.

MARTIN, J.A.: This is a difficult case upon which to arrive at a conclusion satisfactory in all respects. Had it not been for the findings of fact of the learned judge below I should have been inclined from the evidence before us not to have gone so

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far as he has done in favour of the defendant upon the contract, but since he had the advantage of seeing and hearing the witnesses I am not prepared to go the length of saying that he took a clearly wrong view of their testimony. His judgment, as I understand it, is based upon the fact that not only was the plaintiff to supply plain white oak lumber of a F.A.S. grade (there is no dispute about the quartered oak) but that it was to be "specially selected" for the purposes of the defendant to use for interior finishing in the Bank of Montreal. Apart from this element of special selection for a specified purpose I do not think that the judgment could be supported at all but since that has been in effect found, as I read the learned judge's reasons, I do not think it should be. Nor likewise and for the same reasons do I think that we would be justified in disturbing the second main finding that the defendant had "under all the circumstances" lost, because of "unreasonable delay," its right to reject the said oak: I reach this conclusion after a special reconsideration of the evidence in deference to the opinion of my learned brothers that we should overrule the finding of the learned judge on this point, but I see no better ground for doing so in this latter respect than in the former: the "circumstances" before the learned judge upon which he reached the conclusion that there was such delay would include the conflicting accounts of the two chief witnesses on either side as to what occurred when the complaint was made about the lumber on or about the 12th of November, and the inspection of it at that time. It is conceded that after the lumber was delivered, mainly on the 6th and partly on the 7th of November, 75 per cent. of it was properly put in the kiln for drying, and the balance, to the value of about $400, was simply put into the warehouse awaiting the defendant's convenience, instead of being inspected then and there so as to exercise the right of rejection within the required reasonable time in the circumstances if it was decided not to accept it—sections 33, 36, 40, 41; on the face of it, the retention of this substantial portion of one-quarter of the lumber for a period of almost a month from 6th November to 2nd December (when written notice of rejection of all the lumber was given) was a most unreasonable detention and could only

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be justified or explained by other circumstances as aforesaid and those circumstances have been found as a fact to exist in the plaintiff's favour. I agree with my brothers in regarding this contract as not being severable and so as the purchaser here has at least accepted a part of the goods (section 18) it has lost its right of rejection to the whole: I do not wish to be understood as differing from the learned trial judge in his view that there was undue delay in rejecting all the goods, including those put into the drying kiln and taken out on the said 14th of November at latest, for the long delay of over two and a half weeks thereafter has not been explained as aforesaid or otherwise as it must have been: no jury would approve such delay in business affairs, and no reason has been advanced why a full inspection was not promptly made at the latest within a day after the lumber came out of the kiln; it is *prima facie* most unreasonable as a matter of business to keep another man's trade goods for a longer period than is necessary for the purchaser to exercise his right of acceptance or rejection.

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So far, I am in accord with the learned judge below, but, with respect, as a matter of law the date he fixes, said 2nd December, as being that upon which the market value of the oak should be ascertained cannot, with respect, be supported, because it was merely the arbitrary date wrongly and belatedly selected by the defendant for rejection; at the latest, and in any event, said date should have been the 15th, the day after said complaint which, in accordance with the said finding, put the defendant upon guard and the necessity of defining without delay its position; but I am of opinion that the true date in the circumstances is at latest the 7th of November, the day of the complete delivery as aforesaid—*vide* section 88(3). The result is that the judgment should be varied in the appellant's favour by fixing the said date at the 7th of November instead of the 2nd of December, and the cross-appeal of the defendant asking that the defendant be, upon the evidence, entitled to a diminution in the price equal to the contract price of the lumber, should be dismissed because the facts, so far, do not at all support such submission, but on the contrary there is in the testimony of Wurzburg (the defendant's expert) alone

evidence of substantial value thereof for certain purposes, and other evidence not necessary to consider now. I feel constrained to repeat, with every respect, what we said during the argument; that this is not a case where the damages should have been referred to the registrar but decided by the Court in the ordinary way thus avoiding much delay and expense.

The appeal therefore should, I think, be allowed in part as aforesaid and the cross-appeal dismissed.

GALLIHER, J.A.: On the main appeal I am in agreement with the Chief Justice.

During the argument in the cross-appeal I was impressed with the view that it could not succeed, but upon reconsideration and a reading of the evidence, I have changed my views.

The lumber in question was delivered by the plaintiff to the defendant on the 7th of November. It was known to the plaintiff the purpose for which the lumber was required, and as dealers in hardwood it would be known to them that it would be necessary to put it through the dry kiln to render it fit for the interior finishing of the bank. This was done by the defendant shortly after receipt of same, and I find nothing in the evidence to convince me that it was not treated properly in the kiln. The process of drying disclosed defects in the lumber which rendered it unfit for the purposes for which it was ordered, and the same defects were discovered when the defendant started cutting for veneers, whereupon Robertson, the defendant's manager, took samples of the timber to Hulme, the plaintiff's manager, who, according to the evidence of Robertson, which is not specifically denied by Hulme, admitted that it was not suitable for the purpose for which it was ordered.

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A draft was drawn by the plaintiff on the defendant for the purchase price, dated 17th November, and refused, Robertson noting on the back of the draft—"Material unsatisfactory," and on the 2nd of December, Robertson wrote the plaintiff notifying them why the draft was returned and requesting them to take the material away. The plaintiff did not do this, but within a week, issued a writ for the price.

In the meantime, and before the draft was returned, the

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plaintiff had notice of the unsatisfactory character of the lumber, as I have outlined above, and Robertson says that after that conversation he left Hulme under the impression that the matter would be taken up by Hulme with the shippers.

Under those circumstances, I cannot hold that the defendant, by unreasonable delay disentitled itself to reject. Did it then by putting it through the dry kiln so use the lumber or deal with it as to disentitle it to reject? At first blush that impressed me against the defendant, but considering that both parties knew that this would have to be done before the lumber could be used and that it was not unreasonable to put it through the kiln in one lot rather than in small lots which would have greatly increased the cost of drying, and that the evidence satisfies me that it was properly dried, I do not think this is such a dealing with the lumber as would disentitle them to reject. The lumber is still there and is merely kiln dried instead of partially green.

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If I am right in these conclusions, the lumber was rejected and placed at the disposal of the plaintiff within a reasonable time, and the changed nature of the lumber, or the dealings with it, not such as to bar rejection, it follows, in my opinion, that the cross-appeal must be allowed and the action below dismissed.

The defendant has asked for damages, but in view of all the circumstances of this case, I think we should not grant same.

MACDONALD, J.A.: The learned trial judge made a finding of fact in these words:

> "I am satisfied that the oak delivered was not of F.A.S. (meaning first and second) grade, in that it was lowland oak and not of the proper texture to correspond with that grade and that it had checks and other defects."

MACDONALD, J.A.

There is a further finding more controversial, that "it was not fit for the interior finish of any building approaching the type of the Bank of Montreal." In my view the evidence does not shew conclusively a contract of warranty collateral to the main contract of sale and purchase, to supply oak which in all respects would be suitable for the highest quality of interior finish for this projected building. To do so it would even

include an undertaking to match in colour the existing finish in the building. The evidence on this point only amounts to a statement by the plaintiff, knowing where the oak was to be used, that it should be suitable for this purpose but falls short of a warranty, that in consideration of the purchase it would answer requirements in every detail. That was not the intention of the parties. Although the statement of belief of the plaintiff that it would be suitable, is some evidence of intention to warrant, it is not conclusive (*Heilbut, Symons & Co.* v. *Buckleton* (1923), A.C. 30). The plaintiff is not a manufacturer. It resold lumber purchased from other sources. Had it undertaken to find and supply a special quality of oak that would fit the very special requirements of the interior finish in this building, the warranty would be complete. The evidence does not shew, however, a contract that the plaintiff would exercise skill and diligence in securing oak of the requisite quality in colour and texture for this particular purpose.

There was, however, a clear stipulation forming part of the contract which the plaintiff was obliged to conform to, that the grade should be F.A.S., *i.e.*, firsts and seconds, of merchantable quality, not generally, but having regard to the known purposes for which it was to be used. The learned trial judge found that there was a breach of this condition. The oak supplied did not answer this description. It differed in quality from that contracted for. There is ample evidence to support the finding of the learned trial judge that it was not of F.A.S. grade and was defective. It is also clear that the defendant relied on the plaintiff to furnish the proper grade. Hulme, for the plaintiff, was asked:

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"As a matter of fact you knew he [Robertson] was relying upon you to give him lumber that was suitable for what he wanted? To the best of my ability.

"He didn't turn the boards over and examine them? No."

Seventy-five per cent. of the lumber when received was put through the drying kiln; the balance being stored. The defects (which to a considerable extent were latent) first came to defendant's notice when it commenced to cut the lumber not dry kilned for veneers, and the defendant testified that apart altogether from its use for the bank, it would not grade F.A.S.

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Further, the part kiln dried after going through this process, shewed that a considerable portion of it was checked and in places there were signs of decay. Parts too were honeycombed. It was suggested that these defects were the result of defendant's negligence in not strictly following the recognized regulations in the trade, in putting it through the drying kiln. Robertson admitted that "you can ruin lumber in the dry kiln." I have looked carefully through the evidence on this point, and I am satisfied that the plaintiff failed to displace the evidence of the defendant's witnesses, that the proper treatment was applied. Suggestions were made of insufficient spraying, and that the treatment was not continued for the number of days called for by the rules governing this process, but this point was not sufficiently explored to shew with any degree of certainty that the defects disclosed were caused by these alleged omissions. This appears clear when the whole evidence in relation to the undried and the kiln-dried lumber is examined. Wurzburg, an expert called for the defendant, examined 1,500 or 2,000 feet out of a total of 7,800 feet. True, he says it was a cursory examination, but undue prominence was given to this expression. I take it that he meant that even a cursory examination would disclose the defects to an experienced examiner. "Any one who is really familiar with oak," he said, "can tell at once." He says the oak he examined was of very poor quality and checked. It was lowland oak, not at all suitable for interior finish. As to lowland oak, he testified:

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> "We in the trade know so well what class of material it is, that we would not put it, in our own business, into a job of the kind that you have in question."

He could tell it was lowland oak from a cursory examination. He examined a pile in the shed which had been kiln dried, and some large pieces in the warehouse that had not been dried, as well as small pieces. They disclosed checks. It is true that even with a certain proportion of defects the lumber might still be of F.A.S. grade. Wurzburg testified, however, that the oak he examined was not F.A.S. grade, while Robertson (less expert, it is true) said that the oak thus examined was a fair sample of the whole lot. Other witnesses, with less experience, gave similar evidence. Evidence less direct would be sufficient

to sustain the findings of the learned judge. It was, therefore, not of F.A.S. grade as stipulated in the contract.

Under these circumstances, what is the appropriate remedy? I do not think that the defendant, on the facts disclosed, lost the right to reject by unreasonable delay. It is a question of inference from all the facts and while the point is not free from difficulty I agree with the views expressed by my brother GALLIHER on this phase of the case.

On December 2nd, the defendant wrote to the plaintiff returning its draft for the invoice price, complaining that it was not up to grade, and requesting that the lumber should be taken back. The defendant was justified in so doing. The plaintiff cannot therefore recover the purchase price agreed upon for lumber different from that ordered. The plaintiff's action should therefore have been dismissed.

The appeal should be dismissed and the cross-appeal allowed.

Appeal dismissed and cross-appeal allowed, Martin, J.A. dissenting in part.

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Negligence—Forest fire—Spreading—Origin—Direction of statutory authorities—Jury—Reversal of findings.

In an action for damages the jury found that the defendant had been negligent in allowing a fire to spread from its lands to those of the plaintiff.

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Held, on appeal, reversing the decision of MACDONALD, J. (MACDONALD, C.J.A. dissenting), that where a fire starts on forest land and the owner thereof while co-operating with the statutory authorities to put out that fire and under their express direction, without negligence, starts another fire that spreads to his neighbour's property, the owner is not responsible for the damage thereby occasioned.

APPEAL by defendants from the decision of MACDONALD, J. of the 13th of February, 1925, in an action for damages, resulting from a fire started by the defendants which spread to the plaintiff's farm, and burned his house, stables and outhouses. The plaintiff's farm was section 4, range 1, in the Somenos District near Duncan and the defendants carried on a lumber business at Mayo in the county of Nanaimo. In June, 1924, everything was very dry and the defendants had a locomotive on its property that operated on its logging railway from which sparks emanated. A fire started on the timber lands operated by the defendants on the 11th of June, and was put out by the fire wardens on the 15th of June following. Another fire started on the 26th of June and the fire wardens had it under control on the 27th. On the same day the defendants' locomotive was sent into the woods to get a water-tank required to fight the fire. As the locomotive was proceeding to get the water-tank, sparks from its smokestack started a third fire in a spot that was full of underbrush and very dry. The fire wardens then left fire number 2 to fight the third fire, but it spread and joined the number 2 fire and later spread over the hill to the plaintiff's premises, reaching there on the 5th of July and burning down the buildings on plaintiff's farm.

Statement

The appeal was argued at Victoria on the 5th and 8th of

June, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellants: We say first, there is no evidence of negligence, and secondly the verdict is perverse as the evidence shews overwhelmingly that every precaution was taken. There were three fires in June. The fire wardens put out the first one and on the 27th of June they had the second one under control when the third started. The fire wardens then turned their attention to the third fire, but owing to the dry weather this fire did the damage.

Davie, for respondent: The defendants' locomotive started all the fires and there is no dispute as to how the third fire started on the 27th of June. The defendants only worked on the west side of the fire to save its own property. We do not have to shew negligence: see Halsbury's Laws of England, Vol. 21, p. 105, par. 681. The Act does not take away the common law liability. Section 114 provides a penalty. Liability attaches the moment the fire starts: see *Port Coquitlam* v. *Wilson* (1923), S.C.R. 235; *Jones* v. *Festiniog Railway Co.* (1868), L.R. 3 Q.B. 733; *Powell* v. *Fall* (1880), 5 Q.B.D. 597; *Mansel* v. *Webb* (1918), 88 L.J., K.B. 323; *Coryell* v. *Bertha Consolidated Gold Mining Co.* (1923), 33 B.C. 81; *Gallon* v. *Ellison* (1914), 7 W.W.R. 920. On the definition of accidental fire see *Filliter* v. *Phippard* (1847), 11 Q.B. 347; Addison on Torts, 8th Ed., 707. It must be shewn that the fire started accidentally: see *Crewe* v. *Mottershaw* (1902), 9 B.C. 246; 1 Sm. L.C., 12th Ed., Vol. 1, p. 894;

Argument

Farris, in reply: A fire is accidental that started from an engine that was in the control of the Government: see *Musgrove* v. *Pandelis* (1919), 2 K.B. 43.

Cur. adv. vult.

6th October, 1925.

MACDONALD, C.J.A.: It is alleged that defendants started a fire upon certain timber lands operated and controlled by them, which they negligently allowed to escape to the injury of plaintiff's property. The defendants deny starting the fire, and deny negligence in controlling it.

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At the trial, when plaintiff's counsel sought, gratuitously, I think, to shew the origin of the fire, objection was taken that that question was not raised by the statement of claim. The learned judge sustained the objection and refused to allow an amendment, and when charging the jury, withdrew from them the question as to the origin of the fire.

Now, in my opinion, the statement of claim does raise the question of the origin of the fire; it is distinctly stated that it was started by the defendants, true, the pleader goes on to say, "and [who] carelessly and negligently permitted same to escape," and in the following paragraph gives particulars of the negligence. But this does not affect, in my opinion, although not apt pleading, the statement that the defendants started the fire. If the defendants found themselves embarrassed by this pleading, they should have moved to strike it out when the same could have been amended, if necessary, and as they did not do this, the objection which the trial judge sustained was, in my opinion, not a good objection. The cause of action falls within the provisions of Anne and of 14 Geo. III., Cap. 78, Sec. 86. The Forest Act, R.S.B.C. 1924, Cap. 93, does not, in my opinion, affect this phase of it. The Forest Act has to do with the prevention and control of fires, not with civil liability caused by them. The onus of proving that the fire had an accidental beginning was upon the defendants. *Port Coquitlam* v. *Wilson* (1923), S.C.R. 235. The question did not in that case come up directly for decision, and has never been to my knowledge authoritatively decided by any Court, but I think the opinions expressed by the judges in that case indicate correctly, if I may say so, the true construction of the statute.

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The pleadings of both parties are inartificial; all that was necessary for the plaintiff to have alleged was that the fire originated on defendants' property and was allowed to escape to the injury of plaintiff's property. The defence might deny this, and alternatively allege that the fire had an accidental beginning. If they should fail to prove this the plaintiff must succeed irrespective of any question of negligence. The question of negligence could only arise should the defendants prove accidental beginning, and the plaintiff prove negligence in control.

I think the learned judge was in error in withdrawing from the jury the question of responsibility for the beginning of the fire, but there is no appeal by the plaintiff upon this point. That being the case, the question on this appeal is limited to the one submitted to the jury, namely, were the defendants negligent in the control of the fire? The jury must be assumed to have founded their verdict of liability on that issue alone, and hence there was no decision of the issue withdrawn from them. If the plaintiff wished in this appeal to rely upon misdirection, he should have raised the question in a cross-appeal, and asked for a new trial in case the judgment were reversed on the issue tried.

The question of negligence in not controlling the fire involves questions of law and fact. The defendants contended that under the Forest Act the fire warden or his subordinates had authority to take charge of the fire and oust the defendants from control of it, and that that was done here. That is a question of construction of the Act. It is expressly declared that the Act shall not interfere with civil liability for injury to other persons. If defendants are right in their contention, then the Act might on their own submission affect the civil rights of others. They say "we are not liable because the fire warden was in control." In other words, they claim they were relieved of all responsibility as soon as the forest officials took control of the fire or interfered in the matter. This question has two aspects: If neither the defendants nor those assisting them, the forest officials, were negligent, then the question of the right of control is unimportant. If the officials were guilty of negligence which defendants could have prevented—or of omissions which defendants could have made good, then I think they were responsible. The independent act of the officials not controllable by the defendants would be acts for which defendants could not be held accountable. They would be accountable for their want of care when there was no authorized interference by the officials. The true scope of the Act in its relation to the powers of fire wardens is not very well defined, but my interpretation, except as to section 115, which does not affect this case, except in aiding construction of the rest of the Act, is, that

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notwithstanding the assistance or the unauthorized interference of the forest officials, if defendants have failed to use reasonable care to prevent the escape of the fire, they are responsible for the injury done to others. Section 113, far from relieving, because of official assistance, the occupier of the lands from the duty of controlling fires originating thereon, casts the burden upon them of controlling the fires at their own expense and with their whole force of men, if required. Section 114 renders liable to penalties any such persons who refuse or neglect to do their utmost to control such fires. Section 117, which was much relied upon by defendants' counsel, merely gives employees of the forest branch power to enter upon lands in the performance of their duties and imposes penalties upon those obstructing them. It does not, I think, give them absolute control of a fire; it merely provides that the officials are not to be obstructed in their duties of patrol and fire prevention. Section 118 gives the officials power to summon assistance and provides for the punishment of those who refuse it.

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There is nothing in all this from which a necessary inference must be drawn that these officials may take control of the fire to the exclusion of the occupier of the land. I think that the officials are to assist the occupier and may exercise powers for compelling others to assist, and may require the occupier to do certain acts, such as to stop all industrial operations and to call out his force of men, but there is nothing in the Act to off-set the clear declaration or the obligation at common law, that the occupier is primarily responsible for the control of the fire; there is nothing in the Act to relieve him of his obligation to others.

Then is there evidence upon which the jury might legally find negligence on defendants' part? As the case comes to us the burden of proving negligence is on the plaintiff. Has he discharged it?

The plaintiff's witnesses, I think, failed to make out a case of negligence. True, one of them said that between the 27th of June and the 5th of July, the date on which the plaintiff's property was destroyed, he had seen 18 or 20 men shifting track and the suggestion is, that these men should have been

fighting the fire. This is very indefinite and hardly of a character upon which to found a verdict of negligence. It was not shewn that they were defendants' men, nor that the track was on defendants' land, though there is a strong suspicion of that, but the verdict cannot be supported upon suspicion. The witnesses for the defence, however, gave evidence, which in my opinion, is sufficient to sustain the verdict.

Three distinct fires are mentioned; No. 1, that of the 11th of June, may be eliminated from consideration, since it was completely extinguished on the 15th of June; number 2 originated on the 26th of June, and notice thereof was given by defendants upon that day to Porteous, the deputy fire warden, whose district the fire was in, and who arrived on the scene at about 5 o'clock in the afternoon. He put on a small patrol for the night. Up to that time the defendants appear to have done nothing of their own motion. What they should have done at least, was to have had water there for the pump which they expected the official to bring. Next morning, the 27th, Porteous saw the beginning of No. 3 fire, which turned out to be the most serious of the two; it is supposed to have resulted from a spark emitted by a locomotive of defendants which was proceeding to another part of the property for the purpose of bringing down a tank with which to get water to assist in putting out No. 2, though the evidence of Porteous and the pump-man, Kingscote, do not harmonize on this point. The locomotive is said to have been sent out at the request of one of Porteous's subordinates. Porteous recalled the locomotive to the mill to take the water and the pump to this No. 3 fire. He then ordered the mill to be closed down, which was done, and took a number of defendants' employees to the scene of No. 3 fire. The whole 135 men were said to have been called out, but what they were doing, other than what I shall state presently, does not appear.

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Having decided that No. 3 fire could not be put out by the pump and tank, Porteous told Mayo to take the men and get his donkey engine and equipment, some considerable distance away, out. He explains this direction or permission by saying:

"When a fire gets into a logging camp near people's equipment, we don't take the men off away from saving their own private property."

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The saving of defendants' property having occupied the day and most of the night, Porteous then made a reconnaissance, as he calls it, of the fire, and decided on a plan of controlling it.

Now the obligation imposed by the Forest Act upon the defendants was to do their utmost to prevent the spread of the fire. Their obligation at common law was to take all reasonable care to prevent the escape of the fire to the injury of their neighbours. Can it be said that the jury were wrong on such evidence as the above, in finding that the defendants had failed to discharge even the least of these obligations? I think not. At a time when a large force of defendants' men ought to have been employed to secure control of the fire in its infancy, they were employed in putting the defendants' own property beyond risk. The jury might well infer that had the defendants or Porteous, whichever may rightly be deemed in charge, employed the men, the locomotive tank, and the pump in penning the fire within the narrow limits of the triangle of which the logging railway formed the two sides, they might have put it beyond the influence of the high wind of the 5th of July. Moreover, had the defendants, instead of waiting supinely for the forest officials to do what they themselves were bound to do, promptly attended to the extinguishing of No. 2 fire on the 26th when it started to burn; had they filled their tank on that day and had it in readiness for the use of the fire warden and his assistants when they arrived with the pump, is it not a reasonable inference for the jury to have drawn that the third fire which contributed most to the injury, would not have been started at all?

The two fires, Nos. 2 and 3, joined subsequently and caused the general conflagration of the 5th of July.

Moreover, the jury heard the evidence and the explanations of the witnesses, who referred to the plans and sketches which appear in the appeal book, and which I must confess I am unable to follow wholly, by reason of the want of identification in the record of many of the places to which these witnesses were referring.

On all the circumstances of this case, I am unable to say that the jury had not sufficient evidence upon which to find their verdict. The appeal should be dismissed.

MARTIN, J.A.: This is an appeal from the verdict of a jury awarding the plaintiff $2,137.65 for damages occasioned by a fire being negligently allowed to spread on the 5th of July, 1924, from the defendants' land to the plaintiff's.

It is necessary to bear in mind the exact negligence complained of because the case went, properly, to the jury on that ground alone, and it is thus set up in par. 3 of the claim:

"The defendants' said negligence consisted in not properly attending and watching the said fires and in not taking proper steps to insure the complete extinguishment thereof, or to prevent said fires from spreading, having regard particularly to the then nature and condition of the weather and season, which was unusually dry and had been so for several months previous."

A small fire had started on the defendants' timber limit on the 26th of June, 1924, which was duly reported by them to the proper forest branch officers pursuant to the duty imposed by section 112 of the Forest Act, Cap. 93, R.S.B.C. 1924, and it is beyond question, indeed it was admitted, that the said officers were speedily upon the spot and had the fire segregated and under control and gradual extinguishment with a sufficient force of 12 men in charge of it. In the course of these operations, and pursuant to the direction of the local assistant fire ranger, Major Porteous (who had assumed control of the fire situation and was exercising the powers conferred upon him by sections 114 and 118 of said Act) the defendants, by his direction on the morning of the 27th, sent their servants with their locomotive along their logging railway to get a railway water-tank on a flat car that Porteous had on a previous occasion arranged with defendants to have available to assist him with his fire pump, and in so doing a spark from the locomotive started a third fire, despite the fact that the engine was properly equipped with an approved type of modern spark arrester which had recently passed official inspection, and therefore not only could no negligence be imputed to them in starting the new fire (nor was it in fact alleged) but it originated in carrying out the protective measures authorized, it is submitted, by said statute for the safety of the public at large, of which more hereafter.

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This new fire starting in some "slashed" ground (about 1,800

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feet to the west of the small fire) rapidly assumed serious proportions, embracing the smaller fire and requiring the calling out of all defendants' employees, 135, and others up to a total, on the 30th of June and up to the 4th of July, of about 300 men with such success, owing to the favourable location of the logging railway and other local conditions, and still weather, to get it in such a state of segregated control that the said fire ranger in charge, after elaborately detailing his operations of trenching, back-firing, etc., described the situation on the 4th of July thus: "from the forest point of view we thought we had that fire completely extinct" and "everything all right" after taking "extra precautions" and "completely cinched," but on the following morning a very high and exceptional wind arose, with a velocity of 40-50 miles per hour, which fanned the smouldering fire and jumping across the said safeguards that were deemed sufficient, got beyond the control of the fire-fighters and spread to the plaintiff's property doing serious damage thereto. The main essential statements made by Porteous are confirmed by his superior, Forest Ranger Waddington, who visited and inspected the scene of operations on the 3rd of July, and found "a very good job" of it had been made, and also by Mottishaw, a foreman, who was there on the 28th of June, and by Kingscote, assistant to Porteous, who went there on the 27th and left on the 28th at noon: these experienced persons saw no cause for alarm in the situation, and sufficient men were there to cope with it as it then appeared.

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I have read through the whole appeal book with great care to find any substantial contradiction of these statements and I have found nothing. It must be conceded, I think, that if the case had gone to the jury upon the plaintiff's evidence alone, they could only properly have returned a verdict in favour of the defendants, and I am unable to see that the defendants' case has been weakened by their evidence given after their motion to dismiss had been overruled.

Where negligence is alleged, and particularly in a case of this unusual kind, under the Forest Act, it is to be expected that the specific acts of commission or omission that are relied upon to constitute negligence in the circumstances would at least be

clearly drawn to the jury's attention, even if formal particulars thereof had not been demanded and furnished as they should have been, but there is nothing at all of the kind to be found in the charge, from which it can only be inferred that the plaintiff's counsel had not directed the attention of the Court and jury specifically to what he was relying on: all that they, in effect, were told in the brief charge was that it was for them to determine whether or no the fire

"was negligently allowed to spread, and do the damage. Plaintiff says that the negligence consisted in not properly attending and watching the fire, and in not taking proper steps to insure its complete extinguishment, and prevent it from spreading, having regard to the then nature and condition of the weather, and season—it being alleged it was unusually dry, and had been so for several months previous."

And:

"Now what were the conditions existing on say the 3rd of July, 1924? A fire started on the 26th of June; it had not been put out. A fire was started on the 27th day of June and it was not put out. Those fires had joined in the meantime, and become a menace to the locality. They were fought with a large force of men, numbering, at one time, if I remember right, 300 people; and still their success was nil; their efforts were fruitless. And they know as well as you know that a fire of that nature, if it spread, in a locality of that kind, will necessarily do damage. So, those are the conditions existing to which I draw your careful attention. View, then, from those conditions, the amount of care that should have been exercised by the defendants or by the forestry department, acting properly enough to assist the defendants in controlling that fire so that it would do no damage. It is a matter purely for a jury to consider, and to determine. There is not a great mass of evidence to consider. Nor is there very much of a conflict of evidence, after all."

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There is no indication here of any particular instance in which the fire-fighters failed to take that "amount of care that should have been exercised" in preventing the fire from spreading, and the statement that "still their success was nil; their efforts were fruitless" is, with every respect, directly contrary to all the evidence and radically misdescribes the "conditions"; it is much to be regretted, in the interests of the plaintiff as well as defendants, that the customary and very necessary questions in negligence cases were not put to the jury because the answer to that customary one, after negligence found, *viz.*, "If so, what was it?" would have, in all probability, settled the case then and there.

I have gone into this aspect of the appeal, not because of any

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formal objection to the charge (though it was clearly not that "proper and complete direction" required by section 60 of the Supreme Court Act) but to shew how impossible it is, legally, for the jury to find negligence at large instead of in particular in such circumstances. The only suggestion of substance that has been made to us to cure this uncertainty is that on the 27th Porteous, after calling out the defendants' men and shutting down their mill on the outbreak of the new fire on the 27th, permitted the defendants to save their donkey engines and equipment which were threatened by the sudden expansion of the new fire, and next day he, with his full force, continued those operations noted as aforesaid which resulted in getting complete control, as all concerned believed: it is therefore plain that the temporary diversion of the services of a number of defendants' men to save their property from immediate destruction, through no fault of their own, had no harmful effect upon the situation.

MARTIN, J.A.

As I view the evidence, it was impossible for the jury to say reasonably (with all respect for contrary opinions) that the defendants failed in any respect to observe their duty to take reasonable precautions in dealing with such a dangerous element as fire, which was held by the Supreme Court of Canada in *Port Coquitlam* v. *Wilson* (1923), S.C.R. 235, 244, to be "an obligation to take special care"—*Per* Duff, J., concurred in by the Chief Justice and Anglin and Brodeur, JJ.—the fact that no one at the trial suggested in what respect the defendants had failed in their obligation is perhaps the best proof that they had not done so: the case is clearly not one of *res ipsa loquitur* and in view of the full and reasonable expert explanation given by Major Porteous, uncontradicted, of the impossibility of doing more to save the changed situation in the very exceptional natural circumstances which had suddenly arisen, I am unable to discover any legal ground upon which the unfortunate defendants are to be held liable, however much we may lament the uncontrollable consequences which caused serious injury to the still more unfortunate plaintiff.

As to the cases cited, it is only necessary, from my point of view, in the light of the *Port Coquitlam* case, to note that our decision applying it in *Coryell* v. *Bertha Consolidated Gold*

Mining Co. (1923), 33 B.C. 81, is based on negligent operation of a stationary engine: the decision of the old Full Court in *Bailey* v. *Cates* (1904), 11 B.C. 62, affirmed by the Supreme Court of Canada, 35 S.C.R. 293, on non-liability for the consequences arising from a high wind in Vancouver Harbour merits attention, and this is a much stronger case for the defence at Bar.

Such being my view of the matter, despite the careful and good argument of Mr. *Davie,* it is not necessary to consider the effect of the unusual legal situation created by the Forest Act above noted (arising out of sections 113, 114, 118 and 123) but as a matter of precaution I think it proper to say that, as at present advised, I should not, with every respect, be disposed, without some supporting authority, to accept the opinion expressed by the learned trial judge thereupon.

MARTIN, J.A.

GALLIHER, J.A.: The evidence during the trial was directed to the defendants' negligence in allowing the fire to escape. That was the only question left to the jury by the learned trial judge, and if he were wrong in deciding that was the only question covered by the pleadings (upon which I express no opinion) there is no cross-appeal. Such being the course of the trial, we must assume that the fire was accidentally kindled and the jury's finding on the only question submitted to them was that it was negligently allowed to escape. Can the verdict be sustained upon this ground?

GALLIHER, J.A.

For the purpose of my judgment I can assume that if there was negligence on the part of the officials of the forestry department, that negligence was the defendants' (though I do not decide that point). Taking then that the acts of the forestry officials were the acts of the defendants—were the jury justified in finding negligence in controlling the fire? The evidence of these officials who were experienced fire-fighters, is to the effect that nothing more could have been done than was done to check the fire and that it was due to the very strong wind that sprang up on the 5th of July that the fire got beyond their control. There is no evidence to contradict this—there is evidence that some 20 Hindoos were not working on the fire but were taking

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up steel on the logging railroad and it is suggested that if these men had been working on the fire it might have been controlled—but I think when we consider that when the wind sprang up and the fire got out of control there were some 300 men working on it, that suggestion is not of much value.

I have read the evidence through twice very carefully, and fail to see upon what ground a jury could reasonably conclude that there was negligence. It certainly is not the direct evidence, nor is it evidence from which, in my opinion, a jury could draw conclusions warranting such a finding.

I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The fire that damaged the plaintiff's property started on the 27th of June, 1924. Another fire started on the 26th, but it would have been extinguished had not a fresh fire started on the 27th. The evidence of Porteous that "in the ordinary course of events we would have had that fire out if this [*i.e.*, the fire of the 27th] hadn't started," was not disputed. This latter fire was started by sparks from a locomotive sent by the fire wardens of the forest branch of the department of lands, to get a water-tank for fire-fighting purposes. The charge as developed at the trial, was not that the defendants started the fire but that they were negligent in preventing it from spreading to the plaintiff's property. Assuming for the moment that the plaintiff makes out a case, if negligence is established against the defendants, apart altogether from any alleged control by the forest branch, let us see in what it consists. A witness for the plaintiff testified that on the 5th of July, when the damage occurred, a track gang of 18 or 20 East Indians were taking up steel from a logging railway towards the eastern boundary of the fire area, when presumably they should have been engaged in fire-fighting. There are references too by some witnesses, that on certain occasions during the fire period, they were in the locality and did not see anyone at work fighting the fires. There is no direct evidence of negligence in the plaintiff's case, apart from these suggestions.

Mr. *Davie* in submitting evidence of negligence relied not so much on the testimony of the plaintiff's witnesses, but rather

on the evidence of witnesses for the defendants. He suggested negligence on the part of the officials of the forest branch in not having sufficient men at certain points to effectually cope with the fire. The evidence shews, however, that where a small number of men are referred to—alleged to be insufficient—they were working under a leader at a certain point only; not that they were the only men engaged at all points. He alleges that there was no attempt made to protect the eastern front—that they should have back-fired there before the 5th of July. On the whole case, therefore, the evidence of negligence appears to be confined to three suggestions: (a) That at isolated points certain witnesses say they saw no one engaged in fire-fighting (negative evidence of little value); (b) that 18 or 20 East Indians who should have been fire-fighting were removing steel; and (c) that the eastern front was not protected by back-firing. As against those suggestions there is positive evidence by the defendants or rather by the officials of the forest branch, shewing that the usual and customary steps were taken in fighting this fire, and that nothing was left undone with the men and material available to control it. The fire would not have escaped had not a strong wind arose against which human effort was futile. Further, before the big wind arose it was blowing towards the west, and the work and back-firing was properly directed to the danger points in that direction. That explains the partial absence of effort on the eastern front.

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So far as the men engaged in removing track are concerned, there is evidence that with the ties and steel removed an excellent trail was formed. Their work, therefore, at the point in question was not evidence of negligence. Indeed, it is apparent from the whole evidence that all the available men—about 300—in defendants' employ were continuously engaged in fire-fighting at all material times under sufficient direction and supervision, and unless they were bound to accomplish impossibilities it is difficult—in fact impossible—to find fault with the course pursued. Evidence of negligence must not be fanciful or merely suggestive. It must have a reasonable degree of definiteness, or disclose facts from which proper inferences may be drawn.

There was, therefore, no negligence which could justify a

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finding to that effect, whether or not the defendant was acting entirely or only partially under the control of the forest branch officials. Even if, as suggested, the proper view is that there was merely co-operation and that the defendants are not excused from exercising care independently of the presence of the forest branch officials, I would still be of opinion, from a careful perusal of the evidence, that there was no negligence justifying a finding to that effect.

Mr. *Davie* submitted, however, that it is not necessary to prove negligence; that the defendants are in law responsible for damage caused by a fire originating on their premises. This issue though possibly pleaded was not submitted to the jury. Negligence in not taking precautions to prevent it from spreading was relied upon. He referred to authorities shewing that one operating a steam locomotive engine, at common law was responsible for damage caused by sparks escaping, even where negligence was negatived on the principle of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330. When statutory authority was given by Parliament to operate, liability only attached if the engine was negligently used. It was sought to apply these principles to the case at Bar, because the fire originated from a spark emitted from a locomotive (properly constructed and operated without negligence) which at the instance of the officials of the forest branch was sent after a water-tank. There is no evidence of statutory authority to operate the locomotive. Mr. *Farris's* answer to this contention was that the fire should be regarded as starting "accidentally," and if correct it is a complete answer. What is an "accidental" origin for fire is discussed by Mr. Justice Duff in *Port Coquitlam* v. *Wilson* (1923), 2 D.L.R. 194 at p. 200. A fire is not accidental if it originates through negligence, nor if intentionally lighted. In these cases the common law liability attaches. The statement in Addison on Torts, 8th Ed., p. 707, that the word "accidentally" refers only to fires produced "by mere chance or which are incapable of being traced to any cause," would appear to be sound. It is difficult to ascribe the fire in question to "mere chance." This seemed to be recognized by counsel for the respondent. He argued, however, that *qua* the defendants it should be regarded

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as an "accidental" fire because it was started through the agency of outside parties on the defendants' premises. Possibly one reason for this suggestion was that it might be brought within the principle where the occupier of premises is not liable if he could shew that the fire originated through the act of a stranger. It would be difficult, however, to apply that principle when the alleged "stranger" in the present case either combined with the defendant in fighting the fire or took entire control of it. The true tests applicable can only be derived inferentially from the foregoing principles. I am satisfied that there is no way of displacing the common law liability, unless by the special circumstances arising out of the intervention of the officials of the forest branch in fighting this fire. Its origin is traced not simply to fire starting on the defendants' premises, but rather to fire started by this intervening authority to whose directions the defendants were bound to comply or suffer a penalty for refusal. While it is not apt to term it an "accidental fire," nor yet the act of a stranger, it is quite different from a case where a fire originates on premises started by the owner or his servants. It could not be contended—to use an illustration cited by counsel for the defendants at the trial—that if a fire brigade were engaged in extinguishing a fire on a householder's premises (and as in the case at Bar, did extinguish it, because the fire started on the 26th was either controlled or controllable), but in the work of extinguishing it another fire was started by the fire engine, through sparks escaping from it, it being part of the equipment used in fighting the fire, causing damage to a neighbour, that the householder would be responsible. That is similar in principle to this case, and while so far as I know it is not covered by authority, the conclusion is in keeping with the principles of the authorities referred to and affords a complete answer to the plaintiff's claim.

I do not find it necessary to decide whether or not the officials of the forest branch were in complete control to the exclusion of the defendants. Forest fires are recognized by the Legislature to be of so devastating a character that in the public interest the Act (Cap. 93, R.S.B.C. 1924, Sec. 114) provides penalties against any owner who refuses to place at the disposal

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of the department his services and that of all men in his employ, to prevent it spreading. To place "at the disposal" would seem to mean that they must submit to their directions. It would appear strange if after the Act takes away from the defendants their own means of acting independently in fighting the fire, they would still be liable for want of care in preventing it from spreading. However, it is not necessary to decide that point. I merely find that in any event there was no negligence to justify the jury's verdict, and that where the fire is started by such an intervening agency while engaged in fire-fighting—the common law liability for fire escaping from the owner's premises, without proof of negligence, does not attach.

I would allow the appeal.

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

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitor for respondent: *C. F. Davie.*

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Action—Cause of—Interference with legal right—Malicious intent—Justification—Restraint of trade—Injunction.

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The farmers and retail milk dealers in the Fraser Valley other than those already under contract with the Fraser Valley Milk Association Ltd. desiring to better their condition formed the defendant Company for that purpose. In order to attain this end the scheme was evolved of obtaining yearly contracts with the producers of milk other than those with the Fraser Valley Milk Producers Association controlling their output. Then it was sought to have those retail milk dealers (other than the last mentioned association) who were buying directly from the producers, to execute contracts to pay over certain portions of the retail price received by them to the defendant. These parties termed independent milk dealers included the plaintiff. Contracts along these lines were prepared and meetings held which eventuated in the larger portion of producers signing contracts controlling their output and

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the majority of the independent retail dealers executing contracts. The plaintiff was invited to join the defendant association but refused to sign a contract and after endeavouring to induce him to join them, the object being to better the condition of all concerned, the defendant Association wrote the plaintiff a letter advising him that if he did not sign an agreement as aforesaid, the Association would in seven days stop the producers with whom the Association had contracts from supplying him with milk. In an action for an injunction restraining the Association from carrying out its threat, it appeared that the plaintiff had at this time certain contracts with certain producers for the supply of milk from time to time.

Held, that the defendant Association had no right to interfere with and destroy any contractual relationship existing between the plaintiff and those supplying it with milk and the plaintiff is entitled to a perpetual injunction preventing any such interference.

ACTION for an injunction restraining the defendant Association from preventing the plaintiff Company, carrying on the business of milk vendors, from obtaining its supply of milk from the producers. The facts are set out fully in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 27th of November, 1925. Statement

Mayers, for plaintiff.
J. Edward Bird, and *Kent,* for defendant.

15th December, 1925.

MACDONALD, J.: Plaintiff is a milk dealer in the City of Vancouver and is clamant from the Court, on the ground that the defendant has interfered with its business, and threatens, unless restrained, to pursue a course of action which will cause it serious injury. Holt, C.J., in the beginning of the 18th century in *Keeble* v. *Hickeringill* (1809), 11 East 574 at p. 575, succinctly stated the ground, upon which a cause of action of this nature is based, as follows: Judgment

"He that hinders another in his trade or livelihood is liable to an action for so hindering him."

This proposition of law is developed more fully in the judgment of Alderson, B. in *Hilton* v. *Eckersley* (1855), 6 El. & Bl. 47 at pp. 74-5, as follows:

"*Prima facie* it is the privilege of a trader in a free county, in all matters not contrary to law, to regulate his own mode of carrying it on, according to his own discretion and choice. If the law has in any matter

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regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion."

Lord Halsbury in *Mogul Steamship Company* v. *McGregor, Gow & Co.* (1892), A.C. 25 at p. 38, said: "All are free to trade upon what terms they will."

Then Sir W. Erle, in his work on Trade Unions at p. 12, states the law to be that,—

"Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others."

The law is thus beyond question. Shortly stated, it would appear to be that *prima facie* a person may carry on his trade or business without interference from others and, if interference occurs causing damage, it is actionable unless the interference is justifiable. The first point for consideration is, whether there has been an actual or even threatened hinderance or interference by the defendant in the plaintiff's business and then whether it can be justified on any tenable grounds.

Judgment

Before the facts surrounding the alleged interference are discussed, it might be well to outline the fluid milk situation, and the source of supply, from which the plaintiff obtained milk for its customers. In the spring of 1925 the farmers, engaged in the dairy industry in the Fraser Valley, other than those already under contract to the Fraser Valley Milk Association Ltd., concluded they were selling their milk without an adequate return. Meetings were held with a view of bettering conditions from their standpoint and retail milk dealers also attended with the object of rendering assistance. The result was the incorporation of the defendant Company. Directors being duly elected amongst such farmers, they sought then to effect the object in view, *viz.*, the amelioration of their condition. It was stated that the price paid for milk in the City of Vancouver was lower than any other city upon the continent. It followed, and was doubtless contended, that the price to the consumers might be raised without any warranted objection on their part. This would result in the retail dealers being enabled to pay a higher

price to the producers. To attain this end the scheme was evolved and promoted by defendant of obtaining yearly contracts from the producers of milk, other than those under contract with the Fraser Valley Milk Producers Association, controlling their output. Then it was sought to have those retail milk dealers, other than the last-mentioned Association, who were buying directly from the producers, execute contracts, whereby they would, *inter alia*, agree to deduct from the purchase price of all milk purchased by them, and pay over to the defendant, certain sums of money, dependent upon the retail price which might be received by them for the milk. These parties may be termed independent milk dealers and included the plaintiff. Contracts along these lines were prepared and meetings held, which eventuated in a number of the producers signing such contracts, controlling their output, and the majority of the independent retail dealers, also attending and executing contracts with the defendent, of the nature described. At a meeting, in furtherance of the plan of operations, held on the 29th of September, 1925, the plaintiff Company, or rather C. E. Nelson, who was the controlling spirit in this company, was invited to attend. Upon his failure to attend the meeting, the directors of defendant Company early the following morning, waited upon him and urged the advisability of his assisting in the movement, formed, as it was stated, in order to improve conditions and stabilize the milk market. He declined, however, to execute any agreement and desired to remain untrammeled and independent in the method of carrying on the business of his Company. There is very little contradiction between the parties as to what occurred on this occasion. It was sought to shew that an impression was made upon the directors or understanding arrived at, from the conversation, that Nelson would eventually execute the agreement that had been presented to him for that purpose. This, however, was in nowise proved to my satisfaction. I think the directors were honestly endeavouring to further an object they thought was beneficial to all concerned, including the plaintiff. I feel convinced that when the conference was over that morning, Nelson had not agreed to execute the agreement. The directors may have been treated so reasonably and courteously that they

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formed a false impression or hope, as to what the future might have in store, in furtherance of the scheme, which commended itself to them. It was common knowledge at the time, that the defendant Company had obtained support from a number of the milk producers, through agreements signed, for a supply of milk, and Nelson being aware of this situation, admitted that if he were so directed by such milk producers, he would require to pay over any portion of the price to which they might be entitled, either to the defendant or to any other person or corporation, to whom he was directed. This is a far different admission or impression from the one suggested. He at no time stated that he was agreeable to the defendant interfering with his business by destroying or jeopardizing his contracts for a daily supply of milk. Nelson, in a matter of supply of goods, was in much the same position as the parties in *National Phonograph Company Limited* v. *Edison-Bell Consolidated Phonograph Company, Limited* (1908), 1 Ch. 335, who were referred to as having sued for unlawful interruption of contractual relations in a number of cases. Kennedy, L.J., at p. 367, said:

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"In each case there subsisted between the contracting parties, by virtue of the contract, that which, for want of a better phrase, I think might be described as a more or less continuous course of dealing, as, for example, of personal service, though the case is not confined to personal service, of which without justification the party sued had successfully tried to procure the rupture."

Time wore on and further signatures having been obtained both from retail dealers and milk producers, it became evident to the directors of the defendant Company, that the prominent opponent, standing in the way of the completion of their plan of operations, was the plaintiff. The directors were under no misapprehension as to Nelson's attitude and that of a few other retail dealers in Vancouver. The matter was discussed at a meeting held on the 19th of October, and drastic measures were taken to effect their object. It was likely felt at the time, that it was most essential to the success of their scheme, that the plaintiff should be induced to execute the proposed agreement. The meeting resulted in the following resolution being passed by the directors, *viz.*:

"That we give Mr. Nelson or any other dairy that has not signed the

retailers' agreement seven days' notice by registered letter from the 20th of October that all his milk will be cut off that we had signed up unless he or they had signed the retailers agreement in the meantime."

This was followed by a letter under date 20th October from the secretary of the defendant Company, addressed to Nelson, pointing out that he was the only man "standing in the way of farmers in the Fraser Valley receiving 78% per pound butter fat." That the farmers were dissatisfied with this state of affairs and that he could remedy it, by signing the agreement, which the other dairies had signed. It was stated, that it was not putting any hardship on plaintiff as it was only giving the farmers what was coming to them and gave him over 80 cents per gallon of a spread. Further that it would put the dairy industry in the Fraser Valley on its feet. The letter concluded by stating that it would be esteemed a favour if he would sign the agreement, and then added:

"If you do not I am instructed to give you seven days' notice from the above date that all your milk which we have signed up will be stopped on and after the 27th day of October."

It was subsequently stated that such stoppage of the supply of milk to the plaintiff would have amounted to 100 cans. Then the secretary of the defendant Company telephoned Nelson and referred to the letter and again warned him as to the situation. Under these circumstances, the plaintiff, instead of waiting for its supply of milk to be substantially or even partially cut off, as threatened, applied for and obtained an injunction which was continued until the trial of the action. It had the effect of enabling the plaintiff to continue its business without interference. Defendant complains that if made perpetual it would "inflict irreparable injury upon the defendant," and it would "probably be put out of business altogether." This is a peculiar situation, unless the defendant is placing an unwarranted stress or improper interpretation upon the particular wording of the injunction. The main object of such an injunction was to restrain the defendant from improperly interfering in the business of the plaintiff. It is quite evident that it was particularly intended to prevent any interference with written contracts which the plaintiff may have had for its supply of milk from time to time.

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Defendant contended that it was within its legal rights and could, upon due notice, stop further delivery of milk by those with whom it had contracts controlling such supply, even though it resulted in a substantial and serious impairment of plaintiff's supply. This contention was made not only as to producers, who were free to contract for such delivery through not being bound in any way to the plaintiff, but also to those upon whom the plaintiff had a right to rely for its supply, through being under contracts with him to that effect. In this connection objection was raised to the validity of the written contracts held by the plaintiff and while there may have been a variation from time to time in the price under such contracts, still I think that as between the parties thereto they were valid, for the time being at any rate. There was also the "course of dealing" referred to by Kennedy, L.J., in *National Phonograph Company, Limited* v. *Edison-Bell Consolidated Phonograph Company, Limited, supra,* which would be affected.

Aside then from the question as to legal justification or excuse, is the position of the defendant tenable and did it have any right to act in the manner thus adumbrated?

Judgment

The facts just prior to plaintiff taking proceedings, as distinguished from impressions, that may have been gained falsely, are practically not in dispute. The plaintiff in a great measure bases its right of action and consequent redress, upon written documents, and also admissions, sworn to have been made on the the part of the defendant. My task then is to endeavour to apply the principles of law to the facts. In support of its contention defendant, amongst other cases, refers to *Allen* v. *Flood* (1897), 67 L.J., Q.B. 119; (1898), A.C. 1; *Glamorgan Coal Company* v. *South Wales Miners' Federation* (1903), 2 K.B. 546, and *Sleuter* v. *Scott* (1915), 21 B.C. 155. I do not think that the principles of law in those cases as applied to the facts afford the defendant any support in this action. The observations of the Earl of Halsbury in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506, of a general character, before he enters upon a discussion of *Allen* v. *Flood, supra,* have often been cited as indicating the inadvisability of utilizing a case, as enunciating a principle of law, without close consideration and absolute

certainty that the facts in such a case are similar to those then under consideration and requiring decision. He said as follows:

"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 governed and qualified by the particular facts of the case in which such expressions are to be found."

He then added, as another observation:

"That a case is only an authority for what it actually decides."

The defendant might, of course, obtain support from the principles laid down in *Allen* v. *Flood, supra,* if the facts bore a resemblance to those here presented. The distinction between such case and this one becomes more apparent by comparison of the facts in that case, as referred to by the Earl of Halsbury in the much more similar case of *Quinn* v. *Leathem, supra,* at pp. 506-7, as follows:

"He [Allen] simply warned the plaintiff's employers of what the men themselves, without his persuasion or influence, had determined to do, and it was certainly proved that no resolution of the trade union had been arrived at at all, and that the trade union official had no authority himself to call out the men, which in that case was argued to be a threat which coerced the employers to discharge the plaintiff."

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Here, there was ample evidence to shew that the defendant was taking deliberate action through its board of directors by resolution and otherwise to compel the plaintiff to sign a document he was unwilling to execute. They were so acting in pursuance of a settled policy to effect a definite purpose. They were knowingly interfering with the contractual relationship existing between plaintiff and those supplying it, with the sole commodity requisite for its business. Lord Macnaghten in *Quinn* v. *Leathem, supra,* at p. 510, refers to *Lumley* v. *Gye* (1853), 2 El. & Bl. 216, as being rightly decided and said that such

"decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."

While no injury resulted to the plaintiff through the actions of the defendant, still there was clearly undoubted evidence that the defendant intended to interfere with the contracts plaintiff had for its supply of milk, unless it accomplished its purpose,

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already referred to. The evidence, to shew the amount of actual interference of a "positive and active kind" was meagre, but still quite sufficient to warrant a conclusion that interference, to the extent stated in the threatening letter, would, if possible, be carried into effect, by the defendant.

It is contended, however, that even if it be found that the defendant so intended to interfere, still, if it was proceeding without malice, it had a legal right, under the circumstances, to so act, even with dire results to the business of the plaintiff.

This defence of justification or excuse was not clearly indicated by the defendant in its pleading, but I allowed an amendment, even after the evidence was closed, in order to enable the defendant to set up such a defence, and contend that it could be supported at law, upon the evidence adduced. This contention was sought to be supported by a portion of the judgment of Bigham, J., the trial judge in the *Glamorgan* case, *supra*. He held, as the action of the federation, in advising and directing the workmen, was dictated by an honest desire to forward their interest and was not in any sense promoted by a wish to injure the masters and that the federation and its officers were acting without malice of any kind, therefore they had a lawful justification or excuse for what they did. This judgment was appealed and reversed by the Court of Appeal, and such reversal affirmed in the House of Lords (1905), A.C. 239. Even if the same set of facts existed here, as in the *Glamorgan* case, it is beyond question that the proposition of law advanced by the defendant has no weight, in the light of the judgments in such case. Rufus Isaacs, K.C. (now Lord Reading), in argument on behalf of the miners' federation, appears, according to the report, to have presented the same argument, as is now advanced by the defendant in this action. He stated that the question was, whether honest and *bona fide* advice and guidance given without malice or ill-will upon request and in performance of a duty was a justification for interfering with a contract. He referred to the statement of Lord Macnaghten in *Quinn* v. *Leathem, supra,* that interference with contractual relations was a violation of legal right, unless there was sufficient justification for the interference with the controversy. In other words, "no just

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cause or excuse." He contended that the controversy turned on these words and submitted that the miners' federation, in performance of its duty, had simply advised the men and thus it had good cause and excuse for interference. The Earl of Halsbury, in dealing with this contention, in his judgment at p. 244, referred to the principle of law applicable even to the criminal law, that people are presumed to know the reasonable consequences of their acts, but that it was not necessary, however, in that case to have recourse to such presumption, as it was apparent that what the defendants were doing would necessarily cause injury to the plaintiff. Considering then this course was an infliction of an unlawful injury upon the plaintiffs, he repeated what has already been referred to in the *Quinn* v. *Leathem* case, that such conduct constituted an actionable wrong, unless it could be justified. Then discussing the matter of justification, he said as follows:

"Now it is sought to be justified, first, because it is said that the men were acting in their own interest, and that they were sincerely under the belief that the employers would themselves benefit by their collieries being interrupted in their work; but what sort of excuse is this for breaking a contract when the co-contractor refuses to allow the breach? It seems to me to be absurd to suppose that a benefit which he refuses to accept justified an intentional breach of contractual rights. It may, indeed, be urged in proof of the allegation that there was no ill-will against the employers. I assume this to be true, but I have no conception what can be meant by an excuse for breaking a contract because you really think it will not harm your co-contractor."

In that case, it was not disputed that the miners' federation had by its executive induced and procured a vast body of workmen to break their contracts of service. It was not disputed that the federation committed an actionable wrong, so that the sole point to be decided was the one of justification. It was pointedly disposed of by Lord Macnaghten as follows, at pp. 245-6:

"It is no defence to say that there was no malice or ill-will against the masters on the part of the federation or on the part of the workmen at any of the collieries thrown out of work by the action of the federation. It is settled now that malice in the sense of spite or ill-will is not the gist of such an action as that which the plaintiffs have instituted. Still less is it a defence to say that if the masters had only known their own interest they would have welcomed the interference of the federation."

S.C. Lord James, at p. 250, declining to concur with the view of the law as stated by Bigham, J., refers to the word

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"maliciously" as being often employed in criminal and civil proceedings without proof of actual malice, apart from the commission of the act complained of, being required, and as being proved by inference, drawn from the proof of the act being wrongfully committed. He refers to three cases of like nature, *viz., Bowen* v. *Hall* (1881), 6 Q.B.D. 333; *Mogul Steamship Company* v. *McGregor, Gow, & Co.* (1889), 23 Q.B.D. 598, and *Quinn* v. *Leathem, supra,* in none of which the learned judges employed the word "maliciously" as being necessary in order to constitute a right of action. He then deals with the "good cause and excuse" for the alleged unlawful action which the defendants committed, and even accepting their statement that they honestly believed that the workmen would be in a better financial condition if they followed advice given by the Federation, concluded on this point as follows (p. 252):

"I think that no justification in law is established by them. The intention of the defendants was directly to procure the breach of contracts. The fact that their motives were good in the interests of those they moved to action does not form any answer to those who have suffered from the unlawful act. . . . The defendants' motives, no doubt, were that by so doing wages should be raised. But if in carrying out the intention the defendants purposely procured an unlawful act to be committed, the wrong that is thereby inflicted cannot be obliterated by the existence of a motive to secure a money benefit to the wrong-doers."

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So however honest the defendant and its directors have been in their actions and even though they thoroughly believed that the course they had mapped out for the plaintiff to pursue would have been beneficial to all concerned in the milk business, I find that plaintiff's rights were invaded and the motives of defendant afford no defence, when the plaintiff applies for relief.

It was also submitted that the defendant should not be restrained, because, if the parties with whom the plaintiff had contracts, improperly broke such contracts, it could have recourse against the wrong-doers for damages. This contention, however, is of no avail as it involves the commission of a wrong. Lord Lindley in the *Glamorgan* case, *supra,* at p. 253, says:

"Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for an option to that effect. Non-lawyers are apt to think that everything is lawful which is not criminally punishable; but this is an entire misconception. A breach of

contract would not be actionable if nothing legally wrong was involved in the breach."

In my opinion the defendant had no right to interfere with and destroy any contractual relationship existing between the plaintiff and those supplying its milk, on the basis that the plaintiff might be compensated in damages.

Then it was submitted that as no actual injury had resulted to the plaintiff, through the action of the defendant, its application for relief was at least premature. If any right possessed by the plaintiff was in danger of being illegally destroyed or impaired by defendant, then it was perfectly entitled to avert an impending disaster by an application to the Court for protection. Considering the nature of its business, if the source of supply were cut off even for a short time, it would result in serious injury. While the mere prospect or apprehension of injury or belief to that effect will not be sufficient to warrant an injunction, still if the intention to do the act complained of be proved to exist or if an act is threatened, which, in the opinion of the Court, if completed, would give a ground of action, there is a foundation for the exercise of the jurisdiction. See Kerr on Injunctions, 4th Ed., 14, and cases there cited; *Cf. Nocton* v. *Ashburton (Lord)* (1914), A.C. 932 at p. 952:

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"The Court [of Chancery] took upon itself . . . to grant injunctions in anticipation of injury, as well as relief where injury had been done."

"Courts of Equity will grant injunctions to restrain an admitted wrong wherever it clearly appears that in no other proceeding can public or private interest be fully protected":

32 Corp. Jur. p. 48, and cases there cited.

I have no doubt that had the defendant not been prevented, its contemplated actions would have resulted in injury to the plaintiff, which would have been irreparable. I am, therefore, of the opinion that the defendant in its efforts to solve a difficult situation has over-stepped the mark and acted illegally. Where a plaintiff has established his legal right and the fact of its violation, he is in general entitled, as of course to a perpetual injunction, to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case: *Imperial Gas Light and Coke Company* v. *Broadbent* (1859), 7 H.L. Cas. 612. I might add that the question of the balance of con-

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venience or inconvenience in granting or withholding the injunction would not be applicable in this case.

In granting the plaintiff a perpetual injunction restraining the defendant, I think it fitting that I should state that it is not the object intended to be served by the defendant Company and its members which is thus being controlled or prevented. It is the manner in which such object was sought to be accomplished, which affords the plaintiff a ground of relief and protection. Legitimate competition in trade is not illegal, even if a trader aims to drive a competitor out of business by appropriation of the trade, provided the motive be his own gain, and the means he uses to this end be lawful. "The question is whether the plaintiff [in that case] has employed unlawful means": Peterson, J., in *Hodges* v. *Webb* (1920), 2 Ch. 70 at p. 88; *Cf.* to this effect, Lord Morris in *Mogul Steamship Company* v. *McGregor, Gow & Co.* (1892), A.C. 25 at p. 49, and *Cf.* Lord Halsbury L.C. at p. 40:

"I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade is unlawful, and I am clearly of opinion that it is not."

Judgment

The extent to which parties, by arrangement, control or restrict a business, with a view of meeting competition or otherwise benefiting the trade in which they may be engaged, was discussed at length in the *National Phonograph Company, Limited* v. *Edison-Bell Consolidated Phonograph Company, Limited, supra.* With respect to the trade there being dealt with, Lord Alverstone at p. 336, says as follows:

"I can see no reason why the plaintiffs are not entitled to say, We will take all legitimate means in our power to prevent our instruments from being sold by our competitors."

So it is not intended to prevent the defendant within its corporate rights from engaging in business, with due regard to the rights of the plaintiff and without improper interference with its business. The terms of the order for an injunction will require close consideration and will be determined in due course. Plaintiff is entitled to its costs.

Judgment for plaintiff.

RE PARKER AND THE SUCCESSION DUTY ACT.

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RE PARKER AND THE SUCCESSION DUTY ACT

Taxation—Succession duty—Property outside Province—Domicil within Province—Situs of property—R.S.B.C. 1924, Cap. 244.

Debts outside of the Province owing the estate of a deceased person who at the time of his death was domiciled within the Province are subject to duty under the Succession Duty Act.

Quaere, the maxim *mobilia sequuntur personam* is strong enough in law to prevail over the plain language of the British North America Act which limits the power of the Province to taxing only such property as has its *situs* in the Province and that the *situs* is the sole test of its right to tax and not the domicil of the owner, *i.e.*, that the question should be decided by ascertaining the domicil of the debt rather than that of the owner.

APPLICATION for a declaration that certain debts owing to the deceased in the way of mortgages held outside of the Province are not subject to duty under the Succession Duty Act. Heard by HUNTER, C.J.B.C. in Chambers at Victoria on the 5th and 6th of May, 1925.

Statement

Archibald, for the application.

A. D. Macfarlane, contra.

2nd December, 1925.

HUNTER, C.J.B.C.: In *In re Succession Duty Act and Walker, Deceased* (1922), 30 B.C. 549, I ventured to question whether the "founding fathers" ever intended that property situate in one Province should be exposed to taxation in another through the medium of a Latin maxim. But whether or not they troubled themselves about Latin maxims, thanks to the decisions of the Courts, the *mobilia* maxim has become a spectre which pursues us ever, and thus it is that the Crown is now claiming succession duty on the ground that property, which to the ordinary mind would appear to be in fact outside the Province, is in law, within the Province because its owner had Provincial domicil at the time of death.

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If a person of ordinary understanding were to make a list of his properties and their locality, he would, I think, if he held a mortgage on Alberta land, describe it as being situate in Alberta, but by reason of the application of this maxim by the Courts, if he dies domiciled in British Columbia, the obligation to pay is situate in British Columbia, even though the mortgage calls for

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payment in Alberta. But I am unable to understand how this *mobilia* maxim is strong enough in law to prevail over the plain language of the British North America Act. It appears to me that the British North America Act plainly limits the power of the Province to taxing only such property as has its *situs* in the Province, and that the *situs* is the sole test of its right to tax and not the domicil of the owner, or in other words, the question should be decided by ascertaining the domicil of the debt rather than that of the owner. In the case of a simple obligation to pay, there being no place of payment named, if we were to regard the old probate decisions that the debtor's residence is the *situs* of the debt as inapplicable to succession duties, then by reason of the rule of law that the debtor must seek his creditor, the *situs* of the debt would be the domicil of the creditor at the time of death, and we would not need the maxim to solve the question. But I am at a loss to understand why the maxim should be dragged in to give an obligation to pay money at a place outside the Province, and which therefore has its *situs* outside the Province, an imaginary *situs* within the Province so as to enable the Province to tax it, especially as the Act itself imposes taxes on property and not on devolutions of title or on persons, except as ancillary to its enforcement.

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But these sons of Zeruiah be too hard for me, and while I do not pretend to be able to fathom the subtleties which pervade the decisions, I think that the net result of them is to bring the debts in question within the clutch of the Succession Duty Act. It may be that the securities themselves are liable in those jurisdictions where they are registered, but it appears to me that under the decisions the Province is not disabled from taxing the debt itself. The case of the shares is covered by *In re Succession Duty Act and Inverarity, Deceased* (1924), 33 B.C. 318, which is merely another illustration of the far-reaching effect of the maxim. It is, however, noticeable that in the later case of *Brassard* v. *Smith* (1925), A.C. 371; (1925), 1 W.W.R. 311, the Privy Council did not resort to the maxim, but based its decision on the ground that the shares were situate at the owner's domicil.

There must be judgment on all points for the Crown.

LONDON GUARANTEE AND ACCIDENT CO. v. DAVIDSON *ET AL.*

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LONDON GUARANTEE AND ACCIDENT CO. *v.* DAVIDSON

Estoppel—Bond of indemnity—Entered into by plaintiff at request of defendant—Action on bond—Defendant notified—Judgment against plaintiff—Payment of judgment—Action against defendant on warrant to indemnify.

The plaintiff Company at the defendants' request (the defendants giving the plaintiff a bond of indemnity to save the plaintiff harmless, etc.) entered into a bond of indemnity. The plaintiff was sued on the bond and notified the defendants of the action and urged them to assist in the defence but they gave no assistance. The Company defended the action but judgment was given against it in the Court of King's Bench of Manitoba. The plaintiff appealed and notified the defendants but again receiving no assistance dropped the appeal. In an action by the Company against the defendants on their bond of indemnity to repay the moneys paid in satisfaction of the judgment:—

Held, that the judgment against the plaintiff in the Manitoba Court was recovered on the bond given by the plaintiff at the defendants' request. The plaintiff has paid the judgment and the defendants are estopped from denying liability.

ACTION to recover the amount paid by the plaintiff Company upon a judgment recovered against it in the Court of King's Bench of Manitoba, upon a bond of indemnity entered into by the defendants. The facts are set out in the reasons for judgment. Tried by GREGORY, J. at Vancouver on the 17th to the 25th of June, 1925. Statement

McPhillips, K.C., and *Miss Seaton,* for plaintiff.
Mayers, and *W. S. Lane,* for defendants.

14th December, 1925.

GREGORY, J.: The plaintiff founds his action upon two grounds: (1) A judgment of the Court of King's Bench, in the Province of Manitoba, third party proceedings, and (2) a bond of indemnity to save the plaintiff harmless, etc. Judgment

On the first ground I think it clear the action cannot be sustained, for the reasons advanced in *Mr. Mayers's* very full and careful argument. There is no evidence to shew what gave the

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Court jurisdiction over non-residents, as the defendants undoubtedly were. As Mr. *McPhillips* did not refer to the argument or cases cited on that point, it seems unnecessary for me to do so.

Plaintiff's second ground is that by reason of the bond of indemnity, the notice given by plaintiff to the defendants of the action against it, and the judgment recovered against it, the defendants are now estopped from disputing their liability. The defendants' answer is, they are not estopped and plaintiff must now prove in this action the default on defendants' part which the plaintiff has had to make good. Admittedly plaintiff has made no attempt to prove this, the defendants on the other hand have adduced a lot of evidence to shew that they never were in default. That whole question turns upon the grading of certain grain loaded into the S.S. Pollock. There is no denying that at the time of the actual loading, the defendants held Government certificates of the grade they now contend the wheat or grain was, but some days after the loading, without any notice to defendants, a grain inspector went to Buffalo, in the State of New York, and from an elevator took samples of grain which it was alleged was the grain unloaded from the S.S. Pollock, sent these samples, by express, back to Canada, where they were regraded at a lower grade. There appears to be no authority whatever under the Grain Act for such a proceeding, and to make matters worse, if possible, this grain was mixed with other grain *en route* to Buffalo and in the elevator there.

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The plaintiff has offered no evidence of the facts. Indeed, in the ordinary course of business it could know nothing of them. There is evidence before me though, if admissible, that the council of the Winnipeg Grain Exchange supported the claimant, N. Bawlf Grain Company in their contention and authorized their bringing of the action in which the judgment now in question was recovered against the plaintiff herein. I may say that the proceedings before the Exchange council appear according to their own rules and regulations to have been quite irregular.

On this one-sided statement of facts one cannot resist a feeling of sympathy for the defendants. But on the other hand the plaintiff is in no way to blame for the present situation. It, at defendants' request, entered into a bond of indemnity. It was

sued on that bond, it notified the defendants of the action, invited, even urged, them to assist in the defence, but they gave no assistance whatever; the plaintiff Company defended the action presumably to the best of its ability and judgment was rendered against it in the Court of King's Bench of Manitoba.

While it is contended that that Court had no jurisdiction to hold the defendants liable in third-party proceedings, it has not been suggested that that Court had no jurisdiction over the plaintiff or that the judgment of that Court against it is not binding upon it. The plaintiff appealed from the judgment against it and notified the defendants, but again received no assistance and eventually dropped the appeal. The plaintiff now contends that in these circumstances the defendants must, under their bond of indemnity, repay to it the moneys paid by it in satisfying that judgment and it seems to me that this contention is sound. It has proved that it entered into a bond to the Grain Exchange for the defendants; that it was sued on that bond; that judgment was recovered against it; that it paid the judgment, and that the defendants had notice of that action, and that the action was to recover damages for defendants' default to the Grain Exchange. It seems impossible for me to say that such a payment by the plaintiff is not clearly within the terms of the defendants' bond of indemnity to it.

Judgment

The first case referred to by Mr. *McPhillips* is *Duffield* v. *Scott* (1789), 3 Term Rep. 374, and the principle enunciated in it seems to have been followed consistently ever since. That was an action on a bond. Defendant pleaded that the bond was conditioned for performance of covenant to indemnify the obligee from debt incurred by defendant's wife, and that defendant had performed the covenants—Replication that judgment was recovered against the obligee by a creditor of the wife and he had paid the debt of which defendant had notice. Demurrer. *Held,* the defendant was liable. Buller, J., at p. 377, says:

"The purpose of giving notice is not in order to give a ground of action; but if a demand be made which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand,

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that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money."

While I have already held that the third-party proceedings did not bind the defendants, that is in no way equivalent to holding that they are not good as a notice to defendants. It is hard to conceive of any more explicit form of notice that could be given.

In *Smith* v. *Compton* (1832), 3 B. & Ad. 407, Parke, J. quotes with approval the language of Buller, J. above set out. In that action the defendant had conveyed premises to the plaintiff and covenanted for good title. An action of *formedon* was afterwards brought against the plaintiff by a party having better title. The plaintiff compromised the action without giving notice to the defendant of the suit. *Held,* that he could recover the whole amount of the compromise and costs and that the only effect of not giving notice to the indemnifying party was to let in proof by him that the compromise was improvidently made.

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In *Jones* v. *Williams* (1841), 7 M. & W. 493, Parke, B. again quotes with approval the language of Buller, J. in *Duffield* v. *Scott*. That was an action upon a guarantee contained in two letters. R. J. deceased, had at defendant's request entered into a bond. The plaintiff, R. J.'s administratrix, was sued on the bond, and the defendant had notice but did not come in and defend the action. The plaintiff was sued on the bond and the action had been stayed by the Court upon the plaintiff paying the debt and costs. It was held that the plaintiff could recover.

The next case in chronological order is *King* v. *Norman* (1847), 4 C.B. 884, referred to by Mr. *Mayers,* who says "it was exactly this case." I cannot agree with that, for in that case no notice had been given to the defendant of the previous suit. It is also worthy of note that none of the cases above mentioned was referred to in that case. It was admitted that the plaintiff was entitled to judgment for nominal damages at least. On the appeal judgment was not given for the defendant, but a new trial was ordered.

The form of the pleadings and the failure of the plaintiff to give certain evidence were the governing factors in that case and on the appeal it was held that the judgment could not be

used to prove the amount of damages suffered. In that case the plaintiff having been sued on the indemnity bond had submitted to judgment. The concluding part of the judgment referred to by both counsel, though rather long, is worth quoting in full (p. 898):

"The judgment was in this case, evidence that the plaintiff had been sued, and, coupled with proof, or (as in this case) an admission of liability to some extent, might lead the jury to conclude that the plaintiff had been subjected to a *bona fide* pressure, by which he was forced and obliged to pay whatever he was legally liable to pay through Strachan's default. But whether he was legally liable to the extent for which judgment was signed, is a matter which could only be collected by inference from the judgment; and for such a purpose, the judgment could not be used, without holding that a stranger to the judgment—who has had no opportunity to cross-examine the witnesses, or to dispute the conclusions to be drawn from the evidence—can be bound by the verdict where the judgment is after verdict, or can be bound by an agreement made without his privity or intervention, between the parties to the judgment, where, as in the present case, it is founded on agreement. The law, we apprehend, is not so. The judgment cannot be used for such a purpose against one who is neither a party nor privy to it."

The difference between that and the present case is that the plaintiff did not submit to judgment, he strenuously opposed it and notified the defendants of the action and they had ample opportunity of being present and cross-examining the witnesses and doing or urging anything they thought fit, but they declined to avail themselves of the privilege.

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Pettman v. *Keble* (1850), 9 C.B. 701, was an action on an agreement to indemnify. The plaintiff had been sued, defendant had notice of the action but did nothing. Plaintiff took advice and settled the action. The jury found that defendant had impliedly authorized such settlement. On appeal the Court refused to disturb the verdict. Wilde, C.J. held that as plaintiff had taken competent advice and had under the circumstances exercised his best judgment and acted with reasonable caution, there was no ground for disturbing the verdict. Maule, J., at p. 709, said the defendant ought to have taken upon himself the defence of the action, and his failure to do so invested plaintiff with implied authority to act to the best of his judgment, and if necessary pay the money he did pay. Cresswell, J. disagreed, but Talfourd, J. agreed with the Chief Justice and Maule, J.,

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saying there was evidence that the compromise was made with defendant's authority, express or implied.

In *Parker* v. *Lewis* (1873), 8 Chy. App. 1044, it was held that where A contracts to indemnify B against a claim, and a judgment is obtained against B in an action *bona fide* defended by him and he pays the demand, A cannot be heard to contend that the judgment was erroneous. *Duffield* v. *Scott, Smith* v. *Compton,* and *Jones* v. *Williams, supra,* were all referred to by the Court, while *King* v. *Norman, supra,* was not. See the judgment of Sir G. Mellish, L.J., at pp. 1058-9, too long to quote in full, but I particularly refer to the latter part of what he says on p. 1059:

"I apprehend it [the judgment] is conclusive on account of what the law considers the true meaning of such a contract to be. It is obvious that when a person has entered into a bond, or bought land, or altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard, indeed, if, when he came to claim the indemnity, the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive, but in my opinion it is conclusive because that is the meaning of the contract between the parties, for it unquestionably is not the general rule of law that a judgment by A against B is conclusive in an action by B against C. On the contrary, the rule of law is otherwise."

Judgment

If this is a correct statement of the law, and I cannot doubt it, it disposes, I think, of the defendants' contention that the judgment against the plaintiff being that of a Manitoba Court has no effect in this jurisdiction.

Practically all the cases are referred to in Everest and Strode on Estoppel, 3rd Ed., 65; Roscoe's Nisi Prius Evidence, 19th Ed., 483, and Halsbury's Laws of England, Vol. 13, p. 347, where it is stated that an action on a covenant of indemnity is an exception to the usual rule that estoppel is only binding on privies, and Lord Halsbury uses almost the identical language of Sir G. Mellish, L.J., in *Parker* v. *Lewis,* above set out. Bigelow on Estoppel, 5th Ed., 130 *et seq.,* is to the same effect. These authorities appear to me to establish that the judgment against the plaintiff in the Manitoba Court estops the defendants.

It was recovered on the bond given by plaintiff at defendants' request, and plaintiff has paid that judgment. It falls within the terms of Mr. *Mayers's* admission on the argument, *viz.*, "that if plaintiff can shew that this payment was made under the obligation of suretyship arising out of Exhibit 1, then they have made out their case."

Some question was raised about the consideration to support Exhibit 95. That instrument is under seal which imports a consideration.

If there is any technical difficulty arising out of the form of the pleadings, as suggested on the argument, I think the pleadings may be remodelled and the plaintiff may declare on the general contract of indemnity—Exhibit 1 or Exhibit 95—for it is all one transaction, and no one has been misled.

Judgment

There will be judgment for the plaintiff.

Judgment for plaintiff.

MACDONALD-BUCHANAN v. THE VERNON FRUIT UNION.

Contract—Associated growers — Sale of crops — Arbitration — Wrongful retaining of proceeds of sales—Action to recover—R.S.B.C. 1924, Cap. 48—B.C. Stats. 1924, Cap. 48.

The defendant Corporation is subject to and governed by the Co-operative Associations Act, section 29 of which provides that "every dispute arising out of the affairs of an association between a member thereof or any person aggrieved, . . . and the association or a director thereof, shall be decided by arbitration," etc. One W. who later transferred his shares in the defendant Company to the plaintiff and assigned to him the debts in question in this action contracted to market his crops through the defendant Company (Local) and the Associated Growers of British Columbia (Co-operative) and in pursuance thereof for the years 1923 and 1924 his crops were delivered to the Local and forwarded to the Co-operative for sale. The proceeds of sales after certain deductions, were returned to the Local, who made certain deductions before handing over the balance to the

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plaintiff who brings this action to recover three amounts he contends were improperly retained by the Local.

Held, that as the disputes referred to in the above section are those which arise between the Association and a member as a member, and do not apply to collateral contracts which may arise between a member and the Association, this action is properly brought.

Section 11 of the contract provides that "there shall also be retained (by the Local) if deemed advisable, a reserve fund or funds necessary to meet contingencies or the better to enable the Local to finance or operate its business; there shall also be retained any moneys due the Local for material or supplies furnished or moneys advanced to the grower or any other indebtedness or any other obligation due the Local the same to be first lien upon the balance due the Grower by the Local." The defendant retained three items objected to by the plaintiff. The first out of the 1924 crop to purchase shares in a storage company in which the defendant and its members had shares the money being used to pay off a mortgage on the storage company which was a subsidiary company. The second item was reserved out of the 1923 crop as a basis of a contingent reserve fund but this was done in 1924. The third, which was part of the proceeds of the 1924 crop, was used in the purchase of packing-houses. The defendants claimed that all three items could be charged under said section 11 of the contract.

Held, as to the first item, that there is no power to use the plaintiff's money to purchase shares in another company. As to the second item, that the defendant cannot take money in respect of the 1923 crop to provide for a reserve for those who might be members for later years. As to the third item it was the intention under the contract that provision should be made for packing-houses by the central organization and that the burden should not be placed on the Locals. The plaintiff is therefore entitled to recover on all three items.

Statement

ACTION by the plaintiff as assignee of Lord Woolavington, formerly carrying on business as a fruit grower in British Columbia under the name of Coldstream Ranch under deed of assignment of the 25th of January, 1925, of which the defendant received due notice. By agreement in writing of the 22nd of February, 1923, Lord Woolavington agreed with the defendant and the Associated Growers of British Columbia Limited that certain fruit owned by him should be delivered to the defendant for shipment to the Associated Growers as selling agents and that the proceeds of sales should be remitted to the defendant for payment over to Lord Woolavington after deduction of certain sums therein specified. The plaintiff claims that under the agreement in 1924 certain boxes of fruit were delivered to the

defendant which were forwarded to the Associated Growers and sold and the proceeds thereof were remitted to the defendant who paid over part of the proceeds but wrongfully deducted certain sums other than those specified in the agreement, amounting to $575.30; that from fruit deliveries in 1923, the sum of $562.78 was wrongfully deducted; and from further deliveries in 1924, not included in the above the sum of $864.50 was wrongfully deducted. The further necessary facts are set out in the reasons for judgment. Tried by McDONALD, J. at Victoria on the 15th to the 17th of December 1925.

Statement

Crease, K.C., for plaintiff.
Harold B. Robertson, K.C., for defendant.

5th January, 1926.

McDONALD, J.: The plaintiff sues to recover three amounts of money, referred to throughout the case as items 1, 2 and 3, which amounts were received by the defendant Corporation from the Associated Growers of British Columbia, Limited, the first and third items being a part of the proceeds of the sale of plaintiff's fruit for the year 1924, and the second item being part of such proceeds for the year 1923.

It is admitted that the defendant received the amounts in question, but it is contended that under the contract between the parties, Exhibit 1, the defendant was entitled to retain and to use such moneys in the manner hereinafter mentioned.

Judgment

The defendant Corporation was incorporated under the Agricultural Associations Act of 1911, and is now, and was at all times material to this action, subject to and governed by the Co-operative Associations Act, now R.S.B.C. 1924, Cap. 48. There is also a special Act, chapter 48 of the statutes of 1924, which relates to the defendant and the Associated Growers of British Columbia, Limited, and which ratifies and validates the form of contract in question in this action, and contains various provisions relating thereto.

The plaintiff claims as assignee of Lord Woolavington, who by assignment in writing through his attorney in fact, F. E. R. Wollaston, transferred his shares in the defendant Company to the plaintiff and assigned the debts in question in this action.

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Notice in writing of that assignment was duly given before action brought. Mr. Wollaston, when he executed the assignment in question, held two powers of attorney, each bearing date the 25th of May, 1921. One such power of attorney gave authority to execute such assignment while the other did not. After action brought a deed of confirmation was executed by Lord Woolavington confirming the assignment previously made. Mr. Wollaston in giving evidence stated in error that he executed the assignment under that power of attorney which as a matter of fact, contained no such power, and it is therefore contended that the assignment is invalid. It seems to me there is nothing in this contention, and for two reasons: first, because the confirmation constituted a ratification and would relate back to the date of execution of the assignment, and secondly, because inasmuch as Mr. Wollaston did in fact possess the authority under one power of attorney, it matters not that he stated in error that he executed the assignment under the other power of attorney.

Judgment

It is contended that there is no jurisdiction to entertain this action by reason of the provisions of section 29, of the Co-operative Associations Act, which section provides as follows:

"Every dispute arising out of the affairs of an association, between a member thereof, or any person aggrieved who has for not more than six months ceased to be a member, or any person claiming through such member or person aggrieved, or claiming under the rules, and the association or a director thereof, shall be decided by arbitration (which shall be under the Arbitration Act unless the rules prescribed some other method); and the decision so made shall be binding on all parties, and may be enforced on application to a County Court, and unless the by-laws otherwise provide there shall be no appeal from such decision."

At first blush it might appear that the present dispute is one arising out of the affairs of the Association, between a member thereof and the Association, and is therefore governed by said section 29. After a perusal of the authorities, however, I am satisfied that such is not the case. I have read the various authorities cited by counsel, and in my opinion it must be concluded that the disputes referred to in the section are those which arise between the Association and a member as a member, and are not such as arise in respect of a collateral contract which happens to have been made between a member and the Association. I am quite unable to distinguish this case from *Farmer* v.

Giles (1860), 5 H. & N. 753. There the words were, "all disputes which might arise concerning the affairs of the company"; here, the words are "every dispute arising out of the affairs of an association." See also *Morrison* v. *Glover* (1849), 4 Ex. 430; *Mulkern* v. *Lord* (1879), 4 App. Cas. 182, and *Municipal Permanent Investment Building Society* v. *Richards* (1888), 39 Ch.D. 372. It is to be noted, of course, that some of these cases referred to special statutes in England relating to Friendly and Building Societies, but it seems to me that all the cases go to shew that at Common Law a dispute such as that in question in this action, would, notwithstanding the prohibition referred to in section 29, be tried by the ordinary Courts.

Now, as to the merits: Briefly, the contract in question provides that the grower shall "market" his crop through the defendant Company (referred to as the Local), and the Associated Growers of British Columbia Limited (referred to as the Co-operative); that deliveries should be to the Local and thence forwarded to the Co-operative for sale; that after certain expenses of sale and certain other amounts were deducted, returns should be made to the Local, who also were entitled to make certain deductions before handing over the final surplus to the grower.

Judgment

Admittedly all three amounts in question were received by the Local from the Co-operative, and in my opinion immediately such amounts were received they were held by the Local as trustees for the grower, subject, however, to the inquiry as to whether or not the Local was justified under its contract in diverting these amounts to other uses.

The defendant relies upon section 11 of the contract as justifying the course which it took. That section reads as follows:

"11. There shall also be retained, if deemed advisable, a reserve fund or funds necessary to meet contingencies or the better to enable the Local to finance or operate its business; there shall also be retained any moneys due the Local for material or supplies furnished or moneys advanced to the Grower or any other indebtedness or obligation due the Local, the same to be first lien upon the balance due the Grower by the Local."

As to item No. 1, $575.30, the defendant used this amount to purchase shares in the Vernon Storage Company, Limited, in which company the defendant and its various members held

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a large amount of stock. The money when paid to the Storage Company was used by it to pay off a mortgage, and it is contended that the defendant had power to purchase packing-houses and was therefore justified in assisting its subsidiary company to free the latter property from a mortgage. The power to purchase packing-houses, I will discuss later, but so far as the present item is concerned, it seems to me the simple answer is that there is no power in the defendant to use the plaintiff's money to purchase shares in another company, no matter what the motive might be in so doing. There will be judgment for the plaintiff for this amount.

As to No. 2, $562.78, it was provided by the contract that final returns for each year's crop should be made by the 1st of June of the following year, so that the returns for the crop of 1923 should be finally paid over to the grower on or before 1st June, 1924. The sum now in question was received by the defendant on June 20th, 1924, and ought to have been immediately paid over. It was, however, retained by the defendant company and finally the company passed a resolution whereby it was determined to use this sum, along with similar sums held for other growers, as the basis of a contingent reserve fund, which it was determined to set up and which the defendant company had undoubted authority to set up under section 11 of the contract. The plaintiff's objection, however, is that in setting up such a reserve fund, the defendant must make deductions from the proceeds of the current year's crop and not from that of the preceding year; that inasmuch as the personnel of members varies from year to year, and different qualities and varieties of fruit delivered vary from year to year, it was inequitable and unfair that a deduction of so much per box of the 1923 crop should be made in order to set up a fund as a contingent reserve. I think this contention is correct. Everything about the contract goes to shew that it was intended and properly intended, that each year's crop should be dealt with separately, the scheme being that all the members should pool their product, share the expenses of marketing and receive the proceeds. It is conceivable that the members for 1923 might be entirely different people from the members of 1924 and succeeding years. I

Judgment

think there is nothing whatever in the contract to justify taking the money belonging to members in respect of the 1923 crop to provide a reserve fund for those who might be members in later years. This being my view it is not necessary to deal with the contention that it was inequitable and unfair to make a deduction at a rate per box instead of on a percentage of the net proceeds of each member's crop. It follows that there will be judgment for the plaintiff for this amount.

Item No. 3, $864.50. This amount represented a part of the proceeds of the sale of the crop of 1924, and this amount with other similar amounts accruing due to other members was used in the purchase of packing-houses. The plaintiff objects to this for two reasons—firstly, because the plaintiff is what is known as a "grower-packer," that is, a grower who owns and uses his own packing-house as distinct from an "inside grower" who has no packing-house on his own land and is entirely dependent on the packing-houses owned and used by the defendant; and secondly, because in any event, there is no power under the contract for the defendant to use plaintiff's moneys for packing-houses. Inasmuch as I think the second point is well taken, it is not necessary to deal with the first, though there is much to be said in that regard. The contract in question, to my mind, shews clearly by section 4 of the membership agreement, and section 4(e) of the marketing agreement, exactly what was intended in the way of providing packing-houses. The intention was that these should be owned by the central organization, and should be available for the use of various Locals; what has been done here results in the burden being thrown on the Local to an extent that was never intended.

Judgment

The defendant contends that there was authority under section 11, which, for the purpose of the present discussion, may be read as follows:

"There shall also be retained, if deemed advisable, a reserve fund or funds, the better to enable the Local to operate its business."

It is said that if the Local decided it could better operate its business by purchasing packing-houses, it could make the necessary deductions to provide a reserve fund for that purpose. For the reason stated, that I think the whole question of packing-

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houses was disposed of by sections 4 and 4(e), and for the further reason that I think section 11 did not contemplate the building up of a reserve fund for the purpose of purchasing buildings, I think the defendant's contention cannot prevail.

There will be judgment accordingly for the plaintiff for all three amounts claimed.

Judgment for plaintiff.

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Jan. 7.

MCFETRIDGE v. CANADIAN PACIFIC RAILWAY COMPANY.

Damages—Negligence—Railway yard—Passenger run down—Jury's findings—Sufficiency—Intention to find for plaintiff apparent—Trespasser—Invitee.

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The plaintiff was a passenger on the railway from Spokane in the State of Washington to Rossland, B.C. He had to change cars at Yahk, a station on the Crow's Nest branch of the defendant Company, and on arrival there was required to change from one car to another in the railway yard. Through improper information he got confused and missed his connection. He then proceeded through the railway yard in search of a hotel and while on the way through was run into by a car and injured. On the trial of an action for damages the jury's answers to questions were unsatisfactory.

Held, that as it was apparent that the jury intended to find for the plaintiff and the Court would necessarily have to again go over the ground involving a discussion of the defendant's negligence at the time the plaintiff was injured and neither counsel requested it, it would be unfair to send them back to explain or amplify their answers.

Held, further, on the contention that the plaintiff was a trespasser in the defendant's railway yards at the time he was injured, that in fact he was an invitee, as the defendant at the time was using the railway yard, and not the platform at the station, for the transfer of passengers, and had a right to expect a reasonable amount of safety in moving about the yards.

Indermaur v. *Dames* (1867), L.R. 2 C.P. 311 followed.

Held, further, that as no exception was taken to the verdict by either

counsel the plain intention of the jury should be given effect to and their findings be considered as a general verdict in favour of the plaintiff.

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1926

Jan. 7.

ACTION for damages for injuries sustained by the plaintiff by reason of the negligence of the servants of the defendant Company. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Cranbrook on the 6th of November, 1925.

MCFETRIDGE v. CANADIAN PACIFIC RY. CO.

Ross, K.C., for plaintiff.
Spreull, and *Greaves,* for defendant.

7th January, 1926.

MACDONALD, J.: Plaintiff was a passenger travelling by the Spokane International and the Canadian Pacific Railway from Spokane to Rossland. He required to change cars at Yahk, a station on the Crow's Nest branch of the latter Railway. He complains of the lack of system in making a transfer at that point and particularly of the meagre and insufficient information, and accommodation, afforded to passengers for such purpose. According to the evidence, he was misinformed, as to the action he should take after he had arrived in the railway yard at Yahk. Instead of being landed at a platform, he was required to change to and fro from one car to another while the cars were in such yard. It appears to have been a confusing place for the average passenger to change cars. The result was that he missed his connection for Rossland and eventually, after sundry efforts, found himself at the end of the platform at the station. On making inquiries, in his dilemma, and seeking hotel accommodation for the night, being a stranger in the place, he walked back in the direction of the place, where he had alighted from the car, shortly after his arrival from Spokane. In thus seeking accommodation and going, in what appeared to him as the proper direction for that purpose, he was run down by cars, backing up in the yard, and suffered severe injuries.

Judgment

It was pointed out to the jury that the plaintiff had, in giving an account of how the occurrence took place, to assume the burden of shewing negligence on the part of the defendant, causing the accident.

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Upon questions being submitted to the jury, answers thereto were given, which were not wholly satisfactory, particularly the finding as to the nature of the negligence on the part of the defendant. Before the verdict was recorded, I gave counsel an opportunity of being heard, as to my asking the jury to retire and explain or amplify their answers. See, on this point, *Herron* v. *Toronto R. W. Co.* (1913), 28 O.L.R. 59, where a lengthy discussion took place between the trial judge and the foreman of the jury, in a similar situation. Neither counsel, however, requested me to take any action along these lines. I considered the situation, but was loath, especially without a request, to take the course indicated. It was apparent that the jury were intending to find for the plaintiff and it would be futile simply to ask them " to retire and further consider their verdict." I would necessarily have to again go over the ground, which I thought, I had sufficiently covered in my instructions. It would involve discussion of the alleged negligence of the defendant, particularly at the time when plaintiff was injured and pointing out to the jury the finding which they might make in this respect. I may have been influenced, at the time, by the opinion I now have, that such a course would be unfair.

The defendant did not call any evidence on its own behalf nor afford any explanation as to the accident or excuse for its occurrence. It was submitted that the case should be withdrawn from the jury, but I did not accede to the application. I did not consider that the plaintiff was in the same position, for example, as Jewell in his action against the Grand Trunk Railway Company (*Jewell* v. *Grand Trunk Ry. Co.* (1923), 30 C.R.C. 52 and 55).

It was contended, at the close of plaintiff's case, and such contention is repeated, that the plaintiff was a trespasser, at the time he was injured and thus had no right of complaint against the defendant. I do not consider this contention tenable, as the plaintiff was properly upon the premises of the defendant, and endeavouring, at the time, to do the best he could under a trying situation, created, according to his uncontradicted evidence, by the servants of the defendant. At the time he was an "invitee" and the rule laid down in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; (1867), L.R. 2 C.P. 311, applied to him. He was

not in the same position as the plaintiff, in *Westenfelder* v. *Hobbs Manufacturing Co. Ltd.* (1925), 57 O.L.R. 31. He was not, particularly, when you consider his state of mind and the circumstances, attendant upon his journey and change of cars at Yahk, aware of nor, at any time, in a condition to appreciate the dangers surrounding his efforts to seek accommodation over night. As defendant was using the railway yard and not the platform at a station, for transfer of passengers, he had a right to expect a reasonable amount of safety in moving about in such locality.

Assuming then that the plaintiff was an "invitee" and lawfully at the point where he was injured, do the answers of the jury entitle him to judgment, or, taken as a whole, could they be considered as a general verdict bringing about the same result?

Well considered and able arguments have been presented by counsel on both sides. I should endeavour to carry out the intention of the jury. The answer of the jury stating the nature of the negligence was more general than specific. It was broad in its terms as to the treatment meted out by defendant to plaintiff as its passenger. A liberal construction upon such answer might include a finding of failure, on the part of the defendant, to comply with rule 102 of the "general train and interlocking rules" and thus causing the accident. This rule applies to the railway yard in question and requires that a flagman be placed in a conspicuous position at the end of the car which ran down the plaintiff. It might mean and include a finding that such a flagman was not placed on the car, or, if placed, he failed to give any warning which might have averted the accident. The answer to the 5th question would lend support to such a conclusion.

Judgment

Even if a man is posted, as required by the Act, it is open to the jury to find that he did not do what a reasonable man would have done—*O'Callaghan* v. *Great Northern Ry. Co.* (1914), 20 D.L.R. 145; 18 C.R.C. 156.

It is contended that, in any event, taking the questions and answers as a whole, coupled with the trend of the trial and the instructions to the jury, their findings should be considered as a general verdict in favour of the plaintiff. I was inclined to a

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contrary opinion, during the discussion which ensued at the trial, but upon further consideration, I am of the opinion that the plain intention of the jury should not be ignored by a dismissal of the action. Such a course would be an interference with their verdict. I think their finding should be accepted as a general verdict. See on this point *Dunphy* v. *B.C. Electric Ry. Co.* (1919), 27 B.C. 327 and in the Supreme Court 59 S.C.R. 263. In the latter Court, Duff, J. said, at p. 269:

"There can be no practical difficulty in giving effect to this as a general verdict because the instructions in the charge were quite sufficient to enable the jury intelligently to return a general verdict. Had the answers been objected to as insufficient at the time they were given, the trial judge, no doubt, could have presented to the jury the alternative of specifying their findings of negligence more particularly, or returning a general verdict in the usual form. No such exception having been taken, it is not, I think, open to the defendants to take exception to the form—albeit an unusual form—in which the jury have expressed their findings."

Here, as I have mentioned, neither counsel took exception to the findings and they should, if possible, be given the effect intended by the jury.

"We also fully agree that answers by a jury to questions should be given the fullest possible effect, and, if it is possible to support the same by any reasonable construction, they should be supported":

Jamieson v. *Harris* (1905), 35 S.C.R. 625 at p. 631.

Judgment should be entered for the plaintiff for $1,875 and costs.

Judgment for plaintiff.

REX v. CHOW BEN.

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

1925

Dec. 21.

REX v. CHOW BEN

Criminal Law—Summary conviction—Habeas corpus—Certiorari—Possession of opium and cocaine—Information—Not bad for duplicity—Can. Stats. 1923, Cap. 22, Sec. 3(d); 1925, Cap. 20, Sec. 2.

A charge for an infraction of The Opium and Narcotic Drug Act, 1923, recited that the accused "did unlawfully have in his possession a drug, to wit opium and cocaine," etc.

Held, that to charge having "opium and cocaine" is not to charge two offences and that the information is not bad for duplicity.

APPLICATION for a writ of *habeas corpus* with *certiorai* in aid, the accused having been convicted of unlawfully having in his possession a drug, to wit opium and cocaine. The facts are set out in the reasons for judgment. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 13th of October, 1925.

Statement

Stuart Henderson, for accused.
A. D. Macfarlane, for the Crown.

21st December, 1925.

HUNTER, C.J.B.C.: *Habeas corpus* proceedings to test the validity of a magistrate's conviction under The Opium and Narcotic Drug Act, 1923, a *certiorari* being issued at the instance of the Crown.

The first objection is that the information is bad for duplicity. The charge states that the accused "did unlawfully have in his possession a drug, to wit opium and cocaine save and except under the authority of a licence from the minister of public health first having been obtained or other lawful authority contrary to the provisions of subsection (*d*) of section 3 of The Opium and Narcotic Drug Act, 1923, as amnded by Cap. 20, Can. Stats. 1925." The words "save" to "authority" are of course redundant and the offence consists in being in unlawful possession of any of the contraband drugs. To charge having "morphine and cocaine" is not to charge two offences any more than it would be to charge theft of both a $5 note and a $20

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gold piece on the one occasion. If it were so a man might be plastered with a number of charges of the same character arising out of the one crime. Every trinket which he stole from a house on the one visit could be made the subject of a separate prosecution. But in law there is only one theft of the lot and the Court has power to give sentence proportionate to the offence.

The other objections go to the make-up of the record. The conviction clearly shews that the accused consented to be tried summarily being in conformity with the memorandum noted on the information, to wit, "summary." It also states that he pleaded guilty although there is no note to that effect on the information. The sentence accords with the minute of conviction entered on the information. I think the essential requirements of the law appear on the face of the proceedings and therefore the application fails.

Application dismissed.

PACIFIC COAST COAL MINES LIMITED *ET AL.* v. ARBUTHNOT *ET AL.*

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PACIFIC COAST COAL MINES *v.* ARBUTHNOT

Company law—Director and shareholder—Action started in name of company on his direction—No authority—Liability of solicitors.

A defendant moved for an order compelling H. (a director and shareholder in the plaintiff Company) to pay the remainder of the judgment debt and costs ordered to be paid by the plaintiffs on the final disposition of the action, on the ground that he was the initiator and instigator of the proceedings and in fact the real plaintiff and acted without authority in retaining solicitors to issue the writ and prosecute the action. His responsibility as to the judgment debt was not pressed except as to the costs.

Held, that in cases such as this the question to be decided is whether the solicitor who issued the writ had authority to do so and if the applicant has any remedy it lies against the solicitors who issued the writ and not against the respondent H.

MOTION by the defendant Arbuthnot for an order to compel one C. P. Hill to pay the remainder of the judgment debt and costs in this action. The plaintiff Company and two shareholders (Bogue and Thomson) who sued on behalf of themselves and all other shareholders brought action to set aside a certain debenture issue made by the plaintiff Company and for damages for fraud. Judgment was finally given by the Judicial Committee of the Privy Council whereby the debentures ($1,500,000) were declared null and void and Arbuthnot recovered judgment against the plaintiffs for $139,953.88, the charge of fraud not being pressed. The Company became insolvent. Bogue's executors paid Arbuthnot $30,000 in settlement of the claim against him and Arbuthnot now claims that Hill (a director and shareholder in the company) was the initiator and instigator of the proceedings and was in fact the real plaintiff and further acted without authority in retaining solicitors to issue a writ and prosecute the action. Heard by MCDONALD, J. at Vancouver on the 30th of December, 1925.

Statement

Mayers, and *J. R. Green*, for the motion.

A. H. MacNeill, K.C., contra.

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7th January, 1926.

McDONALD, J.: This action was brought by the plaintiff Company and by Messrs. Bogue and Thomson, who sued on behalf of themselves and of all other shareholders of the plaintiff Company, to set aside a certain debenture issue made by the plaintiff Company, and for damages for fraud. The writ was issued 27th February, 1915. The trial was had, accounts taken and, after two appeals to the Judicial Committee of the Privy Council judgment was finally given on the 21st of December, 1920, whereby the debentures amounting to $1,500,000 were declared null and void and the defendant Arbuthnot recovered against the plaintiffs $139,953.88, the charge of fraud not having been pressed before the Judicial Committee.

The plaintiff Company is insolvent and unable to pay the judgment debt and costs. The executors of the plaintiff Bogue have paid $30,000 in settlement of any claim against him and nothing further has been recovered by the defendant on his judgment. The defendant now moves the Court for an order compelling one C. P. Hill to pay the remainder of the judgment debt and the costs upon the ground (to put it briefly) that Hill was the initiator and instigator of the said proceedings and was in fact the real plaintiff and acted without authority in retaining solicitors to issue the said writ and prosecute the action.

Judgment

I have heard a long and careful argument upon the question of whether or not Hill had authority from any or either of the plaintiffs to give such instructions. In the view which I take of the case, it is not necessary that I should reach a conclusion upon that question of fact, though, as at present advised, I am under the impression that the applicant has not succeeded in making out any such case. For the purpose of this judgment, however, I am assuming that Hill was not legally authorized by the plaintiff Company to instruct Messrs. Eberts & Taylor to take the proceedings in question; nevertheless I think there is no foundation in law for the present application.

Hill was a director and shareholder in the plaintiff Company and was the vice-president and a substantial shareholder in Pacific Coast Collieries Limited, which Company held nearly all of the stock in the plaintiff Company and had issued bonds

of which Hill was a substantial holder. It follows from this that it was to Hill's advantage, as such shareholder and bondholder, that the debentures held by Arbuthnot should be set aside and it is argued that by reason of this and of his activities in respect of the litigation Hill was the real and substantial plaintiff in the action. I am quite unable to follow this reasoning. The real and substantial plaintiff in the action was the plaintiff Company though of course every shareholder of whom Hill was one would profit as a result of success in the litigation in proportion to their respective holdings. As the chief acting executive officer of the plaintiff Company and of Pacific Coast Collieries Limited, Hill was the person who would naturally instruct solicitors and do what he could to represent both Companies in seeing that the litigation was properly conducted. Whether or not in law the proceedings which had been taken to appoint directors of the Company, and to authorize Hill to take the course which he did take, were regular no one I think can successfully contend that Hill did not think throughout that he was acting on behalf of both Companies and for their benefit. He took the advice of learned counsel on behalf of the Companies; the Companies passed the resolutions which Hill considered were sufficient to authorize him to proceed and, in my opinion, he acted throughout in good faith.

Judgment

So far as the claim to make Hill responsible for the judgment debt is concerned, I did not understand that this was seriously pressed and no authority was cited for any such startling proposition. The claim against him, however, for payment of costs, was strenuously pressed and many cases were canvassed by counsel upon this phase of the matter.

In *Hayward* v. *Giffard* (1838), 4 M. & W. 194, Lord Abinger, at p. 197 said:

"Those [meaning ejectment cases] are the excepted cases, but the general rule is, that Courts of Justice have no power except over parties to the record."

In *La Compagnie de Mayville* v. *Whitley* (1896), 1 Ch. 788 (strongly relied upon by the applicant) the facts were that one Seal being a director of a company, without any authority from the Company, took proceedings in his own name and in that of the company. Upon the application of the company its name

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was struck out with costs payable by its co-plaintiff Seal. Here the party upon whom costs were imposed was already a "party" to the proceedings and it is difficult to say why, under the circumstances, there should be any doubt about either the jurisdiction to impose costs or the justice of doing so. In my view, this case has no application whatever to the case now under consideration. Neither do I think that *Fricker* v. *Van Grutten* (1896), 2 Ch. 649 has any application. That case simply decides that a person added as a plaintiff, without his written consent, will, on his application, be struck out of the proceedings and the costs visited on the solicitor who added him without proper authority.

In *Forbes-Smith* v. *Forbes-Smith* (1901), P. 258 the question was, whether under section 34 of the Matrimonial Causes Act, 1857, there was power to order a co-respondent to pay the costs of a proceeding to which he was not a party, which proceeding had been consolidated with another proceeding in the same Court and to which he was a party. It was claimed that there was such power under said section 34 as well as under the Judicature Act which provided "that the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid." It was held by the Court of Appeal that no power existed either at common law or under either of the statutes to make the order which was sought.

Judgment

The strongest case relied upon by the applicant is *Re Sturmer and Town of Beaverton* (1912), 25 O.L.R. 566. In that case the real litigant put forward a man of straw to conduct a proceeding before the Court with a view to quashing a by-law and with the obvious purpose of avoiding liability for costs in case of non-success. It was held that, under such circumstances, the Courts in Ontario, where the above mentioned provision of the Judicature Act was in force, had authority to visit the costs upon the real litigant. In the Divisional Court, Middleton, J. reviewed the authorities and so far as any jurisdiction, such as is now alleged to exist, did exist, apart from statute, I take his Lordship's decision to be based upon what was said at p. 575 of the judgment:

"In this case it is not said that Hamilton (the real litigant) 'merely

has an interest in the suit.' It is said and shewn that it is *his* suit and that he has been guilty of something in the nature of barratry and maintenance because, desiring to try his own right, he has procured this man of straw to allow the litigation to be brought in his name."

I take it that the decision would have gone otherwise in so far as any "inherent" jurisdiction was concerned if Hamilton had merely had "an interest in the suit," which after all is all that Hill can be said to have had in the present case. It surely cannot be seriously contended that Hill in this case "desiring to try his own right. . . procured a man of straw to allow the litigation to be brought in his name." The real and substantial plaintiff was the Pacific Coast Coal Mines Limited and, as pointed out above, Hill happened to be but one of many who stood to benefit if the litigation succeeded. I am unable to see that the *Sturmer* case can be of any assistance to the applicant.

In *Richmond* v. *Branson & Son* (1914), 1 Ch. 968 Warrington, J. at p. 974 lays down the principle which appears from all the authorities to be the under-lying principle in cases like the present and that is that the question to be decided is whether or not the solicitor who issued the writ had authority to do so. His Lordship says:

Judgment

"If a solicitor is acting without authority in an action . . . either the plaintiff or the defendant is entitled to have that action summarily stayed, and to an order that the solicitor should pay the costs of the action as between solicitor and client . . . But the real question is the authority of the solicitor. . . . The business of this Court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shewn not to exist in the proper form of proceeding, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority."

Standard Construction Co. Ltd. v. *Crabb* (1914), 7 Sask. L.R. 365 appears to me to be on "all fours" with the present case. There the managing director of a company, without authority, instructed a solicitor to issue a writ on behalf of the company. On an application to stay the proceedings, it was unanimously held by the Court of Appeal in Saskatchewan that the proceedings should be stayed and that the solicitor (and not the managing director) should be ordered to pay the costs.

In *Marchiori* v. *Fewster* (1921), 30 B.C. 251 the matter came before the Court of Appeal of British Columbia, the Court

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being equally divided. In the first place, I am of opinion that that case is entirely dissimilar to the present in this important regard: that there it was proved, as pointed out by MARTIN, J.A. at p. 254, that the appellant (the person who though not a party to the proceedings had been visited with costs) was "admittedly the real litigant and prime and sole maintainer of the litigation" and on that ground the judgment below was upheld. Mr. Justice GALLIHER, with whom the learned Chief Justice agreed, stated that he preferred to adopt the reasoning of Collins, L.J. in *Forbes-Smith* v. *Forbes-Smith, supra,* though I take it that the basis of his Lordship's decision was that no such jurisdiction, as was contended for, existed under the County Courts Act and no such provision existed here as is contained in the Judicature Act.

Judgment

It would seem to me that the matter is finally put beyond any doubt by the decision of the House of Lords in *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte de Mulhouse* (1924), 40 T.L.R. 837, in which Lord Justice Atkin's dissenting judgment in the Court of Appeal (1923), 2 K.B. 630 was upheld and the decision of Warrington, J. in *Richmond* v. *Branson & Son, supra,* expressly approved.

It follows that, in my opinion, if the applicant has any remedy at all, the remedy lies against the solicitors who issued the writ and not against the present respondent, and the application must be dismissed.

Motion dismissed.

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REX v. ROZONOWSKI

Criminal law—Permitting use of premises as disorderly house—Conviction —Certiorari—Jurisdiction of one justice—Word "knowingly" omitted—Effect—Perusal of depositions—Criminal Code, Secs. 228A, 707 and 1124.

The effect of section 707 of the Criminal Code is that if there is no specific direction in any Act or law requiring two or more justices then a complaint or information may be heard, tried, determined and adjudged by any one justice and this applies to an offence coming within section 228A of the Criminal Code.

A conviction for an offence under section 228A which does not state that the accused "knowingly" permitted his premises to be used for the illegal purpose described is materially defective.

The word "knowingly" having been omitted from a conviction under section 228A, on application to quash, the Court not being satisfied that the applicant committed an offence of the nature described, held that section 1124 should not be applied.

While depositions cannot be used on *certiorari* in determining whether the magistrate's jurisdiction was established, an applicant who seeks to quash a conviction, on the ground of want of or excess of jurisdiction may incorporate proper material and present to the Court any facts, whether within or outside the depositions, which would affect the jurisdiction of the magistrate.

When the validity of a conviction is in question an adjournment of the application may be allowed in the discretion of the Court at any time before the conviction has been quashed in order to permit an amended conviction to be filed. But such an adjournment will not be allowed unless the Court is satisfied that a conviction could be substituted which would be according to the truth and supported by the facts before the magistrate; and on the motion for adjournment the Court should consider all the available material including the depositions that will assist it in exercising its discretion.

Statement

APPLICATION for *certiorari* to quash a conviction under section 228A of the Criminal Code. Heard by MACDONALD, J. in Chambers at Fernie on the 15th of November, 1925.

Sherwood Herchmer, for the application.
Fisher, K.C., contra.

14th January, 1926.

Judgment

MACDONALD, J.: William Rozonowski was convicted by a justice of the peace and fined $200. The conviction states, that

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he did "unlawfully permit his premises to be used as a common gaming-house, contrary to section 228A of the Criminal Code of Canada." He now seeks, through *certiorari* proceedings, to have the conviction quashed. When the application was launched, it was apparent, from the notice of motion, that counsel for the applicant thought, that the conviction was under section 228 of the Criminal Code and not under section 228A, as the ground was taken, that a justice of the peace, sitting alone, had no jurisdiction to convict the applicant. This would have been a fatal objection had the justice purported to act under section 228, but section 228A, as enacted in 1913, and creating a new statutory offence, did not restrict the application of section 707 of the Criminal Code. The effect of this section is, that, if there is no specific direction in any Act or law, requiring two or more justices to act, then a complaint or information may be heard, tried, determined and adjudged by any one justice for the territorial division, where the matter of the complaint or information arose. So a single justice of the peace had jurisdiction to try and convict Rozonowski, if he committed an offence coming within the provisions of said section 228A, and this ground of attack against the conviction fails.

Upon the conviction, information and other papers being returned to the Court, counsel for the applicant submitted that I should peruse the depositions, in support of his contention, that there was no evidence whatever to warrant a conviction under section 228A. Objection was taken to this course being pursued as contrary to the definite judgment of the Privy Council in *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128; (1922), 2 W.W.R. 30. One of the points of this important decision is, that depositions are not part of the record and are not available material which the Court, upon *certiorari,* can consider for the purpose of quashing a conviction, once the jurisdiction of the magistrate has been established: see (1922), 2 W.W.R. 30 at p. 31:

> "It is not competent for the superior Court, under the guise of examining whether such jurisdiction was established, to consider whether or not some evidence was forthcoming before the magistrate of every fact which had to be sworn to in order to render the conviction a right exercise of his jurisdiction."

The insufficiency or total absence of evidence being immaterial, as affecting the jurisdiction of a convicting magistrate, is discussed at length in the *Nat Bell* case and authorities cited, supporting such a conclusion: see (1922), 2 A.C. 128 at p. 152; (1922), 2 W.W.R. 30 at pp. 50-1:

"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; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all. This appears from the very full and able discussion of all the authorities in *Rex* v. *Mahony* (1910), 2 I.R. 695. On this point *Ex parte Hopwood* (1850), 15 Q.B. 121 may also be referred to. 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. It was alleged on affidavit that, on the particular summons in question, they had had no evidence before them, even of the service of the summons. The Court held that, even so, the fact did not take away jurisdiction. 'As to the want of evidence on matter of fact,' says Patteson, J., 'that cannot possibly take away jurisdiction: no case can be cited where that has ever been said.' (*Ex parte Hopwood* (1850), 15 Q.B. 121 at p. 128). To the same effect is *In re Shropshire Justices* (1866), 14 L.T. 598. Furthermore a conviction, regular on its face, is conclusive of all the facts stated in it, not excepting those necessary to give the justices jurisdiction, and it is from the facts stated in the conviction that the facts of the case are to be collected."

Judgment

While depositions cannot be used in the manner indicated, to affect the jurisdiction of the magistrate, an applicant is not prevented, in seeking to quash a conviction, on account of want or excess of jurisdiction, from incorporating in proper material, and thus presenting to the Court, any facts which would affect the jurisdiction of such magistrate, whether within, or outside, the depositions. Compare on this point (S.C.) p. 160 as follows:

"The matter has often been discussed as if the true point was one relating to the admissibility of evidence, and the question has seemed to be whether or not affidavits and new testimony were admissible in the superior Court. This is really an accidental aspect of the subject. Where it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought *ad hoc* before the superior Court. How is it ever to appear within the four corners of the record that the members of the inferior Court were unqualified, or were biased, or were interested in the subject-matter?"

Being thus debarred from following the procedure, so long in vogue in Canada, of accepting the depositions of a magistrate, as part of the return from the lower Court in *certiorari* proceed-

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ings, then I must consider the conviction as it stands. Is it valid on its face?

"It is a general rule that a conviction, being an entire judgment, must be good throughout; for if any material part be faulty it vitiates the whole":

Paley on Summary Convictions, 8th Ed., 201.

Before dealing, however, with this question, as to the validity of the conviction, I should refer to a portion of the written argument of counsel for the Crown, that if the conviction is thus to be considered, then an opportunity should be afforded of filing an amended conviction. Though upon the oral argument, no adjournment was sought or application made for amendment, I might even now allow an adjournment for such a purpose, if I thought the ends of justice required, that I should accede to such an application. I might do so at any time before a conviction has been actually quashed. See Seager's Magistrates' Manual, 2nd Ed., 41 and cases there cited. An adjournment for this object is, however, a matter of discretion, and, under the circumstances of this case, should not be allowed, unless I am satisfied that a conviction could be substituted for the one under consideration, which would be according to the truth and supported by the facts produced before the justice. Using the words of Lord Kenyon in *Rex* v. *Barker* (1800), 1 East 186 at p. 188 in this respect, as to an amended or substituted conviction, "nor is there any legal objection to this method, provided the facts will warrant them in stating what they do." Compare Alderson, B. in *Selwood* v. *Mount* (1839), 9 Car. & P. 75 at p. 77:

"I do not see any impropriety in the magistrates drawing up another conviction in a more formal shape, provided that the latter is according to the truth, and supported by the facts of the case."

In the same connection, Beck, J. in *Rex* v. *Fitzgerald* (1911), 19 Can. C.C. 39 decided that he might receive a new or substituted conviction, but added, after having considered the evidence (p. 40):

"The amended conviction must, of course, be supported by the evidence and the other proceedings at the trial. The evidence is clearly sufficient in respect of all the essentials of the offence stated in the conviction."

While I have no right to consider the depositions upon the question of jurisdiction, still, I think that upon an application

for an adjournment, for the purpose of substituting another conviction, I should consider all the material available, including the depositions, which will assist me in properly exercising a discretion in the matter. Acting on this view and upon perusal of the depositions, I do not consider that they disclose facts which would justify me in granting the application, so I proceed to consider the conviction as returned from the lower Court.

In the first place, does it properly allege, that the applicant has been guilty of the statutory offence created by section 228A? Such section reads in part as follows:

"Any one who, as landlord, lessor, tenant, occupier, agent or otherwise, has charge or control of any premises and knowingly permits such premises . . . to be let or used for the purposes of a disorderly house shall be liable upon summary conviction to a fine of $200 and costs," etc.

The side-note to this section states that the enactment covers the "use of premises as disorderly house." Section 228 had, previous to the enactment of section 228A, dealt with the offence of "keeping" a disorderly house and the subsection thereof brought within the purview of the main section, and made liable as a keeper, any person, who might appear to have the care or management of any disorderly house. Section 228A was plainly intended, to render liable to punishment, persons who were not keeping or running the disorderly house but "permitted" their premises to be used for such purpose. Amongst the essentials necessary to render a person guilty of this offence "he must have charge or control of the premises" and must have "knowingly" permitted such premises to be used for the purpose described. In the conviction, which is attacked, there is no mention of either these essentials, so far as the applicant was concerned. Of these two essentials the more important one is that requiring the applicant to "knowingly" permit his premises to be used. The omission of this word from the conviction would not be objectionable, if it were not for the fact that it is used in the statute and thus made an essential part of the offence. Paley on Summary Convictions, 8th Ed., p. 200 says:

Judgment

"Neither is the omission of the words 'unlawfully' or 'knowingly' any objection, unless either of these words be distinctly used in the Act as part of the description of the offence."

See cases there cited. Amongst others, *Carpenter* v. *Mason*

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(1840), 12 A. & E. 629; *Regina* v. *The Justices of Radnorshire* (1840), 9 D.P.C. 90; *Cf. Rex* v. *Hayes* (1903), 6 Can. C.C. 357 at p. 360. In the latter case reference was made to the new offence, created by statute, of importing aliens under contract into the Province of Ontario, but the Act required, in order to render a person liable thereunder, that he should "knowingly" assist, encourage or solicit such importation. Street, J., in his judgment, refers to the conviction then under consideration as follows:

> "In the present case the information does not charge the defendant with having 'knowingly' done the acts charged, nor is he convicted of having 'knowingly' done them; so that he has not been either charged with, or convicted of, any offence known to the law, and the conviction on its face is clearly bad."

So in this case, I consider the conviction materially defective on this point and do not deem it necessary to consider the other objection which might be advanced, that there is no allegation that, in other respects, the applicant comes within the terms of the section in question.

Judgment

Then the Crown, in the event of such a conclusion, seeks to invoke the provisions of section 1124 of the Criminal Code. This involves perusal of the depositions in order that I may satisfy myself "that an offence of the nature described in the conviction, has been committed, over which such justice has jurisdiction." I accept the views entertained by the Manitoba judges in *Reg.* v. *Herrell* (1898), 1 Can. C.C. 510 in considering section 1124 (then 889). Taylor, C.J. at pp. 515-16 said:

> "Now, it is one thing to decline to quash a conviction where there is evidence upon which a magistrate might convict and another thing to interfere actively and amend a conviction. To do that it seems to me that the Court or judge must from the depositions be satisfied that if trying the defendant in the first instance the Court or judge would upon that evidence have convicted. Had the defendant been tried before me I could never have convicted him upon the evidence as it stands."

Killam, J. at p. 519:

> "This Court is not a Court of Appeal from the convicting magistrate. We cannot quash the conviction for being made without evidence unless there was a complete absence of any evidence whatever of the commission by the accused of the offence charged; and we are not to go over the depositions with the point of a pin to search out some small break in its continuity." . . .

And at p. 523:

"Now, it is one thing to say that upon the face of the depositions there appears to have been evidence which might have satisfied the mind of the magistrate hearing the witnesses, and quite a different thing to satisfy one's own mind, by perusal of written depositions, that an accused person has been guilty of an offence against the law. Not only have we not the advantage of seeing and hearing the witnesses but we have only the substance of their evidence, or what the magistrate considers as he goes along to be its substance. In many cases this might be sufficient to satisfy the Court; but here there was directly contradictory evidence, without such collateral circumstances as might enable one to decide between the witnesses. The minds of the members of the Court must be satisfied from a perusal of the depositions and we cannot tamely adopt the opinion of the convicting justice. We have in a measure to try the accused upon the depositions, giving him the benefit of any reasonable doubt."

Adopting the course thus outlined and so perusing and considering the depositions, I am not satisfied that the applicant committed an offence of the nature described in the conviction. There is some evidence, which is contradicted, as to his engaging in a game of poker and in taking a rake-off out of the pot. Aside from the contradiction, the evidence for the prosecution, in this respect even, is vague and unsatisfactory. It does not seem sufficient, even if it were accepted, as against the contradiction of the applicant and the benefit of the doubt was not afforded to him. It only tends in the direction of proving that he was the keeper of a gaming-house. It was not evidence supporting the offence covered by section 228A. The difficulty is, that even if I were to give such effect to the evidence, and find that the depositions proved that the applicant was keeping a gaming-house, then the provisions of 1124 could not be applied, as such an offence is beyond the jurisdiction of a justice of the peace sitting alone. The result is that section 1124 should not be applied. I followed a similar course in *Rex* v. *Castledem* (not yet reported). I might refer to the conclusion of the portion of the judgment of Lord Sumner in the *Nat Bell case* (1922), 2 A.C. 128 at p. 164 where, after referring to the depositions not being made part of the record, he added that:

Judgment

"They are used as independent materials, upon which the judge must uphold a conviction, which upon its face he might otherwise be bound to quash for irregularity, informality or insufficiency, provided that he is satisfied within the terms of the section."

The conviction is defective and should be quashed without costs.

Conviction quashed.

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IN RE ESTATE OF EDWARD DISNEY FARMER, DECEASED.

Jan. 16.

IN RE ESTATE OF EDWARD DISNEY FARMER, DECEASED

Succession Duty—Interest on unpaid duty—Application to extend time from which interest runs—Limitation in time of application—"Impossible"—Interpretation of—R.S.B.C. 1924, Cap. 244, Secs. 20 and 35.

Section 20 of the Succession Duty Act provides "that the duties imposed by the Act, unless otherwise herein provided, shall be due and payable at the death of the deceased, and if the same are paid within six months no interest shall be charged but if not so paid, interest shall be paid from the death of deceased"; and section 35 empowers a judge of the Supreme Court to make an order upon the application of any person liable for the payment of duty extending the time fixed by law for payment thereof and also the date when interest shall be chargeable when it appears to the judge that payment within the time prescribed by the Act is impossible owing to some cause over which the person liable has no control.

Deceased died in Texas, where he was domiciled, on the 29th of May, 1924, having property both in Texas and British Columbia. Probate was issued in Texas on the 26th of October, 1924. The executor arrived in Vancouver on the 8th of November, 1924, and proceeded at once to apply for ancillary letters of probate but owing to delays over which the executor had no control probate was not granted until the 28th of May, 1925. On the 14th of April, 1925, application was made under said section 35 for extension of time for the payment of interest on the succession duty.

Held, that the application may be made notwithstanding the expiry of the six months' time allotted as exempt from interest by section 20 of the Act.

Held, further, that it should be found on the evidence that payment was impossible within the time prescribed by the Act, and that there be an order extending the time for interest to be charged to a date six months after the granting of ancillary letters of probate.

Statement

APPLICATION by the executor of the estate of Edward Disney Farmer, deceased, under section 35 of the Succession Duty Act for an order extending the period from which interest shall be chargeable on the duties imposed on the estate. The necessary facts are set out in the reasons for judgment. Heard by MORRISON, J. in Chambers at Vancouver on the 13th of January, 1926.

J. S. MacKay, for the application.
Buckingham, for the Minister of Finance.

16th January, 1926.

MORRISON, J.: The late Edward Disney Farmer died in the State of Texas on the 29th of May, 1924, leaving property in British Columbia which is subject to succession duty. Steps were taken promptly to administer his affairs both in Texas and British Columbia, but, owing to complications and unavoidable delays, to which I shall refer later, probate did not issue until 28th May, 1925.

The statute, Sec. 20, Cap. 244, R.S.B.C. 1924, provides that the duties imposed by the Act, unless otherwise therein provided, shall be due and payable at the death of the deceased and, if the same are paid within six months, no interest shall be charged or collected thereon but, if not so paid, interest at the rate of six per centum per annum shall be charged and collected from the death of the deceased. Section 35 empowers a judge of the Supreme Court to make an order upon the application of any person liable for the payment of duty extending the time fixed by law for payment thereof and also the date when the interest shall be chargeable where it appears to the judge that payment within the time prescribed by the Act is impossible owing to some cause over which the person liable has no control. An application is now made long after the expiry of the allotted six months for relief from section 20, *supra.* The Crown in opposing takes the objection that the application, not having been made within the six months, is too late. Mr. *Buckingham* for the Minister of Finance of the Province has confronted me with a formidable, puzzling argument supported by authorities. However, I hold that the short answer is to be found in the judgment of the Lord Chancellor in the case of *Banner* v. *Johnston* (1871), L.R. 5 H.L. 157 at p. 172, and in that of Lord Cairns, in dealing with the question of the extension of time under a somewhat similar provision in the English Companies Act:

Judgment

"In truth . . . it is entirely a narrow construction of the word 'extended' to say that extension of time must be made within the period of time first allotted. The time may be extended just as well after the three

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weeks have expired as before. The argument assumes that the Act of Parliament is worded in this way: No appeal shall be brought except within three weeks, unless the Court . . . sanctions, within the three weeks an extension of time to a longer period. But it is not so framed."

I therefore hold that the application may now be made notwithstanding the expiry of the allotted time of six months.

As to the merits, Mr. Farmer died, in the State of Texas on the 29th of May, 1924. His domicil was the State of Texas. On the 13th of June proceedings were commenced to probate his will and on the 1st of October, 1924, the will was admitted to probate in Fort Worth, Texas. On 26th October the inventory and appraisement *re* estate was filed in probate in Texas and probate issued. On 8th November, the executor under the will arrived in Vancouver and proceeded without delay to obtain necessary information in order to apply for ancillary letters probate in British Columbia, and, on the 19th of November, 1924, an application was duly made for ancillary letters. Between that date and March 13th, 1925, the finance department had the matter of succession duty before them and, on the 13th, the deputy minister forwarded a statement of the succession and probate duties payable on the estate. On March 31st, 1925, the solicitors for the executor were informed by the deputy minister of the nature of the bond required to be given by the executor for the payment of the said duty. The bond submitted was approved by the department and forwarded to the executor in Texas for execution and, upon its return, was filed and, on the 28th of May, 1925, probate was duly granted. On April 14th, 1925, the present application was launched asking for an extension of time for the payment of interest on the succession duty pursuant to section 35 of the Succession Duty Act.

I find that payment within the time prescribed by the Act was impossible. Impossible in the sense that the whole of the deceased's estate was involved in the probate proceedings, and for the executor to be compelled to resort *ad interim* to methods of financing, in order to raise sufficient to pay the problematic duty, would be superimposing terrors to death more ingenious than those already originated by the Act.

Counsel for the Government submits that the delay was one

over which the executor had control and should not have happened, the particular period of delay complained of being caused by the learned judge in Texas, who had cognizance of the matter in that jurisdiction, having, as counsel put it, "indulged in the vagary" of a hunt, of which the executor was not one of the participants. For ought that appears on the record, it may be necessary and requisite, as well for the judicial mind as for the body, for Texan jurists to participate in pastimes requiring steady nerve and clear eye in the use of lethal weapons. I deal with this aspect because it was seriously put forward as one of the grounds whereby it is sought to deprive the executor of the right to come in and ask for an extension of time. Apart from the time alleged to have been thrown away, owing to the absence of the judge, and I think, if I may presume to say so, he was properly absent, there does not appear to be any ground upon which the Government should or can successfully resist this application.

Judgment

The order will go extending the time for interest to be charged to a date six months from the date of the granting of ancillary letters of probate in British Columbia, *viz.*, 28th November, 1925.

Application granted.

COURT OF APPEAL

1926

Jan. 5.

WALKER v. B.C. ELECTRIC RY. CO.

WALKER v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Collision of street-car and motor-car—Action for damages—Jury finds defendant's motorman negligent—Plaintiff not licensed driver — Action dismissed — Appeal — R.S.B.C. 1924, Cap. 177, Sec. 9A (1).

In an action for damages to the plaintiff's motor-car caused by a motorman of the defendant Company in negligently driving a street-car into collision with his motor-car, the jury found that the motorman was negligent but the trial judge dismissed the action as the plaintiff who was driving his car did not have a driver's licence as required by section 9A (1) of the Motor-vehicle Act as enacted by B.C. Stats. 1924, Cap. 33, Sec. 3.

Held, on appeal, reversing the decision of LAMPMAN, Co. J., that the failure to obtain a licence under a statute containing a prohibition against driving on the highway without a licence does not deprive the driver of a right of action he would otherwise have against a negligent defendant unless the breach of the statute was the proximate cause of the accident, judgment should therefore be given in favour of the plaintiff in accordance with the jury's finding.

APPEAL by plaintiff from the decision of LAMPMAN, Co. J. of the 22nd of June, 1925, dismissing an action for damages for negligence. At about 8 o'clock on the evening of the 28th of February, 1925, the plaintiff drove his car westerly from the Arena in Victoria. When he had reached a point about 100 yards from Oak Bay Junction he turned to his left and proceeded to cross the road into the Imperial Oil Station but owing to the number of cars going towards the Arena (where a hockey match was about to start) on the south side of the road he had to stop when he was on the south street-car track. As he turned he saw a street-car coming east about to stop on the west side of the junction, but before he was able to make his way into the oil station, the street-car came on and ran into him. The plaintiff claimed $245, the cost of repairs to the car. The jury found that the collision was due to the motorman's negligence. The plaintiff applied for a driver's licence in January, 1925, and was told they were not ready. A licence was not issued to him until the 16th of April. It was held by the trial judge that

Statement

as he did not have a driver's licence as required by section 9A(1) of the Motor-vehicle Act as enacted in 1924, he was precluded from bringing the action and it should be dismissed.

The appeal was argued at Vancouver on the 20th and 21st of October, 1925, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Higgins, K.C., for appellant: The fact that the plaintiff had no licence does not preclude him from a right of action: see *Godfrey* v. *Cooper* (1920), 46 O.L.R. 565; *Perrin* v. *Vancouver Drive Yourself Auto Livery* (1921), 30 B.C. 241; *MacLure* v. *The General Accident Assurance Co. of Canada* (1925), 35 B.C. 33; *Phillips* v. *Britannia Hygienic Laundry Co.* (1923), 2 K.B. 832. The regulations as to licences do not affect civil actions: see *Isaac Walton and Co.* v. *The Vanguard Motorbus Co. (Limited)* (1908), 25 T.L.R. 13; *Grand Trunk Pacific Ry. Co.* v. *Earl* (1923), S.C.R. 397.

Harold B. Robertson, K.C., for respondent: When he has no licence it is only in the case of wilful negligence that he can recover. It must be wilful or malicious: see *Contant* v. *Pigott* (1913), 5 W.W.R. 946; *Etter* v. *City of Saskatoon* (1917), 3 W.W.R. 1110; *Greig* v. *City of Merritt* (1913), 24 W.L.R. 328; *Nash* v. *City of Victoria* (1919), 27 B.C. 487. If he drives without a licence he is a trespasser on the highway: see *Halpin* v. *Grant Smith & Co. et al.* (1920), 2 W.W.R. 753; *Waldron* v. *Rural Municipality of Elfros* (1923), 2 W.W.R. 227 at p. 229; *Roe* v. *Township of Wellesley* (1918), 43 O.L.R. 214; *Sercombe* v. *Township of Vaughan* (1919), 45 O.L.R. 142. That he cannot recover in case of ordinary negligence see *Bensley* v. *Bignold* (1822), 5 B. & Ald. 335; Halsbury's Laws of England, Vol. 7, p. 402; *Johnson* v. *Martin* (1892), 19 A.R. 592; *Harrison* v. *Duke of Rutland* (1892), 62 L.J., K.B. 117; *Town of Portland* v. *Griffiths* (1885), 11 S.C.R. 333; *Hickman* v. *Maisey* (1900), 1 Q.B. 752. On the question of trial by County Court Judge see *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa* (1883), 8 App. Cas. 517 at p. 526; *Laursen* v. *McKinnon* (1913), 18 B.C. 10 at p. 13.

Argument

Higgins, replied.

Cur. adv. vult.

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5th January, 1926.

MARTIN, J.A.: This case turns, in my opinion, upon the view that we should take of the scope of the decision of this Court in *Boyer* v. *Moillet* (1920), 30 B.C. 216, which, though not in identical circumstances of fact or upon identical sections of our statutes, yet declares as a general principle of construction of the Motor-vehicle Act (now Cap. 177, R.S.B.C. 1924, as amended by Cap. 33 of 1924) that, as the Chief Justice put it at p. 220:

"The Legislature was dealing with a subject quite apart from the rights of persons as between themselves for injuries done by one to the other on public highways. The Act was passed, I think, for the protection of the public and for the punishment by fine or imprisonment of those who violate its provisions."

Though I felt constrained to take a different view yet my brother MCPHILLIPS agreed, in substance, with the Chief Justice saying (p. 223):

"If the Legislature intended to impose any liability in excess of that existing at common law, it is reasonable that that should be found in apt words imposing liability and those apt words are absent in the legislation."

MARTIN, J.A.

While that decision was upon section 35 of the Motor-vehicle Act of 1920, Cap. 62, yet the *ratio decidendi* is applicable to the present case arising under section 3 of Cap. 33 of the Motor-vehicle Act Amendment Act, 1924, as follows:

"*Drivers' Licences.*

"9A. (1.) After the first day of January, 1925, no person shall drive or operate any motor-vehicle on any highway, otherwise than as a chauffeur, unless he is the holder of a subsisting driver's licence issued to him pursuant to the provisions of this section."

It is only under this section that the respondent (defendant) can escape liability for the negligence found by the jury because the plaintiff (appellant) was not the holder of a licence so required. The point is a nice and important one and if we were free to consider it in the absence of our said decision it may well be that a strong argument in support of the view taken by the learned judge below could be found in certain of the decisions of the Courts of other Provinces though some are in conflict. But seeing that my brothers all entertain no doubt that the present case is in principle within the scope of our said decision, and I do not feel justified in taking a contrary view, I think it would not be proper for us to further discuss that decision, but

leave that duty to a higher Court should occasion arise. It follows that the said statutory prohibition in section 9A for the protection of the public upon highways should not be held to be a bar to the recovery of damages for the infringement of civil rights upon such highways, and therefore the appeal should be allowed and the case remitted to the Court below for the assessment of the damages suffered by the appellant because of the respondent's negligence as already found.

GALLIHER, J.A.: This Court has held in *Boyer* v. *Moillet* (1920), 30 B.C. 216, and in *MacLure* v. *The General Accident Assurance Co. of Canada* (1925), 35 B.C. 33, that the British Columbia Motor-vehicle Act in no way cuts down the rights of a plaintiff in an action for damages at common law.

GALLIHER, J.A.

It cannot be said here that the want of a licence contributed to the accident. The case of *North Western Construction Co.* v. *Young* (1908), 13 B.C. 297, is, in my opinion, not applicable.

I would allow the appeal.

MCPHILLIPS, J.A.: This appeal is in a case where a collision took place between a motor-car of the appellant and electric street-car of the respondent. The action was tried before LAMPMAN, Co. J. with a jury.

This Court, in *Boyer* v. *Moillet* (1920), 30 B.C. 216, decided that the Motor-vehicle Act, B.C. Stats. 1920, Cap. 62, did not impose a liability beyond that existing at common law in respect of accidents occurring in the operation of motor-vehicles on highways. This Court later in *Perrin* v. *Vancouver Drive Yourself Auto Livery* (1921), 30 B.C. 241, reaffirmed the proposition of law laid down in *Boyer* v. *Moillet, supra.* Now the question arises as to whether the amending legislation above quoted has changed the law as laid down by this Court. I cannot see that it has in any way. The situation is as it has always been, the failure in the appellant to have a driver's licence can only be viewed as failure upon the part of the appellant to comply with a provision of the Motor-vehicle Act and the responsibility therefor is confined to the penalties imposed by the Act. In *MacLure* v. *The General Accident Assurance Co. of Canada* (1925), 35

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B.C. 33, the question of the application of the Motor-vehicle Act again came under review, and at p. 39, I made use of the following language:

"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."

When it is considered that a driver's licence is issued without any examination whatever as to the capacity to drive a motor-car it is easily seen that the Legislature had no intention of affecting the common law responsibility for actionable negligence. It would not in any case reasonably follow that the absence of a driver's licence should preclude the right of recovery for actionable negligence upon the highway were it necessary to pass the most stringent examination as to capacity to drive a motor-car. The most skilled are often guilty of negligence. Here it is the case of the respondent operating a street-car, being guilty of negligence whilst passing along the highway. The contention is and it has been given effect to, that owing to the mere fact that the appellant was without a driver's licence that notwithstanding the jury have found that the collision was caused by the negligence of the respondent there can be no recovery by the appellant for the damages occasioned to his motor-car, he (the appellant) being in no way guilty of negligence. It would really offend against natural justice that this should be. To accomplish any such deprivation of right of recovery it is essential that we find apt words of legislation to that effect and no such legislation exists. The absence upon the part of the appellant of a bare driver's licence, which will be issued upon application and payment of a fee without examination, bears no guarantee of fitness to drive a motor-car whatever. With or without a licence the driver of a motor-car is liable for actionable negligence upon his part whilst driving on a highway.

MARTIN, J.A.

In the present case the respondent having been found guilty of actionable negligence the verdict in my opinion must stand and the appellant is entitled to have judgment entered thereon in his favour.

The learned trial judge has carefully reviewed the authorities

and referred to cases in other jurisdictions where liability was excused on account of the absence of the driver's licence. With great respect, some of the cases are founded upon dissimilar legislation when closely scanned, and in other cases not being controlling decisions upon this Court have no binding effect. Further, this Court, as I have already pointed out, has determined the question in previous cases and we are bound by our previous decisions.

I might conclude by saying that I cannot approve of what has been termed the "outlaw" doctrine, *i.e.*, being upon a highway driving a motor-car without a licence—no damages are recoverable. The Court of Appeal of Ontario repudiated the "outlaw" doctrine in *Godfrey* v. *Cooper* (1920), 46 O.L.R. 565; also see *Grand Trunk Pacific Ry. Co.* v. *Earl* (1923), S.C.R. 397, Anglin, J. at p. 403:

MCPHILLIPS, J.A.

> "Nor does the fact that the plaintiffs were using the highway crossing in violation of a statutory prohibition exclude the defence of contributory negligence,"

and *Godfrey* v. *Cooper, supra,* was referred to.

I have before stated to hold this there must be apt words of legislation to that effect. The judgment under appeal should be reversed and the judgment entered for the appellant, following the verdict of the jury.

MACDONALD, J.A.: The learned County Court judge dismissed the plaintiff's claim and refused to enter the verdict of the jury finding the defendant negligent, holding that, as the plaintiff had not a driver's licence, as required by section 9A(1) of the Motor-vehicle Act as enacted in 1924, chapter 33, he cannot succeed unless it is found that the defendant wantonly and maliciously injured him. The section reads: [Already set out in the judgment of MARTIN, J.A.]

MACDONALD, J.A.

Although some authorities not binding upon us support this view, it appears to me erroneous to hold that a defendant may avoid the consequences of his negligent acts because the plaintiff has not complied with a statutory regulation where the failure to do so in no way contributed to the accident. Negligence is absence of care according to circumstances. The plaintiff's failure to observe the provisions of an Act not designed to regu-

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late the conduct of others, or to excuse negligence on their part, cannot be regarded as a circumstance negativing negligence on the defendant's part. A decision of the Manitoba Court of Appeal (*Contant* v. *Pigott* (1913), 5 W.W.R. 946) and of the Saskatchewan Court of Appeal (*Etter* v. *City of Saskatoon* (1917), 3 W.W.R. 1110) would appear to support the contention of the respondent. I prefer to follow the judgment in *Godfrey* v. *Cooper* (1920), 46 O.L.R. 565, where it was held that the failure to obtain a licence under a statute containing a prohibition against driving on the highway without a licence as stringent in its terms as our own section quoted above, did not deprive the driver of any right of action he would otherwise have against a negligent defendant unless it could be shewn that the breach of the statutory provision was the proximate cause of the accident. This decision was commented upon by Mr. Justice Anglin (now the Chief Justice of the Supreme Court of Canada) in *Grand Trunk Pacific Ry. Co.* v. *Earl* (1923), S.C.R. 397 at p. 403.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *Frank Higgins.*
Solicitor for respondent: *A. D. King.*

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MILLAR v. B.C. RAPID TRANSIT CO.

MILLAR AND MILLAR v. BRITISH COLUMBIA RAPID TRANSIT COMPANY LIMITED AND ROSTILL.

Negligence—Motor-bus and automobile—Collision—Meeting at intersection—Right of way—Right of defendant to cross-examine witnesses of co-defendant.

In the early afternoon of the 21st of November, 1924, the plaintiff was driving southerly on Inman Avenue. He entered Kingsway intending to turn to his left and go towards New Westminster. When slightly over half way across Kingsway he ran into the motor-bus of the defendant Company that was going west on Kingsway towards Vancouver and was driven by the defendant Rostill. The plaintiff recovered in an action for damages.

Held, on appeal, affirming the decision of RUGGLES, Co. J., that there was evidence to support the verdict and the appeal should be dismissed.

Per MACDONALD, C.J.A. and MACDONALD, J.A.: The rule when there are two defendants is that in respect of trials in civil actions (leaving aside divorce) separate counsel should not be heard in cases in which the parties have not pleaded separately; that when they have pleaded separately but there is no substantial difference in their interests, the judge may refuse to allow separate representation or cross-examination of co-defendant's witnesses, and that in other circumstances separate counsel may be allowed to be heard with the consequential right to cross-examine a co-defendant or his witnesses.

APPEAL by defendant Company from the decision of RUGGLES, Co. J. of the 13th of May, 1925, in an action for damages resulting from the collision of the defendant's bus with the plaintiff's automobile. On the 21st of November, 1924, the plaintiff with his wife was driving southerly on Inman Avenue in Burnaby towards Kingsway at about 2.30 in the afternoon. The defendant Company's motor-bus, driven by the defendant Rostill was proceeding westerly on Kingsway towards Vancouver. The plaintiff was proceeding at about 12 miles an hour and proceeded to cross Kingsway from Inman Avenue intending to turn east towards New Westminster. On getting a little more than half way across Kingsway he ran into the front right-hand side of the motor-bus. The evidence shewed the motor-bus was going at about 28 miles an hour, and the driver Rostill saw

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the plaintiff when about 70 feet away from the point of contact. The plaintiff's car was damaged and the jury found for the plaintiff Millar for $277.15, and Mrs. Millar for $26.40.

The appeal was argued at Vancouver on the 22nd and 23rd of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: We submit (1) that the verdict was unreasonable; (2) we were deprived of the benefit of cross-examination of the co-defendant's witnesses; (3) the judge's direction is a subject of complaint. That the verdict was unreasonable see *Monrufet* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 91. That a defendant can cross-examine a co-defendant's witnesses see *Lord* v. *Colvin* (1855), 3 Drew. 222 at p. 224; *Allen* v. *Allen and Bell* (1894), 63 L.J., P. 120 at p. 123; *Glennie* v. *Glennie and Bowles* (1863), 3 Sw. & Tr. 109. The learned judge did not properly charge the jury in respect of sections 18 and 19 of the Highway Act.

Argument

Darling, for respondents: As to the verdict see *Mackenzie* v. *B.C. Electric Ry. Co.* (1915), 21 B.C. 375 at p. 380; *Linnell* v. *Reid* (1923), 32 B.C. 87. He was not entitled to cross-examine co-defendant's witnesses: see *Chippendale* v. *Masson* (1815), 4 Camp. 174. There was just one dispute note filed and there was just one set of witnesses as Rostill had no witnesses. It is only in the case of defendants having different interests that cross-examination is allowed: see *Walton* v. *Board of School Trustees of Vancouver* (1924), 34 B.C. 38 at p. 42. The plaintiff had the right of way and held out his hand shewing he was going to New Westminster. On the question of misdirection there was no substantial wrong: see *King Lumber Co.* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 502; *Lionel Barber & Co.* v. *Deutsche Bank (Berlin) London Agency* (1919), A.C. 304.

Mayers, in reply, referred to *Bridges* v. *Directors, &c. of North London Railway Co.* (1874), L.R. 7 H.L. 213 at p. 234.

Cur. adv. vult.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: There is no doubt in my mind that the judgment should be sustained and the appeal dismissed.

The only question upon which I desire to make some observations is that affecting the right of counsel for one defendant to cross-examine the witnesses of his co-defendant. In *Lord* v. *Colvin* (1855), 3 Drew. 222, that question arose before Vice-Chancellor Kindersley. It being in his opinion a novel point, he consulted with the other judges of the Court, and the conclusion to which they came is stated as follows (p. 226):

"The opinion, then, of the whole of the judges is, that a defendant may cross-examine a co-defendant's witness. When the evidence is taken, whether it be examination in chief or on cross-examination, the whole is common to all parties."

In *Allen* v. *Allen and Bell* (1894), 63 L.J., P. 120, the Court held, as I understand the decision, that if the right to cross-examine is denied by the judge he should direct the jury not to consider the evidence of that witness as against the co-respondent who had been denied the right to cross-examine her. The Court doubted the authority of *Glennie* v. *Glennie and Bowles* (1863), 32 L.J., P. & M. 18. This was also, as was *Allen* v. *Allen and Bell*, an action for divorce.

It would appear to be the practice, however, that when separate defences are not delivered the defendants ought not in general to be represented by separate counsel: Annual Practice 1925, p. 364.

The rule, I think to be deduced from the authorities is, that in respect of trials in civil actions (leaving aside divorce) separate counsel should not be heard in cases in which the parties have not pleaded separately; that when they have pleaded separately but there is no substantial difference in their interests, the judge may refuse to allow separate representation or cross-examination of co-defendant's witnesses, and that in other circumstances separate counsel may be allowed to be heard with the consequential right to cross-examine a co-defendant or his witnesses.

In this case there is but one statement of defence for both defendants. Separate counsel appeared at the trial for the defendants and no objection was raised until the trial had pro-

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ceeded some distance, when one of them claimed the right to cross-examine the co-defendant or one of his witnesses, which was denied by the learned judge. Mr. *Mayers* now contends that counsel had that right or in the alternative, that objection to separation, which amounts to the same thing, ought to have been taken at the outset and is too late when taken in the middle of the trial. That, no doubt, was the proper time to take it, but did the failure to take it then affect the power of the judge to, in effect, hold that he could not or ought not to hear separate counsel? I do not think so. The trial judge is allowed a wide discretion in the regulation of the trial; he may allow counsel to cross-examine his own witnesses in a proper case. No prejudice to the defendants can be suggested here. The objection is merely technical. If more than this was decided in *Lord* v. *Colvin, supra,* then I think experience has shewn the need of modifying the view there expressed.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion this appeal should be allowed and a new trial directed because the counsel for the defendant Company (the only appellant) was wrongfully deprived of his right to cross-examine the witnesses of its co-defendant. It was admitted by respondents' counsel that this right exists where there are separate defences but not when they are joint no matter how many defendants there are or counsel appearing for them. What happened here is that when the trial began separate counsel appeared for the defendants, whose interests were not the same, and their attendances were duly entered upon the record in the ordinary way and to this course no objection was taken till after the defence was opened, both counsel cross-examining the plaintiff J. B. Millar and either taking objections or cross-examining the other plaintiff in the usual way, and generally speaking as regards the other witnesses of the plaintiff acted as they would if representing separate defences upon the record in the ordinary way which they wished to keep distinct, and on behalf of the Company, its counsel moved at the conclusion of the plaintiff's case, for the dismissal of the action (though the other defendant did not) and upon that motion being refused called no evidence though the other

MARTIN, J.A.

defendant did so, and it was only when the Company's counsel claimed the right to cross-examine the first witness of his co-defendant that objection was taken, but at that time the Court permitted him to do so, saying to plaintiff's counsel, "If there is anything you want to examine upon again, you can do it, Mr. *Darling.*" But upon the second witness being called by defendant Roskill the respondents' counsel renewed his objection and the Court ruled against the said right claimed to cross-examine and he was prevented from doing so for the rest of the case, and the same ruling being given twice later as regards other witnesses the Court saying, "I will allow you to examine directly but not cross-examine"; and, "I can only regard Mr. *McTaggart* as associate counsel with Mr. *Housser,*" to which statement Mr. *McTaggart* took exception and said it was not in fact the case as he was before the Court to represent Rostill only, and the Court finally said, "I think in any event the way this thing stands they [the Company] are not entitled to cross-examine." No reference concerning the evidence affected by such refusal was made to the jury as regards its different application.

MARTIN, J.A.

It is to be noted that though the plaintiffs allege that the damage done to them was occasioned by the negligent driving of the defendant Company's motor-bus by its servant Rostill yet they sue both owner and driver not only for the negligent driving but also for negligence in the defective equipment of the bus by sending it out on the road with brakes which were "incapable of holding or gripping when applied either evenly on both wheels or at all," but this branch of negligence is one that would throw a burden upon the Company quite distinct from Rostill and therefore the case was far from being one of identical interests. Such being the fact I am of opinion that the proper course to have adopted was that declared by Vice-Chancellor Kindersley in *Lord* v. *Colvin* (1855), 24 L.J., Ch. 517, wherein after taking "the opinion of some of the other judges on the point in order that a uniform practice might be established," he lays it down thus, p. 519:

"Cases may arise in which, intentionally or unfairly, one of several co-defendants who are supposed *prima facie* to have a common case against the plaintiff, although as between themselves there might be matters in controversy, might call a witness and ask him some indifferent questions

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in order that his co-defendant might cross-examine that witness, and so both the defendants get an advantage against the plaintiff which they ought not to have; on the other hand, it might be that one defendant is in the same interest as the plaintiff, and he might call a witness, and affect by the evidence of that witness; another defendant who theoretically is supposed not to know, but, in reality, does know, of that evidence, and that might prejudice the co-defendant, if he were not allowed to cross-examine that witness. It appears to me that justice would be best worked out, and there would be less expense on examination, if it were open to all parties as if each had a separate interest.

And he proceeds to say:

"The question really is, whether, if a defendant calls and examines a witness in chief, his co-defendant is at liberty to call and cross-examine that witness. If the plaintiff wishes to cross-examine, or if in any case it should appear that justice requires that co-defendants should have an opportunity of raising an issue *inter se*, they may be at liberty to do so, and to examine and cross-examine each other's witnesses, and the Court will deal with the whole question at the hearing; and if the defendant should cross-examine a witness, it is not necessary that the plaintiff should use such cross-examination if he is satisfied without doing so. That appeared to me, and the other judges whom I have consulted, to be the best course in order to adapt a uniform practice to the present mode of examination."

MARTIN, J.A.

There is no restriction of this "uniform practice" to separate defences, quite the contrary; it proceeds upon the existence of separate interests, as we find them herein.

That view of the practice was approved by the Court of Appeal in *Allen* v. *Allen and Bell* (1894), 63 L.J., P. 120, their Lordships saying, p. 123:

"In the Courts of common law in the case of co-defendants, one co-defendant would have a right to cross-examine another co-defendant called as a witness, and the evidence of one would be evidence against the other. In the case of *Lord* v. *Colvin* (1855), 24 L.J., Ch. 517 it was held that a defendant might cross-examine another defendant's witnesses. The Vice-Chancellor in that case consulted the whole of the judges, and said, 'The opinion of the whole of the judges is that a defendant may cross-examine a co-defendant's witnesses.' If a defendant may cross-examine his co-defendant's witnesses, *a fortiori* he may cross-examine his co-defendant, if he gives evidence. If it is objected that there is no issue between a respondent and a co-respondent, the answer is that in most cases there is no issue between co-defendants, but still the right to cross-examine exists. In our judgment, no evidence given by one party affecting another party in the same litigation can be made admissible against that other party unless there is a right to cross-examine, and we are at a loss to see why there should be any deviation from that rule in the Divorce Court."

The Court thus repudiated the submission that there was or should be any difference in the practice in divorce proceedings

from the ordinary procedure at common law and put the matter upon the footing of a "right," which removed it from being subject to denial by discretion. No one can say what harm might have been done by such refusal, and no attempt was made to save the situation, if that were possible, by a proper instruction to the jury.

I have not overlooked the statement in the Annual Practice, 1925, p. 364 that "if they do not put in separate defences they cannot be represented by different counsel at the trial," but no authority is given to support it and *Lord* v. *Colvin* is not even cited, so such an expression is worthless; moreover, in the Yearly Practice, 1925, p. 570 where *Lord* v. *Colvin* is cited it is said:

"In an issue between a plaintiff and one of the defendants cross-examination of a witness called by the defendant and cross-examined by the plaintiff's counsel was not allowed at the hands of counsel for another defendant (*Re Wagstaff* (1907), 96 L.T. 605, 607), but, generally, a defendant may cross-examine a co-defendant's witness (*Lord* v. *Colvin* (1855), 3 Drew. 222)." MARTIN, J.A.

A perusal of *Re Wagstaff* will shew why Mr. Justice Kekewich took the view that in the special issue which had been directed as between two claimants the usual rule of cross-examination did not apply in the circumstances, he concluding (p. 607):

"The result is, I must leave that to be fought out between the two, and I cannot allow cross-examination by the lady's counsel at the present stage."

Therefore even if it were possible for a single judge to alter the practice and the right declared by the Court of Appeal he did not attempt to do so.

For these reasons I would allow the appeal as aforesaid.

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

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

MACDONALD, J.A.: Further consideration confirms the view I formed at the hearing of this appeal, that we should not regard the jury's verdict as perverse. There is reasonable evidence to support it. Nor do I think there was misdirection. It is not MACDONALD, J.A.

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enough to simply criticize the charge. Substantial misdirection, in placing the law and the facts before the jury, must be shewn.

On the point that the defendant Company were wrongly deprived of the alleged right to cross-examine witnesses called on behalf of its co-defendant, the driver of the car in question, I am in agreement with the views expressed by the Chief Justice.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting in part.

Solicitors for appellant: *Walsh, McKim & Housser.*
Solicitor for respondents: *W. H. S. Dixon.*

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FLANDERS v. BRITISH COLUMBIA TELEPHONE CO.

FLANDERS v. BRITISH COLUMBIA TELEPHONE COMPANY.

Contract—Telephone subscriber—Business done largely through telephone—Name through error left out of telephone directory—Damage to business—Right of action.

The plaintiff, a telephone subscriber who was in the "moving and express business" bought out the goodwill of a business of the same kind known as "Homer Moving," also a telephone subscriber. Intending to carry on both businesses on his own premises, the plaintiff instructed a clerk in the telephone office to have all calls for "Homer Moving" telephone number transferred to his own number and that upon a new directory coming out both "John Flanders Moving and Express" and "Homer Transfer" be cited opposite his own number. The clerk then handed him a printed form which he signed without reading, it being in fact an agreement for the installation of another telephone in his own office. When the new directory was issued in October, 1923, "John Flanders Moving and Express" was left out and the error was not remedied until the issue of a new directory in the following May. The plaintiff's business being done largely through telephone orders he brought an action for damages which was dismissed.

Held, on appeal, reversing the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that in arranging for the change of number of "Homer Moving" nothing was said about removing "John Flanders Moving

and Express" from the directory nor did the written agreement (contained in a printed form in no way apt to the business in hand) authorize its discontinuance, and as it resulted in the partial destruction of his business for the period mentioned, he is entitled to recover the amount claimed.

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APPEAL by plaintiff from the decision of MORRISON, J. of the 20th of May, 1925, in an action for damages for breach of contract. On the 9th of September, 1910, the plaintiff and defendant Company entered into a written contract for the supply by the Company to the plaintiff of a telephone, and listing him in the telephone book as "John Flanders Moving and Express, 1356 Pender Street East." On the 18th of July, 1923, the plaintiff purchased the business known as Homer Moving and on the completion of the transfer requested the defendant Company to retain as the name "Homer Transfer" in its directory but to change its address to "1356 Pender Street East" and assign to it the telephone number of "John Flanders." The defendant Company instead of following Flanders's instructions wrongfully took the name of "John Flanders Moving and Express" out of the telephone book and insterted in its stead "Homer Transfer," whereas they should have left both names in the book as he paid for the telephone under both contracts. The plaintiff claims that his business is done largely through telephone orders and owing to the defendant Company's mistake he had no listing in his own name in the telephone book from October, 1923 until May, 1924. His action was dismissed.

Statement

The appeal was argued at Vancouver on the 28th, 29th and 30th of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Bray, for appellant: We had two contracts and the learned judge did not apply his mind to the contracts at all. The moment the plaintiff's name was taken from the telephone book his business fell off and the amount claimed is the loss he suffered through the defendant's mistake.

Argument

Harold B. Robertson, K.C., for respondent: We must take what he says in construing what the contract was: see *Howatson* v. *Webb* (1907), 1 Ch. 537 and on appeal (1908), 1 Ch. 1; *Cooil* v. *Clarkson* (1925), 35 B.C. 308; *Foster* v. *Mackinnon*

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(1869), L.R. 4 C.P. 704. Even if we were liable the damages are too remote: see *Hadley* v. *Baxendale* (1854), 9 Ex. 341; *Horne* v. *Midland Railway Co.* (1872), L.R. 7 C.P. 583 at p. 591; *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499 at pp. 508-9; *British and Beningtons, Ld.* v. *N.W. Cachar Tea Co. and Others* (1923), A.C. 48.

Bray, replied.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.: The plaintiff has for many years carried on a business known as "John Flanders Moving and Express," at 1356 Pender Street East, Vancouver, and was, during the same period, one of defendant's telephone subscribers, the number of his telephone being Highland 517. In June, 1923, he bought the goodwill of a business of the same kind known as "Homer Moving," which carried on business at 714 Homer Street in the same city, the owner of which was also one of defendant's telephone subscribers, his telephone number being Seymour 353. The Homer Moving had as well an advertisement in the telephone book giving its telephone number. The plaintiff intended to continue his business on Pender Street and to fulfil all calls for Homer Moving from his own premises, but as a new telephone directory would not be issued for about three months after this purchase, it was necessary for him to pay for both telephones, although not occupying the Homer Street property at all, and then when the new book came out both names would appear under telephone number Highland 517, the plaintiff's own number, whereupon he would discontinue the other telephone altogether.

MACDONALD, C.J.A.

With this in mind he called at the defendant's office. He was an illiterate man, which of course would be apparent to the Company's servant who heard his application. What he requested on the first occasion is perfectly plain. He wanted all calls for Seymour 353 (Homer Moving) to be transferred to Highland 517, his own number, and that was agreed to. Now, it appears to me that the person having charge of such matters in the defendant's office, if he had ordinary intelligence, would gather from what was said to him by the plaintiff, as shewn in

evidence, and by the very circumstances of the case, its true import. Nothing was said about removing the name "John Flanders Moving and Express" from the telephone list at any time, but nevertheless, when the new telephone directory came out Flanders's name was omitted, the result being that Flanders's business was almost destroyed, there being no way of remedying the mistake until another telephone directory should have been issued.

Flanders claims damages for leaving his name off the telephone list of users, and I think he is entitled to them.

The Company justifies what it did by producing the agreement signed by Flanders. It is an agreement for the installation of another telephone in Flanders's own premises. It is contained in a printed form in no way apt to the business in hand. It was not read to him and he did not read it; it was placed before him and he was asked to "sign that." It is intolerable that servants of the Telephone Company should not take the trouble to ascertain what subscribers, not posted in the technicalities of the telephone service, are desirous of having done. I have no doubt that the employee who took these instructions acted in good faith, but he did not take the pains apparently to understand what was wanted and therefore made a serious blunder. Even this document does not authorize the discontinuance of plaintiff's name in the telephone directory, which is after all the cause of the damage. The appeal should be allowed and judgment should be entered for the amount claimed, with costs here and below.

MACDONALD, C.J.A.

MARTIN, J.A.: This appeal turns on a question of fact as to what took place when the plaintiff interviewed the defendant Company and as the learned judge below founds his finding primarily upon what he styles the defendant's "tried system of dealing with their subscribers" and not upon the evidence as to the practical application of that system to the plaintiff's existing contract and further wishes as communicated to the defendant's servants. I am not hampered by any finding of fact upon conflicting evidence. Such being the case I can only reach the view that the plaintiff has established his cause of action and the

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appeal, therefore, should be allowed and the case remitted to the learned judge below to assess the damages.

GALLIHER, J.A.: The circumstances in this case are peculiar in themselves, and I do not think we derive very much assistance from the authorities cited. Nor do I think it will serve any useful purpose to canvass the evidence.

I have read it carefully, and with great respect, I have come to a conclusion contrary to that of the learned judge below. The error was, I think, clearly that of the Company. It is unreasonable to suppose that the plaintiff, whose name had for some time appeared in the telephone book, and who after buying out the new transfer business, carried it on at his old premises, should have desired his own name left out, thus leaving all his old customers without means of locating him. I am quite certain the error was inadvertent, but as I would hold on the evidence that the defendant is responsible for it, it follows that the appeal should be allowed.

Unless the parties can agree upon a reasonable basis of damages, the case will have to go back for a new trial as to assessment of damages.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: With great respect, I cannot agree with the view expressed by my brothers who constitute the majority of the Court in this appeal. In my opinion no case has been made out which entitles the Court to disagree with the judgment of the learned trial judge. The onus admittedly rested upon the plaintiff (appellant) to establish the contract under which he claimed damages, *i.e.*, that there was a breach of contract and that he had suffered damage by reason thereof. The contract established according to the finding of the learned trial judge was a contract in writing in the terms following: [the learned judge set out the contract and continued]:

At the head of the contract as hereinbefore set forth, we find "Chge Listing." This was shewn to mean that the original listing of the plaintiff in the telephone directory under his previous contract was to be changed to "Homer Transfer," that is, from "John Flanders" to "Homer Transfer." When the telephone directory issued in October, 1923, the change, pursuant to the

contract was made, the original contract was at an end, if not the plaintiff would have been called upon to pay rentals for two telephones which he did not do. The plain reading of the contract entered into was that what should appear was "Homer Transfer" in substitution for the name of the plaintiff. The plaintiff failed to make known to the defendant (respondent) that which he now claims to have been his intention.

It would appear that on the 28th of June, 1923, the plaintiff purchased the business known as "Homer Moving" and the plaintiff arranged with the defendant to have calls going to "Homer Moving" (being "Seymour 353") transferred to "Highland 517," the number of the plaintiff in the then existent telephone directory, and it was not until July 18th, 1923, that the new contract above set forth was entered into, the plaintiff having all that time to determine upon what should be the trade name he would continue business under and if any mistake was made it was entirely the mistake of the plaintiff. The learned trial judge had the opportunity we have not of seeing the witnesses, a valuable advantage, and seeing and hearing them he came to the conclusion that the contract established was that as hereinbefore set forth and that being the case how is it possible to admit of the plaintiff being allowed damages for the breach of a non-existent contract? The evidence shews that the plaintiff, in effect, was to have two telephones until the October telephone directory would come out, *i.e.*, "Seymour 353" (as calls were transferred from that number to "Highland 517"), and "Highland 517." The plaintiff upon his direct examination made answer as follows:

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"Just the two 'phones I had to keep until the new 'phone book came out.
"And after the new book came? Just the one, Highland 517."

The above was in answer to the plaintiff's own counsel at the trial. It is now, however, attempted to be contended that nevertheless two contracts were in existence in respect of one telephone, and one telephone service. The accounts put in evidence shew that but one telephone service was charged for, but now this very extraordinary claim is made. It would seem to me to be nothing more than an afterthought when the plaintiff was disappointed with the volume of his business. It is a claim without real merit and is based upon no foundation whatever.

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The telephone directory issued in October, 1923, and it is well known that the telephone directory is an essentiality in all business in these days, and the plaintiff would at once have notice of how he was listed in it. It was something he would turn to every day, perhaps every hour of the day, if not oftener, yet it is not until the 9th of February, 1924, that this action is commenced.

Reverting again to the evidence, the plaintiff under cross-examination, made answer as follows:

"Well, it may be very important for you to say what took place? Because when I went up to the advertisement man and explained it to the advertising department what I wanted he came down and told Mr. Russell that I wanted my Highland 517 on to Homer ads.

"That is what he said? That is what I wanted, and that is what he said and that is all right, he done that, but Flanders was not to be touched at all.

"What was said about Flanders? There was nothing said about Flanders at all.

"Is that correct what you swore to then? With Mr. Price you mean?

"At the time with Mr. Russell? That is all I guess was said with Mr. Russell.

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"That is all right, then, that is correct. Listen to this, Question 155: 'Who is "he," Mr. Price?' Yes.

"What? That I want my number put on the Homer ad. and he didn't say anything about Flanders Transfer at all and didn't say anything about Highland 517.

"Well, did you say anything then? No, Price said it then.

"To Mr. Russell? Yes.

"That was all that was said? That was all that was said just then.

"And that is the time you are complaining about? Yes.

"The mistake was made then, you say? Yes.

"And your name should have been left on as well as Homer's? Yes.

"To the one telephone? Yes, to the one telephone."

It is quite evident the plaintiff is a very indifferent man of business, but is not by any means illiterate. It would appear that he kept no books of account for a considerable time, but later did do so. This is plain, that he made a contract and signed it and admits that nothing was said about continuing the name "Flanders," and the attempt now is to say that although there was to be only one telephone after the October, 1923, telephone directory issued and one telephone paid for that he can hark back to a contract with the Company made in 1912 which contract was put at an end and superseded by the contract

of 18th July, 1923, and all things proceeded upon this contract and but the one telephone was in existence and for one telephone only did the plaintiff pay. Further, all the payments made by the plaintiff were made in respect of the listing in the October, 1923, telephone directory, reading "Homer Transfer," 1356 E. Pender, "Highland 517." This telephone directory the plaintiff would have in his hands every day, and it is idle now to contend by an action commenced only in February, 1924, that he was not aware of the change of listing and the form which it took. It would only be possible for the plaintiff to succeed if he claimed rectification of the contract and established a case for rectification, which he has not done. How is it possible, as I have previously stated, for him to be allowed damages in respect of a non-existent contract? The plaintiff admits that there was to be but one telephone and that one telephone he had and used and the listing was in strict compliance with the contract made. Finally there remains the other insuperable defence as to the *quantum* of damages, even if the plaintiff could be said to have a cause of action, which of course is not my opinion, that is section 17 of the terms and conditions of the contract reading as follows:

MCPHILLIPS, J.A.

"The Company will issue at its own expense from time to time, as it deems necessary, directories for the use of its subscribers, and while every precaution will be taken to make the directories absolutely correct it is agreed that the Company shall not be liable for any errors or omissions that may occur in such directories, and it is also understood and agreed that the Company's liability (if any) for damages arising from any error or omission in any advertisement whether occasioned by the fault of the Company or not, shall not exceed the sum paid for such advertisement."

It is not to be forgotten that the plaintiff is wholly disentitled to contend that he was unaware of the form of the listing as in the contract there is this notice to him:

"N.B.—To be listed in directory—Homer Transfer. Classification, Express & Transfer."

And the further provision in the contract which reads:

"The subscriber acknowledges that he, she, it has received a duplicate thereof."

And as further stated the plaintiff must be held to have knowledge of the listing as "Homer Transfer" only when he had in his hands from October, 1923, to the time of the commencement of the action, the 9th of February, 1924, the October telephone

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directory which he must have read and handled day after day during the four or five months preceding the commencement of action.

As to the circumstances surrounding the entry into the contract, portions of the discovery evidence of Russell, an officer of the defendant Company and a witness for the defendant, was put in in support of the plaintiff's case and in this connection I would refer to what my brother the Chief Justice of this Court said in *Cooil* v. *Clarkson* (1925), 35 B.C. 308 at p. 310:

"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."

In the present case the plaintiff does not undertake to contradict Russell in any respect relative to what was said and what took place upon the signing of the contract, and it may well be said, in the language of my brother the Chief Justice, that "the facts upon which this appeal must be decided are not in dispute." It is evident that the plaintiff's case, at best, could only be formulated as one of mistake, and here at the very best there was no mutual error, and it must be held on the facts here that there was apparent acquiescence and laches, and even if rectification had been claimed it would not be a case for relief (*Earl Beauchamp* v. *Winn* (1873), L.R. 6 H.L. 223; *Beale* v. *Kyte* (1907), 1 Ch. 564; *Bonhote* v. *Henderson* (1895), 2 Ch. 202).

MCPHILLIPS, J.A.

In that evidence we have the following (Russell's examination on discovery put in by counsel for the plaintiff):

"Do you remember Mr. Flanders coming to see you prior to signing that contract? Yes, he was in before that transferring calls.

"But actually, at the time this contract was signed, were you the officer of the company, or the servant of the company who conducted the business with him? Yes.

"What did Mr. Flanders want, as a matter of fact? He asked us to change the listing from John Flanders to Homer Transfer, which we did, which is all there was to it.

"When you say, 'changed the listing' does that mean you would delete or cut out, John Flanders, and put Homer Transfer in instead? Yes. There is only one listing allowed for a telephone number. We changed the listing from the old name, and put it in the new.

"When you say it is allowed, you mean it is the practice in your company only? Yes, the practice in the company.

"Was that told to Mr. Flanders? No, I wouldn't say it was.

"At any rate, did you write out that document, do the writing there? Yes.

"Do you remember, after you had got it written out, of course, you would hand it to Mr. Flanders? Yes.

"Did he read it? I couldn't say, I don't think so.

"Did he sign it in your presence? Yes.

"I see down here 'to be listed as Homer Transfer'? Yes.

"Was that in when he signed it? Yes, we always put these in before we——

"At any rate, in the book which came out subsequently to this contract, John Flanders did not appear in it? No.

"Apart from the document, was there any conversation upon which you deleted John Flanders's name in your directory and listed Homer Transfer? None, except the orders that he gave us. No conversation about taking it out at all.

"But did he tell you to take out his name? Possibly, I don't say he did. He said to change the listing from John Flanders to Homer Transfer.

"But did he not have some discussion with you to tell you exactly what he did want, or did he merely say 'I want my listing changed'? The whole thing was discussed, no doubt, but what the general terms were, I couldn't tell you.

"Your understanding of the conversation was, that was the effect of it, that was what was desired. I quite appreciate that? Yes."

MCPHILLIPS, J.A.

Upon the whole case I cannot persuade myself that the plaintiff has made out a cause of action. I would affirm the judgment of the learned trial judge and dismiss the appeal.

MACDONALD, J.A.: I agree with the Chief Justice in allowing the appeal.

MACDONALD, J.A.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *H. Richmond.*

Solicitor for respondent: *L. G. McPhillips.*

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1925

Oct. 15.

MILLER v. KNIGHT.

MILLER v. KNIGHT

Conversion—Abandoned buildings on a mineral claim—Improperly removed—Damages—Measure of—Costs.

At a sheriff's sale the defendant purchased a stamp mill and machinery on a mineral claim. Shortly after, one G. obtained an option to purchase an adjoining claim from the plaintiff and he purchased from the defendant all the material obtained at the sheriff's sale and moved it to his property where he re-erected the stamp mill building and built other buildings. G. worked under his option for about two years (the end of 1904) when he abandoned the property and left without paying the defendant for the material taken from the adjoining claim. In 1919 the defendant proceeded to pull down the stamp mill and other buildings on the plaintiff's property and took the material away. In an action for conversion, it was held that the defendant must be treated as a trespasser and the plaintiff should receive the value of the buildings fixed at $4,500.

Held, on appeal, varying the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that the assessment of damages should not be on the basis of the defendant being a trespasser but should be the true value of the property taken and the damages were reduced to $600.

Held, further, MCPHILLIPS, J.A. dissenting, that the respondent should have the costs of the action and the appellant the costs of the appeal.

APPEAL by defendant from the decision of MCDONALD, J. of the 8th of June, 1925, in an action for damages for conversion. The facts are that the plaintiff and two associates named Highman and Muller acquired a mineral claim in the Osoyoos Division of Yale District called the "British Empire" mineral claim in 1898, and three years later they obtained a Crown grant, Muller owning ten twenty-fourths of the claim, and Highman and Muller seven twenty-fourths each. Before the commencement of this action Highman and Muller transferred their interests to Miller, who became the sole owner. In 1902, one Gender, acting for a syndicate from Indianapolis, U.S.A., took a bond on the "British Empire." An adjoining claim known as the "Morning Glory" had been worked previously and buildings had been constructed thereon in which machinery was installed. The "Morning Glory" had financial difficulties and a five stamp mill with machinery, tools and cooking

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utensils were sold by the sheriff to the defendant Knight for $2,000. By arrangement with Knight, Gender transferred the stamp mill and machinery to the "British Empire" claim and he worked the property for two years, putting in 600 feet of tunnel and 185 feet of shaft. In 1904 Gender abandoned the "British Empire" and did not take up the bond on the property nor did he pay Knight for the stamp mill and machinery he had taken over from the "Morning Glory." No further mining operations were carried on on the British Empire, and as Knight had not been paid for the stamp mill and machinery he proceeded to take them off the claim. The owner of the claim, Miller, then brought this action for conversion claiming that as the stamp mill and machinery were installed on his property they belonged to him. The plaintiff recovered in the action.

Statement

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

J. Edward Bird, for appellant: The defendant took what he had reason to believe belonged to him and any damage should be assessed on that basis: see *Wood* v. *Morewood* (1841), 3 Q.B. 440; *Lamb* v. *Kincaid* (1907), 38 S.C.R. 516 at p. 529; *Taylor* v. *Palmer* (1910), 16 B.C. 24 at p. 28; *Stevens* v. *Abbotsford Lumber, &c. Co.* (1924), 33 B.C. 299.

Harold B. Robertson, K.C., for respondent: Gender purchased from the defendant the stamp mill and machinery on the "Morning Glory" and the stamp mill was the only building taken over to the "British Empire." There were five other good buildings on the "British Empire" and in addition to the stamp mill the defendant tore down these other buildings and took them away. In these circumstances he must be treated as a trespasser: see *Stevens* v. *Abbotsford Lumber, &c. Co.* (1924), 33 B.C. 299. He is entitled to exemplary damages. The authorities will be found in Pollock on Torts, 12th Ed., 190; *Last Chance Mining Co.* v. *American Boy Mining Co.* (1904), 2 M.M.C. 150.

Argument

MACDONALD, C.J.A.: The appeal should be allowed in part so

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as to reduce the amount for which judgment was pronounced to the sum of $600.

I wish to add to what I said, since in this case we have disagreed with the learned judge's principle of assessing damages, and I wish to make clear the reason. I only refer to the case of *Stevens* v. *Abbotsford Lumber, &c. Co.* (1924), 33 B.C. 299 in that respect, which shews that the learned judge clearly went upon a wrong principle. Therefore, if the plaintiff had failed to prove any damages at all, in the strict sense, we could have dismissed the action; but, as there was some evidence from which it could be inferred that the stuff was worth $600 we have allowed the $600. There is only one issue, the question of trespass and the consequent damage from that. That is the only issue. In *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1919), 26 B.C. 560 there were several distinct issues. The respondent gets the costs of the trial, and the appellant gets the costs of the appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree. I would just add to what has been said as to the *Stevens* case, that we are dealing with abandoned property.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. Apparently the parties have come to an understanding as to the amount of damages, certainly the case, though, should not be held to constitute a precedent. The evidence in my opinion is sufficiently ample to warrant judgment going for an act of trespass—advisedly an act of trespass—the taking down and destruction of the building upon the property. A more definite act of trespass could not well be imagined. What right was there to go upon this property and take down the building? To in any manner approve of what was done would be the subversal of the organic law of the land. A person going upon another person's property and interfering with it is doing that which, according to the law of England in the earliest times, is an invasion of right that is visited with no lenient hand by the Court; other-

wise we would have the whole country ravaged. In a mining district, large areas may be built upon and then perhaps for a time vacated owing to lack of railway or highway transportation, the people leave the territory though with the full intention of returning when conditions change. Notably is this the case in the Peace River country, where people have come out in great numbers. Does it mean that the farmer who has left his house and buildings, when he returns when railway transportation is available, is to find the buildings dismantled and then is to be coolly told, oh well, they were there for a long number of years, and lumber wasn't worth very much, it is true we took it away, we will pay the value upon the basis of old lumber, and the farmer returns to a place of desolation to be ill recompensed in this way? It can be only necessary to point to a case of this kind to see the enormity of things, and such conduct must meet with stern disapproval. No one can with impunity do a thing of that kind, and the penalty is punitive damages. In the case of *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 Lord Moulton had occasion to consider the question of damages as allowed by a judge or jury, and he said that it was difficult to apply any rule in the matter, that both the judge and the jury were at liberty to advise themselves to a very large extent and unquestionably the learned judge in this case could advise himself when he found that there was trespass with knowledge in the party that he was not the owner of the property. It is difficult to put a limitation upon an act of that kind as to the extent of damages that would be allowed, and I am quite within the *ratio decidendi* of Lord Moulton, in saying upon the facts of this case that the judgment was warranted. It would be indeed perilous that it should be noised abroad that an act of this kind could be perpetrated and this infinitesimal amount be allowed, namely $600 as proposed, for buildings upon the property illegally taken down, buildings which could be put to a beneficial use. I might use the illustration of my own residence. I have had it for over a quarter of a century, and could it be said that because it is a quarter of a century old it has no appreciable value and that somebody could come and take my residence away and then coolly tell me, oh, the

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lumber is worth so much, and that is what you should be satisfied with?

With respect to the *Stevens* case, that was a case where a fire had occurred and it was clearly a case where there was no intention to interfere with property, it was an accidental matter. It certainly would be a terrible thing that the act done here with full knowledge should be dealt with on the principle enunciated there. I might say I dissent from the disposition of the costs—the costs throughout should go to the respondent.

MACDONALD, J.A.

MACDONALD, J.A.: I agree in allowing the appeal in part as stated by the Chief Justice.

Appeal allowed in part, McPhillips, J.A. dissenting.

Solicitor for appellant: *R. M. Chalmers.*
Solicitor for respondent: *A. O. Cochrane.*

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ATTORNEY-GENERAL OF CANADA v. REED

ATTORNEY-GENERAL OF CANADA v. REED *ET AL.*

Revenue—War tax—Jobbers—Sale of bottles—Purchased by brewery—The Special War Revenue Act, 1915; Can. Stats. 1915, Cap. 8, Sec. 19BBB, as enacted by Cap. 71, Can. Stats. 1920; 1921, Cap. 50, Sec. 1; 1922, Cap. 47, Sec. 13.

The defendants entered into a contract with the Vancouver Breweries Limited to collect all beer bottles bearing the name or trade-mark of the Breweries and all similar plain beer bottles which were to be delivered and sorted by the defendants for which they were to receive 30 cents per dozen. They collected and sold bottles under the agreement between the 1st of October, 1921, and the 30th of November, 1922. The Attorney-General for Canada brought action to recover $240.71, claiming that, under section 19BBB of The Special War Revenue Act, 1915, the defendants being "wholesalers or jobbers" should have collected this sum from the purchasers who are "retailers or consumers" under said section. The Attorney-General obtained judgment on the trial.

Held, on appeal, reversing the decision of CAYLEY, Co. J. (GALLIHER, J.A.

dissenting), that having regard to the strict rule requiring clear and unequivocal language in the case of legislation imposing taxation, and the language of the Act being that "the tax shall be payable by the purchaser to the wholesaler and by the wholesaler to His Majesty" it cannot be said with any certainty that this language imposes upon the wholesaler the liability for the tax itself when he has not received it, and the appeal should be allowed.

APPEAL by defendants from the decision of CAYLEY, Co. J. of the 6th of April, 1925, in an action to recover $240.71 which the plaintiff claims the defendants should have collected from retailers or consumers under section 19BBB(1) of The Special War Revenue Act, 1915, as enacted by Cap. 71 of 1920 and re-enacted in 1922 by Cap. 47, Sec. 13. The defendants had entered into an agreement with the Vancouver Breweries Limited to collect beer bottles bearing the trade mark of the Breweries, and similar plain beer bottles, all to be assorted and delivered by the defendants, the Breweries agreeing to pay 30 cents per dozen. The agreement was entered into on the 1st of April, 1921, for one year, but the parties continued to act under it after the expiration of the year. The defendants neglected to collect the tax payable from the purchaser as provided by said section 19BBB(1) of The Special War Revenue Act. The Attorney-General of Canada sues for the amount the defendants should have collected from the purchasers. The plaintiff recovered on the trial. The defendants appealed mainly on the ground that although they may have been liable to penalty, there was no right of action to recover the amount they should have collected.

Statement

The appeal was argued at Vancouver on the 21st of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Brougham, for appellants: The action should be brought by the King and not by the Attorney-General of Canada: see *Rex* v. *Walker & King, Ltd.* (1921), 3 W.W.R. 191. The Crown seeking to recover a tax must bring the subject within the letter of the law: see Craies's Statute Law, 3rd Ed., pp. 105-6. Here they are suing for the tax and not the penalty.

Argument

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F. R. Anderson, for respondent: The case of *Rex* v. *Walker & King, Ltd.* (1921), 3 W.W.R. 191 was decided under a different situation of the law. Under the 1915 Act the Attorney-General is the proper party.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: The question depends on the construction to be put upon the statute itself. The wholesaler has not to pay over moneys which he has not received from the purchaser. The language of the Act itself would indicate that. "The tax shall be payable by the purchaser to the wholesaler and by the wholesaler to His Majesty." Now, how can one say with any certainty that that would impose upon the wholesaler the liability for the tax itself when he has not received it? On that point, I feel perfectly clear, having regard to the strict rule which requires that in tax legislation clear and unequivocal language must be used before the person taxed can be rendered liable. There must be no doubt that Parliament intended to impose it. In this case there is grave doubt. I can see that in any ordinary case it might be possible to say that one construction or the other construction could be put upon that language, but, having regard to the nature of the legislation, and the rule of construction applicable to it, there is no doubt in my mind as to how we should decide. We should set this judgment aside.

The appeal is allowed. Costs follow the event.

MARTIN, J.A.

MARTIN, J.A.: I agree with that view. The duty imposed upon the wholesaler, while it is a single duty, yet it is bipartite in its obligations. It follows upon that the opinions of the Chief Justice should prevail.

GALLIHER, J.A.

GALLIHER, J.A.: With respect I differ. I was for a time of the view that has just been expressed, but the language of this section, at all events as it appeals to my mind, is that the Government imposes the tax which arises once the wholesaler enters into a sale of his goods to some purchaser and that the wholesaler has to pay to the Government the tax upon that transaction and is given the right to collect that tax from the purchaser. Being of that view I dissent.

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McPHILLIPS, J.A.: I agree in allowing the appeal.

MACDONALD, J.A.: I feel that the intention of the framers of the Act was as outlined by my brother GALLIHER, but there is enough doubt about the true construction to bring it within the rule requiring explicit language in the case of legislation imposing taxation.

Appeal allowed, Galliher, J.A. dissenting.

Solicitor for appellants: *W. F. Brougham.*
Solicitors for respondent: *Russell, Hancox & Anderson.*

McCANNELL v. MABEE MACLAREN MOTORS LIMITED.

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McCANNELL v. MABEE MACLAREN MOTORS LTD.

Contract—Sale of motors—Agreement to confirm sale—Specified area—Right of sale to resident outside of area—Subject to division of commission with dealer whose area includes purchaser's residence—Privity.

The defendant entered into a sales contract with the Studebaker Company for the sale of automobiles within a specified area, the contract containing a clause that: "if a dealer sells a Studebaker automobile outside of his territory, or if a Studebaker automobile sold by dealer, shall be taken from dealer's territory by purchaser within 90 days from the date of delivery, and remains in the other dealer's territory for a period of four months or more, dealer in either event shall pay one-half of dealer's discount profit to the Studebaker dealer into whose territory the automobile is taken." Shortly after the plaintiff entered into a similar contract with the Studebaker Company covering an adjoining area to that of the defendant, and while so employed the defendant sold a car to a firm having its place of business within the plaintiff's area and into which area the car was immediately taken. The plaintiff obtained judgment in an action to recover half the commission.

Held, on appeal, affirming the decision of SWANSON, Co. J., that the Company may be regarded as the agent of the several dealers to bring about privity of contract between them, and the plaintiff was entitled to bring action against the defendant for recovery of half of the commission paid to him on the sale of the car.

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Statement

APPEAL by defendant from the decision of SWANSON, Co. J. of the 13th of May, 1925, in an action to recover $366.50 being a half of the commission on the sale of an automobile. Both the plaintiff and the defendant had sales contracts with the Studebaker Company for the sale of its automobile and under the contracts each had a certain area within which they were confined for soliciting sales. The defendant's contract was dated the 1st of March, 1923, and the plaintiff's the 2nd of May, following. Both contracts contained a clause that if anyone who lived outside came into his area and unsolicited, purchased a car, the agent was to pay one-half of the commission to the agent within whose area the purchaser lived. A member of a firm named Armstrong Brothers, carrying on business and residing in Kamloops (outside of the defendant's area) came to Kelowna and unsolicited purchased a car from the defendant. Kamloops being within the plaintiff's area he brought action for half the commission on the sale of the car and judgment was given in his favour.

The appeal was argued at Vancouver on the 15th of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Harold B. Robertson, K.C., for appellant: We submit (1) there was no contractual relationship between the plaintiff and defendant; (2) there was no consideration moving between plaintiff and defendant; (3) the defendant's contract was prior in date to that of the plaintiff and only applied to contracts made prior to the date of his contract and therefore the plaintiff's contract is excluded from it: see Pollock on Contracts, 9th Ed., 226; *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; *Van Hemelryck* v. *New Westminster Construction and Engineering Co.* (1920), 29 B.C. 39; *Dunlop Pneumatic Tyre Company, Limited* v. *Selfridge and Company, Limited* (1915), A.C. 847 at p. 853. It is only in the case of a trust that one can sue without privity: see *Taddy & Co.* v. *Sterious & Co.* (1904), 1 Ch. 354 at p. 359.

Fulton, K.C., for respondent: Section 20 of the contract applies to all agents irrespective of whether they were agents or became agents after the defendant's contract and expressly says

so. The mutual promise is substantial consideration. The money was received by the defendant which in justice belongs to the plaintiff.

Robertson, in reply, referred to *Carlill* v. *Carbolic Smoke Ball Company* (1893), 1 Q.B. 256; *Calland* v. *Loyd* (1840), 6 M. & W. 26.

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5th January, 1926.

MACDONALD, C.J.A.: Several grounds of appeal were taken in the notice of appeal, but the only one seriously pressed in argument was that there was not privity of contract between the parties to the action.

The question is an important one. A large volume of business has sprung up of the character of the transactions in question here. The Studebaker Company carries on an extensive business as manufacturers of automobiles which they dispose of in an extensive territory. They make their distribution through dealers or retailers, who are granted the right to purchase the automobiles on terms set out in a written contract, apparently of a standard form and to sell them within a specified territory. These agreements contain a clause reading as follows:

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"20. Infringement of Territory. Dealer agrees to solicit no trade nor sell Studebaker automobiles to persons residing outside dealer's territory, except that should such persons come unsolicited to dealer's place of business to buy automobiles off the floor for immediate delivery. Dealer may sell such persons, but in every such case dealer must pay the Studebaker dealer in whose territory the customer resides one-half of dealer's discount profit on such sale. It is mutually agreed that if a dealer sells a Studebaker automobile outside of his territory, or if a Studebaker automobile sold by dealer, shall be taken from dealer's territory by purchaser within 90 days from the date of delivery, and remains in the other dealer's territory for a period of four months or more, dealer in either event shall pay one-half of dealer's discount profit to the Studebaker dealer into whose territory the automobile is taken. It is understood and agreed that this paragraph shall be construed as an agreement between dealer and all other Studebaker dealers who have signed a similar agreement and that nothing herein contained shall be construed as a liability on the part of Company to dealer for territorial infringement by any other dealer."

Regarding then this clause as the whole agreement to which the Company is one party and the dealer the other, what is the true interpretation of it as affecting other dealers who have entered into precisely similar contracts with the Company?

It will be seen that in the earlier part of the main contract it

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is expressly declared that the dealer is not the agent of the Company, and that by clause 20 itself, the Company is absolved from liability in respect of the consequences of breach of that clause.

In my opinion, the Company must be regarded as the agent of the several dealers to bring about privity of contract between them. Dealer A agrees with dealer B through and in the agent's name, to carry out the reciprocal terms of the clause, which is manifestly for their mutual benefit. Unlike the case of *Dunlop Pneumatic Tyre Company, Limited* v. *Selfridge and Company, Limited* (1915), A.C. 847, the consideration is not one moving from the Company to the dealer, but from one dealer to the other.

There is nothing novel in regarding the Company as the agent for both parties. The bargain between the plaintiff and defendant is in the words of Lord Dunedin, in the above case:

"A bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce."

MACDONALD, C.J.A.

It is a bargain which can best be brought into existence through the instrumentality of the Company, and there is, I think, nothing inconsistent with the character of sellers in their acting in a collateral matter, as agents for the respective dealers in bringing their minds together. Each of the parties to this action have agreed to precisely the same thing; they have each agreed that the clause shall be construed as an agreement between them and not as an agreement as between each and the Company as principals. It is not necessary that, to constitute an agency, the agent shall be designated as such. The function which he fills in bringing the parties together and their recognition of the relationship which his efforts have created is the test of agency. In this case each of the dealers have signed counterparts of clause 20, and while the other contracting party is not named he is specifically designated in the document, and treating as I do the Company as the agent for both, each has contracted in each document as a principal in the name of the agent.

I have not failed to notice the words in the clause making it applicable between those dealers "who have signed a similar agreement," nor the argument that the past tense does not

include dealers who have signed subsequently to the defendants, but I think the context and object of the clause requires that it be interpreted liberally and in accordance with what all parties must have understood the clause to mean.

I would therefore dismiss the appeal.

MARTIN, J.A.: This appeal should, I think, be dismissed, the learned judge below having reached the right conclusion upon the special contract before him.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal raises a question of some nicety. The question of liability is to be determined in connection with a sale of a Studebaker 1924 model Big Six Speedster Sedan and two contracts, Canadian dealers agreements. The plaintiff being a party to the contract of date the 2nd of May, 1923, with the Studebaker Corporation of Canada Limited, and the defendants being a party to a contract with the same Corporation of date the 1st of March, 1923. In the contract of the 1st of March, 1923, executed by the defendants, paragraph 20 thereof reads as follows [already set out in the judgment of MACDONALD, C.J.A.]:

I am in complete agreement with His Honour Judge SWANSON in the interpretation put upon the contracts, and that paragraph 20 above quoted can well be said to have brought about a contractual relationship between the plaintiff (respondent) and the defendant (appellant), *i.e.*, privity in law was constituted. There can be no question of what the intention was, and I do not view it upon the facts that the defendant was at all unaware of the terms of its agency and the consequent necessity to account in the circumstances established in this case. The defendants wholly rely upon the submission made that in law there is no sufficient contractual relationship made out or privity created calling upon it to account to the plaintiff. As I have already said, the intention is beyond question and the reasonableness of the provision is manifest; further, it may be said that it has almost become notorious now owing to the vast volume of automobile

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sales that this reciprocal condition obtains and might be said to be an implied contract. Here, however, the plaintiff is in no such insecure position for the enforcement of liability upon the defendants as the letter of the contract is ample in form, and the intention is clear.

The judgment under appeal should be affirmed and the appeal dismissed.

MACDONALD, J.A.: In my opinion the principles laid down in *The Satanita* (1895), P. 248 are applicable in this case. From the usual course followed in the sale of cars and from the terms of his own agreement clearly suggesting the course followed, it ought to be presumed that the appellant knew that the respondent or, at all events, other parties in adjacent territory, would have agreements with the Studebaker Corporation of Canada Limited similar to his own. The agreement carries this implication. The appellant and respondent each entered into an agreement with the Studebaker Corporation containing in effect rules and conditions governing their common relations to that company as salesmen in adjoining districts. In the *Satanita* case the owners of two yachts entered a race under an agreement with the Yacht Racing Association containing rules and regulations governing the contest. One of the Association's regulations provided that if certain rules were not observed and as a result damage to another competitor resulted the delinquent would pay all damages. There was no formal contract between the owners of the competing yachts but each entered into an obligation to the other when they by agreement with the Association undertook to observe the rules or pay damages for their breach. A relationship was created between the competitors containing an obligation. To quote Lopes, L.J., at pp. 260-1:

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> "I have no doubt that there was a contract. Probably a contract with the Committee in certain cases, but also a contract between the owners of the competing yachts amongst themselves, and that contract was an undertaking that the owner of one competing yacht would pay the owner of any other competing yacht injured by his yacht all the damages arising from any infringement or disobedience of the rules. In my opinion, directly any owner entered his yacht to sail, this contract arose; and it

is clear that the owners of the Valkyrie and the Satanita did enter their respective yachts and did sail."

So in the case at Bar the appellant and respondent did enter into an agreement (not it is true with each other) but with the Studebaker Corporation containing conditions which *ex necessitate* brought them into contractual relations with each other. They entered into agreements with the Company to sell only in the territory assigned and upon breach of this condition to account to the other for one half the commission thus earned. The relationship thus created involved an obligation for breach of which an action will lie.

Privity being thus established the question of consideration presents no difficulty.

I may add that this is not a case of a third party suing on a contract made by others for his benefit as in *Tweddle* v. *Atkinson* (1861), 30 L.J., Q.B. 265.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Norris & McWilliams.*

Solicitor for respondent: *F. J. Fulton.*

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MATHESON v. THYNNE

MATHESON v. THYNNE.

Vendor and purchaser—Conveyance—Covenant for title—Breach—Damages —Measure of.

The defendant, the owner of four lots adjoining a lake and through which a stream as an outlet from the lake flowed, sold a right of way across one of the lots to a railway company. In 1920 the railway built an embankment along the right of way which held the water back and flooded the lots in the rainy season and the defendant brought action against the railway for damages to his crops. On the 16th of July, 1921, the defendant under agreement for sale sold the four lots to the plaintiff and on the 26th of July following he entered into an agreement with the railway company on behalf of himself, his executors, administrators and assigns settling all claims for present or future damages by reason of the construction of the railway across the said lot and agreeing to the rescission of an order of the Railway Board compelling the railway company to clear the outlet from the lake. In pursuance of the agreement for sale to the plaintiff the defendant executed a conveyance on the 6th of May, 1922, in which he covenanted that he had the right to convey, that the plaintiff should have quiet possession free from encumbrances and that defendant had done no act to encumber said lands. An action for specific performance of the agreement to convey, free from encumbrances or damages in lieu thereof, was dismissed.

Held, on appeal, reversing the decision of MACDONALD, J. that an easement was created by the agreement of the 26th of July, 1921, with the railway affecting the defendant's title. There was a breach of covenant on the execution of the conveyance of the 6th of May, 1922, and the measure of damages is the difference in value of the property free from the easement and its value subject thereto.

Statement

APPEAL by plaintiff from the decision of MACDONALD, J. of the 2nd of February, 1925 (reported 34 B.C. 541) in an action for specific performance of an agreement for sale of lots 68, 475, 604 and 784 in the Yale Division of Yale District, British Columbia. Lot 784 adjoined Thynne Lake. The lake was drained by Otter Creek which ran through said lots. In 1920 when the defendant was owner of the lots the Victoria, Vancouver & Eastern Railway Company ran its right of way over lot 68 and constructed a railway embankment in such a way that in the rainy season all the lots were flooded. In the same year the defendant brought action against the company and

recovered damages. On the 16th of July, 1921, the defendant sold the lots to the plaintiff for $20,000 of which $11,000 was paid in cash and in lieu of the balance the plaintiff assumed certain mortgages. On the 26th of July, 1921, the Railway Board ordered that the railway clear the outlet through Otter Creek so as to prevent the flooding. On the same day the defendant entered into an agreement with the railway settling all claims as to flooding including appeal to the Supreme Court of Canada and rescinding the order of the Railway Board. This agreement was registered as a charge against the property in the registry office. The plaintiff claims the defendant covenanted for good title, free from encumbrances and that he was entitled to damages for breach of covenants (a) that the defendant had a right to convey; (b) that the defendant had quiet possession free from encumbrances; and (c) that he had done no act to encumber said lands. The plaintiff further prayed for a declaration that he was entitled to be registered as owner of the property. The action was dismissed.

Statement

The appeal was argued at Vancouver on the 16th, 19th and 20th of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: The sale to the plaintiff was made ten days before the easement complained of was given but the conveyance was executed on the 6th of May, 1922, and contains the covenants upon which we rely: see Williams on Vendor and Purchaser, 3rd Ed., Vol. 2, pp. 1090-1; *Turner* v. *Moon* (1901), 2 Ch. 825. Notice to the purchaser is immaterial and irrespective of knowledge he is entitled to recover. On the question of notice see *Page* v. *Midland Railway Co.* (1894), 1 Ch. 11 at pp. 19-20; *Great Western Railway* v. *Fisher* (1905), 1 Ch. 316; *In re Chute's Estate* (1914), 1 I.R. 180 at p. 187. As to whether this is an easement see Gale on Easements, 10th Ed., pp. 27-9; *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited* (1915), A.C. 599 at p. 617; *Bronson* v. *Coffin* (1871), 108 Mass. 175. The respondent relies on *Chaudiere Machine & Foundry Co.* v. *Canada Atlantic Rway. Co.* (1902), 33 S.C.R. 11 at p. 15.

Argument

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Argument

Killam, for respondent: Appellant bases his case on the easement but although not appearing as a party he substantially was as he advised on it and accepted it afterwards in such a way as to create estoppel. The flooding only covered part of 68 and another lot and there is no continuing cause of action: see *McCrimmon* v. *B.C. Electric Ry. Co.* (1915), 22 B.C. 76; Salmond on Torts, 5th Ed., 195. A negative agreement cannot be an easement on the land dealt with. There is always a flood there in the wet season. He knew this, and advised settlement, having bought thinking he had a good buy. There is estoppel: see *Chaudiere Machine & Foundry Co.* v. *Canada Atlantic Rway. Co.* (1902), 33 S.C.R. 11; Goddard on Easements, 8th Ed., 2; Gale on Easements, 10th Ed., 30; *Anctil* v. *City of Quebec* (1903), 33 S.C.R. 347. On rectification see *Frey* v. *Floyd* (1922), 30 B.C. 488. On rectification and specific performance see *Bing Kee* v. *Mackenzie* (1919), 3 W.W.R. 221 at p. 228; *Vancouver Power Co.* v. *Hounsome* (1914), 49 S.C.R. 430; Norton on Deeds, 2nd Ed., 559. On the question of waiver see Williams on Vendor and Purchaser, 3rd Ed., 177; *In re Gloag and Miller's Contract* (1883), 23 Ch. D. 320 at p. 328.

Mayers, replied.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I concur in the conclusion reached by Mr. Justice GALLIHER.

MARTIN, J.A.

MARTIN, J.A.: I agree in allowing this appeal.

GALLIHER, J.A.

GALLIHER, J.A.: This is an appeal from the judgment of MACDONALD, J., dismissing the plaintiff's action.

On July 16th, 1921, the plaintiff and defendant entered into an agreement by which the plaintiff purchased from the defendant certain properties mentioned therein, for the sum of $20,000, but in this appeal we are only concerned with lot 68, one of the parcels of property. There was through lot 68, a right of way, which had been granted by the defendant to the Vancouver, Victoria & Eastern Railway Company, consisting

of 21.20 acres, and which was conveyed by deed bearing date the 16th of October, 1912, which was duly registered by the company. Said deed contained a release by the plaintiff in the words following:

"And the said grantor, for himself, his heirs, executors, administrators and assigns does release the grantees their successors and assigns from all claims for any and all damages resulting to the lands through and across which the strips or pieces of land hereby conveyed are located by reason of the location, grade, construction, maintenance and operation of a railway over and upon the premises hereby conveyed."

In the agreement of July 16th, 1921, there is no reservation of the right of way granted to the V.V. & E. Railway Co., but in the deed from the defendant to the plaintiff dated May 6th, 1922, which was accepted by the plaintiff and which he sought to register and still retains, there was reservation of this 21.20 acres right of way through lot 68.

Before the purchase by the plaintiff of lot 68, and in May, 1920, the defendant brought an action in the Supreme Court of British Columbia against the railway company for damage to certain of the lands, including lot 68, and crops grown thereon, from flooding by reason of the said railway and its works, and recovered judgment, which judgment was afterwards affirmed by this Court, and an appeal then taken by the Company to the Supreme Court of Canada. While this latter appeal was pending an agreement was arrived at between the defendant and the company, which agreement was reduced into writing and dated 26th July, 1921, and to which the defendant and the railway company were parties signatory.

After various recitals in which were included the proceedings in the Courts above referred to, the agreement proceeds:

"NOW THIS AGREEMENT WITNESSETH that in consideration of the payment of the amount of said judgment and costs and of abandonment of the said appeal to the Supreme Court of Canada (the receipt of amount of said judgment and costs being hereby acknowledged) the owner doth hereby for himself, his heirs, executors, administrators and assigns, release and discharge the Railway Company, its successors and assigns of and from all claim for loss, costs, damages, charges and expenses of any nature or kind that has arisen or to arise out of the construction of the line of railway of the Railway Company, along Thynne Lake and Otter Creek, or by reason of any interference by the Railway Company with the natural channel and bed of said Thynne Lake and Otter Creek and doth hereby accept the amount of said judgment and costs in full settlement and satis-

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faction of all present and future damages or causes of action which the owner, his heirs, executors, administrators or assigns can now or may at any time hereafter have or make against the Railway Company, its successors or assigns, by reason of the construction of said line of railway in the manner and in the place in which it has been constructed and now is and that notwithstanding any flooding of any portion of said lots 67 and 68 caused or claimed to be caused by reason of the existence of such line of railway, he the owner, for himself, his heirs or assigns will not make any claim for compensation for injury to any of his lands on account of such flooding, damming back of water or deposit of rock, debris, silt, sand or any other material that may be carried on the said lots 67 or 68, by the waters of Thynne Lake or Otter Creek."

It will be noted that this agreement is dated ten days after the agreement between plaintiff and defendant. It was registered by the company and upon the plaintiff applying to register his deed of 6th May, 1922, registration was refused, except subject to this agreement of July 26th, 1921.

The plaintiff complains that this is an easement throwing a burden upon the land and that neither in the agreement for sale nor in the deed given him is there any reservation or exception —that it is in the face of the covenant for quiet enjoyment and in breach of the covenant for title. I think the effect of the agreement is to throw a burden upon the land, in other words, it frees the company from any responsibility for damage caused by water or debris cast upon the lands by reason of the works or operations of the company, in effect granting the company the privilege of depositing water and debris on the lands. This is contrary to the covenants in the plaintiff's agreement. But the defendants say, "You had notice of this." Assuming they had, that objection is disposed of by *Page* v. *Midland Railway Co.* (1894), 1 Ch. 11. That case decides that where the covenant is clear and unambiguous, full effect must be given to it even where on the face of the instrument generally the purchaser could be said to have notice of an encumbrance not specified or excepted in the covenant and that notice of the defect in title relied on as a breach is no defence to the action on the covenant in respect of the breach. See also *Great Western Railway* v. *Fisher* (1905), 1 Ch. 316 at p. 322. We have then an easement or a burden thrown upon the land, breaches of covenant for quiet enjoyment, and for title not affected by notice. The defendant having created this encumbrance in contravention of his

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covenants and imposed on the lands a burden which he cannot remove must answer in damages. It was held in *Turner* v. *Moon* (1921), 2 Ch. 825, followed in *Eastwood* v. *Ashton* (1913), 2 Ch. 39, that the true measure of damages in such cases was the difference in value of the land as purporting to be conveyed and the land as it actually passed to the purchaser.

There is still the question as to whether this case is governed by the principles laid down in *Backhouse* v. *Bonomi and Wife* (1861), 9 H.L. Cas. 503; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127; *Joseph Schlitz Brewing Co.* v. *Compton* (1892), 32 N.E. 693; and *McCrimmon* v. *B.C. Electric Ry. Co.* (1915), 22 B.C. 76, or within such cases as *Chaudiere Machine & Foundry Co.* v. *Canada Atlantic Rway. Co.* (1902), 33 S.C.R. 11 and *Anctil* v. *City of Quebec* (1903), *ib.* 347.

In the *Chaudiere* case, Sir Henri E. Taschereau, C.J., who delivered the judgment of the Court, at p. 15, distinguishes *Backhouse* v. *Bonomi and Wife* and *Darley Main Colliery Co.* v. *Mitchell, supra,* in these words:

> "In these two cases, the acts which had caused the damages were, when done, lawful, so that clearly no action for damages could be thought of till the damages accrued. Here the appellants' claim rests upon their allegation that the works done by the respondents at the outset constituted a nuisance and a trespass on their lot."

GALLIHER, J.A.

The former class of cases, I think, govern here. In the case at Bar, the work when done was lawful, but construction was negligent. Until damage occurred no right of action arose, and then only for such damage as had occurred up to the time of bringing action and so long as the faulty construction remained unremedied and further damage ensued, there would be a right of action for such further damages. The defendant has by his agreement with the company deprived the plaintiff of this right and the plaintiff, in my opinion, is entitled to damages.

I would allow the appeal and (if the parties cannot agree) grant a new trial for the assessment of damages, the proper measure of damages, being as I think, as laid down in *Turner* v. *Moon, supra.*

McPHILLIPS, J.A.: I am in agreement with the reasons for judgment of my brother GALLIHER and would allow the appeal.

MCPHILLIPS, J.A.

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MATHESON v. THYNNE

MACDONALD, J.A.

MACDONALD, J.A.: It is first necessary to decide if the agreement complained of, as derogating from the vendor's grant, creates an easement in favour of the dominant tenement, *viz.*, the property of the railway company over a servient tenement, *viz.*, lot 68. It was executed on the 26th of July, 1921 (ten days after plaintiff purchased under contract), between the defendant and the Vancouver, Victoria & Eastern Railway and Navigation Company. It recites that the defendant complained that by the construction of the railway and through interference with the outlet of Thynne Lake and the channel of Otter Creek lot 68 (and other lands) had been damaged by flooding, crops destroyed and the land depreciated in value. It further recites that the defendant obtained judgment in the Courts against the railway company for damages; complained to the Board of Railway Commissioners of the "alleged obstruction to flowage of water" and that in consideration of payment by the railway company of the amount of the judgment and the abandonment of a proposed appeal to the Supreme Court of Canada the defendant would release and discharge the company from all claims theretofore made or which he or his assigns might thereafter make for damages arising from said interference with the natural flow of water. The defendant, therefore, accepted a stated amount in full settlement of all present and future damages or causes of action, thus granting immunity to the company should flooding recur.

I have briefly outlined the agreement in so far as it is material. Does it amount to more than the settlement of past and future claims for damages by the parties concerned, or does it impress on lot 68 a privilege or right affecting the title thereto; in other words, create an easement? I was inclined to the view during the argument, that it was a misnomer to apply the term "easement" to the situation created by this agreement. Had there been a grant of a right to the railway company to discharge the overflow of water from, for example, a water tank on the Railway Company's property over the defendant's land an easement would without doubt be created. Does it follow that the owner by accepting a sum of money in settlement for past and future damage claims and executing a release, thereby grants an ease-

ment over the lands in question; or does such acceptance and release only relate to the abandonment of remedies and the adjustment of damage claims? One should look at the purposes to be served by an agreement in determining its true import. While these considerations are pertinent to the inquiry, I am of opinion that the agreement does amount to more than the mere settlement of damage claims. The effect of it, notwithstanding its purpose, is that water and debris may be allowed to flow over the defendant's land with impunity. This result follows just as conclusively as if the right were given to the railway company in express terms. We were not referred to any authorities nor can I find in the books any example of an easement thus indirectly created. Goddard in his 8th edition of the Law of Easements at p. 2 defines it as:

"A privilege, without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former."

Here the defendant must "suffer or refrain" from doing something, that is, not bring an action for the advantage of the railway company. In principle it is within the definition.

Gale on Easements, 10th Ed., at p. 29 gives, amongst others, these examples of an easement:

"Right to use or affect the water of a natural stream in manner not justified by a natural right, *e.g.*, by placing a fishing weir therein,"

and

"Right to commit a private nuisance by discharging coal dust over another's land."

The latter example is analogous to this case. If a fishing weir were constructed without permission and an action brought for resulting damages and in settlement for valuable consideration a release was given for past or future claims it would give to the other the identical privilege which would be contained in a direct grant. It follows that in the case at Bar the railway company purchased an easement by the settlement of present and future damage claims.

I find, therefore, that an easement was created by the agreement in question affecting the defendant's title and unless other considerations preclude it, the plaintiff must succeed. The

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breach of covenant occurred on the execution of the conveyance and the measure of damages will be the difference in value of the property free from this easement and its value subject thereto.

As against this conclusion it was submitted that the plaintiff, if not strictly a party to the agreement creating the easement, was, at all events, affected with notice thereof being fully aware of the conditions giving rise to it. I find it unnecessary to decide this disputed question of fact. It is not a defence to an action for breach of a covenant in a conveyance to assert that the plaintiff knew the defendant was not able to convey all that he purported to convey. See *Page* v. *Midland Railway Co.* (1894), 1 Ch. D. 11 at p. 23, where Davey, L.J., discussing the principle enunciated by the Vice-Chancellor in *Hunt* v. *White* (1868), 37 L.J., Ch. 326, and overruling it said:

"The Vice-Chancellor's proposition is certainly expressed too widely, for where the defect of title is one of which the purchaser has notice, though it does not appear on the face of the conveyance, it was held in *Levett* v. *Withrington* [(1687)], 1 Lutw. 317 [125 E.R. 166], that notice of the defect in title relied on as a breach, is no defence to an action on the covenant in respect of the breach. And, indeed, I adopt the statement of the learned editors of Dart on Vendors and Purchasers, 6th Ed., Vol. ii. p. 886, and it would, in my opinion, be contrary to principle to hold that the construction or effect of a covenant can be controlled by extrinsic evidence of notice or intention."

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The covenant, therefore, to give quiet possession free from all encumbrances extends to an encumbrance in respect to which the covenantee has notice. No question of estoppel or waiver arises on the facts in this case. The parties are strictly bound by the conveyance. To avoid being so bound reservations would have to be made in the document conveying title.

It was urged, however, that further action may be taken to recover future damages should they occur. This contention is only important in one aspect. If it is true that the agreement, notwithstanding its terms, does not prevent future actions against the railway company then the latter have not purchased immunity; it merely effected a settlement for damages previously suffered and the document having no further operation did not create an easement at all. The fact is that a second action was successfully launched for subsequent damages and

sustained on appeal to this Court. The defendant submits, however, that, under the agreement, notwithstanding its explicit terms, the railway company is not released from a damage claim in the future for any act constituting negligence. It may well be that if in works of maintenance the railway company negligently make repairs or place other obstructions on the ground, not properly classified as maintenance work, an action would lie for resulting damage. Such a situation would, however, be *dehors* the agreement creating the easement. The present condition cannot be affected or disturbed by speculating on the rights of the parties should an entirely new situation arise.

A further contention was submitted by the defendant. By a conveyance executed on October 16th, 1912, between the defendant and the railway company the right of way on which the works in question were constructed, was conveyed to the company and the plaintiff purchased subject to this conveyance. It contains a covenant releasing the grantees from all claims for damages resulting to the lands conveyed by reason of the location, grade, construction, maintenance and operation of the railway over and upon the premises conveyed. It was argued that the later agreement of the 26th of July, 1921, is no wider in its scope or effect than this clause in the right of way conveyance and that the land, therefore, is subjected to no greater burden by the subsequent agreement. This view is not borne out by a comparison of the releases in these two documents. In any event, if, as I find, the latter document creates an easement, it would have to be shewn that the same easement was in fact created by the clause referred to in the right of way conveyance subject to which the plaintiff admittedly purchased. Without repeating the facts already outlined, the works constructed, the actions brought and the settlement made covered by the agreement of July 26th, 1921, all of which had to be considered in deciding that an easement was created, it is clear that the same easement, or an easement of any kind, was not previously created by the clause referred to in the right of way conveyance. Whether or not this earlier release and other considerations referred to in argument may have a bearing on the *quantum* of damages, when that state is reached, I express no opinion: in

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any event the fact that the easement complained of is an existing encumbrance brought about solely by the agreement of the 26th of July, 1921, is not displaced. It had its origin then: not at an earlier date. It is quite impossible to say that because in the conveyance from the defendant to the plaintiff there is an exception from the property conveyed of the 1.68 acres comprising the right of way, that it constitutes a reservation in respect to the easement subsequently created. It would be necessary to go that far to escape the consequences of the breach of covenant complained of.

The appeal should be allowed with a direction to the learned trial judge to assess the damages.

Appeal allowed.

Solicitor for appellant: *T. J. Baillie.*
Solicitor for respondent: *M. L. Grimmett.*

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BOSLUND v. ABBOTSFORD LUMBER, MINING & DEVELOPMENT CO.

BOSLUND *ET AL.* v. ABBOTSFORD LUMBER, MINING & DEVELOPMENT COMPANY, LIMITED.

Appeal — Practice — Judgment — Reference to assess damages — Final judgment.

When the Court decides the substantial question of liability in an action and merely refers the assessment of damages to a referee, reserving nothing to itself, the judgment should be regarded as a final judgment for the purposes of appeal.

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 22nd of January, 1925 (reported 34 B.C. 485) in an action for damages brought by certain residents of the United States against the defendant Company for negligence in allowing fires started on its lands to spread across the international boundary line to the plaintiffs' lands. The respondents raised the preliminary objection that the appeal was out of time, contending that the judgment appealed from was interlocutory as there was a reference to the registrar to ascertain the damages sustained.

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The appeal was argued at Victoria on the 9th of June, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant.

Mayers (*Patterson,* with him), for respondents, raised the preliminary objection that the appeal was out of time as this was an interlocutory appeal. Judgment was given for the plaintiffs and there was a reference to the registrar to ascertain the amount of damages. In the case of *Laursen* v. *McKinnon* (1913), 18 B.C. 10, the judgment of the Chief Justice should be carefully read in which case it will be found to support our contention: see also *Chilliwack Evaporating & Packing Co.* v. *Chung* (1917), 25 B.C. 90 at p. 92. A judgment with a reference to the registrar is an interlocutory judgment. There is not a final disposition of the action until the amount is ascertained and entered in the judgment: see *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Company* (1891), 19 S.C.R. 434; *Collins* v. *Vestry of Paddington* (1880), 5 Q.B.D. 368; *Crown Life Insurance Co.* v. *Skinner* (1911), 44 S.C.R. 616; *Stephenson* v. *Gold Medal Furniture Mfg. Co.* (1913), 48 S.C.R. 497. The English cases are *The Duke of Buccleuch* (1892), P. 201 at p. 208; *Grieve* v. *Tasker* (1905), 75 L.J., P.C. 12 at p. 13: see also *Miller* v. *Kerlin* (1923), 33 B.C. 140. Argument

Farris, contra: The Court should approach this question from the standpoint of whether the case is disposed of. The cases cited, when read, will be found to be in our favour: see *Stephenson* v. *Gold Medal Furniture Mfg. Co.* (1913), 48 S.C.R. 497 at p. 503; see also *Wenger* v. *Lamont* (1909), 41 S.C.R. 603; *Bank of Vancouver* v. *Nordlund* (1920), 28 B.C. 342; *In re Herbert Reeves & Co.* (1901), 71 L.J., Ch. 70; *In re Jerome* (1907), 76 L.J., Ch. 432. We now apply for an extension of time if this is interlocutory.

Mayers, in reply, referred to *Bozson* v. *Altrincham Urban Council* (1903), 72 L.J., K.B. 271.

Cur. adv. vult.

15th October, 1925.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: A preliminary objection was taken at

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the opening of the appeal based upon the character of the judgment, the question being, was it final or interlocutory? The action is for damages caused by fire. Judgment was pronounced for the plaintiffs and a reference was ordered to assess the damages. No reservations of any kind were made in the judgment; the costs were disposed of both of the trial and the reference. Nothing remained but for the referee to find the amount to which each claimant was entitled. On these facts I think the judgment was a final judgment. Even if I were of the contrary opinion, which I am not, I think we are bound by our decision in *Laursen* v. *McKinnon* (1913), 18 B.C. 10. That was an action of trespass which the learned judge affirmed and then referred the assessment of damages. In that case there were no reservations. The notice of appeal was given three days after the expiration of the three months allowed for appealing from final judgments, but the report of the registrar was within the three months. It was contended that the judgment was interlocutory and did not become final until the registrar's report was entered. The Court held that the judgment was a final judgment, Mr. Justice IRVING dissenting.

MACDONALD, C.J.A.

It has been suggested that this Court has followed the decision in *Salaman* v. *Warner* (1891), 1 Q.B. 734, in preference to later decisions of the English Court of Appeal. I have examined the reported decisions of this Court to find whether or not that impression was well founded. The first case in which judgment of the Court, as distinguished from the late Full Court, was pronounced on this point is *Laursen* v. *McKinnon, supra,* which seems to me to be in conflict with *Salaman* v. *Warner* and in conformity with the later decisions of the English Court of Appeal; *Bozson* v. *Altrincham Urban Council* (1903), 1 K.B. 447. An order was made in Chambers declaring that the question of liability and breach only should be tried, by the Court, and that if liability were found there should be a reference to assess damages. The Court dismissed the action and the question arose as to whether or not that was a final judgment, and it was held to be such.

I see no distinction between the facts there and those in *Salaman* v. *Warner,* where the action was dismissed on a point

of law. In each case the Court dismissed the action after deciding the question of liability on the merits.

In *Chilliwack Evaporating & Packing Co.* v. *Chung* (1917), 25 B.C. 90, the appeal was not from the judgment, which was one in default, but from the refusal of a motion to allow the defendant in to defend. It was held that that proceeding was an interlocutory one and that the appellant was out of time. That case is in no manner in conflict with *Laursen* v. *McKinnon.*

There are, I think, two other decisions of this Court to which we were referred, neither of which, in my opinion, is in any degree in conflict with *Laursen* v. *McKinnon.* Another, *Downes* v. *Elphinstone Co-operative Association* (1924), 35 B.C. 30 is in conflict but the point was not reserved and our attention was not directed to our former decision.

We have been referred to decisions of the Supreme Court of Canada. The last decision (*Stephenson* v. *Gold Medal Furniture Mfg. Co.* (1913), 48 S.C.R. 497), of that Court prior to the coming into force of the amendment to the Supreme Court Act, of 1913, is instructive. I draw an inference from the expressions of some of the judges favourable to the conclusion we arrived at in *Laursen* v. *McKinnon.* That was an appeal from the Manitoba Court of Appeal. The Court of Appeal referred the *quantum* of damages, if any, to a referee. Anglin, J., with whom Brodeur, J. concurred, said (pp. 503-4):

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"But, although it would be eminently unsatisfactory that an appeal should be entertained by this Court from a judgment under which it may be, for aught that appears before us, that nothing will ultimately be found to be due by the appellant (the master is to find the amount of liability of the principal debtor, *if any*), I would be disposed to accept her contention that the judgment rendered against her in the Manitoba Court of Appeal is final within such authorities as *Ex parte Moore* [(1885)], 14 Q.B.D. 627; *In re Alexander* (1892), 1 Q.B. 216; *Bozson* v. *Altrincham Urban Council* (1903), 1 K.B. 547, and that it would be appealable to this Court if 'final judgment' had not been defined in our statute as it was before the amendment of 1913. The judgment against the appellant is similar to that sometimes rendered in the English King's Bench Division for an amount to be ascertained by an official referee."

Davies, J. thought that even under the Supreme Court Act the judgment was final.

There is only one point on which I felt some doubt. The judgment here is not in proper form, it orders that judgment

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"shall be entered," etc., instead of "It is ordered and adjudged." In one of the English cases a distinction was drawn between an order that judgment be entered and the judgment itself (Brett, L.J. in *Standard Discount Co.* v. *La Grange* (1877), 3 C.P.D. 71). But one must look at the substance rather than at the form. This is, in substance, a judgment which if carried out disposes of the whole action including the costs of the action and of the reference. We should not be astute to stand upon technicalities which are the bane of litigation, but should pay attention to the true character of the adjudication.

MACDONALD, C.J.A.

In my opinion, the best rule I am able to deduce from the cases, even in England, is that when the Court decides the substantial question of liability and merely refers the assessment of damages to a referee reserving nothing to itself, the judgment ought to be regarded as a final judgment for the purposes of appeal.

The preliminary objection should be overruled.

MARTIN, J.A. [MARTIN, J.A. took no part in this judgment.]

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

Solicitors for appellant: *Farris, Farris, Stultz & Sloan.*
Solicitor for respondents: *W. H. Patterson.*

REX v. HOLT.

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March 4.

REX v. HOLT

Criminal law—Intoxicating liquors—Conviction—Appeal—Nearest County Court—R.S.B.C. 1924, Cap. 245, Secs. 77 and 78(b); Cap. 146.

An accused was convicted by the stipendiary magistrate at Bowser, B.C., for keeping intoxicating liquor for sale. He appealed to the sittings of the County Court at Nanaimo. Bowser is 27 miles on an ordinary road from Cumberland and 43 miles by railway from Nanaimo. A preliminary objection by counsel for the Crown that under section 77 of the Summary Convictions Act the appeal should have been taken to Cumberland and not to Nanaimo, was sustained.

Held, on appeal, affirming the decision of BARKER, Co. J., that there was no jurisdiction and the appeal should be quashed.

APPEAL by accused from the decision of BARKER, Co. J. sustaining the conviction of accused by the stipendiary magistrate for the County of Nanaimo for that he did at Bowser in the County of Nanaimo unlawfully keep intoxicating liquor for sale. Notice of appeal from the conviction was given to the County Court at Nanaimo. Objection was taken by counsel for the Crown that Bowser was nearer Cumberland than Nanaimo and that under section 77 of the Summary Convictions Act the appeal should have been to the County Court at Cumberland. The section reads as follows: Statement

"Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a Justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal to the County Court, at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose."

Bowser is about 27 miles from Cumberland and is reached by a good road, but Nanaimo which is 43 miles away has railway connection. The preliminary objection was sustained by the judge below.

The appeal was argued at Vancouver on the 3rd and 4th of March, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Brougham, for appellant: The hearing before the County Argument

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Court was a trial *de novo,* and the case comes under the Revised Statutes: see *Rex* v. *Stanely* (1925), 1 W.W.R. 33; *Rex* v. *Perro* (1924), 34 B.C. 169; *Re Kwong Wo* (1893), 2 B.C. 336. The magistrate sent the record to Nanaimo. Under section 78(*b*) of the Summary Convictions Act it is not necessary to say which sittings you appeal to: see *Rex* v. *Georget* (1914), 23 Can. C.C. 341 at p. 344; *Bathard* v. *Commissioners of Sewers of the City of London* (1889), 54 J.P. 135; *Kowalenko* v. *Lewis and Lepine* (*No. 2*) (1921), 3 W.W.R. 648. It was the duty of the judge to adjourn the Court to the proper place. He could do this under section 68 of the County Courts Act. The appeal was heard at the most convenient place as against the nearest road. For the purposes of the trial Nanaimo was by far more convenient.

Argument

Arthur Leighton, for the Crown: The right of appeal is statutory and the statute must be strictly complied with. As the crow flies Cumberland is the nearest place where a sittings of the County Court is held. Because it is more convenient to go by train to Nanaimo has nothing to do with the matter.

Brougham, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal is quashed. We are without jurisdiction.

MARTIN, J.A.

MARTIN, J.A.: I agree. I do not propose to express any opinion as to what the Crown ought to do or ought not to do in carrying out the Liquor Act.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree to the quashing of the appeal. No jurisdiction is shewn. Undoubtedly, though, it is a case for executive clemency as the penalty for the offence is now changed.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal dismissed.

Solicitor for appellant: *W. F. Brougham.*
Solicitor for respondent: *Arthur Leighton.*

COOKE, BAKER AND HEWITT v. MOCROFT.

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COOKE v. MOCROFT

Mechanic's lien—Action on—Prior mortgage and liens filed—Application to add mortgagee as party—Time of, not limited by Act—Appeal—R.S.B.C. 1924, Cap. 156, Sec. 23.

The plaintiffs, having filed mechanics' liens, issued summons and plaint within 31 days as required by section 23 of the Mechanics' Lien Act. Then finding that one Mocroft had registered a mortgage and filed liens on the property prior in date and registration to the filing of their liens, they applied within the 31 days to add him as a party defendant claiming that both mortgage and liens were given to defeat their liens, but the order which included the necessary amendment to the plaint was not made until after the expiration of the 31 days. On appeal by Mocroft from the order:—

Held, per MACDONALD, C.J.A. and MCPHILLIPS, J.A., that the period for commencement of proceedings to enforce the lien applies to proceedings against the mortgagee, and the appeal should be allowed.

Per GALLIHER and MACDONALD, JJ.A.: That the plaintiffs having preserved their rights by bringing action on their liens in time and then finding this mortgage and liens of Mocroft in their way and desiring to test their validity, they can apply to make him a party at any time up to the hearing and are not confined to the time limit fixed by said section 23.

The Court being equally divided the appeal was dismissed.

APPEAL by defendant from the order of HOWAY, Co. J. of the 25th of September, 1925. Cooke, Baker and Hewitt filed mechanics' liens for a total amount of $892, for work and labour performed on lot 12, sections 20 and 21 of township 39, west of coast meridian in the New Westminster district. The liens were filed on the 14th of August, 1925. Proceedings to enforce the liens were taken on the 31st of August, 1925. Dispute note was filed by Handshu on the 9th of September, 1925. The lot in question is registered in the name of Handshu subject to a mortgage given by Handshu to George Mocroft dated the 6th of June, 1925, and registered on the 8th of June, 1925. On motion of the plaintiffs of the 14th of September, 1925, Mocroft (the mortgagee) was added a party defendant by an order of the 25th of September following. The defendant Mocroft appeals from said order on the ground

Statement

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that the application was made out of time, contending that it should have been made within the 31 days.

The appeal was argued at Vancouver on the 20th of November, 1925, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Yarwood, for appellant: The mortgagee should have been made a party in the original summons. The order making him a party was too late as the lien was filed on the 14th of August, 1925, and the order is of the 25th of September following: see *McRae Brothers* v. *Brownlow, Morton and Planta* (1924), 33 B.C. 395. He commenced proceedings in time but he was late adding the mortgagee as a party: see *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592 at p. 594; *Cook* v. *Belshaw* (1893), 23 Ont. 545; Wallace on Mechanics' Liens, 3rd Ed., 493.

W. C. Ross, for respondent: The lien was filed in time and the action commenced in time and although the order was after 31 days had expired the notice of motion was given in time: see County Court Rules, Order IV., rr. 4, 12 and 13. On the question of adding parties see C.E.D., Vol. 4, p. 433. The order can be made under section 31 of the Mechanics' Lien Act.

Yarwood, replied.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: The appeal is from an order of HOWAY, Co. J., making Mocroft a mortgagee, a party to the mechanic's lien proceedings, and amending the plaint in conformity therewith.

The appellant Mocroft, is a mortgagee, having registered a mortgage on the lands against which it is sought to enforce the lien, the said mortgage being prior in date and registration to the filing of the mechanic's lien.

The lien holders issued a summons and plaint within the time limit of 31 days, as provided by statute, but did not make the mortgagee a party. Later, but not within the 31 days, the order

adding the appellant as a party, was made, the lien holders alleging that the mortgage was given to defeat the claims of the lien holders and was a fraud upon them. It appears also that Mocroft had himself filed liens against the property prior to those of plaintiffs and these are sought to be attacked on the same ground.

The point is a nice one and is whether the plaintiffs, not having made the appellant a party to the writ, and not having asked that he be added within the 31 days, have lost their rights as against him in this action. Mr. *Yarwood* for the appellant, cited *MacRae Brothers* v. *Brownlow, Morton and Planta* (1924), 33 B.C. 395, and *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592.

In *MacRae Brothers* v. *Brownlow, Morton and Planta,* the real point involved here is not present there, as Planta was made a party to the writ in the first instance. Nor is it sought here to make Mocroft a party to obtain the relief provided for in section 9 of the Mechanics' Lien Act, R.S.B.C. 1924, Cap. 156, respecting liens on mortgaged premises. It is sought here to attack the mortgage to Mocroft and the liens filed by him as fraudulent. The question then is, should he have been added as a party before the expiry of the 31 days? Section 23 of the Mechanics' Lien Act is as follows:

GALLIHER, J.A.

"Every lien shall absolutely cease to exist after the expiration of 31 days after the filing of the affidavit mentioned in section 19, unless the claimant in the meantime has instituted proceedings to realize his lien under the provisions of this Act in the County Court registry in which the lien was filed," etc.

The plaintiffs duly took these proceedings within the time limited, but did not make Mocroft the appellant a party to same. The plaintiffs are proceeding to enforce their liens against these lands but find registered prior to filing their liens, this mortgage to the appellant and liens filed by him. The *bona fides* of these are attacked—no question of priority is raised if they are genuine—and what is asked here is not as in the Ontario cases making the appellant a party in the master's office, but is an amendment to the writ and plaint by the County Court judge, and the adding of a new defendant, which could under our rules and practice be made if the time limit in section 23 does not apply.

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GALLIHER, J.A.

I find some little difficulty in deciding, but on the whole, I think it may be summed up in this way: The plaintiffs have preserved their rights under the liens as against the lands, they find these obstacles in their way—they allege these obstacles are frauds—we wish to test this out before the judge at the trial, and for this purpose it is necessary that appellant should be a party. In the issues sought to be tried out, I am of the opinion that the appellant does not come within the time limit in section 23, and can be made a party at any time even up to the hearing.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appeal, in my opinion, should succeed, the order is not supportable, the cases cited by Mr. *Yarwood*, counsel for the appellant, are, in my opinion, conclusive upon the point.

MACDONALD, J.A.

MACDONALD, J.A.: The defendant Mocroft was not added for the purpose of establishing a lien in a mechanic's lien action, as against the mortgagee to the extent that the work and labour performed increased the value of the mortgaged premises. If such were the case the time limit would have to be observed, and *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592, would be applicable. This defendant was added after the 31 days elapsed, not to enforce a lien but to obtain a declaration that inasmuch as after the work commenced, this mortgage was registered *mala fides* and for the express purpose of fraudulently defeating the plaintiffs' claim, it should be delivered up and cancelled. In such circumstances, are the plaintiffs compelled to launch a separate action to set it aside, or can the whole matter be disposed of in the mechanic's lien action by adding the mortgagee as a party after the 31 days have passed? I think the mortgagee can be added as a party defendant. It is an issue which may be tried in the mechanic's lien action, and the practice and procedure in use in the County Court or Supreme Court Rules may be resorted to (section 31 of Cap. 156, R.S.B.C. 1924).

I would dismiss the appeal.

The Court being equally divided, the appeal was dismissed.

Solicitor for appellant: *E. M. Yarwood.*
Solicitor for respondent: *W. C. Ross.*

REX v. SAM CHIN.

COURT OF APPEAL

1926

Jan. 5.

REX v. SAM CHIN

Criminal law—Charge—"Break and enter by day"—Conviction—Evidence of stealing in dwelling-house at night—Criminal Code, Secs. 380, 458, 951 and 1016(2).

An accused was convicted by a magistrate under section 458 of the Criminal Code on a charge of breaking and entering a dwelling-house by day and stealing $42 cash and certain articles. The evidence disclosed that the offence was committed at night.

Held, on appeal, that as the magistrate was satisfied of facts sufficient to prove accused guilty of the offence charged, he could, on the indictment, have convicted him under section 380 of the Criminal Code of stealing in a dwelling-house. This Court should therefore (as empowered by section 1016(2) of the Criminal Code) substitute a verdict of guilty under said section 380 for that which was erroneously found, and the sentence of four years' imprisonment which was passed below should stand for the substituted offence.

APPEAL by accused from his conviction by the stipendiary magistrate at Vancouver, for breaking and entering a dwelling-house in Vancouver by day and stealing $42, also certain articles of furniture, the property of the owner. The owner of the house and his wife went to bed at about 12 o'clock on the night of the 3rd of June, 1925, and when they arose at about 6 o'clock on the following morning they found that $42, the owner's trousers, a clock, and part of a photograph were stolen during the night. A window was found open in the morning that had been shut on the previous evening. On the morning of the 4th of June detectives suspecting the accused went to his rooms and finding him there searched him when they found on his person the part of the photograph that had been lost from the house. The other articles lost were never found. The accused explained that he had found the torn part of the photograph on the street on the morning of the 4th. The evidence of the detectives was to the effect that it was a wet night with intermittent rains but the photograph found on accused was dry. Accused was sentenced to four years in the penitentiary.

Statement

The appeal was argued at Vancouver on the 13th of October,

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1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Nicholson, for appellant: The charge is for breaking in by day, and according to the evidence the breaking in must have been between 12 o'clock at night and 6 o'clock in the morning. There is no evidence that the accused was even near the house where the articles were stolen, the only connection between him and the crime being the fact that the torn portion of the photograph was found on him and he says that he found it on the street which is a reasonable explanation. Breaking in "by day" and breaking in by night are separate and distinct offences: see *Rex* v. *Richardson and Narash* (1922), 36 Can. C.C. 113. There was no evidence that the house was entered: see *Rex* v. *Murray and Others* (1906), 21 Cox, C.C. 250.

Argument

Dickie, for the Crown: The only material point in the case is as to the charge which recites that the breaking in was "by day" when in fact it was at night. The evidence shews he committed a graver offence than that for which he was convicted: see *Pearce's Case* (1810), R. & R. 174; *Robinson's Case* (1817), *ib.* 321. In any case there was no substantial wrong done the accused.

Nicholson, replied.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would substitute the conviction for stealing in a dwelling-house for the one complained of, without interfering with the sentence.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from a conviction, by a stipendiary magistrate of Vancouver, for unlawfully breaking and entering by day a dwelling-house and stealing therefrom chattels and money to an amount exceeding $25 in value. See sections 380 and 458 of the Criminal Code.

The evidence sufficiently established the charge except that the offence was shewn to have been committed in the night time, and was therefore burglary under section 457, and not housebreaking as was solely charged in the information, and it was

submitted that the conviction could not be supported. But while it cannot be supported for house-breaking yet section 951 provides that:

"Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included."

This is only a declaration, and amplification in certain respects, of the rule at common law and thereunder it was long ago decided that on such a charge as this the accused could be found guilty of stealing from the dwelling-house where the value was over five pounds (if so alleged) as well as of larceny: *vide* Russell on Crimes, 8th Ed., Vol. 2, p. 1065; Archbold's Criminal Pleading, 26th Ed., 212, 673; *Rex* v. *Withal* (1772), 1 Leach, C.C. 88; *Davis's Case* (1817), R. & R. 322; *Rex* v. *Compton* (1828), 3 Car. & P. 418; *Regina* v. *Brookes* (1842), Car. & M. 543, and *Hungerford's Case* (1790), 2 East, P.C. 518; and 2 Hale, P.C. 302.

It was submitted by counsel for the Crown that there might be a conviction for burglary upon the facts as proved but no authority has been cited to support that submission and it is contrary in principle to the statement in 2 East, P.C. 640: the note in Crankshaw's Criminal Code, 5th Ed., 568, relates, obviously, to a subsequent charge for burglary after acquittal for house-breaking; and the note to section 458 in Tremeear's Criminal Code, 2nd Ed., is wholly unsupported by the case cited, *Robinson's Case* (1817), R. & R. 321, which has no relation to either burglary or house-breaking, but to stealing from the person and highway robbery.

MARTIN, J.A.

But though the conviction cannot stand as it comes before us, yet this is a case to which the new section 1016 (2) of the amendment of 1923 applies, *viz.*:

"Where an appellant has been convicted of an offence and the jury or, as the case may be, the judge or magistrate, could on the indictment have found him guilty of some other offence, and on the actual finding it appears to the Court of Appeal that the jury, judge or magistrate must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found a verdict of guilty of that other offence, and pass such

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sentence in substitution for the sentence passed by the trial Court as may be warranted in law for that other offence, not being a sentence of greater severity."

MARTIN, J.A.: Since it is clear that "the magistrate could on the indictment" have convicted the appellant under section 380 of stealing in a dwelling-house and it appears that the magistrate "must have been satisfied of facts which proved [appellant] guilty of that other offence," this is a case wherein we should substitute a verdict of guilty under said section 380 for that which was erroneously found, and the sentence of four years' imprisonment which was passed below will stand as our sentence for the substituted offence, the maximum penalty for which is fourteen years' imprisonment.

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

MCPHILLIPS, J.A.: I agree in the reasons for judgment of my brother MARTIN. The power of amendment is now very extensive and the case would appear to be one for its application. I would therefore substitute a conviction of guilty under section 380 for that made by the stipendiary magistrate, the sentence of four years to stand for the substituted offence.

MACDONALD, J.A.: MACDONALD, J.A. agreed in dismissing the appeal.

Appeal dismissed.

G. A. HANKEY & CO. LTD. v. VERNON: BANK OF MONTREAL AND ROME, GARNISHEES.

SWANSON, CO. J.

1926

Jan. 15.

G. A. HANKEY & CO. v. VERNON

Garnishment—Claim for commission on sale of land—"Debts, obligations and liabilities"—Scope of—R.S.B.C. 1924, Cap. 17, Sec. 9.

The plaintiff brought action to recover commission on the sale of a fruit farm. The purchaser had paid into a bank the amount of the purchase price with instructions to pay the vendor on title being duly shewn and conveyance executed and tendered. The plaintiff having obtained a garnishing order and served it on the purchaser and on the bank, applied under section 9 of the Attachment of Debts Act for an order directing the garnishees to pay the moneys attached into Court.

Held, that the moneys in question are attachable and should be paid into Court to await the result of the trial.

APPLICATION under section 9 of the Attachment of Debts Act. The defendant, Colonel Vernon, sold his fruit ranch near Vernon, B.C. to one Charles Rome for $7,000. Rome deposited this sum in the Vernon branch of the Bank of Montreal with instructions to pay over the money to Colonel Vernon on title being duly shewn and conveyance executed and tendered. The plaintiff's action is to recover commission on the sale of the said fruit ranch and he obtained a garnishing order copies of which were served on Rome and his Vernon agents the Bank of Montreal. Heard by SWANSON, Co. J. at Vernon, B.C. on the 14th of January, 1926. Statement

Earle, for plaintiff.
Lindsay, for the Bank of Montreal.
Heggie, for Rome.

15th January, 1926.

SWANSON, Co. J.: This is an application under section 9 of the Attachment of Debts Act for an order directing the garnishees to pay money attached into Court.

The plaintiff's action is to recover commission on the sale of the defendant, Col. Vernon's fruit ranch near Vernon, B. C. to one Rome. Garnishing order was obtained by plaintiff and copies served on garnishees Rome, and his Vernon B. C. agents Judgment

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Bank of Montreal. The purchase price of the ranch, $7,000, was deposited by Rome in the Vernon branch of the Bank of Montreal, in "escrow" (as Mr. *Lindsay* alleges) with instructions to pay over the money to defendant, on title being duly shewn and conveyance executed and tendered. There is no suggestion whatever that there is any defect in the title, or any difficulty about execution of conveyance. A mortgage upon the property amounting to $3,500 has already been paid off by Bank of Montreal to Mr. Wilmot. There is no evidence before me that a conveyance of the property has already been executed by the defendant, and placed in escrow with the Bank of Montreal. I am satisfied, however, that there will be no difficulty whatever in having conveyance in due form executed and delivered to Rome or his agents.

The contention is now made before me by counsel for the Bank, and counsel for the purchaser that the money is not attachable. It is contended that the money has been placed in the Bank in escrow, to be held until certain conditions are fulfilled, the shewing of the proper title and delivery of conveyance, and that therefore the debt is a "conditional" one and not subject to attachment.

Judgment

In support of this contention a number of authorities are quoted by Mr. *Lindsay*: *Gray* v. *Hoffar* (1896), 5 B.C. 56; *Howell* v. *Metropolitan District Railway Co.* (1881), 19 Ch. D. 508; *Webb* v. *Stenton* (1883), 11 Q.B.D. 518; *Booth* v. *Trail* (1883), 53 L.J., Q.B. 24; *Lanning, Fawcett & Wilson Ltd.* v. *Klinkhammer* (1916), 23 B.C. 84; *Ryall* v. *Nelson* (1917), 3 W.W.R. 647; *Lake of Woods Milling Co.* v. *Collin* (1900), 13 Man. L.R. 154.

Mr. *Earle* referred also to: *Gross* v. *Mihm and Dundas* (1910), 15 W.L.R. 172; *Girard* v. *Cyrs* (1896), 5 B.C. 45; *Pyne* v. *Kinna* (1877), 11 Ir. R.C.L. 40; *Gray* v. *Hoffar* (1896), 5 B.C. 56; *Heward Milling Co.* v. *Barrett* (1909), 11 W.L.R. 136 at p. 139.

Neither counsel referred me to the very important decision of Chief Justice Brown, in the Saskatchewan Supreme Court, *Barsi* v. *Farcas and Nadge* (1923), 3 D.L.R. 788 in which Brown, C.J., K.B. held that money due under an agree-

ment for sale of land, is a "debt" within the meaning of the Saskatchewan Attachment of Debts Act, R.S.S. 1920, Cap. 59, which will support a garnishee summons. This decision was however reversed by the unanimous decision of the Court of Appeal, reported (1924), 1 D.L.R. 1154, holding that money so due is not an unconditional debt garnishable, that such a debt is conditional on the vendor shewing a good title and executing a conveyance. Before dealing with this case let me point out that our Act differs in some essential particulars from the form of the Rule of Court in England—Order XLV., r. 1—and also essentially differs from the Saskatchewan statute. My brother HOWAY in his judgment in *Lanning, Fawcett & Wilson Ltd.* v. *Klinkhammer, supra,* at p. 86 points out the difference between our Act and the English rule. Under the English rule in order to be attachable "the moneys must be debts owing or accruing." He adds:

"Under section 3 are attachable 'all debts, obligations, and liabilities owing, payable or accruing due,' so that I must concern myself with the construction and meaning of the words 'obligations and liabilities.' It is to be observed that the trend of legislation in connection with this subject has been towards bringing additional property of the debtor into liability to satisfy a judgment, and also to enable moneys to be retained pending the decision of the defendant's liability. Our statute finds its origin in Consolidated Statutes of Manitoba, 1880, Cap. 37, Sec. 44, Administration of Justice Act, now Rules 741 and 742 of The Queen's Bench Act, 1895, of Manitoba."

Judgment

And later he says (p. 87):

"Section 4 of our statute dealing with the meaning of the term 'debts, obligations and liabilities' states that these words shall include all claims and demands of the defendant against the garnishee arising out of trusts or contracts where such claims and demands could be made available under equitable execution."

Dubuc, J., in *Lake of Woods Milling Co.* v. *Collin* (1900), 13 Man. L.R. 154 at pp. 170-1 says:

"There is no doubt that such provision widens the range of debts, obligations and liabilities which may be garnishable. It means that certain claims and demands which could not be reached by ordinary proceedings in law, but which might be the subject of equitable relief and could be made available by the appointment of a receiver, can now be attached by garnishing order."

I think these words of this learned judge (afterwards the Chief Justice of Manitoba) can be well applied to the facts of the case now before me. The money in the case before me in

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my opinion "might be the subject of equitable relief" and could be made available by the appointment of a receiver. I beg to refer to Lord Coke's definition of "obligation" given in Stroud's Judicial Dictionary, and definition of the word "liable" (liability) in the judgment of Kekewich, J. in *In re Chapman* (1895), 65 L.J., Ch. 170 at p. 172.

The English cases, and the Saskatchewan case above alluded to, *Barsi* v. *Farcas and Nadge, supra,* were decided on Rules of Court or statute markedly different from the British Columbia statute and British Columbia Rules of Court. They are not therefore in my opinion precedents to be followed in this cause.

I think the moneys in question are properly attachable and should be paid into Court to await the trial of the issue joined between plaintiff and defendant. I think sufficient to cover costs of trial should be paid in. I think $500 will cover amount of claim and costs of trial, should judgment go in favour of plaintiff. The defendant has left the country, leaving no assets in the jurisdiction apart from the moneys in question. If these moneys are not impounded in Court (that is sufficient to meet claim and costs) the plaintiff if successful may win only a barren victory. If the plaintiff's claim is disallowed, the moneys will be paid out to the garnishees or to the defendant. The ordinary practice is to allow counsel for the garnishee a small counsel fee, where he formally appears and advises the Court that the garnishee has pursuant to the garnishing order paid the money into Court. In this case however the garnishees have seen fit to fight the battle of the defendant Vernon, who is now in England, and having failed to succeed, the plaintiff's costs of this application must be borne by the garnishees, the Bank of Montreal and Rome.

Judgment

Order accordingly.

THE ROBERT DOLLAR COMPANY v. WALKER *ET AL.*

MORRISON, J.

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ROBERT DOLLAR CO. *v.* WALKER

Companies—Formation of—Stock in names of promoter's wife and son—Subsequent judgment against promoter—Action as to actual owner of stock—Foreign law—Effect of.

The plaintiff loaned the defendant L. W. David $25,000 in the United States in 1920 represented by two promissory notes of $10,000 and $15,000 respectively payable in San Francisco, U.S.A., one year after date. The notes not being paid at maturity the plaintiff brought action against David in the State of Oregon and recovered judgment for $31,673.34. In May, 1924, the plaintiff brought an action on the said judgment in the Supreme Court of British Columbia and recovered judgment for said sum. He then brought this action for a declaration that the shares in the Empire Timber Products Limited standing in the names of the other defendants are the property of L. W. David and liable to satisfy the judgment. For many years L. W. David was engaged in the lumber business and organized a number of companies. He was declared a bankrupt in the State of Washington in 1914 and was married in 1915. After his bankruptcy he was always in insolvent circumstances but he continued in the formation of lumber companies until eventually the Forest Investment Company formed in 1921, absorbed his interests in the other companies and the larger portion of the stock in that company came into the names of his co-defendants including his wife and his son. The plaintiff recovered judgment on the trial.

Held, on appeal, affirming the decision of MORRISON, J. in part (GALLIHER, J.A. dissenting in part), that there was sufficient evidence to support the finding that the transactions out of which the shares in question were brought into existence were the transactions of the defendant L. W. David and he used the names of his wife, his son and the defendant Blake to carry his shares with a view to protect himself against creditors, but as there was no evidence to displace that of the defendants Walker and Hull who swore they gave consideration for their shares the appeal should be allowed as to them.

Held, further, that the shares transferred to the wife and son were traceable back to a period before the marriage, issued in consideration of a transfer to the Company of certain timber assets held by L. W. David and it was found by the trial judge that he was a bankrupt from a period prior to his marriage up to the transfer of the shares in question to his wife. The plaintiff became a creditor subsequent to the original transfer to wife and son, and assuming this is community property there is no evidence that by the law of the State of Washington the wife could not hold it as against future creditors when insolvency

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existed at the time of the transfer. The law of this Province must therefore be followed and nothing has been shewn in the evidence to displace our law as to the rights of subsequent creditors in circumstances such as has been shewn in this case.

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ROBERT DOLLAR CO. *v.* WALKER

APPEAL by defendants from the decision of MORRISON, J. of the 23rd of May, 1925, in an action by the plaintiff Company as an execution creditor of the defendant Lester W. David for a declaration that the certain shares held by the defendants Ernest Walker, Jessie E. David, Kenneth L. David, Charles J. Blake, John D. Hull and the Forest Investment Company in the common stock of the Empire Timber Products Limited, a British Columbia corporation, are the property of Lester W. David and liable to satisfy the plaintiff's judgment. On the 15th of May, 1920, the plaintiff Company (incorporated in California) loaned David $25,000 on two promissory notes of $10,000 and $15,000 respectively payable in California in one year. The notes not being paid the plaintiff sued in the State of Oregon and obtained judgment on the 8th of April, 1924, for $31,673.34. The plaintiff then brought action on said judgment in British Columbia and obtained judgment for the above amount on the 3rd of July, 1924. A writ of *fi. fa.* was issued but David had only one share in the Empire Timber Products Limited which was sold for $9. The plaintiff claims David appeared as owner of 98 shares in the Empire Timber Products Limited as trustee of the Forest Investment Company. The other defendants held shares in the Empire Timber Products Limited as follow: Walker, 1 share; J. H. Hull, 250; Jessie David (wife), 500; Kenneth David (son), 70; and C. J. Blake, 80. The plaintiff claims that David transferred the 250 shares to Hull knowing he was about to become indebted to the plaintiff and the shares acquired by Jessie David, Kenneth David and Blake were given to them under an agreement he (David) had with the Empire Timber Products Limited. The plaintiff claims David was the beneficial owner of all these shares which were put in the names of the other defendants to defeat the plaintiff's claim.

Statement

Bourne, and *DesBrisay,* for plaintiff.

Reid, K.C., and *Douglas,* for defendants.

23rd May, 1925. MORRISON, J.

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MORRISON, J.: The plaintiff, who had been negotiating with the defendant David in Oregon regarding the purchase of certain timber areas, ultimately advanced him the sum of $25,000 in May, 1920, in the repayment of which he has made default and judgment was in due course obtained for that amount. David having no visible assets in Oregon with which to respond to this judgment the plaintiff found out he had assets in British Columbia and he thereupon obtained a judgment here for $31,673.34 which judgment remains unsatisfied. It appears that for a number of years David had been identified with a number of large timber and sawmill transactions in British Columbia and had been in a large way engaged in the timber business. During the period from 1899 he organized such large concerns as the Fraser River Sawmills, the Ocean Falls Company, B.C. Wood Pulp & Paper Company Limited, the Whalen Company, the Colonial Lumber & Paper Mills, the Timber Products & Power Company, etc., in all, or at least most, of which he was really the controlling factor, surrounded by his relations and friend-associates, some of whom, particularly the defendant Walker and Kenneth David, held shares in their name in blank which shares would be handed to David and were in his control for such disposal as the exigencies of his multifarious financial operations necessitated. However, the net result of his extensive operations was that in 1914 he was declared a bankrupt by the Courts in Washington, particularly as to his holdings in that State. There is no evidence before me as to what is the law in the State of Washington as regards bankruptcy. As far back as 1916 at any rate, he appears to have been in insolvent circumstances, and so continues. During this period of financial distress he incurred his indebtedness to the plaintiff who now seeks to set aside certain transfers of stock in several concerns in British Columbia to his wife, his son Kenneth and the other defendants Walker, Hull and the Forest Investment Co. The ramification of his interests and the method adopted by him all along, during the period of his activities material to the issues herein, were gone into in detail on discovery before trial and during the trial. It will serve no

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helpful purpose to enter into them in this judgment further than to say that I find that all along his methods were adopted with the view of keeping the true position of affairs as much as possible submerged at least from the technical observation of his creditors, and that they tended to hinder and delay and defeat his creditors. Walker, by the agreement of May, 1920, held shares in trust in blank and David handled them—Hull, in some instances, also was used similarly. They had a long and close relationship with him.

I am satisfied that the formation of the various concerns was a part of a scheme to finance his interests at a minimum risk to himself in case of misadventures or eventualities. That some of those with whom he was from time to time brought into contract, and who are not parties to this action, may have been on their part actuated by similar designs is not now relevant. I think the other defendants knew what David was doing in these various transactions about which, in the sense of the authorities in cases of this kind, there was nothing *bona fide*. As to Walker and Hull, I fear that their interests are within the ambit of David's operations and are affected equally with that of Mrs. David and Kenneth David and the Forest Investment Co. The method of disposal of all these shares was a part of the one design, however *bona fide* they may be made to appear superficially, of which the defendants were in a position to know and did have knowledge of what the intention was. I do not think any of the defendants can or ought to be disentangled from David. I therefore set aside the transactions complained of and give judgment in the terms of the statement of claim.

MORRISON, J.

Evidence was adduced as to what is colloquially termed community law in the State of Washington. Whatever effect that may have as between David and the present Mrs. David within that jurisdiction, it can have, in my opinion, no effect at all as regards the rights of creditors suing in the Courts of British Columbia respecting property within this jurisdiction.

From this decision the defendants appealed. The appeal was argued at Vancouver on the 26th, 27th and 28th of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers (*Douglas,* with him), for appellants (except Walker and Hull): David was interested in the Whalen Company and Ocean Falls Company in 1911, and in 1915 he had a claim of $20,000 against the Colonial Company. This claim he gave up for $10,000 in cash and 90,000 shares in the Company. He gave his wife 50,000 of these shares, and shortly after he gave his son 70 shares in the Pacific Mills in which he was interested. He was at this time sales agent for the Whalen Company. In 1919, he incorporated the Empire Timber Products Limited and in 1920 the wife and son transferred their interests as above to the Empire Company for the shares they obtained in the Empire Company and David transferred to the Empire Company his sales contract with the Whalens for 250 shares of the Empire Company. From 1916 to 1920 David was engaged in developing the Monarch Mills and in 1921 the Monarch Mills were absorbed by the Forest Investment Company (incorporated in 1921) for which David received 2,500 shares in the Forest Company. In November, 1922, the Empire Company was absorbed by the Forest Company and David, his wife and son transferred their shares in the Empire Company to the Forest Company. On the American law as to transfer of property to the wife creating community property see *Yake* v. *Pugh* (1895), 42 Pac. 528; *Deering* v. *Holcomb* (1901), 67 Pac. 240; *Stewart* v. *Kleinschmidt* (1908), 97 Pac. 1105; *Smith* v. *Weed* (1913), 134 Pac. 1070 at p. 1075. The cases the other way are *Schramm* v. *Steele* (1917), 166 Pac. 634 and *Lanigan* v. *Miles* (1918), 172 Pac. 894.

Argument

Reid, K.C., for appellants Walker and Hull: I rely on the submission made by my learned friend.

Bourne (*DesBrisay,* with him), for respondent: David was a bankrupt and was discharged in 1916, and he has never been a man of substance since that time. The Empire Company incorporated in 1919 was David's creature and he dominated it. The Court will infer the intent to defraud in the circumstances: see Kerr on Fraud and Mistake, 5th Ed., 218; *Newlands Sawmills Ltd.* v. *Bateman* (1922), 31 B.C. 351; *Jeffrey* v. *Aagaard* (1922), 2 W.W.R. 1201. On the question of a one-man company see *Edmunds* v.

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Edmunds (1904), 73 L.J., P. 97; *In re Fasey. Ex parte Trustees* (1923), 2 Ch. 1 at p. 17; *Gonville's Trustee* v. *Patent Caramel Company, Limited* (1912), 1 K.B. 599; *In re Goldburg. Ex parte Silverstone, ib.* 384. That the action was properly brought where the assets are out of the jurisdiction see *New York Breweries Company* v. *Attorney-General* (1899), A.C. 62.

DesBrisay, on the same side: The Washington statute will not be given effect to in this case: see Dicey on Conflict of Laws, 3rd Ed., 34; see also *Schramm* v. *Steele* (1917), 166 Pac. 634 and *Lanigan* v. *Miles* (1918), 172 Pac. 894. David and his wife always lived together.

Mayers, replied.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think there was sufficient evidence to support the finding that the transactions out of which the shares in question were brought into existence, were the transactions of defendant David. He used the names of his wife, his son and Blake. The learned judge has found that from 1911 onward, David carried on numerous activities always with an eye to protecting himself against creditors, present and future, should misfortune overtake him in these enterprises. That is, at all events, what I infer from his reasons for judgment. Therefore, with respect to those findings of fact, founded as they are to a considerable extent, upon oral evidence, and finding as I do, that there was sufficient to sustain those findings in relation to some of the defendants at least, I ought not to interfere, unless I think he was clearly in error, and only to that extent. I think he was in error as to two of the defendants, Walker and Hull. Walker holds but one share in the Company, which he swore was paid for by him in cash. This has not been satisfactorily controverted, therefore I think the share must be held to belong to himself.

As regards Hull, who is the registered owner of 250 shares in the Company, I think he is in much the same category as Walker. He swore that he gave consideration for these shares, setting out what it was, and in my opinion, there is no satisfac-

tory evidence, if indeed there be any at all, to displace his testimony. Suspicion may suggest that he was not telling the truth but the onus was on the plaintiff and he has not discharged it.

With regard to the others, I cannot interfere with the findings of the learned judge.

The other question is one of law. The defendant David was married to Mrs. David (in whose name some of these shares stand) in 1915. Now, whether or not the laws of the State of Washington with reference to community property have any application to proceedings in this Province, I do not undertake to determine, since I do not believe it to be material in this appeal to do so. The witness, McCord, a Seattle attorney, states that only property acquired by the efforts of the spouses or either of them after the marriage is to be classed as community property. Now, the shares which were transferred to the wife, or rather the consideration for them, is traceable back to a period before the marriage; the shares were actually issued in consideration of the transfer to the Company of certain timber assets held by the defendant David. These in turn were acquired by him in consideration of his giving up an equity in other property which he owned prior to the marriage. Moreover, in view of the judge's finding, David I think, must be held to have been bankrupt ever since the marriage, and up to the time the shares in question were transferred or issued to his wife. Now, while it is true that the plaintiff became a creditor subsequently to that time, it has not been shewn in evidence that by the law of the State of Washington, assuming that this property, or some part of it, might be regarded as community property, the wife could hold it as against future creditors, when insolvency existed at the time of the transfer, as I think it did. I, of course, cannot search on my own account the laws of the State of Washington. I must take the evidence of witnesses who are well acquainted with those laws. But unless it be shewn that our own laws must give way to the foreign laws, in the particular instance, we must follow our own law. Nothing has been shewn in evidence to displace our law as to the rights of subsequent creditors in circumstances such as have been shewn in this case.

I would allow the appeal of Walker and Hull, and dismiss

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that of the other appellants. Walker and Hull to have their costs of appeal, and the respondent the costs of it against the other defendants.

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MARTIN, J.A.: I agree in allowing the appeal as to Walker and Hull and otherwise dismissing it.

GALLIHER, J.A.: I would allow the appeal only as to the defendant Walker, and in other respects would confirm the judgment below.

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MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dispose of this appeal as set forth by my brother the Chief Justice in his reasons for judgment, and that is that the appeal be dismissed as against the appellants other than Walker and Hull, and allowed as to the latter. I do not consider upon full consideration of the case that the learned trial judge's judgment, in view of the facts and governing authorities, should be disturbed, save as to the allowance of the appeal of Walker and Hull.

MACDONALD, J.A.

MACDONALD, J.A.: I agree in dismissing the main appeal and in allowing the appeal of Ernest Walker and John D. Hull.

Appeal allowed in part, Galliher, J.A. dissenting in part.

Solicitors for appellants: *Reid, Wallbridge & Gibson.*
Solicitors for respondent: *Bourne & DesBrisay.*

ASSOCIATED GROWERS OF BRITISH COLUMBIA LIMITED AND KELOWNA GROWERS EXCHANGE v. EDMUNDS, EDMUNDS AND BYZANT ORCHARDS LIMITED.

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Contract—Sale of all fruit and vegetables from farm for certain period—Formation of company—In control of landowner—Sale of farm to company—Evasion of contract—"Good faith."

In February, 1923, one Edmunds and his wife contracted with the plaintiffs to sell to them all the fruit and vegetables to be grown on their farm for five years. For two seasons the Edmunds' made delivery of all fruits and vegetables to the plaintiffs in accordance with the contract. In February, 1925, the defendant Company (Byzant Orchards Limited) was formed by Edmunds and his wife, who (with the exception of associates required to comply with the Companies Act) were the sole owners and controlled its operations. On the formation of the Company, Mrs. Edmunds, who was the registered owner, transferred the said farm to the Company and the Company became registered for an indefeasible fee in said lands. The agreement of February, 1923, contained a claim as follows: "If the grower shall, except as referred to above, in good faith sell or transfer the said lands or any part thereof and give written notice of such sale to the Local or Co-operative [plaintiffs] then the agreement shall be cancelled as to such lands." An action for a declaration that the sale of the lands to the Company was fraudulent or in the alternative that the agreement with the Edmunds' was binding on the Company was dismissed.

Held, on appeal, affirming the decision of McDONALD, J. (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that although the transfer should be regarded as a mere scheme to evade observance of a contract solemnly entered into, the title to the property passed to the defendant Company with rights and liabilities governed solely by the Companies Act and its own articles. Nor can it be said that in law the defendant Company is a mere *alias* for its co-defendants or that the relationship of principal and agent or trustee and *cestui que trust* subsists between them.

Salomon v. *Salomon & Co.* (1897), A.C. 22 followed.

APPEAL by plaintiffs from the decision of McDONALD, J. of the 3rd of July, 1925, dismissing an action for a declaration that the sale or transfer by the defendants Edmunds, to the Byzant Orchards Limited of lot B, plan 457 in Yale District was not *bona fide* and was not made in good faith and was fraudulent, Statement

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for an order setting it aside, and for a declaration that the agreement for marketing of the fruit and produce grown on said lands (ten acres), dated the 23rd of February, 1923, between the Edmunds' and the plaintiff is a valid and subsisting agreement or alternatively that the Byzant Company is a trustee for the Edmunds' and is bound by the agreement; for an injunction and for specific performance. On the 27th of February, 1923, the plaintiff and defendants Edmunds' entered into an agreement whereby for five years the said defendants would deliver all fruits and vegetables grown on the above ten acres to the plaintiffs. The contract was carried out during 1923 and 1924, but the Edmunds' being dissatisfied they caused a company to be formed known as the Byzant Orchards Ltd. and on the 25th of February, 1925, Elizabeth Edmunds, in whose name the property stood, transferred the ten acres to the Byzant Co. for $5,000, and they were paid in 5,000 shares in the company there being no other consideration. The trial judge found there was no bad faith and dismissed the action.

The appeal was argued at Vancouver on the 30th of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Harold B. Robertson, K.C., for appellants: The transfer to the Company was admittedly for the purpose of defeating the agreement entered into between the Edmunds' and the plaintiffs and was fraudulent. This Company is merely an *alias* for themselves: see *In re Carey. Ex parte Jeffreys* (1895), 2 Q.B. 624; *In re Darby. Ex parte Brougham* (1911), 1 K.B. 95 at p. 101; *Silkstone and Haigh Moor Coal Company* v. *Edey* (1900), 1 Ch. 167; *Gramophone and Typewriter, Limited* v. *Stanley* (1908), 2 K.B. 89 at pp. 97 and 101. The transfer was not made in good faith: see *Jennings* v. *Lentz* (1908), 93 Pac. 327; *State* v. *Petersen* (1905), 75 N.E. 602 at p. 605; *Pfefferle* v. *Wieland* (1893), 56 N.W. 824. The sale was for the purpose of avoiding a contract so as to injure the plaintiff. This is a fraud on the plaintiff: see *Canadian Bank of Commerce* v. *Munro* (1925), S.C.R. 302; *Nocton* v. *Ashburton (Lord)* (1914), A.C. 932 at pp. 954-5 and 964.

Davis, K.C., for respondents (Edmunds): He says it was never intended the property should pass but there is no evidence of that and it is not in the pleadings that the Company was a trustee: see *Macaura* v. *Northern Assurance Co.* (1925), A.C. 619. The question is whether there was a transfer in "good faith" under the agreement which provides that "if the grower shall in good faith sell or transfer the said lands or any part thereof and give written notice of the sale, etc., then this agreement shall be cancelled as to such lands so sold." The words "good faith" mean real and not conditional in any way. The transfer was in "good faith." A statute avoided is not a statute broken. Evading and infringing can be distinguished. Supposing we did commit a breach he has no *status* under his action. He has not asked for damages.

Alfred Bull, for respondent Company: The case of *Salomon* v. *Salomon & Co.* (1897), A.C. 22 applies here: see also *Soper* v. *Littlejohn* (1901), 31 S.C.R. 572 at p. 578; *Rielle* v. *Reid* (1899), 26 A.R. 54. The *Salomon* case, *supra,* says there can be no trust: see also *Mayor, &c., of Bradford* v. *Pickles* (1895), A.C. 587 at p. 589; *Stevenson* v. *Newnham* (1853), 13 C.B. 285 at p. 297; *Allen* v. *Flood* (1898), A.C. 1. You must look at the context to find out what is good faith: see *Vane* v. *Vane* (1873), 42 L.J., Ch. 299 at p. 303. In answer to the allegation of fraud we submit there is express provision that the contract can be cancelled in this way: see *Attorney-General* v. *Richmond (Duke) (No. 2)* (1909), 78 L.J., K.B. 998: see also the further cases of *The Attorney-General* v. *Noyes and others* (1881), 45 L.T. 520; *Attorney-General* v. *Beech* (1898), 2 Q.B. 147 at p. 157. Assuming there was a breach it does not affect the Company. They have chosen a wrong remedy. Fraud does not enter into this at all. It is either a breach of contract or it is not.

Argument

Robertson, replied.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.: The individual defendants contracted with the plaintiffs to sell to them all the fruit and vegetables to be grown on their lands during a specified period of time. The two relevant clauses of the agreement read:

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"13 (a). If the grower transfers any or all of his fruit or vegetable land or any or all the fruits or vegetables owned or controlled by him which are the subject of this agreement to any member of his family by blood relation or marriage, or to any trustee for himself or any such member of his family, any such transferee shall be deemed to be a grower and be bound by the terms of this agreement.

"(b). Any transfer made by the grower to any person, firm, or corporation whatsoever, after March 1st of any year, shall be conclusively deemed to be made subject to this agreement and all its obligations for that calendar year and the transferee shall be bound by the terms of this agreement. If the grower shall, except as referred to above, in good faith sell or transfer the said lands or any part thereof, and give written notice of such sale to the Local and Co-operative then this agreement shall be cancelled as to such lands."

The defendants desiring to free themselves from this contract, caused a joint-stock company to be incorporated for the purpose of holding the said lands which they transferred to that company in consideration of the allotment to them of the whole of its capital stock, and thus as they contend, freed themselves from their obligations under the agreement, and as well left the company free from any like obligations.

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These facts are boldly admitted, their counsel submitting that they and the purchasing company are now under no obligation whatever to the plaintiffs. This was the view taken by the learned trial judge.

It was, I think, in effect, held that they had in this way legally evaded their obligations under the contract. The transfer to the company cannot be attacked under either 13 or 27 Elizabeth as in fraud of creditors or of subsequent purchasers. It is also true that there is no express declaration of trust. That is to say, the company are not declared to be trustees for the original owners. Now, I have no doubt that the transaction by which these lands were vested in the company was not a *bona fide* sale, the company is merely the *alter ego* of the individual defendants. Creditors would be entitled to attack it and have the company declared trustee of the land for the transferors. But though they are not creditors, and while the transfer cannot be set aside, yet I think the arm of the Court is not so short that it cannot right the wrong done. A trust ought to be implied and the trustee must perform the contract.

The appeal should be allowed.

MARTIN, J.A.: In my opinion the learned judge below reached the right conclusion upon the language of this contract, *viz.*, broadly and briefly, that the sale to the newly-formed company cannot be said to be in bad faith unless it is in breach of the terms of the contract which stipulated for "good faith" in the manner specially prescribed but not otherwise, and if it is not, then neither can it be held to be an "evasion" thereof in the proper sense of that much abused and doubtful, legally, expression: it cannot be said, I think, with all respect, that this "sale or transfer" was not a real transaction and that the property did not actually pass to the new company. I would therefore dismiss the appeal.

MARTIN, J.A.

GALLIHER, J.A.: The point submitted to us is a very narrow one and is one of law.

Mr. *Davis,* counsel for the Edmunds', frankly admits that the formation of the Byzant Orchards Limited and the transfer to them by Elizabeth Edmunds, of the lands upon which the fruit and vegetables, the subject of the contract sued on, was for the purpose of defeating that contract. At first blush that strikes one as a transaction which is not honest in itself, but it has long been settled that a contract may be avoided if it can be done so legally even if ethically it may be wrong. It is first urged by the plaintiffs that the defendants, Byzant Orchards Limited, are simply an *alias* for the Edmunds', but in law we must treat them as a separate entity, and it cannot be said that there was bad faith here unless the transaction offends against some provision of the contract.

GALLIHER, J.A.

The term in the contract which the Edmunds' say entitles them to terminate it, is to be found in paragraph 13 (b) of the contract, and is in these words:

"If the grower shall, except as referred to above, in good faith sell or transfer the said lands or any part thereof, and give written notice of such sale to the Local and Co-operative then this agreement shall be cancelled as to such lands so sold as on the first day of March following receipt of said notice."

Both the sale of these lands to the Byzant Orchards and notice thereof to the Local and Co-operative, was made and given in February, and before the 1st of March, and as I think we must

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treat the Byzant Company as a separate entity, the only question really is—was the sale in good faith?

Mr. *Davis* submits, and I think, rightly, that the words "sham" and *"alias,"* "no actual sale, no company," as applied to the Byzant Company goes no further than to say they were trustees for the Edmunds'. I take it that had the sale been made to some person not a relation by blood or marriage, or a trustee for the vendor (they being excepted in 13 (a)), there could be no question that such person without notice, would hold the lands free from any conditions of the agreement. That the Company cannot be regarded as a trustee of the Edmunds', is, I think, settled by *Salomon* v. *Salomon & Co.* (1897), A.C. 22, and other cases cited.

It is not contended that the Byzant Orchards Limited was not duly and properly incorporated under the Companies Act, or that the transfer of the property was not duly carried out, but it is said that this was all done in pursuance of a scheme to get rid of the contract with the plaintiffs and that because the motive was bad and improper it was therefore not a sale in good faith under section 13 (b). As was pointed out in the House of Lords in the case of *Mayor, &c., of Bradford* v. *Pickles* (1895), A.C. 587, it is the act not the motive for the act which must be regarded. No matter how generous the motives were that will not avail when the act is illegal, and conversely, when the act is legal the motive, as here, cannot affect it. The acts of forming the company and transferring the lands were in themselves legal acts, but the question has still to be answered—was the sale in good faith within the terms of the contract? For this purpose I will assume that the transfer of the lands had been made to a stranger and where no fiduciary relationship could be said to exist, but that such stranger was charged with the knowledge that the transfer was being made for the purpose of avoiding the contract, as in my view the company was here, then I find myself unable to distinguish in principle the case at Bar from the majority decision in the Supreme Court of Canada, in *Canadian Bank of Commerce* v. *Munro* (1925), S.C.R. 302, in fact this seems to me a stronger case for the application of that principle. The learned trial judge distinguished that case, but with great

respect, that distinction does not seem to me to meet the point. There, the effect of the transaction, if successful, would have deprived the Bank of their right of security on the goods, here, the effect of the transaction, if successful, would be to deprive the plaintiffs of their right under the contract. The words, "in good faith," are all-important here, and applying the principle laid down in *Canadian Bank of Commerce* v. *Munro, supra*, I would hold that the transaction here was not in good faith.

I think the appeal should be allowed.

GALLIHER, J.A.

The relief which I think the plaintiffs are entitled to, is, in the alternative, under paragraph (d) of the relief claimed.

MCPHILLIPS, J.A.

McPhillips, J.A.: In my opinion the appeal resolves itself into one question, and that is, can the transfer of title to the lands be supported? The provision in the agreement that is relied upon reads as follows: [Already set out in the judgment of Macdonald, C.J.A.]

It would appear that a sale was made of the land to the defendant Company and due notice thereof was given. It cannot be said that the sale made was a breach of contract nor can it, in my opinion, be said to be in any way contrary to good faith in that it was the doing of an act which was plainly unprovided against. We have not here the well-known and understood negative covenant so essential and necessary to accomplish what the appellants are contending for and they failed to make out their case in the Court below, and in my opinion the learned trial judge arrived at the right conclusion.

There is no evidence upon which it can be at all concluded that the sale was not in "good faith," the sale was regular throughout and to a company—a separate entity—and it is impossible to contend that the defendant Company should be deemed to be a trustee for the growers (the defendants John and Elizabeth Edmunds). The sale would appear to be a real transaction (*Salomon* v. *Salomon & Co.* (1897), A.C. 22). Also see *Soper* v. *Littlejohn* (1901), 31 S.C.R. 572 at p. 578), read with the facts of the present case in mind is a conclusive authority upon which the impugned sale can be supported. Lord Halsbury in the *Salomon* case, at p. 31, said:

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"I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence. . . . Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not."

(Also see *Rielle* v. *Reid* (1899), 26 A.R. 54).

In *Mayor, &c., of Bradford* v. *Pickles* (1895), A.C. 587, we find in the head-note the following statement:

"No use of property which would be legal if due to an improper motive can become illegal because it is prompted by a motive which is improper or even malicious."

I would refer to *Attorney-General* v. *Richmond and Gordon (Duke) (No. 2)* (1909), A.C. 466. That was a case of the saving of estate duty and the method adopted was held to be within the law. We have here advanced the dire effect to the fruit industry of the Province if the course adopted in the present case is allowable, notwithstanding the agreement entered into, that it will destroy the work of the Associated Growers whereby the fruit farmers have been the gainers in the economic and advantageous disposal of the fruit crops, yet there may be different views as to this. In the way of analogy as to fears, I would call attention to what Lord Macnaghten said, at pp. 473-4, in the case last referred to:

MCPHILLIPS, J.A.

"Your Lordships were warned by the learned counsel for the appellant of the appalling consequences of the decision under appeal. 'Here,' they said, 'is a tremendous hole in the Finance Act discovered by the ingenuity of a Scotch solicitor. The great fishes which the Commissioners look upon as their own will swim through the gap one by one. The duller-witted Southron will follow the lead. And what will become of the revenue of the country?' My Lords, I do not think the prospect so gloomy, nor can I see that any extraordinary astuteness was required to recommend the course which the late Duke adopted. I should think the eminent solicitor who was the Duke's adviser would be the first to disclaim the left-handed compliments lavished on his skill."

Here there was no failure to disclose what was done, neither was there in this case last referred to. Lord Shaw, who dissented, referred to the facts at p. 486, and said:

"What the motive for the transaction was is not denied. Answering the learned judge who tried the case, his Grace speaks with perfect frankness to a conversation with his father. 'You had a conversation with your father before he began this transaction?—Yes. He told you what his

motive was?—Yes; his motive, as I think I said yesterday, was to lessen the amount of the death duties if he could.' The interests of all the three parties to the transaction were ably attended to by the same firm of solicitors. They accepted the task of endeavouring to give effect to the motive of the late Duke. In doing so they incurred no risk of prejudicing the interest of his son or grandson. On the contrary the result, if it could be legally accomplished, would benefit them, as, under the judgments appealed against, it has benefited them by a saving in estate duty to the amount of 55,000*l*."

The impugned sale must stand unless the transactions impeached could be said to be "unreal, colourable or sham transactions" (Lord Atkinson at p. 475, in *Attorney-General* v. *Richmond and Gordon* (*Duke*) (*No. 2*), *supra*). In that case the transactions were admitted "to be real and genuine in their character" (Lord Atkinson at p. 475), here it is, of course, disputed, but I fail to see how it can be substantiated that the sale to the defendant Company was not real and genuine.

MCPHILLIPS, J.A.

I am of the opinion that the learned judge arrived at a proper conclusion. The judgment should be affirmed and the appeal dismissed.

MACDONALD, J.A.: The transfer from the defendants, the two Edmunds, to Byzant Orchards Limited, was admittedly made for the purpose of evading performance of a contract entered into by the former with the plaintiffs.

In *In re Carey* (1895), 2 Q.B. 624, Vaughan Williams, J., at p. 626, dealing with a case where a trader, in financial difficulties, transferred his business to a company under circumstances somewhat similar to this case, said:

MACDONALD, J.A.

"It is not true to say that there has been a sale by him to the Company, because there is no principle of antagonism between the parties to the transaction. There is not in fact a buyer and seller. The vendor is in reality the principal, and the company is merely his agent. In such a case one should treat the agreement as a nullity. In this case there is only one person, and that is the bankrupt himself. The company is merely another form that he has assumed."

This decision by a single judge, however, relied upon by appellants' counsel, ante-dated the decision by the House of Lords in *Salomon* v. *Salomon & Co.* (1897), A.C. 22, where different principles are laid down.

Counsel for the respondent submitted that in any event, in the case at Bar the main agreement permitted this transfer. I

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cannot agree. Clause 13 (a) provides that if a transfer is made to

"any member of his family by blood relation or marriage, or to any trustee for himself, or any such member of his family, any such transferee shall be deemed to be a grower and be bound by the terms of this agreement."

It was urged that the transfer to the defendant Company was not within one of these classes (and that is true, unless the Company can be regarded as a trustee), and that if it was intended to prevent a grower from escaping the obligations of the main agreement by such a transfer an addition to the prohibited class might have been made by adding such words as, "or to any company in which the transferor holds all the shares." While that suggestion is of some value it does not prevent the proper construction of clause 13 (b) standing by itself. The words "in good faith" introduce a new element and cannot, of course, be ignored. If the transfer is not made "in good faith" within the meaning of 13 (b) the obligations imposed by the main agreement will extend to the transferee unless legal principles intervene to prevent it. I suggest it is idle to say that this transfer was made in good faith.

MACDONALD, J.A.

Notwithstanding this view, however, there are insuperable difficulties in the way of granting the relief sought by the appellant. Even although the transfer should be regarded as a mere scheme to evade observance of a contract solemnly entered into, the title to the property passed to the defendant Company with rights and liabilities governed solely by the Companies Act and its own articles. *Salomon* v. *Salomon & Co.* (1897), A.C. 22.

Nor can it be said that in law the defendant Company is a mere *alias* for its co-defendants, or that the relationship of principal and agent or trustee and *cestui que trust* subsists between them. See *Salomon* v. *Salomon & Co., supra,* at p. 31:

"The Act [the Companies Act] appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence."

And at pp. 42-3:

"Under these circumstances, I am at a loss to understand what is meant by saying that A. Salomon & Co., Limited, is but an "alias" for A. Salomon. It is not another name for the same person; the company is *ex hypothesi* a distinct legal *persona*. As little am I able to adopt the view that the company was the agent of Salomon to carry on his business for him."

And again at p. 43:

"The Court of Appeal based their judgment on the proposition that the formation of the company and all that followed on it was a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862. The conclusion which they drew from this premiss was, that the Company was a trustee and Salomon their *cestui que trust*. I cannot think that the conclusion follows even if the premiss be sound."

If I were able to hold that the Company was a trustee for its co-defendants, it would be brought within one of the prohibited classes in clause 13 (a) of the main agreement, but I find it impossible to do so.

Whether or not an action for breach of contract might be maintained we need not consider, as no such claim is made.

I may add that I have carefully considered the points involved and the authorities cited, in an effort to find a way, if possible, to prevent a clear evasion of a contractual obligation, but without success.

I would dismiss the appeal.

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

Solicitors for appellants: *Norris & McWilliams.*

Solicitor for respondents: *H. V. Craig.*

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THE ASH-TEMPLE CO. v. WESSELS

THE ASH-TEMPLE COMPANY LIMITED v. WESSELS.

Sale of goods—Conditional sale—Default in payments—Repossession by vendor—Notice of resale to buyer—Action for balance due after resale—Sufficiency of notice—R.S.B.C. 1924, Cap. 44, Sec. 10.

The defendant who was a dentist purchased from the plaintiff Company a quantity of office supplies under a conditional sale agreement for $2,063. He paid $513 cash and after paying $102.80 on account of the balance he became in default. The plaintiff then took possession under the agreement and after giving the defendant notice resold the goods. There still being a balance due of $402.75 on the sale the plaintiff brought action and recovered judgment for this sum.

Held, on appeal, reversing the decision of RUGGLES, Co. J. (MCPHILLIPS, J.A. dissenting); that where powers are granted by statute only after compliance with certain prescribed formalities, substantial compliance is necessary and as the notice of resale given by the plaintiff to the defendant claims a larger sum than was actually due and fails to meet the requirements of section 10 of the Conditional Sales Act the plaintiff cannot recover.

APPEAL by defendant from the decision of RUGGLES, Co. J. of the 4th of May, 1925, in an action to recover the balance due under a conditional sale agreement. The defendant was a dentist and purchased, under a conditional sale agreement, a quantity of supplies for his office for the sum of $2,063. He paid $513 on delivery of the goods and subsequently an additional $102.80. The agreement was entered into on the 15th of September, 1921. On the 24th of February, 1923, the defendant was in default, the amount then due being $1,622.75. The plaintiff then repossessed itself of the goods, sold them for $1,220, and sued the defendant for the balance of $402.75. The plaintiff succeeded on the trial. The defendant appealed, alleging, first, that when the goods were taken back they were given up on the understanding that he would be relieved from further liability; secondly, that the trial judge was wrong in assuming that the manager of the Company had no authority to make such an arrangement with the defendant when the goods were taken back by reason of a term in the conditional sale agreement that the plaintiff could sue for the balance due after

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taking the goods back and selling them; and the third ground of appeal was that section 10 of the Conditional Sales Act was not complied with by the plaintiff when he took possession and resold.

The appeal was argued at Vancouver on the 23rd of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Soskin, for appellant: We say, first, there was an agreement between the defendant and the manager that he would accept the goods back as payment in full. The agreement is admitted but it was held the manager of the company had no authority to make it. The manager took office after the original contract was made. It was submitted it was within the scope of his authority. The main point is that section 10 of the Conditional Sales Act was not complied with. He did not give the notice required by subsection (3) and he claimed more than what was actually due, which is a material non-compliance with the statute. As to what is a private sale see *North-West Thresher Co.* v. *Bates* (1910), 13 W.L.R. 657. They did not sell at the time set out in the notice: see *Nichols & Shepard Co. Inc.* v. *McCullough* (1920), 1 W.W.R. 885 at p. 888.

Argument

Cantelon, for respondent: The only question is whether we have complied with the Act. On a true interpretation of the section we have given the required notice. The *Thresher* case is distinguishable as there was a change made as to the place of sale. In any case it is only *dicta.* He was not prejudiced by the defect in the notice.

Soskin, replied.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.

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

MARTIN, J.A.

MARTIN, J.A.: This appeal raises a question upon the construction of a notice given under subsections (3) and (4) of section 10 of the Conditional Sales Act, Cap. 44, R.S.B.C. 1924. It appears that the defendant had bought some dental appliances from the plaintiff Company under a conditional sales contract,

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admittedly within said Act, which provided, shortly, that the title should not pass to the buyer till the price had been fully paid and that in default the seller might retake possession and sell the goods

"and I shall pay any deficiency on such resale, including your costs. . . . but any surplus upon resale shall be paid to me."

Upon default the plaintiff retook possession and before reselling the goods sent the following letter to the defendant which is relied upon as a notice in compliance with said section under which plaintiff seeks to hold defendant liable for the deficiency, about $400, resulting from the sale:

"We beg to enclose you statement of your account with us, shewing a balance of $1,799.52. These goods have been held now for a full twenty days, as required by law.

"We are also enclosing you a brief description of the goods which you will notice we have marked Exhibit 'A.'

"Unless the above amount is paid by the 17th day of February these goods will either be sold by private sale, or else advertised and sold by public auction.

"If you wish to redeem these goods will you get in touch with Mr. Rogers immediately as these goods will be sold either privately, or by public sale on the 17th day of February next."

MARTIN, J.A.

It is objected that this notice is defective in two respects as required by subsections (*b*) and (*c*) of section 10(4), the first of which is as follows:

"(*b*) An itemized statement of the balance of the contract price due and the actual costs and expenses of taking and keeping possession up to the time of the notice."

By an error arising out of the inclusion of a sum due on another account apart from the conditional contract, this demand was excessive to the extent of $132.79, and therefore it is submitted that it is not such a "statement of the balance of the contract price due . . . " as the Act requires. It is often far from a simple matter to determine what is a compliance with a statutory requirement of a condition precedent by way of notice or other performance, but, *e.g.*, even at a time when the provisions of the Mineral Acts as to location were construed strictly a compliance in essentials was deemed sufficient: *Cf. Rutherford* v. *Morgan* (1904), 2 M.M.C. 214 at p. 222.

After a careful consideration of the matter before us I do not think, whatever view might be taken in other circumstances, that an error in the statement of such a substantial sum as $132 out

of $1,799 can be reasonably said to be either an essential or substantial compliance with the statute, and so the appeal should be allowed on that ground alone, and therefore it is unnecessary to consider the second objection. I deem it desirable only to add that I do not think subsection (7) would prevent the buyer from consenting to overlook or waive any irregularities or deficiencies in a notice that had been given in pursuance of section 10 if that intention clearly appeared, but in the present case the facts do not, in my opinion, justify such a conclusion.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: Upon the argument of this appeal I was then of the opinion, that the appeal should fail if it could not be said that there was failure to give the required statutory notice shewing default and the amount claimed to be due. It would appear that $1,799.52 was claimed when the correct amount was $1,645.58. I cannot persuade myself that this error in the amount claimed has the effect of preventing the bringing of an action by the vendor (respondent) against the purchaser (appellant) for the deficit after a sale has been duly had. It was the duty of the purchaser to make a tender of the true amount due and failing in that, I cannot see how he can now complain. Further, it is evident that the defence the appellant in the main relied upon, was that he was released from his liability, the respondent as he contended agreeing to take back the goods and no further liability was to exist. Where a release is pleaded it is well known that it must be established in no uncertain way. Here there was absolute failure to establish any release. The case was peculiarly one of fact as I view it and the learned trial judge had ample evidence to entitle judgment being entered for the respondent. I certainly am not prepared to reverse the judgment.

The appeal should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: The respondent was obliged to comply with certain formalities prescribed by statute before it could exercise the right of resale and call upon the appellant to pay

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any deficiency. Where the statute is so explicit in respect to notice there should be no difficulty in following it with reasonable particularity. Where powers are granted by statute only after compliance with certain prescribed formalities substantial compliance is essential before the right accrues.

The notice herein entirely fails to meet this requirement.

I would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *N. C. Levin.*

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

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McCOUBREY v. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA.

Insurance, life—Wife designated as beneficiary—Will—Declaration that all policies be for benefit of wife—Refusal of insurance company to pay without letters of probate—Action on insurance policy—R.S.B.C. 1924, Cap. 117, Sec. 28.

An insured directed in the policy that the insurance moneys be paid to his wife. His will made shortly before his death recited "I hereby declare that all policies of insurance on my life are and shall from this 24th day of January, A.D. 1925, be considered to be for the benefit of my wife Florence Mae McCoubrey and that the proceeds thereof shall belong to her." The insurance Company refused to pay without letters of probate being taken out. In an action on the insurance policy the wife recovered judgment.

Held, on appeal, affirming the decision of MURPHY, J. that by the wording of the will, deceased was not placing the insurance moneys under the jurisdiction of his personal representatives, but that the insurance Company should hold the moneys in trust for his wife.

[An appeal to the Supreme Court of Canada was quashed.]

Statement

APPEAL by defendant from the decision of MURPHY, J. of the 11th of August, 1925, in an action to enforce payment of an insurance policy. One John McCoubrey insured his life in

the defendant Company for $7,500 in 1915, made payable to his wife. The policy was taken out in Calgary. He came to Vancouver in 1925, where he died in March of the same year. The deceased made a will on the 24th of January, 1925, and with the exception of a small gift to an adopted son left all his estate to his wife and appointed her executrix of the will. The will then proceeded:

"I hereby declare that all policies of insurance on my life are and shall from this 24th day of January, A.D. 1925, be considered to be for the benefit of my wife Florence Mae McCoubrey and that the proceeds thereof shall belong to her, this declaration being intended to operate as a declaration in writing as provided by statute, which will create a trust of all insurance moneys for and in favour of my wife, and wherever necessary will constitute a charge of beneficiary, so that my said wife shall be entitled to all of my life insurance."

Statement

The Company refused to pay until probate was taken out claiming that a proper release could not otherwise be given. The wife brought action to enforce payment and obtained judgment under Order XIV., r. 1.

The appeal was argued at Vancouver on the 3rd and 4th of November, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. M. Macdonald (*Laird,* with him), for appellant: Our contention is that as the deceased's will dealt with insurance, then for our protection we cannot pay until there is representation of the estate. We are entitled to a discharge from the right person. Where a will creates a trust we are entitled to know whether it is the last will. It is necessary to take out probate to give a proper release: see *Cleaver* v. *Mutual Reserve Fund Life Association* (1892), 1 Q.B. 147. She is not a party and has no right of action: see *Alexander* v. *Yorkshire Guarantee and Securities Corporation* (1916), 23 B.C. 1 at pp. 6-7. The money is not payable here but in Toronto: see *Schon et al.* v. *The New York Life Ins. Co.* (1922), 55 N.S.R. 137; *Barthelmes* v. *Bickell* (1921), 62 S.C.R. 599. She should at least have tendered a release signed by herself: see *Green* v. *Standard Trusts Co.* (1912), 1 W.W.R. 993; *Toronto Savings Bank* v. *Canada Life Assurance Co.* (1868), 14 Gr. 509. They are not entitled to speedy judgment: see *Jacobs* v. *Booth's Distillery*

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Company (1901), 85 L.T. 262. On the question of probate see *Re Burgess' Policy; Lee* v. *Scottish Union & National Insurance Co.* (1915), 113 L.T. 443 at p. 444; *In re Engelbach's Estate. Tibbetts* v. *Engelbach* (1924), 2 Ch. 348; *Robb* v. *Watson* (1910), 1 I.R. 243.

Stockton, for respondent: The delivery of a discharge is not a condition precedent to a right of action. He must be restricted to the question of probate: see *Ellis* v. *Allen* (1914), 1 Ch. 904. There is no substantial defence. Under section 28 of the Act, when the wife is named beneficiary the husband is then no more in control. It is admitted no one else claims or has any interest in the money. On the question of the right to bring action see *Gandy* v. *Gandy* (1885), 30 Ch. D. 57 at pp. 66 to 68.

Macdonald, in reply, referred to Annual Practice, 1925, p. 154; *The Electric and General Contract Corporation* v. *The Thomson-Houston Electric Company* (1893), 10 T.L.R. 103; *Hotz* v. *McAlister* (1891), 2 B.C. 77; *Easefelt* v. *Houston and Johnson* (1911), 16 B.C. 353; *Canadian Bank of Commerce* v. *Indian River Gravel Co.* (1914), 20 B.C. 180; *Auld* v. *Taylor* (1915), 21 B.C. 192.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: There are no material facts in dispute. The deceased, by the policy directed that the insurance moneys in question be paid to the plaintiff. By his will made on his deathbed he refers, *inter alia,* to the policy in these words:

"I hereby declare that all policies of insurance on my life are and shall from this 24th day of January, A.D. 1925, be considered to be for the benefit of my wife Florence Mae McCoubrey and that the proceeds thereof shall belong to her."

These words, in my opinion, make it quite clear that the deceased was not placing the insurance moneys under the jurisdiction of his personal representative; it was not the executors who should hold the moneys in trust for the plaintiff, but the defendant.

It was strongly urged that there was a question of law involved which ought to be tried in the usual way and not be disposed of under Order XIV., but where the words are as clear as they

are in this case, it would be putting the parties to unnecessary expense to let the case go to trial.

There were two other questions argued, the one that a discharge under condition No. 8 was a condition precedent to action. It is unnecessary to say whether this condition was a precedent or subsequent one. It would be idle to comply with it since defendants clearly indicated that they would resist plaintiff's claim to the moneys on other grounds.

The other objection, namely, that relating to the payment of the moneys in this Province, was not raised in the notice of appeal, and therefore need not be considered.

The appeal should be dismissed.

MACDONALD, C.J.A.

MARTIN, J.A.: While I agree that the appeal should be dismissed I was at one time rather inclined to take the view that there was merit in the appellant's objection that the legal questions raised on this application for speedy judgment under Order XIV. were of such a nature that they should have been dealt with by the Court in the usual way and not by a judge in Chambers. It appears from the cases, *e.g., The Electric and General Contract Corporation* v. *The Thomson-Houston Electric Company* (1893), 10 T.L.R. 103; *Dane* v. *Mortgage Insurance Corporation* (1894), 1 Q.B. 54; 70 L.T. 85, and *Daimler Company, Limited* v. *Continental Tyre and Rubber Company (Great Britain), Limited* (1916), 2 A.C. 307 at p. 346, that where the legal questions raised are of substance they should not be any more summarily disposed of than questions of fact, but as my brothers are all of the opinion that such questions raised herein are trivial in their nature, and that the defence is not even "plausible" (as Lord Esher, M.R. puts it in the *Dane* case, *supra,* p. 62, being "a simple case of insurance," Lord Justice Lopes concurring) I do not feel strongly enough impressed by the appellant's submission to the contrary to warrant my differing from them. It is sometimes, however, difficult to determine whether or not a case is within the application of Order XIV., and the *Daimler* case, *supra,* is a striking illustration of different opinions thereupon: in it the House of Lords dismissed the plaintiff's action, though the Master had given it leave to sign

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final judgment, and his order was affirmed by Mr. Justice Scrutton in Chambers and an appeal from that judge had been dismissed by the Court of Appeal.

GALLIHER, J.A.: In my opinion the language in the will in no way affects the disposition of the moneys payable under the policy, and creates no trust.

I would dismiss the appeal.

MCPHILLIPS, J.A. (oral): With great respect to my brothers I dissent from their decision in reserving judgment in this case. The defence attempted to be set up is peurile and fatuous to a degree unthinkable wholly and absolutely without merit in fact or in law. The whole contention is despicable. I consider the conduct of the defence a most miserable shewing and devoid of fair and proper appreciation of the contract of a life insurance company. I can only consider that the directors and shareholders had nothing to do with this defence. I am pleased to say that Mr. *Macdonald* of counsel for the company comported himself in an admirable and true forensic manner acting in conformity with his instructions, but visibly not enamoured of his task. I would impress it upon solicitors that they are under no compulsion to forward a cause not well founded, or advance a defence which is ill founded and the latter is the present case. The Life Insurance Company, the defendant in this case, is under its contract of insurance subject to the Life Insurance Act and the Ontario and British Columbia Acts are in all material parts the same, the root principle thereof being that the husband can unassailably provide that the insurance be payable to his wife and children or the wife alone, to the children or any one or more of them. This is a statutory boon provided by Parliament and is much enlarged upon and justifiably so by agents soliciting applications for life insurance. The defendant Company entered into a contract in which the wife, the plaintiff in the present action, was the sole beneficiary and she is specifically named as such in the policy. The husband is dead, the wife asks the fulfilment of the contract, the Company, miserable to relate, resists payment and refuses to honour its bond and the provision made by

MCPHILLIPS, J.A.

the husband and in all solemnity contracted to be performed is left unperformed with the likelihood of privation and suffering to the widow. Could there be imagined a more dishonourable breach of contract? What does the Company say? It is this, the husband has ventured to state in his will that such a contract exists but in no way makes any bequest thereof or disposition thereof in his will, merely states a fact, yet the Company seizes on this and attempts a studied policy of delay and calls for probate of the will before payment, exactly that which Parliament in apt words provided against. The Company dishonourably, and I do not hesitate to say it, attempts in this manner to evade or at least postpone an obligation that it undertook and is recreant to a solemn obligation to the husband who relied upon it that in case of his death his wife would be immediately provided for, but the widow now finds herself met by all these legal exceptions wholly devoid of merit and the attempt is by dilatory proceedings to further evade the payment of a just debt. The Company indeed has brazen effrontery to enter a Court of Justice and advance such a contention. It is a patent case *ex debito justiiæ* for the entry of a speedy judgment and the learned judge in the Court below made the proper order, an order for judgment. That order has been appealed against but it is a futile appeal and cannot be listened to. The case, in my opinion, is one that calls for expedition and the immediate cessation of any further delay and being so convinced of this I feel constrained to dissent, with the greatest respect to my brothers, from the conclusion arrived at by the majority that time be taken to consider the judgment of the Court upon the appeal. I am perfectly aware that to dissent is very unusual, but the case is also very unusual, in fact unprecedented, and tends to throw obloquy upon all life insurance companies, that such a flagrant breach of contract should be perpetrated and such a despicable breach of duty to fail in complying with a solemn contract made with the husband for the benefit of his wife in the event of his decease. It is such a manifestation of broken pledges that when noised abroad and becoming known will assuredly cause shudders of horror on the part of the insured public that notwithstanding every care the widow and orphan may languish and

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starve because of the despicable conduct of the insurance company when the provider is gone. This case is one that beggars description and natural justice calls for the severest animadversions at the hands of the Court. It is pleasing to be able to say that the present case is an isolated one and possibly the sole one of its character. The history of life insurance companies in Canada has been an honourable one. I had occasion in *Hanley* v. *Corporation of the Royal Exchange Assurance of London, England* (1924), 34 B.C. 222, to make some rather stringent observations upon the conduct of the fire insurance company where liability was denied in what I considered a plain case, and in that case, at p. 238, I quoted the language of Vice-Chancellor Malins in *Mackie* v. *The European Assurance Society* (1869), 21 L.T. 102. The Vice-Chancellor there said:

"Having raised these objections, fatal to the public and to the success of the office, and most unwisely taken, and frivolous and ridiculous in themselves, I fear I can only make a decree that they are bound to the terms of the policy, and must make reparation for all damage, with interest on the money. I should be glad if I could make them pay damages for the injury which this defence has caused the plaintiff; it could not have originated with the respectable directors or solicitors, but the miserable officials."

MCPHILLIPS, J.A.

I likewise regret that it cannot be ordered that the defendant Company do pay damages which this defence has caused the plaintiff, a widow left provided for as the husband thought, but left penniless by the action of the defendant Company postponing payment and advancing such frivolous grounds of defence. I unhesitatingly affirm the order for judgment and do so at the earliest moment.

The appeal should be dismissed.

MACDONALD, J.A.

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

Appeal dismissed.

Solicitors for appellant: *Macdonald & Laird.*
Solicitor for respondent: *R. P. Stockton.*

REX v. CUMYOW.

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Criminal law — Practice—Procuration—Evidence—Corroboration—Conviction—Appeal—New evidence—Application for postponement of appeal —Criminal Code, Secs. 216(d) and 1002.

On appeal from a conviction on a charge of procuring a girl to become a common prostitute counsel for the accused moved for a postponement of the appeal until the next sittings of the Court on the ground that shortly after the conviction and nearly two months prior to this application he met one A. on the street who told him that he could procure evidence to shew the girl in question was a common prostitute when she first met the accused but he did not give the names of the witnesses who would give this evidence; that since so meeting A. he had been unable to find him but expected to be able to do so and obtain the evidence before the next sittings of the Court.

Held (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the facts disclosed in the affidavit are made in most general terms and are too shadowy to support an application for postponement, the allegation of new evidence not being directed with that degree of certainty which would justify the Court in acting upon it.

Held, further, affirming the conviction that there was evidence upon which the magistrate could find that there was corroboration within the meaning of section 1002 of the Criminal Code.

APPEAL by accused from his conviction by the police magistrate at Vancouver on the 23rd of October, 1925, for having unlawfully procured one Marion Wilson to become a common prostitute. The evidence of the girl was that the accused took her to a room in a hotel and on one evening induced her to have connection with two men and on each of two other evenings he induced her to have connection with three men; that each of these men, who were Chinamen, paid her $5 and all this money she paid over to the accused. On cross-examination she stated that the only time previous to this that she had had connection with any one was once with a man to whom she was partly engaged. The magistrate found the girl's evidence was corroborated by the conduct of the accused in engaging the rooms in the hotel in which the girl met these men. On the hearing of the appeal, counsel for the accused applied for a postponement of the hearing of the appeal until the next sittings of the Court on

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the ground that he had reasonable expectations to believe that he would have further evidence which would materially affect the guilt or innocence of the accused; an affidavit in support reciting that nearly two months prior to the hearing of this appeal, but after the trial before the magistrate, counsel for the accused met one Andrews on the street in Vancouver who told him that he could procure evidence that the girl Marion Wilson had not told the truth in the witness-box as the evidence he would procure would prove that she was a common prostitute when she first met the accused. He did not mention the names of the witnesses who could give this evidence. There was the further evidence that since meeting Andrews, counsel had made every effort to again get in touch with him but he had been unable to locate him as he had been away from town but that he would be able to get the evidence before the next sittings of this Court in January next.

The appeal was argued at Vancouver on the 25th and 26th of November, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

A. D. Taylor, K.C., for the accused, moved to have the appeal postponed until the January sittings in order to obtain further evidence. If it can be shewn she was a common prostitute then accused is not guilty of the charge. Considering the evidence that has been given of this girl and her own evidence, it is only fair to the accused to give me an opportunity of obtaining this evidence: see *Rex* v. *Edwards* (1912), 8 Cr. App. R. 38 at p. 43; *Rex* v. *Kurasch* (1917), 13 Cr. App. R. 13 at p. 14; *Rex* v. *Walker and Malyon* (1910), 5 Cr. App. R. 296.

W. M. McKay, for the Crown: The Court has discretion to grant the postponement if the circumstances warrant it. We submit that the affidavit in support is not sufficient to warrant an extension. Assuming Andrews did make the statement to counsel alleged, there has been ample time to get the evidence and there is no assurance that it will be forthcoming at the next sittings of the Court: see *Rex* v. *Grosvenor* (1914), 10 Cr. App. R. 230.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the application for a

postponement which is asked to enable new evidence to be obtained. The principles upon which the Court of Criminal Appeal in England has acted when new evidence is sought to be admitted, are stated by Mr. Justice Darling in the most recent case in that Court, *Rex* v. *Mason* (1923), 17 Cr. App. R. 160. Now that was an appeal against conviction, and application for leave to offer further evidence. Mr. Justice Darling said, after dealing with the facts:

"It is now really asked that there should be a new trial, which this Court is not empowered to order, and that we should hear certain witnesses whose names have been mentioned, and then consider the whole of the trial in the light of that new evidence. . . . This Court has to be convinced of very exceptional circumstances before it will reconsider the verdict of a jury in the light of fresh evidence which has not been laid before the jury, and which, in some cases, might have been put before the jury at the trial."

In other words they were proposing there, as they are proposing here, that the Court of Appeal should try the case instead of the original tribunal constituted for the trial.

"There is nothing in the suggested new evidence of the witnesses to cause the Court to hold what would be a retrial. There is one important matter. It was said that it was not a fact that the defence of the appellant was not thought of until after the police court proceedings, but had been thought of all along, and that before his arrest he had sent a letter to a Miss Stewart accusing Vivian of the crime, which letter Miss Stewart had destroyed. We have had produced to the Court a number of letters to and from Miss Stewart, and if there was such a letter it is quite inconsistent with the letters we have seen. We also think it unnecessary to call Miss Stewart, as her evidence would only go to prove that appellant set up his defence three weeks earlier than he undoubtedly did."

There is another case, *Rex* v. *Boss* (1921), 16 Cr. App. R. 71. This was an application for leave to appeal against conviction and to call further evidence. Let us look at the evidence proposed to be offered there. Counsel for the Crown said:

"The only point calling for report is that at the trial no witness was available who could testify that appellant's mind had been seriously affected during his military service abroad in the war. One had now come forward voluntarily who had served in the same company and seen his demeanour and conduct and his subjection to epileptic seizures. An account of what this witness, now in Court, could say had been duly filed with the registrar. The trial lasted from 10 a.m. to 9 p.m. and there were four women on the jury."

The Chief Justice said:

"We shall follow *Lumb* (1912), 7 Cr. App. R. 263 . . . in sending the notes of the fresh evidence to the Home Secretary. It was undesirable

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that a mixed jury should find a verdict at such an hour after so long a day, and perhaps what was criticized as omissions from the learned judge's summing up was due to his desire to shorten the proceedings."

He was entirely dissatisfied with the manner in which that case had been tried and yet refused the application to admit fresh evidence. When we consider the reason for this it is quite apparent how important it is to the administration of the criminal law. As I pointed out a few moments ago, we have exactly the same discretion in civil cases as is given by the statutes of 1923 in criminal cases. The Court of Appeal Act provides that the Court may admit fresh evidence, but the Courts have affirmed by a long course of decisions and this Court has reaffirmed those decisions many times to my knowledge, that there are two things essential to the admission of new evidence. I will put it this way: If evidence is discovered after the trial two things are necessary: first, it is necessary to shew that all due diligence was taken to have that evidence at the trial, and secondly, the new evidence must be such as to be practically decisive of the case. That is founded on sound reason and judgment, the reason being that the Court of first instance is the tribunal to decide the facts, and when it decides the facts the Appellate Court is in general bound by the decision of the Court of first instance. All parties have a right to have the decision of the Court below, where credibility comes into question; in other words, the Court of Appeal ought not to substitute itself for the jury in one case or for the judge who is sitting as a jury in the other, and try the case without reference to the judge or jury. That is the reason for the rule and that rule applies with equal force to a criminal case as to a civil one. Here, we have nothing at all before us. Counsel relates that he met one Andrews on the street who told him he could procure evidence that the complainant had told an untruth in the witness-box, that when she said she had not been a common prostitute he could prove she had been one. It transpires that this offer was made two months ago and that all the parties are here in the city, the girl living with her parents at home. Here we have counsel coming before us today and asking us to postpone the trial on such a statement as that. If counsel may obtain a postponement of a case on a statement of that kind we

should never have a proper enforcement of the law. Therefore I have not the slightest hesitation in saying that the hearing of the appeal should not be postponed.

MARTIN, J.A.: This application is called on for hearing at this Court and counsel for the appellant asks us not to proceed with the hearing now but to postpone it because he has reasonable expectations to believe, on the circumstances set out in his affidavit and statements made to us and not controverted in any essential particular, that before the next sittings of this Court, which begin in the month of January, very shortly to come on, he will have further evidence which will materially affect the guilt or innocence of the convict.

Now, the nature of the application must be borne in mind. It is not now an application to review the evidence before us, but an application to postpone the hearing so that counsel may have an opportunity owing to exceptional circumstances of the case and discovered since conviction despite due diligence on his part, to bring that evidence before this Court. The granting of such an application, that is, the postponement of this appeal, is of course a matter of discretion in this Court, an inherent discretion, which is not mentioned in the statute or the Criminal Code, because the question as to when appeals before a Court shall be brought on or postponed or adjourned is something solely inherent in the Court and would not be mentioned in the statute and is not so mentioned. By section 1021 of the amended Criminal Code in 1923 the powers conferred on this Court, if it thinks it necessary or expedient in the interests of justice, it has the discretion to allow further evidence to be given. Upon that statute numerous decisions are to be found in the English Court of Appeal, and in that one respect the language of the English statute is the same as ours. All through the reports, as I had occasion to make note recently, in every one of these Criminal Appeal Reports, the striking thing about the cases is the very wide latitude the Court allows itself in the interpretation of that new power conferred upon it in the ever varying circumstances of each application. Of course, there is a reason for that, because the issues in criminal cases are

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entirely and fundamentally distinct from the issues in civil cases and the Court has to exercise its functions under circumstances fundamentally different from those in civil cases. For this reason in criminal cases from first to last the onus is on the Crown to prove a prisoner guilty, as we had occasion recently to decide in the case of *Rex* v. *Payette* (1925), 35 B.C. 81, and for that reason the question of reasonable doubt is always exercised in favour of the prisoner. To that fundamental rule of criminal law there is nothing which corresponds in civil law, and for that reason the question of the weight of evidence becomes of the first importance because it is unnecessary for this Court to say, where it has, as we have here, most fortunately, that power of ordering a new trial, which the English Court unfortunately has not (and therefore its judgments and manner of dealing with applications must be read in that different light) it is unnecessary, I repeat, and impossible in law for this Court to say it should now reject evidence which should have gone to the jury because it would not have been decisive because no one can tell what would have been decisive with a jury; all that is necessary for this Court to say, in view of the new grave duty imposed on us by Parliament, is whether or not it is necessary or expedient in the interests of justice that new evidence should be adduced. If it might substantially sway the tribunal below one way or the other then this Court would not be discharging its duty if it failed to give the prisoner the benefit of that. Therefore, it cannot but be apparent to us that it is not for the appellant to shew that the new evidence would be decisive but that it might reasonably induce the jury or the trial tribunal below whether jury or non-jury, to change its view in regard to the guilt of the accused. Therefore, I am of opinion that in the present case, having regard to all the circumstances which have been put before us, it would not be, as the statute says, expedient or necessary in the interests of justice to refuse this application to postpone the trial so that counsel may have the opportunity of submitting to this Court this fresh evidence, if it can be obtained, the fresh evidence which he thinks he has discovered after no lack of diligence. If I had the slightest reason to believe this was an appli-

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cation for the purpose of delaying justice or was not *bona fide* I should have no hesitation at all in agreeing with my learned brother, for whose opinions I have the greatest respect, that we should refuse it, but for the reason that those elements do not appear I am equally of opinion that it would not be expedient in the interests of justice to refuse this postponement for the few weeks involved. I would therefore grant the application for postponement to the January sittings.

MARTIN, J.A.

GALLIHER, J.A.: I would refuse the application. What is before us is of such an indefinite character I do not feel there is anything upon which to base an application for adjournment. The statement is that one Andrews whom counsel met on the street stated that he could obtain evidence in favour of the accused which was not available at the trial, whatever that may be, and that is supported to a certain extent by saying he expected to be able to adduce evidence as to the previous character of the complainant, not at any time or this particular time, it may be five years past. As I stated during argument, I always feel like giving every reasonable opportunity to have the person accused defend himself and take advantage of anything to that end; but I think that we should have something more definite to go upon than we have in this case. It is really on the particular circumstances as outlined in this application that I am refusing the application. Without in any way casting doubt at all on Mr. *Taylor's* genuineness in the matter, still as I said before it is all hazy and indefinite, even as to the nature of the evidence which is sought to be adduced.

GALLIHER, J.A.

MCPHILLIPS, J.A.: Criminal appeals must always be matters of anxious concern. The Parliament of Canada in its wisdom has thrown a statutory duty upon us which we cannot, of course, shirk, and must discharge.

MCPHILLIPS, J.A.

The question is first, to what extent is the Court of Appeal called upon to inquire into the facts and the law of each case? The language of Parliament is "If it thinks it necessary or expedient in the interests of justice." This is a wide authority and is only controlled by the interests of justice. Now, the

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interests of justice is to see to it that no innocent person shall have his life forfeit, or go to gaol. In this particular case the allegation made is that the complainant is a prostitute or was a prostitute at the time of the committing the offence, if so, then the finding of the magistrate in the Court below would be wrong. The new evidence that is said to be obtainable is directed to that one essential or material factor. When I find the magistrate, a member of the Bar, exhibiting in his reasons a doubt as to whether he arrived at the proper conclusion, it certainly makes my duty a difficult one and one requiring grave inquiry into the circumstances. It is not fictional at all that innocent men are sometimes sent to gaol. The fact of the matter is the change in the law of England and the change in the law in Canada, enlarging the powers of the Court of Appeal, was because of a quite modern case where a man served some six years in gaol and was entirely innocent. It so shocked the English people that it immediately impelled them to change the law and the Imperial Parliament did so, and we, in our Dominion Parliament passed like legislation. It would certainly be a deplorable thing if one, being innocent, is sent to gaol.

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Now, the circumstances in this case are sordid. A case of this kind is always one one would wish never to be required to have anything to do with. We know the usual character of the testimony that is adduced, that some of the people who are giving testimony are pursuing lives which throw a great deal of doubt upon their credibility, and when I find the learned magistrate himself apparently having doubt in his mind, conscientiously no doubt, and relying upon the Court of Appeal to put him right if he should be wrong, I am disposed to look with favour on the reception of further evidence, and when I see here a formal affidavit, with the assurance of counsel that the application is *bona fide*, I hesitate and do not feel justified in shutting the door against this claimed to be obtainable further evidence. In any case, we are merely now asked for a postponement for a short period of time. With great respect, I certainly do not feel impressed by any of the authorities referred to by my brother, the Chief Justice. They cannot be deemed controlling authorities which inhibit me from exercising the powers Parlia-

ment has imposed and that is, to as far as possible accomplish the interests of justice, *i.e.*, the ends of justice.

I would grant the postponement of the hearing of the appeal to the January sittings, a very short time and at that sittings the first day of the sittings, the application to introduce the new evidence may be opened. The evidence should then be immediately available, and if allowed to be adduced no further delay in the hearing of the appeal need occur.

MACDONALD, J.A.: To my mind, with deference to contrary views, applications of this nature should not be lightly granted. I have taken the trouble to read the evidence, not to pre-judge the application, but that I might to some extent determine this matter in the light of all the facts. I feel it is not unjust to hold that this affidavit is altogether too shadowy to support the application for an adjournment. The allegation of new evidence is not directed with that degree of certainty which would justify the Court in acting upon it. There is simply a statement that certain evidence might be obtained from unnamed parties, a statement made in the most general terms.

MACDONALD, J.A.

Motion dismissed.

27th November, 1925.

MACDONALD, C.J.A. (oral): This is a case which we reserved until this morning.

There were really two matters before the Court, the motion for leave to appeal on the facts and the appeal on questions of law. After giving the matter careful consideration I have no doubt that the motion should be dismissed, and that the appeal also should be dismissed. There was ample corroboration.

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MARTIN, J.A. (oral): I am of the same opinion. I was anxious in this case to make sure that there was no decision which would in any way conflict with the opinion towards which our minds seemed to be inclining, and I have, therefore, carefully examined all the reported decisions down to this day and I find nothing to clash at all with that view. On the contrary, there is a decision of the English Court of Appeal in *Rex* v. *Staub* (1909), 2 Cr. App. R. 6, which is of assistance and

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therein is an expression which is very appropriate to this case. The Court in giving judgment viewed the conduct of the girl and her attitude towards the matter as being that of one who was easily led away, and I think that is a very appropriate expression to what happened here. I have only this to add, in relation to the decision of the Common Serjeant in the Central Criminal Court (the Old Bailey) in *Rex* v. *Christian* (1913), 78 J.P. 112, that after carefully considering that case, there is nothing at all which conflicts with the view we arrive at, and, if I may say so, I should be in entire accord with the Common Serjeant upon the facts of that case, on which he has relied, the particular facts and circumstances which he thought took it out of anything in the way of procuring. The other cases to which it might be necessary to refer are cited in Russell on Crimes, 8th Ed., Vol. 1, p. 919.

While arriving at this decision I am not in accord, with all respect, to some of the expressions made by his worship the convicting magistrate, and I think they are somewhat inconsequent, nevertheless there were facts before him which would, regarding them in their proper legal way from any point of view, sustain the conviction, and therefore it would not be proper for us to interfere with it.

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GALLIHER and MCPHILLIPS, JJ.A. concurred in dismissing the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: On the facts I would not grant leave to appeal. As to whether procuring in the legal sense is established, there is evidence that she went to the hotel not of her own free will, but as a result of the influence and persuasion of the accused. The magistrate finds that she was a rather weak girl, meaning, I take it, that she was somewhat weak minded and therefore the more easily persuaded. The evidence is ample to constitute the offence of procuring. As to corroboration, the facts and circumstances surrounding the arrest and the registration for the rooms at the hotel afford sufficient evidence of corroboration.

Appeal dismissed.

ICE DELIVERY COMPANY LIMITED v. PEERS AND CAMPBELL.

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ICE DELIVERY CO. v. PEERS

Master and servant—Implied term in contract of service—Duty of servant to act in good faith—Enticing customers—Damages—Injunction.

The plaintiff Company, ice manufacturers, employed the defendants for some years in making delivery of ice to its patrons. Shortly before the termination of their employment the defendants, deciding that they would start in the ice business themselves in partnership, and with this in view, informed the plaintiff's customers to whom they were delivering ice that they would shortly begin business on their own account and expressed the hope of doing business with them. They carried out their intention and subsequently obtained the custom of many persons to whom they had delivered ice while in the plaintiff's employ. The plaintiff obtained judgment in an action for damages for loss of business by reason of the defendants soliciting their customers both before and after leaving the plaintiff's employ and for an injunction restraining the defendants from soliciting their customers.

Held, on appeal, affirming the decision of GRANT, Co. J. (MARTIN, J.A. dissenting), that the defendants in breach of their duty to the plaintiff did while in its employ and during hours of service solicit for themselves their employer's customers, and there was evidence to sustain the finding of damages.

Held, further, reversing the decision of GRANT, Co. J., that the injunction should be set aside as an injunction should not be granted against a servant using knowledge which his memory alone retains and that knowledge is not of a confidential character.

APPEAL by defendants from the decision of GRANT, Co. J. of the 4th of July, 1925, in an action for damages for loss of business by means of the defendants soliciting the plaintiff's customers both before and after leaving the plaintiff's employ, and for an injunction restraining the defendants from soliciting business in the plaintiff's district. The plaintiff was engaged in the business of manufacturing, selling and distributing ice in the City of Vancouver. For about fifteen years prior to the events complained of the defendants were in the employ of the plaintiff Company in delivering ice. The defendants' duties were to solicit and obtain customers for the Company and to deliver ice to them. About the 21st of February, 1925, both defendants left the plaintiff's service and commenced a business

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known as the Pacific Ice Co. in competition with the plaintiff. The plaintiff says that prior to leaving its employ the defendants obtained a full and complete knowledge of the plaintiff's business particularly in the west end of Vancouver; that they conspired together to leave the plaintiff's employ and set up a business in competition with the plaintiff and while still in the plaintiff's employ solicited the plaintiff's customers to leave it and to purchase the ice they required from the defendants. The plaintiff succeeded on the trial.

Statement

The appeal was argued at Vancouver on the 5th and 6th of November, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers (*DesBrisay,* with him), for appellants: A servant is entitled to solicit business while in another's employ from his employer's customers for himself after his services are terminated: see *Nichol* v. *Martyn* (1799), 2 Esp. 732; *Robb* v. *Green* (1895), 2 Q.B. 1 at p. 12 and on appeal p. 315 at pp. 318-9; *Louis* v. *Smellie* (1895), 73 L.T. 226 at p. 228; *Lamb* v. *Evans* (1893), 1 Ch. 218 at p. 236; *Herbert Morris, Lim.* v. *Saxelby* (1915), 84 L.J., Ch. 521 at p. 531. We have not violated any legal obligation: see Labatt on Master and Servant, Vol. 1, p. 874; Halsbury's Laws of England, Vol. 20, p. 126, par. 246; *Yovatt* v. *Winyard* (1820), 1 J. & W. 394; *Morison* v. *Moat* (1851), 9 Hare 241; *Merryweather* v. *Moore* (1892), 2 Ch. 518 at p. 524; *Measures Brothers, Limited* v. *Measures* (1910), 1 Ch. 336 at p. 346; *Amber Size and Chemical Company, Limited* v. *Menzel* (1913), 2 Ch. 239; *Alperton Rubber Co.* v. *Manning* (1917), 86 L.J., Ch. 377; *In re Irish. Irish* v. *Irish* (1888), 40 Ch. D. 49 at p. 51; *Mason* v. *Provident Clothing and Supply Company, Limited* (1913), A.C. 724.

J. W. deB. Farris, K.C. (*Brown, K.C.,* with him), for respondent): Between master and servant there is an implied contract based on the theory of good faith, which governs: see *Robb* v. *Green* (1895), 64 L.J., Q.B. 593 at pp. 597 and 600. There is no question that the defendants have appropriated the plaintiff's business: see *Helmore* v. *Smith* (1886), 56 L.J., Ch. 145 at p. 148; *Measures Brothers, Lim.* v. *Measures* (1910),

79 L.J., Ch. 707 at pp. 710-12; *Neal Bros. Ltd.* v. *Wright* (1923), 3 W.W.R. 1168. If a servant gets a list of his employer's customers, he is not entitled to use it to the detriment of his master: see *Herbert Morris, Lim.* v. *Saxelby* (1916), 85 L.J., Ch. 210 at pp. 220 and 225. On the question of damages he lost more than $500 in one month.

Mayers, in reply: The injunction is a violent invasion of the rights of freedom.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.: This action was brought for damages and for an injunction. The defendants had been employed by the plaintiff for some years delivering ice and shortly before their terms of employment would terminate, decided that on the expiration thereof, they would commence business in partnership on their own account, and with this in mind informed the plaintiff's customers to whom they were delivering ice that they would shortly begin business on their own account, and expressed the hope of doing business with them. They carried out their intention and obtained the custom of many of the persons to whom they had, while in plaintiff's employ, delivered ice.

The learned County Court judge assessed damages in the sum of $500 and also enjoined the defendants from supplying ice or soliciting custom to and from those who had been customers of the plaintiff when the defendants were in its employ.

MACDONALD, C.J.A.

The law on the subject has been fully presented in argument from *Nichol* v. *Martyn* (1799), 2 Esp. 732, down to the latest authorities in our Courts. The defendants took no list of the plaintiff's customers, nor did they make any memoranda thereof, but carried their names and addresses in their memories. I think that the defendants, in breach of their duty to the plaintiff, did, while in its employ and during the hours of service, solicit for themselves their employer's customers. And I think, moreover, that there was evidence to sustain the finding of damages. *Neill Bros.* v. *Wright* (1923), 3 W.W.R. 1168. This term of the judgment should therefore be sustained.

As regards the order of injunction, however, I think it must be set aside. I have considered the several cases to which we

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have been referred by counsel and find that none of them has gone the length of sustaining the respondent's contention. It may be that had the defendant's taken a list of the plaintiff's customers for the purpose of using the same for their own purposes, and so used, or threatened to so use it, an order enjoining them might have been made, but the judges have stopped short of granting an injunction against a servant using knowledge which his memory alone retains, when that knowledge is not of a confidential nature.

In *Louis* v. *Smellie* (1895), 73 L.T. 226, Lindley, L.J., with whom the other members of the Court concurred, said, at p. 228:

"What I think the plaintiff is entitled to is an injunction to restrain the defendant, his servants and agents, from making use of any copies or extracts from the plaintiff's register of agents, or index, or any memorandum made or obtained by the defendant when in the plaintiff's employ relating to any person named in those books or either of them. That, I think, is as far as we can go. If the defendant happens to remember that there is an agent whose address he can find out from the ordinary directories, he is at liberty to do it."

MACDONALD, C.J.A.

In *Amber Size and Chemical Company, Limited* v. *Menzel* (1913), 2 Ch. 239 at p. 242, the case of *Cristol* v. *Powell,* unreported, is referred to, in which Lord Coleridge, in July, 1912, made an order restraining an ex-servant from directly or indirectly soliciting his late master's customers. He had not made any list but relied on his memory. In January, 1913, the Court of Appeal is said to have reversed this decision.

The appeal should therefore be allowed in part and dismissed in part. The appellants should have the costs of the appeal, and the respondent the costs of the action.

MARTIN, J.A.: This appeal in my opinion turns upon the decision of Lord Kenyon, C.J., in *Nichol* v. *Martyn* (1799), 2 Esp. 732; 5 R.R. 770, because all the essential facts, as I regard them, are the same, and unless that decision has been overruled we should I think follow it, even if, like Lord Kenyon, we may feel that "the conduct of the defendant may perhaps be accounted not handsome, but I cannot say that it is contrary to law."

MARTIN, J.A.

No case has been cited to us wherein any higher Court has questioned that decision and nothing of the kind is to be found

in the citations of it by leading text-writers such as Addison on Contracts, 11th Ed., 929; Macdonell on Master and Servant, 2nd Ed., 177; and Halsbury's Laws of England, Vol. 20, p. 126, wherein on its authority this statement is made, par. 246:

"There is, however, nothing illegal in a servant, during his employment, endeavouring merely to recommend himself to his master's customers with a view to securing their custom should he subsequently set up in business himself."

And Addison says on its authority:

"But, while he must not attempt to draw away his master's customers, there is no law which prevents him from soliciting prospective custom from them at some future period when he hopes to be able to set up in business for himself."

I have not overlooked the observations made by Mr. Justice Hawkins in *Robb* v. *Green* (1895), 2 Q.B. 1, wherein at p. 13, he in effect seeks, as a single judge, to restrict the direct effect of Lord Kenyon's decision by speculating what his view of the matter might have been "at the present day" but at the end of his observations properly says that "each case must depend on its own circumstances" which in the case before him were that the defendant had "fraudulently undermined" his employer by secretly copying from his master's order book a list of the names and addresses of his customers with the intention of later making use of it to his own advantage (something very different from what was done in *Nichol* v. *Martyn*), and the decision of the Court of Appeal therein, *ib.*, p. 315, must be read and applied upon that basis of fact, and no hint is given by that Court of any unsoundness in Lord Kenyon's views. Lord Esher, M.R., grounds his decision upon this view of the facts, p. 317:

MARTIN, J.A.

"It is impossible to suppose that a master would have put a servant into a confidential position of this kind, unless he thought that the servant would be bound to use good faith towards him; or that the servant would not know, when he entered into that position, that the master would rely on his observance of good faith in the confidential relation between them. Where the Court sees that there is a matter of this kind which both parties must necessarily have had in their minds when entering into a contract, that is precisely the case in which it ought to imply a stipulation."

And Lord Justice Kay, p. 319:

"It is enough for that purpose to say that, where we find a servant using, after he has left his employment, a document surreptitiously compiled from his master's book to the detriment of his master, there is a breach of trust, if not a breach of contract."

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With all respect I am unable to see upon what reasoning such expressions on such facts can be expanded to cover those in *Nichol* v. *Martyn,* or at Bar. I would, therefore, allow the appeal.

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

McPHILLIPS, J.A.: I agree with my brother the Chief Justice in the allowance of the appeal in part only.

MACDONALD, J.A.

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

Appeal allowed in part, Martin, J.A. dissenting in part.

Solicitors for appellants: *Bourne & DesBrisay.*
Solicitors for respondent: *Ellis & Brown.*

MORRISON, J. (In Chambers)

1926

Jan. 21.

IN RE SUCCESSION DUTY ACT AND WILSON.

Taxation—Succession duty—Property outside Province—Death of owner outside of Province—R.S.B.C. 1924, Cap. 244.

Property outside of the Province is not subject to succession duty unless the deceased both died within the Province and was domiciled within the Province.

IN RE SUCCESSION DUTY ACT AND WILSON

Statement

PETITION for a declaration that certain property is not subject to succession duty. Heard by MORRISON, J. in Chambers at Vancouver on the 6th of November, 1925.

Donald Smith, for the application.
Killam, for the Minister of Finance.

21st January, 1926.

Judgment

MORRISON, J.: The deceased, Hector Wilson, who had lived in Vancouver up to March, 1925, with his wife and children, returned to Scotland and, on the 20th of June, 1925, died in the City of Aberdeen leaving property situate within British

Columbia and also personal property situate outside British Columbia. The domicil of the deceased, at the time material to the matters in the petition, was in British Columbia. A demand has been made by the deputy minister of finance for payment of the succession duty on the whole net estate of the deceased amounting to $59,072.45, situate both inside and outside the Province, on the ground that the deceased's domicil was in British Columbia. The payment of duty in respect of that portion of the estate situate outside the Province is objected to. Section 5 of the Succession Duty Act enacts:

"5. (1) Save as aforesaid, the following property shall be subject, on the death of any person, to succession duty as hereinafter provided, to be paid for the use of the Province over and above the probate duty prescribed in that behalf from time to time by law:

"(*a.*) All property of such deceased person situate within the Province, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto was domiciled in the Province at the time of his death, or was domiciled elsewhere, passing either by will or intestacy."

Section 2 of the interpretation clause of the Act provides:

"'All property situate within the Province' includes all policies of insurance, wherever entered into or wherever payable, and all mortgages upon property of any kind situate or partly situate within the Province, and all choses in action of whatsoever kind, wheresoever entered into or wheresoever payable, all shares, stocks, bonds, debentures, and other securities for money, no matter where the corporation or other body issuing the same may be located, belonging to the estate of any person dying in the Province, who was at the time of his death domiciled in the Province."

It is contended by the petitioner that there are two factors which must be present in order to make property outside the Province liable to duty within the Province: (1) The death must occur in the Province; (2) the deceased must be domiciled in the Province. And he urges that, owing to the absence of the first factor (the death having occurred without the Province), the personal property in Scotland is not liable. I agree. These provisions are specific statutory enactments and the maxim *mobilia sequuntur personam* cannot be employed to displace the clear unambiguous meaning of the words.

I, therefore, hold that the personal estate of the deceased, Hector Wilson, mentioned in paragraph 8 of the petition is not liable to succession duty in this Province.

Petition granted.

MORRISON, J. (In Chambers)

1926

Jan. 22.

BRASH & JENKINS v. VULCAN IRON WORKS.

Practice—Action in tort in County Court—Defendant counterclaims for sum on a contract—Plaintiff alleges sum due him on said contract—Total sum involved exceeds jurisdiction of County Court—Application to transfer proceedings to Supreme Court—R.S.B.C. 1924, Cap. 53, Sec. 23.

BRASH & JENKINS v. VULCAN IRON WORKS

The plaintiff brought action in the County Court claiming in tort $1,000. The defendant counterclaimed for $500 due by the plaintiff under a certain contract in answer to which the plaintiff claimed the defendant owed them $900 in respect of the same contract.

An application by the plaintiff for an order to remove the proceedings into the Supreme Court under section 23 of the County Courts Act was granted.

APPLICATION by plaintiffs that the whole cause be transferred from the County Court to the Supreme Court. The plaintiffs brought action in the County Court claiming in tort the sum of $1,000. The defendant counterclaimed for $500 money alleged to be due from the plaintiffs under a certain contract and the plaintiffs in answer allege that the defendant owes them $900 in respect of the same contract. Heard by MORRISON, J. in Chambers at Vancouver on the 18th of January, 1926.

Statement

Bray, for plaintiffs.

J. A. Campbell, for defendant.

22nd January, 1926.

MORRISON, J.: The plaintiffs in the County Court are claiming in tort the sum of $1,000. The plaintiffs are contractors and the tort arose in the course of their work for the defendant. The defendant counterclaims for $500, money alleged to be due by the plaintiffs under a certain contract. The counterclaim is, of course, a substantive claim. The defendant having brought in this claim the plaintiffs allege that the defendant owes them $900 in respect of the same contract. Should it turn out that the plaintiffs succeeded on both claims and the defendant on the counterclaim the learned County Court judge would then be

Judgment

adjudicating respecting a sum of $1,400. The plaintiffs now apply to remove the proceedings into the Supreme Court under section 23 of the County Courts Act to the end that both the claims and counterclaim may be disposed of. There is no doubt that the cumulative effect of the plaintiffs' claims is to bring the amount beyond the limit within which the County Court has jurisdiction. The plaintiffs being advised they had a good cause of action in tort, chose to pass by, for the time being, their claim on the contract. The defendant chose to bring his cross-action in contract, to which the plaintiffs have a perfect right to introduce their claim in contract by way of defence to that cross-action. The different causes of action may thus be incorporated as it were into one suit and may be and indeed should be tried at the same time. If the sum thus involved in the plaintiffs' two causes of action exceed the $1,000 limit then section 23, *supra,* may be invoked.

Judgment

The plaintiffs and the defendant have claims under mutual debts. The plaintiffs in addition have a claim for damages in tort. The Judicature Act in order to avoid multiplicity of actions provides, as against cases of this sort, by making ample provision for disposing of them together. The order will go in terms of the motion.

Order accordingly.

MCDONALD, J.

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MORGAN v. SHAW

MORGAN v. SHAW *ET AL.*

Promissory notes—Two notes due on different dates—Collateral agreement—If one note not paid at maturity amount of both become due—Place for payment named—Note not presented for payment—R.S.C. 1906, Cap. 119, Sec. 183—Costs—Marginal rules 255 and 260.

The plaintiff brought action on two promissory notes. One fell due on the 10th of November, 1925, and the second on its face fell due on the 10th of May, 1926. A collateral agreement provided that if anyone or any part of either note was not paid at maturity then both immediately became due and payable. The first note was not paid at maturity but an action being brought for the amount of both notes the defendant paid into Court with denial of liability the amount of the first note. The second note had not been presented for payment at the place for payment named therein.

Held, that the acceleration clause did not relieve the plaintiff from the necessity of presenting the promissory note for payment, before action brought at the place named in the note, and that this was essential following *Croft* v. *Hamlin et al.* (1893), 2 B.C. 333.

Held, further, that as the defendant paid the amount of the first note into Court with a denial of liability and without any costs, under marginal rules 255 and 260 the plaintiff is entitled to the costs of the action up to and including the date of payment in and the defendant is entitled to the costs of the action thereafter.

Statement

ACTION to recover the amount due on two promissory notes. Tried by MCDONALD, J. at Vancouver on the 19th of January, 1926.

Gillespie, for plaintiff.
W. H. Campbell, for defendant.

26th January, 1926.

Judgment

MCDONALD, J.: The plaintiff sues on two promissory notes, the first of which, on its face, fell due 10th November, 1925, and the second of which, on its face, will fall due 10th May, 1926. By a collateral agreement under seal, it was provided that, in the event that the said promissory notes or any one (another promissory note included in the agreement having previously fallen due and been paid), or any part of the same was not paid at maturity, then all of the said promissory notes

should immediately become due and payable. The defendant made default in payment of the note which fell due 10th November, 1925, but later, with his defence, paid into Court with a denial of liability, the amount of that note. He counterclaimed for damages for misrepresentation in respect of the agreement, which counterclaim I dismissed at the trial on the simple ground that no such action lies, and it follows that the defendant must pay the costs of the counterclaim.

Admittedly the promissory note which, according to its face, falls due 10th May, 1926, has not been presented for payment at the place of payment named therein. It is contended by reason of the acceleration clause contained in the collateral agreement that this is not necessary and that, in any event, under section 183 of the Bills of Exchange Act it is not essential that a promissory note be, before action brought, presented for payment at the place named for payment. I think the first contention fails. The promissory note is sued on as such and remains a promissory note, notwithstanding the acceleration clause. So far as the necessity for presentment at the place named is concerned, I am, as I understand it, bound by the decision of the Full Court of British Columbia in *Croft* v. *Hamlin et al.* (1893), 2 B.C. 333. It is true that there has been a great conflict of judicial opinion throughout the various Provinces upon this question, but I feel bound to follow the decision of our own Court.

Judgment

The defendant, in paying into Court with a denial of liability, did not pay in any costs. In my opinion, the result is, that under Order XXII., rr. 1 and 6, the plaintiff is entitled to the costs of the action up to and including the date of payment in, and the defendant is entitled to the costs of the action thereafter.

The costs of the claim and counterclaim will be taxed in accordance with the above but no order for payment out should be made until after such taxations have taken place. (See Order XXII., r. 6).

Order accordingly.

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BOAK v. WOODS

BOAK v. WOODS AND MOORE.

Contract—Jockey club—Consideration for taking certain shares—Right to appoint certain directors and salary—Club regulations—Director disqualified if convicted of criminal offence—Conviction of director—Declared disqualified by Board—Action to restrain directors from refusing attendance at meetings and for salary.

The plaintiff entered into a contract with the Victoria Jockey Club Limited, undertaking to purchase $25,000 worth of stock of the Club in consideration for which he was to have the right to elect half the directors of the Club, and to a salary of $3,000 per year as a director. A regulation of the jockey club recited that "A director shall be disqualified if convicted of any criminal offence by a duly qualified and regularly constituted tribunal with lawful jurisdiction to make such conviction." The plaintiff was convicted of manslaughter. The Court of Appeal ordered a new trial and the Supreme Court of Canada restored the judgment at the trial, but directed the Court of Appeal to adjudicate upon the objections to the judge's charge to the jury. While the Court of Appeal had this under advisement this action was commenced to restrain the defendants from excluding the plaintiff from directors' meetings and for salary. A motion for an injunction was, by consent, turned into a motion for judgment, and the action was dismissed.

Held, on appeal, reversing the decision of GREGORY, J. (GALLIHER, J.A. dissenting) that the defendants excluded the plaintiff from the directorate on an alleged disqualification the nature and extent of which or the enforcement thereof are not disclosed in the material but merely referred to in an incomplete and insufficient quotation from an article of association which with other relevant articles should be before the Court. The facts not being sufficiently brought before the Court to sustain the action taken by the respondents, the plaintiff is entitled to succeed and the appeal is allowed.

Per MARTIN, J.A.: Motion for judgment should not have been refused because at the time the plaintiff was not lawfully "convicted of any criminal offence by a duly qualified and regularly constituted tribunal" within article of association F of the Victoria Jockey Club Limited upon which the defendants were relying.

Statement

APPEAL by plaintiff from the decision of GREGORY, J. of the 24th of September, 1925, in an action to restrain the defendants from excluding the plaintiff from attending meetings of the directors of the Victoria Jockey Club Limited and for a mandatory order directing the defendants to deliver to the plaintiff a cheque for $3,000 of the Jockey Club in favour of the plaintiff

which is held by the defendants. The plaintiff moved for an order to restrain the defendants as aforesaid. The plaintiff had entered into an agreement with the Victoria Jockey Club Limited whereby he agreed to purchase $25,000 worth of the stock of the Company in consideration for which he was to have the right to elect half of the directors and to receive $3,000 a year as a director. Regulation F of the articles of association of the Jockey Club provides that a director shall be disqualified "if convicted of any criminal offence by a duly qualified and regularly constituted tribunal with lawful jurisdiction to make such conviction." The plaintiff was convicted of manslaughter for running down and killing two men with his automobile and sentenced to four years' imprisonment. On appeal to the Court of Appeal a new trial was ordered and on appeal to the Supreme Court of Canada the judgment of the trial judge was restored, except as to the passing upon the judge's charge which was referred back to the Court of Appeal and decision on this was under consideration when the directors of the Jockey Club, in accordance with the above regulations, declared that the plaintiff was disqualified from attendance at its board meetings and refused to pay him $3,000 for one year's services as a director. The motion having been changed by consent into a motion for judgment, the action was dismissed.

Statement

The appeal was argued at Vancouver on the 25th of November, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

W. J. Taylor, K.C., for appellant.
No one for respondent.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.: The defendants profess to exclude the plaintiff from meetings of the directorate of the Victoria Jockey Club, on the ground that he was convicted of a crime. They profess to do this under a regulation of the Club, but they have not attempted to prove such a regulation, and the plaintiff far from admitting its existence denies it. But even in the absence of such a denial, the letter does not prove its existence.

MACDONALD, C.J.A.

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There is no proof either by sworn testimony or by admission of the plaintiff of the only document which could justify the defendants' conduct. They admit excluding him and allege, but do not prove, justification of it.

The appeal should be allowed, and judgment should be entered for the plaintiff with costs here and below.

MARTIN, J.A.: This appeal should be, I think, allowed. It appears that at the time the order appealed from was made, on 24th September, 1925, no final judgment had been pronounced on the appeal to the Supreme Court of Canada from the judgment of this Court, delivered on the 19th of March previous (reported in 35 B.C. 256), setting aside the conviction of the present appellant and ordering a new trial. That conviction was not, in my opinion, restored before, at least, the 6th of October last, when our judgment was delivered upon the question of misdirection which question was heard by us pursuant to the judgment of the said Supreme Court (1925), S.C.R. 525, which thus concludes, p. 532:

"There remains the ground of misdirection. This was not discussed at Bar and so far as appears from the material before us was not passed upon in the Court of Appeal. Moreover the charge of the learned judge is not in the record. Having regard to the further fact that the defendant was not represented on the argument of the appeal, we think the only course open to us is to remit the case to the Court of Appeal in order that that Court may pass upon the grounds of appeal based on misdirection."

MARTIN, J.A.

It appears from the material before us that this was the position taken by the appellant before the learned judge below, because in appellant's letter of 6th September to the respondents, he says:

"You are quite wrong in your conclusion. The conviction against me has been set aside, and does not now stand against me whatever may happen later. Surely you are not justified now in assuming that I will be ultimately convicted of a criminal offence, and depriving me of my rights as a director to attend board meetings, and also receive my cheque for $3,000."

This refers to the fact that the result of the said remission to this Court was thus pending and till it was decided the conviction stood vacated. And he took the further position that it was not the directors but the shareholders who, in any event, could declare his disqualification. Therefore I think the learned judge should not have refused the appellant's applica-

tion, because at that time he was not lawfully "convicted of any criminal offence by a duly qualified and regularly constituted tribunal" within article of association F of the Victoria Jockey Club Limited upon which respondents were relying.

The situation was a peculiar one, created by the unusual, not to say unprecedented course adopted by the Supreme Court in hearing an appeal in part only, and in effect making its judgment as to the validity of the conviction which we had set aside contingent upon the decision of this Court upon the ground remitted to us as aforesaid, which was of equal importance to the validity of the conviction as the others because no verdict of conviction based upon misdirection could stand or be restored.

But if the view be taken that after our said decision against any misdirection the conviction was restored and hence should now be regarded as valid by us though it should have been regarded as invalid by the learned judge below when he refused the appellant the relief he was entitled to at that time, then, to prevent these subsequent occurrences from prejudicing the appellant, we should place ourselves in the position of the learned judge below when the matter came before him and, pursuant to rule 5 "make [the] order which ought to have been made," and in such unusual circumstances I should give a more liberal effect to the second ground of appeal, *viz.*, that the order should be reversed "upon other good and sufficient grounds in law," than I would ordinarily give, if any, because of its uncertainty, and would allow any necessary amendment of it to be made. MARTIN, J.A.

Turning then to the material, I do not find therein any justification of the action of the respondents, the legality of which the appellant was protesting against on the several grounds aforesaid; they simply insisted and took the responsibility of relying upon a right of exclusion founded upon an alleged, yet disputed, disqualification the nature and extent of which or means of enforcement thereof are not disclosed in the material but merely referred to in an incomplete and insufficient quotation from an article of association which is not wholly before us as it should be with other relevant articles, in other words,

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the facts are not sufficiently brought before the Court to sustain the respondents in their action, doubtless owing to the unusual expedition shewn in the proceedings, the issuance of the writ, notice of motion, argument and judgment thereupon, all having, I notice, taken place on the same day. Therefore the appeal should be allowed and the application of the appellant granted.

GALLIHER, J.A.: This is an appeal from a judgment of GREGORY, J.

The ground of appeal is "error in holding that the Court recording a conviction against plaintiff was a duly qualified and regularly constituted tribunal, with lawful jurisdiction to make such conviction."

The matter arose in this way: At the Fall Assizes, 1924, in Victoria, the plaintiff was convicted of manslaughter before MURPHY, J., and a jury. An appeal was taken to this Court and argued on three grounds: (1) That the grand jury which found the bill of indictment was illegally constituted; (2) that the petit jury was illegally constituted; (3) objections to the judge's charge to the jury. A majority of the Court held that the petit jury was illegally constituted and granted a new trial. Some of the judges dealt with the grand jury question, upon which, opinion was divided, but none dealt with the question of the judge's charge to the jury, as the majority held a new trial should be had on the jury question. Leave was obtained by the Crown from the Supreme Court of Canada to appeal against the finding of this Court. The Supreme Court decided that this Court was in error, and restored the conviction but directed us to adjudicate upon the question of the judge's charge to the jury, which we did, finding against the accused. Before our decision on this latter point was announced, the present proceedings now in appeal were instituted. On the appeal coming on for hearing, Mr. *Taylor,* of counsel for the plaintiff, stated that he could not hope to succeed in asking us to question the jurisdiction of the Supreme Court of Canada, and in effect, though not in fact, asked for a dismissal of the appeal.

GALLIHER, J.A.

The present proceedings before Mr. Justice GREGORY, were upon motion for an order to restrain the defendants from

excluding the plaintiff from attending board meetings of the directors of the Victoria Jockey Club Limited, and for a mandatory order for directing the defendants to deliver to plaintiff a cheque for $3,000 of the Victoria Jockey Club Limited, in favour of the plaintiff now held by defendants. The material before the Court was an affidavit of Wesley Alexander Brethour, a solicitor, and certain letters passing between plaintiff and defendants. The Chief Justice pointed out that in this material there was a statement by the plaintiff, denying that he had been convicted in the words of the Club's by-law "of a criminal offence by a duly qualified and regularly constituted tribunal with lawful jurisdiction to make such conviction," and that there was nothing to shew that he had been so convicted, and that the appeal should be allowed. I am, however, of the opinion that the learned judge below could take judicial notice of the trial, the setting aside by this Court of the conviction, and its being restored by the Supreme Court of Canada, all of which had been adjudicated upon, except as to our passing upon the question of the judge's charge to the jury at the time the matter was before him, and it is apparent he must have done so in view of the ground of appeal before us.

GALLIHER, J.A.

Whatever may be the merits or demerits of the present appeal, it is quite apparent to me that at least one of its objects, if not its principal object, is to endeavour to get from the Judicial Committee of the Privy Council on appeal from our decision, a review of the decision of the Supreme Court of Canada in the case of *Rex* v. *Boak* (1925), S.C.R. 525, where no direct appeal lies from such Court in criminal cases.

I would dismiss the appeal.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A. would allow the appeal.

Appeal allowed, Galliher, J.A. dissenting.

Solicitors for appellant: *Taylor & Brethour.*
Solicitor for respondents: *H. W. R. Moore.*

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MAKINS PRODUCE CO. v. CANADIAN AUSTRAL-ASIAN ROYAL MAIL LINE

MAKINS PRODUCE COMPANY INCORPORATED v. CANADIAN AUSTRALASIAN ROYAL MAIL LINE.

Shipping—Carriage of goods by sea—Bill of lading—"Apparent good order and condition"—After additional travelling goods found damaged—Onus of proof—Shipment of eggs—Evidence of "sweating."

The defendant Company received in apparent good order and condition on board steamship at Sydney, Australia, 950 cases of eggs (30 dozen per case) on terms and conditions of bill of lading of the 14th of November, 1920, to be delivered at Vancouver, British Columbia. On the arrival of the steamship at Vancouver on the 15th of December, the goods were unloaded and the agents of the defendant and plaintiff finding that 60 of the cases were in a damaged condition they were separated from the others and paid for by the defendant. The evidence discloses that the remaining 890 cases were then inspected on behalf of the consignee and reported satisfactory and on the 20th of December plaintiff's (consignee) agents in Vancouver shipped the 890 cases by steamship to Seattle where they were unloaded on the 22nd of December and stored on the Canadian Pacific Railway wharf. Between the 26th and 30th of December the eggs were sent in four separate consignments to Portland, Oregon; Butte, Montana; Buffalo and Boston. After arrival at their respective destinations complaints were made to the plaintiff Company of the bad condition of the eggs, notice of which was first given the defendant Company in the following May. The plaintiff Company recovered judgment in an action for damages for breach of duty in the carriage and delivery of the eggs by sea.

Held, on appeal, reversing the decision of MURPHY, J. (MARTIN, J.A. dissenting), that the evidence disclosed that before shipment the eggs were taken from cold storage and deposited on the wharf at Sydney where they were allowed to remain some time in the heat of summer; that the warm air coming in contact with the cold eggs deposited moisture on the eggs which trickled down to the lower tiers and soaked the paper fillers in which the eggs were deposited and by which the tiers above were supported, the lower fillers losing their strength owing to their soaked condition. The upper tiers pressed down on them during the voyage so that the eggs contained in them became broken and cracked and the evidence further disclosed that upon the arrival of the eggs at their respective destinations the fillers and eggs in the lower tiers of substantially all the cases were affected the same way. The defendant received the eggs in apparent good order and with the exception of the 60 cases that they paid for, they delivered them in the same good order, the injury complained of only being discovered after several transhipments and long travelling that took place after delivery by the defendant. In all the circumstances the defendant has discharged

any onus which was upon it and the plaintiff has failed to make out a case against it.

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MAKINS PRODUCE CO. v. CANADIAN AUSTRALASIAN ROYAL MAIL LINE

APPEAL by defendant Company from the decision of MURPHY, J. of the 2nd of February, 1925 (reported 34 B.C. 531), in an action to recover $5,274.15 in damages for breach of duty in and about the carriage and delivery of eggs by sea. The plaintiff Company purchased 950 cases (30 dozen each) of eggs from a company in Australia. They were shipped from Sydney, Australia, on the steamship "Makura" (a ship of the defendant Company) on the 15th of November, 1919, and arrived in Vancouver on the 14th of December, 1919, when they were unloaded. It was found that 60 of the cases were stained on the outside and they were taken by Parsons Haddock Co. (plaintiff's agents in Vancouver) to their warehouse and were later paid for by the defendant. On the 20th of December, the remaining 890 cases were loaded on another boat and carried to Seattle where they arrived on the 22nd. They were unloaded on the Canadian Pacific Railway Company's wharf there, where they were stored until the 26th of December, and between the 26th and 30th of December they were sent by rail East in four consignments, one to Boston; one to Buffalo; one to Bute, Montana; and one to Portland, Oregon. Upon their arrival at their respective destinations complaints came in as to the state of the eggs, the first notice of which was given the defendant Company in May, 1920. The eggs on arrival at Vancouver (with the exception of the 60 cases) were examined by the plaintiff's agents and found in good order. The trial judge found that there was sufficient evidence to put the blame on the shippers for the deterioration of the eggs and the damages were fixed at $2,919.84.

Statement

The appeal was argued at Vancouver on the 12th, 13th and 16th of November, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Griffin, for appellant: The damage did not take place on the voyage across the Pacific but was owing to the condition of the eggs before shipment. When the shipment arrived at Vancouver 60 cases were stained and were paid for by the

Argument

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defendant. When unloaded at Vancouver our duty ceased and the 890 cases were then examined and pronounced to be in good order. The eggs were unloaded about the 15th of December, 1919, and we heard nothing of their bad condition until the following May. The plaintiff has not proved they were injured when under our care. The burden is on them to shew the injury was due to our negligence: see *Muddle* v. *Stride* (1840), 9 Car. & P. 380; *Midland Railway Co.* v. *Bromley* (1856), 17 C.B. 372 at p. 380; *Cowans* v. *Marshall* (1897), 28 S.C.R. 161 at p. 169; *Barnabas* v. *Bersham Colliery Co.* (1910), 4 B.W.C.C. 119; *H. C. Smith, Limited* v. *The Great Western Railway Company* (1922), 27 Com. Cas. 247 at p. 249.

Argument

Mayers (*DesBrisay,* with him), for respondent: The burden of proof is on the defendant: see *The Peter Der Grosse* (1875), 1 P. D. 414; *Crawford & Law* v. *Allan Line Steamship Company, Limited* (1912), A.C. 130 at p. 147. There is no difference between "good order and condition" and "apparent good order and condition": see *The Ida* (1875), 32 L.T. 541; *Vancouver Milling & Grain Co.* v. *United States Shipping Board* (1924), 33 B.C. 329 at p. 336. We have shewn that the goods were in good order when put on board. We then shew damage and the burden is on the shipper to shew when it was so damaged: see *The Great Western Insurance Company of New York* v. *Cunliffe* (1874), 30 L.T. 661 at p. 662; *Joseph Travers & Sons, Limited* v. *Cooper* (1915), 1 K.B. 73 at p. 87. In unloading the evidence shews some damage was done and that the winch needed repairs.

Griffin, replied.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The particulars, delivered by the plaintiff, allege negligence on defendant's part in allowing the cases of eggs in question to drop in lowering them into the ship's hold, and in rough handling them in stowing and unloading. The cases of eggs were receipted for by defendant as being in apparent good order, and were delivered in the same apparent good order to the consignee, with the exception of 60 cases which shewed signs of egg stain, but these have been settled for and are not now in question.

The evidence discloses that the cases were inspected on behalf of the consignee when unloaded at Vancouver, and that the report of the inspector was satisfactory. It was shewn that he had opened a few cases but not all. But as my conclusion does not depend on this inspection, I shall pass that over. The eggs were shipped by the plaintiff, after arrival at Vancouver, to its customers in Boston and other cities, and on being opened there some of the eggs were found to have been broken and some cracked. That is to say, the lower tiers in each case contained broken and cracked eggs.

The only evidence of rough handling or dropping in the loading, is that which is admitted. In lowering the cases into the hold by hydraulic lift, an accident occurred on one occasion only, and one sling-load of about 50 cases of eggs fell some distance causing damage to the eggs in those cases. It was submitted by respondent's counsel that less than 50 cases were injured by that occurrence. The hydraulic lift was sworn to be one which worked very smoothly and was the best contrivance known for the gentle handling of eggs, and apart from the said accident, is said to have worked well when used in loading the eggs in question.

The defendant's witness, Gibson, who superintended the loading of the eggs, though not continually at the loading place, but who was there periodically is to the effect that the loading was properly done, with the exception only of the said drop. It is also said that the shippers had a man superintending the loading, but he has not been called as a witness. I am not attaching much weight to this evidence, which is not quite satisfactory; that is to say, it is not, I think, shewn that that person who ever he was, represented the shippers or the consignees. At all events, it is plain that no objection from any source was taken to the manner of loading, and that all the evidence given on defendant's behalf is that the loading and handling on board the ship was done with due care. There is no evidence at all in the case to shew negligence of the defendant in this behalf, the only evidence relied upon by the plaintiff is evidence of the condition of the eggs when they arrived in Boston and other cities.

The eggs were packed 30 dozen to the case, they contain what

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are called fillers, paste-board compartments in which each egg is kept separate from the others. The defendant's theory of the way the eggs became injured is this: the cases were taken out of cold storage or warehouses in Sydney, Australia, by the shippers and deposited on the wharf, where they were allowed to remain some time in the heat of summer. Evidence was called to shew that eggs so treated will "sweat," in other words, that the warm air coming in contact with the cold eggs deposits moisture upon the eggs which will trickle down to the lower tiers and wet the paper fillers which support the eggs, and destroy or weaken that support and that in the voyage the eggs are pressed upon each other, or at all events, the upper ones will press the lower ones which unsupported become broken or cracked. This is rather more than a theory; it is supported by the evidence of experts, and it is calculated to appeal to the reason of men. The learned trial judge has found, and the evidence substantially bears him out, that all the cases were affected in the same way. Now, to my mind it is a most unreasonable assumption and utterly opposed to the evidence, that substantially all the cases in the shipment, some 800 or 900 cases, should have been dropped or roughly handled. Practically the only fact from which we are asked to infer this is that of the falling of one sling-load of eggs. The circumstances that the eggs in all these cases were injured in the same manner is the most cogent evidence to my mind in the case—cogent evidence of the failure of the plaintiff to make out a case.

MACDONALD, C.J.A.

This case is not to be decided on questions of the veracity of witnesses. There is no evidence at all except that of the defendant as to the care used in loading. Neither is there any other as regards the unloading. The decision depends upon the inference to be drawn from undisputed evidence and from the condition of the eggs when inspected at their destination in Eastern cities. Therefore this Court is in as good a position to draw the true inference as was the learned trial judge.

It was contended on behalf of the plaintiff that the onus of proof of how the eggs came to be in the condition they were, was upon the defendant. I do not think that this submission is sound. There is no pretence that the eggs in the cases could be

seen or examined by the defendant. It receiptd for them as being in apparent good order, it delivered the cases in the same apparent good order, with the exception of those which were rejected and paid for, presumably those injured in the fall along with a few others which may have been injured from the same cause as the rest of the shipment and shewed signs of stain on the outside of the boxes.

In the circumstances of this case I think the defendant has discharged any onus which was upon it; it has paid for eggs which were not in apparent good order upon their arrival.

Evidence was given of actual good order at the time of shipment, but none of actual injury when delivered at Vancouver. The injury was discovered only after thousands of miles of railway and steamship transportation, after they left defendant's possession, involving the shipping and transhipping of the cases several times. It was argued that the evidence disclosed no rough handling at those times; neither does it shew rough handling by defendant.

MACDONALD, C.J.A.

The appeal should be allowed.

MARTIN, J.A.: Seeing that in my opinion the learned judge reached the right conclusion I have little to add to the view that he takes, properly, I think, upon the evidence that the eggs were damaged by the negligence of the defendant, and that the plaintiff has discharged any onus of proof that may rest upon it. And, furthermore, I am disposed to the view that the evidence on behalf of the plaintiff of the delivery to the defendant at Sydney supports not only the "apparent" good order of the eggs but a strong *prima facie* case of their actual good order, which is not displaced by the "sweating" theory put forward by the defendant in answer thereto, but in the virtually complete absence of the essential foundation therefor by the proof of the necessarily exact circumstances upon which alone it could be supported it would be unsafe to attach any weight thereto, quite apart from the plaintiff's evidence to disprove the theory.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal has relation to a claim for

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loss suffered to a consignment of goods (eggs) carried by sea. The trial was had before MURPHY, J. and that learned judge found for the plaintiff (respondent), as against the carrier the defendant (appellant).

It would appear that a large consignment of eggs taken from cold storage at the point of shipment in Australia in the summer season, was shipped, billed to the plaintiff, the consignee, at the Port of Vancouver, B. C., arriving at Vancouver in due course of carriage during the winter season. It would seem that as to 60 cases the defendant set them apart upon arrival in a separate pile on the dock, the other cases being also piled on the dock. As to the 60 cases there was outward evidence of the fact that there was leakage of egg contents and without prejudice to any question of liability a certain amount was allowed by the carrier. The learned trial judge, dealing with these cases said this (34 B.C. 531):

"The Steamship Company itself segregated these 60 cases by setting them apart in a separate pile on the dock. That act I regard as an invitation by the Steamship Company to open a discussion not on the breach of the carriage contract *qua* contract but as to the damage done to these particular cases. The decision might be otherwise had the segregation been made on behalf of plaintiffs."

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Then later on the learned trial judge said this (pp. 532-3):

"Basis of damage. I hold this to be market price in Vancouver at time of delivery. Admittedly this is the ordinary rule unless the contract contains special conditions. I do not think, having regard to the fact that the bill of lading is a contract for carriage by sea, that the provision that the word 'loss' therein in reference to the value and cost of goods at the point and time of shipment is to govern settlement applies to damage done to goods by negligent handling. I am fortified in this view by the occurrence of the phrase 'loss or damage' in other clauses of the bill of lading. In assessing damages I rule that no expense incurred for examination and marketing the salved eggs from the 60 cases is to be taken into account. I hold the settlement made with regard to these 60 cases concludes everything in connection with them."

It would appear that the learned judge had in view that the condition of the eggs was consequent upon negligent handling. I, however, fail to see that there was any evidence that that was the cause of the apparent leakage. It is true there was some evidence that the hydraulic crane was not working well upon one occasion at the point of shipment of the eggs, and some cases of eggs were dropped in the loading, not, however, extending to 60

cases or anything like that number. The hydraulic crane is one of modern construction and the equipment of the ship for loading was shewn to be modern and up to date. The most that could be said in the allowance made in respect of the 60 cases is this—the eggs were received on the ship in apparent good condition outwardly, and 60 cases at the point of delivery not being in apparent good condition outwardly were allowed for. There was no admission that there had been negligent handling or that that was the cause of their not being in apparent good condition outwardly. Certainly there is no evidence that 60 cases were dropped in the loading. Now the whole claim of the plaintiff, extending to a very large proportion of the cases, is based upon negligent handling, and although I cannot find in terms that there is a finding to that effect of the learned trial judge, the appeal proceeded upon that footing at this Bar. In my view there is no sufficient evidence that would admit of the learned judge finding reasonably in favour of the plaintiff, that there was negligent handling of the eggs warranting the assessment of damages, in truth, there is no evidence to at all support that the claimed damage to the eggs was because of or consequent upon negligent handling. There may have been and it is reasonable to so conclude that there was "inherent vice in the goods" when it is considered that the eggs were shipped from out of cold storage in Australia in the summer time and would be exposed sometime to summer heat, admittedly great in Australia. It was impossible for the carrier to be apprised of the true state of the eggs—at most all the carrier undertook was to take into its hands for carriage the cases of eggs—outwardly in apparent good condition—that in no way was any admission upon the part of the carrier of the true condition of the eggs—the eggs might have been rotten or approaching that condition at the time of their delivery upon the ship. The evidence would seem to support the conclusion that if the eggs whilst in transit suffered any injury it was injury arising from changes of temperature over which the carrier had no control or possibly putrefaction consequent upon the age of the eggs, or changes of temperature at the point of loading and the point of delivery, being received on board in summer in Australia and delivered

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in winter in British Columbia. It is to be remembered though, that the eggs were delivered to the consignee in the same apparent good condition outwardly as received save as to the 60 cases that the carrier set apart and made allowance for without making any admission as to what caused their apparent changed condition. Upon a close review of the evidence it would not appear to me to state its effect to be that the plaintiff shewed freedom from negligence on its part and that the claimed damage to the eggs did not arise from any want of care on its part and if this be a correct analysis of the evidence it would be a complete answer to the plaintiff's action. The case is not one in which it can be said that in substantive law the burden of proof has been in any way shifted from the plaintiff to the defendant, that is, the burden of proof of the negligence claimed against the carrier and the negligence that the plaintiff was called upon to establish was negligence causing the damage in respect of which the claim is made, or, in other words, this case is not one in which the burden of proving freedom from negligence is upon the carrier. Were I even wrong in this I think I am right in saying that upon the state of the evidence the defendant may well ask that the Court should hold that the evidence produced warrants the conclusion that the damage to the eggs was not due to a failure on the part of the carrier to exercise proper care as to the sufficiency of the hydraulic crane or other tackle.

The defendant in any case is not called upon to shew how the damage to the eggs occurred, or was brought about, that is, they are not under an obligation to demonstrate "freedom from negligence." *Richard Evans & Co., Limited* v. *Astley* (1911), A.C. 674 at p. 678; *Canadian Westinghouse Co.* v. *Canadian Pacific Ry. Co.* (1925), S.C.R. 579, Duff, J., at pp. 583 to 587.

If it can be said upon the evidence that because of the changes of temperature at the time of the delivery of the eggs to the carrier or because of inherent vice in the goods the damage to the eggs occurred or was partly caused, then in such circumstances it is well settled that that would disentitle the plaintiff to recover any part of the loss. To somewhat repeat the proposition, if that which has been last stated could be said to be a true

narrative of the facts, the defence of the defendant was complete in this case, *i.e.*, it was sufficient for the defendant to shew that the loss or damage was owing in part to the default of the plaintiff in causing the damage in respect of which the claim is made. The claim of damage to the shipment of eggs is a somewhat belated one and would not seem to me to be in accordance with natural justice. Here we have a large shipment of eggs from Australia to British Columbia, and the goods are delivered to the consignee in apparent good condition, that is in the same apparent good condition as they came over the side of the ship. The consignee leaves the cases of eggs for sometime on the wharf at the point of delivery, Vancouver, B.C., then sends them forward by boat and rail to different points in the United States some thousands of miles further away and into territory of extreme cold, being in the depth of winter. Is it not reasonable that the condition of the eggs when opened up was caused by the long transit, exposure and many handlings rather than that there was negligent handling in taking the cases upon the ship in Australia? To admit of a claim being made and succeeding upon this state of facts amounts to a holding that the defendant became the absolute insurer of the shipment and would be liable even if the damage was only discovered after the eggs had by later shipments by the consignee been forwarded around the world. To merely state this proposition exhibits its fallacy and calls for immediate disapproval. There is no rule admitting of any such contention, it is against settled and well-known principles. Carriers would, if this were the law, be under an intolerable obligation in effect, once having accepted goods for carriage all the risks of carriage even after delivery to the consignees would still continue, the delivery of the goods at the point to which shipped in apparent good condition when delivered, reasonably operates to discharge the obligation.

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Now, this is what is contended for by the plaintiff and goods which have been duly delivered to the consignee in apparent good order at Vancouver, B.C., having been shipped from Australia are by the consignee forwarded by boat and railway to the other side of this continent of America, then and then only is the demand made that there has been damage to the goods in

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transit, but where did the damage occur, and what carrier did the damage? Is it not equally possible that the damage occurred in the later transit?

I am of the opinion that in the present case the burden of proof was on the plaintiff the consignee, not upon the carrier. It was necessary to shew the condition of the goods when shipped or that they were damaged by the negligence of the carrier. Now what is the evidence? There is an entire absence of any evidence as to the condition of the goods, *i.e.*, eggs—perishable goods—eggs in cold storage in Australia in the summer time and shipped to British Columbia arriving there in the winter time, and possibly in defective condition when shipped. Then as to any evidence of negligence—merely the dropping of a few cases in the loading. The evidence of the supervision of the loading of the very large number of cases was complete as given by the defendant and in my opinion displaces any contention that there could be said to be any negligent handling. It is clear that there is no responsibility for loss or damage consequent upon an inherent quality or defect of goods carried in the case of perishable goods and in the present case the goods come within that category, the carrier is not answerable for their decay or deterioration nor is the carrier liable when the goods have been shipped in an unfit condition (*The Ida* (1875), 32 L.T. 541; *The Barcore* (1896), 65 L.J., P. 97). The head-note in *The Ida, supra,* succinctly sets forth the judgment of their Lordships of the Privy Council upon the question of the proof necessary where action is brought against the shipowner for loss of goods. It reads as follows:

> "There is no rule of law by which the consignee of goods under a bill of lading, stating goods to have been shipped in good order and condition, but containing the words 'quantity and quality unknown,' is bound to shew that the goods were shipped in good order and condition, or fail in his suit against the shipowner for damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to shew that the damage which it sustained is traceable to causes for which the shipowner is responsible."

No doubt if there were adventitious causes introduced by the carrier not traceable to an inherent quality or defect and not arising from the ordinary development of that quality or defect which could lead to the claimed damage, that would alter the

situation. The question is, did any such thing take place which would throw liability upon the carrier? (*The Freedom* (1869), 38 L.J., Adm. 25; (1871), L.R. 3 P.C. 594; *Clark et al.* v. *Barnwell et al.* (1851), 53 U.S. 272). Save as to the dropping of the few cases at the time of loading nothing occurred upon the voyage which could be said to have had any effect upon the eggs enclosed in the crates, that is, no adventitious causes introduced or chargeable to the carrier were established. As to the goods being "in good order," etc., that only means externally, as far as they could be seen, *i.e.*, in good order outside (*The Peter der Grosse* (1875), 1 P.D. 414; 3 Asp. M.C. 195; *Crawford & Law* v. *Allan Line Steamship Company, Limited* (1911), 81 L.J., P.C. 113; (1912), A.C. 130).

It is to be noted that the view as expressed by James, L.J., that the admission that the goods appeared to be in good condition outside threw upon the appellant the onus of proving that the damage did not arise whilst the goods were on board the ship or in their custody or that it came within the exceptions of the bills of lading, cannot be held to be applicable in the present case, as the contrary view was expressed in *The Ida, supra.* The great bulk of the goods in the present case were delivered in apparent good order, and as received, the 60 cases were set apart and allowed for because of the outward shewing on these cases, *i.e.*, leakages, and delivery was taken by the consignee of the whole shipment save as to the 60 cases and the goods were shipped across the continent and only thereafter is claim made. If damaged in transit is it not likely, in fact more than likely, that the damage occurred in the later transit, especially as there was no apparent damage when delivered at the point for the discharge of the goods, *viz.*, Vancouver, B.C.?

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The plaintiffs were at least called upon to make out a *prima facie* case either by shewing that the goods were in good condition when shipped or that damage could be traced to some default of the shipowner. This, in my opinion, was not shewn. Further the balance of probabilities is wholly in favour of the belief which, in my opinion, is incontrovertible that the state of the eggs was not attributable at all to anything that occurred in transit from the point of shipment in Australia to Vancouver.

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It is quite apparent that the plaintiff did not adduce evidence sufficient in its nature to discharge the onus that rested upon it to trace the damage to some default in the shipowner. Further, the proof demonstrating that the the damage was traceable to the default of the shipowner was affirmative proof, that the plaintiff was bound to give, otherwise the action should be dismissed. The preponderance of evidence unquestionably establishes that the eggs were properly stowed on board, that no damage occurred to the eggs while on board and an entire absence of evidence that the damage was traceable to any default of the shipowner.

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This being the case the plaintiff was not entitled to succeed in the action and the learned trial judge, with great respect, arrived at a wrong conclusion. The appeal, in my opinion, should be allowed, and the action dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: I concur with the Chief Justice.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Griffin, Montgomery & Smith.*
Solicitors for respondent: *Bourne & DesBrisay.*

ASSOCIATED GROWERS OF BRITISH COLUMBIA, LIMITED, AND KEREMEOS GROWERS CO-OPERATIVE ASSOCIATION v. RODDICK.

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Contract—Marketing of all fruit and vegetables with association—Subsequent leasing of additional land by producer—Term of lease prohibiting sale of produce to associations—Duty of lessee—Produce therefrom subject to the contract—Injunction—B.C. Stats. 1924, Cap. 48.

The defendant entered into a contract with the plaintiff the Keremeos Growers Co-operative Association on the 23rd of February, 1923, whereby she was to market all her fruit and vegetables with said association, which is a subsidiary organization to the plaintiff the Associated Growers of British Columbia, Limited. In May, 1925, the defendant obtained a lease of a ten-acre lot adjoining her own from the Canada Permanent Trust Company but the lessor expressly refused to give the defendant leave to market the fruit and vegetables raised on the lot with the Co-operative Association. The two associations recovered judgment in an action for specific performance of the agreement and for an injunction.

Held, on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that it was the defendant's duty to obtain, if she could, the lessor's consent to the sale of her produce to the plaintiffs.

APPEAL by defendant from the order of MACDONALD, J. of the 13th of October, 1925, restraining the defendant from delivering fruits and vegetables raised on her farms, otherwise than in accordance with a contract of the 23rd of February, 1923, entered into by her with the Keremeos Growers Co-operative Association whereby the defendant was to market all her fruit and vegetables with said Association which is a subsidiary organization to and a shareholder in the plaintiff the Associated Growers of British Columbia, Limited, incorporated under the Act for the relief of the Associated Growers of British Columbia, Limited, being Chapter 48 of the Statutes of British Columbia, 1924. The defendant owned lot 126, subdivision 174 in Keremeos on which she had raised fruits and vegetables for about four years. In May, 1925, she obtained a lease of lot 15, subdivision lot 277 (an apple orchard of about 10 acres) adjoining her own property, the lessor being the Canada Permanent Trust Company. Under the lease the lessor expressly

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refused leave to the lessee to market any of the fruits and vegetables raised on said lot with the Co-operative Association. The order compels the defendant to market all produce from both her own lot and the leased lot with the Co-operative Association.

The appeal was argued at Vancouver on the 24th and 25th of November, 1925, before MACDONALD, C.J.A., MCPHILLIPS and MACDONALD, JJ.A.

Griffin, for appellant: When the defendant leased lot 15 the Canada Permanent Trust Company the lessors would not consent to the produce from the lot being sold to the Co-operative Company, but this lease was taken by the defendant long after the arrangement with the Co-operative Company was entered into and we submit it does not apply to this lot. An injunction should not be granted when it puts the defendant in a position where her lease (under the terms thereof) is liable to forfeiture: see *Willmott* v. *Barber* (1880), 15 Ch. D. 96; *Meara* v. *Meara* (1858), 8 Ir. Ch. R. 37 at p. 40; *Peacock* v. *Penson* (1848), 11 Beav. 355.

Argument

Mayers, for respondent: The question of forfeiture is new ground of appeal of which notice has just been given and in the circumstances of this case should not be granted: see *Fordham* v. *Hall* (1914), 19 B.C. 80. As to the duty of the lessee in such a case to obtain the consent of the lessor see *Lehmann* v. *McArthur* (1868), 3 Chy. App. 496; *Day* v. *Singleton* (1899), 2 Ch. 320 at p. 334; *Braybrooks* v. *Whaley* (1919), 1 K.B. 435. The Co-operative Society is for the benefit of the growers generally.

Griffin, in reply: The statute deals with matters different from what occurs here and the cases he refers to do not touch the point.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would sustain the judgment. It was the defendant's duty to obtain, if she could, the consent of her lessor to the sale of her fruit to the plaintiffs. *Day* v. *Singleton* (1899), 2 Ch. 320. There are no merits in the other questions argued.

McPHILLIPS, J.A.: In my opinion the appeal should succeed, unless the force of the statute to be hereafter referred to, renders it obligatory upon the Court to grant the injunction irrespective of the controlling authorities, which entitle it being held that notwithstanding there may have been a breach of contract, or a threatened breach of contract, equities exist which entitle the Court to declare that it is not a proper case for an injunction, leaving the parties to their remedy (if any) in damages if the action should be held to be well founded.

During the course of the argument and the discussion of the decided cases, it was, I think, conceded that the present case was not one in which an injunction should be granted unless by force of the statute the Court was statutorily compelled to grant it. The appellant unquestionably is in a very awkward position at first sight in that she has contracted with the respondents to consign and deliver all the fruit and all the vegetables grown or which she shall have any interest in at any place in British Columbia covered by the activities of the respondents.

Now, the facts are that the injunction granted and under appeal, affects fruit grown upon lands held under lease by the appellant from the Canada Permanent Trust Company, and a term of the lease is that, the fruit crop from off the lands demised to the appellant, shall not be sold through the agency of the Keremeos Growers Co-operative Association or any other co-operative association, without the consent of the lessors. With respect to obtaining the consent of the lessors, I am satisfied to follow the authorities cited by Mr. *Griffin* in his very able argument that there was no requirement upon the appellant to make application for the consent of the lessors, that that application was a condition precedent to the respondents bringing action, that is, the onus was upon the respondents to shew that the lessors refused to give their consent.

The vital question, of course is, what is the meaning of the words "covered by the activities of the Co-operative"? That is, what is the extent and scope of the agreement between the respondents and the appellant? Can it be said effectively that fruit grown upon lands that are withdrawn from the activities of the Co-operative and which is prevented by the express terms

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of the lease from being sold through the agency of the respondents, is nevertheless within the ambit of the "activities of the Co-operative"? I would think not, in fact it is unthinkable that it should be so. Here we have the appellant under the obligation as lessee of the land to refrain from selling the fruit crop through the agency of the respondents and if the appellant should commit a breach of this covenant and do that which the injunction directs, it would be at the peril of forfeiture of the lease. It cannot be that the Court will compel (unless, of course, the statute hereafter to be referred to, is mandatory) the appellant to commit a breach of covenant in the lease. We have not here that which the agreement might have contained—a covenant that the appellant would not lease lands or grow crops of fruit upon lands burdened with the condition that the fruit crop should not be sold through the agency of the respondents. The result of the granting of the injunction in the present case is to put the appellant between two fires—if she sells the fruit crop through the agency of the respondents she commits a breach of covenant in the lease and risks forfeiture of the lease, if she disobeys the injunction she will be guilty of contempt of Court and subject herself to the pains and penalties that follow upon contempt of Court. Certainly the present position of the appellant is not an enviable one, especially when throughout all this time the fruit crop of a perishable nature is prevented from being marketed. It is clear that the case is not one for an injunction unless the Court is powerless in the matter. (*Duke of Bedford* v. *Trustees of British Museum* (1822), 2 Myl. & K. 552; *Peek* v. *Matthews* (1867), L.R. 3 Eq. 515; *German* v. *Chapman* (1877), 7 Ch. D. 271; 47 L.J., Ch. 250; Story, 489, 490; *In re Hare & O'More's Contract* (1900), 70 L.J., Ch. 45; 83 L.T. 672; (1901), 1 Ch. 93.)

It is not suggested that the appellant in leasing the land was not acting in good faith, and with no thought of entering into a lease which in the end would place her in the predicament in which she now finds herself, and in this connection I would refer to *Counter* v. *Macpherson* (1845), 5 Moore, P.C. 83 at p. 108:

"Where a binding contract is subsisting, the completion of which, in its exact terms, becomes impossible through accident, without any default of

the party seeking relief, a Court of Equity will struggle with points of form, it cannot, for that purpose, alter the substance of the agreement, or impose upon either party obligations totally different from those which, by the agreement, he had contracted. In this case, there is no reason why the Court, upon any principle of moral justice, should at all desire to interfere; both parties are equally innocent, and the only question is, upon which of them the loss arising from an inevitable accident is to fall."

Certainly, the present case is not one for the interference of the Court unless it be that the Court is powerless to give relief to the defendant, and I take the view it is not powerless.

There remains the question of the effect of the statute upon which Mr. *Mayers* greatly relies. It is section 3 of the Associated Growers of British Columbia Relief Act, Cap. 48, B.C. Stats. 1924, and reads as follows:

"3. Whenever any contract in any of the forms set out in the Schedules hereto, or to the like effect, is produced to the Court and proved to have been signed by all parties thereto, and it is further proved that the grower has delivered any fruits or vegetables otherwise than in accordance with the provisions of such contract, the Court shall forthwith grant an *interim* injunction restraining the grower, his agents and servants, from delivering fruits or vegetables otherwise than in accordance with such contract, and the Court shall also make an *interim* order commanding and directing the grower to deliver the fruits or vegetables in accordance with the provisions of such contract, notwithstanding any defect in the formation, execution, or performance of the said contract, and unless the Court on the trial of the action shall be satisfied that any such contract was induced by fraudulent misrepresentation, the said *interim* injunction or order shall then be made permanent."

It will be seen that the language of the statute, in that the marketing agreement, Schedule A has the words "covered by the activities of the Co-operative," which words are in the contract here to be considered and construed, leaves the question open for decision as to what meaning or effect is to be given to the words "covered by the activities of the Co-operative." The only reasonable meaning and effect that can be given to the statute is to restrict its application to those lands that are not held subject to the inhibition that the fruit crop grown thereon shall not be sold through the respondents, *i.e.*, the "activities of the Co-operative," cannot be held to include areas of land withdrawn from the possible exercise of the activities of the Co-operative. Giving this meaning to the statute accords with the plain meaning of the words used, and it could never have been the intention of the Legislature to enact statute law to have

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any more extensive effect. The zone of the activities of the Co-operative must be confined to the possible area upon which fruit may be grown and which is not withheld by the owners thereof from the activities of the Co-operative. To hold otherwise would mean that the intention of the Legislature is that the owners of lands wherever the activities of the Co-operative may be exercised, that is in effect throughout this vast Province, are to be subject in their freehold rights to be deprived of tenants for their land if the possible tenants should be members of one of the co-operative associations when the owners of the land desire to make a reasonable and lawful provision that the fruit crop grown upon the lands should not be sold through the agency of the Co-operative Associations.

MCPHILLIPS, J.A.

Parliament is admittedly all powerful and can deprive the subject of ownership in land and can create disabilities in regard to the holding of it and against the wishes and discretion of the owner impose such conditions as may prevent the full enjoyment of ownership thereof, yet there must always be found apt words to create such an invasion of right as is here contended for. I fail to find the apt words, and failing to find them I am satisfied that the injunction, with great respect to the learned judge, was wrongly granted, and should be dissolved.

I would allow the appeal.

MACDONALD, J.A.

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

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *H. H. Boyle.*
Solicitors for respondents: *Norris & McWilliams.*

ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA v. STANDARD LUMBER COMPANY LIMITED.

MCKENZIE, JUDGE OF COURT OF REVISION

1925

May 5.

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1926

Jan. 5.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. STANDARD LUMBER CO.

Revenue—Income tax—Logging company—Profits—Profit on purchase and resale of certain properties—B.C. Stats. 1922, Cap. 75, Sec. 118.

The memorandum of association of a limited company, a lumber syndicate, set forth that the objects of the company were, *inter alia*, (1) the acquisition of the assets of The Brunnette Saw Mill Company Limited; (2) carrying on the business of cutting and getting out logs, shingle bolts and other timber. The Company took over the timber limits and licences of the Brunnette Company and while in the course of carrying on the business of cutting and getting out logs it sold four of its timber limits at a net profit of $46,443.57. On appeal from the assessors who added this sum as a taxable profit of the Company's business it was held by the Court of Revision that while a further section of the memorandum of association provides for the "sale and disposition of the property or undertakings of the Company or any part thereof" this is the usual clause giving the Company power to sell its assets but not to trade or deal in timber limits, and the sale of the four limits was not in the ordinary course of trading by the Company but a sale of a portion of its capital assets and should be treated as an accretion and not a profit.

Held, on appeal, affirming the decision of the judge of the Court of Revision, that the business of the Company not being the buying and selling of timber limits but the cutting and getting out logs, shingle bolts and other timber, this sum of $46,443.57 could not be regarded as income assessable for income tax.

APPEAL by plaintiff from the decision of D. McKenzie, judge of the Court of Revision at Vancouver, of the 5th of May, 1925, allowing the defendant Company's appeal from the assessor. The Standard Lumber Company Limited was formed for the purpose of taking over the timber limits and licences of The Brunnette Saw Mill Company Limited and for carrying on the business of cutting and getting out logs, shingle bolts and other timber. The defendant took over from the Brunnette Company its timber limits and licences and a mortgage for $500,000 secured by the Brunnette Company's saw mill and the sawn timber. These assets were paid for partly in cash and partly in stock of the Standard Lumber Company Limited.

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1925

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ATTORNEY-GENERAL OF BRITISH COLUMBIA v. STANDARD LUMBER CO.

Statement

The Standard Lumber Company Limited carried on extensive logging operations on Seymour Inlet from January, 1922, until August, 1923, and for the 1923 Roll these operations shewed a loss of $65,568.79. During that period the Company sold four of these limits in order to provide for their very heavy carrying charges on their timber licences and leases and to cover the losses in their operations above referred to. The profits or accretion on the sale of these limits was $46,443.57. During this period, owing to the uncertainty of the security the Standard Lumber Company Limited entered into an arrangement with The Brunnette Saw Mill Company Limited whereby they agreed that if The Brunnette Saw Mill Company Limited would pay $450,000 in discharge of the mortgage the Standard Lumber Company Limited would throw off $50,000 and accept $450,000 as payment in full. This was carried out and the $50,000 taken off was included in the loss of $65,568.79 shewn above. The assessor concluded that the $50,000 should not be deducted and that the $46,443.57 should be added as a profit, thus making a total profit of $30,874.78 for the year, 10 per cent. of which would be the tax for the year, *i.e.*, $3,087.48.

J. H. Senkler, K.C., for appellant.
Dixie, for respondent.

5th May, 1925.

D. MCKENZIE, Judge of the Court of Revision: This is an appeal by the above named Company from an assessment against it in respect to the Assessment Roll of 1923.

MCKENZIE, JUDGE OF COURT OF REVISION

1. The assessor accepted the figure set out in the profit and loss account on the books of the Company, with the exception of the following two items, namely: (a) Capital surplus, $46,443.57, which is shewn in the balance sheet in Exhibit No. 6, and is also itemized at Schedule 4 of said Exhibit 6. (b) Discount on account of principal payment of mortgage receivable, $50,000, shewn in profit and loss account of said Exhibit 6.

2. The assessor struck out (b) from the profit and loss account and added as profit (a), the result being that while the profit and loss account originally shewed a net loss to the Company of $65,568.79, by reason of the above changes by the

assessor, that is, striking out $50,000 and adding a profit of $46,443.57 made the profit and loss account shew a net profit of $30,874.78 in respect of which the tax imposed is $3,087.48.

3. The contention of the appellant is that the assessor was wrong in adding to the profit and loss account the item of $46,443.57, because that item was not a profit to the Company, but was an appreciation of capital in respect to a portion of their capital assets, which were sold by the Company, not in the ordinary course of trade, but for the purpose of enabling the Company to have money on hand wherewith to pay losses of the Company and overhead expenses.

4. The Company also contends as an alternative that if the assessor was right in adding the above item of $46,443.57, he had no right to disallow the amount of $50,000 lost by the Company in connection with the mortgage of $500,000 which was paid off by the mortgagor company.

5. I find as a fact that the Company was formed for two principal objects: (a) that of acquiring the assets of The Brunnette Saw Mills Company Limited (see section 3, subsection (a) of the memorandum of association), and (b) that of carrying on the business of cutting and getting out logs, shingle bolts and other timber (see section 3, subsections (b), (c), (d), (e), (f) and (h)). I find that the Company was not incorporated for the purpose of trading or dealing in timber licences or leases. The evidence of Mr. Smith, the president and manager, and Mr. Haskell, his assistant, shews these facts, and the fact that the memorandum of association does not contain any suggestion of trading or dealing in timber licences or leases, such, for instance, as clause 2 of the memorandum of association of the Anderson Logging Company, which reads as follows: "To stake, lease, record, purchase, sell and deal in timber licences, timber leases and timber lands," etc., shews that there was no such intention on the part of this Company.

6. While it is true that subsection (1) of section 3 of the memorandum of association of the Standard Lumber Company takes power to sell and dispose of the property or undertakings of the Company or any part thereof, that, in my opinion, is not a clause indicating that the Company wished to trade or deal in

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timber licences or leases, but is the usual and necessary clause put in every memorandum of association giving the Company power to sell its assets. The case of *Tebrau (Johore) Rubber Syndicate, Limited* v. *Farmer* (1910), S.C. 906; 5 Tax Cas. 658, appears to be conclusive of this point. I find further as a fact that the Company did in 1921, 1922 and the early half of 1923, carry on extensive logging operations. The evidence shews that at the time these logging operations were commenced, the price of logs was such that the Company could successfully log. Afterwards, the price of logs started to drop, and in 1923 it was necessary for the Company to shut down its logging operations owing to the low prices of logs. In fact, the evidence shews that the Company made a large loss in these logging operations, approximately $100,000. The evidence also shews that at the time the auditor's reports were put in, the Company thought that these losses did not amount to that sum but a larger number of logs were kept over on inventory prices, and later these prices were not received, resulting in the loss as above stated.

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7. I find as a fact that the Company, owing to its overhead expenses and the loss incurred in its business of logging operations, was compelled to and did sell four pieces of timber land, being part of their assets, and that the price received for that portion of their capital assets which was sold amounted to $46,443.57 more than the actual original cost of the Company of these limits.

8. I am particularly struck with the judgment of the Supreme Court of Canada in *Anderson Logging Co.* v. *The King* (1925), S.C.R. 45 and the judgment of Mr. Justice Duff, which was the judgment of the Court therein. At p. 47, Mr. Justice Duff draws particular attention to the fact that one of the powers in the memorandum of association of that company was,

"to acquire by purchase or otherwise timber licences, timber leases and timber lands, and to sell and deal in these; and to carry on a general business as loggers and dealers in logs and timber of all sorts."

Further, on the same page, he states as follows:

"It is sufficiently clear from the memorandum of association that one of the substantive objects of the company was to acquire timber lands and timber rights with a view to dealing in them and turning them to account to the profit of the company."

At pp. 50-51, Mr. Justice Duff remarks:

"In support of the suggestion that the principal business of the company was in fact the business of logging there is, apart from the memorandum of association, no evidence entitled to appreciable weight, and hardly any which can properly be considered at all."

And on p. 51, he says:

"It is not unimportant to remark that neither of the principal partners of the company, who could have given a history of the company's affairs from its inception, was called as a witness nor, as has already been mentioned, was any but the most meagre evidence adduced as to the character of the company's operations."

On the same page, Mr. Justice Duff discourses further on the same point, shewing that in the *Anderson Logging* case the only evidence that he could rely upon as to intention of the company was the direct wording of the memorandum of association. In the case of the Standard Lumber Company, the memorandum of association shews no intention on the part of the Company to deal in timber limits and the direct evidence of men who had always been in close touch with the operations of the Company was opposed to any suggestion that there ever was any intention to deal in timber limits.

9. Following the reasoning of Mr. Justice Duff (at p. 49) it is necessary that I should decide, "Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?" I have no difficulty in finding, and accordingly do find that the sale of the four pieces of timber limits by the Standard Lumber Company was not a sale in the ordinary course of trading by the Company, but was a sale of a portion of its capital assets, and should be treated as an accretion and not as a profit. Being of that opinion, I allow the appeal of the Standard Lumber Company as to this item, which removes entirely the profit as fixed by the assessor.

10. The second point raised by the appellant was that if it were found that the item of $46,443.57 could not be considered as an enhancement of value by realizing a security, but was an ordinary regular operation of the Company, then the assessor must treat the loss of $50,000 made on the mortgage on the Brunnette property as in the same class, and that such amount should be set off against profits made on the realization of other

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assets. With this contention I also agree. I find that the mortgage was changed into cash by the directors of the Standard Lumber Company, because they did not consider the security sufficient. The only security for the mortgage was the plant and contents of the mill, which it was impossible to insure for such a sum as would cover the amount of the mortgage. The covenant of the Brunnette Company itself was of no value and it was accordingly apparent that they were in jeopardy of sustaining a serious loss. Therefore they accepted $450,000 cash for the $500,000 mortgage. If it be necessary for me to find upon this point, I would uphold the appellant's contention.

From this decision the plaintiff appealed.

The appeal was argued at Vancouver on the 4th and 5th of November, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Killam, for appellant: The Standard Lumber Company did do logging business. It is the same case as *In re Taxation Act and Anderson Logging Co.* (1924), 34 B.C. 163; (1925), S.C.R. 45. Under our Taxation Act it is taxable any way: see *Inland Revenue Commissioners* v. *Korean Syndicate, Ld.* (1921), 3 K.B. 258 at p. 270; *Gloucester Railway Carriage and Wagon Company* v. *Commissioners of Inland Revenue* (1924), 40 T.L.R. 435 and on appeal (1925), A.C. 469; *South Behar Ry. Co.* v. *Inland Revenue Commissioners* (1925), A.C. 476 at p. 485; *Californian Copper Syndicate (Limited and Reduced)* v. *Inland Revenue* (1904), 6 F. 894; *Scottish Union and National Insurance Co.* v. *Inland Revenue* (1889), 16 R. 461 at p. 473; *Beynon & Co.* v. *Ogg* (1918), 7 Tax Cas. 125 at p. 132; *Commissioner of Taxes* v. *Melbourne Trust, Limited* (1914), A.C. 1001; 84 L.J., P.C. 21.

Buell, for respondent: A syndicate bought The Brunnette Saw Mill Company Limited out. The case of *Gloucester Railway Carriage and Wagon Company* v. *Commissioners of Inland Revenue* (1924), 40 T.L.R. 435 is in our favour. The onus is on them to shew our figures are wrong. The profit on the sale of these timber licences is capital and cannot be taxed: see *Secretary of State in Council of India* v. *Scoble* (1903), A.C. 299;

Stevens v. *Hudson's Bay Company* (1909), 101 L.T. 96 at p. 97; *Tebrau (Johore) Rubber Syndicate, Limited* v. *Farmer* (1910), S.C. 906 at p. 911; Sanders on Income Tax, 2nd Ed., 45 and 145.

Killam, replied.

Cur. adv. vult.

5th January, 1926.

MACDONALD, C.J.A.: I agree with the reasons for his conclusions written by Mr. McKenzie, the judge of the Court of Revision. He has made findings of fact which I think are supported by the evidence, and I do not see how, on these findings, he could properly have come to any other conclusion than that stated by him.

The case is clearly distinguishable from *Anderson Logging Co.* v. *The King* (1925), S.C.R. 45. This distinction is not founded on the difference in the memorandum of association of the two, but on the difference in the facts of the two cases.

The appeal is dismissed.

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

GALLIHER, J.A.: I am quite clear that the facts in this case distinguish it from *Anderson Logging Co.* v. *The King* (1925), S.C.R. 45. I would treat the $46,443.57 item as an accretion and not a profit.

The appeal should be dismissed.

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

MACDONALD, J.A.: I am so far in agreement with the reasons given by the judge of the Court of Revision that I do not feel anything can be usefully added to his statement of facts and the conclusions arrived at.

Appeal dismissed.

Solicitors for appellant: *Killam & Beck.*

Solicitors for respondent: *Senkler, Buell & Van Horne.*

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CHAN v. C. C. MOTOR SALES LIMITED.

Automobile—Sale of—Conditional sale agreement—Default—Repossession by vendor—Sale—Surplus over original purchase price—Right of purchaser to balance—R.S.B.C. 1924, Cap. 44, Sec. 10.

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The plaintiff bought an automobile for $3,103.60 under a conditional sale agreement. He paid $950 cash and $700 in monthly payments. Being in default in the next monthly payment the vendor retook possession of the car as provided for in the agreement and resold it for $2,080. The vendor having received in all after allowance for interest the sum of $532.78 over and above the original purchase price, the purchaser sued and recovered judgment for the said balance.

Held, on appeal, affirming the decision of GRANT, Co. J. (MARTIN and MACDONALD, JJ.A. dissenting), that upon a resale of the automobile the purchaser is entitled to any surplus recovered above the amount due and payable under the conditional sale agreement.

[Affirmed by Supreme Court of Canada.]

APPEAL by defendant from the decision of GRANT, Co. J. of the 30th of June, 1925, in an action to recover $746.40, claimed as a balance due the plaintiff upon the sale of a car by the defendant that the plaintiff had purchased from the defendant under a conditional sale agreement, but after making certain payments he had to return to the defendant owing to his inability to make the further payments. The plaintiff purchased the car on the 1st of April, 1924, under a conditional sale agreement for $3,103.60. The plaintiff made an initial payment of $950 and paid six monthly instalments as they came due in all $700. He made no further payments and being in default on the 1st of December, 1924, the car was returned to the defendant who sold it on the 30th of December following for $2,080. The plaintiff claims that the defendant received in all for the car the sum of $3,730 and he claims he is entitled to recover the balance received by the defendant over and above the price he was to pay for the car. He recovered judgment for the amount claimed.

Statement

The appeal was argued at Vancouver on the 16th of October, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: It is a question as to the rights of vendor and purchaser under a conditional sale agreement. When the purchaser is in default and the vendor takes the car back he is then absolute owner and is entitled to the full amount received on a subsequent sale even if he receives more than the original price. They are trying to treat the vendor as a mortgagee with the right to ask him for an accounting. The relationship depends on the form of the contract and insurance cases differ from this. He sold the car the second time as an owner. This case is governed to a large extent by section 10 of the Conditional Sales Act; see also *Sawyer* v. *Pringle* (1891), 18 A.R. 218 at pp. 221-2; *Arnold* v. *Playter* (1892), 22 Ont. 608 at p. 610; *Marston* v. *Baldwin* (1822), 17 Mass. 606. No equitable principle can be introduced, it is a pure question of contract: see *The North British and Mercantile Insurance Company* v. *McLellan* (1892), 21 S.C.R. 288; *The Western Assurance Company* v. *Temple* (1901), 31 S.C.R. 373.

St. John, for respondent: This form of sale is to give the vendor every opportunity to obtain the full purchase price. It is the same as a mortgage when equitable principles are applied. The Courts should assist the purchaser in such a case as this. On equitable principles any surplus should be paid the purchaser. The contract is not at an end when the vendor takes over. The purchaser agrees to pay any deficiency under the agreement: see *Gaar Scott Co.* v. *Mitchell* (1912), 22 Man. L.R. 474; *The American Abell Engine and Threshing Company, Limited* v. *Weidenwilt et al.* (1911), 4 Sask. L.R. 388. There is something further to be done when the vendor takes the car back: see *Toth* v. *Hilkevics* (1918), 1 W.W.R. 905 at p. 907. The question is whether the contract is at an end: see *The John Abell Mfg. Co.* v. *McGuire* (1901), 13 Man. L.R. 454; *Watson* v. *Sample* (1899), 12 Man. L.R. 373. Argument

Mayers, in reply, referred to *Dolliver* v. *St. Joseph Insurance Co.* (1880), 128 Mass. 315 and *Manchester Trust* v. *Furness* (1895), 2 Q.B. 539 at p. 545.

Cur. adv. vult.

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MACDONALD, C.J.A.: The plaintiff bought, under a con- MACDONALD, C.J.A.

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ditional sale agreement, an automobile from the defendant, and after paying a large part of the purchase price made default in the payment of the balance, whereupon the defendant retook possession of the car and resold it at a price which left a balance of several hundred dollars over and above the sum to which under the contract, the defendant was entitled. The defendant has pocketed this sum and refuses to account to the plaintiff therefor.

The Conditional Sales Act, Cap. 44, R.S.B.C 1924, which was passed in 1922, differs from the older Acts in one particular, which is of importance here. It prohibits a vendor from claiming for a deficiency unless he has given the vendee notice of the proposed resale. It will be useful first to notice the provisions of the contract. It provides (1) for retaking on default; (2) for resale; (3) for appropriation of the price to the debt; (4) for payment by the vendee of any deficiency. It is admitted in this case that there was default; that there was no notice to the vendee of the intention to resell; that the resale took place, and that a larger sum than the debt was realized.

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Sawyer v. *Pringle* (1891), 18 A.R. 218, was relied upon in argument by appellant's counsel, the appellant being the defendant in the action and having failed at the trial. In my opinion that decision has no application to the facts of this case. The agreement there did not contain a power of resale, and the Court held that when the vendor resold he rescinded the contract, and therefore could not sue for any deficiency. The *ratio decidendi* was founded on the fact that the sale was not in pursuance of the contract but in breach and rescission of it. Now in the case at Bar the resale was authorized by the contract and there was a clause as above mentioned authorizing appropriation of the purchase-money to the debt and an agreement to pay the deficiency, if any. Said section 10 does not make any part of the contract illegal, it merely provides that the vendor may at his option abandon any right to claim a deficiency; if he should give notice of sale he could claim the deficiency but not otherwise.

No case has been cited in which the exact point in question here has been decided. There would have been no difficulty about the case if the vendor had served the notice which the statute requires him to if he should desire to claim a deficiency.

There is, however, an abundance of authority for the statement that where a debtor authorizes a creditor to sell a security for a debt, which is what the defendants held and have so designated in their agreement, and there is a balance left after the debt has been satisfied, the vendor holds that balance for the vendee and must account to him for it.

Now while a conditional sale agreement is not called a mortgage it is such in effect, and is recognized, I think, by the statute as having, at least, the character of such; a time is fixed by the statute for redemption. A distinction was sought to be made between an agreement of this sort and a mortgage in that the vendor here never parted with the property in the goods but the distinction is merely artificial. If he had parted with the property in the goods to the seller and the seller had reassigned that property to the vendor, the result would be exactly the same as it is now. When a mortgage is given, the mortgagor transfers the legal estate to the mortgagee, and before the intervention of the Court of Chancery, unless the mortgagor should pay the debt on the day named, he lost his property.

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In *Forsyth* v. *The Imperial Guarantee and Accident Ins. Co. of Canada* (1925), [*ante*, p. 253]; 3 W.W.R. 669, this Court held that a purchaser under a conditional sale agreement was an owner of the property; he was an owner subject to a charge; in other words, the vendor held the title to the goods only as security for a debt.

This being so, the question might arise as to what is the construction which ought to be put upon that section of the Act which gives the buyer 20 days within which to redeem his property. If default be made in redeeming, is it to be regarded as a statutory foreclosure? I suggested that to the appellant's counsel on the argument, but he declined to take that position. The question is an important one and I do not propose to decide it in the absence of argument. The result is that the appeal should be dismissed and the judgment below affirmed, with costs here and below.

MARTIN, J.A.: By an agreement in writing between the parties the defendant (appellant) being the owner of a certain motor-car entered into "a contract of conditional sale" (as the

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agreement describes it) thereof to the plaintiff (respondent) upon payment of instalments of the purchase-money secured by concurrent promissory notes of the plaintiff, and subject to certain "terms and conditions" of which the following are of primary importance:

"2. Said property [motor-car] and all parts and accessories added thereto either as additions thereto or in substitution for existing parts or accessories, is now and shall remain the absolute property of the vendor until after full and complete payment of the purchase price therefor.

"3. That on full payment of said promissory notes (or renewals) principal and interest according to their terms, the title to said property shall vest in said purchaser.

"4. The said property and every part thereof at all times while out of the possession of said vendor shall be at the risk of said purchaser, and all loss or damage of said property or any part thereof shall be borne by said purchaser, and no such loss or damage shall operate to extinguish or diminish any liability upon said notes.

"5. The purchaser shall at all times while the said property is in his possession have the right to use the same for such legal uses and purposes as are expressly set out in clause one hereof, but not otherwise."

Subsequent clauses provided that time was of the essence of the contract and that upon default in payment,

"11. . . . . the said vendor may at once take possession of said automobile and said parts, devices, tools and equipment wherever the same may be, and sell said automobile and said parts, devices, tools and equipment and the whole thereof, as provided by law.

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"12. The purchaser agrees to pay any deficiency that may remain after the application of the proceeds of any sale hereunder to the payment of said indebtedness or any judgment obtained thereon."

Upon default being made in certain stipulated payments the defendant retook possession of the car and later sold it for a sum which was considerably in excess of the payments due under the original conditional sale contract and the plaintiff sued to compel the defendant to "account to the plaintiff for the profit made on the resale of the said motor-car" and the learned judge below gave judgment in his favour for $532.78.

This being a "conditional sale" contract to which the Conditional Sales Act, Cap. 44, R.S.B.C. 1924, applies and which, by sections 2 and 10 thereof, introduces some modifications and alterations in contracts of this description between "buyer" and "seller" as defined therein, it is well to understand exactly what the contractual relationship was, so far as material, before the Act, and in so doing it is essential to keep in mind the peculiar

general nature of the agreement in question, which is well and clearly defined in Story on Sales, par. 246:

"A conditional contract of sale differs from a purely executory contract in this particular, that an executory contract is absolutely to sell at a future time, and a conditional contract is conditionally to sell. In the one case the performance of the contract is suspended and transferred to a future time; in the other case the very existence and performance of the contract depend upon a contingency."

It may, I think, be taken as settled ever since that unquestioned decision of the Court of Appeal in Ontario in *Sawyer* v. *Pringle* (1891), 18 A.R. 218, that where the agreement (which "cannot properly be called a 'contract of sale'," pp. 221, 227) provides that the title to the goods shall not pass to the purchaser and that upon default the vendor may resume possession, but omits any provision for a resale, then when possession is retaken and the goods resold the contract is rescinded and the vendor cannot sue the original purchaser for any deficiency: Osler, J.A. puts the situation thus, at pp. 231-2:

"The defendant then having made default the plaintiffs sold to some one else the specific article which they had agreed in the happening of a certain event to sell to him, and the consequence is, that they have by that act deprived themselves of the power of ever carrying out their agreement with him.

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"Still they contend that he must carry out the agreement on his part, and pay them the price, though he can never get the property in or possession of the thing he agreed to buy.

"We are in danger of being misled by a false analogy if we compare this case to one in which there has been an actual sale, and then a resale by the unpaid vendor, who sells the goods *qua pledgee*, as being the property of, and as though they had been pawned to him by, the vendee. The case, on the contrary, is one where there is an express contract which governs the rights of the parties, and in which the plaintiffs have been careful to exclude the possibility of the goods being treated for any purpose as the goods of the defendant, until the price shall have been paid. . . .

"It does not lie in their [plaintiffs'] mouths to say that the sale was a tortious one, or a sale of the defendant's goods, if the property was not the defendant's, and the plaintiffs were careful to stipulate that it should not be his until payment of the price, then the subsequent sale was not wrongful, being one of the plaintiffs' own property."

And also, as Burton, J.A. says on p. 227:

"Where, however, there is such reservation to resell on default, and the vendor exercises that right, it operates as a rescission of the original sale; and this rule applies whether the goods are from the first in the possession of the vendor or are retaken from the purchaser after their delivery to him."

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And the next stage, or aspect, of the matter is reached and considered by Chief Justice Hagarty, at p. 222, thus:

"Where the contract contains this term as to resuming possession, we generally find this followed by a power given to the vendors to sell the chattel, either with or without notice, and to credit the proposed purchaser with the proceeds realized from the sale, leaving him expressly liable for any difference between that and the contract price.

"In such a case the contract would undoubtedly not be rescinded.

"If the plaintiffs here had merely exercised their right to resume possession and had then retained the machine ready for the defendant on full payment, it would also clearly remain in force."

The present contract contains in substance the above "term" and "power" of resale and the right, but not the obligation, to recover the deficiency in the price if the purchaser does not pay the same if required by the vendor so to do. None of the members of the Court agreed with the dissenting opinion of Maclennan, J.A., that the relationship of mortgagor and mortgagee had been established by the agreement before them. In the opinion of Burton, J.A., the vendor had the right to sell the property—it being always his own property until the conditions were fulfilled—when he resumed possession of it, and thus views that situation, p. 228:

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"There seems to me to be a wide difference between the present case and those in which without authority the vendor has sold the purchaser's property. In such a case the purchaser has a remedy but what remedy would the defendant [purchaser] here have if this defence cannot be maintained? The property is not his; he can have no action for the conversion of property which belonged to the plaintiffs; by resuming possession they were within their rights; from that time they held it in security for the payment of the debt, and ready, presumably, for delivery to the defendant, if they still desired to hold him to his contract, on payment of that debt; but being their property, they had the legal power to sell; when, therefore, the defendant became aware that the plaintiffs had elected to sell it, he was entitled to believe that they had elected to abandon this contract, and he had, I think, a clear right to acquiesce in that and do so also.

"If the plaintiffs desired to hold the defendant to his contract, they were bound to hold the machine for delivery to him on payment; when they disabled themselves from doing so, the defendant was, I think, entitled to repudiate the contract also."

And Osler, J.A. says, pp. 230-31:

"Here the agreement between the parties is an executory one; merely a contract, as Lord Blackburn says, to transfer the property in consideration of the purchaser actually paying the price and not merely of his engagement to do so: Blackburn on Sale, 2nd Ed., p. 171. No interest in the subject-matter was vested in or could be acquired by the defendant until

payment of the price in the stipulated manner. The temporary or revocable character of the possession which the defendant acquired under the agreement can, it appears to me, make no difference in this respect. It was collateral to the main object of the agreement, and may therefore be disregarded in considering the rights of the parties in the events which subsequently happened. In other words, I think the case must be looked at as if the possession had always remained with the vendor."

In *Arnold* v. *Playter* (1892), 22 Ont. 608, Chancellor Boyd considered a case where the right to resell after repossession upon default was reserved in the conditional agreement but there was no provision that the purchase-money was to be applied *pro tanto* on the overdue price or that the purchaser was to remain liable for any deficiency and applying *Sawyer* v. *Pringle* he construed the agreement thus (pp. 610-11):

"This kind of contract is said, by the Court of Appeal, to mean: pay the price and get the machine (both possession and property); but till you pay, the machine is ours (the vendors), it is our property—we can take possession, and we have the right to sell, because it is our property. The permission to sell, therefore, is immaterial—it expresses the right in law which the vendor has by virtue of the property and the resumption of possession; and it would seem not to add any ingredient which essentially differs the case from *Sawyer* v. *Pringle*. As said by Mr. Justice Burton, the election to sell was an election to abandon the contract by the vendors; whereupon the vendees acquired a clear right to abandon it also; or rather, I suppose, to treat it as abandoned.

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"That was the first point of distinction alleged by Mr. Hoyles: the expression of a right to sell, which, as I have said, does not appear to carry the case far enough to exempt it from the law of *Sawyer* v. *Pringle*."

It will be noted that he adopts the view of Burton, J.A. that the vendor possessed the right of election to "abandon" the contract by reselling what was always his own property till completely paid for.

The principle of *Sawyer* v. *Pringle* was inversely affirmed by the Full Court of Manitoba in *Watson* v. *Sample* (1899), 12 Man. L.R. 373 (wherein the right to sell and recover any deficiency was reserved), the Court saying, p. 378:

"As it was the express agreement of the parties that the defendant should remain liable for the balance after the credit of the proceeds of the sale, it cannot be held that the contract had been rescinded by the resale of the machine; and the County Court judge was right in holding that the defence of a failure of consideration could not be supported: *Sawyer* v. *Pringle* [(1891)], 18 A.R. 218."

In *The John Abell Mfg. Co.* v. *McGuire* (1901), 13 Man. L.R. 454, the reasoning of the decisions in the *Sawyer* and

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Watson Mfg. Co. cases was applied by Dubuc, J. to material circumstances which were essentially the same as in the *Watson* case; and at p. 460, he expresses the opinion, that after the vendor has retaken possession there is "plausible reason" for deeming him "to be in the position of a mortgagee in possession," but he gives no authority or reasons in support of that view, and therefore, with all respect, this Court of Appeal should not, I think, attach weight to it; the decision of Lamont, J., in *The American Abell Engine and Threshing Company, Limited* v. *Weidenwilt et al.* (1911), 4 Sask. L.R. 388 is on another point.

It was submitted that the effect of the agreement herein is to create the relationship of mortgagor and mortgagee between the vendor and purchaser, and if that is its legal effect then the judgment should be sustained. This raises a very important question, and no Canadian or English case exactly in point has been cited to us, but there are, fortunately, decisions of a very high tribunal which are of great assistance and are always treated by the Privy Council and House of Lords with "very great respect"—I refer to the judgments of the Supreme Court of the United States in the following cases: first, *Heryford* v. *Davis* (1880), 102 U.S. 235, wherein a question arose as to whether or no certain railroad cars in the possession of a railway company were liable to be seized in execution by a judgment creditor of the company, or were not exigible as being the property of the Jackson Shop Car Company which had delivered them into the possession of the railway company under a written agreement which, it was submitted, constituted either a lease or a conditional sale and not a mortgage. The point is thus stated in the judgment (p. 243):

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"The correct determination of this case depends altogether upon the construction that must be given to the contract between the Jackson & Sharp Company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But, if, on the other hand, the title passed by the contract, and what was reserved by the Jackson & Sharp Company was a lien or security for the payment of the price, or what is called sometimes a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company."

The Court after elaborately considering all the terms of the contract reached the conclusion that, p. 246:

"In view of these provisions, we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtors for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale."

And went on to say:

"This was in no sense a conditional sale. This giving the property as a security for the payment of a debt is the very essence of a mortgage which has no existence in a case of conditional sale."

This language is most significant in drawing the sharp and fundamental distinction between the two transactions, *viz.*, unless it can be held that the property was "given . . . as a security for the payment of a debt" it is not a mortgage.

The same question came up, six years later, before the same Court in *Harkness* v. *Russell* (1886), 118 U.S. 663, on a conditional sale agreement which is in all essential respects the same as that before us the material point raised being thus stated by the Court in its judgment, pp. 666-7:

"The first question to be considered is, whether the transaction in question was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase-money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons because not verified by affidavit and not recorded as required by the law of Idaho. But, so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: 'The express condition of this transaction is such that the title . . . does not pass . . . until this note and interest shall have been paid in full.' If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds of it if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of 'damages and rental for said machinery.' . . . It cannot be said, therefore, that the stipulations of the contract were inconsistent with, or repugnant to, what the parties declared their intention to be, namely, to make an executory and conditional contract of sale. Such contracts are well known in the law and often recognized; and when free from any fraudulent intent are not repugnant to any principle of justice or equity,

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even though possession of the property be given to the proposed purchaser. The rule is formulated in the text-books and in many adjudged cases. In Lord Blackburn's Treatise on the Contract of Sale, published forty years ago, two rules are laid down as established: (1) That where by the agreement the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property. (2) That where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, &c., this is a condition precedent to the transfer of the property. Blackburn on Sales, 152. And it is subsequently added, that 'the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and, if they do so, their intention is fulfilled.' "

The Court proceeded to consider many authorities and says, p. 672, in affirming and quoting "an able opinion delivered by Mr. Justice Bigelow," that:

"'All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy.' "

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The Court, at p. 681, considered its previous decision in the *Heryford* case, *supra,* and pointed out the effect of it thus:

"The whole residue of the opinion is occupied with the discussion of the true construction of the contract, and, as we have stated, the conclusion was reached that it was not really a lease, nor a conditional sale, but an absolute sale, with the reservation of a lien or security for the payment of the price. This ended the case; for, thus interpreted, the instrument inured as a mortgage in favour of the vendors, and ought to have been recorded in order to protect them against third persons."

The judgment thus concludes, pp. 681-2:

"It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction; and the further rule, that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed."

In the case at Bar there is no suggestion of any fraud or that the transaction is not in all respects genuine and devoid of sham: the language, indeed, is stronger, if that were necessary, in favour of the vendor because the agreement declares that the motor-car "is now and shall remain the absolute property of the vendor until after full and complete payment of the purchase price therefor" and it is further declared "that time shall be material and of the essence thereof."

Then in *Wm. W. Bierce, L'd.* v. *Hutchins* (1907), 205 U.S. 340, the same Court considered a conditional agreement (p. 344) for sale of railway equipment which contained provisions respecting delivery and possession that in the circumstances were submitted to be inconsistent with the vendor's retention of title, and the Court, pp. 347-8, made the following instructive general observations:

"There remains the question whether the sale was conditional. Such sales sometimes are regulated by statute and put more or less on the footing of mortgages. With the development of its effects there has been some reaction against the Benthamite doctrine of absolute freedom of contract. But Courts are not Legislatures and are not at liberty to invent and apply specific regulations according to their notions of convenience. In the absence of a statute their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose."

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And proceeded to say:

"The contract says in terms that it is conditional and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation was perfectly lawful. *Harkness* v. *Russell* [(1886)], 118 U.S. 663. So that the only question is whether any other provision of the contract is inconsistent with this one or qualifies and explains it as intended to do less than it purports to do when taken alone."

In considering the contract the Court held that neither the laying of the rails supplied thereunder nor the taking of first mortgage bonds of the purchaser as additional security detracted from its true character as a conditional sale as that was merely a way of "exacting an interest . . . to save the vendor's rights." The judgment thus concludes:

"Of course the absolute liability for the price, and putting that liability in the form of a note, are consistent with the retention of title until the note is paid. Parties can agree to pay the value of goods upon what consideration they please, *White* v. *Solomon* [(1895)], 164 Massachusetts, 516,

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and when a purchaser has possession and the right to gain the title by payment, he cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does."

This expression of the entire freedom of contract at common law on the part of the owner of goods to dispose of them on such terms only as he may see fit, is in accord with our law as laid down by the Privy Council in *National Phonograph Company of Australia, Limited* v. *Menck* (1911), A.C. 336, wherein their Lordships say at p. 347:

"To begin with, the general principle, that is to say, the principle applicable to ordinary goods bought and sold, is not here in question. The owner may use and dispose of these as he thinks fit. He may have made a certain contract with the person from whom he bought, and to such a contract he must answer."

The result of these decisions is that, unless the conditional sale in question has been so "regulated by statute" as to be "put more or less on the footing of mortgages" its nature has not been changed.

I turn then to a consideration of our said Conditional Sales Act and at the outset it is to be observed that the Act as a whole is opposed to the view that conditional sales contracts, so called, create mortgage relations because if they did then there was no occasion for most, at least, of its provisions for the situation would be fully governed by ordinary equitable principles, which would provide an adequate remedy for any inequitable conditions that might arise. But on the contrary, said section 2 recognizes the peculiar situation which the parties have deliberately created by their special agreement that delivery and possession shall not divest the owner of any portion of his property till complete performance, by payment or otherwise, by the purchaser. In order, *e.g.*, to protect creditors without notice and subsequent purchasers or mortgagees in good faith from being misled or prejudiced by apparent ownership consequent upon possession section 3 provides that the original seller (as defined by section 2), *i.e.*, the real owner, shall lose all rights against them under his special agreement unless he files a copy of it with the designated "proper officer," failing which "the buyer shall notwithstanding such provision (in the conditional contract) be deemed as against such persons the owner of the goods." It is important to note that as between the parties to the agreement no change

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in the deeming of their true relationship occurs, they being left to their contract. Section 4 effects a similar change as regards goods resold by the purchaser "in the ordinary course of his business" in accordance with the express or implied consent of the original vendor, in which case "the property in the goods shall pass to the purchasers [by resale] notwithstanding the other provisions of this Act." Section 12 is also significant in that it recognizes the right of the original seller to the goods even when they become fixtures, *viz.*:

"12. If the goods have been affixed to realty they shall remain subject to the rights of the seller as fully as they were before being so affixed, but the owner of such realty, or any purchaser, lessee, mortgagee, or tenant, or other encumbrancer thereof, shall have the right as against the seller to redeem the goods upon payment of the amount owing on them."

These provisions are all radically inconsistent with the view that the interest of a purchaser is that of a mortgagor; if, *e.g.*, the goods were held by the purchaser in that capacity they would be exigible under *fi. fa. as* the decisions above cited declare.

So far everything in the Act supports the transaction as an ordinary conditional sale contract. But section 10 is relied upon as effecting the transformation from a naked bailee to a mortgagor, whose position, it has been seen, is in its "very essence" different, so it requires careful consideration, and after having given it I am of the opinion that, with every respect, it has only the effect of substantially modifying the peculiar contractual relationship in two substantial particulars, *viz.*, that it compels the seller after retaking possession to retain the goods for 20 days before reselling them during which time the purchaser may redeem upon payment of the balance of the contract price and costs, or upon due performance or tender of the "condition upon which the property in the goods is to vest in the buyer," failing which redemption (and subject to the giving of a certain notice in a certain event) the seller may resell by private sale or public auction. As to this provision I am unable to see how it changes the nature of the original contract. It simply, in broad effect, confers a special right to redeem within a limited time during which it stays the hand of the purchaser for 20 days before he exercises his legal right to resell at once, in case he should elect to adopt that course, instead of, *e.g.*, keeping his own property

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(as it is in law) for his own use, or leaving it to another person who might wish to get possession of it and use it on a hiring agreement: this right, be it noted, to use the property himself or lease it, is not affected by the provisions of subsection (2) which, needlessly, because he had it already, authorizes him to sell after the 20 days, nor does it purport to interfere with his right, in my opinion, to keep the entire proceeds of the resale of his own property.

The second substantial modification is contained in subsection (3):

"(3) If the price of the goods exceeds thirty dollars and the seller intends to look to the buyer for any deficiency on a resale, the goods shall not be resold until after notice in writing of the intended sale has been given to the buyer."

This comes into operation only when the seller "intends to look to the buyer for any deficiency on a resale," and the effect is to deprive the seller of the right to call upon the buyer for a deficiency even when that right is reserved in the contract, unless he gives the prescribed statutory notice. Such a provision is clearly, to my mind, not an alteration in the nature of the contractual relation of the parties in the true sense but the arbitrary placing of a fetter upon an otherwise unfettered right of the seller conferred by the contract: in other words one of his rights is restricted in its exercise. That the whole section 10 is regarded as an imperative curtailment of certain of the seller's rights is indicated by subsection (7) thereof, which declares that "this section shall apply notwithstanding any agreement to the contrary." In the case at Bar no such notice was given and therefore when the vendor proceeded to resell his property in the absence of it that was an "election," as Burton, J.A., and Chancellor Boyd put it, *supra,* of his intention to abandon his claim for any deficiency should the resale (auction or private, as the case might be) not realize then, or later if on instalments, the expected price necessary to bring the proceeds thereof up to the original sale price: that is the risk the vendor must be prepared to take if he elects to sell without said notice. But if, having elected to take that risk, he does resell his own property, I am unable to perceive upon what principle he is to be deprived of the full proceeds of the sale where, as unquestionably is the

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case herein, the original conditional sale is a *bona fide* transaction.

Viewing the said Act as a whole it is clear, to me at least, that while expressly recognizing and preserving the peculiar situation created by conditional sale contracts, and also their special nature, it provides a remedy both for the protection of the public and the parties themselves against some hardships at least which had arisen out of the enforcement of such special rights: there is not the slightest indication, but the reverse, of any intention to alter the true nature of such contracts which have much to commend them because they afford a means by which industrious persons without capital or sureties may on their own credit acquire, after a relatively small cash deposit, the possession and use of valuable goods which enable them to make a living and a profit according to their capacity; the real consideration for such a special contract is the said possession and use on the buyer's (as defined by section 2) part and adequate protection for the owner, pending full payment, by his retention in its entirety of his title to his property. Upon this sensible basis innumerable transactions in the ordinary course of plain and simple business occur daily throughout Canada, and it would be, in my opinion, a mistake to attempt to hamper them by the introduction of complicated or elaborate equitable principles which are neither appropriate nor necessary in the circumstances. And if the Court is to embark upon the troubled sea of equity in every day sales of ordinary goods it is difficult to see what harbour it will reach because, *e.g.*, if it is equitable that the seller should be compelled to account to the buyer for any surplus over the original price after resale (even where he elects, as here, not to hold the buyer liable for any deficiency and accepts the risk of ultimate realization) then on the other hand it would be fully as equitable to require the buyer to account to the seller for the profits he had made during the time he had the use and possession of a valuable property. If, for example, the buyer were to acquire upon such conditions a valuable painting and make a handsome profit from its exhibition and yet neglect to pay the notes and instalments due upon the contract for it and finally, having dissipated such profits which were more than

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sufficient to pay the full price, allow the picture to be retaken by the seller, would it then be equitable to allow him to call upon the seller to account to him for any surplus upon the resale in the absence of any clause to that effect, without requiring the buyer to account in the slightest degree for the profits he had made by means of the use and possession of the seller's property of which and its profits he had been deprived pending payment under the contract? I do not think it would. And the same reasoning would apply to the case of a race horse so acquired and winning large and profitable stakes which were not applied upon the conditional contract, and many other instances might easily be illustrated if necessary.

I am therefore of opinion that no ground has been shewn to exist for regarding this transaction other than as an ordinary business one under a conditional contract into which the relation of mortgagor and mortgagee does not enter.

We were referred to an expression in the judgment of the Saskatchewan Court of Appeal in *Toth* v. *Hilkevics* (1918), 1 W.W.R. 905, wherein it was said, p. 907, that the plaintiff who resold a horse under a lien note should not be permitted to make a profit to himself upon the expenses of a resale, the Court giving as its reason, "because he stands very much in the position of a trustee": I should have thought it could have been put on a simpler and elementary ground, but in any event seeing that neither the circumstances nor the terms of the contract are set out in the report or judgment, the main appeal being on another point, the decision is of no weight or application to the case at Bar.

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Some argument was addressed to us upon the meaning of the language above quoted authorizing the vendor to resell "as provided by law," but I do not think anything turns upon that, and it would mean nothing more than to exercise the rights he possessed according to law whether they were declared (provided) by statute or by common law as declared (interpreted) by the Courts.

Some reliance was placed upon certain decisions upon insurance policies and in particular our recent one in *Forsyth* v. *The Imperial Guarantee and Accident Ins. Co. of Canada* (1925),

[*ante,* p. 253]; 3 W.W.R. 669, but these, to my mind, have, with respect, no real application and are merely "false analogies" as Osler, J.A., *supra,* puts it. In the *Forsyth* case in which the majority of this Court was not free from doubt (and I should still like that question to go further) the Chief Justice made use of some general expressions upon the nature of conditional sale agreements but they were not shared by the rest of the Court which found itself in a difficulty in endeavouring to apply the wide effect of the language employed by the Supreme Court of Canada in its decisions there cited. But that language was expressly confined to an interpretation "within the meaning of the conditions of the policy" before the Court, and a perusal of the leading American case of *Dolliver* v. *St. Joseph Insurance Co.* (1880), 128 Mass. 315, upon which the Supreme Court largely relies in *The Western Assurance Company* v. *Temple* (1901), 31 S.C.R. 373, 375, shews that the American Court was also careful to base its judgment "on the peculiar language of the policy sued on," which is wholly different from the contract at Bar; and this Court likewise in the *Forsyth* case based its judgment upon the language of the policy before interpreting it as best it might in the light of the controlling expressions of the Supreme Court so far as applicable on the different facts as my brother GALLIHER pointed out.

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I might, for illustration, add that in the case of *The Ash-Temple Co.* v. *Wessels* (1926) [*ante,* p. 424], wherein we are giving judgment this day, there is to be found the usual clause when the seller takes the wise precaution to safeguard himself by stipulating that any surplus after the resale shall be paid to him.

It follows that, in my opinion, this appeal should be allowed.

GALLIHER, J.A.: Shortly, there is a provision in the lien agreement that in case the purchaser fails to make payments as therein provided, the vendor may take possession of the automobile and sell same as provided by law and the purchaser agrees to pay any deficiency that may remain after the proceeds of such sale have been credited. The vendor retook possession and retained the auto for the period of 20 days, and resold with-

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out giving notice provided in section 10 of the Conditional Sales Act, R.S.B.C. 1924. Cap. 44, subsection (2) of section 10, is as follows:

"(2) When the goods are not redeemed within the period of twenty days, and subject to the giving of the notice of sale prescribed by this section, the seller may sell the goods, either by private sale or at public auction, at any time after the expiration of that period."

And subsection (3) is in these words:

"(3) If the price of the goods exceeds thirty dollars and the seller intends to look to the buyer for any deficiency on a resale, the goods shall not be resold until after notice in writing of the intended sale has been given to the buyer."

This is followed by subsection (4) setting out what the notice shall contain. The seller here has resold without giving the notice, hence has debarred himself from looking to the purchaser for any deficiency. If the plaintiff is right here there was no deficiency, but a profit on the resale. Assuming there was a profit, is the plaintiff entitled to it? That, in my view, depends upon whether the vendor was selling under the agreement or whether the agreement was at an end when he took possession of the car. He certainly took possession under the agreement. The sale agreement contains a clause to this effect: After default in payment the vendor may take possession and sell as provided by law, by law meaning as provided in R.S.B.C. 1924, Cap. 44, section 10. I say meaning that because I think that must be taken to be what was in the contemplation of the parties in using the expression in the agreement. And a further provision is as follows: [Already set out in the judgment of MARTIN, J.A.].

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After taking possession of the car the purchaser proceeded, at least, to this extent, under the statute—he retained the car for 20 days without attempting to dispose of it. In *Watson* v. *Sample* (1899), 12 Man. L.R. 373 at p. 378, Bain, J., who delivered the judgment of the Court, says:

"As it was the express agreement of the parties that the defendant [purchaser] should remain liable for the balance after the credit of the proceeds of the sale, it cannot be held that the contract had been rescinded by the resale of the machine."

There, as here, there was a power of sale in the agreement; there, as here, the right of the purchaser to have the proceeds of the sale applied on the indebtedness. See also *The American*

Abell Engine and Threshing Company, Limited v. *Weidenwilt et al.* (1911), 4 Sask. L.R. 388. In *The John Abell Mfg. Co.* v. *McGuire* (1901), 13 Man. L.R. 454, Dubuc, J. seems to have thought that the vendor in retaking possession under the terms of the agreement (as in this case) may be deemed to be in the position of a mortgagee in possession: see p. 460.

The point that gives me some difficulty is that no notice of the sale seems to have been given to the plaintiff. If the only effect of the non-giving of notice is that the defendants have deprived themselves of a right to claim for a deficiency as provided in the agreement, then I have little difficulty, but if on the other hand, it has the effect of making it a sale not under the agreement, it might be held that such sale rescinded the agreement, and on the one hand the plaintiff would not be liable for a deficiency and on the other hand the defendants would not be called upon to apply the proceeds of sale in extinguishment of the debt and pay over the surplus, if any, to the plaintiff. Section 10 of our Conditional Sales Act is none too clear on the point; for instance, section 10 (2) says, "when the goods are not redeemed within the 20 days, subject to the giving of the notice prescribed by this section," and (10 (4) is the only notice so prescribed) the seller may sell the goods by private sale or public auction at any time after the expiration of the 20 days. Then follows 10 (3) which provides that where the goods exceed in value $30 the buyer has to give notice—10 (4)—if he intends to claim for deficiency. If section 10 (2) means that the seller may sell at any time after the 20 days, but subject to giving a notice under 10 (3), if he intends to claim for a deficiency, then if, as here, he does not intend to claim for a deficiency, no notice is necessary under 10 (2). I think, perhaps, that is the effect of the whole section.

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Having repossessed themselves of the goods under the agreement, and having retained them for the statutory period and (if my interpretation of the statute is right) the sale which was made here did not rescind the agreement, and the judgment below should stand, if I can agree as I do with the disposition made by the learned trial judge of the bills for repairs, etc. In my view, therefore, the appeal should be dismissed.

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MCPHILLIPS, J.A.: In my opinion the judgment of GRANT, Co. J. was right upon full consideration of the terms of the conditional sale agreement, and the facts and circumstances surrounding the sale made and the subsequent sale made by the appellant, after default upon the part of the respondent. Paragraph 12 of the conditional sale agreement makes it plain, if anything be needed to establish the equity of the respondent to the surplus moneys upon the resale. It reads as follows: [Already set out in the judgment of MARTIN, J.A.].

The situation, in effect, became that of mortgagor and mortgagee and the reciprocal right must be held to be in favour of the respondent where a surplus is achieved on the resale and that is the present case. "Equity regards the spirit and not the letter." It would certainly be contrary to fair dealing that the respondent should not be entitled to the surplus moneys, *i.e.*, over and above the amount due and payable under the conditional sale agreement. The respondent cannot be prevented from claiming accounts and payment of any surplus to him (*Salt* v. *Marquis of Northampton* (1891), 61 L.J., Ch. 49; 65 L.T. 765; (1892), A.C. 1; *Samuel* v. *Jarrah Timber and Wood-Paving Corporation* (1904), A.C. 323; 73 L.J., Ch. 526; 90 L.T. 731).

The judgment should be affirmed and the appeal dismissed.

MACDONALD, J.A.: The plaintiff purchased a touring car from the defendant under a conditional contract and, after making substantial payments, the defendant (default in two instalments occurring) seized the car and more than 20 days thereafter sold it for an amount in excess of the balance remaining due and payable by the plaintiff. The plaintiff brought action to recover this excess and obtained judgment. From that judgment the defendant appeals. We have not been referred to any direct authorities where, in the absence of a proviso in the agreement itself covering the point, such excess on resale has been recovered.

It is material in determining the incidents of the conditional sale agreement and the rights and obligations arising thereunder to refer to some of the terms of the contract. The vendor agreed to sell and the purchaser to buy on certain conditions. It is not

a sale. The contract of sale is consummated only when the conditions are performed. In the meantime, the agreement is executory. The car remained the property of the vendor until full payment of the purchase price, after which title would vest in the purchaser. In the meantime the plaintiff had a right to its possession and use. On default in payments the vendor might take possession of the car and sell it as provided for in the contract.

In the absence of any term requiring the original vendor to account for any excess received on a resale, I have difficulty in conceiving upon what principle such excess may be recovered. The contract itself and the Conditional Sales Act requiring a notice of sale to be given, complying with certain formalities, covers the point of recovering from the original purchaser any deficiency on a resale. Neither the contract nor the Act, however, provides for the recovery by the original purchaser of any excess on resale.

It was submitted, on behalf of the plaintiff, that the conditional agreement was not cancelled when the defendant seized the car and resold and that the vendor, in reselling, was acting under an existing contract and was in the same position as a mortgagee in possession accountable to the plaintiff. In other words, upon retaking possession, he held the car as security for a debt and, if he undertook to realize the amount due him by the sale of the repossessed article, he must account to the original purchaser for any excess received over and above the indebtedness. This is applying equitable principles to a specific contract. It is an attempt to shew that, as in the case of certain instruments, where notwithstanding their form they may be treated as a mortgage, this contract should be similarly regarded. It might be suggested that before the Conditional Sales Act, it would be necessary to complete this transaction to give a bill of sale of the chattel to the purchaser and take from him a chattel mortgage and that now the conditional sale agreement is in reality a combination of both instruments in one document carrying with it all the incidents of the two, and all the consequences of a realization by sale under a chattel mortgage. I do not think

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this suggestion tenable. As stated by Burton, J.A. in *Sawyer* v. *Pringle* (1891), 18 A.R. 218 at pp. 226-7:

"If I could bring myself to the conclusion arrived at by one of my learned brothers that the relationship of mortgagor and mortgagee existed between these parties, I should probably have no difficulty in arriving at the same result as he has, but that, as it appears to me, is what they have studiously avoided."

The judgment in *Sawyer* v. *Pringle* by a strong Court has been repeatedly followed and referred to and is instructive on the points involved in this appeal. While the action was brought by the vendor, after seizure and resale to recover the balance of the original price, *i.e.*, the deficiency, yet the reasons for judgment are in point in shewing the nature of the relationship created by these conditional agreements and the incidents accompanying repossession and resale. Hagarty, C.J.O., at p. 221 says:

"This agreement cannot properly be called 'a contract of sale.' It is an executory agreement for a future sale on performance of certain named conditions by the defendant [(*i.e.*, purchaser)]."

Then, after referring to a judgment in the Supreme Court of the United States in *Harkness* v. *Russell* (1886), 118 U.S. 663 the learned Chief Justice goes on to say at p. 224:

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"A contract like that before us was held to be not a mortgage, but an executory conditional sale."

And again at p. 227, Burton, J.A. says:

"They have . . . refrained from making any absolute contract of sale, reserving possession merely till payment, but have entered into a peculiar contract under which no sale is to be considered as made until full payment of the price."

And further, on the same page:

"Where there has been a sale, the authorities seem very clearly to establish that where there is no express reservation of a right to resell, such a sale by the vendor is a mere tortious act for which the purchaser has his remedy, but it has no effect as a rescission of the contract. Where, however, there is such reservation to resell on default, and the vendor exercises that right, it operates as a rescission of the original sale; and this rule applies whether the goods are from the first in the possession of the vendor or are retaken from the purchaser after their delivery to him."

Applying the foregoing principles to the case at Bar, what follows? We have a condition in the contract permitting resale on default and a resale was made. Such resale, therefore, rescinded the original agreement. It was at an end and no action can be maintained by the plaintiff on the basis of an existing

contract. The conditional agreement was necessarily terminated on resale because it was no longer possible to transfer to the purchaser on tender of payment the subject matter of the sale. Cases may arise when in the instrument there is no reservation of the right to resell and a resale is made where an action may be maintained by the purchaser on the basis of an existing contract. In such case the unpaid vendor resells in the same way and accompanied by the same incidents as if the article were pledged to secure the balance due. Where, however, there is a power of resale reserved in an agreement, purely executory, not yet consummated by the purchaser complying with the conditions, no property therein having passed to the original purchaser, the plaintiff having only a promise, that if he performed the conditions the vendor would sell and deliver the car, then upon resale the conditional sale is rescinded, and the vendor sells not on behalf of the original purchaser; he sells his own property and need not account for the excess. See Benjamin on Sale, 6th Ed., pp. 1073-4:

"Two test questions may be put which, if answered in the negative, go far to shew that a seller by reselling rescinds the contract: 1. Is the buyer still liable for the price? 2. Is he entitled [as in this case] to any profits realized? The first question has been answered in the negative in *Chinery* v. *Viall* (1860), 29 L.J., Ex. 180; and although there is no authority which supplies an answer to the second, it is submitted that it also should be answered in the negative."

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It follows that on the resale of the car, the defendant was selling his own property: the conditional agreement was at an end and the original purchaser cannot maintain this action or call upon the defendant to account on the basis of mortgagor and mortgagee, a relationship which does not exist. And unless such a relationship exists, no other equitable principles can be invoked to aid the plaintiff.

I would allow the appeal.

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

Solicitors for appellant: *McLellan & White.*
Solicitor for respondent: *F. A. Jackson.*

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THOMAS v. GALE *ET AL.*

Commission—Company seeking loan—Introduction to financial houses—Agreement for loan effected—Change of company—Dividend declared by old company—No provision for debts—Liability of directors—R.S.C. 1906, Cap. 79, Sec. 82.

The Terminal Grain Company Limited was organized by the defendants Gale and Smith for the purpose of building a grain elevator in Vancouver. On the election of directors, Gale was appointed president. The Company obtained a lease from the Vancouver Harbour Commissioners of a site on the waterfront for an elevator and on the 10th of August, 1923, the Board passed a resolution authorizing the president to negotiate and arrange for the raising of $1,000,000 or such sum as was necessary for the erection of an elevator; that the moneys be raised either by the sale of debentures, or of preferred stock, or common stock on such terms as he deemed expedient, to enter such financial obligations on behalf of the company as he deemed expedient and that for the said purpose he proceed to England or elsewhere at the Company's expense. Gale then interviewed the plaintiff who was a broker and had just returned from England where he had been interviewing financial houses on the question of Vancouver grain elevators and in consideration of the plaintiff introducing him to certain firms in London he wrote him a letter on the 30th of August, 1923, agreeing that "In the event of my being successful in raising the money required for my project, from or through any of these concerns, I shall be pleased and do hereby agree, on behalf of the Terminal Grain Company Limited, to protect you to the extent of two (2%) per cent. commission on the amount of the money so raised, said commission to be paid to you as and when the money is received." Gale then went to London with the letters of introduction and through them he met Sir William E. Nicholls of Spillers & Baker, Limited, and others. Later an agreement was arrived at between Gale and Spillers for a loan to build a two million bushel capacity elevator costing about $2,500,000 and that the Terminal Grain Company Limited should transfer 70% of its stock to Spillers, but Spillers stipulated that a lease for a larger site should be obtained and that a new company should be incorporated (in order to protect them from undisclosed liabilities of the old company) of the same authorized capital. The new company was formed with the same directors as the old Company and a new lease for a larger site was obtained and the old company assigned all its rights to the new company in consideration of the allotment of all the share capital of the new company. The shares were allotted to the old company and by resolution of the old company the shares were paid as a dividend to the shareholders of the old company, but this was done in contemplation of carrying out the agreement with Spillers, Gale receiving sufficient of

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the shares to hand over 70% of the stock to Spillers when the agreement was completed, the shareholders retaining 30%. Gale then went to England and carried out his agreement with Spillers. In an action to recover a commission of 2% of the moneys received by Gale it was held that the plaintiff was entitled to 2% on all moneys received up to $1,000,000 and that the defendants Gale, Smith and Gurd were personally liable.

Held, on appeal, affirming the decision of GREGORY, J. in part (MACDONALD, J.A. dissenting), that the plaintiff is entitled as against the Terminal Grain Company Limited to a 2% commission on all moneys supplied or which may hereafter be supplied upon capital account under Spillers's agreement.

Held, further, affirming the decision of GREGORY, J. (MARTIN, and MACDONALD, JJ.A. dissenting), that the directors of the Terminal Grain Company Limited having declared and paid a dividend to their shareholders which exhausted the capital of the company, without making provision for existing debts of which the plaintiff's claim was one, were personally liable for the plaintiff's claim under the provisions of section 82 of the Companies Act.

APPEAL by defendants from the decision of GREGORY, J. of the 12th of June, 1925, in an action tried by him at Vancouver on the 4th to the 14th of May, 1925, to recover a 2% commission on all moneys borrowed by the Vancouver Terminal Grain Company from Spillers Milling & Associated Industries Limited. The plaintiff Thomas, a broker in Vancouver, visited England in March, 1923, and discussed the subject of grain elevators in Vancouver with Bertram Morgan and Edward Baker who were directors of Spillers & Baker, Limited, also with A. D. Watts, managing director of The Canadian British Corporation, Limited. On his return to Vancouver in August, 1923, Thomas was approached by the defendant Gale and after a discussion on the question of elevators Thomas gave Mr. Gale letters of introduction to Bertram Morgan, Lord Invernairn, E. J. Smith and six other financial corporations and Mr. Gale as president of the Terminal Grain Company Limited incorporated under the Dominion Companies Act, addressed to Thomas the following letter: Statement

"Relative to the project of building grain elevators, etc., in Vancouver, concerning which we have had several discussions, I beg to advise that I shall be pleased to take advantage of the letters of introduction which you have given me to the following persons and concerns: . . . .

"In the event of my being successful in raising the money required for my project, from or through any of these concerns, I shall be pleased and

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do hereby agree on behalf of the Terminal Grain Company Limited, to protect you to the extent of two (2%) per cent. commission on the amount of money so raised, said commission to be paid to you as and when the money is received. I shall be pleased to shew you any and all communications or correspondence relating to the above matter.

"Thanking you for your kindness in this matter and trusting that our relationship shall prove of mutual benefit and satisfaction, I beg to remain,

"Yours very truly,

"(Sgd.) Terminal Grain Co., Ltd.,

"R. H. Gale, President."

Gale then proceeded to England and shortly after he left A. D. Watts, managing director of The Canadian British Corporation, Limited, called on the plaintiff in Vancouver and in pursuance of his contract with Gale he caused Watts to cable his company in England instructing its officials to meet Gale at Southampton and on behalf of the plaintiff introduce him to Sir William Nicholls, chairman of the board of directors of Spillers & Baker, Limited. An official of The Canadian British Corporation, Limited, accordingly met Gale and introduced him to Sir William Nicholls. In July, 1923, Gale had procured for the Terminal Grain Company Limited a 21-year lease from the Vancouver Harbour Commissioners of certain lands on the foreshore of Burrard Inlet for the purpose of the erection of grain elevators. At the same time on behalf of said Company he entered into a contract with one John L. Davidson for the erection of said elevators and these were the sole assets of said Company on the 30th of August, 1923. Gale entered into negotiations with The Canadian British Corporation, Limited and Spillers & Baker, Limited, and on the 8th of February, 1924, caused the Vancouver Terminal Grain Company Limited to be incorporated under the Provincial Companies Act with head office at Vancouver, and under a contract of that date between the two companies, The Terminal Grain Company, Limited, transferred to the Vancouver Terminal Grain Company the 21-year lease of the lands upon which the elevators were to be erected and the contract with Davidson for the construction of the elevators in consideration for which the Vancouver Terminal Grain Company undertook to allot to the Terminal Grain Company Limited 1,000 fully paid shares of the capital stock of the Vancouver Terminal Grain Company

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of the nominal value of $100 each, and it was further provided in the contract that the said shares should be allotted 499 shares to Gale, 498 to J. R. Smith, one to W. F. Gurd, one to E. G. Gale, and one to J. W. Macey. There was a further provision that the Vancouver Terminal Grain Company should assume the burden of discharging certain debts of the old company but this did not include the plaintiff's claim. The plaintiff claims that the formation of the new company and the transfer of the assets of the old company to the new was for the fraudulent purpose of depriving him of his commission and that Gale raised during the fall of 1923, from and through The Canadian British Corporation, Limited and Spillers & Baker, Limited, the sum of $12,500,000 as working capital for the purpose of supplying grain elevators at the port of Vancouver. Gale on the other hand states that when he examined Thomas's letters on the way to England he found that the letters stated he represented the Dominion Government of Canada, the Provincial Government of British Columbia and the Vancouver Harbour Board, which was not the case and he concluded he could not use the letters and in fact never did use them in any way.

Statement

Craig, K.C., and *Darling,* for plaintiff.

J. W. deB. Farris, K.C., and *Sloan,* for defendants other than the Vancouver Terminal Grain Co., Ltd.

Davis, K.C., and *Hossie,* for the Vancouver Terminal Grain Co. Ltd.

12th June, 1925.

GREGORY, J.: The action, as against the Vancouver Terminal Grain Co., must be dismissed with costs. It is admitted that there can be no liability on the contract for want of privity, and there can be no declaration, as asked for, against it on the ground of fraud, for though the shareholders of that Company knew perfectly well what was being done and that the Terminal Grain was being stripped of all its assets the acts complained of were those of the Terminal Grain Co. The plaintiff has no standing to set them aside. That would have to be done in winding-up or some similar proceedings.

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The transaction cannot in any case be set aside under the Statute of Elizabeth, for I find no evidence of any actual intention to defraud on the part of any one in the manner in which the new Company was formed and the agreement with Messrs. Spillers was given effect to. Messrs. Spillers, not unreasonably I think, refused to do anything in the name of the old company because, probably, of the impossibility of ascertaining that it positively had no outstanding liabilities, and to protect themselves against any such claims being subsequently put forward. They insisted upon a new company being formed, and anything that was done was done under the advice of their solicitor; they insisted upon it being done in that way for their own protection, and the Terminal Grain Co. *et al.* consented because they could not get the advances in any other way. There is no evidence that the effect upon the plaintiff was in any way considered by anyone.

The main question in the case is, whether the contract in dispute was one of special or general employment and whether Gale was authorized to enter into it.

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It has been urged that under section 69 of the Dominion Companies Act, R.S.C. 1906, Cap. 79, as amended by Can. Stats. 1914, Cap. 23, Sec. 3, the contract cannot be enforced because it is one to borrow money, and under that section the directors, before they could borrow money, would have to be so authorized by by-law passed by two-thirds in value of the subscribed stock at a general meeting called to consider it. I do not think this is so for several reasons. First, it is not a contract to borrow money, but one of employment of the plaintiff. When the plaintiff found some one willing to lend the money it would, no doubt, be the duty of the Company to pass such a by-law, and if it authorized the making of the contract—Exhibit 2—which it unquestionably did, or tried to do, it could not properly refuse to pass such a by-law, in order to avoid paying plaintiff, and there is no doubt that it would not have done so, for Mr. Gale said anything he wanted to be done it would do. Even if the contract be considered as one to borrow money, I am strongly inclined to think that Thomas could assume that the necessary by-law had been passed—the passing of such a by-law being one

of internal management. It is true that the right to borrow is conferred by the statutes and not by a memo of association and by-laws, but I can see no difference in principle, for the statute does not in terms prohibit borrowing except upon the passing of a by-law or express the passing of a by-law as a condition precedent to borrowing. The cases cited by plaintiff's counsel seem to me to be in point. The case of *Pacific Coast Coal Mines, Limited* v. *Arbuthnot* (1917), A.C. 607, does not appear to me to parallel the situation here. In that case the company had done what it was not authorized to do. What it did was not "in the course of its business." It secured the passage of a private Act validiating its acts "subject to the same being adopted by a resolution," etc. The Judicial Committee held that the regular passing of such resolution was not a matter of internal management, but was a "condition" without the fulfilment of which the acts in question would remain *ultra vires.*

The distinction is clear from the language of Viscount Haldane at p. 616, when he says:

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"No doubt where some act, such as the granting of an obligation in the course of his business, is put by the constitution of a company within its power, and certain formalities of administration are prescribed . . . . . the mere failure to comply with a formality . . . . . will not affect a person dealing with the company from outside and without knowledge of the irregularity."

This is a trading company, in the course of its business it may borrow money, its constitution is the Act, and I cannot see reason for treating the passing of a by-law, such as would be required here, in any different way because the Company's constitution is a statute of Parliament instead of a memorandum of association and by-law, the making of which are only authorized by statute; unless the language of the Act is such as to make the due passing, etc., a condition.

The contract in dispute was one, I think, of general employment. Many cases were referred to at the argument, and I have examined them all, but there is nothing to be gained by discussing them here, for in all cases it is a question of fact and in no two cases are the facts the same. It is urged for the defence that no letter of introduction to the Canadian British

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Corporation was received. The contract itself admits its receipt, and I prefer to accept that admission rather than any witness's recollection of the matter, if it is necessary to have its delivery proved, which I think it is not, for there is no promise on plaintiff's part to deliver any actual letter of introduction whatever. The only undertaking in the contract is the Terminal Grain Company to pay commission in the event of the money being raised from or through the named firms. The money was to be raised "for my project." What that project was is set out on the first page of the contract as "the project of building grain elevators, etc., in Vancouver concerning which we have had several discussions." It was attemped to limit the project to the building of grain elevators by raising the necessary money therefor in a special way, and I admitted evidence of the conversation referred to in the contract, but that evidence was unsatisfactory and unconvincing. I have no doubt that Gale hoped to raise it in the way he states, but I am not satisfied that he made this known to the plaintiff. If that has been his fixed intention, I would have expected him to take his proposition to other firms when the Spillers people refused to entertain it, but this he did not do. In no document that I have seen has the method of raising the money now contended for been set out, but, on the contrary, the project is in all writings referred to as the building of grain elevators at Vancouver. It is in the contract, in the letters of introduction, and Gale never complained of the letters on this ground. It is so in the old Company's resolution authorizing Gale to act, and Gale's answer to me at the trial, in response to my suggestion that he did not care very much so long as he got something big for Vancouver, was "that was the main idea."

I am unable to accept Gale's statement that after reading the letter of introduction while crossing the ocean and discovering the untrue statement therein, that he represented the Dominion and Provincial Governments and the Vancouver Harbour Board, he abandoned all intention of using the letters and thereafter never considered the plaintiff in connection with his activities—never dreamed that he could have any claim for commission. Had that been the fact, I would have expected

him to have written the plaintiff promptly pointing out the uselessness of his letter, etc., and advising him that he would make no use of his introduction, but he did not, and it was over a year before plaintiff learned this. That state of mind is also inconsistent with his reference to plaintiff's claim to the people he was dealing with in England, and to his conversation with A. M. White when he first got to England, and I may say that I found White a most satisfactory and, I believe, a reliable and truthful witness.

That money was raised for the building of an elevator is admitted, and there is no doubt in my mind that it was raised from Messrs. Spillers, that the introduction to them was through the Canadian British Corporation and that Gale's introduction to that corporation was the direct and immediate result of the plaintiff's act supplementing his letter of introduction to them.

It is urged for the defence that as the money was never advanced to the Terminal Grain Co. but to a new and different Company, that no commission has been earned. This sounds plausible but is not honest, first, because the new Company—the Vancouver Terminal Grain Company—consisted of the same persons as the old company, was incorporated at the instance of the old company, though on the suggestion of Messrs. Spillers, with the express purpose of carrying out, in an enlarged form, it is true, the old company's project, and it took over from the old company every stick of its assets, receiving in return the entire share capital of the new company. How, in these circumstances, can it be said that it has not received the benefit of the advances, although in form they were to a different company?

A very similar defence was raised in *Gunn* v. *Showell's Brewery Company (Limited) and Crosswell's (Limited)* (1902), 18 T.L.R. 659. In that case the Showell Company agreed to pay plaintiff a commission "in every case when we purchase properties . . . introduced by you." The plaintiff brought to defendant's attention certain properties. In order to carry out defendant's scheme of utilizing the property a new company was formed, and the purchase made in its name, and the Court of Appeal affirmed the judgment of Mr. Justice

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Channell that as the defendant promoted the company which bought the property the commission was earned. Attention may be drawn to the fact that in that case the new and purchasing company was not made a party defendant. See also the case of *McBrayne* v. *Imperial Loan Co.* (1913), 28 O.L.R. 653, and *Stratton* v. *Vachon* (1911), 44 S.C.R. 395.

As to the amount for which the plaintiff is entitled to judgment, there has been no argument, and I will have to hear counsel again on that head; also as to whether there should be a declaration with reference to future payments along the lines suggested by the Chief Justice of the Court of Appeal in *Prentice* v. *Merrick* (1917), 24 B.C. 432 at p. 436.

There must also be judgment against the defendants Gale and Smith under section 82 of the Companies Act, being Cap. 79, R.S.C. 1906. They were directors of the Terminal Grain Co. when it declared and paid a dividend disposing of the entire assets of the Company, *viz.*, shares in the new company, leaving nothing for creditors. This not only impaired but exhausted the capital of the Company. It has been urged that the

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plaintiff's claim was not a debt but a right, if anything, to damages. This does not appear to me to be correct, the plaintiff is not suing for damages but for the moneys the Company agreed to pay him for his services. At the time of the declaration of the dividend the plaintiff's services had been fully performed, there was nothing further for him to do. It only remained for Messrs. Spillers to advance the moneys, and as the moneys were advanced, the commission became due automatically. If the commission moneys could not, strictly speaking, be called an existing debt at the time of the declaration of the dividend, it was one contracted immediately the advances were made.

In the case of *Snow* v. *Benson* (1905), 2 W.L.R. 359, referred to by defendant's counsel, it was held that the defendants had not declared a dividend and so were not liable under the statute to the plaintiff. It is true that the Court further declared that the defendants would not have been liable if they had declared the dividend, but that was because the plaintiff's claim was one for damages and claims for damages were not carried by the statutes.

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The other defendants were all disposed of during the argument.

There will be judgment in accordance with these reasons, and liberty to apply with reference to any matter I have neglected to deal with.

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From this decision the defendants appealed. The appeal was argued at Vancouver on the 20th to the 24th of November, 1925, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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Davis, K.C. (*W. B. Farris, K.C.*, with him), for appellant: There are two causes of action: (1) For damages for breach of contract; and (2) under section 82 of the Companies Act (Dominion). The contract is contained in the letter of the 30th of August, 1923, signed by Gale as president of the old company [set out in statement]. The learned judge below found this was a general employment. We submit this is not a case of general employment such as is found in the cases he relies on. It was no case of employment either general or otherwise. None of these letters were ever used or had anything to do with raising the money advanced. After Gale arrived in England a change took place. There was an absolute change of project and he is not entitled under the written contract to anything and the trial judge found there was no evidence of fraud. Smith and Sifton, the men in England who looked after the transaction knew nothing of any commission. The Thomas project was never carried out, no money was ever raised for the Terminal Grain Company. This is not a case of general employment or of agency but simply a straight contract: see *Colonial Real Estate Co.* v. *La Communaute Des Soeurs De La Charite De L'Hopital General De Montreal* (1918), 57 S.C.R. 585. With reference to section 82 of the Companies Act (Dominion) the contract between the two companies was entered into before any debt was due the plaintiff so that he cannot invoke that section: see *Gray* v. *Hoffar* (1896), 5 B.C. 56; *Webb* v. *Stenton* (1883), 11 Q.B.D. 518 at pp. 522 to 529; *Booth* v. *Trail* (1883), 12 Q.B.D. 8; *Jones* v. *Thompson* (1858), 27 L.J., Q.B. 234 at p. 235. The cases

Argument

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referred to by the learned judge below were all of general employment and do not apply here.

Farris, on the same side: There were in fact two separate entities, *i.e.,* the Vancouver Company (new) and the Terminal Company (old). There was an abandonment of the old Company and of its project entirely. Thomas's contract was with the old company entirely, it was not with Gale personally. The old company carried through the arrangement with the new company as agent for Gale. On the question of internal management see *MacDougall* v. *Gardiner* (1875), 1 Ch. D. 13.

Argument

Craig, K.C. (*Darling,* with him), for respondent: The letter of the 30th of August, 1923, from Gale to Thomas is simply evidence of the contract. On the question of whether this was a contract of general employment see *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614; *Stratton* v. *Vachon* (1911), 44 S.C.R. 395; *Prentice* v. *Merrick* (1917), 24 B.C. 432; *McBrayne* v. *Imperial Loan Co.* (1913), 28 O.L.R. 653; *Gunn* v. *Showell's Brewery Co.* (*Limited*) *and Crosswell's* (*Limited*) (1902), 50 W.R. 659. By the agreement between the two companies all the assets of the old Company were disposed of and an intention to defeat the plaintiff's claim must be inferred: see *In re Ridler. Ridler* v. *Ridler* (1882), 22 Ch. D. 74 at p. 80; *Van Ripper* v. *Bretall* (1913), 4 W.W.R. 1289.

Davis, in reply: On the question of general employment it is not a finding of fact. You cannot have a general employment without being an agent: see *Bridgman* v. *Hepburn* (1908), 13 B.C. 389.

Cur. adv. vult.

28th January, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The action is one to recover commission. The defendants Gale and Smith conceived the project of building a grain elevator at Vancouver. Smith had the unused charter of a company called the Terminal Grain Company Limited, which they determined to use for this purpose. That Company was organized by the election of directors and the appointment of Gale as its president. They obtained a lease

from the Harbour Commissioners of a site for the elevator and thus equipped sought ways and means of procuring the money required to carry out their project.

On the 10th of August, 1923, the Board passed a resolution the material parts of which are as follow:

"RESOLVED that the president be authorized to enter into negotiations and conclude arrangements on such terms as he shall consider reasonable, for the raising of the sum of $1,000,000 or such other sum as may be found to be necessary for the erection and equipment of the elevator proposed to be erected by the company, and also for a feed mill and for working capital; and that such moneys may be raised in one or more ways and in one or more sums, and at different times, and either by the sale of debentures, secured in such manner and payable on such terms as he may deem it expedient to concede, or by the sale of preferred shares with any rights and restrictions he may deem it advisable to grant, or by the sale of common stock or by any two or more of such methods; and in pursuing such negotiations to enter into such engagements and or financial obligations on behalf of the company as he may find to be necessary or expedient; and for the attainment of said object to proceed to England or elsewhere at the company's expense."

Having heard that the plaintiff, a broker in the City of Vancouver, had recently returned from London, claiming to have taken up the question of elevator business with London houses, Gale, either wishing to obtain his assistance, or to remove a rival, interviewed him and got his consent to introduce Gale by letter to his London friends, in consideration of being paid a commission. Thereupon Gale wrote the plaintiff a letter which contains the agreement sued on, and in which the plaintiff's London connections are mentioned by name. By it Gale agreed that,

MACDONALD, C.J.A.

"In the event of my being successful in raising the money required for my project, from or through any of these concerns, I shall be pleased and do hereby agree on behalf of the Terminal Grain Company Limited, to protect you to the extent of two (2%) per cent. commission on the amount of money so raised, said commission to be paid to you as and when the money is received."

Gale then went to London, having received the letters of introduction on the eve of his departure, and was met by a member of one of these firms, the Canadian British Corporation, and through them was eventually introduced to Sir William Nicholls, of Spillers Milling & Associated Industries Limited. Eventually an agreement was arrived at between Gale and Spillers, which is outlined in Exhibit 16, and may be briefly

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summarized as follows: That an amended and enlarged lease of the site should be procured by the Terminal Grain Co. Ltd.; that Spillers should loan the money required to erect an elevator of a capacity of two million bushels, to cost about $2,500,000; that the Terminal Grain Co. Ltd. should assign to Spillers 70 per cent. of their share capital and that Spillers should elect the majority of the membership of the board. Subsequently a firm agreement was arrived at along these lines.

In order to protect themselves against any undisclosed liabilities of the Terminal Grain Co. Ltd. Spillers stipulated that a new company should be incorporated, with the same authorized capital as the Terminal Company, to take over the project. This new company, subsequently incorporated with the name, The Vancouver Terminal Grain Company Limited, is, I think, the mere *alter ego* of the old company.

The new lease was obtained and the old company assigned its rights therein to the new company in consideration of the allotment to it of all the share capital in the new company, namely, 1,000 shares of the value of $100 each.

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This, I think, is a sufficient summary of the facts to enable me to come to a conclusion upon the liability of the Terminal Company to pay plaintiff a commission. The learned judge held that the project mentioned in the letter aforesaid, was one to raise one million dollars for the purpose of building a one million bushel elevator, whereas the agreement with Spillers was for the loan of the larger sum mentioned above and the erection of a two million bushel elevator. The learned judge allowed the 2% commission upon the basis of the finding of one million dollars, although he declared that the contract was one of general employment. In my opinion, the plaintiff is entitled to a commission on the whole amount found or nothing, and in this view it becomes important and necessary to decide whether or not the Spillers agreement comes within the "project" mentioned in the commission agreement. If it does, then the plaintiff is entitled to commission on the sum advanced or to be advanced by Spillers.

The parol evidence is conflicting as to what Gale told the plaintiff was his project. I rely, however, upon the said resolu-

tion as the best evidence of what that project was. I think it was not confined to the raising of the one million dollars, nor to an elevator of a particular capacity, but permitted of both expansion and contraction, and in my opinion, the expansion, if indeed it be such, beyond what Gale now says was his original idea of his project, was one clearly authorized by the resolution; his object was, as he put in in his evidence, to get an elevator for Vancouver, and in the course of his negotiations with Spillers, he was made to realize that his first idea of building one of a capacity of one million bushels was not feasible, but that properly expanded, Spillers were prepared to negotiate. This may be regarded as an expansion of his first proposal, but it was within the project outlined by the resolution. A great deal was made in argument of Gale's contention that his project was to obtain money to build an elevator which should be under the control of his company, that the question of control was all-important, and that that feature in particular differentiated what he now calls his project from that accepted by Spillers. But control is by the shareholders and the resolution provides for sale of shares which might result in control passing from these shareholders to new members. So that when I look at the resolution and what was done under it, I have no difficulty in coming to the conclusion that the final contract with Spillers can quite properly be said to fall substantially within the authority given by the resolution, the project with which Gale went to London.

It is conceded that the resolution was not shewn to the plaintiff, but Gale stated in evidence that he explained his project to him. The plaintiff was really very little concerned with the details of the project; no doubt he was given to understand what Gale was going to London for, and was content to give his assistance in the expectation of the 2 per cent. commission on whatever sum, large or small, might be got in London through his connections. I am therefore of opinion that the plaintiff is entitled as against the Terminal Grain Co. Ltd. to 2 per cent. commission on all moneys supplied or which may hereafter be supplied upon capital account under Spillers's agreement.

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But the plaintiff's claim is as well against the directors of the Terminal Grain Co. Ltd. upon the ground that they had declared and paid a dividend to their shareholders, which exhausted the capital of the company, without making provision for existing debts, his commission it was claimed, being an existing debt at the time. This claim arises under a statute of the Parliament of Canada, being Cap. 79 of R.S.C. 1906, Sec. 82, which enacts that directors shall be jointly and severally liable to the creditors of the company for all debts of the company then existing. The Terminal Company was incorporated by Dominion authority and is therefore governed by this Act. This claim is founded on the inferences to be drawn from acts of the old company, commencing on the 8th of February, 1924, before the agreement with Spillers had been consummated. On that day the old and new companies entered into a mutual agreement by which the old company agreed to transfer all their assets to the new company in consideration of all the capital shares of the new company. One clause of that agreement reads as follows:

"The vendor [the old company] hereby transfers to the hereinafter mentioned persons in the proportions stated opposite their respective names, the said 1,000 shares in the capital stock of the company [the new company], and hereby nominates said persons to receive said shares."

This, I think, was done in contemplation of their concluding an agreement with Spillers. The inference I draw from it is that the old company anticipating the exchange of their assets for all the capital stock in the new company, 1,000 shares, vested these shares in these five nominees pending the final completion of the negotiations with Spillers. On the same day, at a board meeting of the old company, their by-laws were amended to provide for the payment of a dividend to their shareholders in shares of the new company. These minutes shew that Gale explained to the board the state of his negotiations with Spillers. The board therefore would expect that if these negotiations came to a successful conclusion, the Company would get the 1,000 shares of the new company which they could distribute in dividends among their shareholders after Spillers had been satisfied. Again, on the same day, the annual meeting of the members of the Company was held and the amendment to the by-laws made by the directors was confirmed, and the directors

were authorized to distribute the said shares among their shareholders when received, but for convenience, and to accomplish the above result without transfers, the company nominated the said five persons to receive the said shares instead of the company. On the same day, the subscribers to the memorandum of the new company, met as directors and approved the agreement and authorized Gale to proceed to London to close the negotiations with Spillers, and thereupon adjourned to meet in London on the 10th of March. At the adjourned meeting, in London, Spillers's directors were elected in place of two of the old directors. And at the same meeting, Gale produced the agreement which had been entered into this day between Spillers and himself. This agreement brought the negotiations to a conclusion. It was entered into by Gale on behalf of himself and of all other holders of shares of the Vancouver Terminal Grain Co. Ltd., that is to say, the said nominees. It was agreed that as soon as the whole of the shares of the company (the new company) shall have been consolidated into one class, Spillers shall be entitled to complete and present for registration a part of the transfers delivered to them, representing a number of shares which with the shares to be transferred to their nominees, shall equal 70 per cent. of the total capital of the Company. It was also provided that in particular, nothing should be done whereby the old company's nominees should be deprived of their 30 per cent. of the shares. So that on that date, plaintiff's commission became a debt of the old company, and moreover, the shares remaining to the old company, were still held by their nominees, Gale and the others, and were thereafter delivered, or to use the words of the statute, "paid" to the shareholders of the old company entitled thereto. Now, it must be apparent, I think, that what is disclosed by these minutes was done by the old company wholly on the assumption that Spillers would become finally bound to carry out the project. There was, therefore, in my opinion, no real declaration of a dividend on the 8th of February. For instance, they could not have contemplated as the agreement seems to contemplate, the distribution of the whole 1,000 shares amongst their shareholders, since 70 per cent. of them were, in case of the completion

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of the negotiations, to go to Spillers, and only 30 per cent. to the shareholders. It was simply proposed to vest them for convenience in the five nominees as trustees for the company pending completion of Spillers's negotiations. When the agreement with Spillers was consummated they were still in the hands of these trustees and Gale, whose authority is not disputed, on behalf of these trustees, and therefore on behalf of the company, agreed to transfer 70 per cent. of them to Spillers, and not until then could it be said that the agreement or the resolution to distribute the balance to the shareholders had become a reality. The statute declares that if the directors shall declare and pay the dividend, they shall be liable for existing debts. The declaration alone was not sufficient, the shares must have been transferred to the shareholders in their own right in order to effect payment and that obviously, could not be done at a time prior to the Spillers agreement coming into effect. That was the instant of time at which the old company's obligation to the plaintiff became an existing debt, and therefore in my opinion, the statute is applicable and the directors' liability is complete.

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MARTIN, J.A.: This appeal required much argument upon the facts but the real point is a short and neat one. The appellant's counsel is right in his submission that the agreement is a special one to pay money in a certain event and not, as held by the learned judge below, a general employment as agent, and that if the plaintiff has not brought himself within its conditions he cannot recover. The difficulty arises in determining what was "my project" which the defendant Gale referred to in the letter to plaintiff of the 20th of August, 1923, and if it can be fairly and reasonably said that the arrangement which was ultimately arrived at came within the scope of that expression. In solving that question the defendant's own view of what was open to him to bring about in his contemplated visit to England is of the first importance and that is set out in the resolution of the directors (Gale being president of the Terminal Grain Co. Ltd.) of the 10th of August, 1923, nearly three weeks before he gave the plaintiff the letter relied upon. Gale says he explained "my project" to the plaintiff and the evidence is conflicting as to exactly what he did say in that explanation. But

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it is reasonable to infer in Gale's favour that he explained it as being what it really was, *i.e.*, as set out in said resolution and therefore what he had in contemplation in execution of the powers conferred upon him, and so it is not essential that the resolution should have been actually shewn to the plaintiff, the result, in the circumstances, being the same. Such being the case I have, after careful consideration of the facts brought to our attention, reached the conclusion that the arrangement finally agreed upon was one which fairly came within the scope of that resolution having regard to those reasonable modifications or expansions which almost inevitably have to be contemplated, and, if needful or desirable, conceded in the course of negotiations on a large scale and in another and far distant country: the question of the extent of those expansions and modifications being kept within the bounds of reasonable contemplation is always one of degree and often one of no little difficulty, and in this case there is much to be said on either side.

The plaintiff is, therefore, entitled to his commission of two per cent. on all the moneys provided by Spillers Company under the said final arrangement and not merely on the sum of one million dollars as directed by the learned judge below and from which direction the plaintiff has cross-appealed, it being conceded by both sides that the judgment delivered is erroneous as a whole, since the plaintiff is entitled to all or nothing.

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Then as to the personal liability of the directors of the Terminal Grain Company, under section 82 of the Companies Act, Cap. 79, R.S.C. 1906, as follows:

"82. If the directors of the company declare and pay any dividend when the company is insolvent, or any dividend, the payment of which renders the company insolvent, or impairs the capital thereof, they shall be jointly and severally liable, as well to the company as to the individual shareholders and creditors thereof, for all the debts of the company then existing, and for all debts thereafter contracted during their continuance in office, respectively: Provided . . . [proviso here as to protest by any director so as to escape liability]."

The dividend, in the form of shares, complained of was declared on the 8th of February, 1924, and the payment thereof would at least impair the capital and the agreement with Spillers Co. was made shortly thereafter, *viz.*, on the 10th of March, 1924. Before that time I do not think it is proper to

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say that any debt had come into "existence" which would be affected by the section. There was an antecedent obligation which might in a certain event become a debt but nothing more: until said agreement with Spillers was made it could not be said that Gale had been "successful in raising the money required for my project" and therefore the Terminal Grain Co. was not indebted to the plaintiff in the proper sense of the word "debt," as to which in general Brett, M.R., said in the leading case of *Webb* v. *Stenton* (1883), 11 Q.B.D. 518, in ascertaining the meaning of "accruing debt" at p. 524:

"The law has always recognized as a debt two kinds of debt, a debt payable at the time, and a debt payable in the future, and unless the Legislature intended to invent a new kind of debt not known to the law, 'accruing debt' can only be what the judges have so stated."

And he goes on to say, p. 525:

"There is a sum of money which is to be payable out of the proceeds of property when it comes to the hands of the trustees. Nobody can say that until then it is in any legal or equitable sense a debt which is *debitum in presenti*. The money may never come to these trustees without any fault of their own, for they may die or cease to be trustees before anything can become due. Therefore there are contingencies upon which no debt may ever arise, and all that can be said of it is, that it is probable that at the end of half-a-year money will come into the hands of the trustees, but until it does come into their hands, there is no debt existing between them and their *cestui que trust*."

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And Lindley, L.J., says on p. 526:

"I do not doubt that the power of attachment is extended to equitable debts. But is a trustee a debtor to his *cestui que trust*? You cannot say he is unless he has got in his hands money which it is his duty to hand over to the *cestui que trust;* then of course he is a debtor and there is no difficulty in attaching such a debt under this Order."

And at p. 527:

"A debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in presenti, solvendum in futuro*."

And Fry, L.J., said, p. 529:

"I have further no doubt that the word 'indebted' describes the condition of a person when there is a present debt, whether it be payable *in presenti* or *in futuro*, and I think that the words 'all debts owing or accruing' mean the same thing. They describe all *debita in presenti*, whether *solvenda in futuro*, or *solvenda in presenti*. The material question which has been argued before us is this: does the meaning go further, and does it include debts which may hereafter arise? If they may hereafter arise, it is possible also they may not hereafter arise, and it would require explicit words to include such future possible debts."

These expressions upon the nature of debts in general, apart from the language of the order in question, lead me to take the view that a contingent liability of the kind before us "which may not hereafter arise" cannot be said to be a debt "then existing" within the meaning of the statute.

But the statute also declares the directors liable for "all debts thereafter contracted during their continuance in office" and it is submitted that "contracted" should in the remedial sense of the Interpretation Act be given a comprehensive meaning in applying it to the consequences which Parliament was attempting to avert. But while this may be true yet on the other hand before a new and very heavy responsibility is fastened upon directors it must be clear that the language sufficiently expresses that intention when the section is viewed as a whole and in so doing it would not be safe I think to give ordinary legal expressions an extraordinary meaning. The section has occasioned me much thought and I am not free from doubt in reaching the conclusion that it means debts which arise out of new contracts made by the directors, or which arise out of contracts made theretofore but which are of such a nature that it must be known to the directors that debts will thereafter arise therefrom and for which provision must be made, for in that sense, as used in the section, they may fairly be said to be "contracted" for. The cases of *Williams* v. *Harding* (1866), L.R. 1 H.L. 9; *In re Marquess* (1874), Ir. R. 9 Eq. 93; *Kirby* v. *Smyth* (1876), Ir. R. 10 Eq. 417; *Conlon* v. *Moore* (1875), Ir. R. 9 C.L. 190; and *Parker* v. *M'Hugo, ib.* 265, are also of assistance in determining the question, though the circumstances are not the same as regards the kind of contract under consideration.

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I am therefore of opinion, that the action of the directors does not come within the section and so the appeal should be allowed to that extent.

GALLIHER, J.A.: In my view much depends on the meaning to be given to the word "project." The defendants contend that the project carried out and the project first submitted are entirely different and that the employment of the plaintiff, if there was an employment, was special and not general, in other

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words, that his services were sought in respect of a special project which failed and he is not entitled to remuneration. Shortly, the defendant and those associated with him, conceived the idea of building a grain elevator at Vancouver, B.C. It was thought that about a million dollars would be necessary to carry this out, $250,000 of which was to be raised through the defendant Smith, and the balance from outside capitalists, Smith to manage the concern when put in operation.

The plaintiff and defendant came together in Vancouver and entered into an agreement in the following words: [already set out in statement].

It is admitted that the money raised was through the Canadian British Corporation and although there is some dispute as to whether a letter to that corporation was given by the plaintiff, the evidence satisfies me that it was. The defendant Gale proceeded to London and got in touch with certain of the parties to whom he had letters of introduction from the plaintiff, but without, as he says, presenting any of the letters, but as Mr. *Davis* frankly admits the non-presentation of these letters would not affect the plaintiff's right.

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The proposal of Gale and his associates as to how the project should be carried out was not accepted and after considerable negotiations, another method involving considerably more money and by which the defendant Smith had no longer any interest in the project, or its carrying out and by which the Spillers took control and carried out the building of the elevator, was evolved.

It is claimed the original project was abandoned and a new project carried out.

This brings us at the outset to what the word project means and includes. The main project was the building of the grain elevator. I do not regard the dropping of the feed mill, which it was at first contemplated building in connection with the elevator, as affecting the matter (it was merely an adjunct of the main project), nor do I consider the plaintiff's rights affected by the fact that different parties may have held different interests to that originally intended, or that Smith ceased to have any interest in the construction or management when constructed, of the elevator. These I regard as mere incidents of the project,

so that in my view it narrows itself down to this—can the project which it was originally estimated would cost $1,000,000 and which was subsequently enlarged so that some $2,000,000 was expended on it, be said to be an entirely new project or the original project developed to what could be regarded as a reasonable commercial expansion, considering its nature? I think it can be so regarded. What was done can be said to be within the scope of the resolution authorizing Gale to act, and this authority Gale had when he contracted with Thomas on behalf of the Company, whether he disclosed it to Thomas or not.

As all negotiations were carried on the deal finally completed and the moneys advanced by or through some of the parties to whom Gale on behalf of the Company had been given letters by the plaintiff, I think the plaintiff is entitled to his commission at the rate of two per cent. on the moneys advanced. It is either that or nothing, and as I hold in favour of plaintiff, the cross-appeal should be allowed and the judgment below amended accordingly.

I am not without doubt as to the liability of the directors, but I think the learned Chief Justice is justified in drawing the inferences he does from the evidence and that the debt became an existing debt before the assets of the Company were actually distributed.

McPhillips, J.A.: This appeal raises the question whether upon the facts the plaintiff is entitled to a commission upon some $2,000,000, obtained in England through the Canadian British Corporation (hereafter called the Corporation) the plaintiff having introduced the Corporation to the defendant Gale? The actual amount as yet received can be a matter of subsequent enquiry but up to date, a very large sum has been actually received in the accomplishment of the project of the defendant Gale, acting for and on behalf of the defendant Company.

Mr. *Davis* the learned counsel for the defendants in his very able and careful argument, stated the position of the defendants upon the appeal to be that if in all that took place it could be said that the moneys received and to be received were for the

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project as contemplated by Gale when contracting with Thomas, and the capital was obtained in furtherance of that project through the Corporation that then there would be liability upon the defendants. Now, the pertinent contractual obligation was contained in the following writing and the facts are clear that Gale had ample power granted to him by the defendant Company to so contract. The defendant Gale is in this writing stating to Thomas the nature of his contractual obligation to Thomas; the material portion thereof reads as follows: [already set out in statement, and judgment of MACDONALD, C.J.A.]

It cannot be gainsaid upon the facts that it was the agency of Thomas that brought about Gale's introduction to the Corporation and through the Corporation Gale was introduced to Sir William Nicholls of Spillers Milling & Associated Industries Limited. The main contention advanced by the defendants was this: the project as contemplated was not carried out, the contract for commission was a special contract, not in its nature a general employment, a project different in terms was carried out and the obligation to pay a commission was unenforceable and that it was not referable to the commission contract. I cannot agree with this view, the project in the end carried out was nothing more than an expansion of the original project that Gale had in mind. Those who have had experience in such matters well know that a venture at first sketched out undergoes many changes especially when as in the present case it was necessary to obtain the capital and it was but natural and it is in accordance with experience that counter propositions would be made and as always the capitalist becomes the dictator and as a matter of course also must have the control. It is only common sense—those responsible for capital must be the proper conservators of that capital. It is clear to demonstration that Thomas by the introduction of the Corporation to Gale and the moneys later made available brought about exactly that which entitles him to a commission and it is idle for the defendants to contend otherwise. Without the agency of the Corporation and the connection through that Corporation made with Sir William Nicholls and the Spillers (world widely known by this name) Gale could

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not have carried out his contemplated project. That project was in short the erection and operation of an elevator at the City of Vancouver, and ever was that, and that was what was accomplished that the elevator was greater in capacity and other incidental features was no change of project, it was always the same project. Gale had busied himself greatly in this proposed venture for some time; he was a well-known citizen of Vancouver and at one time mayor of that growing and important city having at its door one of the finest ports upon the Canadian Pacific Coast line with ever increasing and expanding trade relations with the Orient and since the opening of the Panama Canal shipping connections to the Atlantic, admitting of the economical and safe transit of wheat to Great Britain and Europe generally. Naturally the Spillers, experts and large operators in this line of business, becoming interested, laid down the plans and scope of the enterprise and as would be expected, the control of the Company to be formed would be the control of the introducers of the capital. Then the larger project, but not in other respects different from that originally contemplated, in essentials the same, made it necessary to obtain from the Dominion Government a larger area or lease on the harbour front and this was obtained.

I do not find it necessary to sketch the various steps taken which in the end brought about the construction of and operation of the 2,000,000 bushel grain elevator. The proceedings adopted were in no way novel and in its many phases never changed in character from that originally contemplated by Gale. The control went from Gale, it is true, yet Gale remains very substantially interested with a ten-year contract, and in receipt of a substantial salary. It is indeed difficult to follow the reasoning with every deference to counsel advanced on behalf of the defendants, for escape from a plain and unambiguous contract and certainly the defence is not in its nature meritorious. Thomas, upon his part unquestionably was the inducing cause that brought about the introduction of the necessary capital and made it possible to carry out the project. That it became a more expansive project and became an accomplished fact surely cannot weaken the value or take away from Thomas

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that which had been contracted would be his remuneration for services admittedly performed. What is said is the project as originally contemplated was not carried out. I fail to see this, the project has been carried out in an enlarged form but still a project of the same character and that which made it possible of accomplishment was the act of Thomas. Then why is it that the commission is denied? It rests merely upon what I consider to be untenable ground that that which was carried out could not be said to be the original project. The fallacy that runs throughout is this, that the project is attempted to be circumscribed by what was Gale's vision at the outset. This cannot be the measure by which the transaction is to be viewed. Gale never limited or defined in any unalterable terms the project he had in mind. It would naturally be subject to change and alteration—this is but common sense. Gale's mission to London was to obtain capital and capital, as always, would lay down the terms in connection with any advances made. The project would naturally be subject to changes, to contend otherwise, only demonstrates a complete want of knowledge of business affairs, conditions are ever changing and nothing is more fickle than capital.

That the searcher after capital to bring about the fruition of a contemplated venture should be unswerving as to the terms of its introduction, would be the courting of almost certain defeat. It is elementary that there would have to be a policy of give and take, that is, elasticity, and without that it would be impossible of consummation. Gale well understood this, he was a man of affairs, his purpose was the establishment of a grain elevator at the Port of Vancouver, and his vision has been proved to be a vision sound in its conception. That he was able to expand his project was in furtherance of this vision. To limit the project to that which he had first in mind as to the capacity of the elevator would not be in keeping with the real spirit and intent of the negotiations. That it was expanded could not be said to bring about a changed project; it was the same project, it was always the project that was to be furthered and without capital it was impossible of practical accomplishment. To punctuate this view of the matter, it is only necessary to refer to these words in the commission contract, namely:

"In the event of my being successful in raising the money required for my project from or through any of these concerns."

Now Gale was successful in raising the money and was successful by and through the Corporation introduced to Gale by Thomas. Thomas performed his part of the contract by the introduction to Gale of responsible parties which brought about the accomplishment of his project. Thomas could in no way hold Gale to any specific terms as to the project to be opened to the Corporation; that was wholly Gale's matter, the project would assume such form as he (Gale) might decide, it might be expanded or contracted and whatever form it finally took, would be within the scope of the contractual obligation with Thomas—"my [Gale's] project." There has been no attempt made to establish that the project consummated was other than Gale's project, and being his project, it would seem to me to be impossible to withstand that which follows—liability upon the defendants for the agreed upon commission.

With respect to the law to be considered and as applicable to this case I would first refer to the analogy as I see it to some extent in *Toulmin* v. *Millar* (1887), 58 L.T. 96; 12 App. Cas. 746. That was a case of selling an estate, and at p. 97, Lord Watson said:

"When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations."

It is to be observed that Lord Watson said "and should the estate be eventually sold to a purchaser introduced by the agent" (and here the Corporation was introduced whose agency brought about the connection with Spillers and the production of the necessary capital) "the latter will be entitled to his commission" (as I here consider Thomas is entitled to his commission) "although the price paid should be less than the sum named at the time the employment was given." This reasoning of Lord Watson in principle supports the right to Thomas to commission

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on the increased amount. It was a commission on the capital necessary for Gale's project and it was for Gale to state and visualize the project and carry on the negotiations, then the commission would naturally be upon the capital achieved. I deduce my conclusion in this case from what Lord Watson said that as applicable to the facts of the present case it can be successfully said as a proposition of law that the amount of capital first mentioned and the scope of the venture was in the words of Lord Watson "merely as the basis of future negotiations leaving the actual price" (here it is capital) "to be settled in the course of these negotiations."

Here we have the necessary capital obtained by and through the Corporation introduced to Gale by Thomas, the direct consequence of the bringing together of Gale and the Corporation, the direct consequence of the agency of Thomas, the direct result of his intervention and introduction of the Corporation to Gale. This was not a case of casual and remote consequences of the action of Thomas, nor was it the achievement by Gale of the capital in a manner differing from what Thomas did at the request of Gale, it was in line with and in conformity with the agreement between Gale and Thomas and in furtherance of the employment. It was in all respects the culmination of what was the ambit of the employment. In further support and in illustration by way of analogy I would refer to *Wilkinson* v. *Martin* (1837), 8 Car. & P. 1 (Lord Chief Justice Tindal). The proposition of law is compendiously stated in the head-note as follows:

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> "To enable a broker to recover a commission on the sale of a ship, the mere fact of his having introduced the purchaser to the seller will not be sufficient; but if it appears that such introduction was the foundation on which the negotiation proceeded, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the broker's hands, and deprive him of his commission.
>
> "The broker will be entitled to his commission, if he was, up to a certain time, the agent or middle-man between the parties, although the contract be afterwards completed without his instrumentality or interference."

Burchell v. *Gowrie and Blockhouse Collieries Limited* (1910), A.C. 614 at pp. 615, 616, 624, 625, (80 L.J., P.C. 41) is, in my opinion, a controlling decision upon the principle of law to be applied to the present case and fully warrants judgment for commission upon the full amount of capital received

and to be received. Unquestionably it was Thomas who brought Gale into relation with the Corporation and made it possible for Gale to obtain the needed capital. I would also refer to *Walker, Fraser, & Steele* v. *Fraser's Trustees* (1910), S.C. 222, Lord Dundas at p. 229, and *Nightingale* v. *Parsons* (1914), 2 K.B. 621, Lord Reading, C.J. at pp. 623-4.

As to the individual liability of the directors, it would seem to be conclusively shewn that they are liable by reason of the plain terms of the statute, Cap. 79, Sec. 82, R.S.C. 1906. The obligation entered into with Thomas by Gale which was binding upon the defendant company was a debt of the company existing at the time of the declaration of the dividend, and there was payment of the dividend, in my opinion, upon the facts as disclosed in the evidence. That being the case the liability imposed by statute upon the directors is complete.

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I would dismiss the main appeal and allow the cross-appeal; payment should be in the terms of the contract sued upon which reads "two per cent. commission on the amount of money so raised, said commission to be paid to you [Thomas, the plaintiff in the action] as and when the money is received." Judgment should go against all the defendants.

MACDONALD, J.A.: In my opinion the contract sued upon, Exhibit 2, is a special contract, not one of general employment. In consideration of certain letters of introduction to specified individuals and concerns given by the respondent to the president of the appellant, the Terminal Grain Company Limited, the latter agreed to pay said respondent two per cent. of the amount of money raised from or through any of these parties for a project ("my project" it is called) of "building grain elevators, etc., in Vancouver." All the respondent had to do was to deliver to the appellant Gale, these letters so addressed as aforesaid. That was his only obligation under the contract, evidenced by the letter referred to, to entitle him to receive the promised remuneration. It was not necessary that the letters should be the inducing cause of the money being raised. He would be entitled to two per cent. of the amount advanced if in fact money was raised from or through these specified sources or

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any one of them, provided it was for the project contemplated by the parties. It stipulates that: [already set out in statement, and judgment of MACDONALD, C.J.A.]

The respondent was to obtain this two per cent. in a certain specified event, *viz.*, the successful raising of money for whatever is meant by "my project." He was not employed as a general agent on behalf of said appellant Company. When he gave the letters of introduction he performed his sole obligation. He had nothing more to do.

In view of the incomplete description of what is called "my project" evidence was properly led to ascertain the scope and extent of these words. It is in this inquiry that the main issue develops. The letter *ex facie* shews that "the project" whatever it might be was the subject of discussion between them. The appellants contend that it was a project to build an elevator and feed mill in Vancouver at a cost of approximately $1,250,000, the amount to be secured, if possible, in several ways. The two principal parties interested had different tasks assigned in attempting to carry this project through. The appellant J. R. Smith, controlled the charter of the Terminal Grain Co. Ltd. He was an operator and was looking forward to operating the proposed plant. His task was to raise, if possible, $250,000. The appellant Gale was to attempt to raise the balance of 80 per cent. required in England by the sale of debentures, preference or common stock and bonds. He was also to secure a lease from the Board of Harbour Commissioners on which to erect the elevator. Smith testified as follows:

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> "Now, as I understand it, we have got this far, that the original scheme in which you and Mr. Gale were involved was that he procure this lease [from the Board of Harbour Commissioners] and he was going to procure the money for the building of the elevator, and I suppose working capital, and you were going to own it? He was going to procure eighty per cent. and we were going to procure the rest."

Of the 1,000 shares of the Terminal Grain Company, Ltd., Smith held 490 shares; Gale 500, the other 10 being distributed. Smith and Gale had control and were to retain control of the Company. Up to this stage, at all events, there can be no doubt what the project was. It is not only committed to writing in a resolution by the Company, authorizing its president the appel-

lant Gale to proceed in a certain manner on behalf of the Company; it was the only project *in esse* at that time. Nor can there be any doubt that it was after this project matured and before any other project was mooted, that the appellant Gale met the respondent with the result that a letter was given which is the basis of this action.

That the appellant Gale proceeded to England in a *bona fide* effort to carry out this project would seem to be beyond dispute.

Mr. A. M. White, assistant manager of the Canadian British Corporation, the company through whose offices it is alleged the money was finally obtained for what I will call the final project and who was a witness for the respondent, testified as follows:

"Now at that time [when Gale reached England] the idea was, the scheme was, the project which Gale laid before you and which he wished to carry out in the Old Country was to obtain $1,000,000 for his company [Terminal Grain Company] as a loan or on bonds for the purpose of building an elevator, a million bushel elevator and a feed mill? That is approximately the set up."

"I am asking about the project with which he came over to England and interviewed you about. That project was that he and his associates should retain control of the Terminal Grain Co.? Yes."

And again quoting from the evidence of Major Watts, taken *de bene esse* another witness for respondent, and managing director of the Canadian British Corporation:

"Major Watts, when you first met Mr. Gale in England on your return from Canada in October, 1923, he did outline to you, I suppose, the general proposal in which he was trying to interest English capital? The one that he brought from Canada?

"Yes. A. Yes.

"And can you tell me what that proposition was, merely outlining it? Broadly, that he wanted to retain control of the company, sell bonds, and give a bonus of common stock to those buying the bonds.

"And can you tell me what percentage of the estimated cost of constructing the elevator he proposed should be provided by the sale of bonds? I think, in his original scheme, that he planned to raise a certain amount of money, perhaps 20 to 25 per cent. in Canada and the balance in England.

"And the balance to be raised in England was to be raised by the issue of bonds? Yes."

It is equally beyond question that this particular project was never consummated.

As to its non-success the appellant J. R. Smith, also called by the respondent, although identified in interest with appellant Gale, testified as follows:

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"Mr. *Davis*: Yes, well, let us take the first time first. He [Gale] returned [from England] in February, 1924, [evidently some confusion as to dates]. Now, tell me what he said then? On the first occasion he said that the original deal could not be put through, that it was impossible for him to secure money to put up an elevator and a feed mill, which is the original proposition. He was over there to secure money, that was the object, that is how I came to be in it, and he was supposed to go there and get 75 or 80 per cent. of the money that was required for this project, he having the lease. And at that time I was supposed to be the operating—to operate the plant and run the plant.

"Was the question of your operating the plant of any special importance to you? Yes, considerable.

"That is your business? Yes."

And again:

"Now, tell me what he said to you about his negotiations in London. You have only told me at present that he could not carry out your original scheme? Well, he told me that it was impossible to negotiate an agreement —at least the deal that he went over on."

The original project, therefore, "my project," to quote from the letter, if it can reasonably be regarded as a distinct project in itself, unconnected with the final project to the extent that the latter can not justly be called the original venture, came to naught. Another scheme was devised and we have to consider whether the final project, or to put it more favourably to the respondent, the final arrangement, was either within the terms of the original contract, adopted by the parties or substituted therefor, in fact, to enable the respondent to claim payment; or whether as a matter of law on the state of facts disclosed in evidence the respondent can succeed.

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Before doing so it is essential to ascertain whether or not the respondent understood the original project to be as outlined above. I have already pointed out that from the terms of the letter it was evidently the subject of discussion; also that the final project could not possibly be discussed at that stage. There is nothing to rebut the natural inference that the original project was fully disclosed to the respondent, although there is a finding of fact to the contrary, or to speak more correctly, the learned trial judge is "not satisfied that he [Gale] made this known to the plaintiff." I think, with deference, that in the course of a long trial the learned trial judge overlooked part of the evidence or misconceived it. The respondent's evidence is:

"I went over and saw Gale and Gale remarked to me that he had a project to build an elevator and so on—feed mill and so on. . . . .

Gale told me that he had a project here—a project to build grain elevators and asked me if I had any one at home who could finance his elevators. . . . . Gale told me also that he had this lease site. He also mentioned an alleged arrangement with the Harbour Board for the construction of a pier."

He refers here to nearly all the elements of the original project. Later also, in a letter written by him, one of the letters of introduction he agreed to give, he says:

"I may say that we both [the writer and Gale] in conjunction with the Harbour Board here are working a good plan for the building of elevators here, &c. . . . I have gone carefully into this and can thoroughly recommend it, especially with the splendid inducements Mr. Gale is empowered to offer."

He means, of course, that he went carefully into it with Gale. It is not suggested that he discussed it with any one else. He can scarcely be heard to say that he did not know the details of the project he so carefully considered that he could recommend it. The respondent's evidence at the trial on this point is an unsuccessful attempt to deny the irresistible conclusion that he was told the details of the project then in contemplation.

I will now deal with the appellant's contention that the original project was entirely changed and that the scheme carried out was not covered by the contract, Exhibit 2, at all, and that therefore no money is due the respondent under that special contract. The deal finally consummated is disclosed by agreements filed as Exhibits 31 and 32, between the appellant Gale on behalf of himself and all other shareholders of the Vancouver Terminal Grain Company Limited (recently incorporated) and Spillers Milling & Associate Industries, Limited (hereinafter referred to as Spillers), by which the latter obtained 70 per cent. of the total capital shares of the said Vancouver Grain Terminal Company, Limited, said shares being afterwards transferred to Spillers Over-Seas Industries Limited. Spillers in turn were to provide or procure for the Company at an interest rate not exceeding eight and one-half per cent. a sum not exceeding $2,500,000 required to complete and equip the buildings and plant necessary for the purposes of its business. It was provided that repayment of these advances should be made by bonds of the Company. Spillers, as stated, were to receive 70 per cent. of the issued capital stock of the

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Company, the balance 30 per cent. to be secured by the appellant Gale.

Briefly, the foregoing is a general outline of the new project. Does it come within the terms of the original letter giving that letter a reasonable construction, indeed I might say, a liberal construction? I think not. I might add that one of the parties interested in the original project, *viz.*, Smith, who was to operate the proposed elevator under the original scheme, dropped out of the substituted scheme. While the question as to whether or not the new scheme is within the scope of the original project might be determined without further elucidation, still evidence was given bearing on the point and might be usefully referred to. A. M. White, respondent's witness, stated that

"the project was changed around to an entirely different basis."

Major Watts, again respondent's witness testified that:

"I told Mr. Gale very definitely that in my opinion if Spillers undertook the financing of this elevator, they would insist upon having control. Mr. Gale was very annoyed with me at the attitude that I took, because I pressed the point very strongly and assured him that unless he was prepared to give way, I was afraid business would not result with Spillers."

A. M. White in his examination *de bene esse,* was asked this question, and it was repeated to him at the trial:

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"Mr. *Davis*: Now, coming back to Mr. Gale's original proposition, Mr. Gale's original proposition was—as put up to you—was that he wanted to raise in the Old Country a million dollars, the whole project was to cost $1,250,000; he was going to put up $250,000 in Canada, and he wanted to get the balance in the Old Country, which was for the purpose of constructing a mixed house and a feed elevator? Yes."

And again:

"Do you say that was Mr. Gale's fixed proposition originally and the most important part of the whole project he had was that he and his associates should remain in control? Certainly a project similar to that was his early project."

The witness endeavoured to modify the effect of these answers but the attempted modification does not affect their essential truth.

The original project involved local control and local operation. The actual project involved control by Spillers. The original project was Gale's project—"my project"; the latter was Spillers's project. Further, the original project, in respect to which two per cent. commission was to be paid to the respondent if it materialized, was to secure, not borrow, $1,000,000 in

England and raise $250,000 in Canada. The new project—none the less new because it relates to the general purpose in view all along—involved an advance by way of loan of a much larger amount. The original project provided for a 1,000,000 bushel elevator; the latter for a 2,000,000 bushel elevator. Additional land also was required. The original project had certain fixed essentials not admitting of variation. The appellant Gale had to act within the ambit of the authorizing resolution of the Terminal Grain Company Limited, with only the latitude that resolution permitted.

It was suggested that the foregoing resolution was broad enough to include the project finally entered into. I examine this suggestion because if the final arrangement was merely an enlargement or expansion of the original project which should reasonably be regarded as within the contemplation of the parties, the respondent would be entitled to succeed. This would be based on the assumption that "my project" as mentioned in Exhibit 2, is any project which could be carried out under the authority of this resolution. This assumption is too wide. It authorized the president to enter into negotiations

"for the raising of the sum of $1,000,000, or such other sum as may be found to be necessary for the erection and equipment of the elevator proposed to be erected by the Company, and also for a feed mill and working capital."

It goes on to say:

"and in pursuing such negotiations to enter into such engagements and financial obligations in behalf of the Company as he may find to be necessary or expedient," etc.

This clause permitted the appellant Gale to enter into the engagement in question with the respondent. It might be said that if he simply placed this resolution before the respondent and said, or in effect said: "This is my project," or "it is any scheme within the scope of this resolution," it would cover the final consummated project. The respondent does not however claim any knowledge of the resolution or of a discussion based upon it. Neither does the appellant Gale. It was simply an omnibus resolution forming the basis for action.

It does not follow, therefore, that the project must necessarily be as wide as the resolution itself. It might be more limited in its scope. I have already outlined what that project

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was, based not on the evidence of the appellant Gale, but on the testimony of respondent's witnesses. He outlined the project to these witnesses (White and Watts) when he reached England. It would be going too far to suggest that what he outlined in England on his first visit as the project he had in mind was essentially different from that originally outlined to the respondent. That project involved, as already pointed out, local control. But it is suggested based on the resolution that if one of the methods for raising money outlined, *e.g.*, "by the sale of common stock," etc., were followed, loss of control would inevitably follow. If, however, the method in mind was as the appellant Gale testifies and the respondent's witnesses White and Watts admit, *viz.*, the sale of debentures or bonds "secured in such manner as he may deem expedient," it would not involve loss of control. When, therefore, we find from respondent's witnesses, that control was insisted upon by Gale, and that Major Watts had to tell him that he would have to give up that feature, coupled with the fact that the resolution does not exclude the possibility of local control, we must either reject the evidence of White and Watts, or accepting that evidence, find that for no apparent reason the appellant Gale outlined one scheme to them and a different scheme to the respondent. It follows therefore that the matter is not concluded by stating that this resolution was broad enough to include the final project. The appellant Gale chose to frame a project within the ambit of the resolution. What that project was, must be determined by the letter Exhibit 2, and the oral evidence, the resolution being only one element in that inquiry.

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It is also clear that the original project was abandoned, not willingly, but reluctantly, without the slightest indication that it was done to evade the alleged obligation to the respondent. The learned trial judge so finds. He says:

> "There is no evidence that the effect upon the plaintiff was in any way considered by anyone."

Mr. White testified that

> "at no time was Mr. Gale willing to give up control—it was because he had to in order to get the money."

Again, White was asked these questions on his examination *de bene esse*, the questions being repeated at the trial:

"Now Mr. Gale did discuss with you, did he not, the advisability of throwing up the whole scheme, when he had to lose control and suggested to you that he could get money on his original basis, in Minneapolis or Chicago; and you and Major Watts prevailed upon him to very seriously consider the other proposition [the Spillers's proposal], pointing out that it would lead to other things in the future, and that it was the starting of British capital coming into Canada, and that now that these people were interested in the thing at all, that it would be wise for him to make a deal with them? We took that line, yes.

"Did you give that evidence? Yes.

"Is it correct? Substantially, if you want to read it into the record I would rather go over it point by point."

The questions were further analyzed with the witness and although his general assent is modified, it remains substantially the witness's statement.

An effort was made to shew that the respondent is entitled to the two per cent. on the money advanced, by pointing out that the appellant Gale got in touch with Spillers through the good offices of White of the Canadian British Corporation. Major Watts, of the same Company, was in Vancouver and, after an interview with the respondent, cabled to his Company in London, on September 19th, 1923, as follows:

"Dai Thomas instructions you meet Gale Empress France Southampton. Arrange meeting Sir John take Gale and meet Sir William Nicholls."

This cable led to White meeting Gale, and through White a meeting with Sir William Nicholls of the Spillers Company, was arranged, although Gale contends that he would have met Sir William in any event. Even rejecting the latter probability, this incident does not affect the situation. If as a result of this introduction the original project was carried through, the respondent would be entitled to recover two per cent. on the amount obtained, as the money would be regarded as secured "through" the Canadian British Corporation. If, however, the original project was in fact abandoned, and a new project substituted not within the meaning of the special contract, Exhibit 2, the intervention of Major Watts and White would have no significance. Of course, if we are not concerned with a special contract but with a contract of general employment, the incident would have a bearing as a part of the employee's work leading to the results obtained. I have, however, already dealt with that feature. The incident would also disclose one reason why Gale

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did not use the letters of introduction given to him by the respondent. They would be unnecessary after receiving this cable, producing as it did, the same result in the way of securing an introduction. However, although nothing turns upon it, I find it difficult to refuse to accept the statement of appellant Gale, that in any event he would not think of using the letters furnished by the respondent. They contained statements so ridiculous as to make them valueless. Another letter by the respondent, filed as Exhibit 5, throws a sidelight on his ethical conceptions. I doubt if he himself believed the statements it contains.

There are in addition many collateral facts set out in the record which while having no direct bearing on the issue except as to credibility, should induce the Court to weigh with care the evidence of the several interested parties who appeared as witnesses for the respondent, and lead it to scrutinize the attempted modifications of evidence given by these witnesses on commission before the trial. With the exception of his reference to the evidence of White, to which I have already referred, the reasons for judgment of the learned trial judge do not necessarily indicate that he did not consider these features. His finding that this was a contract of general employment—a fundamental error, I venture with deference, to suggest, made an analysis of the evidence of less importance than it would be otherwise. These witnesses were all united in the pursuit of gain, whether legitimately or not, from this industrial enterprise. The respondent fortified himself as best he could. An agreement entered into after the action commenced and the need for reinforcements appeared, between the respondent and the Canadian British Corporation Limited was produced and filed without objection as Exhibit 6. It shews that the respondent made use of his claim to the amount sued for as he doubtless thought to the best advantage. It provides that he should pay to this Corporation one-third of the amount he might recover in the action. The agreement has reciprocal favours. The Corporation on its part agreed to account to the respondent for one-third of any sums it may receive from Spillers for alleged services in securing capital for the construction of the elevator at Vancouver, an

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investment which would doubtless be made without the intervention of either. To enter into this agreement after action brought with a corporation, two of whose officials were, and no doubt at that stage fully expected to be, witnesses, should at least induce the Court to consider their evidence with a high degree of caution.

Counsel for respondent submitted that what occurred in reference to the abandonment of the Terminal Grain Co. Ltd. and the formation of the Vancouver Terminal Grain Co. Ltd., the latter acquiring the assets of the former, is a material element in this case in its legal aspects. I can quite understand that if fraud is alleged and proven, and the real reason for the abandonment of the old company and the formation of the new, was to strip the former of its assets so that a legitimate claim of the respondent's should be defeated, it would be material. Or if this procedure was adopted simply to make it appear that a new project was entered into in fact though not in substance, it would also be material. Mr. *Craig's* contention appeared to be that the whole matter was engineered to defeat the respondent's claim. If this so-called manipulation was the result of a *bona fide* change of project, doubly so if the formation of new companies and the transfer of shares, etc., was at the instance of Spillers to enable it to carry through its own project without becoming involved in any possible liabilities of the old company which might exist, though unknown to them, the suggestion loses the force it might otherwise possess.

This alleged manipulation took place after the new project materialized and was simply a step in carrying out the final arrangement. The Terminal Grain Co. Ltd., by agreement with the Vancouver Terminal Grain Co. Ltd. (recently incorporated with a capital of $100,000 divided into 1,000 shares of $100 each) turned over to the latter company its unexpired lease or a new lease arranged for, with the Board of Harbour Commissioners, the consideration being the entire 100,000 shares, said shares being allotted to the old company or its nominees. The old company by the same agreement transferred the shares so acquired to the appellant Gale, J. R. Smith and others, in the proportion therein set out by a stock dividend of

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100 per cent. of the shares so acquired as aforesaid. Smith later transferred his shares to the appellant Gale. To shew Spillers's connection with the arrangement, all the directors of the new company, other than Gale, resigned, and two representatives of the Spillers Corporation took their place. Provision was made for the payment of certain liabilities of the old company, but not for the alleged indebtedness to the respondent. The vendor company was undoubtedly stripped of its assets, and if the respondent's alleged claim was an existing debt, a liability would be incurred by the directors. But I do not so find. This whole matter was, I think properly treated by the learned trial judge. Dealing with this aspect of the case he says:

"I find no evidence of any actual intention to defraud on the part of any one in the manner in which the new company was formed, and the agreement with Messrs. Spillers was given effect to. Messrs. Spillers, not unreasonably I think, refused to do anything in the name of the old company because probably of the impossibility of ascertaining that it positively had not outstanding liabilities and to protect themselves against any such claims being subsequently put forward. They insisted upon a new company being formed and anything that was done was done under the advice of their solicitor; they insisted upon it being done in that way for their own protection and the Terminal Grain Co. *et al.* consented because they could not get the advances in any other way. There is no evidence that the effect upon the plaintiff was in any way considered by any one."

This is a finding of fact fully supported by the evidence and it disposes of any suggestion of alleged manipulation by any one to defeat any *bona fide* claim of the respondent.

It follows therefore, on the whole case, that the conditions of the contract disclosed in Exhibit 2, entitling the respondent to succeed were not fulfilled, and the appeal of all the appellants should be allowed. It is therefore unnecessary to deal with the point of law in respect to the alleged liability of directors.

Appeal dismissed and cross-appeal allowed, Macdonald, J.A. dissenting.

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitor for respondent: *Clarence Darling.*

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE CANADIAN PACIFIC RAILWAY COMPANY.

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ATTORNEY-GENERAL OF BRITISH COLUMBIA v. CANADIAN PACIFIC RY. CO.

Provincial Legislature—Powers of—Fuel-oil Tax Act—Indirect taxation—Ultra vires—B.C. Stats. 1923, Cap. 71—30 & 31 Vict., Cap. 3, Sec. 92, No. (2) (Imperial).

Section 2 of the Fuel-oil Tax Act defines a "purchaser" as "any person who within the Province purchases fuel-oil when sold for the first time after its manufacture in or importation into the Province." Sections 3, 4 and 5 provide, *inter alia*, first, that "Every purchaser shall pay to His Majesty for the raising of a revenue for Provincial purposes a tax equal to one-half cent per gallon of all fuel-oil purchased by him. . . . ." Secondly, that "Every vendor at the time of the sale of any fuel-oil to a purchaser shall levy and collect the tax imposed by this Act in respect of the fuel-oil, ... " Thirdly, that "Every vendor shall, with each monthly payment, furnish to the collector a return shewing all sales of fuel-oil made by him to purchasers during the preceding month. . . . ."

The defendant Company buy fuel-oil from the Union Oil Company of Canada and consume all that they buy in the Port of Vancouver. The Union Oil Company of Canada purchase its fuel-oil from the Union Oil Company of California. The two oil companies have the same executive officers. The shares in the Canadian company are owned or controlled by the California company, but they are separate legal entities. The California company ships the fuel-oil from California to the Canadian company at Vancouver and the Canadian company pay the California company the price at San Pedro, California, on the date of delivery at Vancouver, plus transportation and other charges, the quantity of oil paid for being equal to the quantity discharged into the tanks of the Canadian company at Vancouver. In an action for payment of the taxes alleged to be due and payable under said Act:—

Held, that the first purchaser after importation of the fuel-oil into British Columbia was the Union Oil Company of Canada, that the tax is therefore indirect and *ultra vires*.

Held, further, that assuming the defendant was the first purchaser the tax sought to be imposed is *ultra vires* of the local Legislature as not being direct taxation within the meaning of No. (2) of section 92 of the British North America Act.

ACTION to recover the taxes alleged to be due the Province from the defendant Company under the provisions of the Fuel-oil Tax Act. The facts are as set out fully in the head-note and

Statement

MORRISON, J. reasons for judgment. Tried by MORRISON, J. at Vancouver on the 15th of February, 1926.

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J. W. deB. Farris, K.C., and *Sloan*, for plaintiff.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. CANADIAN PACIFIC RY. CO.

Davis, K.C., and *McMullen*, for Canadian Pacific Railway Company.

Mayers, and *Macrae*, for Union Steamship Company.

9th March, 1926.

MORRISON, J.: The local Legislature of British Columbia in 1923 passed an Act which may be cited as the Fuel-oil Tax Act. In section 2 the word "purchaser" is defined to mean "any person who within the Province purchases fuel-oil when sold for the first time after its manufacture in or importation into the Province." Section 3 enacts that:

"Every purchaser shall pay to His Majesty for the raising of a revenue for Provincial purposes a tax equal to one-half cent per gallon of all fuel-oil purchased by him, which tax shall be levied and collected in the manner provided in this Act."

Section 4 provides that:

"Every vendor at the time of the sale of any fuel-oil to a purchaser shall levy and collect the tax imposed by this Act in respect of the fuel oil, and shall on or before the fifteenth day of the month next following that in which the sale takes place pay over to the collector of the assessment district in which the sale takes place the full amount of the tax."

Judgment

The word "collector" is not interpreted by the Act and it is left to surmise who is meant by this word. By section 5 the vendor must make a return of all sales to the collector.

Section 8 imposes a penalty upon the vendor who violates the provisions of sections 4 or 5. The Canadian Pacific Railway and the Union Steamship Company, consumers of fuel-oil, buy their supplies exclusively from the Union Oil Company of Canada at Vancouver and have steadfastly refused to pay this tax. This action has been launched against them claiming payment for those taxes alleged to be due and payable under the provisions of the Fuel-oil Tax Act. Both suits came on at the same time, the evidence taken in this case being applicable to the case against the Union Steamship Company.

The defendant Company themselves consume all the fuel-oil which they buy from the Union Oil Company of Canada at the Port of Vancouver, B.C. The Union Oil Company of Canada

purchase this fuel-oil from what I may term the parent Company—the Union Oil Company of California. These two oil companies interlock. The executive officers are the same in both companies. The shares in the Canadian company are owned or controlled by the California company. Of course they are separate legal entities. The California company had been, previous to the incorporation of the Canadian company, operating in British Columbia but since that date they have left this field to their namesake here and the substituted method of handling their products appears to be substantially as follows: The staff of the local company transmit from time to time, as occasion requires, to the California company stock reports of the quantities of oil on hand in the local company's tanks in Vancouver and thus keep them informed when the tanks require replenishment. Whereupon when needed a ship of the California company's fleet is cleared from San Pedro, loaded with oil. The ship may, and often does, take on oil which is consigned to intermediate American ports and there discharged. No orders pass between the companies in the ordinary business sense. The foreign company pay the insurance on this cargo. The advance invoice furnished the customs for purposes of importation shews that the shipment is imported into Canada by the California company and in it the following declaration is made:

Judgment

"That none of the said goods have been sold by or on behalf of the owner aforesaid to any person, firm or corporation in Canada."

The Canadian company pay the California company the price at San Pedro, California, on the date of delivery at Vancouver plus transportation and other charges. The quantity of oil paid for is the actual quantity discharged into the tanks of the Canadian company at Vancouver as shewn by the tanks gauge which sometimes differs from that shewn in the invoice. The defendant submits that all this is a purchase by the Union Oil Company of Canada from the Union Oil Company of California, at the time of the delivery of the oil in the said tanks in Vancouver. Considerable argument turned on when "importation" within the meaning of the Act takes place. On that point, I rely upon section 116, subsection (*a*) of Cap. 48, R.S.C. 1906—the Customs Act—which enacts that for the purposes of that Act

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"the importation of any goods, if made by sea, coastwise or by inland navigation, in any decked vessel, shall be deemed to have been completed from the time the vessel in which such goods were imported came within the limits of the port at which they ought to be reported."

If that is what is meant by "importation" as employed in the local Act then the Union Oil Company of Canada make their purchases in question after importation and they are therefore the first purchasers in British Columbia and not the defendant who purchases in turn from them. The plaintiff urges that this is not the definition to be relied upon but rather that the word should be applied to the method adopted by the customs officials in seeing that the goods are properly passed through their hands in compliance with the requirements of the Customs Act, after which only importation in its true practical sense is complete. The delivery to the Canadian company takes place in fact before the completion of all these requirements of completely passing through the customs. That therefore the purchase by the Union Oil Company of Canada takes place before importation and that the sale by them to the defendant is the first sale after importation. The plaintiff seeks on that ground to hold the defendant liable to pay the tax imposed by section 3, *supra*.

Judgment

I am of opinion that the first purchase after importation is by the Union Oil Company of Canada. Counsel conceded that in that event the tax is indirect and the Act *ultra vires*. The defendant's second line of defence is that on the footing that if it is the first purchaser then the tax is nevertheless indirect.

The question of taxation, always a ground of conflict, is in this case, owing to the language of the Act, a particularly troublesome one. To determine the ultimate incidence between the first purchaser and the public, who consume a commodity, is in many cases difficult. I have no doubt that, under the strain of large necessary expenditures in the administration of the affairs of the Province and following an old maxim of taxation, "wherever you see an object tax it," the local Legislature have in the imported article of "fuel-oil" detected a new source of revenue. It would seem that they straightway attempted to strike directly at those who first purchase that article of com-

merce in British Columbia, doubtless taking at his word John Stuart Mill, the great exponent of that school of philosophy which had as its fundamental characteristic the duty incumbent upon all thinkers to investigate for themselves rather than accept the authority of others. However, I feel myself more restrained and am guided in coming to a conclusion in this case, by settled legal authority. We are cautioned by the bookmen that Adam Smith's pronouncement in the field of political economy must be taken only as an important contribution and provisional guide for the future, but it is a future viewed by him from the period of his sojourn in Toulouse and of his commingling with the leaders of the subtle economic thought in the France of that day. We have now reached an epoch of revolutionary movements in social, constitutional and economic manners, methods and mind based upon or influenced by different criteria, some of which were considered absolute by Mill. Whether the views of these great economists are now to be taken as definitive is not for me fortunately to determine, notwithstanding that the chief point to be decided in this case is whether the tax in question is direct or indirect. In all the authorities cited by counsel and which are binding upon me reference is made to Adam Smith and Mill and their definitions of those two methods of taxation. Yet the learned judges emphasize the fact that the question is nevertheless a legal and not an economic one. Although the division of taxation into direct and indirect is not based on any real intrinsic difference nor is it a logical one, it is a classification made for the sake of convenience and which is recognized by writers, legislators and the Courts. Following upon the definition of those writers it is now accepted judicially that direct taxes are so called because they strike directly at the taxpayer from whose income they are supposed to be taken. Indirect taxes are those which are passed on by the person who pays in the first instance to another who in turn passes them on until at last they find lodgment with the consumer or person who bears the burden. They are supposed to be passed on by the first payer to others and are favoured by Adam Smith because the consumer "pays them little and little as he buys the goods. It must be his own fault if he ever suffers any consider-

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able inconvenience from such taxes." They are in reality not so much a tax "as part of the market price of the commodity": 37 Cyc. p. 714. Applying this broad definition, customs and excise duties are taken as the standard examples of indirect taxes. Whilst an income tax is an example of a direct tax, one test in deciding in which category a tax should properly be placed is to enquire can those who are struck at pass on the charge or is the charge susceptible of being passed on? There is no doubt that the ultimate incidence probable or assumed of any tax on imported commodities in this country is well known to "the trade" whatever may be the device employed to conceal from view its real character. The commodity here in question was imported into Canada by the foreign producer and sold in British Columbia to the local company who in turn sold to the defendant which is empowered by its charter to resell. Whether in fact they do so or not is, in my opinion, immaterial in the circumstances of this case. In principle it surely makes little difference that at the time the Act assailed was passed the defendant, owing to the present exigencies of its business, itself consumes the whole of its purchases. The Act imposes the tax upon the first purchaser whether he consumes the oil or passes it on. All the fuel-oil now consumed in British Columbia is either imported into the country or manufactured here from the crude product which is imported. The other companies are the Imperial Oil Refineries and the Imperial Oil Company, both Canadian companies. The Imperial Oil Refineries import the crude material and manufacture the fuel-oil here. The Imperial Oil Company purchases the manufactured oil from the other and sells to its customers for consumption. These two companies are related to each other in somewhat the same manner as the Union Oil Companies. In the case of the Imperial Oil Company the tax would unquestionably be indirect, as regards the oil manufactured and marketed. In my opinion, the exact incidence of this tax can be traced and ascertained as surely as can that on articles upon which is imposed a customs duty. It is conceded by writers on economics that the division into direct and indirect taxation is not logical and to illustrate that, the income tax is given as an example; a tax which it is

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within the power of the local Legislature to impose as being a direct tax. It is not always paid directly by the person out of whose income it comes; and the case is cited of a joint-stock company which pays the Government and deducts the amount from the individual owners of stocks and shares out of whose incomes the amount is derived. The process, not being exactly direct—and in some cases a tax taken to be indirect is not passed on as where "a charge on a commodity is such a small figure that it cannot be easily divisible among ordinary units of retail consumption so that it can be passed on to a consumer of the article in the form of an increased price, it may remain fixed upon those who first pay it." From which it will be seen that in the economist's point of view the definition lacks "rigour." The foregoing remarks may appear too discursive but I make them in deference to the elaborate argument of the counsel for the Crown. The following passage from the judgment of Lord Selborne, L.C. in *Attorney-General for Quebec* v. *Reed* (1884), 10 App. Cas. 141 at p. 144 will serve to shew the way the Courts treat the matter:

"The question whether it is a direct or indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in their view, be called a direct taxation within the 2nd section of the 92nd clause of the Act in question [B.N.A. 1867]."

Judgment

Not only ought the tax which a person is called upon to pay be certain but there should be no uncertainty in the Act creating the tax. It seems to me that sections 3 and 4 of the local Act create confusion which is akin to uncertainty. Mr. *Farris* strongly urges upon me the submission that the Legislature at the very time they passed the Act knew and had in mind the conditions prevailing in the Province as regards fuel-oil. Particularly, that the defendant was not only the purchaser in the first instance but was also the consumer, and that therefore the incidence began and ended with them. But it may be assumed also with equal plausibility that there were other conditions existing of which the Legislature must be held to have known as well, namely those pertaining to other fuel supplies such as coal which is extracted from the extensive coal areas of the

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Province and with which the fuel-oil comes into direct competition. Laudable though the desire may be for the Government of the day to safeguard local products from an imported rival commodity, yet it was not the intention of the Imperial Parliament to empower a local Legislature to create a protective tariff. For in its incidence I think this tax savours of a customs duty.

I, therefore, find (in the words of the Judicial Committee of the Privy Council in the *Reed* case, *supra*) that the Legislature has in the impeached Act sought to impose a tax which is in substance indirect in its nature inasmuch as it would in many transactions be demanded from one person in the expectation that he should indemnify himself at the expense of another. It was also there held that the question of the nature of the tax is one of substance and does not turn only on the language used by the local Legislature, which imposes it, but on the provisions of the Imperial statute of 1867.

In my opinion the tax sought to be imposed is *ultra vires* of the local Legislature as not being direct taxation within the meaning of section 92, No. (2) of the British North America Act, 1867. The action is, therefore, dismissed.

Action dismissed.

ICE DELIVERY COMPANY LIMITED v. PEERS AND CAMPBELL.

COURT OF APPEAL

1926

March 4.

ICE DELIVERY CO. v. PEERS

Practice—Appeal to Supreme Court of Canada—Application for leave—Public interest—Important question of law—Can. Stats. 1920, Cap. 32, Secs. 35 to 43 inclusive.

The question of the right of a servant while in his master's service to solicit business from his customers for himself when his service is at an end, and he sets up on his own account, is not a matter of public importance or an "important question of law" such as would justify granting leave to appeal to the Supreme Court of Canada.

MOTION to the Court of Appeal by the plaintiff for leave to appeal to the Supreme Court of Canada. The action was for damages for the loss of business by reason of the defendants soliciting the plaintiff's customers (the plaintiff being in the ice delivery business) both before and after leaving the plaintiff's employ and in order to solicit said business making use of the knowledge and information obtained while in the plaintiff's employ and for an injunction restraining the defendants from soliciting the former customers of the plaintiff (see *ante,* p. 445). The plaintiff Company submitted evidence that the loss sustained by reason of the acts of the defendants is far in excess of $2,000. The plaintiff succeeded on the trial but the judgment was reversed by the Court of Appeal.

Statement

The motion was heard at Vancouver on the 4th of March, 1926, by MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

J. W. deB. Farris, K.C. (*Brown, K.C.,* with him), for the motion: We are asking for leave to appeal under section 39 of the Supreme Court Act. That it is a case of public interest see *Jennings* v. *Canadian Northern Ry. Co.* (1925), 35 B.C. 495; *Channell* v. *Rombough* (1924), 34 B.C. 52; *Doane* v. *Thomas* (1922), 31 B.C. 457; *Lake Erie and Detroit River Rway. Co.* v. *Marsh* (1904), 35 S.C.R. 197 at p. 200. The words "on some important question of law" is what we rely on. The question at issue in the case was considered in *Nichol* v. *Martyn*

Argument

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(1799), 2 Esp. 732, but that decision was questioned in *Robb* v. *Green* (1895), 2 Q.B. 1 at p. 13 and on appeal p. 315 at pp. 318-9. That there is an important question of law see *Measures Brothers Lim.* v. *Measures* (1910), 79 L.J., Ch. 707; *Hepworth Manufacturing Co.* v. *Wernham Ryott* (1919), 88 L.J., Ch. 432 and on appeal 89 L.J., Ch. 69; *Herbert Morris, Limited* v. *Saxelby* (1916), 1 A.C. 688.

Mayers, contra: An appeal will not be entertained on practice and procedure at all. *Nichol* v. *Martyn* (1799), 2 Esp. 732 was followed by Mr. Justice MARTIN in this Court. There is nothing novel in this case. *Chan* v. *C.C. Motor Sales Ltd.* (1926) [*ante*, p. 488] is against them. The Supreme Court frowns down on these applications except in very important cases and this is not a matter of general importance.

Argument

Brown, replied.

The judgment of the Court was delivered by

MARTIN, J.A.: We are of the opinion that this is not a case where leave should be given. It did involve a principle, and an important one, as was said by both counsel, in regard to what I shall term, sufficiently for the purposes of this case, the view taken by Lord Kenyon in *Nichol* v. *Martyn*, that a servant is entitled to canvass his master's customers within certain limits, and my brothers were of the opinion that the case before us did not come within the circumstances upon which Lord Kenyon based his decision, though I, with the greatest deference, was unable to take that view. Then all that remained would be the relief to be afforded on the declaration of the application of that principle, and that would not appear, we consider, to really embrace anything wider than the application of the discretion of the Court in its own practice. Such being the case, if that view is right, it would not be proper for us to encourage further litigation in this matter.

Judgment

Motion dismissed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council:

CHAN v. C. C. MOTOR SALES LIMITED (p. 488).—Affirmed by Supreme Court of Canada, 31st May, 1926. See (1926), S.C.R. 485; (1926), 3 D.L.R. 712.

MCCOUBREY v. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA (p. 428).—Affirmed by Supreme Court of Canada, 13th March, 1926. See (1926), S.C.R. 277; (1926), 2 D.L.R. 550.

PETER v. YORKSHIRE ESTATE COMPANY LIMITED AND THE YORKSHIRE AND CANADIAN TRUST LIMITED (p. 71).—Affirmed by the Judicial Committee of the Privy Council, 5th March, 1926. See (1926), A.C. 513; 95 L.J., P.C. 91; (1926), 2 W.W.R. 545; (1926), 2 D.L.R. 641.

PORTER & SONS, LIMITED, ROBERT v. FOSTER, ARMSTRONG AND MILLER (p. 222).—Affirmed by Supreme Court of Canada, 13th March, 1926. See (1926), S.C.R. 328; (1926), 2 D.L.R. 340.

Cases reported in 35 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:

JACK v. NANOOSE WELLINGTON COLLIERIES LIMITED (p. 295).—Reversed by Supreme Court of Canada, 8th February, 1926. See (1926), S.C.R. 495; (1926), 2 D.L.R. 164.

PREMIER GOLD MINING COMPANY LIMITED v. COASTWISE STEAMSHIP & BARGE CO. LIMITED (p. 147).—Affirmed by Supreme Court of Canada, 2nd February, 1926. See (1926), 1 D.L.R. 1009.

PRIBBLE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED (p. 46).—Reversed by the Judicial Committee of the Privy Council, 23rd February, 1926. See (1926), A.C. 466; 95 L.J., P.C. 51; 134 L.T. 711; 42 T.L.R. 332; (1926), 1 W.W.R. 786; (1926), 2 D.L.R. 865.

Case reported in 34 B.C., and since the issue of that volume appealed to the Exchequer Court of Canada:

DONOVAN STEAMSHIP CO., THE WM. v. THE S.S. HELLEN (p. 461).—Reversed by Exchequer Court of Canada, 9th February, 1926. See (1926), EX. C.R. 59.

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BANKRUPTCY—*Claim as secured creditor —Contract for supply of timber—Moneys advanced—Purchaser's lien—Bill of sale—Right of appeal—Can. Stats. 1919, Cap. 36, Sec. 74.*] The plaintiff entered into a contract in July, 1923, with T. & V. for delivery of 300,000 feet of lumber at a certain price, and at the same time advanced T. & V. moneys to carry on the work said moneys being secured by promissory notes. On the 13th of August, 1923, T. & V. gave the plaintiff a bill of sale for 100,000 feet of lumber and on the 13th of September following T. & V. assigned for the benefit of their creditors without delivery of the lumber. The trustee in bankruptcy refused to recognize the plaintiff's claim as a secured creditor and on an issue it was held that the plaintiff had a purchaser's lien upon the lumber in question. *Held*, on appeal, reversing the decision of McDONALD, J., that the moneys were advanced as a loan to enable T. & V. to carry out the contract which is inconsistent with the claim for a lien; further the taking of a bill of sale as security and claiming to rank as a secured creditor by reason thereof is also inconsistent with the claim for a lien. *Levy* v. *Stogdon* (1898), 1 Ch. 478; and *Rose* v. *Watson* (1864), 10 H.L. Cas. 672 distinguished. A judge in bankruptcy allowed the plaintiff's appeal from the denial of the authorized trustee of its right to rank as a secured creditor with respect to a contract with the assignees for the purchase of lumber and advances made thereunder. On appeal by the trustee to the Court of Appeal a preliminary objection that there was no jurisdiction to entertain the appeal was dismissed (MACDONALD, C.J.A. and MACDONALD, J.A. dissenting). *In re Motherwell of Canada* (1924), 5 C.B.R. 107 distinguished. APEX LUMBER COMPANY LIMITED v. JOHNSTONE. - - - - - - - - - - - - - **81**

BANKS AND BANKING—*Bills and notes—Cheque—Alteration—When valid—Right of bank to combine customer's savings bank and current accounts—Cheque in blank to cover overdraft.*] The plaintiff who was general superintendent of the Kamloops Copper Company, Inc., issued a cheque and delivered it to the manager of the defendant Bank as follows: "Kamloops, B.C., Feb. 15, 1923. Pay to the order of Kamloops Copper Co. Inc.....Dollars. Savings [sgd.] 'A. T. Wallinder.'" It was endorsed by said company to the Bank and was given to secure the company's overdraft at the Bank. The bank manager afterwards transferred all of the plaintiff's moneys in his savings account to his current account

BANKS AND BANKING—*Continued.*

increasing his current account to $594.65. He then added the symbol "C/A &" above the word "Savings" in the cheque, filled in the amount of $593.65, charged this amount to the plaintiff's current account and used it to liquidate in part the debt owing by the Company to the Bank. In an action against the Bank to recover the amount of the cheque it was found by the trial judge that the cheque was given to the Bank to be used, if necessary, as security for overdrafts in the company's account generally, that what the bank manager did was within the scope of his authority, and he dismissed the action. *Held*, on appeal, that the evidence supported the findings of the trial judge and that he properly dismissed the action. *Per* MACDONALD, J.A.: To be a material alteration to a cheque the change must be made without the assent of the parties liable thereon and must be of such a character as to alter their legal position. In the absence of any special contract to keep a customer's account separate a bank may combine his accounts in different departments of the bank for the purpose of meeting his indebtedness to the bank without notifying him or obtaining his consent thereto. WALLINDER v. IMPERIAL BANK OF CANADA. - **226**

2.——*Company seeking loan—Introduction to financial houses—Agreement for loan effected — Change of company — Dividend declared by old company—No provision for debts—Liability of directors—R.S.C. 1906, Cap. 79, Sec. 82.*] The Terminal Grain Company Limited was organized by the defendants Gale and Smith for the purpose of building a grain elevator in Vancouver. On the election of directors, Gale was appointed president. The Company obtained a lease from the Vancouver Harbour Commissioners of a site on the waterfront for an elevator and on the 10th of August, 1923, the Board passed a resolution authorizing the president to negotiate and arrange for the raising of $1,000,000 or such sum as was necessary for the erection of an elevator; that the moneys be raised either by the sale of debentures, or of preferred stock, or common stock on such terms as he deemed expedient, to enter such financial obligations on behalf of the company as he deemed expedient and that for the said purpose he proceed to England or elsewhere at the Company's expense. Gale then interviewed the plaintiff who was a broker and had just returned from England where he had been interviewing financial houses on the question of Vancouver grain elevators and in consideration of the plaintiff introducing him to certain firms in London he wrote him a letter on the 30th of August, 1923, agreeing that "In the event of my being successful in raising the money required for my project, from or through any of these concerns, I shall be pleased and do hereby agree, on behalf of the Terminal Grain Company Limited, to protect you to the extent of two (2%) per cent. commission on the amount of the money so raised, said commission to be paid to you as and when the money is received." Gale then went to London with the letters of introduction and through them he met Sir William E. Nicholls of Spillers & Baker, Limited, and others. Later an agreement was arrived at between Gale and Spillers for a loan to build a two million bushel capacity elevator costing about $2,500,000 and that the Terminal Grain Company Limited should transfer 70% of its stock to Spillers, but Spillers stipulated that a lease for a larger site should be obtained and that a new company should be incorporated (in order to protect them from undisclosed liabilities of the old company) of the same authorized capital. The new company was formed with the same directors as the old company and a new lease for a larger site was obtained and the

old company assigned all its rights to the new company in consideration of the allotment of all the share capital of the new company. The shares were allotted to the old company and by resolution of the old company the shares were paid as a dividend to the shareholders of the old company, but this was done in contemplation of carrying out the agreement with Spillers, Gale receiving sufficient of the shares to hand over 70% of the stock to Spillers when the agreement was completed, the shareholders retaining 30%. Gale then went to England and carried out his agreement with Spillers. In an action to recover a commission of 2% of the moneys received by Gale it was held that the plaintiff was entitled to 2% on all moneys received up to $1,000,000 and that the defendants Gale, Smith and Gurd were personally liable. *Held*, on appeal, affirming the decision of GREGORY, J. in part (MACDONALD, J.A. dissenting), that the plaintiff is entitled as against the Terminal Grain Company Limited to a 2% commission on all moneys supplied or which may hereafter be supplied upon capital account under Spillers's agreement. *Held*, further, affirming the decision of GREGORY, J. (MARTIN and MACDONALD, JJ.A. dissenting), that the directors of the Terminal Grain Company Limited having declared and paid a dividend to their shareholders which exhausted the capital of the company, without making provision for existing debts of which the plaintiff's claim was one, were personally liable for the plaintiff's claim under the provisions of section 82 of the Companies Act. THOMAS V. GALE *et al.*

COMPANIES — *Formation of — Stock in names of promoter's wife and son—Subsequent judgment against promoter—Action as to actual owner of stock—Foreign law—Effect of.*] The plaintiff loaned the defendant L. W. David $25,000 in the United States in 1920 represented by two promissory notes of $10,000 and $15,000 respectively payable in San Francisco, U.S.A., one year after date. The notes not being paid at maturity the plaintiff brought action against David in the State of Oregon and recovered judgment for $31,673.34. In May, 1924, the plaintiff brought an action on the said judgment in the Supreme Court of British Columbia and recovered judgment for said sum. He then brought this action for a declaration that the shares in the Empire Timber Products Limited standing in the names of the other defendants are the property of L. W. David and liable to

satisfy the judgment. For many years L. W. David was engaged in the lumber business and organized a number of companies. He was declared a bankrupt in the State of Washington in 1914 and was married in 1915. After his bankruptcy he was always in insolvent circumstances but he continued in the formation of lumber companies until eventually the Forest Investment Company formed in 1921, absorbed his interests in the other companies and the larger portion of the stock in that company came into the names of his co-defendants including his wife and his son. The plaintiff recovered judgment on the trial. *Held*, on appeal, affirming the decision of MORRISON, J. in part (GALLIHER, J.A. dissenting in part), that there was sufficient evidence to support the finding that the transactions out of which the shares in question were brought into existence were the transactions of the defendant L. W. David and he used the names of his wife, his son and the defendant Blake to carry his shares with a view to protect himself against creditors, but as there was no evidence to displace that of the defendants Walker and Hull who swore they gave consideration for their shares the appeal should be allowed as to them. *Held*, further, that the shares transferred to the wife and son were traceable back to a period before the marriage, issued in consideration of a transfer to the Company of certain timber assets held by L. W. David and it was found by the trial judge that he was a bankrupt from a period prior to his marriage up to the transfer of the shares in question to his wife. The plaintiff became a creditor subsequent to the original transfer to wife and son, and assuming this is community property there is no evidence that by the law of the State of Washington the wife could not hold it as against future creditors when insolvency existed at the time of the transfer. The law of this Province must therefore be followed and nothing has been shewn in the evidence to displace our law as to the rights of subsequent creditors in circumstances such as has been shewn in this case. THE ROBERT DOLLAR COMPANY v. WALKER *et al.* - - **405**

2.——*Memorandum of association—Powers—Guarantee—Authority.* Under its memorandum of association the Dominion Lumber Sales, Limited, was empowered to enter "into any arrangement for sharing profits, union of interests, 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 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, or any security of any such company and to sell, hold or otherwise deal with the same." The Dominion Lumber Sales, Limited, assigned to the defendant Stevenson, a sum of money to secure the repayment of moneys owing to him by the Rainbow Shingle Company, Limited. *Held*, affirming the decision of MURPHY, J., that the power to give a guarantee under the above clause is dependent upon a prior or contemporaneous agreement between the guarantor and the company whose debt is guaranteed. No such relationship was entered into between the Dominion Lumber Sales, Limited, and the Rainbow Shingle Company, Limited, the assignment was therefore made without compliance with a condition precedent to the assignor's power to make it and was invalid. ABBOTSFORD LUMBER, MINING & DEVELOPMENT COMPANY LIMITED AND THURSTON-FLAVELLE LIMITED v. STEVENSON, DOMINION LUMBER SALES, LIMITED, AND BANK OF NOVA SCOTIA. **181**

COMPANY LAW—*Director and shareholder—Action started in name of company on his direction—No authority—Liability of solicitors.*] A defendant moved for an order compelling H. (a director and shareholder in the plaintiff Company) to pay the remainder of the judgment debt and costs ordered to be paid by the plaintiffs on the final disposition of the action, on the ground that he was the initiator and instigator of the proceedings and in fact the real plaintiff and acted without authority in retaining solicitors to issue the writ and prosecute the action. His responsibility as to the judgment debt was not pressed except as to the costs. *Held*, that in cases such as this the question to be decided is whether the solicitor who issued the writ had authority to do so and if the applicant has any remedy it lies against the solicitors who issued the writ and not against the respondent H. PACIFIC COAST COAL MINES LIMITED *et al.* v. ARBUTHNOT *et al.* - - - **321**

2.——*Winding-up — Voluntary liquidation—Private company—Resolution—Extraordinary—Special—Companies Act, R.S.B.C. 1911, Cap. 39, Secs. 77 and 226, Subsecs. (2) and (3)—B.C. Stats. 1915, Cap. 12.*]

money to purchase shares in another company. As to the second item, that the defendant cannot take money in respect of the 1923 crop to provide for a reserve for those who might be members for later years. As to the third item it was the intention under the contract that provision should be made for packing-houses by the central organization and that the burden should not be placed on the Locals. The plaintiff is therefore entitled to recover on all three items. MACDONALD-BUCHANAN v. THE VERNON FRUIT UNION. - - - - - **307**

2.——*Bill of lading.* - - - **127**
See SHIPPING. 3.

3.——*Crown a party to.* - - **170**
See PARLIAMENT.

4.——*For supply of timber.* - **81**
See BANKRUPTCY.

5.——*Jockey Club — Consideration for taking certain shares—Right to appoint certain directors and salary—Club regulations—Director disqualified if convicted of criminal offence—Conviction of director—Declared disqualified by Board—Action to restrain directors from refusing attendance at meetings and for salary.*] The plaintiff entered into a contract with the Victoria Jockey Club Limited, undertaking to purchase $25,000 worth of stock of the Club in consideration for which he was to have the right to elect half the directors of the Club, and to a salary of $3,000 per year as a director. A regulation of the jockey club recited that "A director shall be disqualified if convicted of any criminal offence by a duly qualified and regularly constituted tribunal with lawful jurisdiction to make such conviction." The plaintiff was convicted of manslaughter. The Court of Appeal ordered a new trial and the Supreme Court of Canada restored the judgment at the trial, but directed the Court of Appeal to adjudicate upon the objections to the judge's charge to the jury. While the Court of Appeal had this under advisement this action was commenced to restrain the defendants from excluding the plaintiff from directors' meetings and for salary. A motion for an injunction was, by consent, turned into a motion for judgment, and the action was dismissed. *Held,* on appeal, reversing the decision of GREGORY, J. (GALLIHER, J.A. dissenting) that the defendants excluded the plaintiff from the directorate on an alleged disqualification the nature and extent of which or the

enforcement thereof are not disclosed in the material but merely referred to in an incomplete and insufficient quotation from an article of association which with other relevant articles should be before the Court. The facts not being sufficiently brought before the Court to sustain the action taken by the respondents, the plaintiff is entitled to succeed and the appeal is allowed. *Per* MARTIN, J.A.: Motion for judgment should not have been refused because at the time the plaintiff was not lawfully "convicted of any criminal offence by a duly qualified and regularly constituted tribunal" within article of association F of the Victoria Jockey Club Limited upon which the defendants were relying. BOAK v. WOODS AND MOORE. - - - - - - - - - **456**

6.——*Marketing of all fruit and vegetables with association—Subsequent leasing of additional land by producer—Term of lease prohibiting sale of produce to associations—Duty of lessee—Produce therefrom subject to the contract—Injunction—B.C. Stats. 1924, Cap. 48.*] The defendant entered into a contract with the plaintiff the Keremeos Growers Co-operative Association on the 23rd of February, 1923, whereby she was to market all her fruit and vegetables with said association, which is a subsidiary organization to the plaintiff the Associated Growers of British Columbia, Limited. In May, 1925, the defendant obtained a lease of a ten-acre lot adjoining her own from the Canada Permanent Trust Company but the lessor expressly refused to give the defendant leave to market the fruit and vegetables raised on the lot with the Co-operative Association. The two associations recovered judgment in an action for specific performance of the agreement and for an injunction. *Held,* on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that it was the defendant's duty to obtain, if she could, the lessor's consent to the sale of her produce to the plaintiffs. ASSOCIATED GROWERS OF BRITISH COLUMBIA, LIMITED, AND KEREMEOS GROWERS CO-OPERATIVE ASSOCIATION v. RODDICK. - - - **475**

7.——*Sale of all fruit and vegetables from farm for certain period—Formation of company—In control of landowner—Sale of farm to company—Evasion of contract—"Good faith."*] In February, 1923, one Edmunds and his wife contracted with the plaintiffs to sell to them all the fruit and vegetables to be grown on their farm for five years. For two seasons the Edmunds'

made delivery of all fruits and vegetables to the plaintiffs in accordance with the contract. In February, 1925, the defendant Company (Byzant Orchards Limited) was formed by Edmunds and his wife, who (with the exception of associates required to comply with the Companies Act) were the sole owners and controlled its operations. On the formation of the Company, Mrs. Edmunds, who was the registered owner, transferred the said farm to the Company and the Company became registered for an indefeasible fee in said lands. The agreement of February, 1923, contained a claim as follows: "If the grower shall, except as referred to above, in good faith sell or transfer the said lands or any part thereof and give written notice of such sale to the Local or Co-operative [plaintiffs] then the agreement shall be cancelled as to such lands." An action for a declaration that the sale of the lands to the Company was fraudulent or in the alternative that the agreement with the Edmunds' was binding on the Company was dismissed. *Held*, on appeal, affirming the decision of MCDONALD, J. (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that although the transfer should be regarded as a mere scheme to evade observance of a contract solemnly entered into, the title to the property passed to the defendant Company with rights and liabilities governed solely by the Companies Act and its own articles. Nor can it be said that in law the defendant Company is a mere *alias* for its co-defendants or that the relationship of principal and agent or trustee and *cestui que trust* subsists between them. *Salomon* v. *Salomon & Co.* (1897), A.C. 22 followed. ASSOCIATED GROWERS OF BRITISH COLUMBIA LIMITED AND KELOWNA GROWERS EXCHANGE v. EDMUNDS, EDMUNDS AND BYZANT ORCHARDS LIMITED. - - - - **413**

8.——*Sale of motors—Agreement to confirm sale—Specified area—Right of sale to resident outside of area—Subject to division of commission with dealer whose area includes purchaser's residence—Privity.*] The defendant entered into a sales contract with the Studebaker Company for the sale of automobiles within a specified area, the contract containing a clause that: "if a dealer sells a Studebaker automobile outside of his territory, or if a Studebaker automobile sold by dealer, shall be taken from dealer's territory by purchaser within 90 days from the date of delivery, and remains in the other dealer's territory for a period of four months or more, dealer in

either event shall pay one-half of dealer's discount profit to the Studebaker dealer into whose territory the automobile is taken." Shortly after the plaintiff entered into a similar contract with the Studebaker Company covering an adjoining area to that of the defendant, and while so employed the defendant sold a car to a firm having its place of business within the plaintiff's area and into which area the car was immediately taken. The plaintiff obtained judgment in an action to recover half the commission. *Held*, on appeal, affirming the decision of SWANSON, Co. J., that the Company may be regarded as the agent of the several dealers to bring about privity of contract between them, and the plaintiff was entitled to bring action against the defendant for recovery of half of the commission paid to him on the sale of the car. MCCANNELL v. MABEE MACLAREN MOTORS LIMITED. - - - - - - - - **369**

9.——*Sale of timber — Licences—"Quantity of timber"—What portion of growth this includes—Question of profit not considered.*] The plaintiffs purchased timber, and timber licences from the defendants on a logging basis, a paragraph of the contract providing that the plaintiffs should log and scale a certain quantity in each year for eight years, the paragraph then reciting "in the event of the purchasers not having carried away and scaled the whole of the said trees and timber before the expiration of the eight years the purchasers shall pay to the vendor at the expiration of the eight years the balance of the purchase price based upon the quantity of timber on the unlogged licences or portions thereof as shewn on the cruise of the said timber licences made by one Rankine," etc. At the expiration of the eight years large sections still remained unlogged. *Held*, that in construing the words "quantity of timber on the unlogged licences or portions thereof" the question of whether a profit can be made in logging said timber cannot be considered but the expression "quantity of timber" is qualified in the contract by the words "as shewn on the cruise of the said timber licences made by one Rankine," the report accompanying which settles the size and length of trees to be cruised. *Swift* v. *David* (1912), 2 W.W.R. 709; 107 L.T. 71 followed. WOOD & ENGLISH v. NIMPKISH LAKE LOGGING CO. LTD. *et al.* - - **237**

10.——*Telephone subscriber — Business done largely through telephone — Name through error left out of telephone directory*

magistrate has any evidence at all to act upon, then the Court cannot interfere even although the Court may be convinced that the detention which is for the time being legal will turn out afterwards by reason of the subsequent proceedings to be unwarranted or unfounded. The evidence before a magistrate on a charge of murder against a Chinaman disclosed that he was in the house where deceased was found, that blood was found on his clothing and there was evidence to repel the theory of suicide or accident. Accused was committed for trial. *Held*, on an application for a writ of *habeas corpus* with *certiorari* in aid that there was some evidence upon which the magistrate might act and the application should be dismissed. REX v. WONG FOON SING. **120**

4.——*Habeas corpus—Application for—Warrant of commitment—Essential ingredient of offence charged—Criminal Code, Sec. 398.*] An accused was committed for trial on a charge of bringing into the Province a gasoline launch which was obtained by theft in Alaska, United States, contrary to section 398 of the Criminal Code. On an application for a writ of *habeas corpus* on the ground that the warrant of commitment was defective in that it did not shew that the accused had obtained the launch outside of Canada:—*Held*, refusing the writ, that the warrant sufficiently disclosed the offence and the reference to section 398 of the Criminal Code makes plain to the accused the offence for which he has been committed. REX v. GALLAGHER. - - - - **246**

5.——*Habeas corpus—Summary conviction—The Opium and Narcotic Drug Act, 1923, Can. Stats. 1923, Cap. 22, Sec. 4—Warrant omitting order for costs.*] An accused was convicted of having opium in his possession. On an application for a writ of *habeas corpus* on the ground that the warrant of commitment did not order payment of costs in compliance with section 4 of The Opium and Narcotic Drug Act, 1923:—*Held*, that the only positive direction in said section 4 is that the Court shall impose both fine and imprisonment. The warrant shews this was done. This positive direction must be regarded as definitive of the word "penalties" in the negative clause of the section and the writ should be refused. REX v. WONG YET. - - **140**

6.——*Habeas corpus — Warrant — Misrecital of statute—Criminal Code, Sec. 723(d)—"Person or thing"—Scope of—Can. Stats. 1923, Cap. 22.*] An accused was convicted of having opium in his possession. The warrant shewed on its face that the conviction was made under The Opium and Narcotic Drug Act but said Act was repealed in 1923 and a new Act entitled The Opium and Narcotic Drug Act, 1923, was substituted therefor, and is still in force. Section 723(*d*) of the Criminal Code provides "No . . . . . warrant . . . . . shall be deemed . . . . . insufficient on . . . . . the ground that it does not name or describe with precision any person or thing." On an application for a writ of *habeas corpus* on the ground that the warrant shewed on its face that the conviction was made under an Act not in force, it was held that the language of said section 723(*d*) was sufficient to meet the objection and the writ should be refused. REX v. GAN. - - - - - - - - - **125**

7.——*Intoxicating liquors—Conviction—Appeal—Nearest County Court—R.S.B.C. 1924, Cap. 245, Secs. 77 and 78(b); Cap. 146.*] An accused was convicted by the stipendiary magistrate at Bowser, B.C., for keeping intoxicating liquor for sale. He appealed to the sittings of the County Court at Nanaimo. Bowser is 27 miles on an ordinary road from Cumberland and 43 miles by railway from Nanaimo. A preliminary objection by counsel for the Crown that under section 77 of the Summary Convictions Act the appeal should have been taken to Cumberland and not to Nanaimo, was sustained. *Held*, on appeal, affirming the decision of BARKER, Co. J., that there was no jurisdiction and the appeal should be quashed. REX v. HOLT. - - **391**

8.——*Keeping common gaming-house—Evidence—Admissibility—Articles seized on premises—Absence of proper warrant—Criminal Code, Secs. 228, 985 and 986.*] Two constables entered a premises under a warrant issued under the Government Liquor Act. They found no liquor but eleven men were in a back room, five of them sitting around a table on which were two packs of cards only. They also found on the premises packs of cards, poker chips, dice, a round cloth-covered table, a board from which one could, upon payment of 10 cents, pull a collar button beneath which was a number and if the number was one of a selected number it drew a prize. The proprietor was convicted by a police magistrate for keeping a common gaming-house under section 228 of the Criminal Code. *Held*, on appeal, affirming the conviction, that apart from any evidence as to an

ELECTIONS — *Provincial—Absentee vote—Improper affidavit endorsed on eleven envelopes containing ballot-papers—Essential features of proper affidavit wanting—Condition precedent—Respondent's majority five—Result affected—R.S.B.C. 1924, Cap. 76, Secs. 106, 107 and 135.*] The returning officer of the Dewdney election received 20 envelopes each containing one ballot of an absentee voter, and of these nine contained the proper affidavit in Form 27 under sections 106-7 of the Provincial Elections Act, but the other eleven envelopes each had endorsed thereon an affidavit made under the Liquor Control Plebiscites Act which did not contain essential facts required under the Elections Act. The 20 ballots were taken out of the envelopes by the returning officer and without being unfolded were put in a special ballot-box by themselves. When counted later two ballots were spoiled, nine votes were for Catherwood, six votes for Smith, and three for a third candidate. Catherwood was declared elected by a majority of five. It was held by the trial judge that the affidavits on the eleven envelopes did not satisfy the condition precedent to these voters being entitled to vote and Catherwood's majority being five the counting of these ballots may have affected the result and the petition to set aside the election should be granted. *Held*, on appeal, reversing the decision of MCDONALD, J., that the making of the affidavit was a condition precedent to the right to obtain a ballot-paper, but when a public officer gives out a ballot-paper which in the course of his duty he is not permitted to do until an affidavit of the voter is sworn and delivered to him, and there is no evidence either for or against that having been done, the presumption of law is that the officer did not commit a breach of his duty in giving out a ballot-paper without first having obtained the requisite affidavit. The election was conducted in accordance with the principles of the Act. There was no fraud or collusion but by some unexplained error, eleven of the election ballots were enclosed in envelopes bearing the plebiscite affidavit, the appropriate envelopes with their affidavits endorsed thereon not being sent to the returning officer or accounted for in any way. The 20 votes were therefore properly counted by the returning officer. *Re* DEWDNEY ELECTION. SMITH V. CATHERWOOD. (No. 2). - - - - - - **98**

ESTOPPEL—*Bond of indemnity—Entered into by plaintiff at request of defendant—Action on bond—Defendant notified—Judgment against plaintiff—Payment of judgment—Action against defendant on warrant to indemnify.*] The plaintiff Company at the defendants' request (the defendants giving the plaintiff a bond of indemnity to save the plaintiff harmless, etc.) entered into a bond of indemnity. The plaintiff was sued on the bond and notified the defendants of the action and urged them to assist in the defence but they gave no assistance. The Company defended the action but judgment was given against it in the Court of King's Bench of Manitoba. The plaintiff appealed and notified the defendants but again receiving no assistance dropped the appeal. In an action by the Company against the defendants on their bond of indemnity to repay the moneys paid in satisfaction of the judgment:—*Held*, that the judgment against the plaintiff in the Manitoba Court was recovered on the bond given by the plaintiff at the defendants' request. The plaintiff has paid the judgment and the defendants are estopped from denying liability. LONDON GUARANTEE AND ACCIDENT CO. V. DAVIDSON *et al.* - **301**

SHIPPING—*Continued.*

against the shipper. On an action by both companies to recover the amount of the loss from the defendant Company it was held that The Colonial Motor Company was entitled to recover but that as against the Ford Motor Company rectification of the bills of lading should be granted as they were obtained by the fraud of The Judson Freight Forwarding Company, who were entrusted with the goods to ship, to obtain the bill of lading and supervise the loading and the Ford Company is bound by the acts of the person so entrusted. On appeal by the defendant Company and cross-appeal by the Ford Motor Company:—*Held,* affirming the decision of McDonald, J. as to the appeal, but reversing his decision as to the cross-appeal, that apart from any agreement, stowage on deck is negligent stowage, that section 4 of The Water-Carriage of Goods Act enacts that where a bill of lading contains an agreement whereby the owner of a ship is relieved from liability for loss by negligence in the proper stowage of goods, such agreement shall be null and void, that the protection afforded by this section extends only to persons who are not parties or privy to the agreement, that neither the Ford Motor Company nor The Colonial Motor Company was privy to the "option to stow on deck." The Colonial Motor Company had therefore a good claim to damages against the defendants, that right they assigned to the Ford Motor Company and the Ford Motor Company thereby acquired a good cause of action against the defendant in the name of The Colonial Motor Company. Ford Motor Company of Canada Limited and The Colonial Motor Company Limited v. Union Steamship Company of New Zealand Limited. **127**

SOLICITOR AND CLIENT—*Consultation—Scope of term.*] In the course of a solicitor's business a consultation means either advising a client as to a course of action or receiving instructions to act for the client in a certain matter. Where a vendor named in an agreement for sale of land on which default had been made by the purchaser, enters a solicitor's office and asks him how much he would charge for clearing his title, but not getting a satisfactory answer leaves him and engages another solicitor to do the work, the solicitor first mentioned is not entitled to charge a consultation fee. Woodworth v. Allan. - - - - **20**

2.——*Disputed retainer—Evidence of solicitor's services being accepted to end of litigation—Implied contract—Shifting of burden of proof—R.S.B.C. 1924, Cap. 136, Sec. 85.*] Where a client has accepted a solicitor's services and has sought to be benefited thereby, an implied contract is created that he should pay the solicitor according to the fees chargeable by a solicitor, and this implied contract can only be destroyed by satisfactory evidence that the usual fees are not payable, the burden of shewing that the usual result would not follow from such employment resting on the client (Martin, J.A. dissenting). *In re* Legal Professions Act and A. E. Beck, a Solicitor. - - - - - - - - **76**

SOLICITOR AND CLIENT—*Continued.*

SOLICITORS—Liability of. - - **321**
See Company Law. 1.

STATUTE—Misrecital of. - - **125**
See Criminal Law. 6.

STATUTES—30 & 31 Vict., Cap. 3, Sec. 92, No. (2) - - - - - **551**
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B.C. Stats 1915, Cap. 12. - - **249**
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B.C. Stats. 1922, Cap. 75, Sec. 118. - **481**
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B.C. Stats. 1923, Cap. 74. - - **551**
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B.C. Stats. 1924, Cap. 48. - **307, 475**
See Contract. 1, 6.

Can. Stats. 1910, Cap. 61, Secs. 4, 7 and 12. - - - - - - - **127**
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Can. Stats. 1915, Cap. 8, Sec. 19BBB. - - - - - - - - - **366**
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Can. Stats. 1919, Cap. 36, Sec. 20. **166**
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Can. Stats. 1919, Cap. 36, Sec. 74. **81**
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Can. Stats. 1920, Cap. 32, Secs. 35 to 43. - - - - - - - - **559**
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Can. Stats. 1920, Cap. 71. - - **366**
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Can. Stats. 1921, Cap. 50, Sec. 1. - **366**
See Revenue. 2.

Can. Stats. 1922, Cap. 47, Sec. 13. - **366**
See Revenue. 2.