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.

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1928.

JUDGES

OF THE

Court of Appeal, Supreme and County Courts of British Columbia and in Admiralty

During the period of this Volume.

CHIEF JUSTICE OF BRITISH COLUMBIA:

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CHIEF JUSTICE:

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JUSTICES:

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THE HON. WILLIAM ALFRED GALLIHER.
THE HON. ALBERT EDWARD McPHILLIPS.
THE HON. MALCOLM ARCHIBALD MACDONALD.

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THE HON. WILLIAM ALEXANDER MACDONALD.
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LOCAL JUDGE IN ADMIRALTY:

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DEPUTY LOCAL JUDGE IN ADMIRALTY:

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COUNTY COURT JUDGES:

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HIS HON. FREDERICK McBAIN YOUNG,	Atlin
HIS HON. PETER SECORD LAMPMAN,	Victoria
HIS HON. JOHN ROBERT BROWN,	Yale
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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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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

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BOWMAN v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

Statute — Interpretation — Revenue—Probate duty—Real estate devised under will—R.S.B.C. 1924, Cap. 202, Sec. 2.

Section 2 of the Probate Duty Act provides that "On every probate and on every letters of administration there shall be collected by way of duty, for the raising of a revenue for Provincial purposes, a charge of one per centum on the value of an estate to father, mother, husband, brother, sister, son-in-law, or daughter-in-law of deceased; and in case of all other legatees, or next of kin, except wife and children and grandchildren, five per centum on the value of the estate shall be charged."

The department of finance claimed $2,491.07 for probate duties upon the value of real estate devised under the will of Richard Bowman, deceased, to his daughter-in-law and nephews and nieces.

In an action by deceased's widow, as executrix of his estate, for a declaratory judgment that the claim by the department of finance is illegal and unauthorized:—

Held, that the Legislature did not by the Act in question clearly indicate an intention to impose probate duty upon real estate and such taxation should be limited to personal estate.

ACTION for a declaratory judgment that a claim by the department of finance of $2,491.07 for probate duties (in addition to succession duties) upon the value of real estate

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devised under the will of Richard Bowman, deceased, is illegal and unauthorized under section 2 of the Probate Duty Act. Tried by MACDONALD, J. at Vancouver on the 10th of September, 1926.

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Alfred Bull, for plaintiff.
Darling, for defendant.

18th September, 1926.

MACDONALD, J.: Plaintiff as executrix of the estate of her husband, Richard Bowman, deceased, upon applying for probate of his will, was met with a claim by the department of finance of $2,491.07, for probate duties (in addition to succession duties) upon the value of real estate, devised under such will, to the daughter-in-law and nephews and nieces of the deceased. This claim unless complied with, operated as a bar to the granting of probate, but, being contested by the plaintiff, she now seeks, in this action, to obtain a declaratory judgment that it is illegal and unauthorized.

It is conceded that this practice, being pursued by the plaintiff to obtain a judicial decision upon this important question is regular and that the case of *Dyson* v. *Attorney-General* (1911), 1 K.B. 410 is applicable. The defendant has facilitated the trial, so that an early determination of the matter may be reached.

Judgment

It is common ground, that the claim by the department of finance, on behalf of the Province, to charge probate duty on real estate, thus devised by a testator, is a new departure, in its effort to obtain revenue for Provincial purposes. It has apparently never been asserted before, that such right exists. It is based solely upon the construction to be placed upon section 2 of the Probate Duty Act, being chapter 202 of the Revised Statutes of British Columbia, 1924, reading as follows:

"On every probate and on every letters of administration there shall be collected by way of duty, for the raising of a revenue for Provincial purposes, a charge of one per centum on the value of an estate to father, mother, husband, brother, sister, son-in-law, or daughter-in-law of deceased; and in case of all other legatees, or next of kin, except wife and children and grandchildren, five per centum on the value of the estate shall be charged."

The history of the Provincial legislation, relating to the imposition of probate duty, prior to 1923, while not a govern-

ing factor, is instructive upon the question to be decided. Amongst the Consolidated Acts of British Columbia, 1888, there is an Act, dealing with the imposition of probate duties, termed the Probate Duty Act (Cap. 97). There is no doubt that this Act did not contemplate the payment, by either an executor or an administrator of any probate duties, based upon the value of the real estate of the deceased. It refers particularly to probate duty or Court fees having been paid "upon the gross estimated value of the personal estate of the deceased," and provides for a return of duty, in the event of the estimate of the personal estate being inaccurate and too large an amount being paid for probate duties. Procedure is also outlined for the return of such overpaid probate duty.

Then an order in council was passed in 1906, which was subsequently ratified by the Probate Duty Act, 1907, Cap. 31. All legislation on the subject was included in chapter 183 of the Revised Statutes of British Columbia, 1911. The order in council was referred to and it was termed "Probate Duty Act." It was similar in its provisions to said section 2.

Judgment

Such portion of the enactment did not refer specifically to personal estate, but contains in subsequent clauses, provision as to the return of duty where the executor or administrator has paid an amount, which was based upon the gross estimated value of the personal estate of the deceased and which should be found to be in excess of the amount of such duty shewn by the net assets of the estate of the deceased. Procedure for the return of such duty is again prescribed by this Act and clearly indicates that only the personal estate of the deceased was to be considered, as a basis upon which probate duty should be paid. The legislation, as it then stood, I have no doubt, did not contemplate any right, on the part of the Province, to recover probate duty on the real estate of a deceased person. Section 2 of said Cap. 183, R.S.B.C. 1911, being the Probate Duty Act above referred to, was amended in 1914 (B.C. Stats. Cap. 57) by adding thereto a provision that hereafter no charge should be made on any probate or letters of administration based on the value of the estate to grandchildren. This stipulation was linked up with that in favour of the wife and child of the

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deceased person and appears in section 2 of the Probate Duty Act, R.S.B.C. 1924, Cap. 202 as above recited.

Then said chapter 57, in subsection (2) of section 2 thereof, states that doubts have been entertained whether certain gifts by will or testamentary instrument are estates liable to probate duty and it was expedient to remove such doubts. Provisions at great length were made accordingly, the intent of such legislation being to bring into effect, and beyond question give a right to recover probate duties under conditions which had been doubtful at the time. It is a proper assumption that this legislation was deemed to be requisite, and that at the time there was no right to charge probate duties upon both the real and personal estate of a deceased person. If such right existed in 1914 there would have been no necessity for legislation along these lines. Such a right was not asserted nor is it contended that it was even suggested.

No statutory change took place upon the subject until 1923, when said chapter 183 of the Revised Statutes of British Columbia, 1911, was repealed and an Act entitled "Probate Duty Act," chapter 58, B.C. Stats. 1923, was enacted. It is in practically the same form, as now appears in chapter 202 of the Revised Statutes of 1924.

Judgment

It seems beyond contention, that the legislation for years in our Province only contemplated the imposition of probate duties upon the personal estate of a deceased person. The statute, as I have mentioned, could not reasonably bear any other construction and it was borne out in practice. Then, did a change take place and real estate, also become liable to such duty? The most favourable time, to support an argument to that effect, would be in 1923, when provisions, which as I have mentioned would have prevented such a construction being placed upon the statute, disappeared; through not being re-enacted. The context would have previously prevented such an interpretation of the statute. While not dealing at this point fully with effect of the context in construing a statute still an apt example of such controlling effect is shewn in the English statute requiring payment of probate duty. There the "estate and effects" are referred to, as being liable to succession duty; but it was never contended that these words would include real estate. The sub-

sequent clauses of such Acts referring to "personal estate" would, as in our yearly statutes on the subject, necessarily prevent real estate being included in the term "estate." Then did the Provincial Legislature in 1923 by said chapter 58 or its subsequent re-enactment make a change and intend to impose such further taxation?

I think it was incumbent upon the Legislature, if such a change were intended, under the circumstances, to make it clear and explicit. There had been Provincial legislation, in harmony with other portions of Canada, in 1921 (Cap. 26), as to the devolving of real estate "notwithstanding any testamentary disposition" to the personal representative of a deceased person. It also provided for probate and letters of administration being granted in respect of real estate only, even if there was no personal estate. Such devolution was not, however, to affect the liability of real estate, to any further payment of duty, than was then payable. The section in this respect ran as follows:

"29. Nothing in this Division of this Part of this Act shall affect any duty payable in respect of real estate, or impose on real estate any other duty than is now payable in respect thereof."

Judgment

In the Revised Statutes of British Columbia, 1924, this section appears in the Administration Act, Cap. 5, in a form emphasizing the intention of the Legislature not to increase the duty on real estate, through it devolving upon the personal representative, and declaring that the duty payable should be only such as existed prior to the 1st of June, 1921. It may be fairly contended that this provision was enacted in 1921 and re-enacted in 1924 to avoid any doubt that real estate in so devolving was not to assume a similar liability to that of personal estate, for payment of probate duties.

If a statute professes to impose a charge, the rule is that such intention must be shewn by clear and unambiguous language: see *Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842 at p. 856.

"It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words":

cf. Parke, B., in *In re Micklethwait* (1855), 11 Ex. 452 at p. 456.

"In a taxing Act it is impossible, I believe, to assume any intention, any

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governing purpose in the Act, to do more than take such tax as the statute imposes. . . . Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation":

Lord Halsbury in *Tennant* v. *Smith* (1892), A.C. 150 at p. 154.

In *Attorney-General* v. *Carlton Bank* (1899), 2 Q.B. 158, Lord Russell, C.J. at p. 164 said:

"I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely, to give effect to the intention of the Legislature as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like."

Judgment

The whole question is whether the word "estate" in the section 2 of said Act, includes both real and personal estate, and being so intended, as the will of the Legislature, that it has been stated in clear and unambiguous language. In the first place it is a fundamental rule of interpretation, to which all others are subordinate, that a statute is to be expounded "according to the intent of those that made it."

"The object of all interpretation of a statute is to determine what intention is conveyed, either expressly or impliedly, by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it":

see Maxwell on Statutes, 6th Ed., pp. 1-2.

"It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed. . . . The long acquiescence of the Legislature in the interpretation put upon its enactment by notorious practice, may, perhaps, be regarded as some sanction and approval of it. It often becomes, therefore, material to enquire what has been done under an Act; this being of more or less cogency, according to circumstances, for determining the meaning given by contemporaneous exposition."

This statement of the law, see Maxwell, pp. 531-2, should be modified however by a further extract from Maxwell as follows (pp. 532-3):

"It has been sometimes said, indeed, that usage is only the interpreter of an obscure law, but cannot control the language of a plain one: and that if it [usage] has put a wrong meaning on unambiguous language, it is

rather an oppression of those concerned than an exposition of the Act, and must be corrected."

While this later extract may be said to apply more particularly to the construction of an Act compelling rights, it might be a question whether it would have the same effect in construing an Act imposing taxation. It is submitted that the language of the Act in question is clear and unambiguous and that usage or practice for a number of years cannot effect the construction now sought to be placed upon it by the department of finance, though in this connection the further citation should not be overlooked, namely:

"Authorities are not wanting to shew that where the usage has been of an authoritative and public character, its interpretation has materially modified the meaning of apparently unequivocal language."

In considering the effect of the word "estate" it should be borne in mind that probate duty is not usually imposed upon real estate under a will or an executor in the first instance does not have to pay tax upon real estate devised under a will. The definition of probate duty is "A tax on the property to which the probate gives title"—Craies's Statute Law, 2nd Ed., p. 578, citing *Blackwood* v. *The Queen* (1882), 8 App. Cas. 82 at p. 90. Then again probate duty is "a tax on the gross value of the personal property of the deceased testator": Wharton's Law Lexicon, 13th Ed., p. 688. These definitions are exemplified in the case of *In re Shaw* (1894), 3 Ch. 615, where it was held that the order in a probate action that costs be paid "out of the estate" means "out of the personal estate."

Judgment

Under the liberal construction placed upon a will, there is no doubt that a devise of "all his estate" would pass everything that a man has; it would thus include both personal and real estate. See Stroud's Judicial Dictionary, 2nd Ed., Vol. 2, p. 642, and cases there cited. Then does this construction apply to a statute, especially one imposing taxation?

In statutes when not specially defined, the import of the term depends in a great degree upon its association with other expressions and the fixed absolute sense of the word in the abstract must give way to the connection in which it is used, it may include personal as well as real property of every kind. It may, however, be limited either to personalty or realty.

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Judgment

"Generally, when legal enactments are intended to apply exclusively to one or the other of these different species of property, the statutes use the proper qualifying words, 'personal' or 'real' estate, as the case may require": 21 C.J. 915.

There is no doubt that if a change was ever contemplated, as to imposition of probate duty upon real estate, it was not so stated specifically by the Legislature. It is now contended, however, that such was its intention, by giving a broad interpretation to the word "estate." In this connection the sound maxim of law, referred to in *Attorney-General of Ontario* v. *Mercer* (1883), 8 App. Cas. 767 at p. 778, may be quoted as follows:

> "That every word [in a statute] ought, *prima facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject of the context."

I have already considered the subject as being one of taxation and that such a construction as sought by defendant would be a departure from the general rule, as to imposition of probate duty. It is difficult to lay down any general rule as to when a primary or natural sense should be applied in construing the words to be interpreted and when they should be limited as words in a statute may be limited, even though apparently general in their terms. Craies on Statute Law, p. 185 *et seq.* and cases there cited. For example, *Thompson* v. *The Advocate-General* (1845), 12 Cl. & F. 1.

Plaintiff also contends that the context has a controlling effect upon the word "estate," and in support of such contention, refers to the charge for probate duty being on the estate and payable by certain relatives of the deceased and then adds: "and in the case of all other legatees or next of kin." It is submitted that the later wording is an inapt expression as applied to real estate. The words would certainly be applicable to personal estate generally speaking, and should not be given a broader interpretation especially in construing a taxation Act, than is required to express the intention of the Legislature. In this connection, further in support of the contention that the context governs the construction to be placed upon the word "estate," the plaintiff takes the strong point, that section 3 of the Act gives a description, at length, of the "gifts" which are to be included within the meaning of the word estate. In so doing

the language is not applicable to real estate. Then at the time when this lengthy legislation was enacted, giving a description of such gifts; it was declared to have been enacted for the purpose of removing doubts, relating to the property which might be included and liable to probate duty. If at any time it became the intention of the Legislature to extend the probate duty so as to apply to real estate as well as personal estate, it could have been easily accomplished in definite terms without re-enacting the lengthy third section of the Act. I think the context has, under the circumstances, control over the general word "estate" and limits its operation.

The long standing usage to the contrary, the lack of any decided change expressed in unequivocal language and coupled with the context, impel me to a conclusion that the Legislature did not by the Act in question, imposing taxation, clearly indicate an intention to impose probate duty upon real estate and that such taxation should be limited to personal estate. There will be a declaratory judgment accordingly, in favour of the plaintiff. No costs.

Judgment

Judgment for plaintiff.

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YORKSHIRE & CANADIAN TRUST v. MORTON

THE YORKSHIRE & CANADIAN TRUST LIMITED v. MORTON *ET AL.*

Will—Codicil—Interpretation—Vested or contingent remainder.

A testator devised the residue of his estate real and personal to trustees upon trust to pay his wife an annuity and declared that on her death annuities should be paid to his son and daughter and later by a codicil he devised to his son "after the death of my said wife" certain real property, in addition to said annuity but directed that if at his wife's death, said real property should be of greater value than $30,000 it should be sold by the trustees and out of the proceeds $30,000 should be paid to his son in cash and the balance if any should form part of the general estate. On originating summons it was held that the son's interest in the premises was a contingent interest only.

Held, on appeal, reversing the decision of MACDONALD, J. that the said interest vested in the son at the death of the testator.

Statement

APPEAL by Joseph Morton from the decision of MACDONALD, J. of the 1st of April, 1926, on an originating summons issued by The Yorkshire & Canadian Trust Limited, trustee of the estate of John Morton, deceased, who died on the 18th of April, 1912. By his will dated the 22nd of May, 1911 (the estate was probated at $750,000, but this was excessive and the estate is now of the value of about $250,000), he devised a property of seven and one-half acres in the New Westminster district to the Baptist Church and the balance of the estate was directed to be converted into funds, his wife to receive an annuity of $1,200 per annum and after her death a fund of $150,000 was to be given to special trustees for educational and religious purposes for the Baptist Church, the residue to be held by the trustees, one-half of annual income to be paid to his son Joseph, and one-half to his daughter Lizzie (Mrs. W. E. A. Thornton, Chilliwack). The day before his death (17th of April, 1912) he made a codicil which recited that "In addition to the said annuity, I devise to my son Joseph Morton after the death of my said wife the premises situated in Vancouver and described as lot number two in block number seventy-one, district lot one hundred and eighty-five," etc. Under the originating summons, the questions submitted were:

"(a) Whether upon a true construction of the will and codicils of the said John Morton, the interest to which the said Joseph Morton . . . . is entitled in the premises situate in the City of Vancouver, B.C., and described as lot number two in block number seventy-one, district lot one hundred and eighty-five, vested in the said defendant at the death of the testator;

"(b) Whether upon a true construction of the will and codicils of the said John Morton, the said Joseph Morton became entitled on the death of the testator to receive the net revenue from the property described in the preceding paragraph hereof, and, if so, whether the said Joseph Morton is entitled to have an account taken of the revenue received by the trustees from the said property since the death of the testator and to receive payment thereof.

"(c) Whether the said Joseph Morton has power to create a valid charge upon his interest in the property hereinbefore described for the purpose of securing money borrowed or to be borrowed thereon."

Statement

It was held by the trial judge that the gift was contingent upon his surviving the testator's wife, and that it is therefore unnecessary to answer questions (b) and (c).

The appeal was argued at Victoria on the 10th and 11th of June, 1926, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Gibson, for appellant: The question is whether the words in the codicil "after the death of my wife" are to be taken as a condition precedent or subsequent. We submit that the estate vests immediately in the son but the enjoyment thereof is postponed until after the death of the wife. The words are sufficient to make a vested interest: see Hawkins on Wills, 3rd Ed., 263 and 282; *Boraston's Case* (1587), 2 Co. Rep. 51; Jarman on Wills, 6th Ed., 1357 and 1371; *Re Shattuck* (1912), 1 D.L.R. 258; *Kirby* v. *Bangs* (1900), 27 A.R. 17; *Packham* v. *Gregory* (1845), 4 Hare 396. As to the income of the estate in the interval see *In re Couturier. Couturier* v. *Shea* (1907), 1 Ch. 470. Where an estate vests it carries an intermediate income: see Jarman on Wills, 6th Ed., 941; *Guthrie* v. *Walrond* (1883), 22 Ch. D. 573. If the words are ambiguous they are to be read rather as introducing a remainder than a defeasance: see *In re Hamlet. Stephen* v. *Cunningham* (1888), 39 Ch. D. 426 at p. 439.

Argument

O'Brian, for the other devisees: In regard to a bequest of personal estate if the words "paid" or "to be paid" are used then

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Argument

there is a vesting, but if they are not used it is a contingency: see Ingpen on Executors and Administrators, 11th Ed., 466; Hawkins on Wills, 3rd Ed., 282; *In re Francis. Francis* v. *Francis* (1905), 2 Ch. 295; *The Merchants' Bank of Canada* v. *Keefer* (1885), 13 S.C.R. 515; *Williams et al.* v. *Thurston et al.* (1889), 21 N.S.R. 357; *Bolton* v. *Bailey* (1879), 26 Gr. 361. The annuity is not a charge on the land itself: see Hawkins on Wills, 3rd Ed., 336; *In re Howarth. Howarth* v. *Makinson* (1909), 2 Ch. 19; *In re Young. Brown* v. *Hodgson* (1912), 2 Ch. 479 at p. 485. On the question of profits see Hawkins on Wills, 3rd Ed., 55-8; *Bective* v. *Hodgson* (1864), 10 H.L. Cas. 656; *In re Scott. Scott* v. *Scott* (1902), 1 Ch. 918; *In re Bowlby. Bowlby* v. *Bowlby* (1904), 2 Ch. 685; *In re Mellor. Alvarez* v. *Dodgson* (1922), 1 Ch. 312.

Gibson, in reply, referred to *Walker* v. *Mower* (1852), 16 Beav. 365.

Cur. adv. vult.

5th October, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This appeal involves the construction of a codicil to the will of the testator, John Morton.

By his will he devised the residue of his property, real and personal, including that now in question, to trustees upon trust, to pay his wife, Ruth Morton, an annuity of $1,200 a year. He then declared that upon the death of his wife, subject to said annuity, one-half of the surplus income of the trust fund, be paid to his daughter Lizzie for life and that out of the other half, his trustees should pay to his son Joseph $1,000 a year for life. The *corpus* and accumulations were to follow the directions in the will.

By a codicil, which is now in question, he declared that in addition to said annuity to his son Joseph, he devised to him "after the death of his [the testator's] wife," the Morton Rooms, but should the same at the death of the wife be of greater value than $30,000, they should be sold by the trustees and out of the proceeds, Joseph should be paid $30,000 in cash and that any balance remaining should form part of the testator's general estate. Is this devise a vested or is it a contingent remainder? It is too well settled to need the citation of authorities to shew

that a devise *simpliciter* to A for life and after his death to B gives B a vested remainder. That, in effect, is this case subject to the direction for sale in the specified event, the effect of which I shall consider presently.

The codicil differs from the will in this: that while by the will the trustees are directed to pay annuities to the son and daughter, in the codicil there is a direct devise to the son followed by a direction by implication to convey, or if there should be a conversion, to pay a substituted sum in money in lieu of the land. Where there is a gift under a trust followed by a direction to the trustees to pay over the same on a named event, the Courts hold that this indicates an intention that the gift should vest in interest at once and that the enjoyment only is postponed. If it were not for the direction to the trustees to sell the land should its value exceed $30,000, at the death of the widow, there could, I apprehend, be no doubt that the gift in remainder to Joseph vested on the testator's death. In the construction of this codicil it makes no difference that the particular estate is vested in trustees instead of in the life tenant; it is vested in them for the purposes of the will, that is to say, to meet the wife's life interest and that of the other charges upon it. There is, therefore, no difficulty in recognizing the legal estate upon which the remainder is limited: *In re Venn. Lindon* v. *Ingram* (1904), 2 Ch. 52. Postponement of conveyance or payment which may be for the convenience of the estate does not import that the devise is not to vest in interest: *Halli-fax* v. *Wilson* (1809), 16 Ves. 168; *Boraston's Case* (1587), 2 Co. Rep. 51; *Taylor* v. *Biddall* (1678), 2 Mod. 289; *Kirby* v. *Bangs* (1900), 27 A.R. 17; *Re Shattuck* (1912), 1 D.L.R. 258. Then, do the words authorizing the trustees to sell if the property should be of a greater value than $30,000 at the widow's death and to pay Joseph in lieu $30,000 in cash, prevent the remainder from vesting? No condition is imposed upon the devise itself, the gift is absolute. The condition is not upon the gift but upon its value and indicates no intention on the testator's part to make the gift contingent on Joseph outliving the widow. I think it imports an intention that the remainder should vest immediately, the only thing contingent about it, if that is the right expression, is that it gives the trustees a power

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to change it from land to money, but it must be either the one or the other.

Although I think there can be no real doubt that the codicil gives a vested interest to Joseph with power to the trustees should the value exceed $30,000 at the death of the widow to partition the land, by means of sale, between Joseph and the personal representatives, yet it may be as well to refer to the will itself as indicating the meaning which the testator attached to the words "after the death of my wife." He directs the trustees to pay an annuity to the wife and then proceeds: "And I declare that my trustees shall after the death of my said wife Ruth Morton, subject to said annuity," pay an annuity to his daughter Lizzie. Then follows a similar one to his son Joseph. It will be noticed that the payment of these annuities are to be made after the death of his wife and subject to the annuity to her. He could not have intended the expression "after the death of my wife" to prevent the immediate vesting of the right to the annuities in the son and daughter since it would be absurd to make them subject to an annuity to the wife after her death.

I would allow the appeal and declare that the devise in the codicil to Joseph Morton became vested in interest immediately upon the testator's death, and that the enjoyment of it only is postponed until the death of Ruth Morton.

Another question argued, though not raised in the notice of appeal, asks what is to become of the income derived from the Morton Rooms in the meantime? That income is dealt with by the will and it is unnecessary to say more than that it is not disturbed by the codicil.

GALLIHER, J.A.

GALLIHER, J.A.: This case presents some difficulty and after a consideration of the authorities to which we have been referred and others, I feel myself, apart from certain governing principles, really down to a consideration of the intention of the testator as expressed in the will itself, or which may be deduced therefrom.

I was considerably impressed by the reasoning of the learned trial judge in the following language:

"It appears to me that the testator desires, and so stated, that the land thus intended to be disposed of should remain owned by the trustee, to whom the property had been previously devised, and that such ownership

should remain during the life of his said wife, and not subject to conveyance in the meantime. He sought to bring about and retain this condition as to the property, by stipulating, that if at the time of the death of his wife it was worth more than $30,000 that it should not then become the property of his son simply through the operation of the devise, but the trustee as legal owner would be entitled and required to complete the transaction by selling the property, and out of the proceeds to pay to his son $30,000, and the surplus would remain in the hands of the trustee as part of the general estate. This means that if upon the death of the wife the property was worth less than $30,000 then and then only would Joseph Morton become the owner of the property."

On further reflection and consideration of the whole will and codicil, I have come to the conclusion that what the testator intended was a gift of the property in question with enjoyment postponed with a power given to the trustees to sell, upon a certain event happening, and not an intention not to confer any benefit unless the son survived the testator's wife.

GALLIHER, J.A.

I think the former is the more reasonable and natural conclusion, and in this view would allow the appeal, costs to all parties out of the estate.

McPHILLIPS, J.A.: I have had the advantage of reading the reasons for judgment of my brother the Chief Justice and entirely concur therein.

MCPHILLIPS, J.A.

MACDONALD, J.A.: We are called upon to construe the following paragraph in a codicil to the will of the deceased, John Morton, *viz.*:

"In addition to the said annuity I devise to my said son Joseph Morton after the death of my said wife the premises situated in the City of Vancouver and described as lot number two in block number seventy-one, district lot number one hundred and eighty-five, but should the said lot at the death of my said wife be of a greater value than thirty thousand dollars I direct that the same be sold by my trustee and executor and out of the proceeds of such sale that there be paid to my said son Joseph Morton the sum of thirty thousand dollars the balance of such proceeds to form part of my general estate."

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and to determine whether the devisee Joseph Morton acquired an immediate vested interest in said property with enjoyment postponed until after the death of the wife; or on the other hand, merely an interest contingent on said devisee surviving the wife. If the son takes a vested interest it would pass to his heirs, even should he die before his mother; if a contingent interest only it would in such event fall into the residue. I

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have examined the text-books and authorities cited to decide whether or not an immediate vested interest was created taking full advantage of the rule as expressed by Best, C.J., in *Duffield* v. *Duffield* (1829), 1 Dow. & Cl. 268 at pp. 311-12, that:

"It has long been an established rule for the guidance of the Courts of Westminster, in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning the doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession."

For a clearer conception I would first consider the clause without reference to the direction for sale by the trustees of the property should it on the death of the wife have a greater value than $30,000. That may be treated as eliminated for the present. We have therefore the words:

"I devise to my said son Joseph Morton after the death of my said wife . . . . lot number 2, in block number seventy-one, district lot one hundred and eighty-five . . . in the City of Vancouver."

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The reservation is "after the death of my said wife." It has been held in *Duffield* v. *Duffield, supra,* that words which apparently are conditional are to be held, if possible, to have only the effect of postponing the right of possession, and that where the devise is conditional it should be construed as a condition subsequent, not precedent, so as to confer an immediate vested interest. For example, in a devise to A when he shall attain a given age and until he attains that age the property is devised to B, A takes an immediate vested estate transmissible, should he die under the specified age, the gift being read as a devise to B for a term of years with remainder to A. *Boraston's Case* (1587), 2 Co. Rep. 51.

In the case at Bar we have a devise to Joseph Morton with enjoyment postponed, not until he attains a specified age but until a specified event, *viz.*, the death of the wife. If it can be said that an absolute property is given to the son and a particular interest in the meantime to someone else until the devisee is entitled to possession the event causing postponement would not operate as a condition precedent; it would rather be a description of the time when the son would take possession. If

open to this view the interest would immediately vest in Joseph Morton with possession postponed. The difficulty is that no intermediate interest is given to the wife during her lifetime to support the alleged vested interest in the son, and the cases shew that there must be a prior interest extending over the whole period during which the devise in question is postponed. That prior interest, however, may be vested in a third person. To determine in whom that prior interest is vested and whether or not it will in law support the view suggested, it is necessary to consider the whole will, or at least the parts of it dealing with title to this particular lot during the life of the wife.

After certain specified bequests he devises and bequeaths all of his real and personal estate to trustees, upon trust, in their discretion to convert into money such parts as shall not consist of money, pay debts, and invest the residue in certain named securities and from the income pay the wife an annuity of $1,200 a year. Upon her death they are directed to pay to the trustees of a fund known as the Morton Fund, $100,000 to be held for educational and religious purposes. The trustees under the will are further directed after the death of his wife, and subject to the aforementioned devises and bequests, to pay one-half of the surplus income of the trust premises to his daughter Lizzie for her life and after her decease to her children in a specified manner. From the remaining one-half of the surplus income the trustees are directed to pay to Joseph Morton, the appellant, an annuity of $1,000 a year for his life and stand possessed of the other half of the trust premises and the accumulated income upon trust after the death of the said Joseph Morton for his children under certain conditions not necessary to detail. Should Joseph Morton leave no children, the trustees are to hold said one-half of the trust premises and the income therefrom upon the same trusts thereinbefore declared concerning the first-mentioned half of the trust premises.

It is further provided that if the daughter Lizzie should die leaving no issue, and at her death Joseph Morton shall have no issue then living, the trustees shall hold the whole trust estate for the benefit of a nephew. Then follows the codicil in question by which he bequeaths to Joseph Morton in addition to the annuity mentioned, 200 shares of stock in the Northwest Canada

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Trust Company, fully paid up, and further devises to the said Joseph Morton

"after the death of my said wife . . . lot number two, in block seventy-one, district lot one hundred and eighty-five . . . . in the City of Vancouver . . . "

part of the clause in question in this appeal.

It is apparent that throughout the legal estate in this lot is vested in the testator's trustees. Provision is made for the payment of certain annuities. For this payment the trustees must first resort to personal property, after which if exhausted the real estate may be resorted to for this purpose.

In my opinion if the testator died possessed only of this one parcel of property and by will used the foregoing words in its disposition, Joseph Morton would take an immediate vested interest therein. To quote an illustration from Jarman on Wills, 6th Ed., Vol. II., p. 1371:

"Where a testator devises lands to trustees until A shall attain the age of 21 years, and if or when he shall attain that age, then to him in fee, this is construed as conferring on A a vested estate in fee-simple subject to the prior chattel-interest given to the trustees, and, consequently, on A's death, under the prescribed age, the property descends to his heir-at-law."

This result follows, the author points out, by construing words which seemingly create a future interest:

"as referring merely to the futurity of possession occasioned by the carving out of the prior interest, and as pointing to the determination of that interest, and not as designed to postpone the vesting."

In the case at Bar I think we can hold that the prior interest is carved out of the estate and vested in the trustees for a limited period, *viz.*, during the lifetime of the widow. It is, therefore, in effect, a devise of the whole estate in this lot to Joseph Morton with the exception of a partial interest carved out for some purpose the testator had in view in the distribution of his estate. Whether that purpose was for the benefit of the devisee or for the benefit of the estate is not, I think, material. If, on the other hand, this should be regarded as a conditional devise, the condition being that the son outlive his mother, the condition will, wherever possible, be construed as a condition subsequent, and not precedent, so as to confer an immediate vested title. I think it is clear that the testator did not intend it as a condition precedent that the son should acquire a vested interest only if he survived his mother. In the natural order of events, as the

testator viewed them, the mother would predecease the son and these words were used merely to denote a condition subsequent to the vesting. I conclude, therefore, that the words used vest the fee in Joseph Morton, although the time of its "falling into possession" is wholly contingent. The son may predecease the mother, but if so, it forms part of his estate. The estate prior to the event specified, *viz.*, the death of the widow, has been given to third persons, *viz.*, the trustees, and the words denoting time "after," or "upon," simply indicate that the ulterior estate is to take effect upon the determination of the intermediate estate in the trustees.

I have so far considered the question without reference to the further proviso that,

"should the said lot at the death of my said wife be of a greater value than thirty thousand dollars I direct that the same be sold by my trustee and executor and out of the proceeds of such sale that there be paid to my said son Joseph Morton the sum of thirty thousand dollars the balance of such proceeds to form part of my general estate."

A duty is hereby cast upon the trustees, exercisable only after the death of the wife and upon a certain contingency, *viz.*, that the lot should be of a greater value than $30,000. If it is of less value than $30,000 the trustees have no further interest or duty to perform in respect thereto; if of greater value, they are trustees to perform an administrative act, *viz.*, to sell, pay $30,000 to Joseph Morton and hold the balance for general distribution. That does not prevent the gift itself under the devise from vesting. The other view is that it is a condition precedent to enjoyment of possession that the lot should be worth less than $30,000. That does not affect the natural order of the remainder taking effect on the determination of the preceding estate. The condition upon which the enjoyment by the remainderman depends is not interfered with in any way. The only new element introduced is an additional act of trusteeship. The estate is already vested in Joseph Morton and at that time, should he be alive will be vested in possession, but he must take it subject to the direction that the trustees act as salesmen in a certain event, disposing of the proceeds as directed.

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A further question submitted is in respect to income or revenue from the property in question. This naturally follows from the disposition of the main appeal. The "enjoyment" was wholly postponed and no right therefore to part enjoyment by receipt of income accrued in the meantime.

I would allow the appeal. *Appeal allowed.*

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PACIFIC COAST COAL FREIGHTERS LIMITED v. WESTCHESTER FIRE INSURANCE CO. OF NEW YORK

AND

PACIFIC COAST COAL FREIGHTERS LIMITED v. THE WESTERN ASSURANCE COMPANY.

Insurance, marine—Actual total loss—Ship chartered—Rendered unseaworthy by defective loading—Effect on insurance—Interest—Marine Insurance Act, 1906 (6 Edw. 7, Cap. 41), Sec. 58 (Imperial)—3 & 4 Wm. IV., Cap. 42, Secs. 28 and 29 (Imperial).

The defendants issued marine insurance policies insuring the plaintiff against loss of a vessel should she become a total loss between the 22nd of January, 1925, and the 22nd of February, 1925. The policies stipulated that they should be "subject to English law and usage as to liability for and settlement of any and all claims." While on her voyage from Vancouver Island to Skagway with a cargo consisting principally of dynamite she left Bella Bella towards the end of January and was never heard of afterwards. Some of her deck cargo was picked up in the vicinity of Bella Bella after she had left that port.

Held, that the facts establish the presumption under section 58 of the Marine Insurance Act, 1906, Cap. 41 (Imperial) of an actual total loss of a missing ship.

An owner chartered his ship and then insured it under a time policy. The charterer after receiving the ship in a seaworthy condition rendered it unseaworthy, without the owner's privity or knowledge, by the manner in which he loaded the cargo.

Held, that the owner does not thereby lose his right to recover the insurance.

Where an insured succeeds in an action under a policy of marine insurance he may be allowed interest, under 3 & 4 Wm. IV., Cap. 42, on the amount recovered, even when the action is not tried with a jury.

Statement

CONSOLIDATED ACTIONS to recover $5,000 on two marine-insurance policies of $2,500 each. The plaintiff owned the schooner "Haysport No. 2" valued at $12,000. One, M. P. Olsen, chartered the vessel for the purpose of taking a cargo consisting principally of dynamite from Nanoose Bay, B.C., to Skagway, Alaska. The policies insured the plaintiff against loss of the vessel should she become a total loss between the 22nd of January, 1925, and the 22nd of February, 1925, and

there was a provision for a continuance of the insurance until the vessel reached her destination. The vessel left Nanoose Bay on the 20th of January, 1925, and reached Bella Bella in the latter part of January. Two days later she left Bella Bella and was never heard of again, the only evidence of the loss being that some of the deck cargo of the vessel was picked up later near Bella Bella. Before the 22nd of February the plaintiff notified the defendants of the reported loss of the vessel and that it desired to take advantage of the provision in the policies providing for extension of the insurance. The further necessary facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 22nd of September, 1926.

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A. Alexander, for plaintiff.

Mayers, and *W. S. Lane,* for defendants.

13th October, 1926.

MACDONALD, J.: In these consolidated actions, plaintiff seeks to recover $5,000 upon two policies of marine insurance for $2,500 each, issued by the defendants, insuring the plaintiff against loss of the schooner "Haysport No. 2," should she become a total loss within the time limit covered by the policies. The vessel was valued in the policies at $12,000 and the limit of insurance was, from the 22nd of January, 1925, to the 22nd of February, 1925, subject to clause 6, providing for a continuation of the insurance, by notice, under certain circumstances, with a *pro rata* monthly premium for the continuation, until the vessel should reach her port of destination. Plaintiff had, to the knowledge of the defendants, demised the said vessel to Mangus P. Olsen, for a rental of $10 per day, while the vessel was out on the business of the said Olsen, as charterer. He obtained cargo for the vessel consisting principally of dynamite and, with a completed load, left Nanoose Bay, Vancouver Island, on the 20th of January, 1925, *en route* to Skagway, Alaska. It had been expressly warranted by the said policies that the vessel was only to be used "as a freighter in the inside waters of Puget Sound, British Columbia and Alaska, not north of Skagway," so that the voyage between the points mentioned was within the terms of the policies. In fact, they did not attach

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until the vessel had been two days out of port on her way to Skagway. It must have been in the contemplation of the contracting parties that, in using the vessel as far north as Skagway, it would be necessary to cross two arms of the sea, which might be termed open waters, *viz.*, Queen Charlotte Sound and Millbank Sound. The vessel, on its way north, passed across Queen Charlotte Sound, the larger of these two bodies of water, in safety, and reached Bella Bella, near Millbank Sound, in the latter part of January and lay there moored to the dock from Saturday until Monday. During this period it was calm weather and there is no evidence of any subsequent storm in that locality which might have caused the disaster. After leaving Bella Bella the vessel was never heard of afterwards, though diligent search was made for her. Some of her deck cargo was picked up in the locality later on. Plaintiff deemed it advisable, before the 22nd of February, 1925, to notify the local representatives of the defendants as to the vessel being reported lost and that the search was still being made for her. Plaintiff also gave a notice that, if the vessel were not so lost, it desired to take advantage of clause 6 of the policies and obtain continuation of the insurance on the vessel. Under these circumstances, thus shortly outlined, the question arises whether the vessel was lost through a peril of the sea, against which she was insured, and which thus would render the defendants liable, unless they were relieved by other matters of defence set up by them.

The policies of insurance stipulated that they should be "subject to English law and usage as to liability for and settlement of any and all claims." It was contended by defendants that there was no evidence afforded as to the English law and usage; consequently the Court was not in a position to determine the question of liability and more particularly to apply statute law, in deciding, whether a presumption arose as to the total loss of the vessel. The English statute law, as it stood at the time of the entering into the contracts of insurance, is binding upon the parties, and the Court is required to take judicial notice of such law, *vide* section 27 of Cap. 82, R.S.B.C. 1924—"Judicial notice shall be taken of all Acts of the Imperial Parliament. . . ." The statutory law, and decided cases before its passage, which apply and should be adopted, is con-

tained in Halsbury's Laws of England, Vol. 17, pp. 436-7, as follows:

"One of the most obvious cases of loss by perils of the seas is the foundering of the ship at sea, and where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed. (Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 58). It is also presumed that the cause of loss is foundering at sea (*Green* v. *Brown* (1743), 2 Stra. 1199; *Newby* v. *Read* (1761), Marshall on Marine Insurance, 4th Ed., 388, *Koster* v. *Reed* (1826), 6 B. & C. 19. These presumptions are, however, only presumptions of fact depending upon the circumstances of each particular case (*Houstman* v. *Thornton* (1816), Holt (N.P.), 242); and in order to lay a foundation for any such presumption there must be evidence leading to the inference that the ship when she left her port of departure was bound for and sailed on the voyage insured (*Cohen* v. *Hinckley* (1809), 2 Camp. 51; *Koster* v. *Innes* (1825), Ry. & M. 333; *Koster* v. *Reed* (1826), 6 B. & C. 19)."

I find that the facts necessary, in order to bring the statutory presumption, above stated, into play, have occurred, and unless otherwise relieved from liability, the defendants should indemnify the plaintiff for its loss, according to the amount of the insurance.

Defendants, however, contend that the vessel was not seaworthy when starting upon the voyage in question. That she was over-loaded and thus rendered unseaworthy. If they can obtain a finding to this effect then they submit, that it would destroy the plaintiff's right to recover upon the policies. While the plaintiff was not concerned in, nor took part in obtaining the cargo nor loading it on the vessel, still it was contended that Olsen stood in such position towards the plaintiff, that it became liable for his actions. So if the vessel were so overloaded as to render it unseaworthy, it was a fair inference to draw that this fault was the cause of the disaster and thus would relieve the defendants from liability. There is no object in discussing and deciding the unseaworthiness of the vessel unless such a finding would affect the plaintiff. In the first place, was the plaintiff responsible for the management or operation of the vessel by Olsen under his charter? It had no choice apparently even as to the nature of the cargo which might be loaded on the vessel. This was wholly within the scope of the charterer and the loading, particularly, under the control, for the time being, of the captain of the vessel. If the plaintiff had conspired, as it were,

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with the said Olsen to overload the said vessel in such a manner as to render it unsafe to navigate, even in inland waters, and it had been so overloaded then relief might be afforded to the defendants. This position is alleged, and assumed to a certain extent, in the statement of defence of the defendants, where it is asserted that at the time of the insurance being effected plaintiff wrongfully concealed or failed to disclose to the defendants a material fact, then known to the plaintiff and unknown to the defendants. There was no evidence adduced in support of this allegation. There was no concealment nor deception shewn on the part of the plaintiff. The marine insurance took place in the ordinary course of such business. In so far as the loading of the vessel is concerned, plaintiff, as I have mentioned, took no part therein nor controlled it in any way. Defendants while unable to afford any evidence supporting "knowledge" or "privity" of the loading of the vessel, still contend that Olsen had knowledge of the loading and that his relations to the plaintiff were such that his knowledge affected the plaintiff's position, if overloading were found to have occurred. In support of this contention the case of *The Sylvan Arrow* (1923), P. 14 and 220 was cited. This was an action, however, *in rem* and not upon a marine-insurance policy. The ship itself was being pursued and it was held that it, and consequently its owners, could not escape liability, by shewing that the ship was chartered to some third party. Hill, J., in that case, at pp. 226-7, in discussing the right to a maritime lien, arising out of a collision, refers to the judgment of Sir Robert Phillimore in *The Lemington* (1874), 2 Asp. M.C. 475, as follows:

"'A vessel placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as *pro hac vice* owners. Damage wrongfully done by the *res* while in possession of the charterers is, therefore, damage done by the "owners" or their servants, although those owners may be only temporary. Vessels suffering damage from a chartered ship are entitled *prima facie* to a maritime lien upon that ship, and look to the *res* as security for restitution. I cannot see how the owners of the *res* can take away that security by having temporarily transferred the possession to third parties. A maritime lien attaches to a ship for damage done, through the negligence of those in charge of her, in whosesoever possession she may be, if that damage is inflicted by her whilst in the course of her ordinary and lawful employment, authorized by her owners. Whether the damage is done

through the default of the servants of the actual owners, or of the servants of the chartering owners, the *res* is equally responsible, provided that the servant making default is not acting unlawfully, or out of the scope of his authority.'"

He then adds that the ship is spoken of as being "the guilty party."

In support of the contention that this case is distinguishable from one, where a remedy is sought on a policy of insurance, a subsequent portion of the judgment refers to the liability for maritime liens being placed upon vessels where the owners or even mortgagees have handed over their possession and control to charterers. The person so acting must be deemed to have given authority to those in control, to subject the vessel to maritime liens. It refers to it being right in principle and reasonable, in order to secure prudent navigation, that persons whose property is damaged by collision at sea, through negligent navigation, should not be deprived of the security of the vessel, in obtaining relief for the damages suffered. This portion of the judgment concludes as follows (p. 228):

"'The persons interested in a vessel in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must contemplate that claims may arise against her in respect of rights given by the maritime law, and may be taken to have authorized those persons to subject the vessel to those claims.'"

I think that this case, and any principle to be derived from it, do not assist an insurance company in disputing its liability under a policy of insurance. It would be unreasonable for the owner of a vessel, who has given a charter in the ordinary way, and then insured his property, to have his right of recovery destroyed through the charterer, who has received the vessel in a seaworthy condition, rendering it, without the knowledge or privity of the owner, unseaworthy, by the manner in which the vessel was loaded. There was no fault to be found with the vessel itself and outside the terms of the policy, why should the actions of the lessee or charterer affect the contract between the parties? The attack was simply made on this point. There were many warranties given by the assured in obtaining its insurance, but the manner of loading was not referred to and, in my opinion, the question of whether the boat was overloaded or not has no bearing upon the right of plaintiff to recover and a finding would be useless. In coming to this conclusion, with-

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out referring to a number of cases, I think the late one of *Thomas* v. *Tyne and Wear Steamship Freight Insurance Association* (1917), 1 K.B. 938, is well worthy of consideration, as shewing the effect of a time policy, and that even where the vessel was unseaworthy in one respect, to the knowledge of the owner, and was lost on the voyage, by reason of other unfitness, no defence was afforded to the insurance company. In that case the vessel went to sea with a hull in such a condition that it sprung a leak and foundered. Atkin, J., in his judgment, after referring to the unfitness of the vessel, and her consequent loss, mentioned that the claimant for insurance "was not privy to the unfitness of a ship, but that he was privy to the insufficiency of the crew." He then referred to subsection (5) of section 39 of the Marine Insurance Act, 1906, which reads as follows:

"In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

The judgment then proceeded:

Judgment

"It was contended by the insurers that as it was found that the ship was sent to sea in an unseaworthy state, namely, with an insufficient crew, with the privity of the assured, and that the loss of the ship was attributable to unseaworthiness in respect of the unfitness of the hull, they were protected. But I do not think that that is the proper construction of the subsection. I think it means that the insurer is not to be liable for a loss attributable to unseaworthiness to which the assured was privy. In the case of insurance under a time policy the intention was that the assured should be unable to recover in respect of a loss occasioned by his own fault. That was the rule under the law as it existed before the Act. It was always necessary to shew that the loss was the result of some misconduct. Now the statute has defined the degree of misconduct required as sending the ship to sea in an unseaworthy state with the privity of the assured. Where a ship is sent to sea in a state of unseaworthiness in two respects, the assured being privy to the one and not privy to the other, the insurer is only protected if the loss was attributable to the particular unseaworthiness to which the assured was privy."

The English Marine Insurance Act, on this point is a codification of the law as it stood at the time and the case of *Thompson* v. *Hopper,* El. Bl. & El. 1038, shews the situation in this respect, so long ago as 1858. A portion of the judgment of Cockburn, C.J., at p. 1054, reads as follows:

"I am of opinion that the judgment of the Court of Queen's Bench should be reversed. Although it may no longer be open to dispute that there is no warranty of seaworthiness in a time policy, I concur with the Court of

Queen's Bench (and for the reasons set forth in their judgment) in thinking that, if a ship, insured in a time policy, is knowingly sent to sea by the assured in an unseaworthy state, and is lost by means of the unseaworthiness, the assured ought not to be allowed to recover on the policy. And, further, I agree that, to constitute a defence in an action on such a policy, it is not necessary that the unseaworthiness should have been the proximate and immediate cause of the loss, provided it can be shewn to have been so connected with the loss as that it must necessarily have led to it."

The result is that, as to the liability under the policies of insurance, the defendants have failed to shew any cause for relief. The plaintiff is entitled to recover. Interest is sought upon the amount of the policies. I think that the provisions of 3 & 4 Will. IV., Cap. 42, may be invoked in support of such a claim—*vide In re Brighouse, Deceased* (1923), 33 B.C. 191; (1924), 1 W.W.R. 55 at pp. 57-8. While the legislation refers to a "jury" allowing interest, still both sections 28 and 29 have been applied, by a judge, sitting without a jury, in *Mackie* v. *The European Assurance Society* (1869), 21 L.T. 102. In this action for recovery under insurance, Malins, V.C., at p. 106, said:

Judgment

"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 follow the same course. There will be judgment for the plaintiff, against each of the defendants for $2,500, and interest, from 22nd February, 1925, at 5 per cent. Plaintiff is entitled to its costs.

Judgment for plaintiff.

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IN RE ESTATE OF ROBERT ALEXANDER, DECEASED

IN RE ESTATE OF ROBERT ALEXANDER, DECEASED.

Succession duty—Testator domiciled in British Columbia—Real property in Saskatchewan—All property devised to trustees upon trust to convert into money — Mobilia Sequuntur personam — Liability of Saskatchewan property to succession duty—R.S.B.C. 1924, Cap. 244, Sec. 5.

A testator died in Vancouver domiciled in British Columbia. By his will he devised all his property to a trustee, upon trust to convert the same into money and to distribute it in accordance with the provisions in his will. The Provincial Government demanded succession duty in respect of certain lands that the testator owned in the Province of Saskatchewan. It was held on the trial that the property was subject to succession duty.

Held, on appeal, reversing the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that the property in question was an immovable and therefore not subject to succession duty in British Columbia.

APPEAL by the executor of the will of Robert Alexander, deceased, from the decision of MORRISON, J. of the 22nd of February, 1926, dismissing a petition for a declaration that the action of the minister of finance in levying probate and succession duties on real property situate outside the Province of British Columbia is *ultra vires* of the taxation powers under the Succession Duty Act. Robert Alexander died in Vancouver on the 9th of June, 1923. At the time of his death he owned certain real property in the Province of Saskatchewan. Under the terms of his will he appointed James Alexander, his nephew, sole executor and trustee. He devised all his real and personal property to his executor in trust to sell and convert into money such real and personal estate (except his residence in Vancouver) and after making provision for payment of debts and duties he directed that there be paid certain legacies out of the estate. It was held by the trial judge that the real property in Saskatchewan was subject to succession duty.

Statement

The appeal was argued at Victoria on the 18th of June, 1926, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Harper, for appellant: The will gives directions to the trustee to convert all realty into personalty, and the testator had

Argument

real property in Saskatchewan. When he died this was real property and it still is real property. Section 20 of the Succession Duty Act provides the duty is payable at the time of the testator's death. This real property is not subject to succession duty. The case of *In re Succession Duty Act and Inverarity, Deceased* (1924), 33 B.C. 318, can be distinguished as it was personal property that was dealt with there: see also *Re Succession Duty Act and Boyd* (1916), 23 B.C. 77; Williams on Real Property, 24th Ed., 480; Quigg on Succession Duties in Canada, 16.

Argument

Brown, K.C., for the Crown: My submission is that the property becomes personalty at the moment of the testator's death: see Armour on Devolution, 22-3; Robbins & Maw on Devolution of Real Estate and Administration of Assets, 3rd Ed., 98-9; Halsbury's Laws of England, Vol. 13, p. 307; *Attorney-General* v. *Dodd* (1894), 2 Q.B. 150.

Cur. adv. vult.

15th October, 1926.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The Provincial Government demands succession duty in respect of land situate in Saskatchewan.

The testator died in this Province domiciled here. He devised all his property to a trustee, upon trust to convert the same into money and to distribute it in accordance with the provisions of his will. The land has not yet been sold.

Counsel for respondent relies on the rule of equity that that is to be regarded as done which ought to be done, coupled with the maxim *mobilia sequuntur personam* and argues that the land must be regarded in contemplation of law as situate in this Province and subject to the duty. By the Succession Duty Act, Cap. 244, Sec. 5, all property real and personal situate within the Province is made subject to the duty. By a process of reasoning founded on those legal fictions, counsel argues that land which is locally situated in Saskatchewan is as it were imported into this Province and made the subject of direct taxation.

The rule that movables follow the person has been incorporated into international law for the convenient distribution of a decedent's property. It tends to obviate many of the diffi-

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culties which would otherwise arise in cases where the property is in several countries. The domicil of the deceased is regarded for certain purposes as the home of his movable property wherever locally situate. His immovable property, however, does not fall under the maxim, it is governed by the *lex loci rei sitæ*. It is therefore necessary to decide whether or not the rule of equity has changed the character of the land from an immovable to a movable so as to bring it under the maxim.

The provisions of the Succession Duty Act do not affect this question. The power assigned to the Province by section 92 of the B.N.A. Act to levy direct taxation within the same cannot be enlarged by Provincial legislation. The question is one of international law, not of Provincial legislation.

I have been able to find two or three cases only in which the point has come up directly for decision—*Murray* v. *Champernowne* (1901), 2 I.R. 232, and a recent decision in England, *Berchtold* v. *Capron* (1923), 1 Ch. 192. These are decisions of Courts of first instance, but the question was so fully dealt with by the learned judges who considered it that I should hesitate to disagree with their conclusions, especially in view of the fact that no prior decisions are in conflict with them. Russell, J., in the last-mentioned case, founded his judgment mainly, if not altogether, upon this: that though land for purposes of succession may be regarded as personal property it is not a movable. Andrews, J., in *Murray's* case, *supra,* was of the same opinion. In *Freke* v. *Lord Carbery* (1873), L.R. 16 Eq. 461, a case concerning the succession to English leaseholds and which inferentially touches upon the point in question here, Lord Selborne, L.C., at p. 466, said:

MACDONALD, C.J.A.

> "When '*mobilia*' are in places other than that of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immoveable and not moveable."

What the rights of the Crown may be when the Saskatchewan land is sold and converted into personalty and brought into this Province, is not before us for decision.

It might be a question worthy of consideration whether land notionally converted by will could, apart from my conclusions expressed above, be said to follow the person since it is only on

the testator's death that it becomes personalty, but this phase of the case was not argued and its decision is not necessary to the disposal of the appeal. The appeal should be allowed.

GALLIHER, J.A.: I concur in the reasons for judgment of the Chief Justice.

Two things would seem to be necessary in order to maintain the judgment below. First, the land directed to be sold must be regarded as personal property for the purposes of succession, and secondly, it must come within the *mobilia* maxim.

GALLIHER, J.A.

The cases cited by my Lord would seem to indicate that the land in question while it might be considered as personal property in Saskatchewan, cannot be considered as a movable and hence not within the maxim.

MCPHILLIPS, J.A. (oral): In my opinion the appeal should be dismissed. The learned Chief Justice has stated the facts. The property sought to be affected by succession duty is accidentally at this time, real estate in the Province of Saskatchewan. But the will under which the trustee and executor has undertaken the burden of administration is a devise to the trustee for conversion of the real estate. And that must be done. The trustee must do that. And by virtue of his office he must pursue the provisions of the will and that is to convert the land into money. That being the case, under section 12 of the Succession Duty Act, I think the value of the land is assessable and was properly assessed by the Government assessor. That section reads:

MCPHILLIPS, J.A.

"Any portion of the estate of any deceased person, whether at the time of his death such person was domiciled in the Province or elsewhere, which is brought into the Province by the executors or administrators of the estate to be administered or distributed in the Province, shall be liable to the duty hereinbefore imposed; but if any estate, succession, or legacy duty or tax has been paid upon such property elsewhere than in the Province, and such duty or tax is equal to or greater than the duty payable on property in the Province, no duty shall be payable thereon, and if the duty or tax so paid elsewhere is less than the duty payable on property in the Province, then the property upon which such duty or tax has been paid elsewhere shall be subject to the payment of such portion only of the succession duty provided for in the last four preceding sections as will equal the difference between the duties payable under this Act with respect to property in the Province and the duty or tax so paid elsewhere."

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It is apparent that the Legislature was acting reasonably in the matter and if the succession duty, or any impost in Saskatchewan is equivalent to that proposed to be imposed here none will be imposed.

There is one principle (before I go into one or two other points) that has always been acted upon by Courts—with the greatest respect to contrary opinion in this case—that is that Courts are averse to being asked to pronounce idle judgments, and judgments idle in effect are not pronounced. Now, in this particular case, what has this trustee to do? Firstly, until the succession duty matter is settled, until security is given thereby allowing Letters Probate to issue the trustee cannot sell the land in Saskatchewan. That is, he must get his Letters Probate before he can do it and he thereby profits by the utilization of the legal authority conferred in British Columbia. Well, when he gets his Letters Probate he must then pursue the trust under which he has undertaken to act, and he must, within a reasonable time, convert this land in Saskatchewan into money. Now, when he does so, does he not (apart from the view I take that he is answerable before he does it) bring a portion of estate into British Columbia? Certainly when he does do it there can be no question that under section 12 this succession duty must be paid.

MCPHILLIPS, J.A.

Now, what profit will there be for the trustee to obtain a judgment in his favour at this moment just because accidentally at this moment the land in Saskatchewan has not been sold? I sound this note of warning that the trustee as I look at it, as a matter of law, will not be able to say that this matter is *res judicata,* because the minute he does this, that is, makes this sale of the land, in Saskatchewan, and brings the money in here for distribution he is called upon to pay the succession duty. Therefore, I say, how idle it would be to have a judgment upon the accidental situation. But I go further, I take the view that the assessor was right in making the assessment. The assessor in a letter to the appellant's solicitors has this to say with reference to the assessment made:

"I have also included in my assessment the $30,000 in real estate outside, which, by the will the executor was directed to sell and convert into money, and which, under section 12 of our Act, is liable for succession duty here."

In that view I agree. Mr. Justice MORRISON also agrees in that, but we are without reasons for judgment from Mr. Justice MORRISON. I may say that for years practitioners of this Province have always been of the opinion (of course, if they were in error that would not assist in the matter) that wills couched in terms such as this will is, with a devise of land with a provision for conversion, that they could not resist the contention made by the Crown, that it was liable to succession duty, as personalty within the Province. And for years practitioners have advised their clients to pay this succession duty. And as I have pointed out in this case, sooner or later it must be paid because the trustee, unless he commits a breach of his trust, has to sell the land in Saskatchewan, convert it into money, bring the money into the Province of British Columbia and distribute it in due course of law. Therefore, how valueless after all would it be to have a decision (and I say this with the greatest respect to my brothers who may take a contrary view) that at the moment no succession duty is payable where we have an absolute requirement that the trustee must follow out the trust. He has undertaken this burden and he must carry out his trust in accordance with the law, and the land must be held to be personalty and the money realized therefrom constitutes legal assets assessable in British Columbia. Now, in reviewing this matter we find that the law is tritely and succinctly stated by that great judge, Sir Thomas Sewell in the case of *Fletcher* v. *Ashburner* (1779), 1 Bro. C.C. 497 at p. 499 (also see *Lechmere* v. *Earl of Carlisle* (1733), 3 P. Wms. 211 at pp. 218-9; *Fauntleroy* v. *Beebe* (1911), 2 Ch. 257, 262; *Gresham Life Assurance Society* v. *Crowther* (1915), 1 Ch. 214, 219, 221; *In re Lyne's Settlement Trusts* (1919), 1 Ch. 80) where Sir Thomas Sewell deals with the well-known principle of equity applicable to this case:

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"Nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land."

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And I may say the above expressions were approved by Lord Alvanly in *Wheldale* v. *Partridge* (1800), 5 Ves. 388 at pp. 396-7; (1803), 7 R.R. 37; *Griffith* v. *Ricketts* (1849), 7 Hare 299. And Sir Frederick Pollock carried this case into Vol. 7 of the Revised Reports, p. 37. In turning to Hanson's Death Duties, 7th Ed., a text-book of great merit, where the cases are well collected, the learned author has this to say at p. 92:

"Legacy and succession duty, as to which no question of probate jurisdiction arises, are governed by entirely different rules. Where the owner is domiciled in the United Kingdom legacy duty is payable in respect of all movable property situate out of the United Kingdom (*Thomson* v. *The Advocate-General* [(1842)], 12 Cl. & F. 1, *post*, p. 301), including mortgage debts (*Lawson* v. *Commissioners of Inland Revenue* (1896), 2 I.R. 418): and also in respect of real or leasehold property out of the United Kingdom forming an asset of a partnership in which the deceased was a partner (*Forbes* v. *Steven* [(1870)], L.R. 10 Eq. 178; *Stokes* v. *Ducroz* [(1890)], 38 W.R. 535)."

MCPHILLIPS, J.A.

Now, by way of analogy is this case any weaker than the case of a partnership owning land in Saskatchewan? Admittedly that land is deemed personalty, but is personalty only because of the law of British Columbia. Of course, Saskatchewan happens to have the law of England as we have, but it is the law of the domicil of the person whose estate is being considered which governs, and we are not really concerned with what the law of Saskatchewan is. According to the law of British Columbia the land of the partnership is personalty.

In this particular case the testator of his own volition does that which Sir Thomas Sewell says can be done. He converts land into money. Is there any difference when one is the principle of law which guides and the other is the act of the testator himself who declares land money? I can see no difference. And as Sir Thomas Sewell so aptly said he can do it and why should he not be able to do it? And having done it, why should not the land—that is, its value, be assessable as personalty within the Province? And here we have the trustee accepting the devise, and undertaking to carry out the provisions of the will. Now, when we have all this determined it seems to me there need little more be said.

In Hanson's Death Duties, p. 92, I repeat a portion of what has been already quoted to give the context and what I particularly call attention to is this:

"And also in respect of real or leasehold property out of the United Kingdom forming an asset of a partnership in which the deceased was a partner; or otherwise subject to a trust for conversion (see *In re Smyth* (1898), 1 Ch. 89)."

Here is a trust exactly within the *Smyth* case, it is a trust for conversion. The *Forbes* case is one of partnership property and the present case is a trust for conversion.

I have no hesitancy in coming to the conclusion that the assessor was right and the learned judge in the Court below in his view was right and the appeal should be dismissed.

There is also one other observation that can be properly made in view of the terms of the Succession Duty Act. Should it be that the trustee by any circuity of action does not bring this money into the Province he will have to pay succession duty out of his own estate.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Harper & Sargent.*
Solicitors for respondent: *Ellis & Brown.*

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REID v. GALBRAITH

REID v. GALBRAITH *ET AL.*

Trespass—Removal of timber—Damages—Action by mortgagee—Sufficiency of possession—Measure of damages.

Certain lands containing a quantity of growing timber were mortgaged by the owner to T. (since deceased) in May, 1913, subject to an agreement for sale of the timber giving a right to enter, cut and remove same up to the 30th of January, 1918, the timber then to revert to the owner. The mortgage having become in arrears T. commenced foreclosure proceedings in February, 1915. Final order of foreclosure was pronounced on the 4th of April, 1920, and the plaintiff (executor and trustee of T.'s estate) became the registered owner on the 14th of April following, free from encumbrances. The defendants, who had previously acquired by purchase all rights in the timber agreement and under an alleged agreement made in 1919 with one L. (who had acquired the equity of redemption in the property from the former owner) for an extension of the timber agreement, cut and removed large quantities of timber from the property between the 1st of March and 30th of June, 1920. In an action for damages for cutting and removing said timber:—

Held, that a mortgagee is entitled to damages against third parties who entered the lands and removed timber after he had begun foreclosure proceedings and before he became registered owner thereunder even although he was never in actual possession under the mortgage.

Held, further, that as there is absence of aggravating circumstances "vindictive damages" should not be awarded but the damages should be assessed on a scale which will fully compensate the plaintiff on a favourable and reasonable view of the value of the property destroyed.

Statement

ACTION for damages for cutting and removing a quantity of timber from the north half of the north-west quarter of section 16, township 10, in the District of New Westminster. The facts are sufficiently set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 28th of September, 1926.

Reid, K.C., and *Bole*, for plaintiff.
Craig, K.C., for defendants.

15th October, 1926.

Judgment

MACDONALD, J.: Plaintiff, as executor and trustee under the will of Roland F. G. Thompson, deceased, seeks to recover damages from defendants in connection with the cutting and removing of a quantity of timber from the north half of the

north-west quarter of section 16, township 10, in the District of New Westminster, British Columbia. This property, with other land, was mortgaged by John H. Claughton to the said Thompson on the 15th of May, 1913, and, though not so stated in the mortgage, was, by the pleadings, admittedly subject, at the time, to an agreement for sale of the timber, giving a right to enter thereon and cut and remove such timber, up to the 30th of January, 1918. It provided that after that time the timber should revert to and become the property of the owner of the land. The mortgage having become in arrears, Thompson commenced foreclosure proceedings on the 25th of February, 1915. He was only entitled at the time to the reversionary interest in the timber, possessed by the owner of the equity. A final order of foreclosure was pronounced in such proceedings on the 4th of April, 1920. In the meantime the rights under the timber agreement had expired. Then on the 14th of April, 1920, the plaintiff, as such executor and trustee, became the registered owner in fee simple, free from all encumbrances on the land. The defendants, James L. Galbraith, John H. Galbraith and David S. Galbraith, had previously acquired by purchase all the rights, comprised in the timber agreement. They had mortgaged their interest therein to the Bank of Montreal on the 23rd of August, 1917, but such agreement and the mortgage thereof appear by the certificate of indefeasible title to have been cancelled on the 4th of February, 1924. The said Galbraiths carried on business under the name of Galbraith & Sons, and on the 9th of April, 1918, made an assignment to D. G. Brymner, since deceased, for the benefit of their creditors. Notwithstanding such assignment the business of logging and manufacturing timber which had been carried on by the said firm of Galbraith & Sons, was continued by the said Brymner, as assignee, and after his death in the name of Robert Galbraith as an assignee, appointed in the stead of the said Brymner. The business thus continued of Galbraith & Sons, while in the name of the assignee for the time being, was for the benefit of the creditors of the said firm in the first instance, and then for the benefit of the said firm and its members, so that they might be relieved of the heavy liability, existing at the time when the assignment was first made. This course of business resulted

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beneficially and a large amount of the indebtedness originally existing had been wiped out, as appears by the evidence of James L. Galbraith, who was, and still is, the controlling spirit in such business. The reference to this situation becomes important when dealing later on with the question, as to where the liability rests, for the trespass upon the land.

The right to the timber on the land in question had expired on the 30th of January, 1918, and the mortgage to said Thompson was thus no longer affected by such agreement. The Galbraiths and Brymner, as assignee, had not seen fit so far to exercise any rights under the agreement. In the spring of the following year, 1919, they took steps to acquire the timber on the land. They ignored any rights that might be possessed by the mortgagee and sought to obtain from E. H. Lees, the owner of the equity, his signature to a document which was prepared and submitted to him and was termed an extension of the expired agreement. Lees, while willing to accept the sum of $50, deemed it advisable to obtain legal advice before executing such document. It was changed so that it amounted simply to a consent on his part, in so far as he was concerned, that Brymner, as assignee, might exercise the rights conferred by the original timber agreement. Even with this waiver of any rights possessed by Lees, no cutting took place upon the land during the year 1919, but on January 29th, 1920, a further application was made to Lees. He then agreed in consideration of $50 that he would not "personally take any steps to prevent" cutting timber on the land in question. The defendants, other than defendant Robert Galbraith, shortly thereafter, in the name of Brymner, as assignee, proceeded to cut and remove all the merchantable timber from the land. Their work commenced in March, 1920, and terminated within three months. I am quite satisfied that such defendants and Brymner, at the time, were all well aware, before cutting and removing any timber from the land, that it was mortgaged. They knew this when they applied to Lees and obtained the first permit or extension from him. Further, that from their knowledge of the property, they must have known that such cutting and removal would affect the value of the land, as security to the mortgagee. Lees did not purport to give any right, as an owner to cut timber on the land.

His letter or permit would estop him from interfering with the logging operations of the defendants or removing timber from the land. His acquiescence in any course which might be pursued by Brymner, as assignee, was simply purchased. The small amounts paid in obtaining these so-called extensions, while shewing that the right to cut had expired, could not be deemed in any sense as a purchase of the timber which had become a security to the mortgagee. Nor could the permits affect any rights possessed at the time by the mortgagee.

It is contended, under these circumstances, shortly outlined, that the plaintiff has no right of action, in respect of the timber cut and removed from the land. There is no evidence that the plaintiff or said Thompson ever took actual possession of the land after the right to do so had accrued to them under the mortgage. I feel no doubt that the plaintiff has a perfectly good cause of action as to any timber, which may have been cut upon the land, subsequent to the time when he became the registered owner thereof in April, 1920, but the question arises, whether such right relates back, so as to entitle the plaintiff to recover damages for the timber cut in March and the early part of April, 1920. If the action had been framed, complaining of the lessening of the security, through the cutting of the timber, or the plaintiff had been in actual possession under the mortgage, there would be no difficulty in the matter, but that is not the position. Defendants being, as I have mentioned, aware of the existence of the mortgage and the refusal of Lees to confer any right to cut timber upon the land, were not acting in good faith towards the mortgagee in cutting the timber. They cannot set up a right to do so upon any equitable grounds, but must rely upon a purely legal position. So far as the enjoyment of the land is concerned, it might well be, that Lees could give permission to a third party to simply enter upon the land, but had no right, especially after proceedings had been taken, to foreclose the mortgage, and a *lis pendens* to that effect registered, on the 25th of February, 1915, to confer any right which would warrant spoliation of the mortgaged property. Even if the so-called extension agreement had purported to give such right, it would have been beyond the power of said Lees, as owner of the equity of redemption, after the right to cut timber expired

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in January, 1918. No one who had acquired any rights thereunder had a right, as against the mortgagee, to cut and remove timber from the land nor could Lees, as the owner of the equity of redemption, cut any timber on the land, except perhaps for the purpose of fuel and fencing, unless it were shewn that the security would not be impaired. A situation, similar in many respects, was discussed in *Mann et al.* v. *English et al.* (1876), 38 U.C.Q.B. 240. In that case Harrison, C.J. referring to the rights of a mortgagee, as against parties cutting timber on mortgaged land, after discussing the matter in a general way, says, at pp. 248-9:

"After default the mortgagee has the right to immediate and actual possession. If we were to hold, under these circumstances, that a mortgagee had no remedy other than on the covenant against persons wrongfully cutting timber off the mortgaged land, our decision would be a reproach to the administration of justice. The injury done to the mortgagee is one done to him in respect of his property. For that injury, although he may or may not have a remedy by contract, he must, I think, have a remedy independently of contract. The remedy must be one against the wrongdoer, whether the mortgagor or a person or persons acting with or without him, or acting with or without his fancied permission, for real permission he could give none."

Judgment

Finding, as I have, that the permission given by the two letters was with full knowledge of the circumstances, I apply the remarks in the judgment thus referred to, and come to the conclusion, without discussing further the many cases cited, that none of the defendants acquired any right to cut or remove the timber in question from the land. It appears to me that while they were pursuing their logging operations in that locality and, having in mind the agreement which had lapsed, they found it convenient to remove all the timber from the land. The permits or extensions they knew or should have known gave them no rights against the mortgagee. It is very likely that they had an impression, at least, that the parties thus seriously affected by their actions, would call them to account sometime in the future. As to the right of action by a mortgagee for acts of trespass by a wrongdoer, prior to entry by the mortgagee, *vide Ocean Accident and Guarantee Corporation* v. *Ilford Gas Company* (1905), 2 K.B. 493, approving and applying *Burnett* v. *Guildford (Earl)* (1855), 11 Ex. 19.

The evidence, as to whether Claughton, the original mort-

gagor, or Lees, the purchaser of his equity, had used or occupied the land in any way, is wanting and might, I should think, have been clearly afforded. Some time before the cutting, plaintiff went to the land and inspected the timber, but apparently saw no one on the land in actual occupation. His evidence was directed to the quality and amount of the timber. From all the circumstances, however, it is a fair conclusion that the land was vacant at the time defendants commenced cutting the timber and remained so except for their occupation. Did the plaintiff then have possession which would support his action? Upon this subject Lord O'Hagan in *Lord Advocate* v. *Lord Lovat* (1880), 5 App. Cas. 273 at p. 288, said:

"Possession . . . . must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession."

This language was quoted with approval in *Kirby* v. *Cowderoy* (1912), A.C. 599 at p. 603, where payment of taxes on land was considered sufficient "possession" by a mortgagee to enable him to obtain the benefit of the Statute of Limitations against a mortgagor even though he "never went into actual occupation" of the land. Compare *Adams Powell River Co.* v. *Canadian Puget Sound Co.* (1914), 19 B.C. 573.

Judgment

The plaintiff is entitled to damages, but to determine the amount, with any accuracy, is, as in all cases of this nature, a difficult matter.

While the action is maintainable by the plaintiff "for entering his land and carrying away his trees,"*vide* Mayne on Damages, 7th Ed., p. 472, I do not think the circumstances warrant the assessment against the defendant of "vindictive damages" as there referred to. The proceedings on the part of the defendants were somewhat high-handed, but the property was apparently vacant and they may have concluded that as it was not cultivated, it was only fit for logging, which could be more economically carried on while the defendants were operating in that district. So while they were wrongdoers there were not aggra-

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vating circumstances. Defendants should, however, pay damages on what might be termed the "higher" scale. That is the amount should be ascertained on a scale which would fully compensate the plaintiff from any favourable and reasonable view that might be taken of the value of the property thus destroyed. In this connection, Lord Selborne stated in *Wilson* v. *Northampton and Banbury Junction Railway Co.* (1874), 9 Chy. App. 279, 285, that in the case of damages, the plaintiff will be entitled to the benefit of such presumptions, as according to the rules of law, are made in Courts, both of law and equity, against persons who are wrongdoers in the sense of refusing to perform, and not performing their agreements.

Scrutton, L.J., in *Abrahams* v. *Herbert Relach, Ld.* (1922), 1 K.B. 477 at p. 482, said:

"I am not inclined to be strict in limiting the damages recoverable against wrongdoers."

Both of these judgments referred to the failure of persons to carry out their contracts and thus being considered, in that sense "wrongdoers," but the principle would be still more pronounced in actions of torts.

Judgment

Estimates were given as to the amount of timber on the land, available for cutting, on a commercial basis. I think the evidence given by Armstrong, a forestry engineer, as to the timber, is well worthy of consideration. It must be remembered, however, that his calculation was based, not on knowledge of the timber obtained by cruising before the cutting, but by a technical reconstruction of the trees, through inspection and application of his extensive knowledge in such matters. If it were not that statutory returns were made of the timber cut upon the land, I would accept the result obtained by Armstrong, he being a very competent and independent witness. But a more accurate determination is reached, if I accept as correct, the statement of logs cut from the land and returns thereof rendered to the Forestry Branch of the Provincial Government. I have no reason to consider such returns were not honestly made and correctly state the amount of timber cut from the land in question and though emanating from the defendants, I adopt them with their books kept at the mill as a basis, to ascertain as nearly as is reasonably possible, the value of the timber cut on the land.

It appears from the books and returns of all kinds of timber there was cut on the land in 1920, as follows:

March	474,879	feet
April	657,441	"
May	677,815	"
June	644,127	"
Total	2,454,262	feet

This amount is far short of the estimate made by Armstrong at 3,339,000 feet in manner indicated, shewing almost a million feet of difference. A task might be undertaken of segregating this amount into fir, cedar and hemlock, but it would be complicated and not produce any accurate result as the books do not shew the quality of such timber and there is no material apparently available to ascertain the amount realized from the finished product and then making proper deductions, to ascertain the value of the commodity. I might accept the statement of Armstrong, as to proportion of different grades, or that of Edwin Burnett, a witness for defendants, but neither of them would possess a sound foundation upon which to base a calculation as to the amount of the damages. In this respect, it might be said that they do not differ from any conclusion reached, as to the value of a quantity of timber long since shipped to customers in the ordinary course of trade, of which no separate record has been kept as to its quality or the amount received by the vendors.

Judgment

Then if the selling price given by Armstrong were applied and necessary costs of logging, transportation and milling operations deducted, it would shew a value to the plaintiff as owner beyond what I think would be reasonable. I do not consider that in dealing with the costs of transportation of the logs, the difficult situation was given its full weight. The land would, in view of the surrounding completed logging operations, have been a difficult and expensive piece to log. One witness said from a commercial standpoint such an undertaking would have been prohibitive. Under these circumstances, I think the better and more reasonable mode to adopt, in determining the amount of damages the plaintiff should be allowed, would be to place the cutting upon a stumpage basis. At the time when the cutting took place, the market for fir logs was in good condition and

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cedar logs were bringing an exceptionally high price, while hemlock logs demanded a lower figure. The average price in the fall of 1920-21, for such timber, was better than in former years by from two to three dollars per M.B.M. I am satisfied that, as to prices then current, Armstrong prepared himself carefully before trial, in addition to knowledge already possessed. His statement is, that, as prices stood at that time, based upon an average of three years, a fair stumpage allowance would be $2.92 per M. upon all the timber of the kinds mentioned, cut from the land in question. I have no reason to doubt the accuracy of this calculation from Armstrong's standpoint, and Harold Gardiner, another competent and independent forest engineer, practically agrees with him, but when I view the prices paid by defendants for the right to log other pieces in the locality it seems high. I also give consideration to the statements of witnesses differing from Armstrong. The original price paid is of very little assistance by way of comparison and the price of lumber has risen since that time. I think, under all the circumstances, a fair amount to allow would be $2 per M. stumpage, calculated on the timber of all kinds taken from the land. Applying this figure to the amount shewn by the books of the defendants, *viz.*, 2,454,262 feet, results in the sum of $4,908.52, which is the amount plaintiff is entitled to recover.

It was contended that the defendants Galbraith and Prendergast were only acting under Brymner, as assignee, and should not be considered and held liable as wrongdoers. I think, on the contrary, that their actions were such that, in accordance with the decided cases, they are liable, except as to the defendant Robert Galbraith. There will be judgment for the plaintiff for $4,908.52, as against all the defendants except Robert Galbraith and the judgment against him should be limited to such moneys, as he may have in his hands or which may come into his hands, as assignee of Galbraith & Sons. Plaintiff is entitled to his costs.

Judgment for plaintiff.

WINTER v. CAPILANO TIMBER COMPANY, LIMITED AND J. A. DEWAR COMPANY LIMITED.

MCDONALD, J. (In Chambers)

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WINTER v. CAPILANO TIMBER CO.

Practice—Costs—Dismissal of action—Indemnity against costs—Refusal of costs to indemnified defendant.

One defendant agreed to indemnify the other defendant against all actions, claims and demands which may be brought by reason of the execution of a certain lease. The plaintiff's action for a declaration that notice of forfeiture of said lease is void and that the lease is valid and subsisting was dismissed with costs.

Held, that the indemnified defendant was not entitled to costs against the plaintiff.

Esquimalt and Nanaimo Ry. Co. v. *Hoggan* (1908), 14 B.C. 49 applied.

APPLICATION by the plaintiff, who was unsuccessful in the action, to be relieved of payment of costs to one of the defendants by reason of an agreement between the said defendant and its co-defendant that the co-defendant would indemnify the other against the costs of the action. Heard by MCDONALD, J. in Chambers at Vancouver on the 9th of June, 1926.

Statement

Alfred Bull, for plaintiff.
J. H. Lawson, for defendant Capilano Timber Co. Ltd.
W. J. Baird, for defendant Dewar Co. Ltd.

20th October, 1926.

MCDONALD, J.: In this action it appears that some considerable time prior to action brought the defendant Capilano Timber Co. had entered into a written agreement whereby it agreed to indemnify the defendant Dewar Company "against all actions, claims and demands which may be brought or made by the Coast Shingle Company Limited or the Trustee in Bankruptcy of the Coast Shingle Company Limited (the present plaintiff) against the defendant (Dewar Company) by reason or on account of the execution by the defendant Dewar Company" of the lease in question in this action, and the defendant Dewar Company covenanted that the defendant Capilano Company should be entitled to deal with and defend as to it might seem meet any such actions, claims or demands, and that the

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defendant Dewar Company should not make nor do any act, deed matter or thing in any-wise thereunto relating without the consent of the defendant Capilano Company expressed in writing.

The present action has been dismissed, but it is contended that the defendant Dewar Company is not, by reason of the above agreement, entitled to any costs from the unsuccessful plaintiff. This contention, I think, must prevail. I am quite unable to distinguish this case from that of *Esquimalt and Nanaimo Ry. Co.* v. *Hoggan* (1908), 14 B.C. 49. It appears to me that the facts in that case are on all fours with those of the present case.

Application granted.

MCDONALD, J. (In Chambers)

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Oct. 26.

VICTORIA LUMBER & MANUFACTURING CO. v. THOMSEN & CLARK

THE VICTORIA LUMBER & MANUFACTURING CO. LTD. v. THOMSEN & CLARK.

Practice—Pleading—Document—Meaning and effect of cannot be pleaded—Estoppel—Cannot be pleaded in counterclaim.

The defendants having pleaded a document *verbatim* will not be allowed to plead the meaning and effect of it as the construction of a document is a matter for the Court.

The rule that a plea of estoppel is not allowed to appear in a statement of claim applies to a counterclaim.

In an action to recover the balance due in respect of the sale of certain timber lands the defendants counterclaimed setting up fraud on the part of the plaintiff in negotiating the sale and pleaded by way of counterclaim that "the plaintiff fraudulently misrepresented to the defendants that a certain cruise shewn to the defendants and made by the Portland Engineering Company was a true and correct cruise of the timber in question, whereby the defendants were fraudulently misled into paying for a large quantity of timber which was in fact non-existent, and the plaintiff was at the time in possession of another cruise made by Brown & Brown shewing a much smaller quantity of timber, which later cruise was true in substance and in fact, and shewed the actual amount of timber upon the lands." This was followed by a plea that "a few days prior to the sale the plaintiff filed with the Government of British Columbia in the department having the conduct of assessment and taxation the said Brown & Brown's

cruise as shewing truly the amount of standing timber upon the lands, and the defendants had no knowledge or notice of such filing."

Held, to be a good plea and should not be struck out.

MCDONALD, J. (In Chambers)

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Oct. 26.

VICTORIA LUMBER & MANUFACTURING CO. *v.* THOMSEN & CLARK

APPLICATION by the plaintiff to strike out certain portions of the defence and counterclaim. Heard by MCDONALD, J. in Chambers at Victoria, on the 22nd of October, 1926.

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

26th October, 1926.

MCDONALD, J.: The plaintiff sues upon a mortgage for a balance of purchase-money due in respect of certain timbered lands sold by the plaintiff to the defendants. The defendants counterclaim, setting up fraud on the part of the plaintiff in negotiating the sale, and seek a return of moneys paid, and damages. The plaintiff moves to strike out certain portions of the defence and counterclaim.

Upon the hearing I ordered that a certain portion of paragraph 2(a) of the statement of defence, and paragraph 13 of the counterclaim be struck out for the reason that the defendants having pleaded *verbatim* the document forming the contract for sale, should not be allowed to plead the meaning and effect of that document, the construction of the document being left to the Court (see Bullen & Leake, 8th Ed., pp. 10 and 11). I also ordered that paragraph 18(a) of the counterclaim be struck out upon the ground that it is not allowable that a plea of estoppel appear in a statement of claim, but only in a subsequent pleading, and I take it that the same rule applies to a counterclaim (see Bullen & Leake, 8th Ed., p. 661(*d*)).

Judgment

I reserved the question as to whether or not certain words in paragraph 15 of the counterclaim should be struck out; this pleading arises in this way:

It is said that the plaintiff fraudulently misrepresented to the defendants that a certain cruise shewn to the defendants and made by the Portland Engineering Company, was a true and correct cruise of the timber in question whereby the defendants were fraudulently misled into paying for a large quantity of timber which was in fact non-existent, whereas the plaintiff

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was at the time in possession of another cruise made by Brown & Brown, and shewing a much smaller quantity of timber, which later cruise was true in substance and in fact, and shewed the actual amount of timber upon the lands.

No objection is made to the defendants setting up these facts, but it is objected that the defendants must not set up, as they do in paragraph 15, the fact that a few days prior to the sale the plaintiff filed with the Government of British Columbia in the department having the conduct of assessment and taxation, the said Brown & Brown cruise as shewing truly the amount of standing timber upon the lands, and that the defendants had no knowledge or notice of such filing.

It is contended for the plaintiff that this is an attempt to set up matter which is irrelevant and is really intended to shew that the plaintiff not only was guilty of fraud in effecting the sale, but had committed a fraud upon the taxation department.

Judgment

Upon consideration it does not seem to me that this is correct. I think this statement is set up to shew not any fraud upon the taxation department, but to shew that the plaintiff considered the Brown & Brown cruise to be true and correct, and acted upon it as such, and was therefore guilty of fraud in representing the cruise of the Portland Engineering Company to be correct. Upon this view of the matter it seems to me that this paragraph ought not to be struck out, but should stand.

It was agreed that the costs of this application should be costs in the cause.

Application dismissed.

YOUNG v. CROSS & CO. AND O'REILLY.

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Oct. 13.

YOUNG v. CROSS & CO.

Practice—Appeal—Delay in obtaining approval of appeal book—Application to extend time for setting down—Costs.

Judgment was delivered in an action on the 29th of March, 1926. Notice of appeal was served on the 7th of June for the sittings of the Court of Appeal at Vancouver on the 5th of October, 1926. The appeal book was submitted to the respondents' solicitors at Victoria for approval on the 30th of September, was returned duly approved on the same day and immediately sent to the registrar at Vancouver for entry on the list of appeals. Finding that the book had not been approved by the registrar at Victoria as required, it was sent back for his approval and did not again arrive at the Vancouver registry until the 4th of October. On motion to the Court of Appeal for an order extending the time and that the appeal be entered and set down for that sittings of the Court:—

Held, that in the circumstances the time should be extended for setting down the appeal, the appellant to pay the costs of the motion.

MOTION to the Court of Appeal for an order extending the time for setting down the appeal. Judgment was delivered in the action on the 29th of March, 1926, and notice of appeal was served on the 7th of June, 1926. The material for the appeal book was delivered to respondents' solicitors on the 29th of September, 1926, and returned with corrections on the same day. The appeal book completed was submitted to the respondents' solicitors for approval on the 30th of September and on being returned, duly approved, was sent on the same day to the registrar at Vancouver for entry on the list of appeals. Finding that the appeal book had not been approved by the registrar at Victoria it was sent back to him by the Vancouver registrar for his approval and after being duly approved was again sent to Vancouver where it arrived for entry in the registrar's office on Monday the 4th of October, the first day of the sittings of the Court of Appeal being on the following day. Upon notice of appeal being served the respondents' solicitors immediately demanded security for costs by letter but the security was not perfected until the 5th of October, 1926.

Statement

The motion was argued at Vancouver on the 13th of Octo-

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ber, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for the motion: The appeal book had to be sent back to Victoria for the registrar's signature and it was not entered in time owing to this slip. The time should be extended subject to terms as in the case of *Gold* v. *Evans* (1920), 29 B.C. 81.

Davis, K.C., contra: Objection to the motion is based not only on unnecessary delay but on the fact that the affidavit in support is misleading. This is an application for an indulgence and he must set out the facts but the facts are not correct in the affidavit in support. The appeal book was not in Mr. *Moresby's* hands until the 30th of September and he returned it the same day. Then there was a delay of three days before it was sent over for entry. [He referred to *Bouch* v. *Rath* (1918), 26 B.C. 320; *Gold* v. *Evans* (1920), 29 B.C. 81 and *Fraser* v. *Neas*. *Roddy* v. *Fraser* (1924), 35 B.C. 70.]

Argument

Mayers, in reply: This application being opposed, we can rely on any material before the Court and Mr. *Moresby's* affidavit is sufficient for my purposes. After this trouble arose Mr. *Moresby* accepted security for costs.

MACDONALD, C.J.A.: I would accede to the motion. I dislike to think that a solicitor would intentionally mislead the Court. There could have been very little motive in this case for doing so. However, solicitors ought to take care to make accurate statements to the Court, and not deal in a negligent or slip-shod manner with facts. But apart from that, it is a clear case for extending the time for setting down the appeal and I would so extend the time. The motion is allowed with costs to Mr. *Davis* in any event in the appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: I am of the same opinion. Upon the facts and in the line of cases starting with *Fraser* v. *Neas*. *Roddy* v. *Fraser* (1924), 35 B.C. 70 this is a case in which leave should be given to extend the time.

In regard to the matter of inaccurate statements—I will put it that way—whether deliberate or not, of the solicitor, I am of the opinion that since it has not been shewn that the client was

MARTIN, J.A.

a party to them and that they were made in order to give a foundation to the motion—in case, I say, where the client does not participate in that deception, it would not, in general, be just to deprive him of his right because of the unauthorized misconduct of his solicitor. Of course the usual order as to costs should go.

GALLIHER, J.A.: In dealing with cases of this kind I have always kept in view one thing, apart from the general principle which might be said to obtain, and that is, there are facts and circumstances in each case that vary and in one case I might refuse and in another case I would grant, and that would be due largely to the particular facts and circumstances in the case. In the present case I think the correct facts—I will use that expression—correct facts were not presented to the Court by Mr. *Green's* affidavit. Then the question comes in, should we penalize the client for that? In some cases it might perhaps be so. In this case, as pointed out by one of my brothers who has just spoken, I cannot see the object of misstating. I am rather inclined to take the view it was more a matter of carelessness on the part of Mr. *Green,* and not with the intention of misleading the Court. In that view I think we should accede to the application with the usual penalty of costs of the motion imposed.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the application should be acceded to: This is a case where notice of appeal was given within the time required by statute and therefore the substantive right of appeal was effected by the client. After all, these other matters are matters of practice, and practice should not affect the merits, in my opinion. If the statement made by the solicitor was false in fact I am still of opinion that should not prevent an appeal. Certainly it would not be in the interests of justice that a solicitor might so far forget his duty to his client and do things which he ought not to do and destroy the right of appeal; there is a way of visiting a solicitor with punishment. Certainly it is against the interests of justice if the client is punished. In this particular case too there was, as my brother MARTIN said, no statement that the client attempted

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to mislead in any way. Taking the whole matter into consideration I cannot but believe that the client where the necessary steps have been taken by giving notice within the time, should have the right of having his appeal heard.

MACDONALD, J.A.: I agree.

Motion granted.

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

1926

Oct. 29.

REX v. WOO FONG TOY.

Criminal law—Charge of being in possession of opium—Conviction—Deportation—Need of order for—Habeas corpus—Can. Stats. 1923, Cap. 22, Sec. 25; 1910, Cap. 27, Form EE.

REX v. WOO FONG TOY

Under section 25 of The Opium and Narcotic Drug Act, 1923, deportation follows automatically in the case of the conviction of an alien under section 4(*d*) of the Act and a formal order for deportation is not necessary. Form EE of The Immigration Act is not applicable without amendment when used for deportation in such a case, unless the minister of justice issues to the warden of the prison wherein the convict is imprisoned a formal order that the time has come for his deportation.

Offences under said section 4(*d*) are punishable by both fine and imprisonment but it is not necessary that the warrant recite anything else than that imprisonment had been imposed.

Statement

APPLICATION for a writ of *habeas corpus*. The accused, an alien, was convicted at Montreal for having opium in his possession. Deportation followed and on his arrival in Vancouver and while in the hands of the immigration authorities he makes this application for his discharge. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 29th of October, 1926.

Saunders, for the application.
Elmore Meredith, for the Crown.

Judgment

HUNTER, C.J.B.C.: In this case the applicant, an alien, was convicted at Montreal for having opium in his possession con-

trary to the provisions of section 4(*d*) of The Opium and Narcotic Drug Act, 1923, Can. Stats. 1923, Cap. 22, deportation followed, and in due course he arrived in Vancouver *en route* to China, and while in the hands of the immigration authorities at Vancouver he makes this application.

The learned counsel for the application urged that the warrant of the deputy minister of immigration (being the return made in the proceedings) is defective inasmuch as there have been stricken from the warrant the following words "And whereas under the provisions of the Immigration Act an order has been issued for the deportation of the said" and, that, since these words are struck out, it must be taken that no deportation order was in fact made, and that if that is so, the procedure laid down by The Immigration Act, Can. Stats. 1910, Cap. 27, has not been followed.

The answer to this is, that by section 25 of the Act deportation follows automatically in the case of conviction under section 4(*d*) of the Act upon the expiration of the term of imprisonment. The direction for deportation of an alien "in accordance with the provisions of The Immigration Act," etc., does not mean that steps which are unnecessary in the particular case to carry out the intention of the Act shall be taken but means that the immigration department shall carry out the statutory sentence. It was therefore unnecessary for any formal order to be made directing deportation in this case, and deletion of the words quoted above becomes necessary in order to properly recite the facts. Form EE is not applicable without amendment, when used for deportation in this class of case, unless the minister of justice issues a formal order to the warden, which can only be for the purpose of notifying the warden, who is under his authority, that the time has come for deportation, no legal proceedings having intervened to delay or prevent it. The imprisonment having expired the prisoner was and is in the lawful custody of the immigration officers who are charged with the duty of deportation.

Judgment

It is also urged that because the warrant recites that the applicant "was convicted of an offence under The Opium and Narcotic Drug Act of 1923 and sentenced to prison" that it is on the face of it invalid. It is true that the Act makes

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offences under section 4(*d*) punishable by both fine and imprisonment, but it was not necessary for the purpose of the warrant to recite anything else than that imprisonment had been imposed and even though it were ascertained that the sentence omitted to impose a fine in conformity with the requirements of the Act there was no application for relief made before the expiry of the imprisonment.

The application must be dismissed.

Application dismissed.

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

1926

Nov. 10.

ROBINSON v. CORPORATION OF POINT GREY

ROBINSON v. CORPORATION OF POINT GREY.

Practice—Costs—Appeal from the County Court—Appendix N—Application—B.C. Stats. 1925, Cap. 45, Sec. 2(5).

Appendix N to the Rules of the Supreme Court of British Columbia applies to the costs of an appeal from the County Court under section 2(5) of the Court Rules of Practice Act Amendment Act, 1925. Further, section 35 of the Court of Appeal Act provides that the tariff in force in the Supreme Court applies to the costs in the Court of Appeal.

Statement

APPLICATION to review the decision of the taxing master and for a direction that he tax the bill of costs of the plaintiff herein under Appendix M of the Rules of the Supreme Court or in the alternative that he tax them under item 3 of the final table of Appendix N or in the further alternative that he should have allowed in the preparation of the appeal book such just and reasonable charges and expenses as appear to have been properly incurred in the procuring of the evidence and preparation of the appeal book for use in the Court of Appeal. Heard by MACDONALD, C.J.A., in Chambers at Vancouver on the 10th of November, 1926.

Woodworth, for the application.

A. G. Harvey, contra.

10th November, 1926.

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

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Nov. 10.

ROBINSON v. CORPORATION OF POINT GREY

MACDONALD, C.J.A.: This is an application for the review of the decision of the registrar to tax the costs of the appeal herein under Appendix N of the Rules of the Supreme Court.

The ground relied upon, in support of this application, is that the learned judges of the Supreme Court had no jurisdiction to make the tariff applicable to the costs incurred in the Court of Appeal. I think it unnecessary to decide what their powers in that respect were. I will assume, for the purposes of this application, that they had none. I found my decision, that Appendix N is applicable to the costs in question, upon the Court Rules of Practice Act Amendment Act, 1925, Sec. 2, Subsec. (5) which recognizes Appendix N in terms which amount to an affirmance of it, thus giving it separate authority.

Judgment

The question then arises, does Appendix N in its scope, and by its language, apply to the costs of an appeal? I think it clearly does. Items 25 to 28, both inclusive, provide a tariff for such costs but in addition to that, section 35 of the Court of Appeal Act declares that the tariff in force in the Supreme Court shall be applicable to the costs in the Court of Appeal. The ruling of the registrar should be affirmed, the applicant to pay the costs of this application.

Application dismissed.

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Nov. 17.

BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT CO.

BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT COMPANY LIMITED.

Practice—Injuries sustained in a collision—Nature of—Scientific investigation—Action for damages—Trial by jury—Marginal rules 426, 429 and 430.

A woman and her daughter were passengers on an automobile stage when it collided with a street-car. In an action for damages the mother claims that in addition to bodily injuries the nervous shock was so severe as to render it permanent. The daughter claims she was so severely cut about the face that she is permanently disfigured, and further claims she had great talent as a vocalist and had been training for a long time to become a professional singer, but the nervous shock she had sustained destroyed all chances of development as a singer. The plaintiffs obtained an order for trial by jury.

Held, on appeal, affirming the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that where damages are claimed for personal injuries sustained in an accident although the evidence of medical men in regard to the nature and extent of the injuries are in a sense scientific, it is not a scientific or local investigation that brings the case within marginal rule 429.

APPEAL by defendant Company from the order of MORRISON, J. of the 4th of June, 1926, whereby it was ordered that the two actions be tried together before a judge with a common jury. Both plaintiffs were passengers on an automobile stage of the defendant Company from New Westminster to Vancouver on the 7th of December, 1925. When the automobile stage reached the corner of Eighth Avenue and Kingsway it collided with a street-car of the British Columbia Electric Railway Company. As a result of the collision the plaintiffs both claim to have been severely injured. Owing to a blow on the head the plaintiff, Jane Bradshaw, claims that she has headaches and nervousness and suffers great pain and claims that the blow was so severe that it has rendered the trouble permanent. The plaintiff Helen Louise, who is the daughter of the plaintiff Jane Bradshaw complains she received injuries to the head resulting in her nose and face being permanently injured and disfigured; also her right knee and left elbow were injured and her nervous system was shocked. She further claims she

Statement

had great talent as a vocalist, and was training to become a professional singer but her injuries have destroyed all chances of development as a singer.

The appeal was argued at Vancouver on the 12th and 13th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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Mayers, for appellant: The present rule 426 was added to the rules in 1925. The party applying must make out a case that a jury should be ordered and unless some special reason is shewn the mode of trial is without a jury. The question here is the damages that arose from shock to two bodies. This is a case that comes under rule 429: see *Clarkson* v. *Nelson and Fort Sheppard Ry. Co.* (1912), 17 B.C. 24; *Iron Mask* v. *Centre Star* (1899), 6 B.C. 474 at p. 478; *Swyny* v. *The North-Eastern Railway Company* (1896), 74 L.T. 88. The proper way of trying this action would be by assessors: see *Shafto* v. *Bolckow and Co., No. 2* (1887), 57 L.T. 17 at p. 18. There are the same rules in Ontario where it was decided that where expert medical evidence was required the trial should be by a judge: see *Gerbracht* v. *Bingham* (1912), 4 O.W.N. 117; *Hodgins* v. *Banting* (1906), 12 O.L.R. 117; *Town* v. *Archer* (1902), 4 O.L.R. 383 at p. 390; *McNulty* v. *Morris* (1901), 2 O.L.R. 656 at p. 658; *Godfrey* v. *Marshall* (1917), 1 W.W.R. 1097 at pp. 1098-9; *McCormick* v. *Canadian Pacific Railway* (1909), 19 Man. L.R. 159; *Morrison* v. *Robinson* (1892), 8 Man. L.R. 218. On the question of material to be used see *Royal Bank of Canada* v. *Pacific Bottling Works* (1916), 23 B.C. 463.

Argument

A. H. MacNeill, K.C., for respondent: The physical condition of these women is at issue. The pleadings disclose a common law action and they are entitled to a jury under rule 426: see *Clarke* v. *Ford-McConnell, Ltd.* (1911), 16 B.C. 344; *Williams* v. *B.C. Electric Ry. Co.* (1912), 17 B.C. 338; *Wilson* v. *Henderson* (1914), 19 B.C. 46; *Clouse* v. *Coleman* (1895), 16 Pr. 496; *Nantel* v. *Hemphill's Trade Schools* (1920), 28 B.C. 422. On the question of right to a jury see C.E.D., Vol. 7, pp. 832-4; *Crescent Pure Milk Co.* v. *Canadian Pacific Ry. Co.* (1923), 1 W.W.R. 1388; *Deacon* v. *City of Regina* (1922),

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3 W.W.R. 353; *Jocelyn* v. *Sutherland* (1913), 3 W.W.R. 961. *Mayers,* replied.

Cur. adv. vult.

17th November, 1926.

BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT CO.

MACDONALD, C.J.A.: This is an appeal from an order directing a trial by a jury. The order originally directed a trial by special jury, but this was amended by consent so as to permit the parties to have either a special or common jury.

The point involved in this appeal is, whether it is a proper case for a trial by a jury, it being alleged that questions, involving scientific investigations, are raised by the pleadings. The plaintiff sustained personal injuries; she is alleged to have sustained a severe shock and that, as a result, her singing voice has been injuriously affected.

Ordinarily actions for damages for personal injury are proper ones to be tried by jury and in many such actions medical or expert evidence must be given. The effect of the plaintiff's injuries upon the organs of her body is a matter for such testimony and physical tests may be applied to her, but why should the diagnosis not be made without dignifying it with the name of scientific investigation? In these times of experimentation in medical science and research it is not well to depart from established judicature except where the facts clearly demand such departure. In my opinion, this case is not one which falls within the rule dispensing with the jury in matters of scientific or local investigation. Every case of personal injury admits of medical testimony. No case has been cited to us which would justify our saying that this is an exceptional case different except perhaps in degree from others of the kind. No doubt modern science has been responsible for the introduction of new devices for testing the effect of shock upon the human system but I cannot think that that fact furnishes sufficient reason for depriving a defendant of a trial by jury.

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A point was taken founded on rule 430. It was submitted that the application was premature but if it were so, it is purely a technical objection quite without merit. It might be an objection to be considered if the application were too late. No right is affected by it being premature.

I would dismiss the appeal.

MARTIN, J.A. (oral): In these cases, that is to say the two Bradshaw cases, I have, with all respect to contrary opinion, reached the conclusion that the appeal should be allowed and that the order for the trial of the issues by a jury should be vacated, being of the opinion that both of the cases come within rule 429, as being those which require "scientific investigation," and, therefore, should, on the facts before us, be "conveniently" tried by a judge without a jury. The ordinary mode of trial is that directed by rule 426, which says that "the mode of trial shall be by a judge without a jury," with certain exceptions, and then we have the said rule 429. Now without labouring the matter I may say that while the question as to whether or no a case may be considered as coming within the classification of scientific investigation depends upon the facts, yet I have no hesitation in saying that this Court should not be prepared to hold that an examination by medical doctors can not attain the height of a scientific investigation within the meaning of the rule. We have here a very remarkable case in the action brought by Helen Bradshaw, which claims that owing to the nervous shock her system has experienced it has (which it is alleged is of a permanent nature), caused not only injuries to her nose and face and other parts of her body, but has had such a strange effect upon her vocal chords that her career as a singer, which she had made long preparation for, has been wrecked. Now, with all due respect, it is impossible, I think, to say that the investigation which would be necessitated by a very unusual examination of that kind can not be classified as scientific. It is well known that of all the ills to which the flesh falls heir, those attributable to the nervous system are possibly, if not the most disastrous, at least fully as disastrous as any other, and give the medical profession most grave concern. And here, the consequences of the shock are, as I say, of such a peculiar nature that I cannot imagine how their classification could be put upon any other plane than that of the scientific. We have the evidence, uncontradicted, of medical men who say that it will be necessary to call in a specialist, and the evidence of the solicitor for the defence who says that their whole defence is based upon the fact that the evidence of expert medical witnesses will be necessary to deter-

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mine this question. Such being the case, and bearing in mind that the ordinary mode of trial is by a judge, I think the matter is brought within the decision of Chief Justice Killam in *Morrison* v. *Robinson* (1892), 8 Man. L.R. 218, which was cited to us, and therefore, I think, the learned judge has certainly proceeded upon a wrong principle, even assuming he has had all the elements before him for the proper exercise of his discretion. I do not think in the proper sense of the word that there was room for exercise of a contrary discretion by him. But in any event, being without the advantage of the slightest intimation from the learned judge (no reasons being given at all) as to what animated him in making his order, it is therefore open to us to search for reasons to support it, and, with all deference, I have been unable to find any.

At one time the influence of shock upon the nervous system was not fully appreciated by the Courts, and a well-known case is the decision of the Privy Council in *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222. That was, if I may say so, an unfortunate one in thus depriving litigants outside the British Isles of a right for damages for nervous shock, however severe, if unaccompanied by actual physical injury, but since the illuminating judgment of that extremely able and truly learned lawyer, the late Chief Baron Palles in the Irish Court on the appeal of *Bell* v. *Great Northern Railway Co.* (1890), 26 L.R. Ir. 428, who declined to follow the decision of the Privy Council and pointed out p. 441 the "error that pervades the entire judgment," it has not been accepted in the United Kingdom and in *Hambrook* v. *Stokes Bros.* (1925), 1 K.B. 141 (C.A.) is said to be "no longer a decision of guiding authority" in England, adopting the language of Lord Shaw in the House of Lords in *Brown* v. *John Watson, Lim.* (1914), 83 L.J., P.C. 307, 314; but unfortunately it is still binding in Canada—*Toronto Ry. Co.* v. *Toms* (1911), 44 S.C.R. 268. I am only speaking now at large upon the nature of the action (which the Privy Council said in the *Coultas* case, *supra*, raised very difficult questions) and the changed attitude of the Courts since the classic judgment of the late Chief Baron.

MARTIN, J.A.

In the light, therefore, of all the circumstances in this case—

and I am for the moment directing myself particularly to the Helen Bradshaw case—I have no doubt whatever, after very careful consideration, that the order should have been made that the case was one for scientific investigation and therefore a jury should not be allowed to try it.

As to the case of the mother, I find it impossible in principle to distinguish it from the daughter's. She also claims for nervous shock and says that her system is suffering from that—a permanent disability; in other words, that her system has been permanently wrecked by this accident. I am unable to draw a distinction between the two cases. Of course, I realize at once that there are some cases of accident which may occur rising out of the very same collision; for instance, if there had been some other occupants in this motor-car who had suffered contusions, or even injuries which necessitated the amputation of a leg thereby suffering severe damage, yet the medical evidence, if it were necessary at all, would not reach, within the meaning of the rule, the realm of scientific investigation, because the matter would be of such small account in the practice of that profession that its exponents would not make a claim which we find here advanced without contradiction.

MARTIN, J.A.

For these reasons I am of the opinion that the appeal should be allowed.

GALLIHER, J.A. (oral): There is an element of doubt in my mind in this case in arriving at the conclusion that I have. It is, I think, pretty close to the line, if not within the line that brings it within the rule, particularly, I think, in the Helen Bradshaw case. However, I am not unhesitatingly firm in the conviction that it is within the rule, although I recognize that there may be a degree that has to be considered in each case to determine whether it shall be known or treated as scientific evidence.

GALLIHER, J.A.

It may be, had the case come before me in the first instance, I might have taken the view that it was within the rule; but it has come before one learned judge who heard the application and he has taken the course of ordering a jury. I am not so strong in my views as to be able to say that he has taken the

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wrong course. While I realize that medical testimony may, under certain circumstances, be classed as scientific evidence, such as intended by the rule, in this particular case I take the view that it is so close to the line that I do not feel myself justified in interfering with what the learned judge has ruled. In these circumstances I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I would allow the appeals. They were both argued together, and with great respect to all contrary opinion, I am of the same opinion as my brother MARTIN. It seems to me that this rule was passed for some purpose, and I cannot see how the particular cases which we have to consider can be said to be outside the scope and intention of the rule. We have here to consider statute law, or rules made in pursuance of statute law, and although we are not to be guided by policy—if the language is not sufficient—to carry out the supposed intention, yet we are to give some attention to what it was intended to do. What was the policy of this change? The policy was that juries by experience have been found to give in many instances excessive damages. And what did that entail? It entailed appeals at great cost to litigants from Court to Court. Now, the Privy Council laid it down in the well-known case of *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309, what principles should guide both judges and juries in the assessment of damages. It is well indicated in the judgment of Lord Moulton that a judge is not disentitled from taking into consideration many matters that might not be deemed to be exactly a mathematical computation, and there is certain latitude allowed; but the latitude that a judge would exercise in a case would be perhaps very different from the latitude that a jury might take to itself in assessing damages.

Now in the cases at Bar it was pointed out that certain sums of money have been paid into Court, and it has not been contended that the amounts paid into Court would not be amounts which would be sufficient in the way of damages for personal injuries where the injuries are not of a permanent nature. If that be so, then we have got clearly here the line of demarcation which the rule it seems to me is intended to cover. The damages claimed are of a special nature, namely, nervous shock, and in

one of the cases as well special and particular damages for the impairment if not the destruction of the vocal chords and consequent loss of a trained voice in operatic singing, such damages are intricate and difficult of being ascertained.

Surely the assessment of damages in such cases as we have here cannot be other than a scientific inquiry and essentially a matter of scientific investigation. How can a jury really apply its mind to these questions? Was not the law rightly changed so as to make the forum of determination one of a sensible nature? How can a jury pass upon the opinions of the specialists who will be called here? They will be highly skilled in the profession of medicine. Why should a mine for instance be of greater moment than the human system? Why should a mine and all its veins be a matter for scientific investigation and the human system be deemed of a more simple nature? It seems to me that if there is any reason for the rule at all these cases are essentially cases intended to be covered; and for these reasons I would allow both appeals.

MCPHILLIPS, J.A.

MACDONALD, J.A. (oral): While there is a sense in which all evidence given by medical men in regard to the nature and extent of injuries is scientific, yet I do not think the facts in this case where two plaintiffs are claiming damages bring it within the rule. I would dismiss the appeal.

MACDONALD, J.A.

Appeal dismissed.

Solicitors for appellant: *Walsh, McKim & Housser.*
Solicitor for respondent: *F. D. Pratt.*

MORRISON, J. (In Chambers)

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Dec. 6.

BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT CO.

BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT COMPANY LIMITED. (No. 3).

Practice—Order for jury—Word "common" inadvertently inserted—Accidental slip—Amendment—Marginal rule 315.

Upon an order for a jury being granted the order was drawn up with the word "common" inserted before the word "jury." Subsequently the plaintiff applied to amend the order by striking out the word "common" under the "slip" rule.

Held, that as counsel on the first application directed their submissions solely to the question of jury or no jury the "slip" rule applied and the amendment should be granted.

Statement

APPLICATION by plaintiff to amend an order for a jury. Heard by MORRISON, J. in Chambers at Vancouver on the 27th of November, 1926. In the order as drawn up the word "common" was inadvertently inserted before the word "jury." The application was made under the "slip" rule.

Pepler, for the application.
Molson, contra.

6th December, 1926.

Judgment

MORRISON, J.: In the present application the "slip" rule, Order XXVIII., r. 11 is invoked to correct the insertion by mistake of a word in what I may term the usual order for a jury made on the 4th of June, 1926, on the plaintiff's application. In the order, as drawn up, the word "common" was inadvertently inserted. The only question to which counsel directed their submissions *pro* and *con* was one solely of jury or no jury. From this order, which in form directed a trial by common jury, there was an appeal against the granting of a jury at all and it then appearing that the slip had occurred the Court obtained from the plaintiff's counsel an undertaking to so alter the order *supra* as to leave it open to the defendant to obtain a special jury, if so desired. Thereupon the summons upon which this application is based was taken out implementing this undertaking and after an adjournment it came on for hearing on the 26th of November and I made an order correct-

ing the original order under Order XXVIII., r. 11 so that the record would harmonize with the order which I originally meant to pronounce, namely, one directing the trial of the issue by a jury. In my opinion the subject-matter came within the "slip" rule which, in the words of Buckley, L.J. in *Oxley* v. *Link* (1914), 2 K.B. 734 at p. 741 is one which is generally applicable. The learned Lord Justice then proceeds:

"To my mind an error in something means that the thing of which you are speaking contains parts which are right and parts which are wrong, and that you are going to alter so much of it as is wrong. It is not correcting an error in a thing which is wrong from beginning to end to substitute for it something which is right. In order to see if this Order applies, I have to see whether this judgment contains something which is right and which I am to correct by adding something, if it be a mistake which arises from omission, or by correcting something, if it be something which requires modification or correction of some sort. So that to see whether the Order applies or not, it is vital in the first instance to see whether this is a document parts of which are right and parts of which are wrong."

Judgment

In *The King* v. *Boak* (1925), S.C.R. 525 at p. 531 where the order which was sought for was for both petit and grand jurors but was drawn up in such a form that inadvertently, as in this case, the provision for directing grand jurors was omitted, Anglin, C.J.C. in the course of his judgment proceeds:

"There is no doubt that the learned judge meant his order to cover both grand and petit jurors and there is equally no doubt that the omission of the words 'the grand jury and' in the operative clause was a mere clerical error entirely due to a slip, or inadvertence, on the part of the solicitor who drew the order up. Under these circumstances, we incline to think the order as pronounced by the learned judge may be regarded as the order made by him rather than the order in the mistaken form in which it was drawn up."

Parenthetically I may add that the defendant opposed the application to omit the word "common" from the order.

Application granted.

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REX v. GURDITTA.

Criminal law—Perjury—Proof of judicial proceeding in which perjury was committed—Proof of issue of writ and of trial—Necessity for—Marginal rule 454.

REX v. GURDITTA

The prisoner was indicted for perjury alleged to have been committed on the trial of an action in the Supreme Court. On the trial of the indictment, the Crown put in evidence the copy of pleadings prepared for the use of the trial judge on the trial of the action at which the perjury was alleged to have been committed. The registrar of the Court gave evidence that he acted as registrar at such trial; and that such trial was held in the Supreme Court, and that he swore the prisoner as a witness. The official stenographer gave evidence that he acted as such stenographer at such trial; and an interpreter gave evidence that he acted as interpreter at such trial. Neither the original writ of summons, nor the judgment on the trial of the civil action was produced.

Held, affirming the decision of GREGORY, J. that there was no substantial wrong done to the accused by reason of the failure of the Crown to prove the writ of summons.

Per MARTIN and MCPHILLIPS, JJ.A.: The case is covered by *Reg.* v. *Scott* (1877), 13 Cox, C.C. 594, where it was held that it was not necessary to produce the writ of summons in a case where copies of pleadings filed pursuant to Rules of Court are produced, which pleadings contain a statement that the writ was issued on a certain day.

APPEAL by the prisoner from his conviction on an indictment for perjury.

The prisoner was tried on the 5th of October, 1926, by GREGORY, J., and a jury. The perjury was alleged to have been committed on the trial of an action in the Supreme Court, brought by one Brama against the prisoner to recover money alleged to have been loaned by Brama to the prisoner. The perjury charged was that the prisoner gave evidence at the trial of the action of *Brama* v. *Gurditta* that he never borrowed any money from Brama.

Statement

On the trial of the indictment, the Crown put in evidence the copy of pleadings prepared for use of the trial judge in *Brama* v. *Gurditta*. The registrar of the Court gave evidence on behalf of the Crown that he acted as registrar at the trial of *Brama* v. *Gurditta*, and that such trial was held before Mr.

Justice MORRISON in the Supreme Court, and that he, the registrar, swore Gurditta as a witness. The official stenographer on the trial of the action of *Brama* v. *Gurditta* gave evidence that he took notes of such trial. Such notes were marked for identification only, but were not put in as evidence. The interpreter who acted on the trial of *Brama* v. *Gurditta* gave evidence that he acted as such interpreter. Neither the original writ of summons nor the judgment on the trial of *Brama* v. *Gurditta* was put in evidence.

The prisoner appealed on the ground that there was no evidence that the alleged perjury was committed in a judicial proceeding.

Statement

The appeal was argued at Vancouver on the 18th and 19th of November, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C., for the prisoner: There was no evidence that the alleged perjury was committed in a judicial proceeding. The proper mode of proof would have been to produce (a) the original writ of summons in *Brama* v. *Gurditta*. This would prove that there was an action pending in the Supreme Court, and that therefore that Court had jurisdiction to hold the trial at which the perjury is alleged to have been committed; (b) the pleadings. These would prove what was in question in that action; (c) the judgment on the trial. This would prove that there was a trial of that action. This is the only way in which these matters can be proved. The parol evidence of the registrar, stenographer and interpreter, so far as they purport to prove matters which are capable of proof by formal documents, was not admissible, and should be now rejected. The result is that there is no evidence that there was a trial of the action of *Brama* v. *Gurditta*. Further, the filing of the copy of pleadings was not sufficient proof that there was an action of *Brama* v. *Gurditta* pending in the Supreme Court, because there is no proof that these documents were preceded by the issuing of a writ, and for the further reason that it was only copies of the original pleadings which were produced, instead of the original pleadings filed. Sections 23 and 28 of the Canada Evidence Act provide that certified copies of such documents may be used

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provided that at least ten days' notice is given of the intention to use them. This is inconsistent with the idea that uncertified copies may be used without any notice.

The appellant principally relies on the point that there was no evidence that there was any trial of *Brama* v. *Gurditta*. The rule is that the best evidence must be used. The best evidence of any matter which is capable of proof by a formal record of the Court is the production of that record. Therefore, the judgment in *Brama* v. *Gurditta* was the best evidence of the fact that there was a trial of that case, and parol evidence was not admissible. There was therefore no evidence to prove that there was any trial of *Brama* v. *Gurditta*: see *Rex* v. *Drummond* (1905), 10 O.L.R. 546.

In *Reg.* v. *Coles* (1887), 16 Cox, C.C. 165, it was held that production of an indictment was no proof that there was a trial of that indictment. Therefore the production of the copy of pleadings in *Brama* v. *Gurditta* was not proof that there was a trial of that action. The copy of pleadings prepared for use of an expected trial that may or may not take place cannot be any evidence that there was a trial. It is not necessary for the prisoner to object when the inadmissible evidence is tendered: *Rex* v. *Farrell* (1909), 20 O.L.R. 182 at p. 186.

Argument

It is admitted that if there had been no judgment in *Brama* v. *Gurditta,* the fact of trial of that case could have been proved by parol evidence. In such case, parol evidence would be the best evidence: *Rex* v. *Legros* (1908), 14 Can. C.C. 161; but it was shewn here that the action of *Brama* v. *Gurditta* was prosecuted to judgment.

There should be uniformity of decisions in Canada on questions under the Criminal Code: *Rex* v. *Nar Singh* (1909), 14 B.C. 192. [He also cited *Rex* v. *Yaldon* (1908), 13 Can. C.C. 489, and *Reg.* v. *Dillon* (1877), 14 Cox, C.C. 4.]

If the appellant is wrong in saying that there was no evidence of the trial, no question of substantial wrong arises, because in that case the prisoner was properly convicted. The question of substantial wrong arises only on the hypothesis that there was no evidence of the trial. In that event, the prisoner suffered substantial wrong in that he was convicted when he should have been acquitted.

C. L. McAlpine, for the Crown: When perjury is committed in a civil action the rigid rule does not apply. There was evidence before the jury in the civil action upon which a conviction could be obtained. Distinction should be drawn between proof of a judicial proceeding and proof of a trial: see *The Queen* v. *Scott* (1877), 2 Q.B.D. 415. The pleadings are entered under marginal rule 454. That the evidence submitted is sufficient see Phipson on Evidence, 6th Ed., 559; *White* v. *Cox* (1876), 2 Ch. D. 387; *Drew* v. *The King (No. 2)* (1903), 6 Can. C.C. 424 at p. 425. The case of *Rex* v. *Drummond* (1905), 10 O.L.R. 546 has been overruled by *Rex* v. *Mitchell* (1913), 21 Can. C.C. 193 which follows the *Drew* case, *supra.* The judgment should not be put in as MORRISON, J. in delivering judgment said he did not believe Gurditta's evidence: see *Reg.* v. *Britton* (1893), 17 Cox, C.C. 627. Under section 1014 of the Criminal Code the Court has power to order a new trial as no substantial injustice has been done.

Argument

Craig, replied.

Cur. adv. vult.

16th December, 1926.

MACDONALD, C.J.A.: The accused was found guilty of having committed perjury in a civil proceeding in the Supreme Court. The ground of the appeal is that there was no formal proof that that proceeding was a "judicial proceeding." It was contended by counsel for the accused that the writ of summons in that action should have been put in evidence, or that an exemplification of the record of the proceeding should have been obtained and put in.

MACDONALD, C.J.A.

I do not intend to go into the details of the proof as I think the law does not now require the conviction to be set aside because of some trifling wrong done at the trial, provided no substantial wrong or miscarriage of justice can be said to have occurred. This is eminently a case for the exercise of that power. That the proceeding was in the Supreme Court; that there was a real trial in the presence of a judge and the parties; that the accused took the oath and gave evidence; that the oath was interpreted to him by a sworn interpreter and his evidence interpreted by the same person, and that it was taken down by

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a duly-qualified official stenographer, is not in dispute. The whole appeal is founded on the technical ground of the failure to prove the writ of summons.

There cannot, in my opinion, be a clearer case of absence of substantial wrong, and therefore there was no miscarriage of justice. The appeal should be dismissed.

MARTIN, J.A.: During the argument the nearest case to this that was cited by counsel was *Reg.* v. *Scott* (1877) and we were referred to the meagre and unsatisfactory report of it in 2 Q.B.D. 415, which leaves in obscurity the exact point passed upon. But I have found in two other reports of the same case in 13 Cox, C.C. 594 and 36 L.T. 476, fuller and satisfactory reports thereof which shew its application to this case, as appears from the following extract from Cox 597-8:

"*Willis, Q.C.*, for the prisoner.—The second question is, whether the evidence of the pending and trial of the action was sufficient. It was insufficient, as the original writ was not produced.

MARTIN, J.A.

"*Gorst, Q.C.*, for the prosecution.—The statement of claim in the action, which was in evidence, states the writ to have been issued on such a day.

"COCKBURN, C.J.—We must assume everything up to the trial to have been regular unless the contrary was proved. But here we have all the proceedings and cannot fail to see that an action was pending."

Now in this case the same statement about the writ is present in the copy of the pleadings used by the presiding judge under rule 454:

"The party entering the action for trial shall deliver to the registrar, at the time of entering said action for trial, a copy of the whole of the pleadings in the action for the use of the judge at the trial. Such copy may be written or printed, or partly written and partly printed."

The exact point being therefore, covered by the said decision of the Court for Crown Cases Reserved, we should, I think, as it appears to be in accordance with sound reason follow it and dismiss this appeal.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: There was a time when in prosecutions for perjury no end of difficulty was occasioned in proving that the statements made which were claimed to constitute the perjury were voiced in a judicial proceeding. The need for some preciseness of definition was apparent and in my opinion

it is effectively set at rest by section 171(2) of the Criminal Code. In view of the language of this section there is room for no doubt that the statements made were upon oath, and in a judicial proceeding. The evidence is most complete in form—there was placed in evidence a certified copy of the pleadings in the action in which the testimony was given, the certified copy being as required under rule 454 of the Supreme Court, and in the form required for the use of the judge at the trial with the official Supreme Court stamp thereon. The trial took place in due course and it was at the trial that the alleged perjury was committed. In view of these facts it is idle to contend that there is lack of proof that the statements made by the prisoner were statements made in a judicial proceeding. I am of the opinion that the objection taken is one wholly devoid of merit and is completely met by the case referred to by my brother MARTIN, namely, *Reg.* v. *Scott* (1877), 13 Cox, C.C. 594 at pp. 597-8.

MCPHILLIPS, J.A.

Further, I am in complete agreement with my brother the Chief Justice, that no substantial wrong or miscarriage of justice was occasioned at the trial, and being of that opinion and for the reasons here set forth, the case is not one calling for relief or the direction that there should be a new trial. I would therefore dismiss the appeal.

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

MACDONALD, J.A.

Appeal dismissed.

Solicitors for appellant: *Craig, Parkes & Tysoe.*
Solicitor for respondent: *C. L. McAlpine.*

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Nov. 5.

KYLE v. TAYLOR

KYLE v. WILBRAHAM-TAYLOR.

Practice—County Court—Appeal—Judge's notes of evidence—Order to supplement notes of no avail—Motion to admit affidavits disclosing evidence at trial.

A motion by the appellant to the Court of Appeal to admit affidavits disclosing the evidence given at the trial before the County judge on the ground that the judge's notes obtained did not sufficiently set out the evidence was adjourned in order to give the appellant an opportunity to apply to the County judge to supplement his notes. The County judge refused to accede to this on the ground that his memory would not permit his doing so. The appellant then renewed his application to admit the affidavits.

Held, MCPHILLIPS, J.A. dissenting, that where the evidence cannot otherwise be obtained it may, in a proper case, be supplemented from other sources, and that in the special circumstances of this case the affidavits should be admitted.

Per MACDONALD, C.J.A.: It is very dangerous to admit extraneous evidence and a motion to be allowed to do so should be acceded to with great caution.

MOTION to the Court of Appeal for leave to admit affidavits disclosing the evidence taken on the trial of an action for damages resulting from a collision between two automobiles, the action having been dismissed by MCINTOSH, Co. J. on the 19th of May, 1926. The motion had previously been made but was adjourned in order to give the appellant an opportunity to apply to the judge below to supplement his notes, but this he refused, on the ground that his memory would not permit him to do so. The appellant then renewed his motion to admit the affidavits.

Statement

The motion was heard at Vancouver on the 5th of November, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

R. O. D. Harvey, for appellant: The learned judge below cannot supplement his notes. In such a case we should be allowed to submit affidavits to bring the facts before the Court: see *Rendell* v. *McLellan* (1902), 9 B.C. 328 at p. 329; *Northern Pacific Ry. Co.* v. *Fullerton Lumber & Shingle Co.* (1919),

27 B.C. 36; *Abrahams* v. *Dimmock* (1915), 1 K.B. 662; *Robertson* v. *Latta* (1915), 21 B.C. 597; *City of Strathcona* v. *Edmonton and Strathcona Land Syndicate* (1910), 3 Alta. L.R. 259; *The Ship Crescent* (1893), 68 L.T. 556.

Bass, for respondent: It is the appellant's duty to have the evidence so taken that he can prosecute his appeal, and not having done so he must suffer the consequences: see *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629; *Dockendorff* v. *Johnston* (1924), 34 B.C. 97. The evidence before us substantiates the findings of the trial judge: see *Skidmore* v. *B.C. Electric Ry. Co.* (1922), 31 B.C. 282. Argument

MACDONALD, C.J.A.: In the circumstances I think we ought to admit this evidence. We have either to lay down a strict rule that in no case will we admit supplementary evidence or additions to the notes except from the trial judges themselves or we are to follow what we have said in the past and what has been said in the English Courts that the evidence may in a proper case be supplemented from other sources.

I confess it is very dangerous to admit extraneous evidence and it should be admitted with great caution. We may have applications of this sort occurring in very many cases in future. Parties will seek admissions of affidavits to supplement the notes. But this is an exceptional case in which the judge has been applied to to supplement his notes. He says "My memory does not permit me to do so." I cannot, therefore, say that what is contained in these affidavits did not take place before him. I regard the deponents as persons of credit; I think they would tell the truth and there being no affidavit from any person on the other side to say that there is anything in them which did not take place at the trial and as they are not repugnant to the judge's notes, I think that under these very exceptional circumstances we ought to admit the affidavits. I would, however, sound this warning, that there must be a very clear case made out for supplementing the notes, otherwise injustice may be done to the litigants in admitting evidence of this character. MACDONALD, C.J.A.

MARTIN, J.A.: I am of the same opinion and the practice of this Court has remained unchanged continuing the practice MARTIN, J.A.

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of the old Full Court for 24 years, and I say that because, in the case of *Rendell* v. *McLellan* (1902), 9 B.C. 328, 24 years ago almost to the day, in company with my brothers Chief Justice HUNTER and IRVING I agreed with them in these observations:

"*Per curiam*: Where it is desired to take exception to judge's notes of evidence, if there was no stenographer at the trial, a formal motion after due notice to the other side should first be made to the judge himself while the matter is fresh in his memory; it is a serious matter to amend the notes. It is not necessary to hold what would be done in case the judge refuses to amend, or what would be deemed to be 'other materials'; in the present case the application must be refused."

There is not a single decision in this Court from that day to this which is contrary to that. On the contrary all the expressions of the Court in similar motions are to the same effect. I agreed with my learned brothers the Chief Justice and IRVING 24 years ago in their belief that these are serious matters and that every reasonable precaution should be taken to warrant the introduction of new evidence, but in this present case and on the facts set out we have the uncontradicted evidence of witnesses that the judge below himself says was credible and I do not think we would be justified in refusing it.

MARTIN, J.A.

As to the expression "other materials" used in our present Court of Appeal rule 16 (which is the English rule 75 and also the former rule of the old Full Court) I refrain now from restricting myself as to what meaning should be placed upon that expression, leaving this Court free to construe it according to circumstances as they arise, and I only now say that one source of material that is an historic one would always be open to us in case of doubt, *viz.*, the notes of counsel upon his brief. Those I have heard frequently brought to the attention of Courts of Canada, in the King's Bench in Winnipeg, for example, and that Court was and is highly esteemed and such notes are always recognized in the Court of Appeal in England. As I say, in the circumstances of this case I think we are justified and it is our duty to admit as "other materials" the affidavits now offered.

The distinction between the *Dockendorff* case (34 B.C. 97; (1924), 3 W.W.R. 207) and this is that in the former there was not any application made to us to supplement evidence by the introduction of "other materials" as there is today, as appears by the report thereof.

GALLIHER, J.A.: I would accede to the application in the circumstances of this case. At the same time I wish to guard myself by saying that if this were not a case where apparently there is no contradiction and where from the facts as they have been put before us it would seem entirely probable that this evidence was given that is now sought to be added to the notes I would not be in favour of granting leave.

The case is probably as clear cut in that respect as one would expect to find and it may be that we will have to deal with similar applications in the future but those applications I may say will have to be very much along the lines of this application before I would accede to a request of this kind because I do not think, on general principles, it is well to bring about what might transpire as some difference of opinion as between the learned trial judge who took the notes and counsel or witnesses who would come forward and say they had given such evidence. I do not think that is a very desirable position for the Court of Appeal to be placed in or to deal with, but of course, we have none of that in this particular case. The learned trial judge has not gone further than to say, in fact I think what he says amounts to practically this, "it may very well be that that evidence was given but I cannot say that it was or was not because my recollection does not carry me that far." One thing is that in cases of this nature where applications are made and where it is expected they will be granted it must be very clearly shewn that there was no contradiction of the evidence sought to be introduced.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would refuse the application and I think in so deciding I am quite within the line of decision which has obtained in this Court now for a number of years. Here we have in the Province of British Columbia what is present in all modern countries now, the opportunity to have the evidence taken by stenographers. Anyone approved by the Court can be an official stenographer for the particular case in the absence of the official stenographer, and where a stenographer is present the transcript shall be deemed to be the record of the proceedings. That is statutory.

MCPHILLIPS, J.A.

Now, here we have a case where there was no stenographer

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and we have the case of a learned judge himself taking notes. Counsel must know that there is always frailty in that. Now, it is attempted by affidavit evidence to supplement the judge's notes in effect, "Well, Jones said so and so, Brown said so and so," and then these individuals come forward and swear to these facts. It seems to me it is not in the interest of justice but is a destruction of justice to admit that kind of thing and further, for opposing counsel to say that they will produce affidavits that this man Jones and this man Brown did not make the statements at the trial that they claim to have made with the probability of a charge of perjury being laid against one or other of the parties. The truth of the matter is, it is only necessary to state the position that matters will assume to see into what chaotic position our jurisprudence would get. These witnesses undertake to say that at a certain trial on a certain date before a certain judge they gave certain evidence. It is beyond the wit of man to say what credibility is to be attached to this class of evidence and affords opportunities for the putting up of fences after trial. The case is heard, the arguments have been had, the witnesses see what is perhaps the determining point of the case and then later on they undertake to say what they said at the trial though there is no record of it. It is all destructive of justice and I certainly am not willing to agree to the introduction of this class of evidence. The Court may in proper cases, of course, direct when the evidence will be taken *de novo*. With the greatest respect to my learned brothers and particularly my brother MARTIN who delivered the judgment of this Court in *Dockendorff* v. *Johnston* (1924), 34 B.C. 97 at pp. 98-9, I may say that I construe the judgment, to which I was a party, to mean exactly what it says and it covers this case. I cannot, with great respect, either, agree with my learned brothers when they say this case is peculiar. I see no peculiarity in the case. Further we have to deal with the matter in the abstract—shall we or shall we not allow evidence to be adduced in this way? My brother MARTIN in the *Dockendorff* case said:

MCPHILLIPS, J.A.

"While we appreciate the fact that the appeal is not free from doubt, yet we are placed in a position of some embarrassment by the evidence coming before us in such a scanty way [now, that is the embarrassment we are in today, the very self-same embarrassment], no official stenographer

having been present below and the supplementary evidence which the learned judge has completed to the best of his power not being in that state which we would like. We wish in such circumstances to again draw attention to the two judgments of this Court in *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629, and *Robertson* v. *Latta* (1915), 21 B.C. 597; in the first of which the Court unanimously pointed out and laid down the rule that 'where solicitors expect to appeal it is their business to have the evidence taken, so that the evidence can be brought before this Court.' That rule, founded on that laid down in 1882 by the English Court of Appeal in *Ex parte Firth* (1882), 19 Ch. D. 419, has been noted in the practice books and has remained a permanent warning for the guidance of the profession ever since.

"Such being the situation, while we feel that Mr. *Bird* put his case to the best advantage before us, nevertheless he was under the disadvantage of incomplete evidence, and we can only come to the conclusion that in all the circumstances we would not be justified in saying that the learned judge's view of the facts is clearly wrong, hence, the only question involved being one of fact, the appeal should be dismissed."

MCPHILLIPS, J.A.

The Court did not allow the evidence to be supplemented in that case. In the view I take I am quite within the *ratio* of that case. Counsel was not admitted there to supplement the case which could have been equally well done as in this case. The decision precluded it being done if they had been allowed to supplement the evidence they could have done so, the point is that this Court said that it could not be supplemented.

MACDONALD, J.A.: I agree with the majority of the Court.

MACDONALD, J.A.

Motion granted, McPhillips, J.A. dissenting.

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KNOX AND LEWIS v. HALL *ET AL.*

Practice—Appeal—Motion to extend time for setting down appeal—Delay due to lack of funds.

Judgment was delivered dismissing the action on the 2nd of June, 1926. Notice of appeal was served on the defendants on the 3rd of September for the October sittings of the Court in Vancouver. The appeal not having been entered for hearing the defendants' solicitors wrote the plaintiffs' solicitor on the 11th of November following that he intended advising the defendants that the appeal was definitely and finally abandoned. The plaintiffs' solicitor immediately replied that he had just received instructions from the plaintiffs to apply to extend the time for appeal and for leave to set the case down for hearing at the next sittings of the Court at Victoria. The application was accordingly made on the 18th of November, 1926. The only excuse submitted for being out of time was that the evidence was very voluminous and costly and the plaintiffs lacked funds for prosecuting the appeal but were now in a position to proceed with the appeal.

Held, GALLIHER, J.A. dissenting, that in the circumstances the motion should be acceded to, that the extension should be granted and notice of appeal be given for the next Victoria sittings of the Court, the applicant to pay the costs of this motion and perfect his security for $500 before the 20th of December, 1926.

MOTION to the Court of Appeal for an order extending the time for setting down an appeal. Judgment was delivered dismissing the action on the 2nd of June, 1926. Notice of appeal was served on the defendants on the 3rd of September, 1926. The appeal was not entered for hearing for the sittings of the Court of Appeal at Vancouver commencing on the 5th of October, 1926. On the 11th of November following the defendants' solicitors wrote the plaintiffs' solicitor that in view of the fact that the case was finally disposed of they were advising their clients that they could proceed to dispose of funds in their hands with relation to the matter in controversy as though it were finally disposed of. The appellants' solicitor replied that he intended to apply to the Court of Appeal for an extension of time and to stand the appeal over for hearing at the Victoria sittings of the Court in January, 1927. The grounds submitted for extending the time were that the appeal book would contain about 2,000 folios and the initial expense in

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setting down the appeal would be about $1,000 and the plaintiffs (appellants) were unable to raise the necessary money to pay the necessary costs to set down the appeal for the October sittings of the Court, but that they are now in a position to pay the necessary costs perfecting the appeal if the extension of time be granted.

The motion was heard at Vancouver on the 18th of November, 1926, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for the motion.
Housser, contra.

Cur. adv. vult.

19th November, 1926.

MACDONALD, C.J.A. (oral): I think, not without hesitation, that the application ought to be acceded to and the transfer made of the appeal from this sittings to the next, on the condition that the security for costs shall be given and that the applicant pay the costs of this motion.

MACDONALD, C.J.A.

My brother MCPHILLIPS thinks that $200 is enough security for the costs of the appeal; my brother M. A. MACDONALD agrees with me that the security should be in the sum of $500 or that a bond should be given to secure that sum. Leave will be granted on the condition that the security be given and the appeal entered before 20th December; costs of this application to be paid within the period of two weeks.

GALLIHER, J.A. (oral): I would refuse the application. I think there should have been more diligence shewn after the 5th of October in applying to this Court for an extension of time and for furnishing security for costs. Under the circumstances of this case I would refuse the application.

GALLIHER, J.A.

MCPHILLIPS, J.A. (oral): I would accede to the application. It is a power that we have to extend the time. Notwithstanding even the lapse of time—here it is not a case of that lapse of time. Notice of appeal was given in time. As I say in this case notice of appeal was given. Then upon what ground should the Court proceed? I think we ought to proceed always

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in the interest of justice and it has not been suggested that this is a frivolous appeal lacking merit or anything of that kind—the ground advanced is that the appellants have been in necessitous circumstances, apparently making every effort to get into a position to perfect the appeal and only at this recent date have been able to do so, and, looking at the amount of money which has to be forthcoming to accomplish that, namely, $1,000 or more, and also being apprised at this Bar that these plaintiffs are loggers, not men of means, I think the interests of justice require the extension of this indulgence and I would accede to the application.

MACDONALD, J.A.

MACDONALD, J.A. (oral): I would grant leave on the facts of this particular application as shewn by the Chief Justice.

Motion granted, Galliher, J.A. dissenting.

JONES v. PACIFIC STAGES LIMITED.

MCDONALD, J.

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JONES v. PACIFIC STAGES LTD.

Negligence — Automobile — Passenger — Personal injuries — Special and general damages.

The plaintiff was a passenger on the defendant's motor-bus coming from Port Moody to Vancouver at about 9.30 on the morning of a very foggy day. After the bus had reached Slocan Street it proceeded down hill on Hastings Street towards Clinton. The street at this point was of wooden block pavement and was in a very slippery and icy condition. From the evidence it appeared that the speed of the bus going down hill exceeded 12 miles per hour. On nearing Clinton Street the driver saw a street-car had stopped in front and a Ford truck was waiting just behind it. He tried to stop, lost control and, turning sharply to the right to avoid the Ford truck, ran over the curb bringing his motor-bus to rest with its front against a store and its left side against a telegraph pole. The plaintiff's legs were seriously injured and he suffered a hernia as a result of the accident. In an action for damages:—

Held, that considering the short range of visibility, the street-car line, and the slippery condition of the road, the motor-bus was proceeding at too great a rate of speed, and should have been kept under such control that it could have been stopped without causing damage, and the plaintiff was entitled to $800 special damages and $3,000 general damages.

ACTION for damages for injuries sustained by the plaintiff while a passenger on a motor-bus of the defendant Company. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 2nd of December, 1926. Statement

Stockton, for plaintiff.
Housser, for defendant.

8th December, 1926.

McDONALD, J.: This is an action for damages for injuries suffered by a passenger proceeding from Port Moody to Vancouver in a motor-bus operated by the defendant for hire.

The decision of the case rests not I think upon the credibility of any of the witnesses, for I believe that all the witnesses told the truth, as best they could, but rather upon the inferences to be drawn from the evidence given. The motor-bus in question, having earlier in the morning proceeded from Vancouver to Port Moody, was returning over the same route at about 9 Judgment

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o'clock through a dense fog through which the range of visibility was from 40 to 50 feet. Having climbed a grade to the intersection of Slocan Street with Hastings Street the motor-bus proceeded over the brow down a grade of 5.44 per cent. toward Clinton Street. When nearing Clinton Street it was noticed by the driver that a street-car had stopped immediately in front to take on passengers and that a Ford truck had stopped behind the street-car. The driver of the motor-bus, in his effort to stop, lost control and, in order to avoid a collision, turned sharply to the right, mounted a 6-inch curb and brought his motor-bus to rest with its left side against a telegraph post and its front against a store building. There seems no doubt that when the emergency arose the driver handled his car in the best possible manner. Immediately following the motor-bus came the chief of police driven by his expert chauffeur, who also, on trying to bring his car to a stop, met with difficulties and skidded into the Ford truck driving it across the street. The chief of police ran back to flag any further cars coming down the hill with the result that the drivers of some eight or ten cars, suddenly faced with this alarming signal, lost control of their cars and skidded down the hill or across the street. The only car that came down the hill safely and rested behind the street-car was the Ford truck.

Judgment

Admittedly the street, which consisted of a wooden block pavement, was in a very slippery and icy condition. The evidence goes to shew that this condition was not observable to a driver and it is suggested that this particular block was in worse condition than any other part of the road. It seems difficult to understand why this should be so.

The driver says that he went down the hill in second gear at about 10 or 12 miles an hour. In my opinion, on the whole of the evidence, the motor-bus was proceeding at too great a rate of speed. Having regard to all the conditions, the short range of visibility, the fact that there was a street-car line upon the road, and the condition of the pavement, as it was, or ought to have been known to the driver, the motor-bus ought to have been and might have been kept under such control that it could have been stopped without doing any damage. It follows that, in my opinion, the plaintiff is entitled to recover. He has proven

special damages amounting to approximately $800. In addition he suffered considerable pain and loss of time from serious injuries to his legs and has also suffered a hernia as a result of the accident. I think $3,000 is not an unreasonable amount to allow for general damages and there will be judgment for the plaintiff for $3,800.

Judgment for plaintiff.

JACOBSON v. SCHNEIDER.

Animals—Bull escapes from closure—Enters lands of another—Attacks owner who suffers injuries—Damages—Liability—R.S.B.C. 1924, Cap. 11, Secs. 3 and 11.

Section 3 of the Animals Act provides that "no person shall allow any bull over six months old to run at large . . . ." etc., and section 11 further provides that "The owner of any animal unlawfully at large shall be liable for the actual damage committed by it while running at large, such damage to be recovered in an action at law by the person sustaining the same. . . . ."

The defendant's bull, four years old, escaped from his farm and entered upon the plaintiff's premises. The plaintiff tried to drive the bull away but evidently owing to a cow being on the premises the bull became infuriated and charged her inflicting severe bodily injuries. In an action for damages the plaintiff recovered judgment.

Held, on appeal, affirming the decision of FORIN, Co. J., that the bull was unlawfully allowed to run at large by the defendant and he is liable for the damages sustained by the plaintiff under section 11 of the Animals Act.

APPEAL by defendant from the decision of FORIN, Co. J. of the 27th of March, 1926, in an action for damages for injuries sustained by the plaintiff, resulting from an attack by a bull owned by the defendant and allowed to run at large. The bull which was kept by the defendant in a closed field on the west side of Lower Arrow Lake, broke out and after travelling some distance came upon the plaintiff's farm. The plaintiff tried to drive the bull away, but apparently owing to a cow which had

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been brought to her farm that day the bull became furious and charged her, breaking her jaw and inflicting other injuries to her body, she being saved from further injuries by the man who had brought the cow. The defendant claimed that under ordinary conditions the bull was not dangerous but the plaintiff was guilty of contributory negligence in attempting to drive it away when she had a cow close by.

Statement

The appeal was argued at Vancouver on the 8th and 11th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

G. L. Fraser, for appellant: The defendant has a right to shew that this was a tame bull: see *Nevill* v. *Laing* (1892), 2 B.C. 100; Halsbury's Laws of England, Vol. 1, p. 372, sec. 813; *Cox* v. *Burbridge* (1863), 13 C.B. (N.S.) 430; *Street* v. *Craig* (1920), 48 O.L.R. 324. The plaintiff was the authoress of her injury. Having a cow close by she should have taken due care: see *Hatton* v. *Morton* (1921), 2 W.W.R. 803; *Rosenthal* v. *Hess* (1926), 2 W.W.R. 532 at p. 533.

Argument

Maitland, for respondent: The appellant is liable for the trespass of the animal: see *Lee* v. *Riley* (1865), 18 C.B. (N.S.) 722 at p. 733; *Patterson* v. *Fanning* (1901), 2 O.L.R. 462; *McLean* v. *Brett* (1919), 49 D.L.R. 162. Parliament did away with *"scienter"*: see *Rex* v. *Brady* (1921), 3 W.W.R. 396; *Curtis* v. *Mills* (1833), 5 Car. & P. 489.

Fraser, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The case is not governed by the common law alone. I think it is affected very materially by the Animals Act. Under the Animals Act, the owner of a bull must keep him in confinement, unless he has authority to let him run at large which was not obtained in this case. He was, therefore, bound to keep him in confinement. It may be that the liability falls within the principle of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330. He may be bound at all hazards to confine him. But assuming that it does not depend upon that principle, he would be negligent if he, without lawful excuse, allowed the animal to get at large. There is no evidence that he took due care to confine him. Therefore, we must assume

that the learned judge found the defendant negligent in this respect. Here was a bull, unlawfully at large. If he had attacked the plaintiff on a public road and injured her, would defendant not have been liable for damages just as clearly as if the bull had strayed on the plaintiff's property and attacked her? There was a breach of the duty imposed by the Legislature on the defendant to keep the bull at home, resulting as it did in injury to the plaintiff. The Act provides that if the owner does not fulfil the conditions imposed upon him, he shall be liable for the damage done. I do not think it was intended to confine that liability to damage to property. Damage to the person as well was contemplated by the section, and therefore I think that the appeal must be dismissed and the judgment rendered by the County Court judge affirmed.

MACDONALD, C.J.A.

MARTIN, J.A.: The circumstances in this case, to which I confine my remarks, are that this animal, being a bull over six months old, was unlawfully, to use the words of the statute (R.S.B.C. 1924, Cap. 11, Sec. 2) "allowed to run at large," and there is an absence of any evidence whatever as to the manner in which the bull was originally confined by its owner, or of the fences of either parties concerned. I note this because of the argument founded upon the case of *Street* v. *Craig* (1920), 48 O.L.R. 324 to which we have been referred, wherein a cow had escaped from the custody of a person who had without negligence driven it along a highway to a railway yard whence it escaped in the attempt to get it into a pen used for loading animals into cattle-cars, and the judgment exculpating the owner is based upon the lack of *scienter*. But we have nothing of that kind in this case, and counsel for the respondent makes the submission that upon the absolute prohibition to run at large his client is, upon the facts herein, entitled to recover. In my opinion this is the correct view of the matter, and I am unable to perceive in such circumstances the application of the remarks in the said Ontario case as to remoteness of damage or otherwise. As to the expression "actual damage" used in section 11 of said Animals Act, I am satisfied it covers what has occurred here, *i.e.*, injury to the person as well as to property.

MARTIN, J.A.

It only remains, therefore, to say a word as to the defence

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of contributory negligence set up. The answer thereto is that the learned judge found that there was no lack of care by the plaintiff and no undue risk taken, and in the absence of any evidence shewing that he took a wrong view of the matter it would be entirely wrong for us to say that he erred, and so I think the appeal should be dismissed, there being no evidence before us.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the judgment of the learned trial judge must be sustained. I think the decision can be based wholly on the Animals Act. I was at first rather impressed with the argument under the common law, that "running at large" had a meaning different from the ordinary meaning attachable to the words. But when I look at the Animals Act and see there is no definition of "running at large" and the language used is simply "running at large," it seems we must take it in the ordinary meaning; and this bull was running at large, because the Legislature has specifically, in subsection (3) of section 3, set out, "Any bull over six months old to run at large . . . ." What does that mean? It means to be out of an enclosure. There is nothing else to interpret the language of the statute by, and we must, I think, assume that when the bull is outside of the enclosure, it must be running at large. It has got upon this lady's property; she was entitled to drive the bull off her property; and that is what she was about to do, I think. Even under the assumption of Mr. *Fraser,* that this bull was a tame animal—although I cannot see that a bull can be ever so called—and proceeding in the belief that the bull was a tame animal, she would not be doing a foolhardy thing, according to the history of this animal, in driving it off the premises. But when she attempts to drive it off the premises, the bull attacks her and the situation is immediately changed. She is in peril of her life, and the bull then does her very serious injury. Was that something the Legislature contemplated, and does the Legislature make provision for it? It would seem so. The Legislature in section 11 provides that "The owner of any animal unlawfully at large"—and as I view it this bull was unlawfully at large, that is, unlawfully out of an enclosure—

"shall be liable for the actual damage committed by it when running at large, such damage to be recovered in an action at law by the person sustaining the same." Now, the language is sufficiently ample to cover personal injury. Therefore on the question of the Animals Act alone it seems to me that it is unnecessary to go further than the statute goes and examine the other very interesting points that have been argued. I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal dismissed.

Solicitor for appellant: *G. L. Fraser.*
Solicitors for respondent: *Donaghy & Matthew.*

REX v. BRANDILINI.

Criminal law—Charge of having liquor in his possession—Conviction—Certiorari—Evidence—Right of review.

Once the jurisdiction of the magistrate has been established on *certiorari* proceedings the Court cannot review the evidence for the purpose of ascertaining whether there was any upon which the conviction could be supported.

Rex v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128 followed.

APPEAL by defendant from an order of MORRISON, J. of the 22nd of June, 1926, dismissing a motion for an order for a writ of *certiorari* to remove a conviction whereby the defendant was convicted for unlawfully having liquor in his possession. On the premises of one J. McCallum was a garage adjoining his residence on Newton Road in the Municipality of Surrey. From information received two constables entered the garage on the 15th of March, 1926, and found two barrels of whisky without the Government seal. On the following morning as the premises were watched by a constable the accused with one Coupland drove up to the house in an automobile. They went

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into McCallum's house and shortly after came out and entered the garage. Coupland then went back to the house and after getting a tumbler returned with it to the garage. The constable, who was watching from the door of the garage, saw the accused taking a drink from one of the barrels.

The appeal was argued at Vancouver on the 6th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Brougham, for appellant: These two men went into a garage and had a drink; nothing more was proved. Reading the depositions is a condition precedent to conviction: see *Rex* v. *Long Wing* (1923), 1 W.W.R. 734; Paley on Summary Convictions, 9th Ed., 468. It must shew in the body of the conviction where the offence was committed: see *Re Joseph* (1924), 42 Can. C.C. 58. He was charged with having the liquor in his possession. There is no evidence of possession. Merely taking a drink does not prove possession: see *Rex* v. *Young* (1917), 24 B.C. 482; (1917), 3 W.W.R. 1066.

Argument

Dickie, for the Crown: There is a *prima facie* case of accused having liquor in his possession. The accused has offered no evidence in answer so the conviction must stand: see *Whimster* v. *Dragoni* (1920), 28 B.C. 132; *Rex* v. *Perry* (1920), 2 W.W.R. 884.

Cur. adv. vult.

On the 17th of November, 1926, the judgment of the Court was delivered orally by

MACDONALD, C.J.A.: In this case the Court reserved judgment on one point only, that was as to whether or not we could look at the evidence on which the accused was convicted for the purpose of ascertaining whether there was any that would support the conviction. At one time the evidence might be looked at, but at that time the practice was to set out the gist of it on the face of the conviction itself, and the Court could look at the conviction to find defects in it; but the practice was changed many years ago so as to set nothing out in the conviction except the conviction itself, and that practice has been followed since then, that where it is a question whether the magistrate

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had evidence upon which he could convict, the evidence could not be reviewed or looked at by the Court. That matter was finally settled, and settled authoritatively of course, in *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128, where the Privy Council went very fully into it; and that case is decisive of this one, so that the appeal should be dismissed.

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Appeal dismissed.

Solicitor for appellant: *W. F. Brougham.*
Solicitor for respondent: *E. A. Dickie.*

REX v. BELLOS.

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Criminal law—Assault occasioning bodily harm—Policeman interrogating accused after arrest—Admission of policeman's evidence as to accused's statements—Effect on accused's testimony—Substantial wrong.

On a charge of assault occasioning actual bodily harm a policeman testified that upon arresting the accused he first warned him that anything he said would be used in evidence against him, then seeing that his hat was smashed he asked him how that happened to which accused replied that he wore another hat that evening; he then asked him the cause of a scrape on his arm about three inches long which appeared to be a fresh wound and his reply was that it was an old mark that had been there a long time. The accused was convicted.

Held, on appeal, ordering a new trial, that there was substantial wrong in admitting the policeman's evidence as it was practically intimating to the jury that accused had told a falsehood when questioned and would affect the credence to be attached to his evidence.

APPEAL by accused from his conviction by MURPHY, J. on the 18th of January, 1926, at Prince George, on a charge of assault and occasioning bodily harm on one Richard Brotherston. On the evening of the 27th of June, 1925, Brotherston and two companions went to a shack behind the Quebec Rooms in Prince George occupied by one Grace Ryan, where they obtained drinks. Shortly after their arrival Bellos and two companions came into the shack. There was threatening of a

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quarrel between the two parties but Bellos and his friends left before anything happened. Twenty minutes later Bellos returned with a friend named Limberdos. Brotherston was knocked down and there was a conflict of evidence as to who struck him, Tallman one of Brotherston's friends on the one hand swearing that Bellos hit Brotherston over the head with some instrument and rendered him unconscious, and on the other hand Limberdos, a friend of Bellos, testified that he (Limberdos) was attacked by Brotherston with a bottle which he seized from him and hit him over the head with it. The policeman who arrested Bellos on the same evening testified that he first warned him that anything he said would be used in evidence against him, and then seeing that his hat was bashed in called his attention to it, and accused said he had worn another hat that night. Then seeing that he had a scrape on his arm about three inches long and one inch wide which appeared to be a fresh wound he drew his attention to it, and Bellos said that it was an old mark that had been there a long time. The jury found the prisoner guilty and he was sentenced to two and one-half years in the penitentiary.

Statement

The appeal was argued at Vancouver on the 17th of November, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Castillou, for appellant.
Brydone-Jack, for the Crown.

MACDONALD, C.J.A.: The appeal should be allowed and a new trial ordered. I base this not on the grounds of impropriety on the part of the jurors; I shrink from finding the jurors were committing an offence against their oath. They have all denied that they made the statements which were attributed to them and where there is conflicting affidavits I prefer to accept the oaths of the jurymen themselves.

MACDONALD, C.J.A.

I found my judgment entirely upon the wrongful admission of the evidence wherein it appears that while the police sergeant said that he warned this man at the time of his arrest yet it further appears that later on, apparently, he called the accused's attention to his hat and to the condition it was in, eliciting a

statement with regard to it, but the most serious thing of all was his calling attention to a mark or wound in accused's arm. He says this:

"There was a scrape on his arm here about one half an inch wide and I would say about two or three inches long, as if it had been pushed against something."

The accused, according to the Crown's case, had been in a fracas in the rooming-house and naturally one would look for wounds and the sergeant did look for wounds and found this "scrape on his arm." And then he says:

"Yes, I drew his attention to it and he said it was an old mark that had been there a long time but as a matter of fact it was fresh."

MACDONALD, C.J.A.

What was the probable effect of that? It was practically intimating to the jury that the man had told a direct falsehood to him when he had questioned him at the time of his arrest. That would affect the prisoner's testimony in the witness box, it would affect the credence to be attached to it and, it might very well have influenced the jury in finding the verdict which they did find. Therefore, in my opinion, there was a substantial wrong which amounts to a miscarriage of justice and the conviction must be set aside and a new trial ordered.

MARTIN, J.A.

MARTIN, J.A.: I agree upon the ground that what the sergeant did here at the time of the arrest amounted to the improper extraction of information by questions from the accused which tended to destroy his defence of an *alibi*.

GALLIHER, J.A.

GALLIHER, J.A.: I think this is a case for a new trial.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree that there should be a new trial.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

New trial ordered.

Solicitor for appellant: *H. Castillou.*
Solicitor for respondent: *A. C. Brydone-Jack.*

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CARRICK v. CORPORATION OF POINT GREY.

Municipal law—By-law—Validity — Ultra vires — Mandamus — R.S.B.C. 1924, Cap. 179, Sec. 54, Subsec. (250).

CARRICK v. CORPORATION OF POINT GREY

By-law No. 44, 1922, of the Municipality of Point Grey with respect to building restrictions within the Municipality and passed under the authority of the Municipal Act *held* to be *ultra vires* of the Act.

Held, further, that the by-law cannot be segregated as the plan or scheme was an entire one and it cannot be presumed that the Council would have enacted a part of it only if it had realized that it had no authority to enact the whole.

ACTION for a *mandamus* to compel the defendant through its proper officer to issue a building permit to the plaintiff for the erection of a gas-station on lot 26, resubdivision of lot 6, block 1, district lot 526, Municipality of Point Grey, according to the plans and specifications tendered by the plaintiff, which building permit was refused by the defendant; also for a declaration that Town Planning By-law No. 44, 1922, of the said defendant Corporation is *ultra vires* and void. The above by-law divided the Municipality into (1) residential, (2) commercial, and (3) industrial areas, and it further provided that only private dwelling-houses should be erected within the residential area. The plaintiff applied to erect a gas-station within the residential area and was refused a permit. Tried by GREGORY, J. at Vancouver on the 11th of November, 1926.

Statement

Macrae, for plaintiff.

A. G. Harvey, and *R. W. Ellis,* for defendant.

29th November, 1926.

GREGORY, J.: In this case, there must be judgment for the plaintiff. No attempt has been made by the defendant to support the by-law complained of in its entirety. It clearly far exceeds in its scope the statute from which it derives its authority.

Judgment

The only question seriously argued was, whether or not the by-law could not be separated into two parts, the good and the bad. There is no doubt that this can be done in many cases

but I do not think that this is one of them. The rule governing such cases was expressed in our own Courts by Mr. Justice GRAY at p. 305 in the case of *In re Clay* (1886), 1 B.C. (Pt. II.) 300 at p. 305:

"A by-law may be good in part and bad in part, and if it is possible to separate the good from the bad, it should be so separated and the validity of the by-law maintained; but the parts so separated must not be connected with or essential to each other. Each must be whole and complete to stand *per se*."

And the language of Duff, J. at p. 323 in *In the Matter of Validity of Manitoba Act* (1924), S.C.R. 317 appears to indicate that, in his Lordship's opinion, that the illegal parts of such statute (or by-law) are only to be severed from the legal parts when it appears that the statute so severed would be one which the enacting body could be presumed to have intended to pass, and this view of Mr. Justice Duff is expressly approved by the Judicial Committee of the Privy Council in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), A.C. 561 at p. 568.

In 6 C.E.D. 252 the rule is expressed as follows:

"A by-law may be good in part and bad in part, but the part that is good must be clearly distinguishable from the part that is bad, so that if the invalid portion is eliminated there will still remain a perfect and complete by-law capable of being enforced. The instances which admit of severance of the good from the bad portion of by-laws are confined to cases where the parts sought to be severed relate to distinct subject-matters."

Judgment

Applying these principles to the by-law in dispute it appears to me that it cannot be supported. A mere reading of the by-law makes it clear that the Municipal Council intended to do a great deal more than it had any statutory authority for. Take paragraph 4 for example: At least two-thirds of it is objectionable. The subject-matter of the whole of it is private dwelling-houses. The object was to regulate their erection, maintenance and occupancy. The plan or scheme was an entire one and it cannot be presumed I think that the Council would have enacted a part of it only if it had realized that it had no authority to enact the whole. Each part is connected with and essential to the other as enacted.

The cases referred to by the defendant's counsel are all distinguishable from the case at Bar.

In *Reg.* v. *Lundie* (1861), 31 L.J., M.C. 157, the only effect

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of striking out the bad part was to restrict the enforcement of the penalty to the persons offending. The subject-matter of the by-law and its plan and scope remained exactly the same.

In *Fennell and the Corporation of Guelph* (1865), 24 U.C.Q.B. 238 the by-law dealt with a number of commodities and a number of traders and the effect of the decision was only to limit the by-law to the specific commodities and traders authorized by the enabling statute.

In *Re Harris and Corporation of City of Hamilton* (1879), 44 U.C.Q.B. 641 the operation of the by-law was left exactly as enacted but its scope was confined to the *locus* authorized by statute.

In *Ross* v. *Corporation of York and Peel* (1864), 14 U.C.C.P. 171 the by-law had two objects, *viz.*: To prohibit the sale of intoxicating liquor and to prohibit the use of improper and profane language. There was no authority for the prohibition *re* intoxicating liquor so it was quashed while the remainder being complete in itself and authorized by statute was allowed to stand.

The by-law must be quashed with costs but I will hear further argument upon the subject of *mandamus* if counsel desire to be heard.

By-law quashed.

MURPHY, J. (In Chambers)

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Jan. 19.

CAPTAIN J. A. CATES TUG & WHARFAGE CO. v. FRANKLIN FIRE INS. CO. OF PHILADELPHIA

CAPTAIN J. A. CATES TUG & WHARFAGE COMPANY LIMITED v. THE FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA.

Practice—Taxation—Witness fees—Allowance for preparation to give testimony—Marginal rule 1002, regulations (9), (25), (41) and (42).

Under regulation (9) of marginal rule 1002 the registrar after hearing evidence allowed certain amounts to various witnesses for time occupied in preparing themselves to give testimony at the trial. The registrar made no notes of the evidence. On an application to review the taxation objection was taken that under regulation (42) of said marginal rule the Court must determine the matter on the evidence given before the registrar which was not before the Court.

Held, that the objection must be sustained as under said regulation (42) the judge is precluded from ordering that the evidence given before the registrar be repeated before him.

Held, further, that the submission that the registrar has no power to take verbal testimony is answered by regulation (25) of said marginal rule 1002.

APPLICATION to review a taxation by the registrar at Vancouver who allowed certain sums for various witnesses for time occupied in preparing themselves to give evidence at the trial under regulation (9) of marginal rule 1002. Heard by MURPHY, J. in Chambers at Vancouver on the 14th of January, 1927. Statement

J. A. MacInnes, for the application.
Sidney Smith, contra.

19th January, 1927.

MURPHY, J.: Application to reveiw taxation in reference to the allowance by the registrar of amounts to various witnesses for time occupied in preparing themselves to give testimony at the trial. The allowances were made under regulation (9) of marginal rule 1002. When the application came on for hearing, it was objected that the Court must under regulation (42) of the same marginal rule determine the controversy on the evidence given before the registrar and that *viva voce* evidence had been taken before him but was not before the Court. I adjourned the matter and have since seen the registrar. He Judgment

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informs me that lengthy evidence was given *viva voce* before him bearing on the necessity of such preparation in the case of each witness in whose favour allowance was made.

Before this evidence was led the registrar suggested to the solicitors attending that, in view of the possibility of an appeal, shorthand notes of such evidence be taken. The suggestion was not, however, acted upon. The registrar made no notes of evidence. The consequence is that the Court is without any record of such evidence and cannot therefore comply with the provisions of regulation (42). Said rule states that no further evidence shall be received upon the review hearing unless the judge shall otherwise direct. This provision I think precludes me from ordering that the evidence given before the registrar be repeated before me. The number of witnesses to whom preparation allowances were made seems large but the registrar informs me evidence was led before him justifying this as the witnesses prepared as to different phases of the controversy. In face of the provisions of said regulation (42), I feel bound to sustain the objection. I have not and cannot obtain the material upon which that rule directs me to determine the matter. It is suggested that the registrar has no power to take verbal testimony. This seems a startling proposition and is I think answered by regulation (25) of marginal rule 1002 and by the decision in *In re Evans* (1887), 35 W.R. 546.

The application is dismissed with costs.

Application dismissed.

CARR v. LA DRECHE.

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CARR v. LA DRECHE

Principal and agent—Sale of land—Commission—Two prospective purchasers introduced by agent but they refused to purchase at price fixed—Same men at instance of another broker later accept an offer at a smaller sum—Special or general employment.

The defendant listed a property with the plaintiff, a real estate agent, for sale at the price of $16,000. The plaintiff introduced two prospective purchasers to the defendant but they would not buy at the price named. Subsequently the same men were introduced by another agent and the property was sold to them at $15,000. The plaintiff recovered in an action for $750, being 5 per cent. of the sum at which the property was sold.

Held, on appeal, affirming the decision of CAYLEY, Co. J. (MACDONALD, C.J.A. dissenting), that the inference to be drawn from the evidence was that there was a general listing to find a purchaser at the price named, but that if the plaintiff obtained a purchaser at a figure the defendant was willing to accept, he was, nevertheless, entitled to a commission.

On the contention that the sale was subject to the transfer to the purchasers of a beer licence which depended upon the assent of the liquor control board and that the assent was not obtained until after the writ was issued, the action being therefore premature, it was *held* that the case was one of a completed sale subject to defeasance or resale and return of the purchase price should the assent be withheld, but the commission was earned when the sale was made.

APPEAL by defendant from the decision of CAYLEY, Co. J. of the 28th of May, 1926. The action was for a commission of $750, being 5 per cent. on the sale of a property for $15,000. The plaintiff is a real estate agent and he claimed that the defendant employed him in November, 1925, to act as his agent to find a purchaser for the London Hotel, 700 Main Street, Vancouver, for the sum of $16,000 agreeing to pay a 5 per cent. commission in case of a sale. The plaintiff introduced two men named John Johnson and George Johnson to the defendant as prospective purchasers, but the Johnsons would not buy at that price. Later, in March, 1926, through the efforts of one F. J. Carter, another real estate agent, the Johnsons and the defendant were again brought together and the Johnsons then agreed to purchase the property at $15,000.

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The appeal was argued at Vancouver on the 6th and 9th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for appellant: We say this was a special employment to find a purchaser for $16,000 net to the defendant. Secondly, the evidence shews Carr was not the effective cause of the sale and thirdly, this action was brought when negotiations were pending for transfer of a beer licence and it was premature. That it was a special contract see *Prentice* v. *Merrick* (1917), 24 B.C. 432; *Turner, Meakin & Co.* v. *Field* (1923), 33 B.C. 56; *Cairns* v. *Buffet* (1912), 3 W.W.R. 352; *Fitchell* v. *Lawton* (1919), 3 W.W.R. 728. The evidence is clear that as between Carr and La Dreche the matter was completely dropped for some time before another agent took the matter into his hands. Carr had nothing to do with the actual sale: see *Herbert* v. *Bell* (1912), 3 W.W.R 608; *Taylor* v. *Rabbitts* (1920), 1 W.W.R. 1024; *Barnett* v. *Isaacson* (1888), 4 T.L.R. 645. That the action was premature see *Greer* v. *Godson* (1918), 25 B.C. 229; *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215.

Argument

Hurley, for respondent: We say the sale took place in March, 1926, and the plaintiff was still defendant's agent: see Chalmers's Sale of Goods, 7th Ed., 7. That he was a general agent see *Turner, Meakin & Co.* v. *Field* (1923), 33 B.C. 56 at p. 60; *Toulmin* v. *Millar* (1887), 58 L.T. 96. There was no special arrangement between plaintiff and defendant and the listing with the plaintiff was never withdrawn. He introduced the purchasers and was the effective agent: see *Wilkinson* v. *Martin* (1837), 8 Car. & P. 1.

MacInnes, in reply, referred to *Griffith* v. *Frederickson* (1926), 4 D.L.R. 50 at p. 55.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The action was for commission. The property was listed by the defendant with the plaintiff to sell at the price of $16,000. What took place between them may be stated in the words of the plaintiff himself; he said: "I told La Dreche at the time I was afraid his price was high. He

said, 'I want that figure.' But," plaintiff continues, "I always had the impression I could beat the figure without much trouble."

Afterwards the plaintiff did try to beat the figure and failed. He saw the defendant three or four times—"I was trying to break him down on that figure and he would not break." The customer, Johnson, said that the price quoted to him by the plaintiff was $16,500. It is suggested that the $500 is a mistake. In any case, it does not matter. This price was quoted to Johnson some days after the inspection of the property by him, and I think the fair inference to be drawn from the evidence is that this was after the defendant had refused to lower his price. Johnson says that no other price was ever quoted to him, and that when that price was quoted, he said "I won't buy it." He further says that they dropped the matter and that plaintiff shewed him other properties. After a time Johnson bought the property at a lower price through another agent. There is no evidence of collusion. Indeed, plaintiff's counsel disclaims any suggestion of such.

MACDONALD, C.J.A.

On these facts, I think the agency was a special one and the plaintiff having failed to find a purchaser at the price cannot claim a commission.

Other defences were raised, such as that the agency relationship between the plaintiff and defendant ceased when Johnson refused to buy, and that in any event, the action was premature. While I do not need to determine these questions, there is much to be said in favour of the latter one.

I would allow the appeal.

MARTIN, J.A.: In my opinion the learned judge below reached the right conclusion upon all the evidence before him and therefore this appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: The facts of this case, in my opinion, bring it within the decision of this Court in *Turner, Meakin & Co.* v. *Field* (1923), 33 B.C. 56, as to the liability of the defendant.

GALLIHER, J.A.

The only other point is, was the action premature? The bill of sale of the goods was executed and registered and the purchase price to be paid in cash placed in the hands of a third

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party in escrow, to be delivered up on the acceptance of the liquor board of the transfer of the licence and an agreement between vendor and purchaser that in case the board refused the transfer the parties were to be restored to their original position. The purchasers entered into possession and carried on the business when the documents were executed, employing the defendant at $5 per day to run the business, the purchasers taking the profits pending acceptance by the board and paying expenses. The board accepted the application for transfer of the licence and the money was paid over to the defendant, but before such acceptance this action was brought. The sale was complete, the payment of the money being deferred until the happening of a certain event. It was, therefore, I think, a sale with a defeasance in the event of the transfer being refused. It is not, as I view it, a case within the rule as to premature actions dealt with by Mr. Justice DUFF, who delivered the judgment of the Court in *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215. The plaintiff's commission was earned when the sale was made and the appeal should be dismissed.

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The defendant submits that a special listing was made with the plaintiff for the sale of the hotel premises either for $16,500 as claimed by him, or for $16,000 as claimed by the plaintiff, and that because the plaintiff failed to procure a purchaser at that figure he is not entitled to a commission although the premises were in fact sold for $15,000 about two weeks later to the same purchasers introduced by the plaintiff. It is suggested that the actual sale consummated was in reality effected by one Carter. I am inclined to the view that the learned trial judge was right in inferring that Carter, whose brother was a former owner of the hotel, did little, if anything, more than advise the defendant that $15,000 would be a fair price. True, in answer to a leading question—because the witness was not asked simply to detail his conversation with Carter—one of the purchasers stated that Carter quoted a price of $15,000 carrying the suggestion that he was acting as an agent. I do not feel obliged, however, particularly in the absence of evidence from Carter, to draw an inference

from what took place differing from that drawn by the learned trial judge. True, the purchase-money was placed with Carter in escrow to be held until the beer licence was transferred. This relates, however, to carrying out the terms of purchase not to effecting it. In this view it follows that the sale was brought about through the agency of the plaintiff but not at the price quoted to him by the defendant.

Where an agent is engaged to procure a purchaser at a fixed price and on specified terms, he cannot claim a commission unless the purchaser he procures is ready and willing to buy upon the terms specified. But the inference to be drawn from the evidence is one of fact. A definite sum was mentioned by the defendant with, however, no statement that a commission would be paid only if the sum stated was obtained. True, he later repeats to the plaintiff his statement as to price when the latter tried to induce him to accept a smaller sum. His words were, "That is the best I can do," or according to the plaintiff's evidence, "I want that figure." Was this to be merely a basis for future negotiations as mentioned by Lord Watson in *Toulmin* v. *Millar* (1887), 58 L.T. 96 at p. 97, leaving the actual price to be settled later? It is clear from the fact that within two weeks' time the defendant did sell for $15,000 that his original demand for $16,000 was not final and conclusive. It is fair to interpret his statements in the light of his subsequent actions.

We may look at all the facts in drawing inferences. I would therefore regard the listing as a general authority to find a purchaser at the price named, if possible, but if he got one at a figure the owner was willing to accept, the agent would nevertheless be entitled to a commission.

As to the plaintiff's services being the efficient cause of the sale I do not think the mere fact that the purchasers for a time directed their attention elsewhere looking for other properties and were finally induced to reconsider the purchase of the defendant's hotel, through the suggestion of Carter under circumstances already mentioned, in any way breaks the connection. The postponed negotiations to purchase culminating in a sale were the result of the original introduction.

It was urged, however, that the action should have been dis-

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missed because the sale was subject to the transfer to the purchasers of a beer licence and that depended upon the assent of the liquor control board. This assent was not obtained until after the writ issued, although before action the purchasers obtained a bill of sale which they registered, entered into possession and received the profits, agreeing, however, to retransfer should assent be refused. The purchase price in the meantime was held by Carter. It is suggested, in effect, that the plaintiff's contract was to procure a purchaser acceptable to the liquor control board, able, ready and willing to purchase. I do not think that additional terms can be imported into the agreement. Although the defendant states in answer to a leading suggestion, that the whole deal was subject to the transfer of the licence, it is not suggested that the point was discussed when the plaintiff was given authority to sell. This is not an agreement for a sale to become actual on the fulfilment of this condition; it is a completed sale evidenced by an executed transfer and entry into possession, subject to defeasance or resale and return of the purchase price should assent be withheld. I think the plaintiff performed his part and was entitled to the commission earned, even before the assent to the transfer of the licence was obtained.

I would dismiss the appeal.

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

Solicitors for appellant: *MacInnes & Arnold.*
Solicitor for respondent: *T. F. Hurley.*

TURNER, MEAKIN & CO. v. THE CALEDONIA AND BRITISH COLUMBIA MORTGAGE COMPANY, LIMITED.

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Jan. 4.

TURNER, MEAKIN & CO. v. CALEDONIA AND BRITISH COLUMBIA MORTGAGE CO.

Agency—Agent employed to find purchaser subject to confirmation by defendant's local board—Purchaser found willing to pay amount arranged—Confirmation refused—Commission.

E. & A., general agents in British Columbia for the defendant, interviewed the plaintiffs and gave them a general listing of the defendant's property for sale at $15,000 fixing the terms upon which payment should be made. Later they wrote the plaintiffs giving them the exclusive right to sell the property upon the terms previously arranged but subject to confirmation by the local board of the defendant Company. Two days later the plaintiffs obtained a purchaser upon the terms arranged, $1,000 being paid on account of the purchase price and delivered over by the plaintiffs to E. & A. Subsequently the defendant's local board refused to confirm the sale. The plaintiffs succeeded in an action to recover $312.50, commission on the sale.

Held, on appeal, reversing the decision of GRANT, Co. J., that the arrangement was that the sale be subject to confirmation by the local board of the defendant, and neither the board nor E. & A. had done anything which precluded the board from rejecting the offer of the purchaser.

APPEAL by defendant from the decision of GRANT, Co. J. of the 27th of April, 1926, in an action to recover $312.50 commission for the sale by them of lot 18, in block 30, district lot 183 of the City of Vancouver for $15,000. On the 7th of October, 1925, Messrs. Edwards & Ames, real-estate agents in Vancouver were appointed agents of defendant Company in British Columbia and shortly after they gave a general listing of the property to the plaintiffs for sale at $15,000 after certain negotiations as to offers of purchase at lower prices were not carried through, the listing including the terms on which payments should be made. Later, on the 21st of January, 1926, they wrote the plaintiffs giving them the exclusive right of sale of the property upon the terms arranged, for four days, subject to confirmation by the local board of the defendant Company and on the 22nd of January the plaintiffs closed a sale on the terms agreed with W. H. Moore and Flora M. Seeley. One thousand dollars was paid forthwith on the purchase price which was

Statement

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delivered by Turner, Meakin & Co. to Messrs. Edwards & Ames. Subsequently the defendant local board refused to confirm the sale.

The appeal was argued at Vancouver on the 27th and 28th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Macrae, for appellant: We say that under the powers vested in Edwards & Ames by the defendant Company as shewn by Exhibit 6, they did not have the authority to list the property with the plaintiffs. The main point in our favour is that the alleged sale to Moore and Seeley was made subject to confirmation by the defendant and such confirmation was never given.

Argument

McTaggart, for respondent: It was held by the trial judge that Edwards & Ames had authority to list the property with the plaintiffs and that the evidence disclosed the terms of sale that would be accepted and the plaintiffs found purchasers who were ready, willing and able to buy upon the terms so arranged. The trial judge's judgment as to these facts should be accepted.

Macrae, in reply, referred to *Huff* v. *Maxwell* (1916), 9 Alta. L.R. 458; *Carlson* v. *Thompson* (1923), 3 W.W.R. 869.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Plaintiffs claim a commission for obtaining a purchaser for defendant's property.

The defendant, a foreign corporation, appointed Edwards & Ames to be its agents in Vancouver, and also appointed a local board to sanction transactions of the nature of the one in question. Edwards & Ames requested the plaintiffs to seek a purchaser for the defendant's property and told them that a sale must be sanctioned by the board. The plaintiffs eventually obtained a purchaser, ready, able and willing to purchase at the price named by Edwards & Ames, but the board declined to accept him. In my opinion the board had not, nor had Edwards & Ames done anything which precluded the board from rejecting the offer of said purchaser.

The appeal should be allowed.

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

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

I have carefully read the evidence and considered the documents filed as exhibits, and with every deference, I must come to the conclusion that at no time did the plaintiffs ever have the sale of this property not subject to confirmation.

This renders it unnecessary to consider the question of option raised by Mr. *Macrae*, though I have read the authority cited.

MCPHILLIPS, J.A.: I concur in allowing the appeal.

MACDONALD, J.A.: The learned trial judge found that the plaintiffs closed with Moore and Seeley for the purchase of the property in question (securing a deposit of $1,000 and giving them an interim receipt reciting the terms) before they actually received the letter of the 21st of January, 1926, Exhibit 5, from the agents of the defendant. Whether or not I would come to the same conclusion on the facts, assuming that all the witnesses gave their evidence to the best of their recollection, I need not say. I would not feel justified in disturbing this finding so that the question of liability or otherwise must be disposed of without regard to this letter, except in so far as it throws light and confirmation on preceding conversations. If the plaintiffs are entitled to the commission claimed it was earned before the receipt of this letter.

It is clear from the evidence of Meakin that early in December, 1925, it was understood that before plaintiffs would be entitled to a commission any offer received for the purchase of the property would have to be submitted to defendant's advisory board for confirmation and acceptance. Plaintiffs claim, however, that on January 5th, 1926, that situation was altered; that a definite selling price was then fixed, the details as to payment being arranged in interviews and that if a sale was effected for this amount agreed upon no confirmation was required. On that date the plaintiffs wrote (Exhibit 2) to the defendant's agents (with whom alone they dealt) pointing out that a probable purchaser with whom they were negotiating would likely offer $12,000 (defendants wanted an offer of $15,000),

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$2,000 cash with small semi-annual payments and the balance at the end of three years. In this letter the plaintiffs say:

"If there is any possibility of this offer being refused, we would like to be in a position to discourage Mr. Trimble, so possibly you will give this matter your consideration and let us know within the next day or two in order that we can guide ourselves accordingly."

It would appear that plaintiffs had in mind the necessity of submitting all offers for confirmation, although I do not press this view. They knew, of course, that they would have to receive authority before closing for a figure considerably less than $15,000.

On the same day defendant's agents reply as follows:

"We duly received your letter of today's date. We managed to hold a meeting of the local board of this company, and placed your tentative proposal before them. We regret to advise you that they did not see fit to reduce their previous price of $15,000. We trust that you will be able to induce either Mr. Trimble or some other purchaser to make an offer of $15,000."

This letter must be construed in the light of the situation existing up to that time. That situation was as the plaintiffs admit, "no commission without confirmation." It discloses to the plaintiffs that defendant's agents submitted the proposal to the board as if it were the usual practice, and after declining to entertain it they say, in effect, "try to get Mr. Trimble or someone else, to make an offer of $15,000." What possible significance can the words "make an offer" have except this—that it would be submitted for confirmation or otherwise with the strong probability, but not the certainty, that it would be accepted. This view is fortified by the admission of Meakin that although plaintiffs had quite a few deals with defendant's agents, they never put through any sale that was not subject to confirmation. Defendant's advisory board might well refuse to confirm, either because they changed their mind or hoped to get a better offer or because the terms of payment were not satisfactory. As a matter of fact, the purported sale on which commission is claimed was in the nature of an option agreement. The proposed purchaser might decline to complete by forfeiting $2,500. That might not be satisfactory to the defendant unless it, through its agents, must be held to have agreed to it. Speaking broadly, however, the defendant was within its rights in requiring every sale to be subject to confirmation and

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if that was the situation in the case at Bar no commission was earned by the plaintiffs.

After receiving the letter of 5th January, plaintiffs received an offer to purchase from Moore and Mrs. Seeley of $13,500. This was submitted to defendant's agents who still stated their price was $15,000. A later offer from the same parties of $14,500 was also submitted and this figure being so close to the stipulated amount plaintiffs procured the exclusive right to sell until the following Monday. Within this period the offer of $15,000 was made. Moore and Seeley gave plaintiffs a cheque for $1,000 as deposit and obtained the interim receipt referred to, shewing a purchase by way of option on the terms already outlined. I do not think anything turns on the question as to whether or not there was authority to negotiate a sale on the terms agreed upon with the proposed purchasers. The fact is that apart altogether from details as to terms nowhere does it appear that the requirement as to confirmation was dispensed with. That is the all-important aspect. The interim receipt contains a phrase that the proposed sale is "subject to the owner's confirmation." If this stood alone it might well be regarded as a more or less formal phrase in a printed document of common use, but in the light of all that occurred it is entitled to be considered as an element in the case.

I am not overlooking the statement made by Edwards, of Edwards & Ames, defendant's agents, in the following question and answer:

"I suggest that having got that letter, you told Turner & Meakin to go on and get Trimble or somebody else and we will do business? Yes."

suggesting as it does that they were willing to "do business" or to close at $15,000, but viewing his evidence on the whole, I cannot find that he meant that no confirmation would be required.

Significant evidence, which was not contradicted, was given on behalf of the defendant, by McNair, employed in the firm of Edwards & Ames. Speaking of January 22nd, after the plaintiffs brought in the interim receipt and deposit cheque for $1,000, a time when, if plaintiffs' contention is right, the commission was earned, he said:

"Nothing occurred until just a few minutes to three. I got information

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through the office that the advisory board had been called to meet during the afternoon to discuss this and I was sitting in my office on the left of the entrance when Mr. Meakin appeared about five minutes to three, I should say it was, and I took it that he came to find out what had happened to this offer that he put in. Mr. Honeyman, one of the advisory board, followed on probably the next elevator, because I nodded my head. I said, 'These people are just coming together now.' Mr. Meakin said to me, 'Does Mr. Ames's voice carry more weight with the advisory board?' I said, 'To my mind it carries a great deal of weight.' Mr. Meakin turned as he went out and said, 'Try and get it through,' that is the very expression he used."

This shews that Meakin realized certainly the advisability or, as I think, the actual necessity of obtaining confirmation.

On the whole, therefore, I am of the opinion that the terms upon which this property was placed with the plaintiffs for sale was that they should find a purchaser able, ready and willing to pay $15,000, on terms and conditions as to payment which, as I view it, are not important, the whole to be subject to confirmation by the defendant and no confirmation being obtained, the plaintiffs have not earned the commission claimed, and the appeal should be allowed.

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Appeal allowed.

Solicitors for appellant: *Abbott, Macrae & Co.*
Solicitors for respondents: *McTaggart & Ellis.*

REX v. LEW HING LOY.

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

1926

June 22.

REX v. LEW HING LOY

Criminal law—Unlawful possession of morphine—Summary trial of offence—Conviction—Legality—Habeas corpus—Can. Stats. 1923, Cap. 22—R.S.C. 1906, Cap. 1, Sec. 28.

The accused having been charged with being in unlawful possession of morphine, and having consented to summary trial, was found guilty and convicted. On *habeas corpus* it was urged that summary trial with the consent of the accused is not legal in the case of offences under The Opium and Narcotic Drug Act, 1923, on the ground that the Act is a code in itself and as it provides that the offence may be prosecuted either by indictment or by way of summary conviction the provisions of the Criminal Code as to election are inapplicable.

Held, that there is no reason why the right of election should not be open to the accused and there is nothing in The Opium and Narcotic Drug Act, 1923, inconsistent with the existence of the right which is absolute. Moreover section 28 of the Interpretation Act provides that all the provisions of the Criminal Code relating to indictable offences or offences, as the case may be, shall apply to such an offence.

APPLICATION for a writ of *habeas corpus* in respect of a conviction for being in unlawful possession of morphine. Heard by HUNTER, C.J.B.C., in Chambers at Vancouver on the 21st of June, 1926. Statement

Bray, for plaintiff.
Hogg, for defendant.

22nd June, 1926.

HUNTER, C.J.B.C.: *Habeas corpus* proceedings in respect of a conviction for being in unlawful possession of morphine. The only document before me is the commitment. It is on a printed form and the material part begins as follows:

"WHEREAS Lew Hing Loy late of City of Vancouver was this day at and in the said City of Vancouver, duly convicted before the undersigned H. C. Shaw, Esq., police magistrate in and for the said City of Vancouver, for that he the said Lew Hing Loy at the said City of Vancouver on the 20th day of November A.D. 1925, did unlawfully have in his possession a drug, to wit, morphine, without the authority of a licence from the minister first had and obtained or without other lawful authority contrary to the provisions of section 4(*d*) of The Opium and Narcotic Drug Act, 1923, as amended by section 3 of chapter 20 Statutes of Canada, 1925, contrary to the form of the statute in such case made and provided, and consenting Judgment

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to my trying the charge summarily, and being found guilty of the said offence.

"It was thereby adjudged," etc.

So that apparently the prisoner was convicted first and tried afterwards.

It is now urged that the mode of trial known as the summary trial with the consent of the accused is not legal in the case of offences under The Opium and Narcotic Drug Act, 1923, on the ground that the Act is a code in itself and that as it provides that the offence may be prosecuted either by indictment or by way of summary conviction the provisions of the Criminal Code by which, with certain exceptions, the accused has the right of election to be tried summarily are inapplicable. I cannot see any ground for this contention. The Code is always speaking and there is no reason *per se* why the right of election should not be open to the accused and there is nothing in The Opium and Narcotic Drug Act inconsistent with the existence of the right which is absolute unless the Attorney-General interferes under subsection (4) of section 777.

Moreover by section 28 of the Interpretation Act it is provided that all provisions of the Criminal Code relating to indictable offences or offences, as the case may be, shall apply to every such offence.

The application must be dismissed.

Application dismissed.

BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT COMPANY LIMITED. (No. 2).

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Nov. 23.

BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT CO.

Practice—Leave to appeal to Privy Council—Application for—Action for damages for injuries—Order for jury—Sustained by Court of Appeal.

In an action for damages for injuries sustained by the plaintiffs in a collision between a motor-bus in which they were passengers and a street-car, an order obtained by the plaintiffs for a jury was sustained by the Court of Appeal.

An application for leave to appeal to the Privy Council was refused (McPHILLIPS, J.A. dissenting).

MOTION for leave to appeal to the Privy Council from the decision of the Court of Appeal of the 17th of November, 1926 (reported *ante,* p. 56), dismissing an appeal from the order of MORRISON, J. of the 4th of June, 1926, granting the plaintiffs' applications that the actions be tried with a jury. Statement

The motion was heard at Victoria on the 23rd of November, 1926, by MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Housser, for the motion: Leave should be granted under rule 2 of the Privy Council Rules. It is a matter of importance as to the circumstances under which as a matter of right a litigant is entitled to a jury: see *Van Hemelryck* v. *New Westminster Construction and Engineering Co.* (1920), 29 B.C. 60; *Van Hemelryck* v. *William Lyall Shipbuilding Co.* (1921), 90 L.J., P.C. 96. Argument

A. H. MacNeill, K.C., contra: This is not a matter of public importance within the rule: see *Ice Delivery Co.* v. *Peers* (1926), 36 B.C. 559 at p. 560; *Doyle* v. *Moirs Limited* (1915), 24 D.L.R. 899; *Terainshi* v. *Canadian Pacific Railway Co.* (1918), 25 B.C. 536; *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234 at p. 239.

Housser, in reply: This case goes further than the ordinary investigation by a doctor of medicine.

MACDONALD, C.J.A.: The application should be refused. MACDONALD, C.J.A.

I must express my surprise that an application of this kind

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should be made at all. It is sought to appeal from an order of this Court refusing to set aside the order of a judge of the Supreme Court, providing for the trial of the action by a judge with a jury, the contention of the applicant being that the action should be tried by a judge alone.

The Rule of Court invoked is marginal rule 429, which provides that trial may be ordered without a jury in any cause requiring prolonged examinations of documents or accounts, or any scientific or local investigation, which cannot, in the opinion of the Court, be conveniently made with a jury, or where the issues are of an intricate or conflicting character.

The action is brought for damages for personal injury, the injury complained of being severe shock, and in the case of the plaintiff Helen Louise Bradshaw, shock which occasioned injury to her voice as a singer. The applicant claims that the defendants will have to make a scientific investigation into the condition of Miss Bradshaw. It is said that it will be an intricate diagnosis involving scientific tests, and that therefore the action cannot be properly tried before a jury. I entirely disagree with

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that contention. In the first place I may say that, in my opinion, the rule was never intended to apply to an investigation of the person; it was passed long before the law permitting examinations of the person in a case of this kind; it is, in my opinion, utterly inappropriate to the subject to which it is proposed to apply it in this case. It has not yet been decided to what extent an examination of the person may be carried, except that we are told that in the Court below it was held that the physicians examining Miss Bradshaw were not entitled to ask her questions.

I do not intend to consider the scope of the legislation. I doubt very much if an examination of the person, such as tests by means of X-rays and other processes of that kind, can be insisted upon. These are all questions which may be left for future decision. In this case the only question involved is one of procedure. It is not disputed that the judge appealed from had power to make the order for trial with a jury; he has exercised his discretion, and on that ground alone the case might be allowed to rest, but I go further, and say that, in my opinion, the rule has no application at all to the alleged subject of

investigation. I think it might be a matter of very grave complaint if this Court should give leave to appeal to the highest Court in the Empire, on a matter involving procedure alone. That is to say, whether an action should be tried with a jury or without a jury.

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

MCPHILLIPS, J.A.: The case is one that in my opinion brings up a very important question indeed, and one bearing upon rule 429 of the Supreme Court, which reads as follows—having the force of statute law:

"The Court or a judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury, or where the issues are of an intricate and complex character."

It should be noticed that the disjunctive "or" is inserted between "scientific or local investigation." Therefore it seems to me that if you come within the meaning of "scientific," we are not embarrassed by the question "local investigation." It would indicate in the latter case, perhaps, that it is referable to property, not the person.

The claim made here is a very large one, and, as I indicated during the argument, certain moneys have been paid into Court which would normally be thought to be sufficient to satisfy any damages which the plaintiffs might ordinarily recover in an action for personal injury. But here extreme claims are made, which could only be acceded to if it were shewn that the injuries were of such a character as would be lasting and permanent in their nature, and, if so, how is that to be determined? Now we have medical evidence advanced that this question can only be determined by most careful examination and enquiry, and highly scientific in its nature, and with that I do not think I am able to at all disagree. It seems to me the case is one that comes within the language of rule 429, and if it does, then the trial should proceed without a jury.

MCPHILLIPS, J.A.

Now what we are asked to do is to grant leave for an appeal to the Privy Council; there is no appeal to the Supreme Court of Canada from an interlocutory order; the rule to be found on

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p. 264 of the Rules of the Court is section 2, subsection (*b*): that an appeal shall lie—

"At the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance [again we have the disjunctive situation] or otherwise, ought to be submitted to His Majesty in Council for decision."

Now as to whether this is of general or public importance, with great respect to all contrary opinion, it seems to me that it is of that nature—that is, within the provision of the rule; the litigating public are governed by the rules and they are entitled to all the advantages of the rules, whatever these advantages may be. You might conjure up cases where there are a long series of actions brought against large operators, factories and so on; practically large industries might be crippled by excessive and ill-founded claims; it might mean the destruction of these industries. The rule committee, acting under their statutory powers, approved this rule of the Supreme Court—a rule of statutory force. The rule, it seems to me, is based on this, that a jury could not, as well as a judge, hear the case and determine it in the interests of justice, where the investigation is one of a scientific nature; and if that is so, then the enforcement of the rule is a constitutional right that the litigant can insist upon, and it thereby becomes a matter of general or public importance. If in the interest of justice something arises—and this rule 429 is passed in the interest of justice—then it becomes a matter of general and public importance. Because once this Court of Appeal lays down in the abstract that any personal injury case must be tried with a jury, although the injury is of such a nature that it transcends all ordinary claims for injuries, as in this case for the loss of the power for operatic singing, and for nervous shock, something that cannot be really seen or tested out—a question that is so abstruse and so hard to find out, entailing the calling of world widely known medical specialists, it necessarily becomes a matter of scientific investigation, and the forum ought to be a judge and not a judge and jury. And then we have the words "or otherwise," which seem to me to enlarge the general application of the Privy Council rule.

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Therefore I consider that this case cannot be deemed to be

one that is not special in its nature, calling for scientific investigation; and being of that opinion, I think it would not be unreasonable to grant leave to appeal to the Privy Council.

Motion refused, McPhillips, J.A. dissenting.

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BROWN v. GREAT NORTHERN RAILWAY COMPANY.

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BROWN v. GREAT NORTHERN RY. CO.

Negligence—Damages—Brood mare killed on railway track—Gate leading to railway right of way left open by stranger—"Wilful leaving" of gate open—Inference to be drawn from wilful opening—Can. Stats. 1919, Cap. 68, Sec. 386.

The plaintiff's brood mare was killed early in the morning by a train on the defendant Company's right of way. The plaintiff's lands where the brood mare was kept adjoined the right of way and a gate between was closed and properly fastened the night before. In an action for damages the trial judge inferred that the gate had been wilfully opened by a stranger within the meaning of section 386 (1) (*b*) of the Railway Act but gave judgment for the plaintiff concluding that he could not infer that the gate had been wilfully left open.

Held, on appeal, reversing the decision of HOWAY, Co. J. (MCPHILLIPS, J.A. dissenting), that the evidence from which the trial judge inferred that the gate leading to the track had been "wilfully opened" by a stranger justified the further inference that it had been "wilfully left open" and the action fails.

Per MACDONALD, C.J.A.: In applying section 386 (1) (*b*) of the Railway Act where there is evidence from which the wilful opening of the gate by a stranger can be inferred, it is not necessary to go further and shew that he wilfully left it open.

APPEAL by defendant from the decision of HOWAY, Co. J. of the 8th of July, 1926, in an action to recover $300 damages for the loss of a brood mare on the defendant Company's right of way. The plaintiff owned a farm which lay on both sides of the defendant's right of way and close to Colebrook station. The plaintiff had gates on both sides so that he could take his cattle from one side of the track to the other. It was found that the gates were in proper order as to fastenings and on the day preceding the accident the gate in question was properly

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fastened with chain and hook. On the night of the 11th of October, 1925, or in the early morning of the 12th the gate was unfastened and four of the plaintiff's animals got through onto the right of way and a brood mare was killed by a passing train in the morning. It was found by the trial judge that the gate was not opened by an officer, agent, employee or contractor of the Railway Company and that the plaintiff had previously added a piece of wire to the fastening to prevent the hook from slipping. It was further found that there was evidence from which it could be inferred that the gate was opened in the early morning of the 12th of October by hunters who were in the vicinity. It was a foggy morning and the section foreman coming along the track at about 8 o'clock found the gate open and drove the three other animals from the right of way through the gate and closed it. It was found by the trial judge that the defendant was liable under sections 274, 275 and 386 of the Railway Act and that the plaintiff should recover the value of the brood mare.

The appeal was argued at Vancouver on the 8th and 9th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

A. H. MacNeill, K.C., for appellant: It is purely a question whether under the Railway Act the Company is responsible notwithstanding the fact that it has taken every precaution. It was found below that the gate was opened by hunters. There is an express section putting the onus on the plaintiff to see that the gate is closed when not in use. We rely on subsections (*b*) and (*e*) of section 386 of the Act: see *Rickards* v. *Lothian* (1913), A.C. 263. As to the word "wilfully" my submission is that it means that it is done "with intention to do it" but it is not malicious: see *B.C. Fruitlands Ltd.* v. *Canadian Northern Pacific Co. and Canadian National Railways* (1923), 1 D.L.R. 104; *In re City Equitable Fire Insurance Co.* (1925), Ch. 407.

Stockton, for respondent: The onus is on the appellant to prove that some stranger "wilfully" left the gate open. The word must be taken in its ordinary meaning and we say there is no evidence to shew that it was a wilful act; it was simply an act of carelessness. Section 406 of the Act throws some light

on the meaning of the word: see MacMurchy & Denison's Railway Law of Canada, 3rd Ed., pp. 426-7 and 684-5. The hunting season did not commence until three days after the accident. There is no evidence to substantiate the inference that the gate was left open by hunters.

MacNeill, replied.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.: The appeal is from a judgment awarding the plaintiff damages for the loss of a horse killed on defendant's railroad. The horse got upon the track, as the learned trial judge found, by reason of the defendant's gate having been wilfully opened and left open by some person or persons unknown.

Section 386 of the Railway Act of Canada, 1919, Cap. 68, casts the liability for damages caused to animals getting upon the railway line, upon the Company, but such liability may be displaced by it, *inter alia,* establishing that the gate was "wilfully opened and left open" by a person other than an officer, etc., of the Company.

There is no dispute about the facts; the fence was a lawful one, and the fastenings of the gate were in accordance with legal requirements. The defendant satisfied the learned judge that the gate had not been opened and left open by any of the defendant's officers, etc., and also that the gate was closed and properly fastened the night before the animal was killed (it was killed at 6 o'clock in the morning), and further that it must have been opened by human agency. The learned judge inferred that it had been wilfully opened by a stranger, but he gave judgment for the plaintiff because he thought he could not infer that it had been wilfully left open. My construction of the section is that upon evidence from which wilful opening by a stranger could be inferred, it is not necessary to go further and shew that he had wilfully left it open, or if I am wrong in this, I think the learned judge might have inferred that it had been wilfully left open from the same evidence which led him to infer that the gate had been wilfully opened.

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I think that the mind which impelled the stranger to open the gate also impelled him to leave it open.

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The above is the only question which was seriously argued at this Bar, and is the only one which I think is deserving of serious notice.

I would allow the appeal.

MARTIN, J.A.: I agree with my brother M. A. MACDONALD.

GALLIHER, J.A.: I have read the evidence carefully and am in entire accord with the finding of the learned trial judge, that some person not connected with either party opened the gate on the night in question. I think the evidence justifies the further inference that it was left open.

The evidence as to the tracks of the horses—the one that was killed, and the other mare and two colts—which led from the field to the Company's right of way through the gate which was found open on the morning of the 12th, and through which the remaining horses were returned by the sectionmen, leaves, I think, no doubt that the horses escaped through the gate. It must have been open before they so escaped and the inference from reading all the evidence is so strong that whoever opened that gate must have left it open and not closed; and closed here means fastened, as according to the evidence the gate here was so constructed as to swing out into the field and would not remain closed until it was fastened.

GALLIHER, J.A.

The Act provides for swing gates and there is no complaint on that head.

The portion of section 386 of the Railway Act which seemed to give the learned judge most trouble was subsection (*b*), wherein it is set out that the Company shall be liable unless they establish that the damage was caused by some person other than an officer, employee, agent or contractor opening and leaving the gate *without some one being at or near such gate to prevent animals from passing through the gate on to the railway,* particularly the words I have italicized. There seems to be only one conclusion to draw, and that is, that the person opening the gate left it open or unfastened, which in this case is equivalent to open and equally so that no one was at or near the gate to prevent the animals from passing out.

Under the circumstances here it would be impossible to

affirmatively prove such a thing, and Parliament does not impose impossibilities and render persons liable if they cannot meet them.

I would allow the appeal.

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MCPHILLIPS, J.A.: I would dismiss this appeal, and I may say that I do so without the slightest hesitation, with every respect for all contrary opinion. The learned trial judge, HOWAY, Co. J., arrived at the proper conclusion in imposing liability upon the Railway Company and I do not see, with great respect to that learned judge, why the result should be considered to be at all "inequitable." Here we have intractable statute law which upon the unquestioned facts imposes liability. The Court has nothing whatever to do with the policy of the statute law, Parliament is alone responsible for this; further, the statute law is eminently just. The situation is this: a railway company is given a charter which entitles it to compulsorily invade and traverse the farm of the plaintiff (respondent) and Parliament rightfully and consistent with elementary justice, imposes responsibilities upon the railway company. Proper and safe fences have to be erected by the railway company and farm crossings provided with proper, safe and secure gates, and the responsibility for all happenings in the way of running down animals that may get upon the track or right of way, by reason of the gates being open, if not the fault of the proprietor or occupant of the lands, is upon the railway company, unless it is shewn to be excused under the provisions of the section (386) of the Canadian Railway Act and subsections which read as follow:

MCPHILLIPS, J.A.

"386. (1) When any horses, sheep, swine or other cattle, whether at large or not, get upon the lands of the company and by reason thereof damage is caused to or by such animal, the person suffering such damage shall be entitled to recover the amount of such damage against the company in any action in any Court of competent jurisdiction unless the company establishes that such damage was caused by reason of,—

(*a*) any person for whose use any farm crossing is furnished, or his servant or agent, or the person claiming such damage or his servant or agent, wilfully or negligently failing to keep the gates at each side of the railway closed when not in use; or,

(*b*) any person other than an officer, agent, employee or contractor of the company wilfully opening and leaving open any gate, on either side of the railway provided for the use of any farm crossing, without

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some one being at or near such gate to prevent animals from passing through the gate on to the railway; or,

(*c*) any person other than an officer, agent, employee or contractor of the company taking down any part of a railway fence; or,

(*d*) any person other than an officer, agent, employee or contractor of the company turning any such animal upon or within the enclosure of any railway, except for the purpose of and while crossing the railway in charge of some competent person using all reasonable care and precaution to avoid accidents; or,

(*e*) any person other than an officer, agent, employee or contractor of the company, except as authorized by this Act, without the consent of the company, riding, leading or driving any such animal or wilfully suffering the same to enter upon any railway, and within the fences, guards and gates thereof.

"(2) Where any such animal, by reason of being at large within half a mile of the intersection of a highway with any railway at rail level contrary to the provisions of section two hundred and seventy-eight, is killed or injured by any train at such point of intersection, the owner of such animal shall not have any right of action against any company in respect of the same being so killed or injured; but contravention of the said section shall not in any other case, nor shall the fact that the company is not guilty of any negligence or breach of duty, prevent any person from recovering damage from the company under this section.

"(3) Nothing in this section shall be construed as relieving any person from the penalties imposed by section 406 of this Act."

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It will be seen that the liability is absolute where it is shewn, as in the present case, that the killing of the mare of the plaintiff, which had got upon the railway track of the Company was due to its being struck and killed by one of the trains of the Railway Company, the defendant. The learned judge in his reasons for judgment said at the commencement thereof, that:

"The facts in this case are scarcely in dispute. The plaintiff's mare was killed near Colebrook in this county on the morning of October 12th, 1925, by a train of the defendant. The animal, with others, had for some weeks been pasturing in the plaintiff's field adjoining the defendant's right of way. There was a farm crossing to give access to this field from other property of the plaintiff. I find that the gate of this crossing was suitable in every respect and provided with the proper fastening, and that on the preceding day and when last seen, it was securely closed. In some way it was opened during the night of October 11-12th, and the plaintiff's animals escaping on to the defendant's right of way therefrom, the mare in question was killed early in the morning. I find further that the gate was not opened by an officer, agent, employee or contractor of the defendant. The value of the animal I find to have been three hundred dollars."

The essential facts have been found in favour of the plaintiff which entitled judgment being given for the plaintiff, which was the judgment given—the defendant having failed to excuse

itself from liability under section 386, subsections (*a*), (*b*), (*c*), (*d*) or (*e*). This was not a case of the animal getting upon an intersection nor upon a highway crossing but from and out of a field of the plaintiff, where it was pasturing, by reason of a gate being open, admitting of the animal making its way into the right of way and track of the defendant.

There was no evidence that the gate was not kept closed by the plaintiff, his servants or agents. Section 275 reads as follows:

"275. The persons for whose use farm crossings are furnished shall keep the gates at each side of the railway closed, when not in use."

In view of section 386 it cannot be said that this is absolute, if so, no action would ever be maintainable by the farmer; he would have to place a sentry at each gate day and night to ensure their being at all times closed save when not in use. It would reduce the statute to an absurdity to construe the Act in that way so that nothing avails the defendant from this to escape liability. The situation is a very plain one indeed, the Railway Company must, to evade the palpable statutory liability shew not alone that a farm crossing gate had been left open but that in being left open, it was left open wilfully. Now this was not shewn in this case, on the other hand, the evidence led by the plaintiff at the trial shewed careful supervision upon the part of the plaintiff, and his servants and the gate was closed on the evening before the accident, the plaintiff himself making the inspection at about six o'clock in the evening, the mare being killed on the following morning.

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I do not think that it is at all necessary to further enlarge upon the facts of this case, it can be effectively said that railway companies are by statute law insurers for all damages caused to animals getting on the lands and track of the railways—it is a statutory contract made by Parliament in favour of the owners of the animals and the only possible escape for the railway companies is to establish that the damages were caused by some one or more of the happenings set forth in subsections (*a*), (*b*), (*c*), (*d*) and (*e*), to section 386 of the Railway Act. The Railway Company relied upon the statute, but failed to establish the defence. In *Lennard's Carrying Company, Limited* v. *Asiatic Petroleum Company, Limited* (1915), A.C. 705, Lord Dunedin

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at pp. 715-6 said, speaking of section 502 of the Merchant Shipping Act, 1894, and the analogy with the present case is complete:

"The parties who plead this 502nd section must bring themselves within its terms; and therefore the question is, have the company freed themselves. . . ."

And in the *Royal Exchange Assurance Corporation* v. *Kingsley Navigation Co.* (1923), 92 L.J., P.C. 111, Lord Parmoor at p. 115, said:

"It has been held under this section that parties who plead the section must bring themselves within its terms, and that the whole onus lies on the shipowner . . . . "

MCPHILLIPS, J.A.

and that is exactly the position of the Railway Company, the defendant in the present case. This the defendant did not shew in the Court below, it therefore followed that there could be but one result, and that was judgment for the plaintiff. I am indeed, surprised at the hardihood of the Railway Company launching an appeal in this case—it is an attempt to fly in the very teeth of the statute. The Court must not legislate, and what is asked here is, to absolve the defendant from a liability imposed in the plainest terms by Parliament. This would mean legislation. It is, of course, beyond the power of this Court to legislate—it is the entry into a domain that is not ours.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: While the main facts are not in dispute, opinion may differ on the proper inferences to be drawn. After careful consideration, I am not prepared to differ from the findings of the learned trial judge.

Just how the gate was opened is not free from doubt. Much depends on the evidence in respect to the wire which was attached by the respondent to the chain used in fastening the gate, for additional security. If the chain was secured by this wire on the evening before the accident, the gate must have been opened by the hand of man; not by animals rubbing against it with head or body. The respondent can not complain if we accept, as I do accept, the statement made by him contained in a report given to the claims agent shortly after the occurrence and before his mind was directed to the issues in the action. In the statement referred to, which he read over before signing, he stated:

"I was over at this gate the evening of the 11th of October [just before the accident] and the gate was securely fastened with the chain and wire then."

At the trial he said he was wrong in saying that it was fastened with the wire at that time. I am inclined to think he subconsciously reached this view persuading himself it was correct after he understood its bearing on the issues.

Who opened the gate? Servants of the Company would have no occasion to do so, and this possibility was negatived as far as possible by evidence. It was not opened by the respondent or his employees. I think, notwithstanding that the weather was foggy, making it improbable that many would be moving about, that it was the act of a stranger passing through for some purpose of his own. Under section 386 (1) and subsection (*b*) of chapter 68, Can. Stats. 1919, the onus of proving that fact is on the appellant. But that onus can be discharged by establishing sufficient facts from which an inference may be properly drawn. The only inference consistent with the facts is that it was the act of a stranger.

The next point is this: was it a wilful act? As Romer, J. points out in *In re City Equitable Fire Insurance Co.* (1925), Ch. 407 at p. 434: MACDONALD, J.A.

"It is difficult to lay down any general definition of 'wilful.' The word is relative, and each case must depend on its own particular circumstances."

To carelessly leave a gate in a barnyard open, might not be wilful as the mind would not be directed to dangerous consequences. It is quite different where a gate leading to a railway track in constant use is concerned, adjoining a farm where it must be presumed every one knows stock is likely to be in the fields. The act involved a wilful disregard of consequences.

On these findings the appellant is within the exceptions contained in subsection (*b*) of section 386 of the Railway Act.

With great respect, while agreeing with the findings of fact below, I think they point to a different conclusion in law. Subsection (*b*) referred to should receive a natural construction and I see no difficulty in construing it from the fact that the appellant to escape liability must prove not only that it was wilfully opened, but that it was left open without some person being there to prevent animals from passing through. All this follows as a natural inference from the findings that the gate

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was wilfully opened and the further fact that it was found open in the morning with no one standing on guard.

I would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. H. MacNeill.*
Solicitor for respondent: *R. P. Stockton.*

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Criminal law—Sale of liquor—Venue—Sale made in one county—Trial and conviction by justice of the peace in another county—Jurisdiction—Certiorari—Appeal.

An accused was convicted of selling liquor contrary to the provisions of the Government Liquor Act by a justice of the peace at Alert Bay in the county of Vancouver, the offence having been committed at Hardy Bay in the county of Nanaimo. A motion by the accused for a writ of *certiorari* on the ground that the justice of the peace had no jurisdiction was refused.

Held, on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that there never was either by custom or statute a local venue in cases before a justice of the peace in this Province and the appeal should be dismissed.

Statement

APPEAL by accused from the refusal of a writ of *certiorari* by MACDONALD, J. on the 16th of September, 1926, on a conviction by W. M. Halliday a justice of the peace at Alert Bay in the county of Vancouver on a charge of selling liquor. The offence was committed at Hardy Bay in the county of Nanaimo and the accused was brought to Alert Bay, a distance of 26 miles and tried there. An appeal was taken on the ground that the justice of the peace at Alert Bay had no jurisdiction to try the accused for an offence that was committed in another county.

The appeal was argued at Vancouver on the 5th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Orr, for appellant: If the offence took place outside his county the justice of the peace has no jurisdiction. The counties are defined by Act of Parliament: see R.S.B.C. 1924, Cap. 50, and it is for all purposes relating to the administration of justice. An accused is entitled to be tried in his own county. We say there is a local venue. The question is discussed in *Regina* v. *Malott* (1885), 1 B.C. (Part II.) 207 and on appeal (1886), *ib.* 212.

Robert Smith, for the Crown: Hardy Bay is 26 miles from Alert Bay, and the question of convenience must be considered: see *Rex* v. *McKeown* (1912), 20 Can. C.C. 492. We admit there are counties defined by the Act but on the question of local venue *Regina* v. *Malott* (1885), 1 B.C. (Part II.) 207 is in our favour.

Argument

Orr, in reply: That there is a local venue see *Rex* v. *Brady* (1914), 20 B.C. 217; *Langwith* v. *Dawson et al.* (1879), 30 U.C.C.P. 375. The Counties Definition Act was Cap. 10 of the British Columbia Statutes, 1895.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.: The accused was convicted of selling liquor contrary to the Government Liquor Act. The offence was committed at Hardy Bay in the County of Nanaimo; the trial took place at Alert Bay in the County of Vancouver. The magistrate's commission covers the whole Province and is not limited to any county. The Government Liquor Act makes it an offence to sell liquor within the Province. *Certiorari* proceedings were taken at appellant's instance before a judge of the Supreme Court, who refused the motion. This appeal is from that refusal.

MACDONALD, C.J.A.

The appellant's contention is that the accused could not be tried out of the County of Nanaimo. In other words, that the magistrate had no power to try him in the County of Vancouver since the offence was not committed in that county. The legislation bearing upon the question, other than that referred to above, is contained in the following Acts:

The Interpretation Act, Cap. 1, Sec. 23, Subsec. (10), R.S.B.C. 1924, which reads as follows:

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"If anything is directed to be done by or before a magistrate or other public functionary or officer, it shall be done by or before one whose jurisdiction or power extends to the place where such thing is to be done."

What the magistrate here was required to do under the Government Liquor Act was to try the accused for the offence charged in the information, and to pronounce a proper sentence. That subsection says that that shall be done before one whose jurisdiction extends to the place where such thing, namely, such trial, is to take place. Now the magistrate's jurisdiction clearly extended to the place where this trial took place. The next statute and the one which is relied upon by the appellant, is section 5, subsections (1) and (2) of the Summary Convictions Act, R.S.B.C. 1924, Cap. 245. Subsection (1) provides that the complaint shall be tried by one justice or two or more justices as directed by the Act under which the complaint is laid; and subsection (2) then proceeds:

"If there is no such direction in any Act or law, then the 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: Provided that everyone who aids, abets . . . may be proceeded against and convicted, either in the territorial division or place where the principal offender may be convicted, or in that in which the offence of aiding . . . was committed."

MACDONALD, C.J.A.

It was contended by the appellant that this reference to territorial divisions means the divisions into counties, and that those two subsections shew that the Legislature meant that the principal offender should be tried in his own county though the abettor might be tried in another.

When we consider that some magistrates in the Province were appointed for particular counties and even for cities, while others were appointed for the whole Province, one can see the reason for the distinction drawn in said subsection (2). Moreover, the Summary Convictions Act, subsection (1) refers only to the number of justices who may sit on the trial, and subsection (2) was meant to meet a case in which the justice had a more limited territorial jurisdiction than the one who tried the appellant enjoys.

As the question for our decision, in my opinion, is one which is to be decided on the legislation of the Province, and as that legislation has received no construction applicable to this case in the Courts, the cases cited to us, which have no relation to such

legislation, are inapplicable, and in my opinion, not useful. The question is one of local venue and there never was, either by custom or statute, a local venue in cases before magistrates in this Province.

I would dismiss the appeal.

MARTIN, J.A.: This appeal should, I think, be dismissed upon the short ground that the common law rule requiring a jury to be drawn *de vicineto* does not apply to the present case which is a conviction by a magistrate acting under the Provincial statutes in question, and for that reason the *ratio* of the decision of the former Full Court in *Reg.* v. *Malott* (1886), 1 B.C. (Part II.) 212, being a trial by jury in a capital case, does not support the appellant.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would allow the appeal. It would only be intractable statute law that would propel me to hold that an accused person charged with the offence of selling liquor could be tried for the offence at some remote point in the Province far from where the alleged offence is claimed to be committed and without the boundaries of the county where committed. I fail to find any apt words in any legislative enactment that would denude the subject of an inalienable right that might almost be said to have been existent from time immemorial. To give adhesion to the holding of the Court below would be the denial, in my opinion, of elementary justice, and may well be stated to be a determination against natural justice. If that which has been decided is to be affirmed it means that in this Province of British Columbia an accused person charged with an offence of a *quasi*-criminal nature, namely, an offence under the Government Liquor Act (R.S.B.C. 1924, Cap. 146), or for that matter any offence under a Provincial statute, may be taken right across this Province, *viz.*, for illustration, from Nanaimo to Fernie, or Prince George to Cranbrook and be there tried the alleged offence taking place in Nanaimo or Prince George, as the case might be. To only state the proposition must be destructive of the contention made in support of the determination of the Court below.

MCPHILLIPS, J.A.

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I might refer to the following statute law as indicative of the opinion I have formed: Firstly, we have the Interpretation Act (R.S.B.C. 1924, Cap. 1, Sec. 23, Subsec. (10)), and the subsection reads as follows:

"If anything is directed to be done by or before a magistrate or other public functionary or officer it shall be done by or before one whose jurisdiction or power extends to the place where such thing is to be done."

It may well be that, as here, the magistrate being a magistrate appointed for the Province has jurisdiction throughout the Province, but it is quite another thing to say that he may drag an alleged offender from one confine to the other confine of the Province and try him for an offence alleged to have been committed at that remote point.

Secondly, section 5 of the Summary Convictions Act, R.S.B.C. 1924, Cap. 245, reads as follows:

"5. (1.) Every complaint and information shall be heard, tried, determined, and adjudged by one justice, or two or more justices, as directed by the Act or law upon which the complaint or information is framed, or by any other Act or law in that behalf.

"(2.) If there is no such direction in any Act or law, then the 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: Provided that every one who aids, abets, counsels, or procures the commission of any offence punishable on summary conviction may be proceeded against and convicted, either in the territorial division or place where the principal offender may be convicted, or in that in which the offence of aiding, abetting, counselling, or procuring was committed."

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The above is a plain indication of the intention of the Legislature that offences shall be tried in the locality where it is claimed they have been committed.

Thirdly, is there any difficulty in determining where that locality is in any particular case? I see none. In the present case the offence is alleged to have been committed in the County of Nanaimo, but the accused person is tried in the County of Vancouver.

Now we have a Counties Definition Act (R.S.B.C. 1924, Cap. 50) and it is by no means recent legislation but goes back many years in the history of the Province, and section 2 thereof reads as follows:

"2. For all purposes relating to the administration of justice, and where it is not otherwise provided in an Act relating to a special branch thereof, and for all other purposes dealt with in any Act wherein the provisions hereof are incorporated or referred to, the Province shall be

divided in the manner hereinafter provided, which divisions shall be known and described as 'counties.'"

So that we have counties defined "For all purposes relating to the administration of justice . . . ." In the administration of justice, then, notice must be taken of counties, and reverting to the Summary Convictions Act, Sec. 5, Subsec. (2), above quoted, under the heading of "Jurisdiction," we have this language:

"The 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," etc.

Does this not import, in fact prescribe, where the complaint must be tried? "May be heard" is here to be read "shall be heard." This is demonstrated by the language which follows in providing that where

"one who aids . . . the commission of any offence . . . may be proceeded against and convicted either in the territorial division or place where the principal offender may be convicted or that in which the offence of aiding, abetting, counselling or procuring was committed."

MCPHILLIPS, J.A.

Then as to the meaning of "territorial division," the words are interpreted in the Summary Convictions Act, and the interpretation is: "means, district, county, union of counties, township, city, town or other Provincial division or place." Statute law must be read as a whole, and read as a whole can there be any doubt but what the statute law unmistakably is that every one proceeded against must be proceeded against "where the matter of the complaint or information arose" (Cap. 245, Sec. 5 (2)) and that would be in the present case in the County of Nanaimo, not in the County of Vancouver? In my opinion there can be no doubt; the magistrate was without jurisdiction in trying the appellant at Alert Bay in the County of Vancouver for an offence alleged to have been committed at Hardy Bay in the County of Nanaimo, and the conviction should be quashed and the fine remitted to the appellant. That is, I would allow the appeal.

MACDONALD, J.A.

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

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McKay, Orr, Vaughan & Scott.*
Solicitor for respondent: *Robert Smith.*

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SCHUBERG v. LOCAL 118, INTERNATIONAL ALLIANCE THEATRICAL STAGE EMPLOYEES *ET AL.*

Trade-union—Theatre—Stage hands—Reduction in number employed—Strike—Picketing—Distribution of handbills—Sandwich-men placarded—"Watching and besetting"—"Fair and reasonable argument"—Injury to theatre business—Violation of legal rights—Cause of action—R.S.B.C. 1924, Cap. 258, Secs. 2 and 3.

SCHUBERG *v.* LOCAL No. 118, INTERNATIONAL ALLIANCE THEATRICAL STAGE EMPLOYEES

The plaintiff, owner and operator of a theatre, reduced the number of his stage hands from seven to five. The stage hands, who were members of the defendant trade-union, went on strike and the plaintiff employed non-union men to fill their places. The trade-union then distributed handbills at the theatre entrance addressed to the public, stating that the plaintiff's theatre "is unfair to organized labour" and they had motor-cars and sandwich-men going up and down before the theatre entrance displaying signs and banners bearing the same statement. The plaintiff recovered judgment in an action for damages and an injunction.

On appeal, the decision of GREGORY, J. was affirmed on an equal division of the Court.

Per MACDONALD, C.J.A., and MCPHILLIPS, J.A.: An actionable wrong was done by the defendants with the object of compelling the plaintiff, by inflicting loss upon him, to do something from which he had a legal right to abstain from doing and the case falls within the principle of *Quinn* v. *Leathem* (1901), A.C. 495. The Act relating to Trade-unions does not protect a labour-union from liability for conspiring to injure an employer in his business and from intentionally injuring him.

Per MARTIN, J.A.: The producing and staging of plays and the sale or purchase of tickets of admission thereto are within section 3 of the Act relating to Trade-unions and what the defendants did is within the expressions (a) "publishing information with regard to a . . . labour grievance or trouble . . . . "; (b) "warning workmen . . . . employees or other persons . . . . not to seek employment in the locality affected . . . . "; and (c) warning the same "from purchasing, buying, or consuming products produced or distributed by . . . . " said employer. The handbill is in effect a direct and unmistakable "warning" to the "theatre going public" against "buying" the "product" that the plaintiff was offering to the public and it was the falling off in the sale of his tickets that he complained of. The expression "communicating of facts" in section 2 of the Act does not require a full statement of all relevant facts *pro* and *con.* nor the exactness required in legal proceedings and the statement that an employer is "unfair to organized labour" is not necessarily merely a statement of opinion; further, the statement that "conditions enjoyed by stage employees for eighteen years are now denied them by

the present management" was one of fact in substance; and the allegation that it had been proved at the trial that the theatre was "unfair to organized labour" had been established. The case comes within the second of the two propositions deduced by Lord Cave in *Sorrell* v. *Smith* (1925), A.C. 700 at p. 712.

Per MACDONALD, J.A.: Theatre-goers are purchasers of products produced or distributed by an employer of labour within the meaning of the latter part of section 3, and it is permissible to warn persons from purchasing or buying products produced by the employer of labour party to a strike or labour grievance and it is not necessary that the warning be based on "fair or reasonable argument" or confined to "communicating facts" as in section 2. The acts complained of were not accompanied by unlawful threats or intimidation, and acts performed pursuant to legislative permission should not be regarded as done maliciously.

APPEAL by defendant from the decision of GREGORY, J. of the 10th of May, 1926 (reported 37 B.C. 284), in an action for damages and for an injunction. The plaintiff, a theatrical manager, carried on business under the name of "Empress Theatre" at 292 Hastings Street East, Vancouver. For a number of years he employed a stage crew of seven men who were members of the defendant trade-union, and on the 28th of December, 1925, he gave notice to one Frank Killian, foreman of the crew, that only five men would be employed as a stage crew after the 11th of January, 1926. The whole stage crew then walked out on strike. The plaintiff hired non-union men to fill their places and the defendant Corporation then proceeded to systematically boycott the plaintiff's business by distributing handbills near the theatre that the theatre managers were unfair to organized labour. Sandwich men walked up and down in front of the theatre doors with the same notice on placards and they had motor-cars going up and down the street in front of the theatre with notices of the same nature in the way of placards shewn in front and behind. An *interim* injunction was granted by MACDONALD, J. on the 4th of March, 1926, and at the conclusion of the trial it was held that the defendant combined to destroy the plaintiff's business by unlawful means for which it was liable in damages at $1,750, and the injunction was made permanent.

Statement

The appeal was argued at Vancouver on the 15th, 18th and 19th of October, 1926, before MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

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Lefeaux, for appellant: We are appealing against the judgment as to liability, but we are not complaining as to the *quantum* of damages if we are liable. We say this was a trade dispute: see Halsbury's Laws of England, Vol. 27, p. 662, sec. 1215; *Conway* v. *Wade* (1909), A.C. 506 at p. 512. This case is governed by sections 2 and 3 of the Trade-unions Act and we say that what we did is within the protection of the statute. There was no intimidation: see *Haile* v. *Lillingstone* (1891), 35 Sol. Jo. 792; *Connor* v. *Kent* (1891), 2 Q.B. 545 at p. 562. The Trade Disputes Act, 1906, is Cap. 47 of 6 Edw. 7, as to which see *Brimelow* v. *Casson* (1924), W.N. 7 at p. 8 and *Dallimore* v. *Williams and Jesson* (1912), 29 T.L.R. 67. Under section 501 of the Criminal Code any person who "besets or watches" the place where one carries on business is committing an offence within the section. The acts complained of do not come within "besetting and watching": see *Ward, Lock, and Co. (Limited)* v. *The Operative Printers' Assistants' Society* (1906), 22 T.L.R. 327 at p. 329; *Fowler* v. *Kibble* (1922), 1 Ch. 487 at pp. 493 and 497. Labour, *i.e.,* ability to work, is a commodity and is entitled to the same consideration as a commodity: see *Quinn* v. *Leathem* (1901), A.C. 495; *Rex ex rel. Barron* v. *Blachsawl* (1925), 3 W.W.R. 344; *Allen* v. *Flood* (1898), A.C. 1 at pp. 120 and 132. As to "inducing not to contract" or "inducing not to deal" see *Mogul Steamship Company* v. *McGregor, Gow & Co.* (1892), A.C. 25 at pp. 43, 52 and 59. We submit there was no malice: see *Ware and De Freville, Ld.* v. *Motor Trade Association* (1921), 3 K.B. 40 at p. 70. If a matter is in your trade interest and malicious, it is nevertheless lawful: see *Sorrell* v. *Smith* (1925), A.C. 700 at p. 711 *et seq.*; *Mogul Steamship Company* v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 at p. 618. "Wrongful action" in such circumstances has to be criminal action: see *Toronto Electric Commissioners* v. *Snider* (1925), 94 L.J., P.C. 116 at p. 123.

Argument

T. G. McLelan, for respondent: If the method employed by the defendant, although peaceful, results in damage then they are liable: see *Reners* v. *The King* (1926), 3 D.L.R. 669; *Rex ex rel. Barron* v. *Blachsawl* (1925), 3 W.W.R. 344. Section 3 of the Trade-unions Act is not applicable to the cir-

cumstances here. They are guilty of a crime the result of which is damage to our business. If it is a criminal act it is a tort resulting in damage for which they are liable. It is also wrongful at common law: see *Ward, Lock & Co. (Limited)* v. *The Operative Printers' Assistants' Society* (1906), 22 T.L.R. 327; *J. Lyons & Sons* v. *Wilkins* (1899), 1 Ch. 255; *Sleuter* v. *Scott* (1915), 21 B.C. 155; *Temperton* v. *Russell* (1893), 1 Q.B. 715. In *Quinn* v. *Leathem* (1901), A.C. 495 at p. 510 it was held that malice is inferred from their actions.

Lefeaux, in reply, referred to *Sorrell* v. *Smith* (1925), A.C. 700 at pp. 735, 745 and 746; *Rex ex rel. Barron* v. *Blachsawl* (1925), 3 W.W.R. 344 at p. 352; *Quinn* v. *Leathem* (1901), A.C. 495 at p. 511 *et seq.*

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.: The facts relied upon to sustain the judgment are in the main not in dispute, and those not admitted were amply proved.

The plaintiff was the owner and manager of a theatre; he desired to cut down his staff by discharging two out of seven; these men were members of the defendant Union; the plaintiff was waited upon by a committee of the Union, and was denied the right to dismiss the men. In other words, they told him that if he persisted in his action of dispensing with the services of the two men, the Union would withdraw all seven. This they did, and when the plaintiff had replaced the men withdrawn by five others who were not members of the Union, the defendants admittedly in collusion together pursued a course of conduct towards the plaintiff which resulted in great loss of business to him. The seven men who had formerly been his employees in combination with the other defendants, beset the theatre from the 18th of January until the 24th of February, when an injunction prevented them from continuing. Men were stationed outside the theatre who distributed handbills to patrons asserting that the plaintiff was unfair to organized labour; they also caused automobiles to parade before the theatre carrying banners upon which similar words were inscribed. The result of this course of conduct was that the plaintiff's receipts fell off very considerably. This conduct was admitted by the defen-

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ants' counsel, who indeed boldly proclaimed and justified it on the ground that the object was to compel the plaintiff to reinstate the members of the Union who had been withdrawn. They do not admit the unlawfulness of the proceeding, they say it was peaceful persuasion; that there was no malice in it, and that the intention was to effect a legitimate object. They further argued that they had the right to injure the plaintiff if by doing so they could bring about their purpose, in what was termed, a peaceful manner.

Even assuming that they conducted themselves in a peaceful manner, the question is, had they the right to bring about what was virtually a boycott of the plaintiff? The defendants' object in distributing the handbills and in parading with banners, was unquestionably to prevent persons from patronizing the theatre. No matter how peaceably this may have been done, and even admitting the absence of actual malice, yet I think it was an actionable wrong done by these defendants, in combination, with the object of compelling the plaintiff by inflicting loss upon him to do something from which he had a legal right to abstain from doing. The case falls clearly within the principle of *Quinn* v. *Leathem* (1901), A.C. 495. It is distinguishable from such cases as *Ward, Lock & Co. (Limited)* v. *The Operative Printers' Assistants' Society* (1906), 22 T.L.R. 327, in which Vaughan Williams, L.J., said, p. 329:

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> "I am of opinion that there is no evidence that the comfort of the plaintiffs or the ordinary enjoyment of the Botolph Printing Works was seriously interfered with by the watching and besetting."

The Act of this Province, Cap. 258, R.S.B.C. 1924, does not assist the defendants. It would protect them only against civil liability for the act of communicating information to workmen, concerning the hiring with the employer and against liability for "persuading or endeavouring to persuade by fair and reasonable argument without unlawful threats, intimidation or other unlawful acts," and against liability for warning workmen against seeking employment from the recreant employer. It does not protect them from liability for conspiring to injure the employer in his business and from intentionally injuring him.

I would dismiss the appeal.

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MARTIN, J.A.: In this case the learned judge has found that "there is practically no dispute about the facts" and that there

was "no evidence of personal malice against the plaintiff," but that the defendants had "watched and beset the plaintiff's place of business," a theatre, with the intention to injure him in that business (which he took over on 15th July, 1925) and so force him to continue to employ a "crew," so-called, of seven stage hands as were formerly employed "for a long period" of years, 18 in fact, the reduction of which crew to five (made by him about five months later, on 28th December, 1925, to take effect on 11th January thereafter) caused a trade dispute between the parties hereto with the result that the defendants, after all the stage hands had left the plaintiff's employ and he had engaged five outsiders to take their places on said 11th January, took certain steps, beginning on the 18th of January, and lasting till the 24th of February, which the learned judge below thus describes:

"The defendants thereupon placed men at the entrance to the theatre who distributed handbills addressed to 'the theatre-going public of Greater Vancouver' stating, *inter alia*, in large type, that, 'The Empress Theatre is unfair to organized labour.' Defendants also caused motor-cars and sandwich-men, displaying signs and banners bearing the same statement, to parade before the entrance to the theatre; they watched and beset the plaintiff's place of business."

These are all the allegedly wrongful acts that are found against them, and they are no more than are admitted in the defence which justifies them as being done for the sole purpose of lawfully furthering defendants' interest in a trade dispute, but they undoubtedly had the result of diminishing the profits of plaintiff's business and so the learned judge awarded him $1,750 as damages therefor, though he claimed that his receipts had fallen off $700 per week for the five weeks of the said disturbance.

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Since much stress was laid upon the handbill its full text should be given, *viz.*:

"It is Illegal to Boycott but this is to
inform the
THEATRE GOING PUBLIC
of
GREATER VANCOUVER
That
THE EMPRESS THEATRE
Is Unfair
to
ORGANIZED LABOR.
Conditions enjoyed by the Stage Employees
for eighteen years are now denied
them by the present management.
Local No. 118, I.A.T.S.E."

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It is to be noted that the learned judge has not found, nor is there evidence to support a finding, that the plaintiff was boycotted or that there was violence or intimidation or that any disturbance involving a breach of the peace was created by defendants' actions, nor was there any breach of contract. The extent of the number of defendants' men at the entrance to the plaintiff's theatre is thus limited by the plaintiff himself:

> "There was always during the boycott period one to three of our former stage employees or other stage employees, standing out on the curb during the whole time after the doors were open to the public."

In addition he relies on one particular incident, but that was explained satisfactorily and the learned judge below properly attached no importance to it, and plaintiff admits that (except that one incident) he had no complaints from patrons, "most of it was joking and making fun." In my opinion all that happened could not properly be said to constitute a nuisance at common law and at most it was a case of peaceful picketing.

The defendants largely rely upon the rights acquired under our "Act relating to Trade-unions," Cap. 258, R.S.B.C. 1924, Secs. 2 and 3, which it is submitted are essentially the same (but with additions) as those acquired by the effect of the provisions of the English Trade Disputes Act, 1906, Cap. 47, amending the Conspiracy and Protection of Property Act, 1875, Cap. 86. Section 2 of our Act extends not only to trades-unions and their officers, members, agents or servants but also to "any other person" and frees them from liability "for communicating to any workman, artisan, labourer, employee, or person (*i.e.*, to all the world) facts respecting employment or hiring by or with any employer or producer, etc., of the products of labour, or for persuading or endeavouring to persuade by fair or reasonable argument, without lawful threats, intimidation or other unlawful acts, such workman . . . employee or person" not to renew expired contracts, or to refuse to become the employee or customer of any such employer or producer. This goes very far, but the next section 3 goes still further and relieves the same persons from liability "for publishing information with regard to a strike or a lock-out . . . or other labour grievance or trouble, or for warning workmen, artisans, labourers or employees or other persons against seeking employment in the locality affected" or "from purchasing, buying or consuming

products produced or distributed by an employer being a party to the . . . labour grievance or trouble during its continuance." The producing and the staging of plays and the sale or purchase of tickets of admission thereto are unquestionably within this section; and what was done by the defendants here is equally, to my mind, within its three expressions, *viz.*, (a) publishing information with regard to . . . a labour grievance or trouble"; (b) "warning workmen . . . employees or other persons not to seek employment in the locality affected"; and (c) warning the same "from purchasing, buying or consuming products produced or distributed by" said employer. The much-relied-on handbill is, in effect, a direct and unmistakable "warning" to the "theatre going public" against "buying" the "product" that the plaintiff was offering to the public and it is the falling off in the sale of his tickets that he complains of. It must also in practice be the case that the publication of the "information" and "warning" will be primarily given "in the locality affected," otherwise it would be largely ineffective and the specific rights conferred by the statute would be considerably frustrated if it were unwarrantably, as I think, construed to authorize only acts done outside of that locality: these authorized appeals to the members, friends and supporters of organized labour, or the uninformed public in general, must in reason be intended to be addressed to them where they will be most effective, *i.e.*, on the very scene of the "labour grievance or trouble" itself—its *locus* or locality and surrounding neighbourhood. Furthermore, there is no limitation set upon the means used to "publish" the "information" or "warning" (which may be by handbills, signs, billboards, banners or other forms of advertisement) or the number of persons who may act in concert to that authorized end, and in such case I am, with all respect, unable to see how the element of criminal conspiracy enters into the matter, and as already noted, no intimidation, threats or other unlawful acts have been found: the general intention of the section might almost be summarized as one to authorize the resort to means which will induce the public at large to interest itself in the trade dispute and so bring pressure to bear upon one or both of the disputants: that it is intended to be remedial to and confer important rights upon "labour" is evident from

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the fact that the rights of "publishing" and "warning" and freedom from liability for their consequences, are bestowed upon "labour" alone and not upon the employer, and so the section must be construed in that significant light.

Such being my view of section 3, there is no necessity of giving here the full results of the elaborate study of section 2 that I have made thereof, and I shall content myself with observing, with all due respect to other opinions, first, that the expression "communicating facts" is a loose one and does not require the full statement of all relevant facts *pro* and *con.*, nor with that exactness which is required in legal proceedings; such a requirement would be obviously beyond reasonable contemplation in the course of a trade dispute with its unavoidable creation of heated minds and acrimonious feelings; second, that a statement that an employer is "unfair to organized labour" is not necessarily "an opinion merely," as was found below, but if it is established by evidence it becomes a fact *ab initio* and one of paramount consequence; third, that this view is supported by the permission given to resort to persuasion by fair or reasonable argument, and once the door is opened to persuasion and argument it is an extremely difficult, if not manifestly impossible thing to say what constitutes a fair and reasonable limitation to set thereto; I do not think any two minds could be got to agree upon the application of an exact boundary to argument and persuasion upon the rights or wrongs of a labour dispute; and fourth, that I regard the statement that "conditions enjoyed by the stage employees for eighteen years are now denied them by the present management" as one of fact in substance, though indefinite in detail, which was established by evidence at the trial.

I have not overlooked the submission of defendants' counsel that it was proved as a fact at the trial that the theatre was "unfair to organized labour," and on this there is no finding by the learned judge below, he not passing upon it as being "one of opinion merely" as already noted. I have, however, felt it to be my duty to consider carefully this allegation, with the result, after a close perusal and re-perusal of all the evidence in the case, that I think it has been established, and the reason given by the plaintiff for reducing his stage "crew" from seven

to five is not satisfactory to me in view of the evidence adduced by the defendants in support of their feeling of "unfairness," which is something more than the assertion of or reliance on either side upon strict legal rights. The testimony of several witnesses shews that the reduction of the staff threw additional burdens upon the reduced members of it, and that the retention of the full crew was a necessity for the proper production of the plays that were then being produced in a stock theatre of that description, and the fact that these conditions had been recognized for eighteen years as fair and just between master and servant and adopted by other theatres in Vancouver of a like class strengthens this view. Simply for an employer to reduce a very long existing staff so as to make more money by cutting down expenses in a business which he says was paying before the dispute is not of a sufficient reason to prevent the defendants from reasonably maintaining that such an act was "unfair" upon them in its oppressive results, in the wide and true sense of the term as applied to the relations that ought to exist between employer and employed, even though strictly within the letter of the law. It is in recognition indeed of higher rights than mere strict legal powers under labour contracts that caused the Legislature of this Province to pass in 1918 the Minimum Wage for Women Act, Cap. 56, now Cap. 173 of R.S.B.C. 1924, to prevent the oppression of working women by "sweating" and otherwise, section 5 thereof providing in part:

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> "It shall be the duty of the Board to ascertain the wages paid and the hours and conditions of labour and employment in the various occupations, trades, and industries in which females are employed in this Province, and to fix the minimum wage, the maximum hours, and such conditions of labour and employment as in the opinion of the Board seem necessary or expedient for the welfare of employees . . . ."

And since then the Male Minimum Wage Act of 1925, Cap. 32 has been passed, and both of these statutes are aimed at remedying conditions in labour which while legal as a matter of contract between master and servant were yet felt to be so "unfair" in the wider interest of the public that they called for the intervention of Parliament and that there are other conditions which would become unfair in a popular and yet true sense by the unjustifiable assertion of legal rights is beyond question.

Such words indeed as "intimidate," "wrongful," "legitimate"

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and also obviously I think, "unfair" are not words of art but "of common speech and everyday use, and must receive therefore a reasonable and sensible construction according to the circumstances of the case as they arise from time to time," and "looking at the course of legislation and keeping in mind the changing temper of the times on this subject," as the Court of Crown Cases Reserved put it in *Connor* v. *Riston* (1891), 7 T.L.R. 650, and considering also the observations of Lord Dunedin in *Sorrell* v. *Smith* (1925), A.C. 700 at p. 717, pointing out that a judge is not always "able to give a strict legal definition" of words to a jury yet they may decide between two alternatives by "that inner standard of right and wrong which is not exactly conscience but which I think is best expressed by the French term *'for interieur.'*"

The conclusions I have reached after a lengthy consideration of the matter is that the defendants are justified in what they did by said section 3, apart from their additional invocation of section 2, and I prefer to base my opinion upon our statute which is not the same in important respects as the English statutes and is more favourable to the defendants than they are,

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but even if they were identical the general and main effect of the many English cases which have been cited, and which I shall not attempt to review (because as Lord Dunedin says in *Sorrell* v. *Smith* (1925), A.C. 700, 717 "it would be an impossible task to reconcile either the decisions or the *dicta*") would be to sustain, in my opinion, the clear and able submission of the appellants' counsel. Out of respect to the learned judge, however, I shall refer to a recent decision of the House of Lords in said *Sorrell* v. *Smith* and *Rex ex rel. Barron* v. *Blachsawl* (1925), 21 Alta. L.R. 580; 3 W.W.R. 344; which are specially relied upon by him, and to *Reners* v. *The King* (1926), S.C.R. 499, which was pressed upon us by respondent's counsel. As to the *Sorrell* case wherein all relevant authorities are considered, Lord Cave, at p. 712 (Lord Atkinson concurring), after referring to "the famous trilogy of cases" there cited (*Mogul Steamship Company* v. *McGregor, Gow & Co.* (1892), A.C. 25; *Allen* v. *Flood* (1898), A.C. 1 and *Quinn* v. *Leathem* (1901), A.C. 495) deduces these two propositions:

"(1.) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.

"(2.) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.

"The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken."

Lord Buckmaster, at p. 748, says that "the onus is not on the defendant to justify but on the plaintiff to prove that the act was spiteful and malicious."

Since the case at Bar comes within the second proposition on the facts before us the decision of the House of Lords assists the defendants and not the plaintiff.

Then as to the *Blachsawl* and *Reners* cases, the first being a decision of the Appellate Court of Alberta and the latter of the Supreme Court of Canada on section 501 of the Criminal Code, I am unable to apprehend what assistance is to be derived in this civil case from decisions on criminal offences in which very different considerations arise and in which the accused did not have the benefit of any statute similar to our said Trade-unions Act (Cap. 258) which is conceded to be *intra vires* of the powers of this Province under the B.N.A. Act. At p. 356 of the *Blachsawl* case Mr. Justice Beck points out the distinction between that case and *Sorrell* v. *Smith,* noting thereon (1) "That it was a civil case," and (3) the existence of a "special statutory enactment" therein which is exactly what we have here, and it supplies here, on the facts, that defence of "lawful authority" which the same learned judge contemplated on p. 355, and which the said section of the Code in its opening provisions is careful to preserve by only striking at acts done "wrongfully and without lawful authority," thereby recognizing the effect of Provincial statutes dealing with the property and civil rights of master and servant. The *Renners* case is based upon the existence of common nuisance or an unlawful assembly both of which elements are absent from the case at Bar, and one has only to read the facts set out in the judgment to see how greatly they differ from those herein, quite apart from the existence of our said special Act: the omission from our Criminal Code of anything corresponding to the English statute is noted on p. 505, but in this civil action we have a statute

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which goes further than the English one to justify the defendants; and at the same page, the Supreme Court noted the concurrence of certain "great judges" in England

"that it was necessary to establish, in one way or another, that the watching and besetting was done wrongfully and without legal authority."

And at p. 506 it is said:

" . . . . the present question . . . . depends upon its own facts, except in so far as they affirm, what is evident by the statute itself, that if picketing be carried on in a manner to create a nuisance, or otherwise unlawfully, it constitutes an offence within the meaning of the statute."

The facts upon which those defendants were convicted are thus recapitulated at the close of the judgment, p. 508:

"The numbers of men who assembled, their distribution about the premises, including the company's property, their attendance there by day and by night, the fires, the shouting, their reception of the police, their threats and conduct when the police approached, afford cogent evidence, not only of a nuisance, but also of an unlawful assembly."

How such a case so far removed in its facts from the restrained conduct of the defendants herein can assist the present plaintiff I confess I am unable to apprehend.

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The result is that in my opinion this appeal should be allowed, because the defendants have lawfully made use of the rights conferred upon them by our said statute in furtherance of their business interests, *i.e.*, the sale of their commodity called labour, as to which it is well observed by Sir James Stephen in his History of Criminal Law of England (1883), Vol. III., p. 212, after considering *pro* and *con.* some objections that had been raised in certain quarters against the rise and operation of trade-unions:

"However this may have been, two Acts were passed in 1824 and 1825 which set the whole of the law on the subject on an entirely new basis. They represented and were based upon the view that labour, like other commodities, was to be bought and sold according to the ordinary rules of trade; every one was to be free, not only to buy and sell as he chose, but to consult with others as to the terms on which he would do so. This was the essence of the Act 5 Geo. 4, c. 95."

If the subject of "labour trouble," as our statute hath it, be approached in this historic light it will be freed from much difficulty, especially if the wise injunction of the Court of Crown Cases Reserved hereinbefore recited be not overlooked.

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MCPHILLIPS, J.A.: This is an appeal that calls for the consideration of An Act relating to Trade-unions, Cap. 258, R.S.B.C. 1924.

The appellants through their counsel Mr. *Lefeaux,* who delivered a very able argument in support of the appeal, submitted most persuasively, but not, to me, convincingly, that the statute upon the facts of the case constituted complete immunity for that which was done in the present case. I am in complete agreement with the learned trial judge, Mr. Justice GREGORY, in his findings of fact and conclusions of law; in reviewing the facts the learned judge said:

"There is practically no dispute about the facts in this case and shortly stated are that the plaintiff carries on business under the name of 'Empress Theatre.' At the time of the acts complained of he was the sole owner of the business. He had no formal contract with the defendants or anybody purporting to act for them. Mr. Harrington's statement that plaintiff said the contract would be the same as that with his former firm, being disputed by the plaintiff is not satisfactorily proved.

"For a long period the Empress Theatre had employed seven stage hands. Plaintiff gave notice that he would, after a named date, employ only five. This was unsatisfactory to the stage hands and to the defendants and the stage hands were called out, or walked out. Plaintiff employed five outsiders and the defendants thereupon placed men at the entrance of the theatre who distributed handbills addressed to the theatre going public of Greater Vancouver stating, *inter alia,* in large type, that 'The Empress Theatre is unfair to organized labour.' Defendants also caused motor-cars and sandwich-men, displaying signs and banners bearing the same statement, to parade before the entrance to the theatre; they watched and beset the plaintiff's place of business.

"I find as a fact, that these acts were all done with the intention of injuring the plaintiff's business and in the hope that to save himself from such injury he would return to the employment of seven stage hands as desired by the Vancouver Theatrical Federation, the body with whom the contract, if any, would have been made. Defendants' intention was to injure plaintiff; its object was to force him to conform to the Vancouver Theatrical Federation's views of the proper number of stage hands to be employed at the Empress Theatre. Apart from this, I find no evidence of any personal malice against the plaintiff."

Here there is no attempt made to deny liability for that which was done, it is admitted that the acts alleged were done, and done with authority, but that they were lawful and in any case the appellants stand absolved therefrom by reason of the statute. Sections 2 and 3, of the Act are the only sections that call for consideration in this appeal, and they read as follows:

"2. No such trade-union or association shall be enjoined, nor shall any officer, member, agent, or servant of such trade-union or association or any other person be enjoined, nor shall it or its funds or any such officer, member, agent, servant, or other person be made liable in damages for communicating to any workman, artisan, labourer, employee, or person

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facts respecting employment or hiring by or with any employer, producer, or consumer or distributer of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-named workman, artisan, labourer, employee, or person, at the expiration of any existing contract, not to renew the same with or to refuse to become the employee or customer of any such employer, producer, consumer, or distributer of the products of labour.

"3. No such trade-union or association, or its officer, member, agent, or servant, or other person, shall be enjoined or liable in damages, nor shall its funds be liable in damages, for publishing information with regard to a strike or lock-out, or proposed or expected strike or lock-out, or other labour grievance or trouble, or for warning workmen, artisans, labourers, or employees or other persons against seeking, or urging workmen, artisans, labourers, employees, or other persons not to seek, employment in the locality affected by such strike, lock-out, labour grievance or trouble, or from purchasing, buying, or consuming products produced or distributed by the employer of labour party to such strike, lock-out, labour grievance or trouble, during its continuance."

It will be seen that there is immunity in communicating facts under section 2 and persuasion by fair and reasonable argument "without unlawful acts." This refines the matter under this section to "facts," and persuasion "by fair and reasonable argument." That which was done here was not confined to facts but a conclusion, a verdict upon undisclosed facts, the handbill reads: "Is unfair to organized labour," and that was what was placed before the theatre-going public at the entrance to the theatre. As to section 3, it in no way assists the appellants as it is confined to immunity for publishing information as to strikes, or expected strikes or lock-outs, or other labour grievances or troubles, and warning workmen or urging them or other persons from seeking employment or from purchasing, or consuming products produced or distributed. I have generally stated the effect of this section—it is a well-known provision—but really is not in any way effective to absolve the appellants here. Again, in connection with this section, as with section 2, that which was done was not "publishing information" at all, it was the statement of a conclusion upon undisclosed facts. That which is not to be forgotten is, that the Legislature in section 2, accentuates in the plainest manner, and in apt words, that the common law is in no way abrogated by the legislation. I would refer to the words,

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" . . . . be made liable in damages for communicating to any workman, artisan, labourer, employee or person facts respecting employment or

hiring by or with any employer, producer, or consumer or distributer of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts. . . ."

Therefore, what is to be inquired into is, what were the acts complained of and which the learned judge gave effect to as being unlawful acts? It would seem to me that the learned judge has in his reasons for judgment succinctly set them forth and they constitute in my opinion unlawful acts and they are as hereinbefore set forth. Here we have besetting and watching, conducted in a manner which was unlawful, and being of that nature it was actionable. *Rex ex rel. Barron* v. *Blachsawl* (1925), 3 W.W.R. 345, was a case of besetting and watching, an unanimous judgment of the Supreme Court of Alberta Appellate Division, an analogous case to the present one. It is true that it is a criminal case and the prosecution was under the Criminal Code (section 501), but the law was generally gone into and I would particularly refer to the judgment of Mr. Justice Beck, whose reasons for judgment were specifically agreed with by Harvey, C.J.A., and Hyndman and Clark, JJ.A. at p. 355:

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"It is set down in 27 Halsbury, tit. 'Trade and Trade Unions,' Sec. 1025, p. 525:

" 'It is the general principle of the common law that a man is entitled to exercise any lawful trade as and where he wills; and the law has always regarded jealously any interference with trade, even at the risk of interference with freedom of contract, as it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the State.'

"See in particular *Lyons & Son* v. *Wilkins* (1898), 1 Ch. 255, at p. 267, 68 L.J., Ch. 146, 79 L.T. 709, 15 T.L.R. 128.

"For this proposition numerous cases are cited. In the case of *Sorrell* v. *Smith* (1925), A.C. 700 (H.L.) a case which 'involved the examination of a large number of authorities including the famous trilogy of cases' in the House of Lords, *Mogul S.S. Co.* v. *McGregor, Gow & Co.* [(1891)], 61 L.J., Q.B. 295, 66 L.T. 1, (1892), A.C. 25; *Allen* v. *Flood* [(1897)], 67 L.J., Q.B. 119, 77 L.T. 717, (1898), A.C. 1, and *Quinn* v. *Leathem* (1901), A.C. 495, 70 L.J., P.C. 76, 85 L.T. 289, 65 J.P. 708, it was held that 'a combination of two or more persons for the purpose of injuring a man in his trade is unlawful and, if it results in damage to him, is actionable.' As to whether combination or conspiracy is an essential was left undecided.

"The question of lawful authority is clearly a question of defence, that is, a question of shewing that something which done without lawful authority is wrongful has in fact, in the particular case, been done with lawful authority."

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MCPHILLIPS, J.A.

Here we have unquestionably, quite apart from the criminal law, the invasion upon the part of the appellants of the common law right the respondent had of carrying on his business without interference on the part of others. To interfere is *per se* actionable and where there is injury the damages will be assessed and imposed against those responsible for the injury. The purpose of the appellants here, was to compel the respondent to employ seven stage hands instead of five only, and it is not denied. I might almost say, that the counsel for the appellants gloried in it and frankly admitted on behalf of his clients full responsibility for their action but strenuously and ably maintained that no liability rested upon his clients therefor. That, of course, is the question to be finally determined. It is exceedingly difficult, in fact, unsafe to rely upon all the English cases since 1906 in determining the question here to be decided, and to indicate this it seems to me that I can best do it by making the following excerpt from the judgment of Mr. Justice Idington in *Reners* v. *The King* (1926), 3 D.L.R. 669 at pp. 672-5: [His Lordship quoted from p. 672, line 13, to p. 675, line 6 from the foot of the page, and continued.]

We have no analogous statute law in British Columbia to the English Trade Disputes Act, 1906, Cap. 47. Our legislation, An Act relating to Trade-unions (Cap. 258, R.S.B.C. 1924), in no way authorizes besetting or picketing or attendance "at or near a house or place where a person resides or works or carries on business or happens to be if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working." Here, unquestionably, the respondent had the legal right to carry on his theatre without interference at the hands of the appellants, the right to engage workmen, and the right to discharge workmen and to employ men belonging to unions or not belonging to unions, to define the number of workmen to be employed at any particular work, in short, do all that any employer of labour is entitled to do. No doubt, though, the employer must provide his employees with a safe place to work, but no question of that character arises here. What was done here was, in my opinion, the invasion of a legal right; the respondent had the right to carry on his business without unlaw-

ful interference, and what the appellants have been found liable for is this—the unlawful interference with the respondent in the exercise of his legal rights and such interference produced injury to the respondent and damages have been rightly assessed and imposed upon the appellants therefor. I do not think I could more fittingly conclude my reasons for judgment in this case than to quote an excerpt from the judgment of Lord Macnaghten in *Quinn* v. *Leathem* (1901), A.C. 495 at pp. 510-11:

"Precisely the same questions arise in this case as arose in *Temperton* v. *Russell* ((1893), 1 Q.B. 715). The answers, I think, must depend on precisely the same considerations. Was *Lumley* v. *Gye* [(1853)], 2 E. & B. 216) rightly decided? I think it was. *Lumley* v. *Gye* was much considered in *Allen* v. *Flood* (1898), A.C. 1. But as it was not directly in question, some of your Lordships thought it better to suspend their judgment. In this case the question arises directly, and it is necessary to express an opinion on the point. Speaking for myself, I have no hesitation in saying that I think the 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.

"The only other question is this: Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. *Gregory* v. *Duke of Brunswick* [(1843)], 6 M. & G. 205, [(1844)], 953 is one authority, and there are others. There are valuable observations on the subject in Erle, J.'s charge to the jury in *Duffield's Case* (1851), 5 Cox, C.C. 404) and *Rowland's Case*, [*ib.*] 436. Those were cases of trade union outrages; but the observations to which I refer are not confined to cases depending on exploded doctrines in regard to restraint of trade. There are also weighty observations to be found in the charge delivered by Lord FitzGerald, then FitzGerald, J., in *Reg.* v. *Parnell and Others* (1881), 14 Cox, C.C. 508. That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of Bowen, L.J., and Lords Bramwell and Hannen in the *Mogul Case* ([(1891)], 23 Q.B.D. 598; (1892), A.C. 25). A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing (as Lord FitzGerald observes) when one man has to defend himself against many combined to do him wrong."

I lay stress upon the words used by Lord Macnaghten upon the question of when there is liability—these are " . . . . on the ground that a violation of legal right committed know-

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ingly is a cause of action . . .” Here we have appellants admitting that they did the acts complained of and still maintaining their right in doing them and attempting to escape liability by pleading the statute, An Act relating to Trade-unions (Cap. 258, R.S.B.C. 1924). It was incumbent upon the appellants as the onus was upon them to establish that they were protected by the terms of the statute; that they failed to do. The “violation of legal right” in the present case is in no way supportable upon the facts of the present case by the statute law pleaded.

I would, for the foregoing reasons, dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: In my opinion this appeal is determined by deciding whether or not the actions complained of on the part of the appellants are within sections 2 and 3 of Cap. 258, R.S.B.C. 1924, an Act relating to Trade-unions. If on the facts disclosed the appellants enjoy immunity under the Act, that ends the matter. Little assistance is obtained from decisions on informations laid arising out of similar or somewhat similar conduct on the part of strikers under section 501 of the Criminal Code. The Provincial Trade-unions Act is *intra vires* and the Federal Act (section 501) does not purport to declare that actions relating to the exercise of civil rights which are legalized by sections 2 and 4 of the Provincial Act are criminal.

The parts of sections 2 and 3 which are applicable, omitting words not material, are as follows: [Already set out in the judgment of MCPHILLIPS, J.A.]

In the English Act, 5 & 6 Edw. VII., Cap. 47, the words “trade dispute” are used. Here we have in section 3 words of similar import, *viz.*, “labour grievance.”

In the case at Bar the facts were as follow: The respondent is a theatrical manager carrying on business at the “Empress Theatre,” Vancouver. Up to January 10th, 1926, he employed a crew of seven stage hands to assist in scene shifting and the various duties connected with back-stage work. Two weeks previously notice was given to the foreman of the stage crew, advising that only five of the seven would be employed after January 11th, 1926. The respondent was not obliged by con-

tract to continue to employ seven men in this work. The unsigned contract produced, said to have been affirmed by a letter of acceptance, would not, in any event, obligate the respondent to continuously engage seven stage hands regardless of his own requirements. If, however, the appellants in caring for the welfare of its members chose to take the position that seven men should be engaged to do certain work instead of five, they may do so and may take means to force compliance with their views provided they do not overstep the limits set by sections 2 and 3 of the Act referred to.

According to the evidence a few of the striking stage employees appeared on the street in motor-cars carrying banners advising the public that the "Empress Theatre" was unfair to organized labour. They distributed handbills in hotels and other places and threw them into motor-cars around the theatre. These handbills read as follows: [Already set out in the judgment of MARTIN, J.A.]

Some of the words were in large type and the whole so arranged as to attract the greatest attention. Further, two or three of them stood on the curb while the doors of the theatre were open to the public distributing the handbills. These men were members of Local Union 118. I do not find from the evidence that any noisy demonstrations occurred or that any conduct was resorted to amounting to a nuisance; in fact, the distribution of the handbills around the theatre and fairly generally throughout the city and the display of banners on motor-cars would appear to be the full extent of their activity.

The question arises—were the foregoing acts permitted by sections 2 and 3 of the Act referred to? If it amounted to no more than "communicating to any person" (I think the word "person" embraces and was intended to embrace, members of the public) facts respecting employment, or if it was simply an effort to persuade the public "by fair or reasonable argument" not to patronize the theatre, section 2 would afford immunity. As the learned trial judge points out, however, the handbills set out not "facts" but opinions. At best it contains mixed facts and opinion, with the facts not fairly stated. A true statement of fact would be that the employer insisted on engaging five men instead of seven to do a certain amount of work. The assertion

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was made that the respondent was "unfair to organized labour." The appellants may have honestly thought so; others might well believe that in the absence of agreement the employer should be at liberty to employ simply the number of men he thought necessary to do the work and no more. I do not agree that the statements contained in the handbills should be regarded as the communication to the public of facts respecting employment. Not a single fact in respect to the labour grievance in question was set out; no one could form from these handbills a true view of the facts giving rise to the dispute.

The next point is—can the statements be regarded as "fair or reasonable argument"? That is for the Court to decide on the facts in each case. This phrase is broader than the "communication of facts." Opinions might be stated if they could be regarded as fair or reasonable argument. The situation would be identical if instead of distributing handbills these members of appellants' Union engaged in conversation with possible patrons of the theatre using the words printed on the handbills. I cannot think that it is fair or reasonable argument for one party to the dispute to say that the other is unfair to organized labour. The purpose of the Act is to enable labour-unions to enlist the sympathy of the public and bring moral pressure to bear on the employer by disseminating facts or by reasonable argument. How can the public appraise the merits of a dispute by having placed before them the opinion of one of the parties thereto as to the conduct of the other without any of the true facts being disclosed to enable those addressed to reach a just conclusion? These handbills might convey all sorts of suggestions not warranted by the true facts. It might be thought that employees were overworked, underpaid, or compelled to work under insanitary conditions or for longer hours than usual. The public could not possibly learn from the handbills that the real cause of the dispute was the effort on the part of the appellants to compel the respondent to employ more men than the work required. How can it be said, having regard to the purpose of the Act, *viz.*, to enlist public sympathy and gain support by "communicating facts" or by engaging in "fair or reasonable argument" that the handbills answer either requirement? This is not to say that handbills can not be distributed. It only

means that their contents must be within the provisions of the Act.

Section 3, however, is more favourable to the appellants. First, I think, it should be held, as pointed out by Russell, J., in *Brimelow* v. *Casson* (1924), W.N. 7 at p. 8:

"that the business of presenting histrionic performances to the public for profit might fairly be described as a trade or industry in which many persons, including actors, were employed."

I think that theatre-goers are the purchasers of products produced or distributed by an employer of labour and are within the meaning of the words used in the latter part of the section. That being so, it is permissible to "warn . . . persons from purchasing, buying or consuming products produced or distributed by the employer of labour party to such strike, lock-out, labour grievance or trouble during its continuance." Warn in respect to what? No details are stipulated as to the nature of, or the supporting facts, if any, to be given as the basis of such warning. It is simply a warning in respect to a labour grievance or trouble during its continuance. The Legislature has, in effect, provided that labour-unions may warn customers of an employer with whom they have differences of the fact that a labour grievance exists. It is anomalous that the same state of facts which fall short of granting immunity under section 2 should be effective for that purpose under section 3, but the appellants have the benefit of both sections. If section 3 standing by itself is unambiguous it is not necessary to resort to section 2 to aid in its interpretation. It is not necessary that the "warning" should be based on "fair or reasonable argument" or confined to "communicating facts" as in section 2. If such was intended these words should have been incorporated in section 3. If the handbills and banners answer the general description of a warning to intending patrons immunity is secured. One might suggest that the warning should not mislead the public as to the true facts—that it should not contain the expression of a biassed opinion or make unwarranted assertions. But these considerations concern the law-making body, not the Courts. I must hold that however crude the means employed, the handbills and banners did convey a warning of the existence of a strike or of a labour grievance and that it

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affords an answer to the respondent's claim. It cannot be said that any one reading these handbills would not receive a warning that a trade dispute was going on. He may not, indeed will not, get the true facts in regard to it but he does get a warning.

I have considered the authorities to which we were referred but do not feel that it is necessary to add anything further, except to say that I do not find that the acts complained of were accompanied by unlawful threats or intimidation, nor do I think (without discussing whether or not the element of malice is an ingredient) that acts performed pursuant to legislative permission should be regarded as done maliciously.

I would allow the appeal.

The Court being equally divided the appeal was dismissed.

Solicitor for appellant: *Bird, Bird & Lefeaux.*
Solicitor for respondent: *J. Lorne Pyke.*

PAYNE v. GAMMON.

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PAYNE v. GAMMON

Administration of estates—Costs—Motion for removal of administrator—Contested—Probate rule 60—Supreme Court Rules, Appendix N—R.S.B.C. 1924, Cap. 5, Sec. 135—R.S.B.C. 1911, Cap. 13, Sec. 27.

The costs of a contested motion for the removal of an adminstrator and the appointment of another should be taxed under Appendix N of the Supreme Court Rules and not as between solicitor and client.

Rule 60 of the Probate Rules of 1925 only applies to non-contentious matters.

APPEAL by W. L. Gammon, administrator of the estate of W. H. Gammon, deceased, from the order of McDONALD, J. of the 13th of July, 1926, ordering that W. L. Gammon personally pay to Alice E. Payne her costs as between solicitor and client of her petition to remove him as administrator and trustee of the said estate. Alice E. Payne obtained judgment against W. L. Gammon as administrator of said estate for $1,157.90 and costs on the 25th of February, 1926. On the petition of Alice E. Payne an order was made by McDONALD, J. on the 29th of April, 1926, removing W. L. Gammon from the office of administrator and trustee for the benefit of creditors of said estate, the costs of and incidental to the motion being reserved. At the instance of the petitioner an order was then made on the 13th of July ordering said W. L. Gammon personally to pay the costs as aforesaid. Statement

The appeal was argued at Vancouver on the 11th and 12th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Brydone-Jack, for appellant: There should have been no costs at all, but if costs are given it should be under Appendix N of the Supreme Court Rules, 1925, p. 245: see *In re Estate of Hugh Magee, Deceased* (1925), 36 B.C. 195.

Bucke, for respondent: Appendix N does not apply to probate matters: see section 62 of the Administration Act. The probate rules do not apply to contentious matters. The caption to the order in council is not a guide. This matter comes under "some Argument

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other service" and should be taxed under Schedules 4 and 5 of Appendix M. Section 135 of Cap. 5, R.S.B.C. 1924, reinstates the 1911 Act as far as insolvent estates are concerned. This petition is not an action within Appendix N.

Brydone-Jack, replied.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.: The appeal is from the order of Mr. Justice MCDONALD which directed that the costs of a motion for the removal of an administrator and the appointment of another in his place should be taxed as between solicitor and client. The new Probate Rules of 1926 were relied upon in support of the order. There is some doubt as to the meaning of these rules, they are headed "Rules in Uncontested Matters," and yet rules 57 and 60 thereof are couched in wider language. Again the Administration Act declares that proceedings under it shall be intituled "In Probate." While I have some doubt as to the result arrived at by the majority of this Court, I shall not dissent, particularly as we decided in *In re Estate of Hugh McGee, Deceased* (1925), 36 B.C. 195, that it is no longer competent in contested proceedings to order that costs should be taxed as between solicitor and client, that practice having become obsolete.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree in allowing this appeal, for the reasons given by my brother GALLIHER.

MARTIN, J.A.

GALLIHER, J.A.: Prior to January 2nd, 1925, there were no separate Probate Rules, but matters in Probate were governed by the Rules of the Supreme Court. At that date Rules in Probate were brought into force, but these rules as the caption specifically states, were for non-contentious business in probate.

Mr. *Bucke* referred us to rule 60, p. 333, of the Rules of 1925, which states that,

"Costs in all probate matters shall be taxed as between solicitor and client unless the Court otherwise directs," etc.

But I think this must be taken as speaking only with regard to non-contentious matters.

The matter here was an application by petition under section

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27 of the Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13, as revised, Cap. 5, Sec. 135 of the Administration of Estates Act, R.S.B.C. 1924, for the removal of Wilsford Lawrence Gammon as administrator of the estate of William Henry Gammon, deceased. It was a contentious matter and as I view it, comes under Appendix N as contended for by Mr. *Brydone-Jack*.

I must confess I find it rather difficult to reconcile certain sections of the Supreme Court Rules, the Probate Rules and statutes to which we have been referred, but have ultimately come to the conclusion above stated.

GALLIHER, J.A.

The appeal should be allowed.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellant: *A. C. Brydone-Jack.*
Solicitor for respondent: *Horace W. Bucke.*

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McGEE v. CLARK

McGEE v. CLARK.

Contract—Mines and minerals—Transfer of claims under agreement—Transferee to do assessment work and pay certain sum when claims sold—Assessment work done for two years—Claims allowed to lapse—Damages—Measure of.

The defendant obtained a transfer of the plaintiff's mineral claim under an agreement that he would pay her $1,000 in the event of his being successful in making a sale of the claim and that he would protect the claim by doing the assessment work until the claim be sold. The claim was worked in conjunction with two adjoining claims for two years and certificates of work were taken out. The defendant then wrote the plaintiff that he intended to abandon the claims as he was of opinion they were of no value. The claims lapsed and were relocated by others. The plaintiff stated she did not receive the defendant's letter as to abandonment. An action for damages was dismissed.

Held, on appeal, reversing the decision of CALDER, Co. J., that the plaintiff was entitled to damages for breach of contract, the measure of damages being the value of the property lost by the plaintiff.

Statement

APPEAL by plaintiff from the decision of CALDER, Co. J. of the 15th of June, 1926. The facts are that one Pete Sawyer, an experienced miner, staked three mineral claims on the 28th of February, 1921, one for himself and the others for two Indian women, and the statutory notice was given the mining recorder that the claims would be worked together. On the 6th of February, 1922, the plaintiff and the other Indian woman transferred their claims to the defendant under separate written agreements the consideration in each case being $1. The defendant agreed to give each of the women $1,000 when a sale of their claims was made and he further agreed that he would do the assessment work and keep the claim in good standing until sold. Sawyer, who was the miner, carried on the work on the three claims and the plaintiff in the course of two years paid out for supplies in carrying on the work about $900, and the certificates of work were taken out for the years 1922 and 1923. At the end of that time the defendant and Sawyer came to the conclusion that the claims were of no value and the defendant then gave notice in writing to the two women that he intended to abandon the properties as they were of no value. The letter to the plaintiff was sent to her by post and Sawyer

delivered the letter addressed to the other Indian woman to her personally. The plaintiff claims that she never received the letter the defendant says he sent her, and did not know the claims were abandoned until the time for assessment work had expired and the claims were relocated.

The appeal was argued at Vancouver on the 9th of November, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

D. J. McAlpine, for appellant: The defendant allowed our claim to run out and we are entitled to damages for loss of a chance for a sale that might be made: see *Chaplin* v. *Hicks* (1911), 2 K.B. 786; *Pell* v. *Shearman* (1855), 10 Ex. 766; *Wilson* v. *Northampton and Banbury Junction Railway Co.* (1874), 9 Chy. App. 279 at p. 285.

Buell, for respondent: The defendant provided the funds for Sawyer to work the properties. They did faithful work for two years and recorded the assessment work. They then concluded the properties were of no value and Sawyer abandoned his own claim with the other two. They proved the claims were of no value whatever. The contract to pay $1,000 is based on a valid claim of saleable value: see *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (1918), 1 K.B. 592 at p. 605; *The Moorcock* (1889), 14 P.D. 64 at p. 68. On mitigation of damages see *Pell* v. *Shearman* (1855), 10 Ex. 766. The trial judge found the claims were of no value and that the plaintiff received the letter of abandonment which the defendant had sent her.

Argument

McAlpine, replied.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.: The defendant obtained a transfer of the plaintiff's mineral claim, Spatsum No. 3, and agreed to pay $1,000 for it in the event of his selling it. He also agreed to keep the assessment work up until a sale should be effected. He grouped the claim with two others and did the assessment work on one of the others for the three. He did no work on the one obtained from the plaintiff. Altogether he spent about $400 on the group. He then determined to abandon the plaintiff's claim by letting it expire in default of the assessment work.

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No notice of this was given to the plaintiff, if indeed notice would have been any protection to her. The result was that the defendant deprived himself of any chance of selling the claim or restoring it to the plaintiff, who knew nothing about the default until after the claim had been forfeited to the Crown. Some months after the abandonment of the claim, his friend Holt restaked it and it is now held by him.

Treating the transfer of the claim as one for sale only and not an actual sale to him his obligation was to keep the claim in good standing until sold and if and when sold, to pay the plaintiff $1,000. What the defendant did was to put it out of his power to make a sale, and as well made the restoration of the claim to the plaintiff impossible by allowing it to be destroyed. There was, therefore, an immediate right of action for breach of contract.

In my opinion the plaintiff is entitled to more than nominal damages. In *Chaplin* v. *Hicks* (1911), 2 K.B. 786, substantial damages were said to be recoverable for merely depriving a contestant for a prize of the chance to compete. Here we have a very much stronger case, a case of the deprivation of the plaintiff of her mineral claim by default on the defendant's part.

MACDONALD, C.J.A.

An unexplored mineral claim is of speculative value. Its value can only be determined by what it will bring in the speculative market. Its real value cannot be ascertained except by the expenditure of money in exploitation. Although the defendant says that this claim is worthless, he has no personal knowledge of it at all. He did no work on it nor did he examine it. The only evidence he has offered of its lack of value was that of Sawyer, who had an adjoining claim and who said that he abandoned it because he had work to do at home. That does not help the defendant. In addition we have the evidence of an engineer sent up to the neighbourhood of the claim to enable him to give evidence at the trial. His evidence shews the character of his examination. He spent a few hours in the neighbourhood, he examined a claim which he thought was the plaintiff's and which turns out not to have been her claim at all; he examined a claim which was relocated since the forfeiture, known as Bluebird No. 3, and assumed that that claim had been

Spatsum No. 3, and was located on the same ground, whereas Bluebird No. 1 was the claim which had been relocated on the ground formerly occupied by Spatsum No. 3. This engineer says that he examined the territory in a radius of three miles, and that in his opinion there was no mineral there. That statement indicates the character and the absence of value in his evidence. There being therefore no evidence at all of the market value of Spatsum No. 3, I think I must pay some attention to the value which the parties themselves placed upon the chances of sale, *viz.*, $1,000.

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There is the fact also that defendant's friend Holt thought it worth restaking and that plaintiff was deprived of her property. Unfortunately, the plaintiff has offered no evidence of value and in these circumstances I would assess the damages at $50. The plaintiff should have costs here and below.

MARTIN, J.A.: I agree with my brother GALLIHER.

MARTIN, J.A.

GALLIHER, J.A.: I think the appeal must be allowed.

The defendant entered into an agreement with the plaintiff by which he was to pay her $1,000 for her mineral claim so soon as he should effect a sale of same, and further agreed to keep the claim alive until such sale was made by doing the annual assessment work. Mr. *Buell* suggests that there should be an implied term with regard to this last stipulation to the effect that should the claim in working it prove valueless the defendant should not be called upon to continue doing the assessment work, claiming that it could never have been in the minds of the parties that under such circumstances assessment work should continue. But should that be so? The development of what are termed prospects in mineral claims is largely a gamble, and the present claim might have shewn up so as to command a price of, say, $10,000. In such case the defendant would have to pay the plaintiff $1,000 and he would be out, even supposing he had carried on development until he had expended $500—that sum—and the cost of obtaining a Crown grant, say another $100 or $200, in all including the payment of, say, $1,700. The balance would be the profit he took the chance of making and for which no doubt he gave his promise to keep the claim alive. Looking at it from this standpoint, there is nothing

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unreasonable or improbable in his having agreed in the words set out, and in my view, there should be no qualification of them. He, having broken his contract by allowing the claim to lapse, and seeing it is now staked by another, and the plaintiff having lost her claim, she is entitled to damages.

I do not think the $1,000 mentioned in the agreement and claimed by her can be taken as the measure of damages. It should be, I think, the value of the property she lost by reason of the breach of contract. She gave no evidence as to this but from the evidence given by the other side, it would strike me the property is of little or no value.

GALLIHER, J.A.

I would, however, agree with my brothers in fixing her damages at $50.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement that the appeal be allowed in part by a reduction of the damages to the sum of $50.

MACDONALD, J.A.

MACDONALD, J.A.: I was of opinion at the close of the hearing that the appeal should be allowed, but the question of consequential relief presented some difficulty. Further consideration confirms my view that the respondent could not by destroying, so to speak, the subject-matter of the contract (allowing the claim to lapse) prevent the accrual of a right of action by the appellant. The appellant did not assent to the abandonment. It was suggested that the agent Sawyer did so. He was not, however, her agent to assent on her behalf to the abandonment of a legal right. The agreement may be improvident but that is not an answer. By the agreement the appellant had the right to be kept in the position where she had a chance of obtaining the promised payment in the event of a sale. One party to a contract cannot alter that situation or destroy the opportunity given by the contract.

As to consequential relief, it must be based upon breach of contract, and the resultant damages proven. None were proven and only nominal damages can be obtained. But as pointed out by the Earl of Halsbury in *The "Mediana"* (1900), A.C. 113 at p. 116 the term "nominal damages" does not necessarily mean "small damages." I would place the amount at $50.

Appeal allowed.

Solicitor for appellant: *C. H. Pitts.*
Solicitor for respondent: *W. S. Buell.*

QUEEN INSURANCE COMPANY OF AMERICA AND RITHET CONSOLIDATED LIMITED v. BRITISH TRADERS INSURANCE COMPANY LIMITED.

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QUEEN INSURANCE CO. OF AMERICA *v.* BRITISH TRADERS INSURANCE CO.

Insurance, fire — Reinsurance — Contract — Whether completed — When effective.

The plaintiff insured N. for $67,000 but it being a rule of the Company that each risk be limited to $37,000, the balance of $30,000 was reinsured in other companies. Anticipating that N. would require further insurance the plaintiff and defendant corresponded with reference to reinsurance between the 17th and 23rd of July, 1925, whereby it was agreed that the defendant Company would accept a line of $15,000 reinsurance the plaintiff to forward commitments in the course of a week or so. At about 6.30 p.m. on the 31st of July, N.'s accountant telephoned the manager of the Burrard Agencies Limited, who were the plaintiff's agents in Vancouver, to place an additional $20,000 on N.'s stock-in-trade. It being after hours the Agency's manager made a note of the arrangement leaving the issue of a policy until the following day. Early in the morning of the 1st of August N.'s plant was destroyed by fire. The plaintiff succeeded in an action to recover the reinsurance.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN, J.A. dissenting), that the evidence established that both a completed contract of insurance and a completed contract of reinsurance existed prior to the fire.

Held, further, that a contract of fire insurance may be effected by an oral proposal and acceptance, and specific performance will be decreed even if the fire occurs before the issue of the formal contract or policy.

Per MCPHILLIPS and MACDONALD, JJ.A.: Where reinsurance has been agreed on prior to the acceptance of the risk by the original insurer, its right to the agreed upon reinsurance exists at the moment of its acceptance of the risk.

APPEAL by defendant from the decision of MCDONALD, J. of the 15th of April, 1926 (reported 37 B.C. 202) in an action to recover $12,864.37 reinsurance on an insurance policy for a loss by fire. The plaintiff claims that the British Traders Insurance Company was responsible for the loss under a contract by which said Company reinsured the Queen Insurance Company up to the amount of $15,000 against the loss in question. The plaintiff Company had insured the National Canners Limited for $67,000, but it being a rule of the Company that

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insurance on each risk should be limited to $37,000 under contracts of reinsurance $25,000 of the additional amount was reinsured on the 14th of July, 1925, with the California Insurance Company and $5,000 with the Pacific Coast Fire Insurance Company. On the 17th of July following, correspondence commenced between the plaintiff Company and defendant Company as to the defendant accepting reinsurance in respect to the National Canners Limited and on the 23rd of July it was agreed that the defendant would accept a line of $15,000 reinsurance, the plaintiff to forward commitments in the course of a week or so. On the evening of the 31st of July the accountant of the National Canners Limited, telephoned Burrard Agencies Limited who were the plaintiff's agents in Vancouver to place an additional $20,000 on the stock-in-trade of the company. It being after hours the agent made a note of the arrangement, leaving it until the following day to issue the policy. That night the National Canners Limited was destroyed by fire. It appeared in the correspondence between the plaintiff Company and defendant Company which terminated on the 23rd of July, that the manager of the plaintiff Company's main agents in Victoria instructed his clerk that in case of further insurance for the National Canners Limited, the first $15,000 should be reinsured in the British Traders Insurance Company and the next $5,000 in the Pacific Coast Fire Insurance Company and the main agents were empowered to issue policies on behalf of the British Traders Insurance Company. The policies were subsequently issued by the agents in the names of the British Traders Insurance Company and the Pacific Coast Fire Insurance Company. It was held by the trial judge that the defendant Company was liable.

The appeal was argued at Vancouver on the 13th, 14th and 15th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, for appellant: The question is whether there was ever any contract of reinsurance made. Our contention is that the letters between the companies prior to the fire amounted to nothing more than an offer that was never accepted, and it was sought after the fire to convert this correspondence into a con-

tract. The trial judge recalled a witness and asked him a leading question which he was bound to answer as he did. This is highly improper: see *In re Enoch and Zaretzky, Bock & Co.* (1910), 1 K.B. 327. The judge should not ask a leading question that is in favour of one side and against the other, the answer being one on which he bases his decision: see *Eden* v. *Blake* (1845), 13 M. & W. 614 at p. 618. You cannot hold a party to a contract by memorandum that is not communicated to him: see *Hebb's Case* (1867), L.R. 4 Eq. 9 at pp. 11-12. The letters all refer to the plant, whereas the insurance in question was put upon the stock: see *Hanley* v. *Corporation of the Royal Exchange Assurance of London, England* (1924), 34 B.C. 222.

Davis, K.C., for respondent: It was not necessary to fix the amount as the letters already fixed the amount the defendant Company was to cover. The case is based on the idea that the action of the plaintiff's agents after the fire was fraudulent. There is no evidence whatever to substantiate this. The question is, was there a contract of insurance? *Hanley* v. *Corporation of the Royal Exchange Assurance of London, England,* was an entirely different one. If the British Traders refused to pay we would have an action for specific performance: see Halsbury's Laws of England, Vol. 17, p. 517, sec. 1019. We sue both on the oral contract and on the policies issued. Barnes was principal officer for Rithet Consolidated Limited and Waller was his subordinate. Their evidence of what took place is sufficient to establish the contract.

Argument

Ghent Davis, for Rithet Consolidated: The Rithet Company are only interested in the question of fraud and the evidence does not suggest anything of the kind.

Mayers, replied.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.: The first question is, was there a completed contract of insurance between the plaintiff and the National Canners Limited, the assured, prior to the fire which took place early on the morning of the 1st of August upon which to found a contract of reinsurance; and secondly, if so, was

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there a completed contract of reinsurance by which the defendant undertook the risk to the extent of $15,000? The learned trial judge found both questions in favour of the plaintiff. In my opinion there is no room for doubt that on the evening of 31st July a completed contract was entered into between the plaintiff and the assured, by which the plaintiff agreed, verbally, in the interim between that time and the time when the policy could be issued, to insure the National Canners Limited to the amount of $20,000. Subsequently, and after the fire, the plaintiff issued the policy in pursuance of this agreement and paid the loss. I think the learned judge was right in his finding upon this branch of the case.

Then, was there a valid contract of reinsurance prior to the destruction of the property insured? Fortunately there was correspondence between the parties which materially assists me. The letters relied on are marked Exhibits 14, 15, and 16 and the inference which I draw from them, coupled with the oral evidence, supports Mr. *Davis's* argument that the contract between the parties was that if the plaintiff took the risk on the National Canners Limited the defendant would take $15,000 of it. This correspondence was prior to the destruction of the property, and while it is possible that there may be two opinions as to the inference to be drawn from it, I am unable to say that the learned trial judge drew the wrong inference, and therefore would not disturb his judgment.

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The agents of the defendant apparently took the same view since they issued the policy of reinsurance within a day or two after the fire. The appellant claims that this was done fraudulently, but the learned judge has found against it on this point, and was in my opinion, amply justified in so finding.

I would dismiss the appeal.

MARTIN, J.A.: While I agree that there was a contract of insurance between the respondent Company and the National Canners Limited yet, with all respect to contrary opinions, I cannot reach the conclusion that the alleged contract for reinsurance between the respondent Company and the appellant Company has been established and therefore I think the appeal should be allowed.

MARTIN, J.A.

GALLIHER, J.A.: I would dismiss the appeal for the reasons given by the learned trial judge.

Mr. *Mayers* took the point that the learned judge had no power to recall the witness Barnes, and question him in the manner set out in the appeal book, citing *In re Enoch and Zaretzky, Bock & Co.* (1910), 1 K.B. 327.

What took place was this: The learned judge evidently wished to clear up in his own mind whether the witness Barnes understood the question put to him in respect of the power of an agent who was not a general agent to issue a policy for reinsurance. Barnes had been called by the plaintiff and examined, cross-examined and re-examined, and while I would have no doubt in my own mind as to that, the learned judge wanted to satisfy himself that there was no mistake and I think he was entitled to.

GALLIHER, J.A.

The case cited when read does not, in my opinion, apply here; moreover, the evidence given does not alter what Barnes had already testified to.

MCPHILLIPS, J.A.: This appeal raises a point of some nicety in the business of fire insurance and the carriage of reinsurance and the liability therefor. The facts would not seem, though, to be at all dissimilar to what may be said to be the general course of the carrying on of a fire-insurance business and the acceptance of risks in the day to day business of fire-insurance companies. The companies concerned in the present case are companies of outstanding position in the insurance world and it is hard for any one acquainted with the procedure obtaining in this line of business to follow or understand the meaning of the non-admission upon the part of the British Traders Insurance Company Limited of what appears to me to be a patent case of liability on its part to the Queen Insurance Company of America in the way of a reinsuring risk up to $15,000.

MCPHILLIPS, J.A.

The learned trial judge, Mr. Justice MCDONALD, with whose judgment I entirely agree, has succinctly set forth in his judgment the facts of the case. Shortly, they may be stated to be of this nature: The Queen Insurance Company of America (the respondent) had a fire-insurance risk upon property of the National Canners Limited in amount, on the morning of the

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31st of July, 1925, $67,500. The Queen Insurance Company of America (hereinafter called the Queen) was not desirous of carrying without reinsurance more than $37,500, and that was the extent only that the Queen intended to assume as a matter of insurance risk, covering their liability to any further extent by reinsurance and in furtherance of this policy the additional $25,000 had been reinsured with the California Insurance Company. On the evening of the 31st of July, 1925, the night when the fire loss occurred, the National Canners Limited by telephonic communication arranged with the Burrard Agencies Limited, authorized agents for the Queen, to have an additional covering of $20,000 with the Queen upon its stock-in-trade, but being after business hours the notation of the risk was made, the policy to be written up the next day. The situation in insurance parlance was that the Queen accepted and was on the risk, *i.e.*, covered to the further extent of $20,000. That night the premises of the National Canners Limited were destroyed by fire. There is no question that there was at the time existent insurance to the further extent of $20,000 with the Queen. After adjustment the loss in respect of this further insurance of $20,000 was paid by the Queen and the subject-matter of this action is the claim of the Queen to recover $12,812.87 from the British Traders Insurance Company Limited (hereinafter called the Traders). The question that requires consideration now is whether or no the Traders are liable by way of reinsurance of the Queen to the limit of $15,000, which is the claim of the Queen (in fact though reduced upon adjustment to $12,812.87 as before stated). The reinsurance claimed to have been effected by the Queen with the Traders arose in this way: On the 16th of July, 1925, Elderton, the agent of the Traders, was seen by Barnes of the Rithet Consolidated Limited, the general agents of the Queen, and Barnes told Elderton that the Queen was carrying insurance on the property of the National Canners Limited, and asked if the Traders would "give the Queen a line of reinsurance." On the 17th of July the Rithet Consolidated Limited wrote the Traders in the terms following, and subsequent correspondence took place as is hereinafter set forth:

"National Canners, Limited.

"This property is not yet shewn on Goad's map, but is situated just south of the Canadian National Union Station on Main St. It is a new plant and they had a very successful season last year and practically operate the year round. The business is controlled through the Burrard Agencies Ltd., and is owned by friends of ours.

"The writer spoke to Mr. Elderton about this line yesterday and he intimated that he would be quite willing to accept a reinsurance of the Queen on this risk and we should be glad if you would kindly look into the matter and let us know how much reinsurance you would accept on behalf of the Queen, which has at present $35,000 on the line."

This was replied to in a letter of the 20th of July reading as follows:

"Re National Canners Block 84A Vancouver.

"I duly received your letter of the 17th inst. in reference to the plant of the above firm, and shall be glad to accept a line of $15,000 as reinsurance of the 'Queen.' Will you kindly advise me when the Company is bound on the risk."

And the last-mentioned letter was replied to by a letter of the 23rd of July reading as follows:

"National Canners, Ltd.

"We thank you for yours of the 20th instant advising that you are in a position to accept a line of $15,000 as reinsurance of the Queen on the above risk. We hope to be able to forward some commitments in the course of the next week or so."

It will be seen that the Traders unquestionably undertook with the Queen "to accept a line of $15,000 as reinsurance of the Queen." Further, obviously the Traders left it with the Queen to effectuate the risk—note the language of the Traders to the Queen—"Will you kindly advise me when the Company is bound on the risk." The risk of the Traders would have to be instantaneous with the Queen placing the insurance on the property of the National Canners Limited, it could not be said that it was a condition precedent to the Traders being on the risk, that the advice had to be received by the Traders and acceptance of the risk on its part; this would be a wholly illusory situation and it revolts one's understanding of commercial morality to have such a contention made. Liability in law must be postulated along true lines of business ethics and business custom and usage. Insurance being applied for must be accepted or rejected at once—business could not be conducted upon other than these lines. Who is to say when the fire loss may occur? That is the inscrutable. Business men, though, take business precautions and it is not permissible that there be

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the lulling to sleep of people and allowing them to be in a false sense of security. It is inconceivable that that was the position in the present case. Everything was done in a business-like manner and in accordance with modern commercial conditions. It was not necessary to have policies of insurance extant at the time of the loss, the verbal covering was effective covering (see *Westminster Woodworking Co.* v. *Stuyvesant Insurance Co.* (1915), 22 B.C. 197) and in my opinion there can be no question upon the facts that the Traders are liable as the learned trial judge has held by way of reinsurance of the risk accepted by the Queen. The Traders must be held to have contracted to reinsure the Queen in respect to any risk undertaken by the Queen upon the property of the National Canners Limited to a limit of $15,000. I fail to see how it is possible to view the matter in any other light.

In my opinion, with great respect to all contrary opinion, the present case is one simple in its features when fully understood, nothing lies in the way of preventing the Court imposing the legal liability in the manner that the business world has all along conceived the case to be and that is, that where reinsurance has been agreed upon, that the right exists to the agreed upon reinsurance coincident with the acceptance of the risk upon the part of the company insuring, if this were not the case reinsurance would be wholly illusory—that there should be even a moment of time intervening would be fatal as the fire loss might be one of instant happening, following the acceptance of the risk by the insuring company.

MCPHILLIPS, J.A.

As to the question of fraud, I am in complete agreement with the learned trial judge; there is nothing to support this allegation. The Queen unquestionably accepted the risk, it was after business hours, and the Queen accepting the risk had the right to reinsurance at once from the Traders. There was effective insurance made with the Queen, and the Queen in ordinary course, following the previous agreement with the Traders, was entitled to the reinsurance. That later policies were written up and as of the 31st of July is quite an immaterial matter as there was insurance and reinsurance quite independent of the policies and the question of whether in law they should have been written up after the fire is not a matter of moment. Unques-

tionably there was no fraud in doing this as after all the existent policies are truly representative of the fact that there was insurance and reinsurance upon that date.

The case attempted to be made out by the Traders (the appellants) to absolve themselves from liability is, in my opinion, devoid of merit, and wholly untenable. It is difficult at times to discern the motives of insurance companies in resisting the acceptance of liabilities plainly undertaken, it cannot redound to their business standing and it most certainly gives rise to considerable unrest amongst the insuring public. The duty is upon the Court, even in the interests of the insurance companies themselves, to unhesitatingly impose the liability, unless restrained by intractable law, and that, I fail to find present here (see *In re Etherington and Lancashire &c. Accident Insurance Co.* (1909), 79 L.J., K.B. 684, Vaughan Williams, L.J., at pp. 686-7; *Hanley* v. *Corporation of the Royal Exchange Assurance of London, England* (1924), 34 B.C. 222 pp. 228 to 239).

MCPHILLIPS, J.A.

I would, for the foregoing reasons, dismiss the appeal.

MACDONALD, J.A.: The appellant submits that there was neither an original contract for insurance covering the stock-in-trade of the National Canners Limited by the respondent Queen Insurance Company of America, nor a contract of reinsurance with the latter by the appellant, British Traders Insurance Company, Limited. The first question to my mind presents no difficulty. The insurance was effected by a conversation between MacGregor, secretary of the National Canners Limited and Irving of Burrard Agencies Limited, who had authority as local agent for the Queen Insurance Company in Vancouver, to contract for insurance. A contract of insurance may be effected by a verbal proposal and acceptance and specific performance would be decreed even if the fire occurred before the issue of the formal contract or policy. The conversation between the parties mentioned was clear and unambiguous. Insurance for $20,000 was agreed upon and MacGregor was told by Irving that his company were covered from that time. It is quite immaterial so far as the insured is concerned whether or not the Queen Insurance Company had

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exceeded the limit it was authorized to place. Further there is no evidence to substantiate the allegation of fraud.

The question of reinsurance presents more difficulty.

This contract must be made out, if at all, from certain letters exchanged, conversations and conduct in reference to allocation with possibly the further question as to the authority of Barnes in his dual capacity as general agent for the Queen Insurance Company and local agent for British Traders Insurance Company, Limited, to issue a policy on behalf of the latter. The letter of July 17th, 1925, Exhibit 4, shews that a conversation between Barnes of Rithet Consolidated Limited and Elderton of the British Traders Insurance Company, preceded it and oral evidence was given in reference thereto. This letter recited the willingness of Elderton, pursuant to a previous arrangement to accept reinsurance of the "Queen" to some extent, at all events, and inquired as to how much reinsurance it would accept. On the 20th of July (Exhibit 15) the British Traders advised Rithet Consolidated Limited that it would accept a line of $15,000 (the amount afterwards placed) as reinsurance of the "Queen," adding, "Will you kindly advise me when the Company is bound on the risk?" This makes it clear that the parties were in agreement not only on the general question of reinsurance but also as to the amount the British Traders were willing to assume. The only point left open was the time when the British Traders would be bound on the risk. Rithet Consolidated Limited in its reply on July 23rd (Exhibit 16) while not definitely fixing the time state: "We hope to be able to forward some commitments in the course of the next week or so." That is, of course, pursuant to the arrangements already made. These letters shew that the Queen Insurance Company was at liberty to take additional insurance on National Canners Limited with the understanding that it could secure reinsurance for any additional amount not exceeding $15,000. It follows that the moment the additional insurance in question in this appeal was contracted for by the Queen Insurance Company, the British Traders Insurance Company, Limited, were liable to reinsure in performance of its agreement. It then became binding and effectual.

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In this view it is not necessary to consider the question of

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the authority of Rithet Consolidated Limited to issue a policy on behalf of the British Traders Insurance Co. with or without its consent. Specific performance would be ordered in any event.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Mayers, Lane & Thomson.*
Solicitors for respondent: *E. P. Davis & Company.*

WOODWARD'S LIMITED v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

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Insurance, burglary—Safe inside vault—Policies covering burglary from safe or vault described—Burglary from vault but not safe—Right to recover—Right to rectification of policies.

The plaintiff held two policies of insurance against burglary in the defendant Company. There was a vault on the plaintiff's premises inside of which was a safe in which each day's receipts were kept. Owing to the volume of business on the day previous to a burglary the safe would not hold all the money taken in and the surplus was left in the vault outside the safe. Burglars broke through the wall of the vault and took all the cash that was outside the safe but the safe remained intact. The principal clause in the policies insured against all direct loss by burglary "from the interior of any safe or vault described in the schedule" to the policies. It was held on the trial that the assurance was not confined to the money in the safe.

On appeal the decision of MCDONALD, J. was affirmed on an equal division of the Court.

Per MACDONALD, C.J.A. and GALLIHER, J.A.: We have to look at the description of the subject-matter of the insurance to determine what the policies actually cover. The description of the property insured, and the place where contained, together with surrounding circumstances, make it clear that the insurance was on the contents of the safe and not on the money outside the safe, though within the vault. Moreover the rates of insurance paid were for a burglar-proof safe and it is admitted that the vault was not burglar-proof.

Per MARTIN and MCPHILLIPS, JJ.A.: That upon the whole the facts and circumstances of the case warranted the conclusion at which the learned trial judge arrived.

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APPEAL by defendant from the decision of MCDONALD, J. of the 21st of June, 1926 (reported 37 B.C. 450), in an action to recover on a policy of burglary insurance. The plaintiff carries on a large retail business on Hastings Street in Vancouver. For the safe-keeping of money a vault was built of brick with a Goldie-McCullough vault door and inside the vault was a Taylor safe. The money was kept in the safe but at times after a large day's business there was not sufficient room in the safe to contain all the money and the balance had to be left in the vault outside the safe. On the 27th of December, 1925, burglars broke into the vault through the side by breaking down the wall (not through the door) and took what money there was in the vault outside the safe. They did not get into the safe. Two policies of insurance were taken out upon which premiums were paid at the rate of $8.25 per thousand, one for $15,000 and the other for $10,000. The Company's established premium charges were $8.55 per thousand for burglar-proof safes and $11.55 per thousand for vaults and fire-proof safes. The plaintiff contended that the evidence shewed that it was intended by both parties that both safe and vault were covered by the policies and that even if the policies as written did not cover the vault the policies should be rectified to cover the vault in accordance with what was understood between the parties. The plaintiff recovered for the loss on the trial.

Statement

The appeal was argued at Vancouver on the 20th and 21st of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C. (*St. John,* with him), for appellant: They only paid the premium required for burglar-proof safes, when in fact the vault was fire-proof only, the safe inside the vault only being burglar-proof. The two policies, one for $15,000 and the other for $10,000 are worded just the same. We say only the safe inside the vault was insured.

Argument

J. Edward Bird, for respondent: The evidence shews clearly that the arrangement between insurer and insured was that both vault and safe were to be insured. A policy must be construed against rather than in favour of the Company: see *In re Etherington and Lancashire &c. Accident Insurance Co.*

(1909), 78 L.J., K.B. 684; *In re Bradley and Essex and Suffolk Accident Indemnity Society* (1912), 1 K.B. 415.

H. I. Bird, on the same side: We submit there was a mutual mistake in framing the policy and we are entitled to have it reformed. When there was a special run of business the safe would not hold all the money taken in and it became full, the balance being left in the vault. There is a presumption in favour of the affirmative statement as against the negative: see *Dunphy* v. *Cariboo Trading Co.* (1915), 21 B.C. 484. There was a misdescription in the policy for which the insurer was responsible and the mistake was mutual: see *The Liverpool and London and Globe Ins. Co.* v. *Wyld and Darling* (1877), 1 S.C.R. 604 at p. 621; *Hastings Mutual Fire Insurance Co.* v. *Shannon* (1878), 2 S.C.R. 394; *Mahomed* v. *Anchor Fire and Marine Ins. Co.* (1913), 48 S.C.R. 546; *In re Universal Non-Tariff Fire Insurance Co.* (1875), L.R. 19 Eq. 485 at p. 496. By reason of its representation the Company is estopped from saying the vault is not covered: see *West London Commercial Bank* v. *Kitson* (1884), 13 Q.B.D. 360.

Argument

Davis, in reply: They have two branches: (1) That under the contract the Company is liable; (2) that on the facts they are entitled to reformation. All this evidence that was allowed in is allowed as to the second point only but should not be allowed or considered as to the action on the contract. There is no ambiguity as to the contracts. All the evidence given refers to the safe and not to the vault. As to admission of extrinsic evidence see Phipson on Evidence, 6th Ed., pp. 605 to 665. As to reformation, he must shew there was an agreement that the contents of the vault were insured and he must shew this by admissions of both or by irrefragible evidence that this prior agreement was made. The evidence does not approach this position. The original policy was in 1919 and there was no change in instructions since that time. It is almost impossible to obtain rectification on verbal evidence of matters that took place years before. The proof must be beyond the shadow of a doubt. On the question of rectification see *Fowler* v. *The Scottish Equitable Life Insurance Society and Ritchie* (1858), 28 L.J., Ch. 225; Kerr on Fraud and Mistake, 5th Ed., p. 533; *Campbell* v. *Edwards* (1876), 24 Gr. 152; *Booth* v.

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Callow (1913), 18 B.C. 499; *Frey* v. *Floyd* (1922), 30 B.C. 488; *United States* v. *Motor Trucks, Ld.* (1924), A.C. 196.

Cur. adv. vult.

4th January, 1927.

WOODWARD'S LTD. *v.* UNITED STATES FIDELITY AND GUARANTY CO.

MACDONALD, C.J.A.: We are concerned in this appeal with two questions, the construction of the policies of insurance, and the reformation of them. The expression "vault or safe" found therein are used in a way which calls for some examination. The policies are framed, being printed, in a compendious form. When a safe only is covered, the word vault is superfluous. The words are disjunctive. We have to look at the description of the subject-matter of the insurance to determine what the policies actually cover. The description of the property insured, and the place where contained, together with the surrounding circumstances, make it quite clear, at least to me, that the insurance in question here was on the contents of the safe and not on the money outside the safe, although within the vault.

Mr. *Davis* in an able argument, followed the description of the receptacle of the money, the safe, in detail, and I think demonstrated conclusively that the insurance was confined to money in the safe. The learned trial judge found otherwise, and in this, with great respect, I think he was in error.

MACDONALD, C.J.A.

The claim for reformation of the policies also fails. There are no findings of fact on this branch of the case, since it was unnecessary to decide it in view of the conclusion at which the learned judge arrived. Mr. Allix, the employee of the general agents of the defendant, had several interviews with Mr. Folkins, the person who had charge of the plaintiff's insurance matters. It was argued that Allix was an agent merely for soliciting applications for insurance and could not bind his company by an agreement such as the one alleged, namely, the verbal agreement which it was alleged had by mistake not been incorporated in the writing. I do not find it necessary to my conclusion to pronounce upon that question, but will assume for the purpose of the appeal that Allix had such authority.

When the evidence of Folkins is carefully examined, it will be found to fall far short of that conclusiveness which has been

held essential to enable a Court to reform a written document. It is true Allix does not categorically deny that he had made the statements which Folkins attributes to him, but he does not admit that he had. His evidence inferentially throws much doubt upon Folkins's recollection of the character of what was said between them. The difficulty I find in Folkins's testimony is that it does not distinctly prove when the words alleged to have been spoken by Allix were spoken.

There are three points of time in question: the first a certain interview in September, 1923; then one in November, 1923, and another in January or February, 1924. It was at the first of these that Folkins alleges that the question of insuring the money in the vault outside the safe had been seriously mooted. They were either negotiating insurance or discussing policy No. 16868. The evidence of Folkins is much involved, and to me, inconclusive on the question of contract. In concluding it he said:

"Now, just to clean up that 16868, this conversation you have referred to took place [when] 16868 was delivered to you? Yes."

They were discussing the meaning of the policy not what it should stipulate.

Another meeting of these men took place in November, 1923, brought about by Folkins making an application for additional insurance on receipts of money during a one-day sale in each month, a monthly bargain day. At this time, or prior thereto, the defendant, for some reason unexplained, desired to substitute or had substituted for policy No. 16868, one of the policies, No. 16872, sued on herein. Folkins does not remember the reason for this substitution, but thought it had something to do with the rates of insurance. On this occasion Folkins alleges that he said to Allix:

"that he would have to be sure that it [the new one-day insurance] would be on the vault as it would be impossible to get nearly all of our money *on those days* in the safe."

The italics are mine.

This new insurance was effected by an endorsement on policy No. 16872, and was not the insurance on the money afterwards stolen. It is very doubtful on Folkins's whole evidence whether this was the occasion on which the question of insurance on money outside the safe took place. Even if the alleged assur-

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ances of Allix were made at that time they would appear to have been made after policy No. 16872 had been delivered to Folkins, and to have had reference to a loss which was not covered. This is strengthened by Folkins's statement that Allix "read over the clause where it stated, 'In the vault and safe as described above.'" They may have had the blank form there, but what I call attention to is the inconclusiveness of the evidence as to time on these occasions.

The other policy sued on is numbered 16874, and was issued in December. It is the one covering receipts of money during Christmas week, the money which was stolen. When that policy was negotiated there was no discussion as to whether it covered money in the vault or not.

I now come to the evidence of Folkins given on examination for discovery. He there says:

"He [Allix] said 'As long as you get it inside of that vault door, lock that vault door,' he said, 'you are absolutely alright.'"

When was this said? Just before this Folkins described the occasion.

"I said, now Mr. Allix, the main thing is, we want to be covered while that money is locked up."

MACDONALD, C.J.A.

One would gather from this that it was a term which he wanted Allix to incorporate in the policy and that Allix replied as above quoted.

Now when we look at the page following these quotations, we find that that conversation took place in January or February and after the robbery, and that it could have been nothing more than a discussion between the two men as to the meaning of the policies.

It cannot, therefore, in my opinion, be said that the evidence of Folkins, even standing alone, makes out a case of mistake. The most that can be said of it is, that after the contracts were made, or perhaps after the fire only, these two discussed the meaning of them and came to the conclusion that they covered both vault and safe.

Moreover, the rates of insurance were different for the contents of a burglar-proof safe, and a vault which admittedly was not burglar-proof, and this fact had prior to any of the interviews, been sharply called to the attention of Allix by his company. It was not likely, therefore, if he were honest, and there

is no reason for concluding that he was not, that he was knowingly making stipulations contrary to the rules of his company. He made a mistake in supposing that the safe was burglar proof, but there was no mistaking the fact that the vault was not.

I would allow the appeal.

MARTIN, J.A.: This appeal should, I think, be dismissed, the learned judge below having reached the right conclusion in a case which presents not a little difficulty. Moreover, if it be necessary I am of opinion that a case for reformation has been made out.

GALLIHER, J.A.: I am satisfied that on the true construction of the policies they do not cover moneys in the vault, which were not contained in the safes insured.

The only question then is, should there be rectification?

"It has frequently been said that Courts of equity do not rectify contracts —they may and do, rectify instruments purporting to be made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to shew that there was an actual concluded contract antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument":

Kerr on Fraud and Mistake, 5th Ed., p. 533.

Furthermore, the mistake must be mutual. No question of fraud enters into this case.

Another principle in dealing with rectification is that,—

"A party seeking rectification from a Court of Equity on the ground of mutual mistake must be able to shew by the clearest evidence, 'irrefragable evidence,' to use Lord Thurlow's language; that neither of the parties intended the agreement to be such as the writing expresses it to be":

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Strong, J., in *Campbell* v. *Edwards* (1876), 24 Gr. 152 at pp. 171-2. See also reference to *Fowler* v. *Fowler* (1859), 4 De G. & J. 250 at p. 264 on pp. 172-3.

Keeping these principles in mind and assuming that Allix had authority to make the agreement contended for (which I doubt, but do not find necessary to decide) was the antecedent agreement which it is necessary to establish before they can have rectification, ever in fact made?

I have read the evidence bearing on this and in my view it is not of that clear convincing nature which is called for. While it appears clearly enough that Folkins (Woodward's man) was desirous of having the money in the vault outside

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the safe covered he is not definite as to the date of the conversations and on the evidence I would be inclined to think that they took place after the policies sued on were issued, but further in any event, it appears to me that even assuming that what Folkins says to be true (and that is not specifically denied by Allix) it, I think, resolves itself into this: that Folkins having expressed his desire to be covered on the vault, he and Allix considered the clauses in the policies issued and Allix expressed his view on the policies themselves that the moneys in the vault were covered.

This is not proof of an antecedent agreement on which the contract of insurance as set out in the policies is founded, but rather an interpretation of the policies themselves after they had been issued.

GALLIHER, J.A.

Hence, in my view the requirements necessary to enable the Court to make rectification are wanting.

The appeal should be allowed.

McPHILLIPS, J.A.: This appeal calls for the consideration of and construction to be put upon two policies of insurance covering risk from burglary as to money, securities and merchandise in the vault described in the policies. The policies followed verbal application therefor, and at the time of the application the respondent was said to be covered and the risk was undertaken by the appellants. This is my conclusion upon the evidence and I would affirm the judgment of the learned trial judge believing as I do that he arrived at the right conclusion.

MCPHILLIPS, J.A.

The principal clause in each of the policies indicating the risk taken and indemnification reads as follows:

"Clause A: By burglary of money, securities, and/or merchandise described in Statement 8 of the Schedule and stated to be insured hereunder, occasioned by the felonious abstraction of the same from the interior of any safe or vault described in the Schedule hereinafter contained and located within the premises of the assured, by any person or persons making felonious entry into such safe or vault by actual force and violence, of which force and violence there shall be visible marks made upon the exterior of such safe or vault by tools, explosives, chemicals or electricity."

Statement 8 above referred to reads as follows:

"The merchandise covered hereby is fully described as follows: Money and securities, uncancelled Canadian postoffice and revenue stamps."

The learned counsel for the appellant, Mr. *Davis,* in his very able and analytical argument endeavoured to establish that upon a true reading of the policies that which was insured against was confined to money in the safe which was in the vault and not the money outside that safe, and what is claimed is indemnification for money stolen which was in the vault but outside the safe. I cannot agree with the submission made, as it appears perfectly clear to me and is consistent with what I deem to be a reasonable construction to place upon the policies that the risk undertaken was comprehensive of moneys both within and without the safe but conditional upon being within the vault and the money was all within the vault. Throughout the language of the policies we find the words "safe or vault."

In my opinion upon all the facts and circumstances of this case it is clearly apparent that the respondent desired the insurance to cover the actual happening here, and it is further clearly apparent to me, that the appellant undertook the risk and engaged to indemnify the respondent, and in the light of all the facts and circumstances the policies are capable of being so read. I would refer to the principle which governs even where ambiguity may be present, but I am not of the opinion that ambiguity is present in this case. We find Vaughan Williams, L.J., saying, at pp. 686-7 in *In re Etherington and Lancashire &c. Accident Insurance Co.* (1909), 78 L.J., K.B.:

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"In my opinion, the judgment of Mr. Justice Channell in this case is right and should be affirmed. I do not say that the construction of this policy is easy. But I start with this—that it is well established by authority that in construing a policy of insurance, whether life, fire or marine, or any other kind of policy, an ambiguous clause should always be construed against rather than in favour of the insurance company. That view was affirmed by this Court in *Joel* v. *Law Union and Crown Insurance Co.* (1908), 2 K.B. 863; 77 L.J., K.B. 1108; and was particularly emphasised by Lord Justice Fletcher Moulton in the course of his judgment. He said, 'I fully agree with the words used by Lord St. Leonards in his opinion in the case of *Anderson* v. *Fitzgerald* (1853), 4 H.L. Cas. 484, at p. 507 to the effect that in this way provisions are introduced into policies of life assurance which, "unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable proportion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written."' I think that this policy should be construed *fortius contra proferentem,* and on that basis I will consider

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what is its meaning. But before I do so I wish to refer to two points. The first is this. Counsel for the insurance company called our attention to the case of *Isitt* v. *Railway Passengers' Assurance Company* [(1889)], 58 L.J.Q.B. 191; 22 Q.B.D. 504 as being a decision which, if it were applicable and were followed in this case, would make it difficult for the company to maintain their defence; for there the Court held that the death of the assured was due to the 'effects of injury caused by accident,' where the ultimate cause of the death was a result which was reasonably to be expected from the accident. But we were told that the clause which appears in this policy was introduced for the purpose of getting rid of the decision in that case. I have no doubt that that is historically right, and that that was the object of the clause. But I think that if the company desired to get rid of that case they had not the commercial courage of their desire. They have not, in my opinion, expressed with sufficient plainness their desire that what was laid down by the Court in that case should in no sense be applied against their policies. Then there is another point. We must not construe this policy merely in reference to this particular case. We must recollect that it is a document which is used and regularly issued by this insurance company to persons who are desirous of effecting insurances against accidents, and we must consider where the construction which is urged upon us on behalf of the company would lead if we were to adopt it. So far as I can see, if we adopted that construction it would lead to this result—that it would be very difficult to establish the liability of the company on such a policy in any case except where the accident resulted in what used to be called death on the spot; for in every other case except that of death on the spot there is always the possibility of an intervening cause. It would be very difficult to look forward with any certainty to any money being recoverable on such a policy if we were to put that construction upon it. My view, therefore, is supported by this consideration, which I think will in a sense be welcomed by the insurance company—that if I am right I am avoiding a construction under which the policies that could be enforced against the company would be so reduced in number that very few people would care to insure against accidents."

It is evident when all the facts and circumstances of this case are considered and the policies carefully read, that the excerpt from the judgment hereinbefore quoted—in a most apposite manner—well indicates the liability that, in my opinion, must be imposed upon the appellant in the present case. I would also refer to what Farwell, L.J., said in *In re Bradley and Essex Accident Indemnity Society, Lim.* (1911), 81 L.J., K.B. 523, at p. 530:

"Contracts of insurance are contracts in which *uberrima fides* is required not only from the assured, but also from the company insuring. It is the universal practice for the companies to prepare both the forms of proposal and the form of policy. Both are issued by them on printed forms kept ready for use. It is their duty to make the policy accord with and not exceed the proposal, and to express both in clear and unambiguous terms, lest—as Lord Justice Fletcher Moulton, quoting Lord St. Leonards, says

in *Joel* v. *Law Union and Crown Insurance Company* (1908), 2 K.B. 863, 886; 77 L.J., K.B. 1108, 1120—provisions should be introduced into policies which, 'unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable portion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written.' It is especially incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses, and may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the conditions. Accordingly it has been established that the doctrine that policies are to be construed *contra preferentes* applies strongly to the company—*Etherington and Lancashire and Yorkshire Accident Insurance Co., In re* (1909), 1 K.B. 591; 78 L.J., K.B. 684. It has been further held that if the proposal be in one form, and the office draws up the policy in a different form varying the right of the assured, Courts of equity will rectify the policy so as to make it accord with the proposal—*Collett* v. *Morrison* (1851), 21 L.J., Ch. 878; 9 Hare 162 and *Girffiths* v. *Fleming* (1909), 1 K.B. 805; 78 L.J., K.B. 567—and in cases like the present, where the proposal is 'considered as incorporated' in the policy, the Court will, on construction of the two documents read together, give effect to the proposal as overriding the policy where they differ."

MCPHILLIPS, J.A.

It is clear upon the facts and circumstances of this case that rectification would be proper, if there be need, but in my opinion there is no need.

Upon the whole case I am clear in my view that the facts and circumstances of this case warranted the conclusion at which the learned trial judge arrived. It is unthinkable to come to the conclusion that the appellant did not undertake the risk which the respondent unquestionably desired indemnification against. Here we have a very large departmental store being carried on with extraordinary sales at times taking place and the necessity at times of carrying over in safes and vaults, large sums of money it not being possible to get these moneys into the bank, and a well-managed business would assuredly look for and obtain the protection claimed. That the appellant undertook the contract of indemnification I have no doubt and the policies of insurance can be and should be, so construed. The construction to be put upon the policies to give indemnification does no violence to the language as contained in the policies; in truth in my opinion, the language is ample to fully and effectually

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uphold the judgment under appeal. The Courts now must administer equity as well as law and equity has ever looked to the spirit rather than the form of the contract, the substance is what is to be inquired into here and that was protection from burglary by way of indemnification and that was what was asked from and given by the appellant to the respondent, and the policies in my opinion must be read as effectuating that protection and giving effective indemnification.

I therefore am of the opinion that the judgment of the learned trial judge must be affirmed, and the appeal dismissed.

The Court being equally divided the appeal was dismissed

Solicitors for appellant: *Noble & St. John.*
Solicitor for respondent: *H. I. Bird.*

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Employer and workman—Workman assisting in putting hay in mow—Lost balance in pulling on rope that gave way—Fell sustaining injuries—Damages—Negligence—R.S.B.C. 1924, Cap. 278, Secs. 81 and 82.

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The plaintiff was employed in distributing and tramping down hay in a mow the hay being moved from a waggon to the mow within a barn by a fork attached to a carriage which ran on a track on the inside of the roof of the barn. After the fork had deposited a fork load of hay in the mow the plaintiff pulled on a rope attached to the carriage above in order to bring it back above the waggon. The rope gave way and the plaintiff losing his balance fell over the hay-rack breaking his jaw and sustaining other injuries. In an action for damages it was held that the defendant was negligent in allowing the rope to become frayed through constant use, but that the plaintiff was guilty of contributory negligence as it was no part of his duties to touch the rope. Under sections 81 and 82 of the Workmen's Compensation Act the plaintiff was allowed half the damages sustained, namely, $1,250.

Held, on appeal, affirming the decision of GREGORY, J. (MACDONALD, C.J.A. and MACDONALD, J.A. dissenting as to the cross-appeal), that the accident was due to the negligent fastening of the rope to the fork and although the Court was of opinion that the plaintiff was acting

within the scope of his employment in attempting to pull back the carriage and therefore not guilty of contributory negligence, on the evidence they would not be justified in increasing the sum awarded in damages and the cross-appeal should be dismissed.

Per MACDONALD, C.J.A. and MACDONALD, J.A.: That the plaintiff should be awarded the full amount of damages claimed, namely, $2,500.

APPEAL by defendant from the decision of GREGORY, J. of the 27th of May, 1926, in an action for damages for injury to the plaintiff on the 7th of July, 1925, while in the service of the defendant by reason of a defect in the condition of the plant used in the defendant's business or in the alternative by reason of the defendant's negligence. The defendant, who is the owner of a farm near Salmon Arm, employed the plaintiff to assist in getting in his hay in the Summer of 1925. At the time of the accident they were unloading hay from a waggon into the mows in the barn and this was done by means of a hay-fork attached to a carriage which ran on a track below the roof of the barn. After the fork had deposited the hay in one of the mows the plaintiff, who was working in the mow, it being his duty to distribute the hay around the mow and tramp it down, pulled on the rope attached to the carriage which held the fork in order to bring it back into place above the hay-rack. This rope broke and the plaintiff lost his balance and fell over on to the hay-rack breaking his jaw and sustaining other minor injuries. It was held by the trial judge that the defendant was negligent in allowing this rope to become frayed and in a weakened condition but that the plaintiff was guilty of contributory negligence as it was no part of his duties to touch this rope and in view of the provisions of sections 81 and 82 of the Workmen's Compensation Act he allowed the plaintiff one-half of the actual damages sustained and gave judgment for the plaintiff for $1,250, and costs.

Statement

The appeal was argued at Vancouver on the 11th and 12th of November, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Harold B. Robertson, K.C., for appellant: This case does not come under the Workmen's Compensation Act at all. There is no evidence of negligence, the rope in question having been new in 1924, one year before the accident. Next, the plaintiff

Argument

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had no right to touch the rope at all as it was not part of his duties. That there was no actionable negligence see *Wood* v. *The Canadian Pacific Railway Company* (1899), 30 S.C.R. 110 at p. 111-12. That the plaintiff had acted outside his duties see *McMannamin* v. *R. Chestnut & Sons Limited* (1917), 44 N.B.R. 571; *Finlay* v. *Miscampbell* (1890), 20 Ont. 29; *Alliance Insurance Co.* v. *Winnipeg Electric Ry.* (1921), 2 W.W.R. 816. Inspection would not have disclosed any defect in this case: see *Phelan* v. *Grand Trunk Pacific Rway. Co.* (1915), 51 S.C.R. 113 at p. 131. There is no evidence of negligence here: see *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115 at p. 122. That there was contributory negligence see *Headford* v. *McClary Mfg. Co.* (1893), 23 Ont. 335; *British Columbia Mills Co.* v. *Scott* (1895), 24 S.C.R. 702; *Plumb* v. *Cobden Flour Mills Company, Limited* (1914), A.C. 62; *Reed* v. *Great Western Railway* (1909), A.C. 31 at p. 33. As to the effect of the Act see *Wright* v. *Hale* (1860), 6 H. & N. 227; *Welby* v. *Parker* (1916), 2 Ch. 1 at p. 6.

Argument

McPhee, for respondent: The rope that broke shewed signs of weakness. This is sufficient evidence of negligence: see *Proctor* v. *Parsons Building Co.* (1913), 14 D.L.R. 40; *Herbert* v. *Samuel Fox & Co., Limited* (1916), 1 A.C. 405 at pp. 410-11; *Wilsons and Clyde Coal Co., Lim.* v. *M'Ferrin* (1926), 95 L.J., P.C. 130 at p. 133; *Morris* v. *Structural Steel Co.* (1917), 24 B.C. 59; *McArthur* v. *Dominion Cartridge Co.* (1904), 74 L.J., P.C. 30. On the inference of negligence from the mere happening of the accident see *Scott* v. *The London Dock Company* (1865), 34 L.J., Ex. 220. That the act was done in the course of his employment see *Limpus* v. *The London General Omnibus Company Limited* (1862), 32 L.J., Ex. 34 at p. 39.

Robertson, replied.

Cur. adv. vult.

5th January, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff was employed by the defendant to assist in the harvesting of hay. At the time of his injury he was working in the hay mow into which the hay was being unloaded by means of a hay-fork, a machine operated by horse power. When a forkful of hay had been brought to

the desired position in the mow and tripped, releasing the hay, it was the part of the person on the load to haul back the fork by a rope attached to it for that purpose. This person was a boy, the son of the plaintiff, and on the occasion in question, the plaintiff, anticipating that the boy would experience some difficulty in hauling back the fork, took hold of the rope and pulled on it, when it became detached from the fork, whereupon the plaintiff pitched over the edge of the mow on to the rack below and was very severely injured. He claims that the defendant was negligent in not having had the rope properly secured to the fork or in not inspecting it from time to time to see that it was in proper condition.

The rope was attached by the defendant himself; it was passed through an eye in the block or pulley and knotted. The allegation is that either the knot had been insecurely tied or that the rope had become frayed and broke. The rope was produced and was in good condition and capable of sustaining a weight or pull of 1,800 pounds. There is no evidence that it had frayed or that it had broken. The piece, if there was one, which remained with the fork, was not produced nor accounted for. The fellow servant who was present with the plaintiff in the mow, gave evidence that he passed the end of the rope through the eye again and knotted it. If the rope had become frayed and had broken it would bear evidence of it. The knots on the rope as produced were tied very close to the ends. This rope was produced by the defendant and I must assume that it was represented to be about in the same condition that it was in when originally rigged to the fork. It was quite possible, in fact, to my mind, certain, that the knot slipped and untied, and thus let the rope through the eye. There were only two possible theories. That the knot untied or that the rope frayed and broke. There is no suggestion of anything else which caused the plaintiff's injury. There is no pretence that anyone had interfered with the rigging of the fork, except the defendant. It was rigged up to the ceiling or roof of the barn. No one was near it when it came loose. As there is no suggestion that anyone other than the defendant had had anything to do with the rigging of the fork, we have to determine whether or not, as the learned trial judge found, the maxim of *res ipsa*

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loquitur could be applied to the facts of the case. He found, as a fact, that the knot had either slipped or the rope had broken.

In *Farmer* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 423, I dealt somewhat fully with the same maxim, and shall not repeat here what I said there. The cases on which I relied are referred to at length and are useful here. It is true that in that case we held that the plaintiff in the circumstances given in evidence, had failed to make out his case since there were two reasonable explanations of the fault, the negligence of fellow-workmen, or the negligence of the employer. No such alternative inference can be made here. It is not possible to hold that fellow-servants had anything to do with the plaintiff's accident. If, therefore, there was negligence at all, it was the negligence of the employer, and in my opinion, there was negligence to be inferred from the fact of the detachment of the rope from the fork.

MACDONALD, C.J.A.

On the question of contributory negligence, I think, with respect, that the learned trial judge was in error. It is a surprising thing to me to hear it said that farm-hands working together harvesting hay, cannot assist each other when occasion arises or appears to arise. There was evidence that the boy on the rack could not get a direct pull on the rope, that it would bear on the front of the mow and make it difficult to pull back the fork; his father, in order to help him, took hold of the rope and pulled. How can it be rightly said that he had no business to do this, merely because he had been assigned for the time being to assist in the mow? What he did could best be done in the mow. I think it would be a shock to farmers to be told that when a farm-hand was assigned to do a particular thing for the moment and who did something intending it to be for his master's benefit in assisting his fellow-worker, though carefully done, was *per se* negligent.

The appellant also complains of the measure of damages. The injuries received by the plaintiff were unusually severe for an accident of this kind; both his jaw bones were broken, each in two places; his nose was broken and the sight of his eyes injured. His expenses for surgical and hospital attention were $545. There is even the likelihood of the hurt leaving some

permanent disability. In these circumstances I think that $2,500 cannot be considered excessive.

The appeal should therefore be dismissed. The cross-appeal allowed, and judgment should be entered for the plaintiff for $2,500 and costs.

MARTIN, J.A.: At the close of the argument we informed counsel that we were all of the opinion that the injury was suffered by the plaintiff during the course of his employment, and after a further consideration of the matter, there can be little doubt, I think, that the accident was caused by the negligent fastening of the rope to the fork, and also that the plaintiff was not guilty of contributory negligence; and so the defendant's appeal should be dismissed.

The plaintiff, however, has cross-appealed to increase the damages which the learned judge below assessed at $1,250 on the mistaken view, with all respect, that the plaintiff was guilty of contributory negligence, and so it is submitted that he would, inferentially, have awarded a much larger sum if there had been no contributory negligence. But when we are invited to increase damages it is open to us, in fact it is our duty, in all cases to scan closely the amount that has been awarded so as to satisfy ourselves, apart from any conclusion reached by the trial judge upon a correct or incorrect basis, that the case is one where, upon all the facts it can be stated the award is clearly insufficient in amount to meet the justice of the case, and our opinion in making that review cannot be fettered by the reasoning that the trial judge resorted to in his judgment which is what is under review. In this light I have examined all the relevant evidence and do not think that a case for increasing the award has been made out and therefore the cross-appeal should be dismissed.

GALLIHER, J.A.: I think I must hold on the evidence that the defendant was negligent. I am satisfied from examination of the rope which was filed as an exhibit, and upon the evidence that it did not break, but that the accident was caused by the knot on the rope being insecurely tied allowing it to untie and pass through the ring when the weight was put upon it. I

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understood it to be agreed in argument that the knot on the rope as presented to us was tied in the same manner as was the one at the time of the accident. The insecurity in such tying consisted in leaving a very small portion of the rope end protruding from the knot, not sufficient to bind, and this part fraying with user in the operations to more or less of a point allowed the knot to slip off and the rope pulled through the ring. This would account for the frayed condition in which the witness Maki said he found the rope end after the accident. As I understand the Court expressed the view during the argument that the plaintiff was within the scope of his employment and this being so the plaintiff on the evidence, I would hold not guilty of contributory negligence. The appeal should therefore be dismissed.

GALLIHER, J.A.

On the cross-appeal to increase the damages, I would hold that the amount awarded by the learned trial judge, although upon a different principle, is ample to cover both special and general damages to which the plaintiff is entitled under the evidence.

I would dismiss the cross-appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal, and as to the damages, they have been allowed at an amount by the learned trial judge that I cannot disagree with, and the cross-appeal should also be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: The facts, as I view them, are as follows: After a bundle of hay, raised from the load by the hay-fork, was safely discharged in the mow, the rope used both to trip the fork and pull it and the carriage back to the load, got caught in the hay. Ordinarily it would be the duty of the man on the load to handle this rope and pull the hay-fork on the carriage back to the waggon. No doubt with a little extra effort on his part involving possibly a loss of time, he could have done so in this instance. But he was a boy of 16 years, a son of the plaintiff, and no doubt the father who was engaged in the mow spreading the hay as unloaded, noticing the difficulty and feeling that he ought to help his son, pulled at the rope to haul the fork back. Primarily that duty devolved on the man on the

load, but the defendant stated that "it is alright to disengage the rope from the hay if the hay falls on it [*i.e.*, for the plaintiff to do so]." He means of course, that he should simply disengage it and allow the man on the load to pull the fork back. I have no doubt, however, that in the situation disclosed in evidence the plaintiff was not going outside the scope of his duties in assisting the son in the manner disclosed. The whole operation is of a general nature and it was reasonable to assist in the manner described, particularly when the hay in the mow was higher than the load at the time the accident occurred.

The angle at which the plaintiff was pulling the rope would subject it to greater pressure than if pulled by the boy on the load. While thus pulling the fork back and when near the edge of the mow the hay gave way under plaintiff's feet suddenly throwing his whole weight on the rope with the result that it gave way in some manner and he fell to the hay-rack sustaining severe injuries. There was no investigation at the time to ascertain if the rope actually broke at or near the point where it was fastened to the fork, or whether the knot by which it was tied gave way or became undone, thus allowing it to slip through the eye. It is a little difficult now to surmise just how it gave way. If there was any defect either in the fork causing it to cut or chafe the rope or in the rope itself, we could say it would be a reasonable inference to attribute the accident to it. But no defects were disclosed. In appearance it would seem to be strong enough to withstand the strain to which in the ordinary course it should be subjected. The breaking point left sufficient margin of safety. It may be that if the plaintiff had not slipped thus throwing his weight upon it, it would not have given way. The learned trial judge found that it was either defective through abrasion (although examination of the exhibit discloses no evidence of it) or that from the manner in which it was attached to the fork it gave way. An examination of the part of the fork through which the rope passed was made after the accident but nothing was disclosed to shew that it would cut the rope.

MACDONALD, J.A.

The rope, however, was attached by the defendant and it did give way. He tied the knot. I will not refer to the evidence in

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regard to inspection further than to say that the trial judge remarked: "It is quite evident that it is well cared for," and I think that statement was justified from its general appearance. In any event, there was no defect discernible by visual examination, and it can not be said that the defendant was guilty of negligence in operating with this rope. It would have to be shewn that he knew or ought to have known that it was unsafe to use it. Lack of inspection would not constitute negligence unless it was shewn that inspection would reveal a defect.

On the foregoing facts can we as a matter of inference ascertain the cause of the rope giving way and fix the blame, if any? I think we can. It is not necessary to invoke the maxim *res ipsa loquitur* which applies where an injurious agency is under the control of the defendant and the accident is one that does not ordinarily happen if those who have control exercise proper care. I am not deciding whether it is applicable or not to the facts under consideration. Its application is not always free from difficulty. I am assuming that the burden of proving negligence is on the plaintiff. I think, however, that burden has been discharged. The only inference from all the facts submitted is that the knot became undone thus permitting the rope to slip through and as the defendant was obliged to fasten it securely he was guilty of negligence in that respect. It follows from my finding that the plaintiff was within the scope of his employment in pulling back the fork, that there was a breach of duty *qua* the plaintiff on the defendant's part. Enough evidence was adduced to enable the Court to fairly deduce both the existence of the act of negligence and its connection with the injury complained of.

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The learned trial judge found contributory negligence on the part of the plaintiff, holding that he had no right to touch the rope at all and that had he not done so there would have been no accident. It follows from my view that he was not acting beyond the scope of his employment that this finding must be reversed. The result is that the appeal should be dismissed and the cross-appeal allowed, and damages fixed at $2,500. I would not have allowed so large an amount if I were trying the

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case, but I do not feel justified in interfering with the finding of the learned trial judge.

Appeal and cross-appeal dismissed, Macdonald, C.J.A. and Macdonald, J.A. dissenting in the cross-appeal.

Solicitor for appellant: *G. S. McCarter.*
Solicitor for respondent: *E. C. Savile.*

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Timber lease—Royalties and ground rents—Renewal of lease before its expiration under Land Act Amendment Act of 1901—Effect on royalties payable—Reading "renewed" as "renewable" in section 14 of Forest Act, 1912—B.C. Stats. 1901, Cap. 30—B.C. Stats. 1912, Cap. 17, Secs. 13, 14 and 58.

A lease of certain timber was issued on the 1st of April, 1893, for 21 years. Under the provisions of the Land Act Amendment Act, 1901, this lease was surrendered and a renewal thereof was issued on the 7th of October, 1903, for 21 years. The renewal lease provided that royalties should continue as provided in the original lease until 21 years after the date of the original lease "and thereafter such royalty as may at that date be prescribed by the terms of any statute of the Province of British Columbia in such case made and provided in force on the 7th of October, 1914." The petitioners claimed that the amount of royalty to be paid was fixed by section 58 of the Forest Act, B.C. Stats. 1912, but the Crown's submission was that the royalty was governed by sections 13 and 14 of said Act. The petitioners succeeded on the trial.

Held, on appeal, reversing the decision of MORRISON, J., that the word "renewed" in the first line of said section 14 is a draftsman's error for "renewable" and the latter word should be substituted therefor in which case it is clear that the Legislature intended by sections 13 and 14 to fix the rents and royalties to be paid by a lessee who had surrendered his lease under the Act of 1901.

Per MCPHILLIPS, J.A.: The covenants as contained in the lease call for the payment of the royalty as provided by sections 13 and 14 of Cap. 17, B.C. Stats. 1912, the Forest Act.

APPEAL by defendant from the decision of MORRISON, J. of the 27th of May, 1926, on a petition of right praying for a

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declaration that the suppliants were the owners of a timber lease comprising the lands known as section 91, Renfrew District, Vancouver Island, and that the royalty payable thereunder was up to the 7th of October, 1924, 50 cents per thousand feet, pursuant to section 58 of the Forest Act, B.C. Stats. 1912, and for an account. On the 1st of April, 1893, a lease was issued by the Government of British Columbia to the Sayward Mill & Timber Company, Limited, for 21 years of the above lands, the lease being subsequently assigned to the Pacific Coast Lumber Company Limited. Under the provisions of the Land Act Amendment Act, 1901, this lease was surrendered and a renewal lease thereof was issued to the said Pacific Coast Lumber Company Limited covering said section 91. This renewal lease is dated the 7th of October, 1903, and is for 21 years and is a renewal of the original lease issued to the Sayward Mill & Timber Company. The suppliants herein have duly succeeded the Pacific Coast Lumber Company Limited as lessees of the said property. The issue to be determined in this action is as to the amount of royalty payable under the clause in the lease which provides as follows:

"And therafter [*i.e.*, after October 7th, 1914], such royalty as may at that date be prescribed by the terms of any statute of the Province of British Columbia, in such case made and provided, in force on the 7th day of October, 1914."

Maclean, K.C., for suppliants.

J. W. deB. Farris, K.C., for the Crown.

27th May, 1926.

MORRISON, J.

MORRISON, J.: The royalty, payment of which is prescribed by any statute in force on the 7th of October, 1914, is the royalty in controversy herein. The only statute in force on the 7th of October, 1914, was the Forest Act, of 1912. Coming to this enactment there are two sections to be considered, *viz.*, sections 14 and 58. The question which remains to be determined is as to which of these sections applies herein. I find that section 14 refers to those who secured renewals under section 13.

Inasmuch as the suppliants secured their renewals under the 1901 statute, I give effect to their prayer herein.

From this decision the Crown appealed. The appeal was

argued at Vancouver on the 12th of November, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: In 1903 the original lease was surrendered and a renewal lease issued for 21 years. There was an overlapping until 1914. The dispute is as to the royalty after that date. It is based on the statute in force in 1914. The statute in force is the Forest Act, B.C. Stats. 1912, and my contention is that sections 13 and 14 of that Act apply. The original period continues to run until 1914 and up to 1914 it is still open to the Legislature to fix the amount of royalty: see *Morris* v. *Structural Steel Co.* (1917), 24 B.C. 59; *Elliott* v. *Glenmore Irrigation District* (1923), 33 B.C. 205 at p. 210; *The King* v. *Bank of Montreal* (1919), 49 D.L.R. 288; *Cox* v. *Hakes* (1890), 15 App. Cas. 506 at p. 518. Argument

Maclean, K.C., for respondents: When the original lease was surrendered in 1903 it ceased to have any force whatever. A new lease was then issued and our rights are entirely under that lease and the laws in force when that lease was issued. Section 14 of the Act of 1912 does not apply to us at all. We rely upon section 58. We are subject to the Land Act of 1901: see *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1891), A.C. 531 at p. 549.

Farris, replied.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.: The dispute herein concerns royalties and ground rents payable to the Crown by the holder of a timber lease. The original lease was granted in 1893 for a period of 21 years. The Act of 1901 provided for the surrender of existing leases before the expiry thereof, and for the granting of renewals thereof for successive periods of 21 years. By section 7 of that Act, it was enacted that the new leases should be subject, for the unexpired term of the old lease, to the payment of the same royalties and ground rents as were reserved by the old lease, and that on the expiration of that time and for the residue of its term, it should be subject to such royalties and ground rents as should be applicable by statute in force at the MACDONALD, C.J.A.

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expiry of the term of the original lease. If, therefore, the lease granted in 1893 had remained in force for its whole term it would have expired in 1914. It was, however, surrendered, and in 1903 a renewal lease terminating in 1924 was taken under the provisions of said Act, and the royalties reserved in the original lease were paid up to 1914. But the respondent has refused to pay the sums demanded by the appellant between that time and the expiry of the renewed lease in 1924. It is the latter rents and royalties which are now in dispute.

The statute in force in 1914 is the Forest Act, B.C. Stats. 1912, Cap. 17, which we are called upon to construe and apply to the decision of the questions before us. The sections of that Act relied upon by the appellant are numbered 13 and 14. The respondent does not dispute his liability to pay the smaller dues under the only other section which could be applicable, namely, section 58.

Section 13 declares that any existing lease which was duly surrendered and renewed under the Act of 1901, may be renewed for successive periods of 21 years, subject to such royalties and ground rents as may be in force "at the expiration of such lease."

MACDONALD, C.J.A.

Section 14 deals with leases which had been "renewed" in accordance with the preceding section, *i.e.*, section 13. Now the lease in question here was not renewed pursuant to section 13, it was renewed pursuant to the Act of 1901, but is renewable pursuant to section 13 but not until 1924.

Counsel for the Crown contended that the language of section 14 indicates that the Legislature meant that section to apply not to leases renewed under the preceding section as stated, but to leases renewable pursuant to it, and argue that the word "renewed" in section 14 should read "renewable."

With this in view, I now return to section 13.

As stated above we have a lease granted in 1893, surrendered under the Act of 1901, renewed under that Act for a term of 21 years, eleven years of which is the "unexpired" term of the original lease. That is the lease contemplated by section 13. The words "existing lease" are used in two places, each referring to a different lease, the lease of 1893 before surrender, the lease granted in renewal thereof after surrender and renewal, which

latter is again renewable at its expiration in 1924. That, I am confident is the only interpretation which the section will bear. There is no right of surrender under section 13; that could only be had under the Act of 1901.

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Turning now to section 14; had the word "renewed" in the first line been written "renewable" the section would precisely fit into the situation which the Legislature had in contemplation, *viz.*, the fixing of rents and royalties to be paid by a lessee who had surrendered his lease under the Act of 1901, and had taken a renewal of it, and which in relation to rents and royalties was divided into two periods, the balance of the original term and the further term required to make up the 21 years for which it had been granted, the "original period" and the "residue" of the term of the renewed lease. Now it is quite clear to me that no lease except one which had been surrendered and renewed under section 7 of the Act of 1901 could have an "original period" and a "residue." Section 14 was passed to apply to just such a lease, and will be rendered futile unless we can say that the draftsman had made a slip in using the word "renewed" instead of "renewable." There is ample authority for holding that he had. Without repeating what I said in *Morris* v. *Structural Steel Co.* (1917), 24 B.C. 59, I would refer to the cases there considered and applied.

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I would allow the appeal.

MARTIN, J.A.: I concur in allowing this appeal.

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GALLIHER, J.A.: I would allow the appeal. I agree that the Court can, and should, substitute the word "renewable" for the word "renewed" in the first line of section 14, Cap. 17, B.C. Stats. 1912.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In this appeal it is necessary to consider the provisions of the Forest Act (Cap. 17, B.C. Stats. 1912), the sections requiring consideration being sections 13, 14 and 58. The respondents contend and were successful in the Court below in obtaining judgment declaring that the royalty payable under the lease in question to the Crown for the remainder of the term, *viz.*, from the 7th of October, 1914, to the expiry thereof, the 7th of October, 1924, is the royalty set forth under

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section 58. That is, the royalty is to be calculated at 50 cents instead of $1.50 per thousand feet—such is the judgment under appeal.

It is necessary to give particular attention to the lease as well as the statute law. The lease in question from the Crown is under date the 7th of October, 1903. It was a renewal lease under the Land Act Amendment Act, 1901. The original lease would have expired in 1914, but, being renewed, the term of the demise stood extended to the year 1924, and it is the last ten years of the demise that is to be considered and the royalty payable during that time. I think that as a matter of contract alone under the terms of the lease the increased royalty as called for by the Forest Act, Sec. 14, is payable. Turning to the lease we find this language:

"For the remainder of said term of twenty-one years an annual rent, at such rate per acre yearly, payable on the anniversary of the date of these presents, as may be prescribed by the terms of any statute of the Province of British Columbia, in such case made and provided, in force on the 7th day of October, 1914, all such payments to be made at the Land Office, Victoria, without any deduction or abatement whatever. And also rendering to His Majesty, His heirs, and successors, a royalty of fifty cents per thousand feet, board measure, upon and in respect of all timber suitable for spars, piles, saw-logs or railroad ties, cut on the premises hereby demised, during the said term from the 7th day of October, 1903, to the 7th day of October, A.D. 1914, and thereafter such royalty as may at that date be prescribed by the terms of any statute of the Province of British Columbia, in such case made and provided, in force on the 7th day of October, 1914; Provided, nevertheless, that the said lessee shall be entitled to a renewal of said lease for a further term of twenty-one years, on such terms, conditions, royalties and ground rents as may be in force by any statute of the Province of British Columbia at the time of the expiration hereof, and so likewise from time to time and as often as may be necessary for consecutive and succeeding periods of twenty-one years: Provided that the said lessee shall make application to the chief commissioner of lands and works for such renewal within one year previous to the expiration of the then existing lease, and provided that all arrears of royalties, ground rents and other charges are first fully paid: AND the said party of the second part hereby, for its successors and assigns, covenant with the said lessor in manner following, that is to say: THAT the said lessee will pay the royalty and the rent hereinbefore reserved, at the times and in the manner hereinbefore appointed, and will not assign any part of the premises, rights, powers or privileges hereby granted, without the permission in writing of the said chief commissioner of lands and works first had and obtained: AND will at all times pay all rates, taxes and assessments whatsoever (if any) which may be made, assessed, or levied for or in respect of any of the premises; AND shall erect, and during

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the said term maintain and keep in regular and continuous working and repair (save when prevented by inevitable accidents) lumber mill capable of cutting not less than thousand feet of lumber per day of twelve hours, in such part of the Province of British Columbia as the chief commissioner of lands and works may approve of in writing; AND shall keep correct books of account of all logs brought to mill, stating from whom such logs were acquired, where cut, the date received, and the scale measurement thereof, and shall make monthly returns to the chief commissioner of lands and works shewing the measurement of such logs, and such other particulars as the Lieutenant-Governor in Council may require: AND shall also make reasonable use within reasonable periods of the whole of the premises hereby granted, and apply the same to the purposes hereinbefore mentioned, and perform this covenant to the satisfaction of the said chief commissioner of lands and works for the time being:

"PROVIDED that this lease shall, on and after the 7th day of October, 1914, be subject to such taxes and conditions as may be in force by statute at said last-mentioned date."

It is to be observed that the royalty "thereafter," that is, after the 7th of October, 1914, and until the expiry of the lease in 1924, is "such royalty as may at that date be prescribed by the terms of any statute of the Province of British Columbia in such case made and provided in force on the 7th of October, 1914." Now, on the 7th of October, 1914, the Forest Act was in force being assented to on the 27th of February, 1912. In obtaining the lease here to be construed which was a renewal lease, it was necessary to surrender the previous lease and this was done and in conformity with the provisions of the Land Act Amendment Act, 1901. Therefore, as I view it the lease we have here to construe must be deemed to be a lease covered by the terminology of section 13 of the Forest Act. Section 13 reads as follows:

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"13. Any existing lease of Crown lands granted by the Crown in right of the Province of British Columbia pursuant to any statutory authority to any lessee for the purpose of cutting spars, timber, or lumber which was duly surrendered and renewed under the provisions of the Land Act Amendment Act, 1901, or any other statutory provisions for leasehold renewals, may be renewed for consecutive and successive periods of twenty-one years, subject to such terms, conditions, royalties, and ground rents as may be in force by statute at the time of the expiration of such lease: Provided that such renewal be applied for within one year previous to the expiration of the existing lease; and provided also that all the conditions of the lease and all regulations made under statutory authority from time to time concerning the cutting, scaling, and removal of timber and the disposal of debris and the prevention of fire have been complied with to the satisfaction of the minister, and that all charges prescribed by the minister, under

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authority of any Act of the Legislature or order of the Lieutenant-Governor in Council, in any year in respect of such leasehold for the upkeep of a system of fire prevention and extinguishment, together with all royalties, rentals, scaling fees, and other charges, have been duly and fully paid."

It certainly was a lease renewed under the provisions of the Land Act Amendment Act, 1901, and may be in due course later renewed under the provisions of section 13. There is no difficulty whatever under this line of reasoning of applying section 14 in its entirety to the lease in question that we have before us on this appeal. The section reads as follows:

"14. Every lessee holding a lease renewed in accordance with the next preceding section of this Act, the original period whereof terminates subsequently to the coming into force of this Act, and for the residue of the term whereof new, further, or other rentals and royalties, conditions and regulations, may be imposed or prescribed by statute, shall, for the residue of the term of such lease, be subject to pay and shall pay to the Crown in right of the Province of British Columbia an annual rental of fifty cents per acre and a royalty of one dollar and fifty cents per thousand feet on the scaled measurement of all timber cut on the leased premises, and shall be subject also to comply and shall comply with all the conditions laid down in the next preceding section of this Act: Provided that in each year during the residue of the term of such lease, upon due payment by the lessee of the rental and royalty imposed by this section, the department shall refund to the lessee such portion of his payment on account of rental as exceeds the amount that he would have paid had he made payment at a rate per acre calculated as one six-hundred-and-fortieth part of the fee payable that year in that portion of the Province for a special timber licence covering six hundred and forty acres, and such portion of his payment on account of royalty as exceeds the amount that the holder of a special timber licence would have been required to pay for the same scaled measurement of timber cut during the same period of time."

Was not this lease "renewed in accordance with the next preceding section [13] of this Act [1912]"? It was because it was a renewal of a lease "which was duly surrendered and renewed under the provisions of the Land Act Amendment Act, 1901."

Let us further pursue the language as contained in section 14—"the original period whereof terminates subsequently to the coming into force of this Act." That was the present case, the original period of the lease surrendered under the Land Act Amendment Act, 1901, would only expire in 1914, and the Act took effect in 1912. Then follows in section 14,

"and for the residue of the term whereof new, further or other rentals and royalties, conditions and regulations may be imposed or prescribed by statute shall for the residue of the term of such lease be subject to pay,

and shall pay to the Crown an annual rental of fifty cents per acre and a royalty of one dollar and fifty cents per thousand feet on the scaled measurement of all timber cut on the leased premises, and shall be subject also to comply and shall comply with all the conditions laid down in the next preceding section [13] of this Act."

I see no difficulty whatever in the construction of the statute law and nothing calling for the reading of the statute law in other than its plain terms. Further, the lease we have to construe is in itself effective as according to its terms the lessees agreed to pay for the last ten years of the term of the lease renewed in 1903, as we have seen "such royalty as may at that date be prescribed by the terms of any statute of the Province of British Columbia in such case made and provided in force on the 7th of October, 1914." The statute is unquestionably the Forest Act which was in force in 1912, and in force on the 7th of October, 1914. The situation is a very plain one to me, the statute law is very plain, the lease in question is ear-marked by the language of sections 13 and 14—the lease is a renewal lease of a previous one which in conformity with the language of section 13 "was (in 1903) duly surrendered and renewed under the provisions of the Land Act Amendment Act, 1901, ..." What misunderstanding can there be upon such a plain state of facts? The Legislature enacted the Forest Act quite understandably, and to cover the exact case we have before us. I see no difficulty. I would refer to what Lord Watson said in *Salomon* v. *Salomon & Co.* (1897), A.C. 22 at p. 38:

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> "'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

The "reasonable and necessary implication" in the present case is not difficult of being found, it is absolutely made manifest upon the face of the statute; further, the lease itself is definite in its terms and the royalty agreed to be paid is the royalty fixed by the statute. I consider that we have here the "express words." If I should be in error in this then, "by reasonable and necessary implication," the lessees are called upon in the present case from 1914 to 1924 to pay the increased

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royalty as provided in section 14 of the Forest Act. To accede to the contention of the respondents, with great respect to the learned trial judge, would be the denial of the "reasonable and necessary implication." In concrete terms the respondents insist that they pay a royalty of but 50 cents when it is unmistakably clear that in the last ten years the royalty was to be as prescribed by statute, and unquestionably it was contemplated to be greater in amount. It is inconceivable that the royalty should remain at the original 50 cents, and it is inconceivable that the Legislature so intended.

I have no hesitation in arriving at my conclusion in this appeal, and that is, that the appeal be allowed.

MACDONALD, J.A.

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

Appeal allowed.

Solicitor for appellant: *J. W. Dixie.*
Solicitors for respondents: *Elliott, Maclean & Shandley.*

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YOUNG v. CROSS & CO. AND O'REILLY.

Vendor and purchaser—Sale of land—Promoters of syndicate to purchase the lands, take a share—Promoters subsequently sell their share to plaintiff—Non-disclosure of their ownership—Duty to disclose to purchaser—Lapse of time in bringing action.

In June, 1912, the defendants formed a syndicate for the purpose of purchasing a block of land. Upon the formation of the syndicate the land was purchased by way of agreement for sale and a first payment on the purchase price was made. The defendants took a share in the syndicate themselves and shortly afterwards sold their interest to the plaintiff at a small profit. All subsequent payments under the agreement for sale were made of which the plaintiff paid his share. Mr. Cross of the firm of Cross & Company who carried on all negotiations with the plaintiff with reference to the sale, died in 1923. This action was commenced in 1926 to set aside the contract and for repayment of all moneys paid by the plaintiff on the purchase of the land on the ground of non-disclosure of the fact that the interest sold the plaintiff

belonged to Cross & Company. It was held on the trial that it did not appear that the vendor failed in any duty he owed the plaintiff, his duty to disclose not extending beyond the facts material to the contract.

Held, on appeal, affirming the decision of GREGORY, J. (MARTIN, J.A. dissenting), that the questions raised on the appeal are purely of fact and the decision of them depends very largely upon the impressions made upon the trial judge by the plaintiff himself, whose memory was most unreliable and unsatisfactory. The documents are against him and the action was not commenced until long after the death of the other party to the transaction. In these circumstances it is hopeless to ask the Court to say that the trial judge came to a wrong conclusion.

APPEAL by plaintiff from the decision of GREGORY, J., of the 10th of March, 1926 (reported 37 B.C. 188), in an action for restitution of all moneys obtained by the defendants from the plaintiff in respect of the sale of certain lands near Cordova Bay, Vancouver Island, by fraud, and in breach of their duty as the plaintiff's agents. Cross & Co. formed a syndicate in June, 1912, for the purpose of purchasing 80 acres of land near Cordova Bay at $650 per acre. The syndicate was composed of the Atlantic and Realty Improvement Co. which had a one-third interest, George H. Dawson and his sister a one-third interest, E. S. Fowler a one-sixth interest and Cross & Co. a one-sixth interest. The property in question was paid for by the syndicate in three instalments and after the first instalment was paid Cross & Co. sold their one-sixth interest to the plaintiff in July, 1912, for $3,500 on which they made a profit of about $150. Later the plaintiff made the further payments necessary for the purchase of the lands, the total amount paid by him being slightly over $10,000. All negotiations with reference to the sale and as to the firm's dealings with the plaintiff were carried on by Mr. C. T. Cross who died in October, 1923. The plaintiff claims that Cross & Co. were his agents; that they sold him their own interest in the syndicate and occupying a fiduciary position towards him they were bound to make full and fair disclosure; that he had no knowledge of the defendants' interest in the syndicate and that he is entitled to rescission and repayment of the moneys paid by him. The further necessary facts are set out in the judgment of the trial judge.

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The appeal was argued at Vancouver from the 12th to the

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16th of November, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: From what he was told by Cross the plaintiff thought he was getting a one-fifth interest in the syndicate whereas it was a one-sixth interest and he did not know it was Cross's share he was buying. It was Cross's duty to disclose the whole transaction: see *Gordon* v. *Street* (1899), 2 Q.B. 641 at p. 646; *Lindsay Petroleum Company* v. *Hurd* (1874), L.R. 5 P.C. 221 at pp. 229 and 242. That it was their duty to observe good faith see Lindley on Partnership, 9th Ed., 389; *Fawcett* v. *Whitehouse* (1829), 1 Russ. & M. 132 at p. 148; *Hichens* v. *Congreve* (1828), *ib.* 150(n); *Morgan* v. *Wright* (1926), 3 W.W.R. 109 at p. 115. As to the plaintiff not having shewn due diligence see *Stahl* v. *Miller & Kildall* (1918), 2 W.W.R. 197 at p. 203; *Greenizen* v. *Twigg* (1922), 2 W.W.R. 71 at p. 89; *McGuire* v. *Graham* (1908), 16 O.L.R. 431 at p. 434; *Stearns* v. *Stearns* (1921), 1 W.W.R. 40 at p. 48; *Edgar* v. *Caskey* (1912), 2 W.W.R. 1036; *Dunne* v. *English* (1874), L.R. 18 Eq. 524 at pp. 533-5. That there should be full disclosure see *Ball* v. *Gutschenritter* (1925), S.C.R. 68 at p. 73; *Brandling* v. *Plummer* (1854), 2 Drew. 427 at p. 430; *Love* v. *Lynch* (1920), 2 W.W.R. 538; *Phillips* v. *Homfray* (1871), 6 Chy. App. 770 at p. 778. The only case that appears to be against us is *Turner* v. *Green* (1895), 2 Ch. 205.

Argument

Davis, K.C., for respondents: The case turns on the question as to whether there was any fiduciary relationship between the plaintiff and Cross. There is no such relationship here, even the plaintiff's own evidence does not establish it and the trial judge has so found: see *Phillips* v. *Homfray* (1871), 6 Chy. App. 770 at pp. 779-80. There is a great difference between enforcing a contract and rescinding a contract with relation to disclosure. The commission on the sale was paid by Bradshaw who was the original vendor. The sale had been made to Dawson and we put up $3,350 as our one-sixth share for the first payment, the same as the others. Cross is dead and when there is an action against an estate, as here, at common law corroboration is required and claims of this nature should be examined

with jealous suspicion. This rule of practice has been made a rule of law by section 11 of the Evidence Act: see *Ledingham* v. *Skinner* (1915), 21 B.C. 41 at p. 45. There was no fiduciary relationship between them, no evidence of principal and agent: see *Stevenson* v. *Sanders* (1912), 17 B.C. 158. As to the distinction between co-owners and partnership see Lindley on Partnership, 9th Ed., pp. 27-8. As to whether the relationship of vendor and purchaser is such that the vendor must disclose his interest see Spencer Bower on Actionable Non-disclosure, 1915 Ed., pp. 79 and 83. On the question of commission see *Kelly* v. *Enderton* (1913), A.C. 191. If there is no case of fraud the Statute of Limitations applies: see *Coaks* v. *Boswell* (1886), 11 App. Cas. 232 at p. 235. As to cases where material facts were disclosed and specific performance ordered see *Turner* v. *Green* (1895), 2 Ch. 205; *Greenhalgh* v. *Brindley* (1901), 2 Ch. 324; *Smith* v. *Colbourne* (1914), 84 L.J., Ch. 112. There has been a sale of the property since the sale in question here so there cannot be rescission.

Argument

Mayers, replied.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.: The questions in this appeal are purely questions of fact. The decision of them depends very largely indeed upon the impressions made upon the trial judge by the principal witness, the plaintiff himself. His evidence as taken down is, to me, unsatisfactory. His memory was most unreliable, as he frankly admitted, and leaves the impression that it cannot be depended upon.

MACDONALD, C.J.A.

The documents in evidence are against him. The other party to the transaction is now dead. In fact the action was not commenced, nor any complaint made by the plaintiff until long after Mr. Cross's death. In these circumstances it is, I think, hopeless to ask the Court to say that the learned judge came to a wrong conclusion.

I would dismiss the appeal.

MARTIN, J.A.: I am unable, with all respect, to take the same view as my learned brothers of this appeal, because, to put it briefly, I regard the case as one wherein the plaintiff was

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invited to join and did join what was in effect a special partnership styled a syndicate (quite apart from any question of principal and agent upon which the learned judge below alone proceeded) for the purpose of acquiring certain lands for resale, and therefore he was entitled to expect the fullest disclosure of the transaction and *uberrima fides* from his associates in general and from the deceased Cross in particular, he being the manager in the common interest of the syndicate. That duty, in my opinion, was not discharged, a conclusion which I am forced to reach after a very careful examination of the entire evidence given by the plaintiff, who the learned judge below found to be a witness of "integrity" but of defective memory and upon that ground alone "unreliable." As to this, I am very favourably impressed by the exceptional frankness and candour shewn by the plaintiff, who frequently refused to spur his memory, so to speak, when it would have advanced his case to do so, for which reason I am the more prone to credit him when he speaks with certainty, when his memory justifies him, and in essentials he has, to my satisfaction, established his case and therefore the appeal should be allowed. I am the more moved to this conclusion because the learned judge below was obviously oppressed by a reluctance to credit the plaintiff owing to the credit of the deceased, thus expressing himself [37 B.C. p. 190]:

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> "I can see no evidence of agency whatever, and speaking generally, I think it would be monstrous in such a case as this to brand a dead man—a prominent and respected business man, with fraudulent conduct. . . ."

With all respect, and also "speaking generally," I see no reason why the credit and reputation of living witnesses of admitted integrity should not be as highly esteemed by Courts of justice as that of the dead; everybody is presumed to be "respectable," but the estate of a deceased person does not become absolved from the consequences of acts proved to be improper simply because he unfortunately dies: Courts have a duty to the living as well as to the dead and should not shrink from it.

GALLIHER, J.A.

GALLIHER, J.A.: I have gone into this matter with considerable care, and have read and considered every bit of the evidence, and find myself unable to say that the learned trial

judge was not justified in coming to the conclusion he did on both the law and the evidence; in fact, I would go further and say that I agree in his conclusions.

The appeal should be dismissed.

MCPHILLIPS, J.A.: The learned trial judge in this case, in his very careful judgment deals in detail with the relevant facts and applied the law thereto. I unhesitatingly agree with the learned judge and have little to add to the reasons of the learned judge which so completely dispose of the cause of action attempted to be set up.

It is significant that what evidence was led in support of the case of the plaintiff consists almost wholly of testimony of the plaintiff himself and has relation to a real-estate transaction which took place some fourteen years before the trial—without the evidence of the plaintiff unquestionably no case would be possible of establishment and with it—it in my opinion wholly fails. No fiduciary relationship of any nature or kind between the defendant and the plaintiff was made out. The allegation of fraud stands wholly unsupported by evidence and was insisted upon by counsel for the plaintiff at the trial and persisted in at this Bar. It is unnecessary to enter into a disquisition as to the necessary requirement of proof when fraud is alleged, and unquestioned proof that fraud was present at the inception of the transaction or at any relevant time during the carrying out of same and that it was resultant in damage proved to have been suffered by the plaintiff. It is well to bear in mind that in the history of the development of all parts of Canada that at times great inflation of real estate values took place and speculators made and lost fortunes. It is difficult when the boom has spent itself to really grasp or understand the atmosphere of the time when all is optimism—the time of pessimism surely comes, then things look dark indeed, and it is perhaps natural for those who have suffered to cast about for some means to rehabilitate the situation and pass the loss upon someone else. I will not say that it is always a calculated attempt to cast the burden upon other shoulders and shoulders that should not bear the blame to the knowledge of the person making the attempt. It is really an exhibition of the saying, it is easy to be wise after

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the event. I am not imputing to the plaintiff any desire to overreach in the present case with the intent to recoup himself from and out of the estate of the defendants, he may well have the firm, and to him, conscientious belief that the defendants are liable to him and should indemnify him for the monetary loss he has sustained, but he must make out his case and alleging fraud he must prove it. This, in my opinion, he has wholly failed to do. I am completely of the same view as the learned trial judge, that no fiduciary relationship between the defendants and the plaintiff existed and that there was not shewn by even a scintilla of evidence that anything done had even the slightest semblance of or badge of fraud. The action failed signally and as the attempted case endeavoured to be set up would have to be spelled out of the testimony of the plaintiff, it is significant and important to note what the learned trial judge had to say with reference to that testimony [37 B.C. p. 190]:

"While I do not desire to cast the slightest reflection upon the integrity of the plaintiff, I can place no reliance upon his testimony as to what was said on any occasion. He seemed so vague, indefinite and uncertain. He repeatedly referred to his 'memory not being good'—'not good after fourteen years,' to his 'impression,' etc., and to his work in the war having injured his memory, etc. I can see no evidence of agency whatever, and speaking generally, I think it would be monstrous in such a case as this to brand a dead man—a prominent and respected business man, with fraudulent conduct, and more especially when the slightest diligence on the part of the plaintiff by reading the statements, etc., that he received during the life of Mr. Cross (who only died in October, 1923), he could have had all the information he has today, and when Mr. Cross was alive to meet any charge of false dealing."

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It is futile to advance this allegation of fraud, it was repelled by the learned trial judge and should equally be repelled here. The case is one that may be said to be peculiarly fitted to be finally determined by the learned trial judge and in this connection I would refer to *Nanoose Wellington Colliery Co.* v. *Jack* (1926), 2 D.L.R. 164. In that case the learned Chief Justice of Canada (Anglin, C.J.C.), delivering the judgment of the Supreme Court of Canada, dealing with the question of finding fraud and the position of a Court of Appeal when it has not been found in the Court below, which is this case, at pp. 165-6:

"Without casting the slightest doubt on the right of the Court of Appeal in a proper case to find fraud established notwithstanding the contrary

view taken by the trial judge (*Annable* v. *Coventry* (1912), 5 D.L.R. 661), we are all very clearly of the opinion that under the circumstances of this case, the explicit findings of the trial judge, which obviously rested largely on his appreciation of the respective credibility of . . . witnesses who testified before him . . . . should not have been disturbed (*Nocton* v. *Lord Ashburton* (1914), A.C. 932, at pp. 945, 957-8)."

(Also see *Grant, Smith & Co.* v. *Seattle Construction, &c., Co.* (1919), 89 L.J., P.C. 17, Lord Buckmaster at foot of p. 19 and top of p. 20). Then we have Lord Sumner in his speech in the House of Lords in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8, saying:

"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shewn that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for judgment the trial judge's conclusion of fact should, as I understand the decisions, be let alone. In *The Julia* (1860), 14 Moore, P.C. 210, Lord Kingsdown says: 'They, who require this Board, under such circumstances, to reverse a decision of the Court below, upon a point of this description, undertake a task of great and almost insuperable difficulty. . . . We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.' Wood, L.J., in *The Alice* (1868), L.R. 2 P.C. 245, 248, 252, says: 'The principle established by the decision in *The Julia* is most singularly applicable . . . we should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made.' James, L.J., thus laid down the practice in *The Sir Robert Peel* (1880), 4 Asp. M.L.C. 321, 322: 'The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression.'

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"Again, in *The Glannibanta* (1876), 1 P.D. 283, 287, the Court of Appeal, after referring to *The Julia* and *The Alice*, say that they would not be

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disposed to reverse, 'except in cases of extreme and overwhelming pressure,' but, being of opinion that the trial judge (contrary to what is the fact here) did not proceed at all on manner or demeanour, but proceeded on inferences, which the Court of Appeal could draw as well as he could, they formed their own view of the facts and decided accordingly. I am not aware that this rule has ever been disowned and, if it has too often been neglected, still the current of authority on the subject runs all the other way."

I am not of the view that it is at all necessary to further dwell upon the facts or the law—the learned trial judge obviously gave the case most careful consideration and weighing all the facts, and bearing in mind the controlling decisions which govern in an action of this nature and the observations of the learned trial judge as to the plaintiff's evidence, his finding upon the facts is conclusive. I would finally say that I cannot persuade myself that there are any elements that would admit of disagreement with the learned trial judge, on the contrary, I am wholly of the view that the learned trial judge was right in dismissing the action, and being of that opinion, would dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The point in issue is in respect to an alleged representation that the plaintiff was to acquire an interest in a syndicate to be formed, not the interest already held by the defendants in an existing syndicate. Mr. Cross, since deceased, a member of the defendant Company, told the plaintiff—so he testified—that he wanted a fifth member (four being already committed to the project) to invest $10,000 for a fifth interest. The plaintiff after consideration decided to take the share offered, and gave his cheque for $3,500 as a first payment. He did so in response to a letter from the defendants who wrote saying they understood plaintiff had decided "to take the interest in the Cordova Syndicate." Although the plaintiff claims that he was to acquire a one-fifth interest he later adds "they began to talk afterwards that I was getting one-sixth"—a feature that does not seem to concern him or to put him to closer inquiry.

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The plaintiff claims that he did not know that the defendants had any interest in the syndicate at all beyond acting for him, nor did he know of it when he made subsequent payments; not in fact till his solicitor, Mr. *Green*, told him quite recently. He

denied seeing a statement alleged to be sent to him in 1913, shewing that defendants had contributed $3,550 to the syndicate and therefore must have had an interest but he made a payment of $80.30 based upon that statement. When he made his second payment of $3,399.93, he would not admit receiving a letter shewing that it was paid for a one-sixth interest, nor of seeing the receipt therefor setting out that the payment was his proportion of a one-sixth interest.

It was suggested by his counsel that it was not their ground of complaint that a sixth interest was obtained rather than a one-fifth interest. That is true, but it has some bearing as a side-light on the question of alleged fraudulent misrepresentation.

On the evidence of the plaintiff a trial judge would, I think, be strongly disposed to dismiss the action at the close of the plaintiff's case. I agree with the learned trial judge that no reliance should be placed upon his testimony. He had a poor memory. However, his evidence could not be contradicted as the party with whom he dealt was dead and it was urged that it shewed that the relationship of principal and agent existed between them, requiring that full disclosure should have been made by the deceased Cross in respect to the interest he was disposing of: or that even apart from agency that duty devolved upon him as a matter of law. I have no doubt that the relationship of principal and agent did not exist. It was suggested that a previous purchase from Pemberton & Sons established agency. Defendants in that transaction, however, were the agents of Pemberton & Sons, except possibly that for a limited purpose, *viz.*, to register documents they acted for the plaintiff. It would not follow that they must necessarily be the plaintiff's agents in respect to the transaction in question in this action. The parties, in law therefore were dealing at arm's length. It is not a case where the plaintiff must of necessity confide in the defendants. He does not suggest that means of knowledge or opportunity to ascertain the true facts were denied to him. Where parties are dealing in relation to a subject-matter not otherwise *uberrimæ fidei,* there is no such obligation to disclose. One has to inquire whether, from the nature of the transaction the fact, *viz.,* that the defendants were the real owners of the interest acquired by the plaintiff was material to be disclosed.

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What difference did it make? It was suggested that if the plaintiff knew defendants were disposing of their interest he would not have purchased. But there might be many reasons why they should wish to sell, apart from their view of the value of the property. Mr. Dawson remained a member of the syndicate, and it was the fact that he was a member that induced the plaintiff to invest. True, all matters affecting title, such as the existence of any title at all in whole or in part, or as to the nature of the title bargained for, or as to easements or encumbrances affecting it must be fully and clearly disclosed. The existence too of any cloud that would restrict enjoyment or in any way affect the title must be disclosed. But that is not this case.

I may add that there is no evidence to support the allegation of fraud.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *John R. Green.*

Solicitors for respondents: *Moresby, O'Reilly & Lowe.*

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Trustees—Remuneration—Employment of solicitors—Collection by solicitors without bringing action—Fees by way of commission on collection—Right of trustees to charge as a disbursement.

Executors are entitled to employ the services of agents where the circumstances render it reasonable that they should do so and the costs thereby incurred may be charged as a disbursement on the executor's accounts.

Executors acting under a will which directed them to employ a certain firm of solicitors in case their duties rendered it necessary, made demand upon a debtor for $4,720 due under an agreement for sale. The debtor refused to make payment and refused to recognize the executors as having anything to do with the matter or entitled to the money. The executors then consulted the solicitors and left the matter in their hands for collection. The solicitors after an exchange of letters with the debtor's solicitors came to an agreement whereby the debtor agreed to make the payment that was due provided the executors arranged for the removal of a *caveat* that was filed against the lands sold under the agreement for sale on behalf of deceased's wife who had made a claim under the Testator's Family Maintenance Act. The solicitors charged $248.50, commission for the collection of the above sum. An appeal from the disallowance of this sum as a disbursement by the registrar on the taking of the executor's accounts, was dismissed.

Held, on appeal, reversing the decision of MCDONALD, J. (MACDONALD, C.J.A. dissenting), that the evidence shewed it was not on account of the *caveat* being filed against the lands in question that the debtor refused to pay the sum due under the agreement for sale, and the payment made to the solicitors for their employment to enforce payment was a disbursement the executors properly incurred.

Stephen v. *Miller* (1918), 25 B.C. 388; (1918), 2 W.W.R. 1042 applied.

APPEAL by the executors of the estate of Louis Level, deceased, from an order of MCDONALD, J. of the 25th of June, 1926, dismissing an appeal from the decision of the deputy registrar at Vancouver on the taking of accounts of the said executors in refusing to allow the sum of $248.50 paid by the executors to their solicitors by way of collection fee for collecting a debt of $4,470 owed the estate by one Joe Le Moon. The facts are that in 1919, Louis Level sold to Joe Le Moon under agreement for sale lot 30, block 15, district lot 196. The purchase price was $26,000, and at the time of Louis Level's death

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\$12,000 and interest were still unpaid. Upon a payment of \$4,000 coming due in November, 1924, the said Le Moon refused to pay and Messrs. *Savage & Roberts* were instructed to take the necessary proceedings to collect. Subsequently a settlement was arrived at between Messrs. *Savage & Roberts* and Le Moon's solicitors whereby Le Moon was to pay \$4,470 upon Messrs. *Savage & Roberts* arranging for the removal of a certain *caveat* filed against the lands on behalf of Clara Level, widow of the deceased, making claim under the Testator's Family Maintenance Act and it was consequently unnecessary to take any action in the Courts.

The appeal was argued at Vancouver on the 13th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellants: The charge was made in accordance with the allowance for collections in Order LXV., r. 27, sub-rule (59A), Supreme Court Rules, 1912. The executors employed the solicitors to take such proceedings as were necessary. The solicitors made the collection and were paid the regular commission for so doing by the executors. This item should not have been struck out.

Argument

Molson, for respondents: Deceased's wife was not properly provided for and she invoked the Testator's Family Maintenance Act and a *caveat* was filed against the lands. The rule referred to precludes the solicitors from payment. This is a commission charged on a collection: see *Canadian Financiers Trust Co.* v. *Chan Shun Chong* (1921), 29 B.C. 543; *Stephen* v. *Miller* (1918), 25 B.C. 388; (1918), 2 W.W.R. 1042.

Mayers, replied.

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MACDONALD, C.J.A.: I would dismiss the appeal. In my opinion the case is very simple. The executors were parties to the proceedings for the increase of the wife's allowance under the will. The petitioner, as I suppose he was in that case, filed a *caveat,* as he was entitled to do under the Act, so as to prevent any dealing with the estate while this application was pending and until it was disposed of. The solicitor who filed it was bound to, and would have removed it, after that matter was

disposed of, if he had been requested to do so and upon the removal of that *caveat* the executors would be entitled to collect from this man the amount in dispute here. There was nothing to shew us that he would have refused to pay. The security was several times the amount of the debt, and the executors, if they were forced to legal proceedings could very easily have recovered. Instead of taking proceedings to find out, if they did not know already, what was the reason for the refusal, the affidavit of Moore which is very vague and gives very little information, simply says he absolutely refused—does not tell why—absolutely refused to make payment to the executors, or to recognize the executors as having anything to do with the matter, or being in any way entitled to the money. The view of the executors at that time was that Joe Le Moon was merely "stalling." Now, on that bit of evidence we are expected to say that the executors should not have acted as any ordinary business man would and found out from the solicitor to the proceedings what was the obstacle, and have removed it. He could have done so without any expense and without going to his solicitor and having him collect the money. He might possibly, if not aware of the *caveat,* have gone to his solicitor and found out what was the matter and paid for that. The trustee has not set forth the facts, if any, which would justify his conduct. He has shewn no diligence in the performance of his office being content to draw his commission from the funds of the estate and engage another to do the work which he ought to have done himself with the result that the estate is mulcted in two commissions, one to himself and one to solicitors. I think the registrar and judge were quite right in refusing to give sanction to such a transaction. The costs will come out of the estate.

MACDONALD, C.J.A.

MARTIN, J.A.: In the case of *Stephen* v. *Miller* (1918), [25 B.C. 388]; 2 W.W.R. 1042, this Court laid down the principles which guide us in disposing of a matter of this kind, and in brief, as I understand it, it is this: Where the circumstances of the case render it reasonable they should do so the executors are entitled to employ the services of such agents as may be necessary. In this particular case we find that the executors were acting under a will which directed them to employ a

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certain firm of solicitors in case the discharge of their duties rendered that necessary, and in the course of such discharge it became necessary for them to endeavour to collect the sum of $4,720 due under an agreement for sale. They made a demand under that agreement upon the debtor, and this is what they were confronted with upon that demand, which I understand from reading the affidavit, was a personal demand, as it is not mentioned as being in writing and the circumstances would shew it must have been a personal demand, as follows: I made a demand upon Joe Moon for the amount, but—" this is the position taken by the debtor, "he absolutely refused to make payment to the executors," and secondly, "or to recognize the executors as having anything to do with the matter," and, thirdly, "as being in any way entitled to the money"; and the affidavit goes on to say their view of the interview or the view entertained by the executors was that Joe Moon was really "stalling for time" and would pay up if suit were brought. Now, being placed in that intolerable position whereby their authority was defied on three separate grounds they resorted to the firm the will contemplated they should resort to, *i.e., Savage & Roberts,* to be advised as to what course they should take in such an embarrassing position, and the learned counsel for the respondent frankly admits it was a position which entitled them to take legal advice. Having got that far, they would have to abide by the advice they got. If they went to the solicitor and asked his advice and then refused to take it the consequences of such neglect of duty of course would be worse than failure on their part to resort to legal advice.

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Then the registrar's report shews we have everything before us which was before him, and at p. 5 he recites the material or evidence before him, and so far as was material for the purpose of disposing of the matter it was brought before the learned judge and it appears from what occurred on the 12th of June that he (as his final order of the 25th of June recites) not being satisfied with the evidence before the registrar called for further material, and the further material got was this very same affidavit of the 23rd of June which I have read, so that two days after receiving that material he made the order disallowing the claim. So it is perfectly plain we have everything which

was before the registrar, and the additional facts which were before the learned judge, so we are better able to dispose of this matter than the learned registrar, the learned judge having filled any possible gap which might be required to be filled to explain the position taken by the executors. It is to be noted that there is not one single thing in that material that shews it was because of the *caveat* that the debtor refused to pay. He refused on three grounds which I have made, and it was only when the matter was put into his lawyer's hands that he was finally brought to his senses and the matter was adjusted without any lawsuit. I must say in such circumstances as we have before us I have, with every respect for other opinions, no hesitation in saying that we have for our guidance the same principle as we laid down in *Stephen* v. *Miller,* and so I think the amount should be allowed as a disbursement properly made by the executors.

MARTIN, J.A.

GALLIHER, J.A.: I take the same view as my brother MARTIN.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I may say I am of the same view as my brother MARTIN who has reviewed the facts before the learned judge and also referred to the decision of this Court in *Stephen* v. *Miller* which is binding upon us. In my view this is not a singular case at all. It is a case similar to many which are occurring all the time in carrying on the work of an estate. Certainly in this particular case the executors were under obligation to employ Messrs. *Savage & Roberts,* as solicitors, but apart from that I think the executors were reasonably entitled upon these facts to consult solicitors, and having consulted solicitors they would naturally in ordinary course follow the advice given, and just because a solicitor is able to get in the money of the estate on a mere letter written does not constitute any reason why the solicitor should be deprived of reasonable fees for his work. The question comes as to what should be allowed; it was thought in the wisdom of the Legislature that the best thing to do was to fix the amount by way of commission. I know during long years of practice I had cases of this kind and the commission was the only remuneration that could be got. Why should not the solicitor receive remuneration and why should not the estate be called upon to pay for the services rendered? I speak

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with great respect to contrary opinion, but I think myself it highly unjust to say the least, that executors should be called upon to call upon the solicitor who had impeded them in the carrying on of their work as executors. In my opinion the executors did a right thing and a reasonable thing and having done the right thing and the reasonable thing in engaging solicitors, it is only reasonable the solicitors should be remunerated. This appeal is a meritorious one; the appeal should be allowed and the item allowed.

MACDONALD, J.A.

MACDONALD, J.A.: I do not think, with deference, the question of the *caveat* enters into the matter at all. There is no evidence to shew that the debtor refused to pay on that ground; in fact the contrary is suggested. The employment of agents was reasonable under the circumstances and the appeal should be allowed.

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

Solicitors for appellants: *Savage & Keith.*
Solicitors for respondents: *Walsh, McKim & Housser.*

CLARKSON *ET AL.* AND HOME BANK OF CANADA v. LANCASTER.

MCDONALD, J.

1926

May 28.

CLARKSON AND HOME BANK OF CANADA *v.* LANCASTER

Banks and banking—Winding-up—Assignment of debt of depositor to bank—Right of set-off—R.S.C. 1906, Cap. 144, Sec. 71—R.S.B.C. 1924, Cap. 16, Sec. 4; Cap. 135, Sec. 2(25).

L. being indebted to the Home Bank for advances and having certain moneys accruing due from the Great Northern Railway Company for delivery of cross-ties, executed an assignment as follows: "The undersigned hereby assigns and transfers to the Home Bank of Canada as security for all existing or future indebtedness or liability of the undersigned to the Bank all the debts, accounts and moneys due or accruing due or that may at any time hereafter be due to the undersigned by the Great Northern Railway Company," etc. This document was duly registered and notice thereof given the Railway Company. At the instance of the Railway Company two further assignments of his interest in certain cross-ties delivered to the Railway Company were executed by L. in favour of the Bank, notice of which was given the Railway Company. Shortly after the execution of the last assignment the Bank closed its doors. At this time the Railway Company were depositors in the Home Bank in a sum exceeding the amount that was due L. from the Railway Company and assigned to the Bank. In an action by the liquidators against L. on certain promissory notes made by him in favour of the Bank to secure his indebtedness to the Bank, the defence was raised that the notes were paid by virtue of the fact that the Railway Company was entitled to set off the amount owing to the Bank by the Railway Company in respect of the assignments, against the moneys of the Railway Company on deposit in the Bank.

Held, that the first assignment from L. to the Bank was an absolute assignment within the meaning of the Laws Declaratory Act; that the debt owing by the Bank to the Railway Company and the debt owing by the Railway Company to the Bank were "mutual debts" and there was the right of set-off of one against the other. The action should therefore be dismissed.

After the Bank had closed its doors and after the present dispute arose the manager of the Bank attended the registrar and released to L. the first assignment above referred to by authorizing the registrar to mark the assignment as "satisfied" which the registrar did.

Held, that what was done before the registrar was without effect as the only way a chose in action could have come again into L.'s hands was by the execution of another assignment from the Bank to L. and no such assignment was ever executed.

Statement

ACTION by the liquidators of the Home Bank of Canada on certain promissory notes made by the defendant to secure the

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Bank in respect of advances made to him. In July, 1923, the defendant, having certain moneys accruing due to him from the Great Northern Railway Compay on a contract for supplying cross-ties to the Railway Company, executed an assignment in favour of the Home Bank as security for all existing or future indebtedness to the Bank all debts, accounts and moneys due or accruing due or that may at any time hereafter be due to him by the Great Northern Railway Company. The assignment was registered and notice thereof was duly given to the Railway Company. On the 24th of July following at the instance of the Railway Company the defendant executed a further assignment to the Bank of all his interest in certain cross-ties delivered to the Railway Company, and prior to the 14th of August, 1923, a third assignment was executed in favour of the Bank as to a further delivery of cross-ties to the Railway Company. Upon delivery of the third assignment the Railway Company was indebted to the Bank, as assignee of Lancaster in the sum of $2,100. On the 17th of August, 1923, the Home Bank suspended payment and the plaintiffs were appointed liquidators of the Bank. At the time of suspension the Bank had $2,800 on deposit belonging to the Railway Company. In November, 1923, and after this dispute had arisen the manager of the Bank attended the registrar and released to the defendant the first assignment by authorizing the registrar to mark the assignment "satisfied" but no document by way of reassignment was executed. The defendant's submission is that the promissory notes sued on are paid by virtue of the fact that the Railway Company is entitled to set off *pro tanto* against the amount owing to the Bank by the Railway Company in respect of the above assignments, the moneys of the Railway Company on deposit in the Bank. The assignments are set out in full in the reasons for judgment. Tried by MCDONALD, J. at Fernie on the 12th of May, 1926.

Fisher, K.C., for plaintiffs.
Sherwood Herchmer, for defendant.

28th May, 1926.

Judgment

MCDONALD, J.: On the 16th of July, 1923, the defendant, being indebted to the Home Bank of Canada and having certain

moneys accruing due to him from the Great Northern Railway Company in payment for cross-ties being delivered to the Railway Company, executed the following document:

"The undersigned hereby assigns and transfers to the Home Bank of Canada as security for all existing or future indebtedness or liability of the undersigned to the Bank all the debts, accounts and moneys due or accruing due or that may at any time hereafter be due to the undersigned by Great Northern Railway Company, and also all contracts, securities, bills, notes and other documents now held or which may be hereafter taken or held by the undersigned or any one on behalf of the undersigned in respect of the said debts, accounts, moneys or any part thereof.

"Dated at Fernie, B.C., the 16th day of July, 1923.

"(Sgd.) James Lancaster."

On or about the 17th of July written notice of this assignment was duly given to the Great Northern Railway Company. At the request of the Railway Company, Lancaster executed a further document on the 24th of July, 1923, in the following words:

"[Exhibit 12]

"City or Town of Flagstone State of B.C. Canada July 24th, 1923, for Value Received I hereby assign, transfer and set over to the Home Bank of Canada of Fernie, B.C. all my right, title, interest, claim and demand to 3,155 cross-ties delivered on right of way Great Northern Railway Company at or near Flagstone & Dorr Stations Division, inspected in month of July pile No. — And I hereby authorize the treasurer of said Great Northern Railway Company to pay the value thereof to said Home Bank of Canada instead of to me.

"James Lancaster,
"Flagstone, B.C."

Judgment

and sometime prior to 14th August, 1923, a further assignment in the following words:

"[Exhibit 14]

"City or Town of Flagstone, Province of British Columbia, 1923, for Value Received I hereby assign, transfer and set over to the Home Bank of Canada of Fernie, B.C. all my right, title, interest, claim and demand to 3,383 cross ties delivered on right of way Great Northern Railway Company at or near Flagstone & Dorr station, Division, inspected in month of August pile No. — And hereby authorize the Treasurer of said Great Northern Railway Company to pay the value thereof to said Home Bank of Canada instead of to myself.

"James Lancaster,
"Flagstone, B.C."

Written notice of both last-mentioned assignments was duly given to the Railway Company. On 17th August, 1923, the Home Bank of Canada suspended payment and later the plaintiffs Clarkson and Weldon were appointed liquidators of

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the Bank and, pursuant to the Dominion Winding-up Act, have obtained an order giving leave to bring this action.

On the date of the suspension of payment no moneys had been paid by the Railway Company to the Bank under any of the above assignments. On that day the Bank had moneys on deposit belonging to the Railway Company amounting to some $2,800 and the Railway Company was indebted to the Bank as assignee of Lancaster in some $2,100.

Lancaster is now sued on certain promissory notes made by him in favour of the Bank to secure the Bank in respect of advances made to him and the defence to this action is that the notes are paid by virtue of the fact that the Railway Company was entitled to do, as it did do, *viz.*, set off *pro tanto* against the amount owing to the Bank by the Railway Company in respect of the above assignments, the moneys of the Company on deposit with the Bank. It had been deemed by the Bank that the assignment first above mentioned, was an assignment which required registration under the Revised Statutes of British Columbia, 1924, Cap. 16, relating to assignments of book debts and that assignment was duly registered. On or about the 23rd of November, 1923, after the present dispute had arisen, the manager of the Bank attended the registrar and, as stated in Exhibit 34, "released to Lancaster the assignment covering his book accounts." No document by way of reassignment was executed but the registrar was authorized to mark the assignment "satisfied" and this he did.

Judgment

In the first place, though it was contended that none of the assignments in question were absolute assignments within the meaning of the Laws Declaratory Act, Sec. 2 (25), in my opinion, whatever may be the effect of Exhibits 12 and 14, the first-mentioned assignment was an absolute assignment within the meaning of the Act. Some of the cases are somewhat difficult to reconcile but applying the tests laid down in Odgers's Broom's Common Law, 2nd Ed., Vol. II., p. 769, where the authorities are reviewed, this assignment must be held to be an absolute assignment. If this conclusion is correct, then immediately notice was given of the assignment to the Railway Company, the Bank was in a position to bring suit against the Railway Company for the recovery of the amount owing by

the Railway Company to Lancaster, and what was done before the registrar is without effect as the only way that the chose in action could have come again into the hands of Lancaster was by the execution of another assignment of that chose in action from the Bank to Lancaster and no such assignment was ever executed.

The only remaining question for discussion is, whether or not the Railway Company was entitled to exercise the right of set-off. It is contended that no such right existed but this contention I think cannot prevail. Section 71 of the Winding-up Act provides as follows:

"The law of set-off, as administered by the Courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accuring due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act."

But it is contended that this section does not apply as the debt owing by the Bank to the Railway Company and the debt owing by the Railway Company to the Bank were not "mutual debts." I think they were "mutual debts" and that one might be set off against the other.

Judgment

This is an entirely different case from *The Maritime Bank* v. *Troop* (1889), 16 S.C.R. 456 where it was held that a shareholder liable for calls could not set off against such liability a debt due to him from the Bank. There, as pointed out, the debts were not "mutual debts" because the calls were owing to the creditors of the Bank (in liquidation) while the moneys were owing by the Bank itself to the shareholder. In the present case, the moneys due to Lancaster and assigned to the Bank were owing by the Railway Company to the Bank as such, and the Railway Company's money on deposit was owing to the Railway Company by the Bank, as such.

It follows from the above that this action must be dismissed with costs.

Action dismissed.

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REX v. ROBERTSON AND HACKETT SAWMILLS LIMITED.

REX v. ROBERTSON AND HACKETT SAWMILLS LTD.

Master and servant—Male Minimum Wage Act—Conviction of employer for failing to post order of Board—Powers of Board—Order limited to occupations in lumber industry only—B.C. Stats. 1925, Cap. 32, Sec. 7.

The defendant employer of labour was charged with failing to post and keep posted in its establishment a copy of the order of the Board as defined by the Male Minimum Wage Act. The order recited that "the minimum wage for all employees in the lumbering industry [the expression "lumbering industry" being defined in the order] shall be the sum of 40 cents per hour." No other order had been made by the Board and it was submitted by the defence that the order of the Board was invalid because the Board had no jurisdiction to make an order under said Act limited to occupations in the lumber industry only. Upon conviction an appeal was taken, by way of case stated, to the Supreme Court. The order was declared valid and the conviction upheld.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C. (GALLIHER, J.A. dissenting), that it is conceded that the Board is authorized to make an order that all employees throughout the Province shall receive not less than a stated wage but it is denied that this may be done, as it were, piecemeal. The Act itself contemplates successive orders and admits of the fixing of wages for all employees engaged in occupations connected with particular industries as it would be difficult otherwise to give effect to the particular circumstance of separate employers contemplated by the Act.

APPEAL by defendant from the decision of HUNTER, C.J.B.C., of the 10th of November, 1926, answering in the affirmative a certain question submitted to him by way of case stated by H. C. Shaw, Esquire, police magistrate for the City of Vancouver. The case stated was as follows:

"1. On the 6th day of November, A.D. 1926, an information was laid against Robertson and Hackett Sawmills Limited, charging the Company as follows:

Statement

"'Robertson and Hackett Sawmills Limited, an employer within the meaning of the Male Minimum Wage Act, did on the 1st day of November, 1926, fail to post and keep posted in a conspicuous place in its establishment or plant in the City of Vancouver, so that all employees affected thereby could have ready access to and see the same, a copy of the order of the Board, as defined by the said Male Minimum Wage Act the said Robertson and Hackett Sawmills Limited having been duly supplied with copies of said order by the Board, contrary to the provisions of the said Male Minimum Wage Act.'

"2. The order of the Board dated the 29th day of September reads as follows:

"'Province of British Columbia

'Male Minimum Wage Act.

'Order establishing a Minimum Wage in the Lumbering Industry.

'Pursuant to the Provisions of the Male Minimum Wage Act this Board of Adjustment, constituted under the Hours of Work Act, 1923, having made due enquiry hereby orders:

'1. That where used in this order the expression "Lumbering Industry" includes all operations in or incidental to the carrying on of logging camps, shingle-mills, sawmills, planing-mills, lath-mills, sash and door factories, box factories, barrel factories, veneer factories, and pulp and paper mills, and all operations in or incidental to the driving, rafting and booming of logs.

'2. That, subject to the other provisions of this order, the minimum wage for all employees in the lumbering industry shall be the sum of forty cents per hour.

'3. That the number of handicapped, part time, and apprentice employees in respect of whom a permit may be obtained pursuant to the said Male Minimum Wage Act authorizing the payment of a wage less than the minimum wage otherwise payable under this order shall, in the case of each employer, be limited to ten per centum of his employees.

'Dated at Victoria, B.C., this twenty-ninth day of September, 1926.

'J. D. McNiven, Chairman,

'T. F. Paterson,

'F. V. Foster.

'Members of the Board of Adjustment.'

Statement

"3. The said charge came on for hearing before me at Vancouver, B.C., on the 9th day of November, 1926, when a plea of 'not guilty' was entered.

"4. Evidence was thereupon taken by way of an agreed admission of facts, which as accepted and found by me are as follows:

"(a) That after enquiry the order as referred to in the information was made and established by the Board and duly published in the Gazette on the 30th day of September, 1926. A copy of the order is set out above.

"(b) That enquiry by the Board prior to making the said order was made in regard to the occupations in the lumbering industry, as defined in the said order, and to other occupations to which the Act applies, but that the enquiries were only completed as to the occupations in the said lumbering industry.

"(c) No other order has been made by the Board, but the Board are conducting further enquiries and a further order, or orders extending the application of the Act to the other occupations to which the Act applies will be made.

"(d) On the 1st day of November, 1926, Robertson and Hackett Sawmills Limited was an employer within the meaning of the Male Minimum Wage Act and had and operated with its employees a sawmill at its establishment in the City of Vancouver, and was supplied by the Board with copies of the said order on and prior to said 1st day of November.

"(e) No copy of such order was posted or kept posted in a conspicuous place in the said establishment by the said Robertson and Hackett Sawmills Limited on the 1st day of November last, or at all.

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"5. The defence thereupon asked for a dismissal of the charge on the ground that no offence was committed because the order of the Board, as recited in the said information was invalid, because the Board had no jurisdiction to make an order under the Male Minimum Wage Act limited to occupations in the lumbering industry only.

"6. I decided that the order was valid: That the said Company had violated section 7 of the said Male Minimum Wage Act, and entered a conviction accordingly.

"7. Counsel for the said Robertson and Hackett Sawmills Limited desires to question the conviction on the ground that it is erroneous in point of law for the reason above stated, and has applied to me to state and sign a case setting forth the facts of the case.

"8. The question submitted for the judgment of this Honourable Court is: Was I right in holding that the order of the Board is valid?"

J. W. deB. Farris, K.C., for appellant.

D. Donaghy, and *Orr,* for respondent.

HUNTER, C.J.B.C.: It is admitted that the Act is a new venture in the field of legislation and the point being one of small compass, I do not find it necessary to reserve judgment. Mr. *Farris's* contention is that the Act imposes the duty on the Board of making a preliminary comprehensive inquiry into the wages subsisting in all the industries of the Province save those which are excepted by the Act before the Board has any jurisdiction to make an order establishing a minimum wage for any one of such industries. So to interpret the Act I think would make it unworkable, and it is the duty of the Court, if the language permits, to construe the Act in such a way that the evident intention of the Legislature can be carried out. I therefore think it is quite open to the Board to proceed to establish a minimum wage in any one or more industries, and vary the order from time to time, without the necessity of making this comprehensive inquiry. The only condition imposed by the Act is that before the Board makes an order establishing a minimum wage it shall make an inquiry, which I take to mean an inquiry *pro hac.*

Judgment

I therefore think the conviction was right.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 16th and 17th of November, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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J. W. deB. Farris, K.C., for appellant: Under the Act it is the duty of the Board to fix a minimum wage for employees in the various occupations within the Province. What they did was to merely fix a wage for men labouring in the lumber industry. My first submission is that they cannot perform their duties piecemeal by fixing a minimum wage for one industry and not dealing with another at all. In the next place the whole subject-matter should not be dealt with on a basis of industries but on a basis of occupations. There must not be discrimination and there is discrimination when they deal with one industry alone. Their powers must be exercised concurrently.

D. Donaghy (*Orr,* with him), for respondent: It would be unworkable to compel the Board to make an inquiry into wages subsisting in all industries and deciding on a minimum wage on all at one time, and the learned Chief Justice so decided. It would be inconsistent with their powers to vary the minimum wage with respect to different occupations at any time they considered it proper to do so. The only condition imposed by the Act is that an inquiry shall first be had before an order is made.

Argument

Cur. adv. vult.

2nd December, 1926.

MACDONALD, C.J.A.: The prosecution is founded on the provisions of the Male Minimum Wage Act, Cap. 32, of the Acts of 1925, which enacts that every employer shall post up in his establishment a copy of the order of the Board fixing a minimum wage for his employees. It was for a breach of the Act not for a breach of the order of the Board that the appellant was convicted.

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Its answer to the charge and the only one open to it, is, that the order was made without authority of the Act, and is therefore null and void. It submits that no obligation was imposed upon it by the Act to post up a piece of paper which in contemplation of law had no existence. The question for decision, therefore, is not whether the Board made the right order or the wrong order, but whether they had power to make the order, whether it were right or wrong. Mr. *Farris,* appellant's counsel, made two submissions in support of his contention,

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that the Board has no power to make any order in the terms of the one in question; he argued that they were authorized to fix a minimum wage for those engaged in "occupations," not a minimum wage for those engaged in "industries," and that the order is of the latter description. Secondly, he argued that the Board were authorized to fix a minimum wage only for all those engaged in an "occupation" throughout the Province, not for some of them merely.

I shall deal first with the latter contention, since in my opinion, the answer to it will determine the appeal.

The question, it will be borne in mind, is not whether the order is right or wrong, but whether it is or is not null and void. It is conceded that the Board have power to fix a minimum wage for those in occupations to which the Act applies. It is also conceded that the Board is authorized to make an order that all those employees, for instance, engineers, blacksmiths, etc., throughout the Province shall receive not less than a stated wage. But it is denied that this may be done as it were, piecemeal. It must be applied to all engineers, etc., irrespective of the particular industry to which they may be attached for the time being. That is the appellant's contention. That contention, in my opinion, goes only to the legality of the order, not to the powers of the Board to make it. The Board have power to make a general order. We will assume that they mistakenly made a limited one; that order may be wrong but not a nullity, the latter is the only question we are concerned with. The Act itself, I think, contemplates successive orders and admits of the fixing of minimum wages for all employees engaged in occupations, connected with particular industries. It would be difficult otherwise to give effect to the peculiar circumstances of separate employers contemplated by the Act.

I now come to the first submission mentioned above, that the Board by the order complained of, without authority fixed a minimum wage to be paid to employees in an "industry" not of an "occupation." Agreeing with Mr. *Farris*, as I do, that the wage must have reference to the occupation not to the industry, it becomes necessary to examine into its substance which is the fixing of a minimum wage for all employees whatever their several occupations may be, that is to say, trades or callings,

connected with the lumbering industry, at 40 cents an hour. True, it does not specify those occupations by name, but it includes them all in the 40-cent rate. Now whether or not that is a fair way of dealing with them, having regard to the different standards of wages, is not the question. The question is one of *ultra vires* or *intra vires*, not merely right or wrong.

I am satisfied that the Board had power to make the order in question, so that the conviction ought to be affirmed.

Whether or not they exercised their powers properly in the premises, I find it unnecessary to say. I do not wish to go beyond what is strictly necessary for the decision of this appeal. I would dismiss the appeal.

MARTIN, J.A.: In my opinion, which I base upon the broadest aspect of the enactment (which I think is an elastic one, and must necessarily be construed in that spirit, so as to give the effect to it which in my opinion the Legislature obviously intended) it was and is within the powers of the Board, in the fixing of the minimum wage for any occupation, to make classifications in so dealing with it; and these classifications may be either regional (as for example in the manner formerly in force under the old Jurors Act, drawing a line east or west of the Cascades) or they may be industrial, as applied to various industries, such as the lumber industry, the mining industry, the constructing industry, the coal industry, or many other industries—all those other industries which are included in the Act.

It would in this case I think be beyond question that if the order had been that in all occupations in the lumbering industry all employees shall be paid the minimum wage of 40 cents an hour, then such an order would be within the powers of the Board. It may be true that the Board has not used the exact language of the Act, and that their order is perhaps not artistically drawn, but that it in substance carries out the intention of the Legislature, in terms, as well as in spirit, I do not doubt, and therefore the appeal should be dismissed.

GALLIHER, J.A.: I am of the view that the word "occupation" in the second line of clause 3 of the Male Minimum Wage Act, B.C. Stats. 1925, Cap. 32, has reference to occupations of

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employees and not to industries in which the employer may be engaged. Section 13 of the Act would seem to strengthen that view.

Assuming this to be right, the Board are directed to fix a minimum wage for such employees in the manner provided in the Act. The Board are further directed to make such inquiries as it deems necessary for the purposes of the Act by section 4; and section 5 enacts:

"(1.) After inquiry the Board may by order establish a minimum wage for employees, and may establish a different minimum wage for different conditions and times of employment."

Then there are other directions which do not affect the point raised here. The Board proceeded under the Act, made certain inquiries and fixed a minimum wage for those employed in lumber industries only and objection is taken that they are in error in dealing with the Act piecemeal. The point is, should the Board first proceed to make all inquiries relating to the employment of those engaged in different classes or occupations, fix a minimum wage for each class and then, or at the same time, if different conditions and times of employment require it in certain cases, fix a different minimum wage in those cases, or can they proceed as they did here, and fix a minimum wage for one industry before fixing any general minimum wage?

My view of the Minimum Wage Act is that the Board should first fix a minimum wage for a class of occupations, say a carpenter, a blacksmith, or a stationary engineer, so that not less than a stipulated wage may be paid to him in the carrying on of his occupation generally, no matter how favourable the conditions are, thus establishing a basis which shall be the minimum in that occupation, then having established that basis, the Board may, where the employee is engaged in his occupation, where the conditions are hazardous to life or health (to instance mining) or for other good reasons within the Act, grade up (if I may use the expression) the minimum wage to the employee under such conditions.

Once you have established your minimum wage for an occupation you cannot grade down—if conditions call for it, it may be graded up and to grade up you must have a basis or foundation to start from.

I do not say it is not open to other construction, but the best consideration I can give it, leads me to the above conclusion.

I would allow the appeal.

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McPHILLIPS, J.A.: This appeal calls for the consideration of the Male Minimum Wage Act (Cap. 32, Statutes of B.C. 1925). The Act itself is not questioned; that is, it is deemed to be *intra vires* of the Legislative Assembly of British Columbia; that which is questioned is the procedure of the Board and order made by the Board that the minimum wage for all employees in the lumbering industry should be the sum of 40 cents per hour. There was a prosecution under the Act and a conviction was made against the appellant in the following terms by the police magistrate in and for the City of Vancouver: [already set out in statement.]

The appeal is from HUNTER, C.J.B.C., who upon the hearing of a case stated from the police magistrate, the question propounded being, "Was I [the police magistrate] right in holding that the order of the Board is valid?" That question the learned Chief Justice of British Columbia answered in the affirmative.

It is submitted on behalf of the appellant that the order of the Board is *ultra vires*. The grounds urged being these, that the purview of the Act plainly indicates that what is aimed at by the legislation is the establishment of a general scheme for the various occupations coming within the Act not meaning a uniform minimum wage but of uniform application, each minimum being a part of a co-related whole, and that there was no jurisdiction in the Board to classify by industry, it must be by occupation. Further, that there was no jurisdiction, in any case, to make the order as having application to the employees of one industry only, and that the order would at one and the same time have to be comprehensive of all those pursuing their respective occupations in whatever industry they might be employed. In short, an exhaustive inquiry being had then an order could be made dealing with each class of occupation irrespective of the industry in which employed, and not until then, *i.e.*, the order would extend to all occupations within the ambit of the Act and constitute a comprehensive whole.

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The Crown upon the other hand submits that the manifest

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meaning of the Act is, that there may be many inquiries held and as justice may require, and orders made from time to time and reference is made to sections 4, 5, 6 and 7 in support of this view. I must say that I cannot disagree with this submission, it is certainly the most sensible view of the legislation—especially when we consider the magnitude of the task of the Board and a minimum wage is called for—and we must assume that it is something that calls for expedition. The Board would in ordinary course proceed in its inquiries to consider the wages paid in the various industries to which the Act applies. Presumptively it would take up the cases of the employees said to be most in need of consideration at the outset and it may well be that is the present case. It is well to bear in mind in considering the question to be here determined, that the legislation is quite specific—that the "conditions and times of employment" have to receive the consideration of the Board in the establishment of a minimum wage for employees, section 5(1) reading as follows:

"5. (1) After inquiry the Board may by order establish a minimum wage for employees, and may establish a different minimum wage for different conditions and times of employment."

MCPHILLIPS, J.A.

This language appearing in the Act makes it abundantly clear that the Board has to apply its mind to the conditions and times of employment of the various industries not alone to the "various occupations." When we turn to section 3 of the Act, which reads as follows:

"3. It shall be the duty of the Board to ascertain the wages paid to employees in the various occupations to which this Act applies, and to fix a minimum wage for such employees in the manner provided for in this Act."

it is clearly apparent that in construing the section we are entitled to read in after the words "various occupations" the words "in the various industries"; this is accentuated upon reading section 13 of the Act which is in the following terms:

"13. This Act shall apply to all occupations other than those of farm-labourers, fruit-pickers, fruit-packers, fruit and vegetable canners, and domestic servants."

Section 13 unquestionably constitutes the dictionary which must be turned to to enable the Board to carry out the duties devolving upon it under section 5(1)—"may establish a different minimum wage for different conditions and times of employ-

ment." Mr. *Farris,* the learned counsel for the appellant in his very able argument laid great stress upon the words "various occupations" and combatted the view that the intention of the Legislature must have been that in all cases it was not the occupation alone that had to be dealt with, but the occupation relative to the industry in which the employees were working. It would seem to me that taking the Act as a whole the plain intention of the Legislature was to cast upon the Board the duty of inquiring into not alone the occupations of the employees, but the occupations in relation to the industry in which they were performing their labours. I can well understand that Parliament would give heed to the industrial conditions obtaining in regard to each and every industry and would legislate along lines that would admit of reciprocal consideration as between employees and employer and that the extent of the inquiries of the Board would go that length, and in taking this view I do no violence to the language of the statute, let me repeat under section 5(1) the Board "may establish a different minimum wage for different conditions and times of employment." This view, if sound, demonstrates that the inquiries are to be distinctive as to the industries and must take into consideration the varying conditions and times of employment. It would be unthinkable that the Board must in its inquiries cover all occupations irrespective of connection with industries and fix, once for all, the respective minimum wage for each occupation. That is not my reading of the Act. Now, what is our guide in such matters and what are the rules that govern? Speaking generally, it may be said that the Courts are at liberty to apply the principles of equity to the construction of statute law and carry out the intention of the Legislature, that is, to interpret the statute law in accordance with its spirit and not be confined too strictly to the form of expression therein:

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"should not, without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect, or be of some use":

the Judicial Committee in *Ditcher* v. *Denison* (1857), 11 Moore, P.C. 324 at p. 337; and in *Cargo ex "Argos"* (1873), L.R. 5 P.C. 134, 153, the Judicial Committee said the rule is "to adopt [that construction] which [will] give some effect to

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the words rather than that which [will] give none." The intended effect of the Act requiring consideration here is, in my opinion, made manifest in no uncertain manner. Firstly, there is to be a minimum wage for male employees; secondly, the Board to arrive at that minimum wage must enter upon inquiries to the end that in the fixing of the minimum wage all conditions existing in the various industries must be taken into account and that necessarily involves separate inquiries and may result in variance of amount in respect to the various occupations in the various industries coming within the scope of the Act. The intention of the statute being clear, in my opinion, it is not within the province of the Court to render the legislation nugatory by any too strict construction of the language used. The rule upon this point was very tritely and succinctly stated by the Judicial Committee in *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627, 634:

> "It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractibility of the language used."

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In *Brett* v. *Brett* (1826), 3 Addams Ecc. 210, Sir John Nicholl said (p. 216):

> "The key to the opening of every law, is the reason and spirit of the law —it is the '*animus imponentis*,' the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connexion with its whole context—meaning, by this, as well as the title, and preamble, as the purview, or enacting part, of the statute."

In *Doe dem. Bywater* v. *Brandling* (1828), 7 B. & C. 643, 660, Lord Tenterden, C.J. said:

> "In construing Acts of Parliament we are to look not only at the language of the preamble, or of any particular clause, but at the language of the whole Act. And if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect, from the more large and extensive expressions used in other parts, the real intention of the Legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause."

In my opinion, the Act is in form sufficient to carry out the intention of the Legislature, and taken as a whole—as the rules

require—the Board proceeded rightly in its inquiry and in the fixing of the minimum wage for all employees in the lumbering industry.

I might refer to what Lord Justice Selwyn said, in *Smith's Case* (1869), 4 Chy. App. 611, 614:

> "It is not the duty of a Court of Law or of Equity to be astute to find out ways in which the object of an Act of the Legislature may be defeated."

I am of the opinion that the challenged order of the Board was rightly and validly made, and would affirm the decision of the learned Chief Justice of British Columbia, upon the case stated, being of the opinion that he arrived at the right conclusion, and that the appeal should be dismissed.

MACDONALD, J.A. agreed in dismissing the appeal.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellant: *Farris, Farris, Stultz & Sloan.*
Solicitors for respondent: *McKay, Orr, Vaughan & Scott.*

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VANCOUVER ICE AND COLD STORAGE CO. v. B.C. ELECTRIC RY. CO.

VANCOUVER ICE AND COLD STORAGE COMPANY LIMITED v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Negligence—Damages—Street-car in collision with motor-truck—Driving street-car in fog—Duty of driver—Costs of repair—Depreciation—Loss of use.

The plaintiff while driving his motor-truck easterly on 16th Avenue, Vancouver, in a fog, was met by a Ford car going in the opposite direction. He turned slightly to the right to avoid the Ford car but in doing so went on the track of the defendant Company where his truck stalled. Before he could start his engine a street-car of the defendant Company ran into him smashing his truck badly. In an action for damages the plaintiff recovered the full amount claimed for costs of repair, depreciation and loss of use while undergoing repair.

Held, on appeal, that the decision of MCDONALD, J. should be upheld as to the finding of negligence on the part of the defendant but that the amount of damages should be reduced to the costs of repairs only, and the allowances for depreciation and for the loss of use of the truck while undergoing repair should be struck out.

Per MACDONALD, C.J.A. and MCPHILLIPS, J.A.: That the driver of a street-car while driving in a fog should keep his car under such control that he may stop within the limits of his vision.

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 29th of June, 1926, in an action for damages for negligence. On the 7th of December, 1925, at about the noon hour, there being a rather thick fog at the time, the plaintiff's truck was proceeding easterly along 16th Avenue on the travelled portion (or driveway) which is on the north side of the avenue, both tracks of the defendant Company on that portion of the road being on the south side. The driver of the truck was travelling on the right side of the travelling portion (and close to the tracks) when he was met by a Ford car going westerly. The driver of the truck then turned slightly to his right to let the Ford car pass, but in doing so he went slightly over the north track where his engine stalled. He got down immediately to crank his engine but before he could start it he heard a street-car coming from the east in the fog. The street-car struck the truck violently turning it completely around, the

plaintiff claiming that it was damaged to the extent of $2,658.28.

The appeal was argued at Vancouver on the 18th of November, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C. (*Riddell,* with him), for appellant: Under section 38 of the Consolidated Railway Company's Act, 1896, the street-cars have the right of way and it is the duty of all other vehicles to avoid obstructing street-cars. On the question of speed of the street-car see *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81; *Columbia Bithulithic Ltd.* v. *B.C. Elec. Co.* (1917), 2 W.W.R. 664.

Housser, for respondent: As to contributory negligence even when the truck swung out onto the track he brushed the Ford car as it went past. He did the reasonable thing in turning out and putting on his brakes as the road was narrow and barely allowed two cars to pass one another: see *Zellinsky* v. *Rant* (1926), 37 B.C. 119. On *quantum* of damages the fact that we have a spare truck has no bearing on the case: see Roberts and Gibb on Collisions on Land, 143; *The "Greta Holme"* (1897), A.C. 596; *The "Mediana"* (1900), A.C. 113 at p. 117; *The "Argentino"* (1889), 14 App. Cas. 519 at p. 523. On depreciation see Roberts and Gibb, 140.

Argument

Farris, in reply, referred to *The "Mediana"* (1900), A.C. 113 at p. 118.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.: The finding that defendant was negligent cannot be disturbed. In my opinion the driver of a tram-car when driving in a fog ought to keep his car under such control that he may stop it within the limits of his vision. The driver of the car which injured the plaintiff's truck fell short of that duty, and was therefore negligent.

MACDONALD, C.J.A.

There was, in my opinion, no contributory negligence. To avoid a collision and the almost certain death to the driver of the on-coming Ford car, the plaintiff's driver swung his truck necessarily upon the tramway, where it became stalled. Evidence was given that the driver of the tram-car had he been

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looking ahead as he ought to have been, could have seen the truck at a distance of 50 feet, nevertheless, he struck it with considerable force turning it around.

The learned trial judge gave the full damages claimed, and in this, I think, he was in error. These are made up of the costs of repair—$958.28—the alleged difference in value of the truck before and after the accident $500, and the replacement of the truck by another while the former was under repair $1,200. I am satisfied from the evidence that the truck was at least as valuable after being repaired as it had been just before the accident. The third item requires more consideration. The plaintiff being an ice company was obliged to lay off several of its trucks during the winter months; the accident happened in December and the evidence shews that it intended to put the truck, which was afterwards injured, into the repair shop practically at once. After the injury it used one of its other trucks which was not then in use to replace the one injured. This would have been done in any case. In any event, there is no evidence of wear and tear of the truck while replacing the other. The plaintiff is not entitled to use its own truck at a profit and it has not shewn how much, if any, of the $20 a day claimed is for actual depreciation of the truck while so used.

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It is noticeable that while the injured truck is valued by plaintiff's manager at $2,500, it has recovered $2,652.28 in respect of it.

The appeal should be allowed and the damages reduced to the sum of $958.28.

MARTIN, J.A.: I agree in allowing the appeal on the question of damages only, though I am not without doubt as to the negligence found on the part of the defendant's motorneer and am not prepared to lay down any general rule as to driving tram-cars or motor-cars in fogs, which must always depend upon the particular circumstances present at the time.

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As regards the damages awarded, the two well-known cases relied upon do not support the award when the facts upon which the decisions are based are exactly comprehended.

GALLIHER, J.A.: I do not feel that I should set aside the learned judge's finding as to defendant's negligence, though I

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think it is pretty close to the line. Nor would I find under the circumstances of this case, that plaintiff was negligent.

It remains then to deal with the question of damages.

The first thing that strikes one is that while the plaintiff fixes the value of its truck at $2,500, at the time of the accident, it has the truck itself which cost it $958.28 to thoroughly repair and which its foreman mechanic states is in better shape since repair than it was at the time of the accident, providing no latent defects develop and none had developed during three months of user, and it has a judgment besides for $2,652.28. In other words $152.28 more than it valued its truck at the time of the accident. It seeks to justify this by two items: (1) Depreciation by reason of the collision $500; (2) loss of use of truck for 60 days at $20 per day $1,200. First, as to depreciation: The evidence of its mechanic does not establish that any sum for depreciation should be allowed. It is true he estimates it at from 20 to 25 per cent. but when pressed for his reasons in cross-examination he says: "I would not buy a car that had been in an accident," and again, "some latent defect might develop." He admits the truck is running all right and that during three months it has been operating no defect has developed, and he further states that failing defects developing, it was in better shape after being repaired than it was at the time of the accident. The fact of the matter is that the car was practically reassembled, and thoroughly gone over, a new chassis put on, damaged parts replaced or repaired and everything done that would be necessary in thoroughly overhauling a truck that had not been in an accident at all. I would disallow this item.

Secondly, loss of use of truck: Plaintiff's evidence is that it had a number of trucks some of which were not in use at the time of the accident, and it took one of these and used it in place of the damaged truck, but most important of all is that the truck which was damaged was going in for overhauling and necessary repairs in a week, and its mechanic says that the truck lay in the garage for some time before he had instructions to go ahead with repairs and yet, in face of all this they sued to recover from the defendant for the full period between the

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accident and completion of repairs. I cannot see upon what principle, and would disallow this item of $1,200.

There is no dispute as to the cost of repairs and plaintiff should have judgment for that sum and the formal judgment amended accordingly. To that extent the appeal is allowed.

MCPHILLIPS, J.A.: I concur in the judgment of my brother the Chief Justice, allowing the appeal in part, and reducing the damages from $2,500 to $958.28.

MACDONALD, J.A.: I would not interfere with the findings of the learned trial judge, except as to the *quantum* of damages. The plaintiff was awarded $2,652.28 for damages to a truck valued at about $2,500 at the time of the collision. I would disallow the items for loss of use of the car for 60 days at $20 a day, and $500 for alleged depreciation. It was submitted that the first item was allowable on the authority of such cases as *The "Greta Holme"* (1897), A.C. 597, and *The "Mediana"* (1900), A.C. 113.

The facts of the case must be kept in mind in reading the judgments: In the former case where a dredge was damaged in a collision and another dredge owned by the plaintiff was used while the other was under repair it was shewn that they were companion dredges and although the other continued to work effective progress could not be made with one working alone. This was proven. To come within it the respondent in the case at Bar would have to shew that the deprivation of the damaged truck delayed it in its work or otherwise caused damage. This it failed to do. In fact, it was admitted that "we did not lose anything actually for the loss of time." It may well be that if evidence was led to shew loss from usage or wear of the substituted car while the other was under repair, it should be considered. The claim, however, was made for $20 a day for the whole 60 days, even although the damaged car in any event would have been laid up for part of that time for painting and overhauling.

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In the other case referred to where the facts were somewhat similar, also arising out of a collision, it was shewn that the substituted lightship was maintained at an annual expense for

the purpose of such emergencies. The registrar, as pointed out by Lord Shand, at p. 121, found that it was kept for this purpose at an expense of about £1,000 a year. The number of collisions occurring rendered it necessary to have an emergency lightship available. It is quite true as pointed out by Lord Halsbury that a jury might award as general damages any sum they might think proper to allow for the withdrawal from use of the subject-matter in question. They might award a reasonable amount or find that no damages should be given on this ground. It is an error, I suggest, to award as damages where no actual loss is proven (in fact disclaimed) the gross amount which would have been earned by the truck during the time it was under repair. If a jury should so decide the verdict could be set aside either on the ground of being excessive or for want of evidence to support it.

As to the allowance for depreciation, a large amount was spent in repairs, the plaintiff's mechanics doing the work. They overhauled it thoroughly, supplying other necessary parts where required. No charge, of course, was made against the defendant for these special items, but it has a bearing on the question of depreciation. Only a general opinion was given that any car after a collision would depreciate from 20 to 25 per cent. I would be inclined to doubt it if properly repaired and generally overhauled at the same time, but I do not rest on that view. Here it was admitted that barring hidden defects, the car was in better shape after the accident than before and that this truck was in commission for three months after the collision without any defects being disclosed.

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I would therefore disallow this item also.

Appeal allowed in part.

Solicitor for appellant: *V. Laursen.*
Solicitor for respondent: *W. W. Walsh.*

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

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THE PASCHENA v. THE GRIFF

THE PASCHENA v. THE GRIFF.

Admiralty law—Practice—Costs—Taxation review—Rules 141 and 228.

Rule 228 of the Admiralty Rules recites that "In all cases not provided for by these rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed."

On review of the taxation of defendant's bill of costs pursuant to rule 141:—

Held, that the expression in said rule 228 "in all cases not provided for" relates to "the practice and proceedings" and not to items in the table of fees in the Appendix to the Rules.

Statement

REVIEW at the instance of both parties of the taxation of the defendant's bill of costs pursuant to Admiralty rule 141. Heard by MARTIN, Lo. J.A. in Chambers at Vancouver on the 3rd of February, 1927.

Ghent Davis, for plaintiff.
Mayers, for defendant.

MARTIN, Lo. J.A.: A point of importance was raised respecting the application of rule 228 to the Table of Fees (authorized by rule 221) so as to warrant the allowance of items not to be found therein, but which are in the English tariff in Admiralty proceedings in the High Court there.

Judgment

After considering the matter carefully, I am of opinion that the expression in said rule, "in all cases not provided for" relates to "the practice" . . . and "proceedings" and not to items in our tariff (said table), and therefore the taxation under review has in that respect proceeded upon a proper basis based upon our tariff alone. Considering, therefore, the bill before me in that light, I have noted thereupon my ruling upon each of the many items in question: the costs of the review will be borne equally by the parties both being successful to a nearly equal degree either upon principles or their application.

It is due to the learned deputy registrar to add that he has well discharged his duty on the taxation of this bill which presented difficulties of an unusual order.

IN RE IMMIGRATION ACT AND LEE CHOW YING.

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IN RE IMMIGRATION ACT AND LEE CHOW YING

Alien—Entry into Canada—Detained for inquiry—Released without security on adjournment of inquiry—Deportation ordered at adjourned hearing—Habeas corpus—Certiorari—Can. Stats. 1923, Cap. 38, Sec. 14.

A Chinese girl seeking admission into Canada was examined by the controller who on adjourning the hearing allowed her to go ashore without any deposit of money as security for her return pursuant to section 14 of the Chinese Immigration Act, 1923. On the adjourned hearing an order was made for her deportation. A writ of *habeas corpus* issued by HUNTER, C.J.B.C. with *certiorari* in aid was quashed.

Held, on appeal, affirming the decision of MURPHY, J., that although the controller may have failed to obtain security as required by said section 14 the mistake is not the equivalent of an assent to her being landed in Canada and the appeal should be dismissed.

APPEAL by Lee Chow Ying from the order of MURPHY, J. of the 17th of March, 1926, whereby a writ of *habeas corpus* issued pursuant to the order of HUNTER, C.J.B.C. of the 2nd of September, 1925, with *certiorari* in aid, was quashed. Lee Chow Ying alleges that she was born in Victoria on the 23rd of August, 1905, and that she is a Canadian citizen. She was taken to China on the 23rd of November, 1910, and returned to Victoria on the 11th of July, 1925. On her arrival she was examined by Samuel N. Reid, controller of Chinese immigration and on the 18th of July, 1925, was released. On the 20th of July her attendance was again required by the controller for the purpose of registration. As she had not the required photographs of herself in triplicate she was detained for further examination and after a number of hearings the controller came to the conclusion that she was not the same woman who left for China in 1910 and he ordered her deportation. On the application of Lee Chow Ying, an order was made by HUNTER, C.J.B.C. as above stated.

Statement

The appeal was argued at Vancouver on the 22nd and 25th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Stuart Henderson, for appellant: This girl was born in Victoria. After her first examination there was evidence that

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she was unconditionally released but the controller later tampered with the record and put in the word "temporarily." There is at the same time no evidence that the stenographer was sworn. She was released and the word "temporarily" was put in afterwards: see *Regina* v. *Cameron* (1897), 6 Que. Q.B. 158.

Argument

Jackson, K.C., for the Crown: We say the controller could not release this woman: see *Ex parte Daley* (1888), 27 N.B.R. 129; *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417; *Rex* v. *Carter* (1916), 28 D.L.R. 606; *Rex* v. *Reinhardt Salvador Brewing Co. Ltd.* (1917), 27 Can. C.C. 445; *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128; (1922), 2 W.W.R. 30; 65 D.L.R. 1; *In re Low Hong Hing* (1926), 37 B.C. 295; *Rex* v. *Rozonowski* (1926), 36 B.C. 327.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.: The appellant is a Chinese girl seeking admission into Canada. She was examined by the controller on the 7th of July, 1926, when the inquiry was adjourned until the 21st of July, she being allowed to go ashore in the company of her friends who undertook to bring her back on the 21st. They did so and the inquiry was resumed and her deportation was finally decided upon.

The appellant now claims that as no deposit of money was required from her as secruity for her return on the 21st pursuant to section 14 of the Chinese Immigration Act, 1923, she, in contemplation of law, was landed when allowed to depart with her friends, notwithstanding the arrangement about her return.

MACDONALD, C.J.A.

Although the controller may have failed to take the course pointed out by section 14, yet that does not shew an intention on his part to land the girl in Canada. On the contrary, such intention is expressly denied, and as well rebutted by the facts aforesaid, and the continuation of the inquiry in the presence of her solicitor, who took no objection. The mistake of the controller in the matter of the deposit is not the equivalent of an assent to her being landed in Canada.

The appeal should be dismissed.

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MARTIN, J.A.: Though I am not free from doubt about this matter, owing to the irregular course pursued by the controller, yet my doubt is not strong enough to compel me to dissent from the view taken by my learned brothers that the learned judge below, Mr. Justice MURPHY, was right in refusing a writ of *habeas corpus* to prevent the deportation of the appellant.

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

MCPHILLIPS, J.A.

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

Appeal dismissed.

Solicitor for appellant: *Stuart Henderson.*
Solicitor for respondent: *M. B. Jackson.*

ROBINSON *ET AL.* v. CORPORATION OF POINT GREY.

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ROBINSON v. CORPORATION OF POINT GREY

Costs—Plaintiff nonsuited although no formal application made therefor—New trial ordered—Costs of abortive trial.

The plaintiff having closed his case, counsel for the defence, without making formal application for a nonsuit, expressed some doubt as to whether he should do so, and the trial judge then took the matter in his own hands and dismissed the action. The Court of Appeal ordered a new trial and after reserving judgment as to the costs of the first trial:—

Held (MARTIN, J.A. dissenting), that the ordinary rule should apply and the costs of the first trial should abide the result of the new trial.

Statement

APPEAL by plaintiffs from the decision of GRANT, Co. J. of the 19th of May, 1926. The action was for damages for injuries sustained by a boy who was seven years old owing to the alleged negligence of the driver of a motor-truck. The boy having jumped on the motor-truck while in motion, slipped and fell under the truck sustaining severe injuries. In the course of the trial, after the plaintiff's case was closed, counsel for the defence expressed himself as being in doubt whether he should

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ask for a nonsuit before putting in his defence and the learned judge then, without a formal application being made for a nonsuit, took the matter in his own hands and dismissed the action with costs. The appeal was allowed and a new trial ordered, judgment being reserved on the question of the costs of the trial.

The appeal was argued at Vancouver on the 11th of October, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Woodworth, for appellants: On the question of the costs of the trial the leading case is *Swift* v. *David* (1910), 15 B.C. 70. A variation of the same principle is shewn in the cases of *Carty* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 3 and *Courtnay* v. *C.D. Co.* (1901), 8 B.C. 53 at p. 65.

A. G. Harvey, for respondent: On the question of the costs of the trial see *Morton* v. *Vancouver General Hospital* (1923), 31 B.C. 546.

Cur. adv. vult.

4th January, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: We reserved the disposition of the costs of the abortive trial, the contention being that the respondent should be ordered to pay them. I can see no reason for departing from the usual order, *viz.,* that they should follow the event.

In the many cases in which new trials were ordered by the Court in the last seventeen years, there were, I think, only two in which that rule was departed from, and then only for special reasons. In *Swift* v. *David* (1910), 15 B.C. 75, the Court thought the question in appeal should have been raised below on a point of law, the failure to do this being the fault of counsel, not of the judge. In *Carty* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 3, in which the liability was admitted, but defendant appealed as to the *quantum* of damages only, the Court there thought that to make the costs of the first trial abide the event when the event must inevitably be in the plaintiff's favour, would be making the successful appellant pay them in any event. There is nothing of that kind here. Defendant's counsel at the close of the plaintiffs' case said:

"I am not sure whether I should move for a nonsuit at this stage;

perhaps it would be right for me to reserve that and go on with the defence."

Thereupon the learned judge took the matter into his own hands, and, after much discussion with opposing counsel, withdrew the case from the jury. We held that he was in error in doing this and ordered a new trial.

In my opinion it is counsel's right, and in many cases, his duty to move for a dismissal at the close of the plaintiff's case, and if the judge errs in granting his motion, that in itself is no good reason for ordering his client to pay the costs of the abortive trial. Counsel is privileged to raise any question in a trial upon which he desires the decision of the judge without incurring for his client the penalty of a special disposition of the costs. If he should move for a dismissal of the action and elect to stand on his law refusing to make his defence, he takes the risk of being refused a new trial should the trial judge erroneously accede to the motion. That is quite a different case from that of a new motion without election, to dismiss.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion the disposition of the costs of the first trial do not come within the ordinary rule that they should follow the event, but within the exception which we have recognized more than once, that where a party succeeds in obtaining the dismissal of a case upon an unfounded objection which prevents the action being tried out he should bear the costs thrown away by taking that position—*Swift* v. *David* (1909), 15 B.C. 70-75; *Carty* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 3; and *Errico* v. *B.C. Electric Ry. Co.* (1916), 23 B.C. 468, 471.

MARTIN, J.A.

This case is stronger than *Swift's* case, because here there was a jury and there a judge only who dismissed the action upon a legal objection, just as the judge did here, thereby having "prevented the trial from going on" as I said in *Errico's* case, p. 471.

It is in my opinion, and with all respect, not fair to throw the responsibility of counsel's adoption of a definite position (and it is always counsel's duty to make his position definite) upon the shoulders of the trial judge who gives effect to an objection and then make the opposite party suffer for the costs which have been improperly incurred as the direct result of

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taking that unsound objection. And it is also the clear duty of counsel, if he is not in accord with the course proposed by the judge in favour of his client, to have the courage of his convictions and disclaim and oppose it, with all due deference, so that he may, in some cases at least, save his client from the consequences of error, judicial or otherwise. But in this case there is no doubt about the course adopted by defendant's counsel, he, upon the conclusion of the plaintiffs' case, made a motion to dismiss the action in these words:

"Mr. *Harvey*: My submission in that case is that there is no evidence of negligence, no evidence to combat, no case to meet. I have the doctor here ready to call regarding the boy's condition, there is no medical evidence adduced by the plaintiff.

"THE COURT: There is the legal aspect.

"Mr. *Harvey*: As far as that is concerned is there any evidence of negligence?"

MARTIN, J.A.

Finally after hearing the plaintiffs' counsel against the motion the Court made the following ruling upholding it:

"THE COURT: The action is dismissed and as I say we have a Court of Appeal in this country."

Such being the position I find myself quite unable to perceive why the defendant herein is in a better position than was the defendant in *Swift's* case—he is indeed in a worse one because, as already noted, the jury were prevented from trying the case because of an objection taken by him which was wholly without foundation and contrary to well-known leading authorities—not indeed, even a plausible objection in the light of them, though that would make no difference in principle.

GALLIHER, J.A.: At the close of the argument the Court allowed the appeal, and ordered a new trial reserving the question of costs. Ordinarily, when a new trial is ordered the rule is that the costs of the former trial abide the result of the new trial.

GALLIHER, J.A.

Mr. *Woodworth* for the appellants contended that the costs of the abortive trial should, in the circumstances of this case, be, in any event, paid by the respondent, citing *Swift* v. *David* (a decision of this Court) (1910), 15 B.C. 70. The case went to the Supreme Court of Canada and the judgment of this Court was affirmed (Iddington, J. dissenting) (1911), 44 S.C.R. 179, but the question of costs did not come up. The question there

was whether a right of action accrued before an arbitration had been held to determine the amount that would be payable under the contract, in other words, was the determination by arbitration a condition precedent to the plaintiffs' right to bring an action? This was determined on the interpretation to be placed on section 4 of the agreement, and it was held that it was not a condition precedent.

Up to the trial the defendant insisted that it was, and succeeded before the learned trial judge, his decision being reversed by this Court, IRVING, J.A. dissenting, but agreeing with the majority of the Court that the costs of the abortive trial should, in the circumstances, be paid by the defendant at p. 75, in these words:

"As to costs thrown away, I agree that the parties should have raised this as a question of law (rule 286), and the plaintiff being right (as the other judges have found) the trial should have proceeded. It would have gone on, had not the defendant insisted upon this objection. The defendant ought, therefore, to pay forthwith the costs thrown away."

I took the same view, although not so fully expressed and with me, the Chief Justice agreed, my brother MARTIN not expressing any opinion on it in his reasons for judgment, though I did not take him as dissenting during the argument—if my recollection is right. It is clear why the Court in that case rightly or wrongly departed from the general rule. The parties there could have, by a simple and comparatively inexpensive method, determined the question. What happened in the case at Bar was this: At the close of the plaintiffs' case counsel for the defendant said, addressing the Court:

GALLIHER, J.A.

"I am not sure whether I should move for a non-suit at this stage; perhaps it would be right for me to reserve that and go on with the defence."

Whereupon the Court said:

"I do not know if there ever was a case before me that would justify moving for a non-suit this is the case."

To which counsel for the defendant replied:

"My submission in that case is that there is no evidence of negligence—no evidence to combat—no case to meet."

Then follows a short discussion between the Court and defendant's counsel, as to negligence and contributory negligence, from which point the Court seems to have taken charge of the matter with only plaintiffs' counsel taking part, though I think defendant's counsel must be taken to have acquiesced in

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the course taken by the Court as he did not further intervene, the learned judge eventually withdrawing the case from the jury.

I do not think there is the same reason for departing from the general rule of practice in this case as there was in the case of *Swift* v. *David, supra.* There, there was something which the defendants could, and should have done, and which was entirely within their province to do; here, counsel, while intimating his willingness to go on, in fact suggesting that he go on, deferred to the course adopted by the learned judge without more.

While I still think that the Court in *Swift* v. *David* were justified in the course they took in that case, I feel that we should not go further, which I think we would be doing if we acceded to the plaintiffs' request.

Moreover, I agree with the Chief Justice that assuming the defendant here had of its own motion asked for a non-suit upon which the learned trial judge wrongly ruled in its favour, the ordinary rule as to costs should not be departed from.

Costs should abide the event of the new trial.

MCPHILLIPS, J.A.

MACDONALD, J.A.

MCPHILLIPS and MACDONALD, JJ.A. agreed that the costs of the abortive trial should follow the result of the new trial.

Appeal allowed and new trial ordered, costs of abortive trial to follow event of new trial, Martin, J.A. dissenting.

Solicitor for appellants: *C. M. Woodworth.*
Solicitor for respondent: *A. G. Harvey.*

IN RE ESTATE OF JOHN HENRY DAVIES. DAVIES v. DUGGAN.

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IN RE ESTATE OF JOHN HENRY DAVIES

Practice—Appeal—Notice of—Delay in settling order—Interlocutory—Notice out of time—Appeal struck out.

After an order had been made for the taking of accounts of the executor of an estate, one of the executors applied for an order fixing his remuneration and for his discharge. An order was made fixing his remuneration but the question of his discharge was left over for further hearing. The order was made on the 12th of November, 1926, but owing to disputes as to the form of the order it was not signed and entered until the 25th. Notice of appeal was served on respondent's solicitors on the 3rd of December. On motion to quash the appeal on the ground that it was out of time:—

Held, that the order was an interlocutory one and as the notice of appeal was not given within the time provided by the rule the appeal should be quashed.

MOTION to the Court of Appeal that the appeal of Emma Davies, executrix, and co-trustee with William Charles Duggan, and sole beneficiary under the will of John Henry Davies, deceased, under her notice of appeal of the 2nd of December, 1926, be quashed on the ground that said notice of appeal was not given within the period limited for such purpose by section 14 of the Court of Appeal Act. There had been an order for the taking of accounts and then William C. Duggan applied for an order fixing his remuneration and for his discharge as executor. An order was made by SWANSON, Co. J. as Local Judge of the Supreme Court on the 12th of November, fixing his remuneration but the question of his discharge was left over for further hearing. Owing to disagreement between counsel as to the form of the order it was not finally settled and entered until the 25th of November, 1926. Notice of appeal by Emma Davies was served on the respondent's solicitors on the 3rd of December following. Statement

The motion was argued at Victoria on the 4th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Alfred Bull, for the motion: The order was made on the 12th Argument

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of November and notice of appeal was served on us on the 3rd of December. The order is interlocutory and they are out of time: see *Re Gardner; Long* v. *Gardner* (1894), 71 L.T. 412; *Pheysey* v. *Pheysey* (1879), 12 Ch. D. 305; *In re Lewis. Lewis* v. *Williams* (1886), 31 Ch. D. 623. The application was for an order fixing his remuneration and for his discharge. The order made fixed his remuneration but the question of his discharge was left over: see *Downes* v. *Elphinstone Co-operative Association* (1924), 35 B.C. 30. There remains something to be done so that the order is interlocutory.

Argument

Bass, for Mrs. Davies: The cases cited were administration actions and do not apply. As far as this application is concerned there is nothing further to be done and it comes within the judgment of this Court in *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386. In any case counsel could not agree on the order and it was referred back to the judge on the 19th of November and finally settled on the 25th of November.

Bull, replied.

MACDONALD, C.J.A.: We think the appeal should be quashed; that the order is an interlocutory one; and since the notice of appeal was not given within the time provided by the rule, it should not be entertained.

Are you going to make your motion for extension of time now, Mr. *Bass*?

MACDONALD, C.J.A.

Mr. *Bass*: My motion now is simply to amend the notice of appeal. And we have filed notice of appeal.

MACDONALD, C.J.A.: Does this judgment dispose of your motion?

Mr. *Bass*: Not if your Lordship will give us an extension of time in which to appeal, in these particular circumstances.

Mr. *Bull*: There is no such motion before the Court.

Mr. *Bass*: I could make that motion separately.

MARTIN, J.A.

MARTIN, J.A.: Is there any substantive motion on your part, Mr. *Bass,* now that we have decided, as the Chief Justice has expressed it, that it is out of time, and not properly given? Unless you can get around the consequences of that, by another

motion to extend the time, of course that is an end of the matter. And you have not got a substantive motion to that effect.

Mr. *Bass*: No, my Lord, we have to make a separate motion for that.

MACDONALD, C.J.A.: Then this appeal is quashed.

Appeal quashed.

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MINISTER OF CUSTOMS v. BRADSHAW

Taxation—Sales tax—"Nursery stock" and "vegetables"—Meaning of—Can. Stats. 1907, Caps. 11, Schedule A, Item 82, and 1915, Cap. 8, Sec. 19BBB, Subsec. (4), as enacted by Can. Stats. 1920, Cap. 71, Sec. 2, and amended.

The Customs Tariff, 1907, and The Special War Revenue Act, 1915, are both taxing statutes and *in pari materia* and the phrase "nursery stock" in subsection (4) of section 19BBB of the later Act should receive the meaning attached to it in Item 82 of Schedule A of the former.

Vegetable plants are not included in the word "vegetables" used in said subsection (4) and are not exempt from sales tax.

ACTION for an accounting of moneys owing by the defendant to the plaintiff for sales tax pursuant to The Special War Revenue Act, 1915, and amending Acts, the defendant having during the year 1916 been a producer of the products of floriculture, plant culture and vegetable culture, and a vendor thereof to dealers therein and for the sum of $1,000 being the penalty for the neglect and failure of the defendant to take out an annual licence pursuant to subsection (6) of section 19BBB of said Act. Tried by MURPHY, J. at Vancouver on the 22nd of December, 1926. Statement

E. Meredith, for plaintiff.
Dickie, for defendant.

7th January, 1927.

MURPHY, J.: In my opinion, the phrase "nursery stock" as Judgment

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used in subsection (4) of section 19BBB of The Special War Revenue Act, 1915, should receive the meaning attached to it in Item 82 of Schedule A of The Customs Tariff, 1907. These statutes are, on this point, I consider *in pari materia*.

In so far as The Customs Tariff is enacted for revenue purposes, it is a taxing statute. In so far as it is enacted for protective purposes its object is to build up production in Canada. The Special War Revenue Act, 1915, is clearly a taxing Act. The object, I think, of exempting nursery stock from its operation, is to stimulate production in Canada. If this view is correct, then the two Acts, in so far as they are *in pari materia* are to be taken together as forming one system and as interpreting and enforcing each other. *Palmer's Case* (1784), 1 Leach, C.C. 352.

It follows that neither cut flowers nor potted plants, as described in defendant's admission of facts, fall within the exception.

I am also of opinion that vegetable plants are not included in the word "vegetables" used in the original subsection (4). Vegetable plants only became exempt from sales tax when the words were specifically introduced into the Act by Parliament in 1925. Otherwise why was such legislation deemed necessary?

Judgment

I hold the objection to the constitutionality of the Act to be unfounded. It is admitted the Dominion can impose such taxation as the Act does impose but objection is taken to the requirement that a licence must be taken out annually and a fee paid therefor. It is said this interferes with civil rights. To my mind this licence provision is merely ancillary to the primary object, *viz.*, taxation, and is a reasonable, and indeed necessary, provision to insure the collection of the taxation so imposed.

The obtaining of the licence is not a condition precedent to entering upon the pursuits with which the Act deals. The requirement of a licence by the Act involves in no way any attempt at regulation of said pursuits.

I desire to hear counsel further on the question of the penalty to be imposed for defendant's default in not taking out the required licence.

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ARMSTRONG v. CORPORATION OF CITY OF REVELSTOKE

Practice—Change of venue—Preponderance as to witness expenses—View—Fair trial—Onus.

The plaintiff commenced action in Kamloops against the City of Revelstoke for damages for closing a street and erecting a rink thereon adjoining his property on which he had erected a residence and from which he had access to the street that was closed. The defendant applied for a change of venue from Kamloops to Revelstoke on the grounds that the plaintiff had only one witness in Kamloops and one in Vancouver, whereas, the defendants in addition to themselves had nine witnesses in Revelstoke; further that a view of the *locus in quo* was necessary. The plaintiff claimed he would not have a fair trial in Revelstoke, as the public generally were interested in the erection of the rink and would be adverse to him. The application was dismissed.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that although there is preponderance of convenience in favour of the defendants nothing short of great preponderance of convenience and expense would justify the taking from the plaintiff the right that the law gives him to select the place of trial; that in such a case as this a view would be of no benefit and is not necessary and the onus is on the defendants to displace the plaintiff's right to lay the venue at Kamloops by proving that a fair trial would be obtained in Revelstoke, but they have failed to do so.

APPEAL by defendant Corporation from the decision of MCDONALD, J., dismissing an application for a change of venue from Kamloops to Revelstoke. Heard in Chambers at Vancouver on the 22nd of September, 1926. The plaintiff owned property comprising six lots at the north-east corner of Boyle Avenue and Fourth Street West, in Revelstoke, upon which was a residence facing Boyle Avenue, Fourth Street West always being used as access to the house. In October, 1924, the defendant Corporation passed a by-law purporting to close Fourth Street West for 250 feet in length, and adjoining the north-western boundary of the plaintiff's property for the purpose of building a skating-rink thereon, and in November, 1924, at the instance of the defendants an order in council was passed authorizing the closing of that portion of the street. The plaintiff brought action for damages, claiming that the erec-

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tion of the rink has created a nuisance; that he is deprived of proper access to his property; that the accumulation of snow on the roof of the rink subjects his property in the spring of the year to flooding, and the glare of the sun on the tin roof in summer renders his residence uncomfortable to live in, and generally the erection of the rink has seriously depreciated the value of his property. The defendants claim the plaintiff has one witness in Vancouver and one in Kamloops, and that in addition to the defendants themselves, they have nine witnesses residing in Revelstoke, and further that a view of the *locus in quo* is necessary. The plaintiff claims, on the other hand, that he would not have a fair trial in Revelstoke, as the public generally were interested in the erection of the rink, and this interest would be adverse to his in the outcome of the action.

J. A. Grimmett, for the application.
L. B. McLellan, for defendant Sawyer.
E. R. Thomson, for plaintiff, *contra.*

5th October, 1926.

MCDONALD, J.: The plaintiff sues the defendants for damages done to the plaintiff's property in the City of Revelstoke, through the defendants having conspired together to obstruct and close, and having obstructed and closed the public highway giving access to the plaintiff's property, and having maintained a public skating-rink on the said highway. The plaintiff, as he had a right to do, laid the venue in Kamloops, and two of the defendants now move to change the venue to Revelstoke. The plaintiff proposes to have the action tried by a jury. The defendants shew that there would be some considerable saving of expense if the venue were changed to Revelstoke by reason of the fact that most of the witnesses reside there. The plaintiff, on the other hand, sets up in his affidavit that in his opinion he could not obtain a fair trial by a jury in Revelstoke by reason of the fact that the matters in question were matters of public interest, and that the position he took with regard to the closing of the highway in question was in opposition to that of a large majority of the people of Revelstoke. The defendants deny that any prejudice exists against the plaintiff among the ratepayers of Revelstoke. There is no sug-

Judgment

gestion whatever, of course, that a fair trial cannot be had in Kamloops.

Applying the principles laid down in *Centre Star* v. *Rossland Miners Union* (1904), 10 B.C. 306, and the recent case of *Sloan* v. *McRae* (1926), [37 B.C. 464]; 3 W.W.R. 136, I am of the opinion that the defendants have not made out a case which would justify making the order applied for, and the application must therefore be dismissed.

The appeal was argued at Victoria on the 7th and 10th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellants: The three defendants, and their nine witnesses live in Revelstoke, whereas the plaintiff has only one witness in Kamloops and one in Vancouver, so the preponderance of convenience is decidedly in favour of Revelstoke: see *Sloan* v. *McRae* (1926), 37 B.C. 464; *Centre Star* v. *Rossland Miners Union* (1904), 10 B.C. 306; *Bridcut* v. *Duncan and Sons* (1891), 7 T.L.R. 514. That the jury should have an opportunity of viewing the *locus in quo* see *Biggar* v. *Victoria* (1898), 6 B.C. 130.

P. J. McIntyre, for respondent: It must be shewn that defendants will suffer injury and injustice in having the trial at Kamloops: see *Shroder, Gebruder, & Co.* v. *Myers & Co.* (1886), 34 W.R. 261; *Lapointe* v. *Wilson* (1896), 5 B.C. 150. A view would be of no assistance to the jury it being a very different case from *Biggar* v. *Victoria* (1896), 6 B.C. 130. The view varies according to the season of the year: see *George* v. *Mitchell* (1912), 17 B.C. 531 at p. 542; *London General Omnibus Company, Limited* v. *Lavell* (1901), 1 Ch. 135 at p. 138. Owing to the attitude of the people in Revelstoke with relation to the rink we cannot get a fair trial there: see *Allinson* v. *General Council of Medical Education and Registration* (1894), 1 Q.B. 750; *Leeson* v. *General Council of Medical Education and Registration* (1889), 43 Ch. D. 366.

Argument

Mayers, in reply referred to *Regina* v. *Ponton* (1899), 18 Pr. 429.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This appeal comes somewhat close to

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the line. There is a preponderance of convenience in favour of a change of venue, but nothing short of a great or considerable preponderance of convenience and expense would justify the taking from a respondent the right which the law has given him to select his own place of trial.

It is claimed that a view of the *locus in quo* is desirable. The action is for damages for the closing of a street and the erection of a skating-rink. In my opinion there is no necessity for a view. Moreover, several views would have to be taken in order to create a proper impression. It is claimed that the plaintiff's property is injured by the melting snow thrown from the roof of the skating-rink, and that in the heat of summer, heat radiates from the said roof affecting the plaintiff's enjoyment of his property.

It is difficult to imagine how a view could assist anyone on either of those claims, but if it could, a view would have to be taken in the winter or spring and another one in the middle of the summer. The rule is not that a view should be taken, that is the exception, and there is certainly nothing exceptional in the present case. Parties ought not to be put to the expense of a view unless there is real necessity for it.

MACDONALD, C.J.A.

The respondent claims that a fair trial cannot be had in the City of Revelstoke. While it is not disputed that a fair trial can be had where the venue is laid, namely in the City of Kamloops, there is a heavy burden upon the appellant in such circumstances to shew that a fair trial may be had in Revelstoke. The facts are that Revelstoke is a small town of about three thousand inhabitants, it is the centre for winter sports; the rink was built to facilitate sports of that nature and 200 of the inhabitants subscribed for the erection of it; the plaintiff fears that in those circumstances there would be prejudice against him. To meet this the appellants offer to consent to the jury being selected from the county outside of Revelstoke; but this, I think, would involve additional expense to the Province, and I can see no reason why we should put the Province to that expense—it would be a mere shifting of the burden of expense. I would therefore dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: In my opinion, and with great respect the

learned judge has, in endeavouring, as he says, to apply the principles laid down in certain cases in this Court, which he cites, unfortunately misconstrued the principle, with the result that the decision he has given is not in accordance with the established practice of this Court, as I conceive it, laid down in these cases. And it is briefly this, that where it is established that the preponderance of convenience is in favour of the trial at a certain place, that place should be the place of trial. The expression is not "great preponderance," even in the English cases, but such a preponderance, as I understand it, as becomes substantial. Then if that substantial preponderance has been established (which does not mean expense alone, but includes expense) in order to be displaced it must be shewn that there will result some unfairness in the trial which would render it not in the interest of justice to give effect thereto. It is not denied that the preponderance of convenience exists here, either from the aspect of expenditure of money or from the parties themselves. The defendants have deposed, and so has the clerk of the Municipality, that they are all business men who are actively engaged in business in the City of Revelstoke and that it will work a hardship upon them if they are compelled to have the trial of the action in Kamloops. On the one hand some nine witnesses live in Revelstoke, and on the other hand the only witness on behalf of the plaintiff not living in Revelstoke is one who lives in Vancouver. Therefore, preponderance, and substantial preponderance to an unusual degree, is established. Such a case being made out, how is it displaced? That is only attempted by the suggestion that it will be impossible to get a fair trial because 200 of the 3,000 inhabitants of the City of Revelstoke have subscribed to the skating-rink. Now, I do not think, on the face of it, supposing it were possible to get the jury impanelled, selected only from the residents of Revelstoke alone, that it would be proper to, so to speak, put the brand of impropriety upon the whole community because 200 persons have subscribed to the skating-rink, in which they are interested. I must say that I decline, with all respect to other views, to regard any community of this country as having that unfair complexion. This sort of suggestion should be met in the way it was met by the old Full Court of this Province 30 years ago,

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in a case of a very exceptional nature, *Biggar* v. *Victoria* (1898), 6 B.C. 130. In that action the principle was enunciated which I propose to adhere to—it was good 30 years ago and it is just as good today—and it is, that if you have a suggestion of that kind made, the obvious and proper way to rid the proceedings of it is to have an undertaking on behalf of the person who is asking for a change of venue that persons who are directly affected should be excluded. In the *Biggar* case the circumstances were very exceptional because no less than over 60 people were killed and many injured, with the result that if the action were successful an immense sum of money would have to be paid by the city—and that sum of money eventually was paid, of over $400,000, apart from very large costs and crippled this community in its earlier days for years, but notwithstanding that, the citizen jurors of Victoria did their duty in the jury box against themselves. I cannot believe that the citizens of Revelstoke are less alive to their obligations in regard to the administration of justice today than were the citizens of Victoria 30 years ago. That, to my mind, disposes of this matter, because it cannot be said that the case of the substantial convenience has been displaced.

MARTIN, J.A.

In the case at Bar it is especially very unwise, if I may say so with all respect, to depart from the established practice. What do we find here? A man who says himself he had been living fifteen years in Revelstoke, and according to his affidavit, the matters complained of having prejudicially affected him, he leaves the town and goes away, and takes his lawsuit with him; and then as time goes by, and he thinks his premises are damaged and his tenant complains, he decides, having taken his lawsuit with him, to begin proceedings, after several years' absence. Well, he might just as well have gone up to Prince Rupert and taken this step, and he would find every single word that has been uttered in favour of the trial in Kamloops as against Revelstoke equally easy to apply to Prince Rupert as against Revelstoke because it having been admitted that the substantial preponderance exists against Kamloops, it would exist against Prince Rupert. It simply shews that once you establish a thing to the extent of a degree that is sufficient further degrees become immaterial.

That alone, to my mind, is sufficient, with all respect to the learned judge below, to shew that he has not fully appreciated and applied the principles which would necessitate an adherence to our established practice because they have been found to be in the interests of justice, and sufficient to attain justice from the point of view of both parties.

I have not overlooked this further feature of a view by the jury. And I must say that having regard to my own long experience as a trial judge with a jury—and the plaintiff here says he intends to have a jury—I think that a jury in this case would be most desirable—just as much desirable as it was in the *Biggar* case; and if I were a judge in this case I would not think for a moment of discouraging the jury from having a view if they asked for it—and we are told it will be asked for by the defendants. How could they have refused to let the jury see the bridge itself in the *Biggar* case, even though they had a model—which meant a scientific model, of course, prepared by engineers for the purpose? And what is the difference between a jury going out and looking at a skating-rink and a house beside it, to see how it is affected by it, and looking at a bridge which is said to be defective in some way, which must necessarily have had relation to its scientific construction? I should think a jury, the average jury, would derive a much better knowledge of the *locus* in the case of a skating-rink and a house, with which they are all familiar, than the construction of a bridge having mechanical and engineering details of which they would know nothing.

The right of a jury in such cases is something that has existed for a very long time and is an historical feature in our jurisprudence. I refer to the case of *Lyons* v. *Nicola* (1916), 23 B.C. 143, to this feature of it, citing the case, the celebrated *Bushell's Case* (1670), Vaugh. 135, 142 and 147, wherein Chief Justice Vaughan in giving the judgment of ten out of eleven judges of the Common Pleas, sets forth, in enumerating the various heads of "evidence which the jury have of the fact," this fourth one:

> "4. In many cases the jury are to have view necessarily, in many, by consent, for their better information; to this evidence likewise the judge is a stranger."

MCDONALD, J. (In Chambers)

1926

Oct. 5.

COURT OF APPEAL

1927

Jan. 10.

ARMSTRONG v. CORPORATION OF CITY OF REVELSTOKE

It was carried out in the well-known Act of 4 Anne, for the Amendment of the Law, and the better Advancement of Justice, 1705, Cap. 16, Sec. 8:

"And be it further enacted by the Authority aforesaid, That from and after the said First day of the Trinity Term in any Actions brought in any of her Majesty's Courts of Record at Westminster, where it shall appear to the Court in which such Actions are depending, that it will be proper and necessary, that the Jurors who are to try the Issues in any such Actions, shall have the view of the Messuages, Lands, or Place in Question, in order to their better understanding the Evidence that will be given upon the Trials of such Issues."

I refer also to my judgment in the case of *Yukon Gold Co.* v. *Boyle Concessions* (1916), [23 B.C. 103 at p. 114]; 10 W.W.R 588, on the question of view, and to the authorities cited there.

MARTIN, J.A.

Therefore the opinion I have in this matter is that a case has been made out for the change of venue in accordance with the established practice of this Court, and that as regards the view, we are advised it will be asked for and in such circumstances, having regard to the authorities I have quoted, I cannot see how the Court would refuse a request that the jury have that information for the "better understanding" of the issues and the evidence that is essential to attain justice.

GALLIHER, J.A.

GALLIHER, J.A.: In this case I may say I am not influenced by the suggestion that there should be a view. In fact I do not think it is a case where that suggestion should be given effect to with the idea of changing the venue. As I stated during the argument, to give effect to that it would not meet what it really suggests, because this case is made up of three distinct claims for damages, one for accumulation of snow on the roof, one for the water percolating into the cellar and destroying the foundations of the pillars—which would take place at a different period, and one for the radiation of heat from the roof, which would take place at a still different period. So that a view, to be logical, would have to be taken at all three distinct times—one in the winter, one in the spring and one in the summer; and that of course is unworkable.

The point that has given me most trouble, however, is not that. Apparently, as I stated, if one looked at the fact that the property is in Revelstoke, and most of the witnesses there, one would

say the logical place would be to have the trial in Revelstoke. That of course can be overcome by other circumstances. The first thing we have to consider is the preponderance of convenience. Now, while the plaintiff has the right to choose his forum, and has done so in this case, yet if it can be shewn that the preponderance of convenience—and that should not be a trifling matter—if the substantial preponderance of convenience would be in favour of having it tried at Revelstoke the venue could be changed. It is not denied, so that I think we may take it as established that the preponderance of convenience would be to have the trial at Revelstoke. The point that gives me most concern is this, that that is met by the plaintiff who says, and attempts to justify what he says by affidavit, that he will not get a fair trial in Revelstoke. Now, personally that does not appeal to me very strongly, unless there is a good foundation for it. Of course, if there is a good foundation for it then it should be given effect to. Now here it looks to me something like this, that it is rather a fear on the part of the plaintiff than what might be termed a genuine state of feeling existing with regard to him in that town. We must, of course, take some notice of what the trial judge has done in this case. It was in his discretion to grant or refuse the application in the first instance, and he has refused it. Now, on what principle has he refused it? If he has refused it upon a wrong principle then we are entitled to interfere and put it right. Now, turning to his reasons, he sets out certain reasons why he thinks that the plaintiff cannot get a fair trial, and then the learned judge sets out that the defendants deny that any such reasons exist. And then he goes on to say that applying the principle laid down in *Centre Star* v. *Rossland Miners Union* (1904), 10 B.C. 306 and *Sloan* v. *McRae* (1926), 37 B.C. 464, he is of the opinion that the defendants have not made out a case which would justify making the order applied for. In *Sloan* v. *McRae* this Court held that the defendant had not discharged the onus resting on him to shew that he could not obtain a fair trial in Nanaimo. I think here the defendants must shew not only preponderance of convenience, but since the question of a fair trial has been raised, that there will be no prejudice or injury, as in the words of Lord Esher in the case cited to us.

GALLIHER, J.A.

MCDONALD, J. (In Chambers)
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The learned judge did not think that onus was discharged; and I do not feel like saying that he wrongly exercised his discretion; nor, if my view as to onus is right, did he proceed upon a wrong principle.

I would dismiss the appeal.

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ARMSTRONG v. CORPORATION OF CITY OF REVELSTOKE

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I may say that I am of the same view as that expressed by my brother MARTIN, and there is little that I have to add except this, that I cannot quite see why a case should be tried in Kamloops that has such close relation to the city of Revelstoke.

Firstly, preponderance of convenience has been established, which is one of the grounds upon which the venue may be changed. Then there only remains what is best to be done in the interests of justice. Now, I cannot see anything in this case which would indicate that there would be a deprivation of the interests of justice in trying the case in the City of Revelstoke. The matter is wholly one of local nature, and local knowledge. Roads are called in question here and buildings are called in question; and also a difference in climate. There is a great difference between the climate of Revelstoke and the climate of Kamloops. Great stress is laid upon the fall of snow, and the melting of snow. So that it looks to me as if it is essentially a case which should be tried in Revelstoke. Has anything been made out which would establish that it would be against the interests of justice to try this case in Revelstoke? First, we have got preponderance of convenience; on this ground it should be tried in Revelstoke; and unless there is something such as would bring about a miscarriage of justice, that is, that the plaintiff could not safely proceed to Revelstoke and have this question determined, the case should be tried there. Now, on the material I cannot see that that has been at all made out. It does not seem to be a proper thing that the plaintiff should live for many years in the City of Revelstoke, then have a collision with the corporation of the City, and some of the citizens, then move to Kamloops, and have the action determined there. I am satisfied upon the material adduced that no case has been made out which would shew that the plaintiff would suffer any injury by the action being tried in Revelstoke. Here we have a municipal corporation charged with conspiracy. We have citizens of Revelstoke whose names appear as defendants, charged with

entering into a conspiracy, and a conspiracy to the extent that a minister of the Crown is said to have implemented it. There is, though, no suggestion that the minister of the Crown was knowingly a party to it, but an order in council was passed. Now all this is a most serious charge. And does it mean this, that if one has the hardihood to make such serious charges against the municipal government of a city, and the actions of some of its citizens, that that cause of action should as of right be taken away from the locality and taken to some other part of the Province, it might be to some rival municipality, where the plaintiff possibly would be enabled to gain some advantage? I think that in reading the case of *Sloan* v. *McRae* (1926), 37 B.C. 464 the *ratio decidendi* is really against the plaintiff's contention and in favour of the trial of this action at Revelstoke. It is, in my view, fit and proper that the case should be tried in Revelstoke. We have nothing to shew us that the jurors that would be empanelled in Revelstoke would not do their sworn duty; I think they would, even if it affected their pockets. I feel certain that the case is one which should be tried in Revelstoke rather than in Kamloops; and in my opinion I think the learned judge erred, upon the material before him, and he should have changed the venue to Revelstoke.

MCPHILLIPS, J.A.

MACDONALD, J.A.: In the form in which this matter comes before us, I would not interfere with the learned trial judge. It was made on material in which facts, not opinions, were set out in the plaintiff's affidavit, alleging that a fair trial would not be obtained in Revelstoke. There were *contra* affidavits but the judge below considered them, and reached a conclusion favourable to the contention of the plaintiff. I do not say that is conclusive, but it is an element to be considered. The appellants must displace the plaintiff's right to lay the venue at Kamloops by proving that a fair trial would be obtained in Revelstoke. The onus is on them. On the whole I think they have failed to do so. I do not attach any weight to the suggestion that a view is necessary, for the same reasons mentioned by my brother GALLIHER. I would dismiss the appeal.

MACDONALD, J.A.

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

Solicitor for appellants: *A. M. Grimmett.*
Solicitors for respondent: *Macintyre & Chalmers.*

MACDONALD, J. (In Chambers)

1927

Jan. 18.

IN RE SCHMALZ.

Testator's Family Maintenance Act—Will—One-third of estate left widow—Insufficient provision—Discretion of Court—R.S.B.C. 1924, Cap. 256, Secs. 3 and 4.

IN RE SCHMALZ

If, on an application under the Testator's Family Maintenance Act, the Court is of opinion that a will does not adequately provide for the maintenance of the testator's widow, a different division of the estate may be ordered notwithstanding the fact that under the will she would have received as much as she would have been entitled to if the testator had died intestate.

Allardice v. *Allardice* (1911), A.C. 730 applied.

Statement

APPLICATION by the widow for a larger share of the estate of her deceased husband than was left her by his will under the Testator's Family Maintenance Act. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. in Chambers at Vancouver on the 17th of January, 1927.

A. J. Cowan, for Mrs. Schmalz.

Housser, for the executor.

18th January, 1927.

Judgment

MACDONALD, J.: Claus Schmalz died on the 30th of July, 1926, at Lulu Island, leaving real and personal estate. He was then 72 years of age and had, at some time previous, made his will, dividing his property, giving one-third to his widow and the balance amongst his four children by a previous wife. The estate approximately amounts to $5,400. While the widow will receive, as much as she would have been entitled to receive, had the testator died intestate, still she claims that, under the Testator's Family Maintenance Act, R.S.B.C. 1924, Cap. 256, and particularly section 3 thereof, that she should be allowed a further amount out of her husband's estate. The Act provides that, notwithstanding any law or statute to the contrary, if, in the opinion of a judge before whom application is made thereunder, adequate provision has not been made for the proper maintenance and support, *inter alia,* of the testator's wife, then the Court may, in its discretion, order that such provision as the Court thinks adequate, just and equitable, in the circumstances shall be made, out of the estate of the testator, for such

wife. As was mentioned by Stout, C.J. in *Allardice* v. *Allardice* (1910), 29 N.Z.L.R. 959 at p. 969 similar legislation in New Zealand did not "empower the Court to make a new will for a testator." It is the application of certain remedial measures to remove an injustice. The principles which are to govern, in the application of the Act, were discussed by me in *In re Livingston* (1922), 31 B.C. 468. I there referred to the leading case of *Allardice* v. *Allardice* (1911), A.C. 730. It was there pointed out, that the intention of the Act was not to interfere with the will of the testator to the extent of apportioning his estate but that "the first inquiry in every case must be, what is the need of maintenance and support, and the second, what property has the testator left?" I also cited other cases along these lines and particularly laid stress, upon the duty that the testator owes to his wife, especially where she is advanced in years. My remarks in that case are applicable here. The duty of the Court in applying this Act is referred to by the Court of Appeal in *Allardice* v. *Allardice* at p. 973 and, without quoting that judgment at length, it is only necessary for me to point out, that I should place myself, as far as possible, in all respects, in the position of a testator. I should then consider whether or not, he has been guilty of a manifest breach "of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be" in the discharge of his duties. I "should [not] lose sight of the fact that at best [I] can but very imperfectly place [myself] in the position of the testator, or [adjudge] the motives which [may] have [actuated] him in the disposition of his property." Even with only a partial ability in this respect, I am required, as it were, to sit in judgment upon the actions of a testator, otherwise the Act would become a dead letter. As it is remedial in its nature, if the testator has not properly discharged his duty to the widow, I must necessarily apply its provisions. Taking into consideration all the circumstances, as they have developed, especially the age of the widow, and the difficulty that she would encounter through future years, in obtaining a livelihood, I think some readjustment of the property should take place. In so deciding, I have not considered it proper to apply section 4 of the Act, as I do not think it can support the contention,

Judgment

MACDONALD, J. (In Chambers)

1927

Jan. 18.

IN RE SCHMALZ

submitted by counsel for the executor. I am of the opinion that the will does not make adequate provision for the proper maintenance and support of the widow. That she is in need of such maintenance and that there is property to assist in that direction. While there is not sufficient property to enable the widow to live in ease and comfort, still that a provision adequate, just and equitable in the circumstances should be made, by dividing the estate in a different manner to that contemplated by the will. How can an attempt be properly made towards this end? It is apparent that of the four children, who will be benefited by the will, only one of them is really in a position where assistance is fully needed. She has a sick husband, being a returned soldier, and I think her share of the estate should not be interfered with. Then another daughter Grace while not wealthy is not, as compared with the applicant, in need of any benefit under the will, and her share upon the distribution, I think, should go to the widow. Then, as to the two sons, Harold and Albert, they are both earning wages and doubtless all of the shares to which they are entitled, would not be out of place ordinarily, but as against the claim of the widow, I think there should be a rebate, so that in the distribution of the property they should only each receive, two-thirds of the amount to which they would be otherwise entitled under the will. Under this arrangement, the share which would otherwise go to Grace should be paid out of the estate to the widow and the one-third reduction upon the share of Harold and Albert should be paid in like manner.

Judgment

I consider, on account of the small estate involved, it would not be advisable to make any provision whereby the share applied or the portion rebated would be invested and the revenue paid to the widow. It would keep the estate unsettled for a lengthy period and it is far better, for all concerned, to have the division fully accomplished, by the time the moneys are paid under the agreement for sale of the land.

Pending the final receipt of moneys by the executor he may, upon the basis here established, make payments to the parties entitled by way of, what might be termed, dividends. There will be an order accordingly. All parties are entitled to their costs out of the estate.

Order accordingly.

REX v. R. C. PURDY, LIMITED.

COURT OF APPEAL

1927

Jan. 20.

REX v. R. C. PURDY LTD.

Intoxicating liquors—Keeping liquor for sale—Chocolates with liquor inside —R.S.B.C. 1924, Cap. 146, Secs. 28 and 60(2).

The defendant kept chocolates for sale in his store. The chocolates consisted of an outer shell made in the shape of a bottle and the cavity thus formed was filled with a liquid found to contain 7.87 per cent. of alcohol. On a charge under section 28 of the Government Liquor Act the defendant was convicted of unlawfully keeping intoxicating liquor for sale and fined $1,000. On appeal by way of case stated to the Supreme Court the conviction was set aside.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C., that the questions submitted by the magistrate, which were: "1. Was I right in finding that it was proven that the defendant kept intoxicating liquor for sale? 2. Was I right in my finding that the manufacture of the said liqueur chocolates was not authorized by section 60, subsection (2) of the said Act?" should be answered in the affirmative and the conviction should be restored.

APPEAL by the Crown from the decision of HUNTER, C.J.B.C. of the 2nd of December, 1926, on a case stated setting aside and vacating a conviction of R. C. Purdy, Limited, for unlawfully keeping intoxicating liquor for sale contrary to the provisions of section 28 of the Government Liquor Act. The case stated was as follows:

"1. R. C. Purdy, Limited, a body corporate, was charged before me at the City of Vancouver that the said Company did unlawfully keep intoxicating liquor for sale, contrary to the provisions of section 28 of the Government Liquor Act, and on the 9th day of November, 1926, I found the said Company guilty and imposed a fine of $1,000.

Statement

"2. On the evidence given before me I find the following facts:

"(a) The said R. C. Purdy, Limited, kept for sale candies, namely, chocolates. These chocolates consisted of an outer shell in the shape of a bottle, and the inner cavity formed by the outer shell contained a liquid which had 7.87 per cent. of alcohol. Some of the outer shells of the chocolates are attached to this case as an exhibit, the liquid having been poured out of the chocolates into a container for analysis.

"(b) The said chocolates were manufactured at Vancouver, and have been so manufactured for four months past.

"(c) The liquid contained in the said chocolates was made in the following way: water and sugar were boiled. Commercial whisky and rum were added. Flavouring extracts were then added. These extracts were concentrated brandy, concentrated rum and concentrated whisky. No evi-

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dence was given to shew how much alcohol was contained in the flavouring ingredients or how much in the commercial liquor.

"(d) The liquid described above was then run through a small funnel into prepared starch moulds. These moulds were then dipped in chocolate.

"(e) It was contended by counsel for the said R. C. Purdy, Limited:

"1. That the definition of liquor in the said Act was not sufficiently comprehensive to include a preparation partly solid as was the case here, and

"2. That the manufacture of the said chocolates was lawful inasmuch as they came within the exception provided by subsection (2) of section 60 of the Government Liquor Act.

"I overruled the said objections and convicted the defendant.

"The questions submitted are:

"1. Was I right in my finding that it was proven that the defendant kept intoxicating liquor for sale?

"2. Was I right in my finding that the manufacture of the said liqueur chocolates was not authorized by section 60, subsection (2) of the said Act?"

Statement

The appeal was argued at Victoria on the 6th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Johnson, K.C., for appellant: The learned Chief Justice held that the chocolates were not liquor giving effect to section 60(2) of the Act. These chocolates contain a liquid having over 7 per cent. alcohol and they are sold. This is in contravention of section 28 of the Act.

Higgins, K.C. (*Harper,* with him), for respondent: This is an article of food kept for sale. We have a right to use this liquid for culinary purposes under section 60(2) of the Act and we had a permit to be allowed to do so. In estimating the percentage they should include the whole article but the analyst in estimating the strength took the liquid only.

Argument

Johnson, in reply: Section 15 of the Act does not allow a permit to be issued to a corporation.

Cur. adv. vult.

On the 20th of January, 1927, the judgment of the Court was delivered orally by

MACDONALD, C.J.A.: The accused was convicted for unlawfully keeping intoxicating liquor for sale contrary to the Act [Government Liquor Act, R.S.B.C. 1924, Cap. 146] and was found guilty and fined $1,000. The liquor was contained in

Judgment

chocolates which were made in the shape of a bottle, with an inner cavity containing the liquid of 7.87 per cent. alcohol. The *modus operandi* used in making them was to pour the liquid through a small funnel into prepared starch moulds which moulds were then dipped in chocolate which formed the outer case.

A case was stated in which the following questions were submitted by the magistrate:

"1. Was I right in my finding that it was proven that the defendant kept intoxicating liquor for sale?

"2. Was I right in my finding that the manufacture of the said liqueur chocolates was not authorized by section 60, subsection (2) of the said Act?"

Judgment

The case came before the Chief Justice of British Columbia, who answered the questions in the negative. The Attorney-General appeals.

The Court would answer both questions in the affirmative, and restore the conviction.

Appeal allowed.

Solicitors for appellant: *McKay, Orr, Vaughan & Scott.*
Solicitors for respondent: *Harper & Sargent.*

COURT OF APPEAL

1927

Jan. 20.

BULGER v. THE HOME INSURANCE COMPANY.

Insurance, fire—Furniture in house covered—Partially destroyed by fire—Proof of loss delivered—Action to recover—Arbitration proceedings—R.S.B.C. 1924, Cap. 122, Condition No. 22 of Schedule.

BULGER v. HOME INSURANCE CO.

The plaintiff's furniture, insured in the defendant Company, was partially destroyed by fire on the 19th of October, 1925. Proof of loss was delivered to the Company on the 12th of July, 1926, and the plaintiff brought action to recover the sum claimed on the 15th of September following. On the 12th of October, 1926, the Company gave notice of appointing an arbitrator under Condition No. 22 of the Schedule to the Fire-insurance Policy Act and six days later a further notice that the insured appoint an arbitrator. On the 30th of October the Company moved for a stay of the action and on the same day applied in Chambers for an order for the appointment of an arbitrator for the plaintiff. Both motion and application were dismissed.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C., that under the Act the defendant is given the right to arbitrate, and the judge should appoint an arbitrator where one of the parties has failed to do so; the duty is imperative.

Held, further, that it is contrary to good practice that both proceedings should go on at the same time and the action should be stayed until the arbitration is disposed of.

APPEAL by defendant from two orders of HUNTER, C.J.B.C. of the 29th of November, 1926. The plaintiff insured his furniture in the defendant Company on the 4th of May, 1925, for $2,500, and it was partially destroyed by fire on the 19th of October following. On the day following the fire one of the Company's adjusters visited the premises of the assured and, as he contended, with the consent of assured's wife, removed some of the furniture for the purpose of having it repaired. The wife denied that she gave her consent to the removal of the furniture. Proof of loss setting out that furniture of the value of $5,429.25 was destroyed to the extent of $2,254.50, was delivered to the Company on 12th July, 1926. The plaintiff brought action to recover this sum on the 15th of September, 1926.

Statement

The statutory conditions in the Schedule to the Fire-insurance Policy Act, were embodied in the policy, and under Condition No. 22 thereof the defendant Company gave notice of appoint-

ing an arbitrator to assess damages on October 12th, 1926, and six days later a further notice to appoint an arbitrator. On October 30th, the defendant moved to stay the action pending the arbitration and the plaintiff not having appointed an arbitrator the defendant on the same day, by Chamber summons, applied for the appointment of an arbitrator for the plaintiff. Both motion and application were dismissed.

The appeal was argued at Victoria on the 19th and 20th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Mayers, for appellant: The Company elected to repair. Under statutory Condition No. 17 it may elect any time within 15 days after receipt of proofs of loss. We are entitled to the orders under sections 6 and 8 of the Arbitration Act. As to the words "may" and "shall" see *In re Bjornstad and The Ouse Shipping Co.* (1924), 2 K.B. 673. That we are entitled to a stay of the action see *In re Hudson's Bay Insurance Company and Walker* (1914), 19 B.C. 87; *Rowe Brothers and Co. Lim.* v. *Crossley Brothers Lim.* (1912), 108 L.T. 11; *Lock* v. *The Army, Navy, and General Assurance Association (Limited)* (1915), 31 T.L.R. 297. That we have the right to reinstate see *Anderson* v. *Commercial Union Assurance Co.* (1885), 55 L.J., Q.B. 146 at p. 148; *Murray* v. *Royal Insurance Co.* (1904), 11 B.C. 212. We tried to salve some of the furniture the day after the fire but we have a right to take any action necessary to prevent any further damage accruing. The Company is not bound strictly on the question of reinstatement: see *Sutherland* v. *Sun Fire Office* (1852), 14 D. 775. In taking precaution to prevent further damages, this includes the right to repair: see *Kelly* v. *Sun Fire Office* (1891), 21 Atl. 447; *Tolman* v. *Manufacturers Insurance Company* (1848), 55 Mass. 73. As to the right to do anything to minimize the loss see Halsbury's Laws of England, Vol. 17, p. 541, sec. 1078; *Oldfield* v. *Price* (1860), 2 F. & F. 80; *Castellain* v. *Preston* (1883), 11 Q.B.D. 380; *London Assurance Company* v. *Sainsbury* (1783), 3 Dougl. 245 at p. 253. The question of the right to remove the goods is quite apart from the question of election.

Argument

McPhillips, K.C., for respondent: We submit there is noth-

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BULGER v. HOME INSURANCE CO.

ing to arbitrate. The Company must pay the loss occasioned by the fire as set out in proofs of loss. As to when "shall" can be read "may" see *In re Hudson's Bay Insurance Company and Walker* (1914), 19 B.C. 87; *In re Eyre and Corporation of Leicester* (1892), 1 Q.B. 136 at pp. 143-4; *The King* v. *The Justices of Leicester* (1827), 7 B. & C. 6 at pp. 12 and 13; *Barker* v. *Palmer* (1881), 8 Q.B.D. 9 at p. 10; Macgillivray on Insurance Law, p. 689. That they had elected see Porter's Laws of Insurance, 6th Ed., pp. 215, 256 and 262; *Wynkoop* v. *Niagara Fire Ins. Co.* (1883), 91 N.Y. 478. He cannot repair in part and pay in part: see *Brown* v. *Royal Insurance Co.* (1859), 1 El. & El. 853; *The Times Fire Assurance Company* v. *Hawke* (1859), 28 L.J., Ex. 317 at p. 318; *Oldfield* v. *Price* (1860), 2 F. & F. 80; *Norton* v. *The Royal Fire and Life Assurance Company* (1885), 1 T.L.R. 460; *Miller, Gibb & Co.* v. *Smith & Tyrer, Limited* (1916), 1 K.B. 419 at p. 424; *Doleman & Sons* v. *Ossett Corporation* (1912), 3 K.B. 257 at pp. 271-2. As to staying proceedings in the action see *Clough* v. *County Live Stock Insurance Association* (1916), 85 L.J., K.B. 1185; *G. Freeman & Sons* v. *Chester Rural Council* (1911), 1 K.B. 783.

Argument

Mayers, replied.

MACDONALD, C.J.A.: Both appeals should be allowed. I am quite convinced that on the question of the appointment of the arbitrator the learned judge was in error. I do not think he had any discretion to refuse to appoint him.

The reasons for judgment given in this Court in *Shannon* v. *Corporation of Point Grey* (1921), 30 B.C. 136 are useful. The case discusses the principle involved here; that is to say, when must the Court exercise the power? I there referred to *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at pp. 231 and 241 and to a number of cases which were there cited. Lord Penzance said (p. 231):

MACDONALD, C.J.A.

> "I think it far more satisfactory that your Lordships should look at what the Courts in previous cases have done rather than what the learned judges may have said, and I invite your Lordships' attention to the cases cited in argument."

In reviewing these cases he said that regard must be had above all to the position and rights of the person, or class of persons

for whose benefit the power had been conferred. Lord Blackburn put it very concisely in these words: "If the object for which the power is conferred is for the purpose of enforcing a right," and that is the case here, "there may be a duty cast on the donee of the power, to exercise it." And again, he referred, as supporting this, to several cases cited in argument. In all of those cases powers were conferred upon the donees to effectuate the rights, and the exercise of the power was held to be obligatory. That is precisely in line with the case here. The defendant is given the right to arbitrate; and it is for the judge, where one of the parties fails to appoint an arbitrator, to appoint him; the duty is imperative.

As to the other appeal, *viz.*, from the learned judge's refusal to stay the action pending this arbitration, it would be contrary to good practice to hold that these two proceedings should go on at the same time. If there is to be an arbitration, and that is defendant's right, then I see no escape from the conclusion that we must stay the whole action until the arbitration is disposed of. It may be said that there are two causes of action in one statement of claim and we ought not to stay both, but they are alternative causes of action; both cannot succeed; and therefore if one is stayed the other ought to be stayed until the arbitration is had, or until the plea in the statement of claim for the insurance money, as distinguished from that for damages, shall have been abandoned.

MACDONALD, C.J.A.

MARTIN, J.A.: I am of the same opinion. I base my reasons, shortly, upon the ground that under this statute the insurer has a right, in a case such as this, where two inconsistent and alternative pleas are placed upon the record, to require that the arbitration should be proceeded with. It is true that inconvenience and expense may possibly result from that course being adopted; but, in the first place, that is all due to the fact that pleas of that nature have been put upon the record (and in that respect the case differs from any other case that has been cited to us) and in the next place, the fact that inconvenience and expense might result is no reason for refusing a statutory right invoked by one who is not responsible for the creation of that unfortunate situation. From that it follows that there can, I

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think, be no serious doubt that if this is a case where the arbitration should go on, then it is a case in which the action should not go on.

I conclude by saying that I regret that a counsel whom I have held so long in so high esteem as Mr. *McPhillips* should not have taken advantage of the opportunity we gave him to cite any further cases in support of his submission.

GALLIHER, J.A.: I agree. Shortly, I think in the circumstances of this case we must consider the section in the Act as being obligatory. As I pointed out during the argument, it seems to me that where an action is brought on the insurance policy, there is a right then on the part of the party defending that action to have the matter submitted to arbitration: and in such a case of course the suit and the arbitration really should not go on at one and the same time. I do not wish to add anything further to what has been said by my learned brothers.

GALLIHER, J.A.

MACDONALD, J.A.: I am of the same opinion.

MACDONALD, J.A.

Appeal allowed.

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

VAN WASSENAER v. ADAMS AND ADAMS.

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VAN WASSENAER v. ADAMS

Practice—Writ of summons—Garnishee—Action premature—Application to set aside—Application dismissed and plaintiff given leave to amend—Appeal—R.S.B.C. 1924, Cap. 17, Sec. 3 (2).

On an application to set aside a writ of summons and garnishee order on the ground that the action was premature it appeared that the writ was issued on the 5th of November, 1926, and the statement of claim recited that by agreement in writing dated the 1st of November, 1926, the defendant agreed to purchase a certain lot for $7,500 of which $2,000 was to be paid on the completion of the agreement and the balance at certain periods therein set out. The statement of claim then proceeded "particulars November 6th, Cash payment due $2,000." The application was dismissed and the plaintiff was allowed to amend his statement of claim by substituting "November 2nd" for "November 6th" under the slip rule.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C., that there was material before the judge below upon which he was entitled to amend if he thought that justice required it and notwithstanding section 19 of the Attachment of Debts Act which excludes the application of Rules of Court in matters referred to in sections 2 to 18 of the Act, it was within his discretion to do so, and the amendment supported the attaching order.

Held, further, that the objection that the garnishee order does not properly describe the garnishee, the Bank of Commerce, as the order does not say that it carried on a banking business, should not be given effect to, as the fact that the garnishee is described as a bank would import that it carries on a banking business.

APPEAL by defendants from the decision of HUNTER, C.J.B.C. of the 19th of November, 1926, dismissing an application to set aside a writ of summons and garnishing order. The writ was issued on the 5th of November and the statement of claim set out that by agreement in writing dated the 1st of November, 1926, the plaintiff agreed to sell a certain lot in Vancouver to the defendants for $7,500 of which $2,000 was to be paid on the completion of the agreement and the balance as therein set out, and that default had been made by the defendants in making the cash payment. The statement of claim then proceeded as follows:

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"Particulars.

"November 6th, 1926, Cash payment due.....	$2,000
"By deposit	100
"Balance due and owing by the defendants to the plaintiff	$1,900"

Statement

The defendants claim that the action was premature in that on the face of the statement of claim the moneys claimed were not due and payable at the date of the issue of the writ. On the application of the plaintiff he was allowed to amend the statement of claim by striking out "November 6th" and inserting in lieu thereof "November 2nd" as the date upon which the cash payment became due. The defendants' application was then dismissed.

The appeal was argued at Victoria on the 20th and 21st of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

David Whiteside, K.C., for appellants: The cause of action did not arise until the 6th of November and the writ was issued on the 5th of November. The action was premature: see *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215; *Miller* v. *Allen* (1912), 23 O.W.R. 527. An amendment cannot be allowed to make good an attachment. This is an action for specific performance and in fact it could not succeed at all: see *Cushing* v. *Knight* (1912), 46 S.C.R. 555 at p. 560; *Kelly* v. *Watson* (1921), 1 W.W.R. 958. On the question of striking out a pleading see *Republic of Peru* v. *Peruvian Guano Company* (1887), 36 Ch. D. 489. Section 19 of the Attachment of Debts Act provides that "all matters referred to in sections 2 to 18 shall be governed by this Act notwithstanding any Rules of Court upon the subject." As the Rules of Court are excluded no amendment of the statement of claim is possible after the issue of the attaching order which stands or falls on the basis of the material filed with the registrar. The affidavit supporting the attachment order is defective as it does not give the address: see *Joe* v. *Maddox* (1920), 27 B.C. 541, and further the description of the garnishee is defective. "Body corporate" is not a description: see *The Queen* v. *Tugwell* (1868), 37 L.J., Q.B. 275; *Coulson* v. *Dickson* (1890), 59 L.J., Q.B. 189; *Sims* v.

Trollope & Sons (1896), 66 L.J., Q.B. 11. Even as amended the statement of claim will not support the attaching order.

Mayers, for respondent: The statement in the statement of claim that the money was due on the 6th of November was purely a clerical error as shewn by the amended statement of claim: see Annual Practice, 1926, p. 448; *Roberts* v. *Plant* (1895), 1 Q.B. 597; *Paxton* v. *Baird* (1893), 1 Q.B. 139. The registrar is bound to make the order if the writ is issued. He has nothing to do with the endorsement. He performs a ministerial duty. If the proceedings before the registrar are regular the judge cannot interfere: see section 19 of the Attachment of Debts Act; *Richards* v. *Wood* (1906), 12 B.C. 182; *North American Loan Co.* v. *Mah Ten* (1922), 31 B.C. 133.

Argument

MACDONALD, C.J.A.: The appeal should be dismissed. Mr. *Whiteside* contends for the appellants that at the time the writ was issued the cause of action had not accrued. He attacks the writ and the attaching order, the one as premature, the other for irregularities. The only irregularity suggested is that the order does not properly describe the garnishee. It is stated that the garnishee is the Bank of Commerce but the order does not say that the Bank of Commerce carried on a banking business. That is the defect alleged. Now it seems to me that the fact that the garnishee is described as a bank would import that it carries on a banking business.

MACDONALD, C.J.A.

The principal question, however, is, must the writ be set aside because issued before the cause of action accrued? The writ has been amended to shew a good cause of action, since it was alleged that the date when the cause of action arose had been wrongly stated, and it was amended so as to state what is alleged to be the true date. I think it was within the discretion of the judge to have amended it. He might have set aside the writ; but on the other hand he was entitled to amend if he thought that justice required it. I think the amendment would support the attaching order.

MARTIN, J.A.: Seeing that the affidavit in question is (to quote subsection (2) of section 3 of the Act) in or to the effect

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of the form prescribed, and that (to further quote the Act) a writ for the amount of the claim had in fact been issued, it became thereupon the duty of the registrar to issue the garnishing order. And upon that being done he, exercising that power in his ministerial way as *persona designata* had special jurisdiction, which could not be interfered with by any Court or judge. I am assuming for the moment, that the form was in the Act, because I am of the opinion that the objection taken to the description of the Bank is not well founded, in that the name of the Bank contains a self-description, because by the operation of the Federal statute no person can use that word (bank) unless authorized by a statute and by charter pursuant to sections 156 and 157 of the Bank Act; and there is no doubt about the business that is being carried on, because section 61 *et seq.* and section 76 *et seq.* of the Bank Act describe the business that a bank must carry on; therefore there can be no misunderstanding here as to the business of this bank, because the Act of Parliament declares what it is, and of that declaration everybody in the land must take notice.

MARTIN, J.A.

Then it is said that the writ is defective in that it contains such statements as shew that the action is premature. That would be a good ground for setting aside the writ on an application made; and the application was properly here made by summons in Chambers. But upon that application it was open to the plaintiff to shew that that was a matter of allegation and in the stating of the cause of action there was a slip, and to apply to amend it thereupon. That application to amend in such circumstances would of course be one for the learned judge primarily; and if he exercised his discretion in a case in which "proper materials" were before him, and did not proceed upon wrong principles, then as Lord Dunedin (*Dominion Trust Company* v. *New York Life Insurance Co.* (1918), 3 W.W.R. 850; (1919), A.C. 254) has said in a well-known case, it would not be proper for the Court to disturb it. Can it for one moment be said that there are not materials here upon which the learned judge below could have exercised his discretion in directing the amendment to the writ? And so the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: There is just one point on which I am in

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some doubt, as at present advised, and that is with regard to the fact as to whether the amendment granted by the learned judge should attach also to the garnishing order, or attachment order in this case. On that point I must say I am not free from doubt; but my learned brothers having come to a definite conclusion on that as well as the other features of the case, with which I agree, I do not wish to hold up judgment, but merely express a doubt on that point.

MACDONALD, J.A.

MACDONALD, J.A.: I am in agreement with the views expressed by the Chief Justice and my brother MARTIN.

Appeal dismissed.

Solicitors for appellants: *Daykin & Burnett.*
Solicitors for respondent: *Walsh, McKim & Housser.*

BOOTH v. FORD AND SHAW.

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Negligence—Employer and employee—Duty of employer—Hotel—Proper lighting of corridor.

The plaintiff had been working for two weeks as a chambermaid on the first floor of a hotel of which the defendants were proprietors and at about 2:30 on the afternoon of the 22nd of December, 1925, after she had finished making up a room at the end of a corridor she walked out of the room and after taking about four steps she fell over a man lying on the floor, breaking her arm and suffering other injuries. The corridor was fairly dark at the time and although there was an electric light in the ceiling at the middle of the corridor it was not lit. The man she fell over disappeared immediately after the accident. The jury found the defendants were negligent in not having the corridor properly lighted and awarded the plaintiff damages for which judgment was entered.

Held, on appeal, affirming the decision of MORRISON, J., that in the circumstances of the case there were grounds upon which the jury might reasonably have found that there was negligence on the part of the defendants and the verdict should not be disturbed.

Statement

APPEAL by defendants from the decision of MORRISON, J., and the verdict of a jury in an action for damages for injuries

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Statement

sustained by reason of the defendants' negligence. The defendants are the proprietors of the Manitoba Hotel on Cordova Street, Vancouver. They hired the plaintiff as a chambermaid on about the 7th of December, 1925, and she was assigned to looking after the rooms on the first floor of the hotel. She continued to perform her duties until December 22nd, and at about 2.30 on the afternoon of that day, after she had finished making up a room at the end of the corridor, she walked out of the door and after taking about four steps she tripped over a man lying on the floor, broke her arm, and suffered other injuries. She was about 58 years old, and complained that the accident was due to the corridor not being properly lighted. There was an electric light in the ceiling at the middle of the corridor but it was not lit at the time. The man over whom she fell disappeared immediately after the accident, and was not heard of again. The jury found that the defendants were guilty of negligence in not having the corridor properly lighted and awarded the plaintiff $1,200, for which judgment was entered.

The appeal was argued at Victoria on the 27th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, and MCPHILLIPS, JJ.A.

Argument

Wood, for appellant: She had worked in this corridor for two weeks. There were no traps. It was a reasonably safe place for the work she was doing: see *Geall* v. *Dominion Creosoting Co.* (1917), 55 S.C.R. 587; *Toronto Hydro-Electric Commission* v. *Toronto R. Co.* (1919), 48 D.L.R. 103 at p. 104; *McDowall* v. *Great Western Railway* (1903), 2 K.B. 331. A servant cannot be in a better position than a guest in the hotel: see *Walker* v. *The Midland Railway Company* (1886), 2 T.L.R. 450; *Wilkinson* v. *Fairrie* (1862), 32 L.J., Ex. 73; *Fairman* v. *Perpetual Investment Building Society* (1922), 92 L.J., K.B. 50; *McKinlay* v. *Mutual Life Assurance Co. of Canada* (1918), 26 B.C. 5; *Huggett* v. *Miers* (1908), 2 K.B. 278; *Kynoch* v. *Bank of Montreal* (1923), 3 W.W.R. 161; *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420; Halsbury's Laws of England, Vol. 20, p. 131, sec. 256. As to the duties of the master and the duties of the servant see *Kellett* v. *B.C. Marine Ry. Co.* (1911), 16 B.C.

196; *Bergklint* v. *Canada Western Power Co.* (1912), 17 B.C. 443; *Priestley* v. *Fowler* (1837), 3 M. & W. 1; *Brown* v. *Coxworth* (1913), 4 W.W.R. 776.

A. Alexander, for respondent: The corridor was not properly lighted. The plaintiff could not see the man on the floor. There was a beer-parlour on the premises and it might reasonably happen that an intoxicated man would wander to this corridor. If the light had been turned on the accident would not have happened. There was a duty on the proprietors to keep the corridor properly lighted: see *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274 at p. 288. The cause of the injury was one that the defendants should have foreseen and guarded against.

Statement

Wood, replied.

MACDONALD, C.J.A.: I think the appeal must be dismissed.

The hall was unquestionably dark, very dark—that is admitted. There was a light there, but it was not burning. The defendants engaged the plaintiff as a servant, to use that hall in getting back and forth to her employment in taking care of the rooms, and it was a duty which the law casts upon the employer to see that the hall was in such a condition as not to endanger her person. The illustration given by Mr. *Alexander* was a very apt one, and of course a great many others could be given. Assuming, he said, a dark hall, so dark that a servant could not see an obstruction, and assuming that one of the roomers had put his suit-case outside the door, or his boots to be cleaned, or some other chambermaid had left a bucket of suds there, or a carpet-sweeper, which could not be seen by the plaintiff and she had stumbled over it, what would the conclusion have been? Would it not be that because the employer had been remiss in his duty he would be liable for any damage? It seems to me that this is the only conclusion which we can come to. There are no facts in dispute. It is not suggested that we could interfere with any of the findings of fact by the jury; there has been no contributory negligence on her part. Therefore, if there is any liability at all, it is the liability which arises from the neglect of duty of the employer, and from that alone.

MACDONALD, C.J.A.

The jury had a view of the place which enabled them to

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understand the evidence better than we can by reading it. Therefore it is impossible for this Court to interfere with the verdict of the jury, and this verdict should be sustained.

MARTIN, J.A.: Having regard to the findings of the jury, which have freed the plaintiff from any contributory negligence, I find it impossible to see any ground upon which we would be justified in disturbing the verdict. If it had not been for that finding, I must say I should have felt very disinclined to believe the plaintiff when she said she was not aware of the existence of that light seeing that in the course of her duty she had occasion to work in that dark corridor. But I would not be for a moment justified, having regard to the circumstances of this case, which is somewhat peculiar, in disturbing the verdict of the jury, and we have not been invited to do so.

There is this other element which might well have weighed with the jury in this case, *i.e.*, that there was a beer-parlour there and drinking was going on, and if people will allow drunken men to resort to their premises, then they should take steps to see that their employees are prevented from the consequences of that sort of thing. But I lay no stress upon the fact of the presence of the drunken man himself, though he was, from the evidence given, the cause of this accident. The legal result here would have been the same if, instead of falling over him, she had fallen over a carpet-sweeper.

MARTIN, J.A.

I think the jury, taking all the circumstances of this case, which has some peculiar features, were justified in the conclusion they arrived at. The case is a narrow one and very little would turn it one way or the other, and if more evidence had been given, *e.g.*, that this woman was apprised of this light being there subject to her immediate control the case would have had a different complexion.

GALLIHER, J.A.: I may say I was at first inclined against the plaintiff in this matter, but Mr. *Alexander* just before lunch-time somewhat clarified what I was in some doubt about, and I feel in the circumstances I would not be justified in interfering with the verdict given.

GALLIHER, J.A.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: In my opinion this appeal raises a point

of some nicety and what may be said to be a case close to the line. The learned counsel for the appellants delivered a very able and persuasive argument, but with every deference thereto the verdict of the jury is conclusive in the present case upon the facts as adduced at the trial.

In view particularly of section 80 of the Workmen's Compensation Act, it seems to me that the evidence led on the part of the plaintiff would establish a case such as a jury might be entitled to go upon and to reasonably find as they have found in favour of the plaintiff. Now section 80(1) says:

"Where personal injury is caused to a workman by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in the business, of his employer, or by reason of the negligence of his employer or of any person in the service of his employer acting within the scope of his employment, the workman, or, if the injury results in death, the legal personal representatives of the workman, and any person entitled in case of death shall have an action against the employer."

It seems to be common ground, and so understood between counsel, that this corridor was a dark corridor. Starting with that premise, that it was a dark corridor, it would occur to me that it was a case for the maintenance of a permanent light, and ought not to have been left to any other decision on the part of the employees or anyone else coming down the corridor.

MCPHILLIPS, J.A.

The duty that is upon the employer was well considered in *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420. The employer is bound to provide for the employee a safe place to work, the responsibility is as great upon the landlord; the landlord must take reasonable care to ascertain the safety of his premises. There is an implied warranty against all defects that could be discovered with reasonable care and skill. The statute, of course, is in favour of the workman, it could have been found out by the exercise of reasonable care and skill upon the part of the landlord that this particular corridor was a dark one and consequently a dangerous corridor. In the face of the findings of the jury, it would seem to me that it is impossible for a Court of Appeal to hold otherwise than the jury has, or disagree with the findings upon the evidence. The jury were asked, "Was there negligence, if so, what was it?" The answer was "No." "Was the defendant guilty of negligence, if so, what was it?" The

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answer was, "Not properly lighted." "What was the proximate cause of the accident?" The answer was, "Darkness." The final question was, "Amount of damages, if any?" The answer was, "$1,200."

In view of these findings and the governing law which required the landlord to take reasonable care to ascertain the safety of his premises, and the implied warranty that all defects that could be discovered with reasonable care and skill would be remedied, it is not a case in which the Court of Appeal would be entitled to disagree with the findings of the jury.

Is it unreasonable to say that there was a defect in the condition and arrangement in this building? The answer must be No. There was a defect, in having a dark corridor, and that dark corridor not permanently lighted. The jury has said, and reasonably said, there was darkness there, and there should not have been darkness. I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *H. S. Wood.*
Solicitor for respondent: *G. L. Fraser.*

IN RE S. *IN RE* EQUAL GUARDIANSHIP OF INFANTS ACT.

GREGORY, J. (In Chambers)

1927

Jan. 26.

IN RE S.

Infant—Custody—Illegitimate child—Application by putative father—Applicability of Act—R.S.B.C. 1924, Cap. 101.

The Equal Guardianship of Infants Act has no application to an illegitimate child.

APPLICATION by putative father of an illegitimate child for the guardianship of the infant. Heard by GREGORY, J. in Chambers at Victoria on the 24th of January, 1927. Statement

O'Halloran. for the application.
Maclean, K.C., contra.

26th January, 1927.

GREGORY, J.: This is an application by the putative father of an illegitimate child for an order for the custody of the child.

The application is made under section 13 of the Equal Guardianship of Infants Act, being Cap. 101, R.S.B.C. 1924; it is opposed by the mother—the infant is under two years of age.

The father having been guilty of two offences under the Criminal Code is being deported by the immigration authorities, and proposes, if granted the order, to take the child with him which will remove it from the jurisdiction of the Court. A bare statement of these facts would appear to be sufficient to justify a refusal of the order asked for. While these facts are admitted it is contended that there are extenuating circumstances. Judgment

I have not, however, gone into the merits of this contention, for I feel bound to sustain the preliminary objection that this Court has no jurisdiction to entertain the application under the Equal Guardianship of Infants Act. That Act, I think, applies only to legitimate children. Section 3 states that the power of a guardian appointed under it shall be the same as a guardian appointed under the Imperial Act, Cap. 24, 12 Car. II., and Cap. 27, Sec. 4, 49 & 50 Vict. I have not made an exhaustive search, but I think no case can be found where an appointment of a guardian has been made under those Acts of an illegitimate child.

GREGORY, J. (In Chambers)

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Although the child in question may be an infant within the definition of the word infant in the Equal Guardianship of Infants Act, and the putative father is undoubtedly a parent in the sense that he is one who generated the child, still speaking generally, "In the eye of the law an illegitimate child is *filius nullius*": Simpson on Infants, 4th Ed., 100. Almost every section of the Act uses some expression which indicates that the Legislature had only in contemplation legitimate children, *e.g.*, section 4, "Married women"; section 5, "The husband and wife"; section 9, "Should the surviving parent remarry"; section 11, "The husband and wife"; section 12, refers to a judicial separation or decree for divorce; section 18, "Minor husband," "minor wife"; section 21, "Property of the husband and wife."

In addition to this, our statutes contain a special Act, Cap. 34, R.S.B.C. 1924, dealing with illegitimate children, it is called the "Children of Unmarried Parents Act," and section 6 of that Act provides for the appointment of guardians for such children.

Also, chapter 6, R.S.B.C. 1924, being the Adoption Act, distinctly recognizes the difference between illegitimate and legitimate children. In section 5, subsection (1)(*c*) it is provided that the consent in writing

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"of the parents, or surviving parent, or the parent having the custody of the minor, if legitimate, and of the mother only if the minor is illegitimate."

It was urged at the hearing that the Act applied to illegitimate as well as legitimate children, and in support of this contention, was cited *In re P.* (1922), 1 W.W.R. 853, which certainly gives some support to such argument. But that was a case which it seems to me was decided on the general principle of what was in the best interests of the infant, was by a divided Court, and was upon an Alberta statute quite unlike ours in many respects; the particular point was not fully discussed and so far as one can judge from the report, there is no such Act in Alberta as our Children of Unmarried Parents Act, and the case of *The Queen* v. *Gyngall* (1893), 2 Q.B. 232, referred to by Mr. Justice Hyndman, was a *habeas corpus,* which is quite different and it was also a case of a legitimate child.

It might be well to add that in *O'Rourke* v. *Campbell* (1887), 13 Ont. 563 at p. 564, Mr. Justice Rose stated that in Ontario

"the cases establish: 1. That the father of an illegitimate child has, in this country, the right to its custody and care as against a stranger or person other than the mother. 2. It follows the mother has the right as against the father."

The application will be dismissed without costs.

Application dismissed.

GREGORY, J. (In Chambers)

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IN RE S. ——

REID v. GALBRAITH *ET AL.*

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Jan. 28.
March 1.

REID v. GALBRAITH

Mortgage—Licence by mortgagor to cut timber—Foreclosure proceedings—Mortgagor's possession—Duration of—Action for trespass by mortgagee Notice of appeal—Demand for payment of judgment by respondent after notice of appeal—Cross-appeal—Waiver.

If the successful party in a trial demands payment of his judgment after the unsuccessful party has given notice of appeal, he must be deemed to have abandoned any right of cross-appeal.

A mortgagor in possession may cut timber on his land and give other persons a licence to do so unless it is shewn that the security is thereby impaired, and the onus is on the party seeking to establish impairment to plead and offer proof of it.

In an action for trespass the mortgagee recovered damages against third parties who entered and removed timber after he had begun foreclosure proceedings but before he became registered owner and went into actual possession.

Held, on appeal, reversing the decision of MACDONALD, J. in part (MCPHILLIPS, J.A. dissenting), that the mortgagor being in possession up to the date of the registration of the final order for foreclosure, the defendants, his licensees were not trespassers before that date and the mortgagee on taking possession was not entitled to sue them for trespass committed prior thereto.

APPEAL by defendants from the decision of MACDONALD, J. of the 15th of October, 1927, (reported *ante*, p. 36), in an action for trespass on the plaintiff's lands and taking timber therefrom. The lands in question were originally owned by one Milburn who on the 30th of June, 1908, granted the right to cut timber for ten years to one McNair and shortly after he sold the lands to one Claughton. On the

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Statement

13th of May, 1913, Claughton mortgaged the property to one Thompson who died in 1919 and the plaintiff Reid became executor of his estate. On the 21st of January, 1913, McNair sold his timber rights to Galbraith. Later Claughton sold the lands subject to the mortgage to one Lees. Reid brought action for foreclosure under the mortgage and obtained final order for foreclosure on the 10th of April, 1920. The timber lease ran out on the 30th of June, 1918, and in April, 1919, Lees the then owner in consideration of $50 authorized one Brymner who was assignee of the Galbraiths to continue to exercise the rights conferred by the timber lease originally given by Milburn on the 30th of June, 1908, until the 13th of April, 1920, and this was further extended by Lees on the 29th of January, 1920, until the 13th of October, 1920. The trial judge held that the defendants were trespassers and assessed damages on the milder scale.

The appeal was argued at Victoria on the 28th and 31st of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Craig, K.C., for appellant, moved to quash the cross-appeal on the ground that the appellant accepted the judgment by taking the money out of Court and taxed their costs demanding and accepting payment thereof. This comes under the general principle that they cannot approbate and reprobate a judgment: see *Atlas Record Co. Ltd.* v. *Cope & Son, Ltd.* (1922), 31 B.C. 432. Our appeal was launched before they wrote demanding payment.

Reid, K.C., for respondent, *contra*: We cross-appeal under another rule than that from which the usual cross-appeal is taken: see rule 8 of the Court of Appeal Rules: see also *International Wrecking Co.* v. *Lobb* (1887), 12 Pr. 207; *Russell* v. *Diplock-Wright Lumber Co.* (1910), 15 B.C. 66.

Craig, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the motion must succeed. I was inclined the other way until the circumstance was referred to by Mr. *Craig, viz.*, the demand for the judgment money, after the notice of appeal had been given. If the plaintiff had not

made that demand I think he would have been entitled to give the notice of cross-appeal, notwithstanding that up to that time, he had taken preliminary steps to realize on his judgment. The language of rule 8 of the Court of Appeal Rules seems to indicate this:

"It shall not under any circumstances be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court or judge appealed from, should be varied, he shall give one day's notice thereof."

Now it seems to me that the rule makers had this situation in view, that the successful party in the appeal may be quite satisfied with the judgment providing the other party leaves it alone, but when the other party proceeds to open it up, his adversary, who has succeeded, may decide to retain all his original rights, the same rights that he had at the trial. Was it intended by the rule on its true construction that the person who has got judgment in his favour shall wait for three months before taking any proceedings on that judgment? I do not think that such a thing was in contemplation. But when the appellant has given his notice, then if the plaintiff still insists upon payment of his judgment, I think he must be deemed to have abandoned any right of cross-appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: In the absence of authority the only safe thing to do is to fall back upon principle. And the principle in this matter is found laid down in the case of *Atlas Record Co. Ltd.* v. *Cope & Son, Ltd.* (1922), 31 B.C. 432, where we held that one cannot both approbate and reprobate a judgment. The principle of that decision is in my opinion wholly applicable to the present case. But if there should be any doubt upon it, I agree with what the Chief Justice has said, that that doubt is removed by the fact that the fruits of this judgment were taken after the notice of appeal was given in view of which it is impossible to say that there was not an election.

MARTIN, J.A.

As to the suggestion that the Court should regard the arrangements that are made between a solicitor and his client, in the case of a respondent, or should inquire into the relations of confidence or lack of confidence that existed between the solicitors in the proceedings, that one is secured or unsecured by the

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other, I agree with the suggestion of my brother McPHILLIPS during the argument, that this Court has nothing whatever to do with that, for that is a "domestic," or "indoor" arrangement so to speak of their own. We look to the fact, and the fact is this, that money has been paid, though an undertaking has been given to return it.

I therefore am of the opinion that the general principle of the *Atlas* case applies to cross-appeals. And if it be suggested that such a situation was not contemplated by the rule (though how we are to inquire into what the rule committee contemplated to be done in any possible case I must say it is difficult for me to understand, for the language employed is the key to "contemplation"), yet the language here is apt and sufficient to cover the case and in such circumstances a respondent who is not satisfied with the judgment must elect, and speedily, what course he will adopt. And if the situation is that he thinks there is something about the judgment that he is not satisfied with, and that if the other party appeals he will cross-appeal, what he has to do under those circumstances is either to have the courage of his convictions and say that he will not take the money then, or else wait until he sees the move taken by the other party; and that time will come when the notice of appeal is or is not given within the specified time. He has his period of election before notice of appeal, and he must stand or fall by what he does in that time. The situation created is one where if he has any appeal in his mind and is not satisfied with the judgment, he should, if in doubt do what every solicitor would do, take counsel's opinion without further delay, so as to be prepared to act promptly when the time comes.

MARTIN, J.A.

GALLIHER, J.A.: I do not decide what the position would have been originally without the further feature that occurred after notice of appeal was given. I have some doubt on that phase of the question. But assuming that it would not have precluded the plaintiff from cross-appealing, I would still say that taking into consideration what did occur after notice of appeal was given by the defendant, that by their act, then, they have deprived themselves of the right of cross-appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the cross-appeal

MCPHILLIPS, J.A.

should be quashed. I think the best way, perhaps, to analyze the matter is to just view it in this way: suppose the plaintiff the judgment creditor has any doubt about the situation, and that there may possibly be an appeal, and that then he might decide to cross-appeal, the policy would be (and I know in practice it has been done repeatedly), to do nothing in the way of enforcing the judgment until the expiry of the time of appeal. Now, if, on the other hand, he is desirous of having the money, he can only get that money with the consequent risk. Because once he insists upon the money, and voluntarily upon his part presses for the money—which was the case here—and gets the money, he has undoubtedly elected then to be satisfied with the amount; the *quantum* he settles forever so far as he is concerned; that election cannot be revoked. That is the way I look at it. The payment being insisted upon and the payment being made, is the same as if it had passed right then into the pocket of the plaintiff; and how can it be claimed that it is not in his pocket? I do not think we are entitled to look at what, after all, is extraneous matter; the undertaking to return the money in the case of the defendant being successful on appeal is a matter *dehors* the Court; that, it seems to me, is apart from the Court. Of course that undertaking might be proceeded upon in Court, and I am not saying that the Court will not enforce the undertaking; but then that is wholly a matter between the solicitors; the solicitors of course would be bound upon their undertaking.

MCPHILLIPS, J.A.

I think the view here expressed is not unreasonable, in the due administration of justice. The defendant ought to be able to go to counsel and get his opinion, based on the facts that the plaintiff having elected to take the fruits of the judgment, that he the defendant might appeal, the risk not being greater than the amount of the judgment debt which the plaintiff has insisted upon and received. That would seem reasonable. Why should it not be the case? It comports well with the interest of justice. If on the other hand the judgment debt has not been insisted upon and received, the whole matter would be open, and a cross-appeal to increase the claim of the plaintiff would be permissible.

Cross-appeal quashed.

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Craig, on the merits: My first contention is that the mortgagee not having gone into possession he cannot intervene as long as the property is not depreciated. In the next place going on the principle that there was no punitive damages the damages have been assessed at twice what they should be. The amount was based largely on the evidence of one Armstrong. I do not complain as to his honesty but he examined the property four years after the cutting and he only took one strip of the property in his examination and based all the balance on that, in fact he examined only 8 of the 80 acres. Further, he did not take into consideration that a fire swept the whole area five years before the cutting so that his estimate is very inaccurate and not based on a proper examination. As to liability, the owner has the right to cut timber as against the mortgagee; the question of depleting does not arise; the mortgage included other properties: see *King* v. *Smith* (1843), 2 Hare 239; *Simmins* v. *Shirley* (1877), 6 Ch. D. 173 at p. 175; *Humphreys* v. *Harrison* (1820), 1 J. & W. 581. As to onus, depreciation is not alleged in the pleadings so that *McLean* v. *Burton* (1876), 24 Gr. 134 and *Scott* v. *Vosburg* (1880), 8 Pr. 336, to which the respondent refers do not apply. The mortgagor can deal with the timber until the mortgagee can shew the security is insufficient: see *Usborne* v. *Usborne* (1740), 1 Dick. 75; *Hampton* v. *Hodges* (1803), 8 Ves. 105; *Hippesley* v. *Spencer* (1820), 5 Madd. 422; *Harper* v. *Aplin* (1886), 54 L.T. 383; Fisher on Mortgages, 10th Ed., p. 353, sec. 675. The renewals of the lease to cut are valid as long as the security is sufficient. A mortgagee not in possession cannot maintain an action for trespass: see *Harrison* v. *Blackburn* (1864), 17 C.B. (N.S.) 678 at p. 691; *Ryan* v. *Clark* (1849), 14 Q.B. 65 at p. 73. The persons sued are not those who did the cutting. The Galbraiths had nothing to do with the taking of the timber. Prendergast was a foreman in the woods but the cutting was actually done by Brymner.

Argument

Reid: The lease to cut ran out in 1918 and could not be revived without the consent of the mortgagee. In 1915, *lis pendens* was registered which was notice that foreclosure was started. When the question of renewal of the lease to cut timber came up Galbraith was expressly told that foreclosure proceed-

ings were under way: see Beddoes on the Law of Mortgage, 2nd Ed., p. 38; *McLean* v. *Burton* (1876), 24 Gr. 134; *Scott* v. *Vosburg* (1880), 8 Pr. 336; *Delaney* v. *Canadian Pacific R. W. Co.* (1891), 21 Ont. 11; *Mann et al.* v. *English et al.* (1876), 38 U.C.Q.B. 240. In contemplation of law the mortgagee is in possession and can bring action in trespass for timber taken, and if not in trespass we have a right of action in trover: see *M'Laren et al.* v. *Ryan* (1875), 36 U.C.Q.B. 307. This is wild land and payment of taxes is sufficient possession: see *Kirby* v. *Cowderoy* (1912), A.C. 599 at p. 603; *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Company* (1905), 2 K.B. 493; *Barnett* v. *Earl of Guildford* (1855), 11 Ex. 19. As to the right to hold the Galbraiths and Prendergast as well as the assignee of the lease see Addison's Law of Torts, 8th Ed., p. 585; *Stephens* v. *Elwall* (1815), 4 M. & S. 259 at p. 261. Anyone who takes advantage of the conversion is liable: see *In re Raybould. Raybould* v. *Turner* (1900), 1 Ch. 199; *Last Chance Mining Co.* v. *American Boy Mining Co.* (1904), 2 M.M.C. 150; *Adams Powell River Co.* v. *Canadian Puget Sound Co.* (1914), 19 B.C. 573; *Joseph Chew Lumber and Shingle Manufacturing Co.* v. *Howe Sound Timber Co.* (1913), 18 B.C. 312; *Clark* v. *Milligan* (1920), 28 B.C. 22; *Phillips* v. *Conger Lumber Co.* (1912), 5 D.L.R. 188; Salmond on Torts, 5th Ed., 206.

Argument

Craig, in reply, referred to Pollock on Torts, 12th Ed., 366.

Cur. adv. vult.

1st March, 1927.

MACDONALD, C.J.A.: I concur in the reasons for judgment handed down by my brother GALLIHER.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree with my brother GALLIHER.

MARTIN, J.A.

GALLIHER, J.A.: This is an appeal from the judgment of MACDONALD, J. The facts are fully set out in his reasons for judgment [*ante,* p. 36].

GALLIHER, J.A.

The action was one for trespass in cutting timber and judgment was given in favour of plaintiff for $4,908.52, being at the rate of $2 per M for all timber cut on the premises in ques-

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tion amounting to 2,454,262 feet as per log scale and mill cut in the records of the defendants' operations which was accepted by the learned trial judge.

Dealing with the rate of $2 per M which was objected to as excessive: If this was the ordinary case of valuing timber as between a prospective purchaser and a prospective vendor, under the circumstances which are shewn to have existed here, I would agree but, as it is an action for trespass, I feel that I would not be justified in interfering with the conclusions of the learned judge.

As to the right to cut timber. If the mortgagee cannot be deemed to be in possession until registration of the final order for foreclosure then the mortgagor was in possession up to 10th April, 1920, which appears to be the date as in the abstract of title and which counsel, as I understood them, agreed was the date.

The mortgage included a number of securities other than the one in question here and, as I understand the law to be, a mortgagor in possession can cut timber upon land during the existence of the mortgage unless it is shewn that the value of the security is thereby impaired or lessened. There is no allegation in the pleadings and no proof that such was the case. The onus I think rests upon the party seeking to establish this to plead and offer proof of it (in this case the mortgagee). See *Harper* v. *Aplin* (1886), 54 L.T. 383, and cases therein referred to. As against these authorities Mr. *Reid* cites the cases of *McLean* v. *Burton* (1876), 24 Gr. 134, and *Scott* v. *Vosburg* (1880), 8 Pr. 336.

GALLIHER, J.A.

McLean v. *Burton* was a suit to restrain the cutting of timber on mortgaged premises and the part of the judgment of Spragge, C., relied upon is to be found at p. 136 of the report. There, in dealing with the question of the mortgagor being restrained from cutting over the land, Spragge, C., used this language:

"I should say that he [the mortgagor] ought to be restrained unless he proved demonstrably, so as to leave no room for doubt, that the land still remained ample security to the mortgagee."

It does not appear from the report that the question of the security being impaired was raised by the plaintiff but it

being a suit for an injunction to restrain cutting, I think we may fairly assume that contention was raised and that the language of the learned Chancellor must be taken to apply to a case where the question of impairment has been raised by the mortgagee and in such a case the mortgagor must prove beyond doubt as against the case set up by the mortgagee that there would be no such impairment otherwise as I understand the authorities, it would seem not to be in accordance with the English authorities.

And in *Scott* v. *Vosburg, supra,* Proudfoot, V.C. at p. 338, makes this reference:

"It would appear from *McLean* v. *Burton* that the burden of shewing the sufficiency is cast upon the mortgagor."

I will deal only with the timber cut up to the 10th of April, the date of the foreclosure order, as I am of the opinion that in cutting and removing timber after that the defendants were trespassers.

The first question then to decide is—was the mortgagor in possession to that date? If he were, then he could give the defendants a licence to do what he could have done himself and such licence was given. It is true the mortgage was in default long before the timber was cut, and the mortgagee would have a right to enter and take possession but I find no act by which, in my opinion, he could be said to have taken possession. I hold that the mortgagor was in possession up to the time of the foreclosure order. But Mr. *Reid* argues that even if that be so, that in the case of a mortgagee taking possession, that possession relates back so as to enable him to recover for trespass committed before actual possession taken—that if the mortgagor in possession could sue for such trespass but does not, the mortgagee, after taking possession, can do so, citing *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Company* (1905), 2 K.B. 493. That case so decided but there is this difference that here the mortgagor could not have brought action in respect of such alleged trespass; in fact, as regards him, there was no trespass for the parties were there by his leave and licence. This I think distinguishes that case.

GALLIHER, J.A.

The view I take of the case then is, that the defendants were not trespassers up to the 10th of April, 1920, and that they are entitled to have the judgment below reduced accordingly.

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The sheets before us, which were accepted by the learned trial judge (and not demurred to by the parties) shewing the log scale and mill cut enable us to easily segregate the quantities cut and removed by April 10th:

March shews	474,879 feet
Up to April 10th.....	194,962
Total.....	669,841

This at $2 per M amounts to $1,339.68. The judgment pronounced was for $4,908.52. This I would reduce by the sum of $1,339.68, and the judgment below should be so amended. Costs follow the event.

GALLIHER, J.A.

Mr. *Craig* raised the question, as to whether the persons sued were the persons liable, but dealing with it shortly and viewing this whole transaction in the light of the evidence, I am of opinion that they are. I think they cannot be regarded in the same light as to the extent of their liability as would, for instance, workmen in the ordinary way, which I think they were not.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that Mr. Justice MACDONALD, the learned trial judge, arrived at the right conclusion and I am not able to agree that anything has been shewn that would entitle the judgment being disturbed and for substantially the same reasons as those given by the learned trial judge in his very careful judgment I would dismiss the appeal.

Appeal allowed in part, McPhillips, J.A. dissenting.

Solicitors for appellants: *Craig, Parkes & Tysoe.*
Solicitor for respondent: *J. P. Hampton Bole.*

LAIRD v. LAIRD.

MCDONALD, J.

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LAIRD v. LAIRD

Divorce—Petition by husband—Adultery of petitioner—Exercise of Court's discretion—Interests of all parties including children—Delay—R.S.B.C. 1924, Cap. 70, Sec. 16.

Where on a petition for divorce it is admitted by the petitioner that he has been guilty of adultery the Court will exercise its discretion in his favour in a case that comes clearly within the principles laid down in *Wilson* v. *Wilson* (1919), 89 L.J., P. 17.

PETITION by a husband for a divorce from his wife on the ground of her having committed adultery. Frederick Laird, the petitioner, was married to Bella Laird, the respondent, at Nanaimo on the 9th of June, 1906. They lived together at Nanaimo until October, 1910, when the alleged adultery by the wife took place and the husband left her, going to Vancouver with his two children. In 1914, the petitioner employed one Elizabeth M. Lack, as housekeeper for his two children and shortly after he began to live with her as man and wife and they continued to live together during which time they had five children. In April, 1926, he brought these proceedings mainly for the purpose of being in a position to marry Elizabeth Mary Lack and legitimatize the five children. Heard by McDONALD, J. at Vancouver on the 1st of February, 1927.

Statement

Marsden (*Hodgson,* with him), for petitioner: I rely on the case of *Wilson* v. *Wilson* (1919), 89 L.J., P. 17, where the facts are substantially the same as here and it was held that the circumstances warranted the exercise of judicial discretion in the petitioner's favour, the reasons for so holding being: (1) on account of the position and interests of his children; (2) the interests of the woman with whom he has misconducted himself; (3) that the holding of the decree is not likely to reconcile husband and wife; and (4) the interest of the husband himself —that he may remarry and lead a reputable life. This case was followed by Lord Birkenhead, L.C. in *Wilkinson* v. *Wilkinson and Seymour* (1921), 37 T.L.R. 835. The judge has unfettered discretion in such a case: see *Tickner* v. *Tickner* (1924),

Argument

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93 L.J., P. 39; *Wickins* v. *Wickins* (1918), 87 L.J., P. 155. The delay is not a bar to the action: see *Pointon* v. *Pointon and Sutton* (1922), 38 T.L.R. 848.

Sullivan, for respondent.

Judgment

MCDONALD, J.: I have considered the judgment of Sir Henry Duke in *Wilson* v. *Wilson* (1919), 89 L.J., P. 17; also that of Lord Birkenhead, L.C. in *Wilkinson* v. *Wilkinson* (1921), 37 T.L.R. 835, following *Wilson* v. *Wilson, supra,* and in view of these authorities I do not see how I can refuse to exercise my discretion in favour of the petitioner in this case, as all the points mentioned, as matters meriting consideration in the above cases, exist here.

Petition granted.

REX v. MCDONALD.

COURT OF APPEAL 1927 Feb. 1. REX v. MCDONALD

Criminal law—Sale of liquor to minor—Mens rea—R.S.B.C. 1924, Cap. 146, Secs. 40 and 75—B.C. Stats. 1924, Cap. 30, Sec. 12.

The accused, a waiter in a beer-parlour, in the course of his duties, served a minor with beer. On a charge for an infraction of section 40 of the Government Liquor Act his only defence was that he thought the boy was over age. The complaint was dismissed and an appeal to the County Court was dismissed.

Held, on appeal, reversing the decision of ROBERTSON, Co. J., that considering the object and scope of the statute although there is no express language to that effect, it was evidently the intention of the Legislature to deprive the accused of the application of the doctrine of *mens rea* and he must be found guilty of the charge laid.

Statement

APPEAL by the Crown from the decision of ROBERTSON, Co. J. of the 13th of December, 1926, dismissing an appeal from an order of P. J. Moran, police magistrate at the City of Prince George dismissing a complaint that the said John McDonald did on the 18th of September, 1926, supply liquor, to wit: beer to one Ray Graham, a person under the age of twenty-one years. The facts are that on the 18th of September,

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1926, the boy Ray Graham who was at the time seventeen years old entered the Dave McDonald Beer Parlour in Prince George with a companion at about seven o'clock in the evening and he and his companion were served with beer by the accused who was a waiter in the beer-parlour. The only defence was that accused thought the boy was over twenty-one years of age.

The appeal was argued at Victoria on the 1st of February, 1927, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

E. O. C. Martin, for the Crown: This was a clear infraction of section 40 of the Government Liquor Act. The penalty is provided for by section 71 as amended by section 12 of the 1924 Act. The magistrate and the learned judge below both excused the accused on the grounds of *mens rea* but on a proper application of the Act this is no excuse: see *Rex* v. *McKenzie* (1921), 29 B.C. 513; *Rex* v. *Mainfroid* (1926), 1 D.L.R. 1013.

Argument

No one appeared for accused.

MACDONALD, C.J.A.: The appeal must be allowed. The only question which has been argued before us, and the only question which we have to pass on is that of *mens rea.* The magistrate and the learned County Court judge appeared to have thought that it was necessary to prove a guilty mind; that is to say, it was necessary for the Crown to prove that the accused supplied liquor to the infant, knowing that he was not of the age specified in the Act which is 21 years. We had this matter of *mens rea* before us in *Rex* v. *McKenzie* (1921), 29 B.C. 513, where it was rather exhaustively dealt with, particularly in the reasons of my brother GALLIHER, with whom I concurred. I have nothing further to add to what was said there.

MACDONALD, C.J.A.

As to the penalty, I think the minimum fine ought to be imposed. It is a case in which the young man who supplied the liquor apparently did so under the mistaken belief that the boy was 21 years of age. While that does not protect him from the penalty, I think in the circumstances we ought not to impose a penalty greater than the minimum fixed by the statute. The penalty is $300, and in default the minimum imprisonment.

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GALLIHER, J.A.: I agree. I notice, just in passing, in the case of *Rex* v. *McKenzie* (1921), 29 B.C. 513, decided by this Court, I have gone pretty fully into the question, and cited the authorities *pro* and *con.*; and I see no reason in the circumstances here to take a different view from what I arrived at there.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same view. *Rex* v. *McKenzie* (1921), 29 B.C. 513 was a decision of the Full Court.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal allowed.

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SHUTTLEWORTH v. VANCOUVER GENERAL HOSPITAL

SHUTTLEWORTH v. VANCOUVER GENERAL HOSPITAL.

Nuisance—Hospital for infectious diseases—Plaintiff's residence across road from hospital—Danger of infection—Depreciation—Quia timet action—Alternative for damages—Onus.

In an action for an injunction restraining the establishment of a hospital for infectious diseases on the ground that it will constitute a nuisance the law requires proof of a well-founded apprehension of injury; proof of actual and real danger; a strong probability almost amounting to moral certainty that if the hospital be established it will be an actual nuisance, and the plaintiff cannot succeed on an alternative claim for damages, without proving a violation of a legal right.

Depreciation of the value of a property with a sentiment of danger will not of itself constitute a cause of action.

ACTION for an injunction restraining the defendant from establishing a hospital on the ground of nuisance or in the alternative for damages. The hospital is a reinforced concrete building extending through the middle of a block from street to street, one end facing on 13th Avenue in Vancouver, the plaintiff's residence being on the opposite side of 13th Avenue and 110 feet away. The hospital is used for treating infectious diseases other than small-pox, plague and venereal diseases. Tried by MURPHY, J. at Vancouver on the 31st of January, 1927.

Statement

Woodworth, for plaintiff.

McCrossan, and *Lord,* for defendant.

7th February, 1927.

MURPHY, J.: Defendants, who for many years have carried on the Vancouver Civic Hospital, a very large institution, have within the past year erected on block 418, which they own and which is the adjoining block to that on which the main hospital stands, an infectious diseases hospital. It is intended to treat therein all communicable diseases other than small-pox, plague and venereal diseases. This Hospital was opened in its entirety three or four days before the trial of this action though portions of it had been used for some time.

The building is a reinforced concrete structure. It is hereinafter referred to as the Isolation Hospital. It extends almost from street to street through the middle of the block. One end faces on 13th Avenue. Plaintiff's private dwelling also faces on 13th Avenue on the opposite side of the street and is directly across from the south end of the Isolation Hospital. The distance between the two from their nearest points is roughly 110 feet. From the upper storey windows of plaintiff's dwelling, it is possible to look into some of the Isolation Hospital rooms and see what is going on therein though the patients in their cots cannot be seen as the cots are placed by the windows and the lower portion of these are painted. Plaintiff alleges the Isolation Hospital to be a nuisance and asks for an injunction or, in the alternative, damages. The action is one of the class termed *quia timet* actions and is brought, not so much to obtain relief against wrongs already committed by which the plaintiff has suffered actual damage, as to protect him from damage which he has reason to fear will be the result of the operation of the Isolation Hospital. The requirements for success in this action are I think set out by Fitz Gibbon, L.J. in *Attorney-General* v. *Rathmines & Pembroke Joint Hospital Board* (1904), 1 I.R. 161 at pp. 171-2:

Judgment

"To sustain the injunction, the law requires proof by the plaintiff of a well-founded apprehension of injury—proof of actual and real danger—a strong probability, almost amounting to moral certainty, that if the Hospital be established, it will be an actionable nuisance. A sentiment of danger and dislike, however natural and justifiable—certainty that the Hospital will be disagreeable or inconvenient—proof that it will abridge a man's pleasure, or make him anxious—the inability of the Court to say

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that no danger will arise—none of these, even if accompanied by depreciation of property, will discharge the burden of proof which rests on the plaintiff, or will justify a precautionary injunction, restraining an owner's use of his own land upon the ground of apprehended nuisance to his neighbours."

It is true this passage deals with injunction only and not damages. But to obtain damages it is just as essential to prove a violation of a legal right as it is where an injunction is sought. Halsbury's Laws of England, Vol. 17, p. 208; Kerr on Injunctions, 4th Ed., 583. *Dreyfus* v. *Peruvian Guano Company* (1889), 43 Ch. D. 316 where at p. 342 Fry, L.J. says: "Where there has been no wrong done it appears to me that Lord Cairns' Act confers no power to give damages." It is also objected that the *Rathmines* case was one of public nuisance. But the report shews there was a relator and a perusal of the judgments will shew that the case was dealt with as one of private nuisance to the relator. Again, in *Fleet* v. *Metropolitan Asylum Board* (1886), 2 T.L.R. 361, Bowen, L.J. at p. 363 is reported as saying that he "found it impossible to doubt that the camp was extremely disagreeable to the plaintiffs, but things which merely abridged a man's pleasure or made him anxious were not actionable nuisances." The law, as thus laid down, is in no way affected by *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193. That case decides that where a hospital has been found by a jury to be a nuisance exemption from liability can only be claimed as a result of a mandatory and not a permissive statute.

Plaintiff bases his allegation that the Isolation Hospital will be a nuisance on three grounds. First he says the crying of child patients will make it such. As to this, it is sufficient to say that the proper time to seek redress will be when the fact is established. Conceivably the collection in one place near a private dwelling of a number of sick children, who simultaneously, at frequent intervals, engage in violent crying, which is heard by persons occupying such private dwelling, may constitute an actionable nuisance. But there is no proof here that this will occur. There may be no great number of sick children in the Isolation Hospital at any one time. If there are they may not make sufficient disturbance to occasion an actionable nuisance. They may be so distributed in this large substantial

building that plaintiff may not hear any crying, or, at any rate, crying sufficient to constitute an actionable nuisance.

The next ground put forward by plaintiff is based on the fact above stated that a person can, from the upper storey of plaintiff's house, see into some of the Isolation Hospital rooms. If I understand the matter aright, the contention based on this is, that inmates of plaintiff's house will have their sympathy for human suffering constantly aroused by this view to such a degree as to seriously interfere with their comfort and enjoyment of life. If it exists such susceptibility to sympathy for human suffering is doubtless admirable. People of coarser fibre might think that since, according to the experience of humanity up to the present, human disease and consequent suffering is inevitable, susceptibility to sympathy therefore would more likely be soothed than exacerbated by a view shewing that every effort was being made to alleviate such suffering. Gross minds might even suggest that the true foundation of such susceptibility was a sub-conscious desire to mulct the hospital authorities in damages or by the obtaining of an injunction to force them to buy property at a high price. But whatever be the proper deduction, the law, as above stated, is clear that proof of the existence of objection based on sentiment will not give plaintiff a cause of action.

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The point of substance in plaintiff's case is that there is danger of infection to members of his household from the existence or operation of the Isolation Hospital. The *Rathmines* case, *supra, Fleet* v. *Metropolitan Asylum Board* (1886), 2 T.L.R. 361; *Attorney-General* v. *Nottingham Corporation* (1904), 1 Ch. 673; *Attorney-General* v. *The Guildford, Godalming, and Woking Joint Hospital Board* (1895), 12 T.L.R. 54 and other cases shew that the onus is on plaintiff to prove a well-founded apprehension of injury, proof of actual and real danger. What plaintiff has in fact done is to call evidence to shew that members of his household and his neighbours entertain a real fear of such infection. I am quite prepared to believe they do. He has also sought to establish, mainly by cross-examination, that fear of infection from an Isolation Hospital, given the facts as to proximity proven herein, is widely held by people in general and even by members of the

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medical profession. No direct testimony that medical men do entertain such fear was led by him. Again I am prepared to accept the contention that such fear under the given conditions would be widely entertained by laymen. In the absence of direct testimony, I cannot impute belief of the likelihood of infection to members of the plaintiff's household to any qualified physician. But the cases cited shew plaintiff must go further and prove not only wide-spread belief but that such belief must be well-founded in fact. He has failed to adduce such proof. He has indeed suggested what is called the aerial convection theory, *i.e.*, that infection may be air-borne. The cases cited, however, shew that he must not only shew that infection may be air-borne but that it will be thus carried over a distance at least as great as the space intervening between his dwelling and the Isolation Hospital. In all the similar cases that I have read, evidence was adduced to fulfil this essential requirement. In the cases hereinbefore cited, plaintiffs failed because it was held the evidence did not in fact satisfy the Court that infection could be carried over the intervening distance. It is true that such distance varied, being greater in some cases and less in others, and in every one of them greater than the intervening distance in the case at Bar. But, as put by Fitz Gibbon, L.J. in the *Rathmines* case at p. 176, "the range, not the fact, of aerial convection is at issue." On the other hand, whilst the cases shew that defendants are not called upon to prove a negative the evidence here shews that given proper care in operation, there is no danger to members of plaintiff's household of infection from the Isolation Hospital. As to proper care "the defendants are entitled to ask the Court to assume that the hospital will be properly managed and that all that scientific skill and knowledge usually require will be taken." Farwell, J. in *Attorney-General* v. *Nottingham Corporation* (1904), 1 Ch. 673. Inasmuch as plaintiff adduced no direct testimony on the crucial point of range of infection over a distance of roughly 110 feet, it is not incumbent on me to deal at length with the testimony for the defence. However, in support of my statement that the evidence shews that no danger exists (a statement not necessary to dispose of the action since the onus of proving that danger does exist rests upon plaintiff but introduced for

what it is worth to allay the fears entertained by members of plaintiff's family and his neighbours) I may state that it was proven that the Isolation Hospital is the last word in modern scientific construction of hospitals for communicable diseases. Its plans and equipment are such as to exclude the possibility of infection even to inmates of the building to the greatest extent known to up-to-date medical science. The technique to be observed by nurses, doctors and all others who enter the building is of the same character. Modern science is agreed that the communicable diseases to be treated in the Isolation Hospital have their origin in small vegetable growths which, if they gain entrance into the human body, generate poisons therein, which cause such specific diseases as measles, scarlet fever, etc. These small vegetable growths exist in the secretions and excretions of patients. Danger arises from being brought in contact with these growths as such contact may result in them gaining entrance into the body of a healthy person. Modern experience has proven that given proper technique patients suffering from different communicable diseases may be kept in the same room with an intervening space of not over 30 feet without danger of cross-infection. From a building, such as the Isolation Hospital, if conducted with due care, there would seem to be no danger to any person who does not enter it. Evidence was led by plaintiff to shew that, in the opinion of real estate men, the value of plaintiff's property has been depreciated by the erection of the Isolation Hospital. But if depreciation has taken place the only reason given before me is the existence of the fear of infection. It being my view that this does not *per se* constitute a ground for an action such as this, it follows that such depreciation—assuming it proven—has not been occasioned by any legal wrong. The mere fact of depreciation cannot found an action. The act complained of must be both tortious and hurtful. Pearce & Meston on Nuisances, p. 13. Fitz Gibbon, L.J. in the passage cited *supra* expressly states that depreciation of property accompanying a sentiment of danger will not without more give a cause of action.

Judgment

The case is dismissed with costs.

Action dismissed.

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REX v. McLANE.
REX v. NOON.

Criminal law—Intoxicating liquor—Conviction—Quashed on appeal with costs against the Crown—Appeal as to costs—R.S.B.C. 1924, Caps. 62, 146 and 245.

REX v. McLANE

REX v. NOON

Where a conviction for an offence against the Government Liquor Act is quashed on appeal taken under the Summary Convictions Act, the Crown Costs Act is a bar to the awarding of costs against the Crown.

APPEAL by the Crown from the decision of ROBERTSON, Co. J., of the 13th of October, 1926. The accused were convicted by the police magistrate at Prince George on the 28th of October, 1926, for selling liquor contrary to section 28 of the Government Liquor Act and fined $300, and costs. On appeal to the County Court the conviction was set aside and the Crown was ordered to pay the costs of the appeal fixed at $50. The Crown appealed from that part of the judgment ordering that the costs of the appeal be paid by the Crown on the grounds: (1) That the informant in laying the information was acting for the Crown as an officer of the Crown and no Court or judge has power to adjudge costs against the Crown or any officer of or acting for the Crown; (2) that the learned judge erred in holding that the Crown Costs Act did not apply; (3) that there was error in holding that section 82 of the Summary Convictions Act authorized him to make an order for costs of the appeal against the Crown or a Crown officer acting for the Crown.

Statement

The appeal was argued at Victoria on the 1st of February, 1927, before MACDONALD, C.J.A., GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Carter, D.A.-G., for the Crown: Costs were given against the Crown and the appeal is on the question of costs only. The Crown Costs Act applies and there is no power in the Court to impose costs on the Crown: see *Rex* v. *Caskie* (1922), 31 B.C. 368; *In re Estate of Sir William Van Horne, Deceased* (1919), 27 B.C. 372; *Watson* v. *Howard* (1924), 34 B.C. 449. The learned County Court judge followed sections 78 and 80 of the

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Summary Convictions Act, but they do not override the Crown Costs Act: see *Rex* v. *Volpatti* (1919), 1 W.W.R. 358; *Rex* v. *Liden* (1922), 31 B.C. 126. The Act must expressly say so before it takes the case out of the Crown Costs Act.

No one for accused.

Cur. adv. vult.

7th February, 1927.

MACDONALD, C.J.A.: I agree with reasons of GALLIHER, J.A.

GALLIHER, J.A.: On September 22nd, 1926, the respondent McLane, was convicted before P. J. Moran, police magistrate at Prince George, for an offence against the Government Liquor Act.

The respondent appealed to the County Court judge, who quashed the conviction and awarded costs against the Crown—$50. The Crown appeals against that part of the order awarding costs.

The point is—does the Crown Costs Act apply?

The Crown Costs Act, R.S.B.C. 1924, Cap. 62, Sec. 2, is as follows:

"No Court or judge shall have power to adjudge, order, or direct that the Crown, or any officer, servant, or agent of and acting for the Crown, shall pay or receive any costs in any cause, matter, or proceeding except under the provisions of a statute which expressly authorizes the Court or judge to pronounce a judgment or to make an order or direction as to costs in favour of or against the Crown."

GALLIHER, J.A.

This Act was first passed in 1910, and amended in 1911 to read as above set out. There is nothing in the special Act under which the offence was committed that affects the matter. The procedure was under the Summary Convictions Act, R.S.B.C. 1924, Cap. 245.

In *Watson* v. *Howard* (1924), 34 B.C. 449, the matter came before this Court under the Fire Marshal Act, B.C. Stats. 1921 (Second Session), Cap. 15, where costs were awarded under section 21 of that Act. We held that the word "expressly" in the Crown Costs Act was satisfied if it could be said that the Crown by necessary intendment was included; and it was there held that the Crown Costs Act was not a bar to awarding costs. This statute was subsequent to the Crown Costs Act. My brother MARTIN in his judgment pointed out that under this

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section (21) of the Act the Crown is the respondent in every appeal, thus distinguishing it from *Rex* v. *Volpatti* (1919), 1 W.W.R. 358, and that therefore the awarding of costs must necessarily include the Crown.

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Here the question has to be determined under the provisions of the Summary Convictions Act. This was dealt with by Clement, J. in *Rex* v. *Volpatti, supra,* in these words:

"The Summary Convictions Act (B.C. Stats. 1915, Cap. 59, Sec. 80) provides that upon any appeal the Court to which the appeal is made 'may make such order as to costs to be paid by either party as it thinks fit.' And the question is simply this, does this provision bring the case within the exception specified in the Crown Costs Act as above quoted? Were the Crown one of the parties to every appeal under the Summary Convictions Act, that fact would afford an argument, that the word 'party' in section 80 inferentially constituted an express inclusion of the Crown. But there are many cases in which the Crown is no party to proceedings under the Summary Convictions Act and no party to an appeal thereunder. Under these circumstances I must upon well-recognized principles as well as upon the language of section 2 of the Crown Costs Act hold that section 80 of the Summary Convictions Act does not 'expressly authorize the Court or judge to make an order as to costs in favour of or against the Crown,' the Crown not being either expressly or by necessary intendment mentioned in said section 80."

GALLIHER, J.A.

In *Rex* v. *Liden* (1922), 31 B.C. 126, a case under the B.C. Prohibition Act, the matter came up for consideration by this Court, MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A. The Chief Justice, with whom I agreed, refused costs by reason of the interference of the magistrate with the course of the trial (not deciding as to the applicability of the Crown Costs Act). MARTIN and MCPHILLIPS, JJ.A. held that the Crown Costs Act applied and refused costs.

The Prohibition Act contains no provisions affecting this question. So that the *Liden* case and the case at Bar are on all fours as to the determination of the point in question and the decision in the *Volpatti* case, *supra,* was upon section 80 of the Summary Convictions Act, B.C. Stats. 1915, Cap. 59, which is in the precise words of section 82 of our present Summary Convictions Act.

We have then to consider whether the decisions of my brothers MARTIN and MCPHILLIPS in the *Liden* case and Clement, J. in the *Volpatti* case, wherein it was held that the Crown Costs Act was a bar to recovery of costs, are well founded.

My own view is that these cases were rightly decided, and I find support for this in the case of *Attorney-General* v. *Allgood,* decided by Sir Thomas Parker, Lord Chief Baron of the Court of Exchequer in 1743, and reported in 145 E.R. 696, to which the Chief Justice has drawn my attention. There, the effect of clauses 4 and 5, of IV. Anne, Cap. 16 was considered and determined in favour of the Crown's contention that the Crown not being mentioned the Act did not apply to it. These clauses are quite as embracing in their phraseology as our section 82 of the Summary Convictions Act.

The appeal should be allowed.

GALLIHER, J.A.

The same result follows in the case of *Rex* v. *Noon,* where the question to be decided was exactly similar.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in allowing the appeals.

MACDONALD, J.A.

MACDONALD, J.A.: I agree with the view expressed by Clement J., in *Rex* v. *Volpatti* (1919), 1 W.W.R. 358. In so doing I do not apply a restricted interpretation to the word "expressly" as used in section 2 of the Crown Costs Act (Cap. 62, R.S.B.C. 1924). It may be construed as meaning whatever is "necessarily or even naturally implied" from the language employed, as pointed out by Mr. Justice Willes in *Chorlton* v. *Lings* (1868), L.R. 4 C.P. 374, 387, and referred to by my brother MARTIN in *Watson* v. *Howard* (1924), 34 B.C. 449 at p. 453.

But this natural implication does not follow from the words used in section 79 (1) and section 82 of the Summary Convictions Act (Cap. 245, R.S.B.C. 1924), dealing merely with procedure in appeal in a variety of cases under the Act, in many of which the Crown is not a party to the proceedings. The Legislature in the Summary Convictions Act did not "plainly," "clearly" or "expressly" enact that section 2 of the Crown Costs Act should be superseded to the extent permitted by the exception to that clause.

I would allow the appeal.

The same result follows in *Rex* v. *Noon.*

Appeals allowed.

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

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BELL v. WOOD AND ANDERSON.

Practice—Trial—Application for jury—Sufficiency of affidavit in support—Right to supplementary or counter affidavits—Orders as to procedure—Power to make—Marginal rule 430.

BELL v. WOOD AND ANDERSON

An application under Order XXXVI., r. 6 ought to be supported by an affidavit which should either verify the claim or state the cause of action in clear and positive terms so that the judge can have no doubt as to the plaintiff's right to the order. No counter affidavit ought to be allowed nor supplementary affidavits, except to supply immaterial omissions or to correct clerical errors. If the plaintiff makes out that his cause of action comes within the terms of the rule the judge has no discretion to refuse the order.

The Court has a discretion to make any order about a matter of procedure which it considers the circumstances require, when the rules are silent on the subject and especially when it tends to prevent misuse of the process.

Statement

APPLICATION for an order for a trial by jury. The facts are set out in the reasons for judgment. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 4th of February, 1927.

Wismer, for plaintiff.
Housser, for defendants.

9th February, 1927.

Judgment

HUNTER, C.J.B.C.: In this matter written arguments have been put in for which I am indebted to the learned counsel engaged. It is a Chamber application for an order for trial with a jury. I gather from the material on file that the plaintiff, while on board an automobile, was injured in a collision with another automobile driven at the time by Anderson but owned by Wood, Wood himself not being present. Wood is defending the action but Anderson is not.

It is alleged in the claim that Anderson was intoxicated and that he was permitted to use the auto by Wood who knew he was in that condition. An affidavit in support of the application was filed by the plaintiff, the material averment of which is as follows:

"2. That this action is brought by me for damages for injuries caused

to me when an automobile in which I was riding was struck by an automobile the property of the defendant Wood while the said automobile was being driven by the defendant Anderson with the consent of the defendant Wood."

It was objected that this affidavit does not shew any cause of action as there is no allegation of negligence and, on an adjournment being allowed to file a fresh affidavit (the question being reserved, as to whether it ought to be taken into consideration) a second affidavit is filed which states that Wood allowed Anderson to use the auto knowing he was under the influence of liquor.

It is now urged on the one hand that no affidavit is necessary but that the Court should act on the pleading alone and, on the other hand, that an affidavit is properly required and should not be allowed to be bolstered up by subsequent affidavits.

I think that any application for a jury ought to be supported by an affidavit which should either verify the claim or state the cause of action in explicit terms. A defendant is not now liable to be dragged at the whim of the plaintiff through a kind of trial which is not only more costly but in many cases abortive and unsatisfactory. The plaintiff has, in all cases, to obtain an order for trial with a jury and of course must shew the judge that he is entitled to it and the ordinary way of supporting a contentious application is by affidavit. It is obvious that merely alleging a common law cause of action in the statement of claim does not protect the defendant against an unauthorized process and any subsequent direction that the solicitor should pay the extra costs might be an illusory remedy.

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It was argued that because there is nothing in the rules requiring the affidavit that there is no jurisdiction to require it. That is to say, the Court is controlled by the process and has no power to control it but I apprehend that the Court has a discretion to make any order about a matter of procedure, which it considers the circumstances require, when the rules are silent on the subject and especially when it tends to prevent misuse of the process. The rules are made to promote justice and not to impede it or to render the Court powerless to prevent injustice and it would of course be impossible for any set of rules, however elaborate, to cover every conceivable case.

The question remains, whether the second affidavit ought to

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be acted on. No doubt the evidence of all parties may, in proper cases, be considered, as to whether or not a jury ought to be allowed. As, for instance, in *Jenkins* v. *Bushby* (1891), 1 Ch. 484. In that case the decision, as to whether or not a jury ought to be allowed, was in the discretion of the Court under rule 7 but that is not this case. This is an application under rule 6 and if the plaintiff makes out that his cause of action comes within the terms of this rule the judge has no discretion to refuse the order and his opinion, as to whether or not, the case could better be tried without a jury, is irrelevant. But I think in case of an application under rule 6, the affidavit leading to the order, being of a jurisdictional nature, ought either by way of verifying the statement of claim, or by itself to state the cause of action in clear and positive terms so that the judge can have no doubt as to the plaintiff's right to the order and that no counter-affidavit ought to be allowed, nor should supplementary affidavits be allowed except perhaps to supply immaterial omissions or to correct clerical errors, but the plaintiff should not be allowed to file a second affidavit on the main issue as otherwise, if counter-affidavits and supplementary affidavits were to be allowed, there might have to be cross-examinations and so a trial within a trial, which there ought not to be on the dry legal question, as to whether the cause of action sworn to is or is not within the scope of rule 6. As, however, the practice appears to be unsettled and no reported decision either way has been cited, I do not think that the plaintiff in this case ought to be penalized to the extent of refusing him his order, but I think, under the circumstances, that I ought to allow the application. Costs in the cause except that the extra costs occasioned by the adjournment and the second affidavit will be the defendant's in any event.

Judgment

I may add, in case I may be thought to have overlooked it, that the point, that in any event no cause of action is shewn as against Wood, cannot be decided on this application. That is for the trial judge.

Application granted.

REX v. JUNGO LEE.

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REX v. JUNGO LEE

Criminal law—Charge under The Opium and Narcotic Drug Act—Conviction in another Province—Deportation—Habeas corpus—Necessity of application in Province of conviction—Jurisdiction of Court of Appeal—Can. Stats. 1923, Cap. 22.

Where an accused has been convicted in another Province for an infraction of The Opium and Narcotic Drug Act, 1923, an application for *habeas corpus* ought not to be entertained unless some good reason is shewn why the application could not have been made in that Province, as, for instance, where the applicant was not allowed sufficient time to do so.

APPLICATION for a writ of *habeas corpus* arising out of a conviction in the Province of Ontario for an offence against The Opium and Narcotic Drug Act, 1923. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 11th of February, 1927. Statement

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

HUNTER, C.J.B.C.: This is a second *habeas corpus* application arising out of a conviction in Ontario for an offence against The Opium and Narcotic Drug Act, 1923, involving statutory deportation. The conviction took place in November, 1924. The sentence was served and the defendant, who was engaged in business, was allowed several months to wind up his affairs after the warrant for deportation was issued and before the deportation began.

The first application was based on the ground of a defect in the deputy minister's warrant which omitted the year date in the recital of the Act. A second warrant supplying the omission was also returned and in the result the accused was held to be lawfully detained. He took an appeal to the Court of Appeal which affirmed the detention and then an appeal to the Supreme Court of Canada. That Court decided that it had no jurisdiction as the *habeas corpus* proceedings arose out of a criminal charge. It necessarily follows from this decision that the Court Judgment

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of Appeal had no jurisdiction to entertain the appeal and therefore the position is the same as if no appeal had been brought and the right to make a second application is established by the controlling authority of *Cox* v. *Hakes* (1890), 15 App. Cas. 506. This application is based on the same ground as well as on other grounds, all being of a technical character and relating to the procedure subsequent to the conviction.

The points of substance have been decided against the applicant in Ontario in spite of an application to the Court there and an appeal to the minister of justice, *i.e.*, that he was guilty as charged and that he is an alien but no application was made to the Ontario Court questioning the validity of the deputy minister's warrant or the other alleged irregularities in procedure and it is only on his arrival here that he has invoked the judicial power.

If this be a legitimate practice there is no reason why the deportee could not apply to the Courts of the different Provinces all along the route, in that way making dilatory progress to his destination in the hope that some judge, overwhelmed by the fundamental injustice of a law which bars all rights of appeal, might find some technical flaw in the proceedings to which he could give effect.

Judgment

As this is not the first case of the kind and as it is anomalous that the Courts of one Province should review the proceedings had in another, I have thought it advisable to consult the three other judges available and we are all clearly of opinion that no application ought to be entertained in the case of a conviction taking place in another Province unless some good reason is shewn why the application could not have been made in that Province, as for instance, that the applicant was not allowed sufficient time to do so.

The fact that the Act cuts off all rights of appeal from the decision of a magistrate, which involves imprisonment and deportation, is not in itself a good reason why this Court should assume a function which primarily belongs to the Courts of the other Province.

The application is dismissed.

Application dismissed.

PACIFIC COAST FREIGHTERS LIMITED v. WESTCHESTER FIRE INSURANCE COMPANY OF NEW YORK. AND PACIFIC COAST FREIGHTERS LIMITED v. THE WESTERN ASSURANCE COMPANY.

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March 1.

PACIFIC COAST COAL FREIGHTERS LTD. v. WESTCHESTER FIRE INS. CO. OF NEW YORK

THE SAME v. WESTERN ASSURANCE CO.

Insurance, marine—Insurance by owner—Chartered at time of loss—Actual total loss—Presumption—Allegation of unseaworthiness due to overloading—Rights of insurer.

Where a ship is chartered to a third party and there is nothing in the evidence that indicates the owner had any knowledge of alleged overloading or was in any way privy to it, or connived at it, he is entitled to recover insurance on the loss of the ship notwithstanding the overloading of the ship by another when not under his supervision.

APPEAL by defendants from the decision of MACDONALD, J. of the 13th of October, 1926 (reported *ante,* p. 20) on two actions to recover from each of the defendants $2,500 on marine-insurance policies (time) on the gas-boat or schooner "Haysport No. 2." The schooner was valued at $12,000 and the limit of insurance was from the 22nd of January, 1925, to the 22nd of February, 1925, there being a clause providing for a continuance of the insurance if required. The plaintiff, the owner, had demised the schooner to one Olsen as charterer. He took the vessel to Nanoose Bay when the cargo was completed (consisting principally of dynamite) and left there on the 20th of January, 1925, *en route* to Skagway. The boat was to go by the inside route. She reached Bella Bella and after remaining there for two days, she left for Skagway about the end of January. The boat was never heard of again, the only evidence of loss being that some of its deck cargo was found in Milbank Sound a short distance outside of Bella Bella. Before the 22nd of February, 1925, the plaintiff gave the Companies' agents notice of the vessel being reported lost and advised them that if it was not lost he desired to continue the insurance. The main defence was unseaworthiness due to overloading. The plaintiff recovered judgment in both actions.

Statement

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The appeal was argued at Victoria on the 21st and 24th of January, 1927, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

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THE SAME v. WESTERN ASSURANCE CO.

Argument

Mayers, for appellants: It was held below that unseaworthiness was irrelevant unless it occurred through the wilful default of the assure. We submit (1) There is no warranty of seaworthiness in a time policy. This is a time policy and when the ship has gone to sea unseaworthy through the assure's wilful default, on any loss attributable to unseaworthiness, it cannot recover. (2) Irrespective of wilful default the assure can only recover for a loss by perils of the sea and a loss due to unseaworthiness is not a loss by perils of the sea, so that (3) where the unseaworthiness is due to the wilful default of the charterer resulting in the loss of the vessel, the owner cannot recover on the policy. (4) There was wrongful rejection of evidence, and until the plaintiff has proved a loss by perils of the sea he cannot recover. On the first point see *Fawcus* v. *Sarsfield* (1856), 6 El. & Bl. 192; *Ballantyne* v. *Mackinnon* (1896), 2 Q.B. 455; *E. D. Sassoon & Co.* v. *Western Assurance Company* (1912), A.C. 561 at p. 563; *Grant, Smith and Company and McDonnell, Ld.* v. *Seattle Construction and Dry Dock Company* (1920), A.C. 162 at p. 171; *P. Samuel & Co.* v. *Dumas* (1924), A.C. 431 at pp. 446, 455 and 459; *Munro, Brice & Co.* v. *Marten* (1920), 3 K.B. 94. That the burden of proof shifts in this case to the assure see Arnould on Marine Insurance, 10th Ed., Vol. II., p. 934, sec. 725. The evidence shews clearly that the vessel was overloaded when she left Bella Bella. As to the Marine Insurance Act (Imperial) being applicable, my submission is that the Act must be proved: see *Smith* v. *Gould* (1842), 4 Moore, P.C. 21 at p. 26; *The Queen* v. *Brenan and Gallan* (1847), 16 L.J., Q.B. 289 at p. 290; *Brailey* v. *Rhodesia Consolidated, Limited* (1910), 2 Ch. 95 at p. 102. As to loss attributable to unseaworthiness see *Thompson* v. *Hopper* (1858), El. Bl. & El. 1038 at p. 1054; *Thomas* v. *Tyne and Wear Steamship Freight Insurance Association* (1917), 1 K.B. 938 at p. 939. Here the charterer deliberately overloads and the charterer's default is the owner's wilful default. It is a charter by demise and both owner and charterer

are interested. A charterer by demise is for the time being owner: see *Reynolds* v. *Toppan* (1819), 15 Mass. 370; *The Sylvan Arrow* (1923), P. 220 at p. 226. We discovered further evidence before the close of the trial as to the condition of the vessel when *en route* and on application the admission of this evidence was refused: see *Baden-Powell* v. *Wilson* (1894), W.N. 146; *Hargreaves* v. *Hilliam* (1894), 58 J.P. 655.

A. Alexander, for respondent: The Evidence Act provides for taking judicial notice of English statutes. When an English Act is brought to the attention of the Court, it can be read: see *United States of America* v. *McRae* (1867), 3 Chy. App. 79; 37 L.J., Ch. 129; Halsbury's Laws of England, Vol. 13, p. 488. Our Marine Insurance Act of 1906 is the same as the English common law. In a case where a vessel disappears and it cannot be shewn when the loss occurred the insurer has the burden on him as it is presumed to be a loss by perils of the sea: see *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Company* (1901), A.C. 362 at p. 371. Where a vessel is missing, after a lapse of time she is presumed to have been lost by a peril of the sea. This has been the law for 100 years: see Halsbury's Laws of England, Vol. 17, p. 436; *Green* v. *Brown* (1743), 2 Str. 1199. *Prima facie* this is a loss by perils of the sea and circumstances must be shewn to rebut the presumption. It must be shewn (a) that the vessel was unseaworthy; (b) that the loss was due to the unseaworthiness; and (c) that the owner knew and deliberately sent her to sea in an unseaworthy condition. The cases cited by appellant are all where there was knowledge of how the loss occurred. The unseaworthiness must be shewn to be the cause of the loss: see *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284 at p. 297. The stores and cargo were 64 tons and she had travelled safely from Nanoose Bay to Bella Bella being about one-third of the trip: see *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Company* (1898), 2 Q.B. 114. There is evidence to shew she was seaworthy. Her carrying capacity was 80 tons. None of their witnesses were experts on seaworthiness: see *Compania Maritima of Barcelona* v. *Wishart* (1918), 34 T.L.R. 251.

Argument

Mayers, in reply, referred to *The M. Thomas and Son Shipping Company (Limited)* v. *The London and Provincial Marine*

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1927

March 1.

PACIFIC COAST COAL FREIGHTERS LTD. v. WESTCHESTER FIRE INS. CO. OF NEW YORK

THE SAME v. WESTERN ASSURANCE CO.

and General Insurance Company (Limited) (1914), 30 T.L.R. 595.

Cur. adv. vult.

1st March, 1927.

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

MARTIN, J.A.: The root question in this appeal is that of the alleged unseaworthiness of the gas-boat Haysport No. 2, formerly a fishing schooner, and so I have addressed myself to it with care, and after a close examination of all the evidence upon the point I can only reach the conclusion that she must be held upon that evidence to be seaworthy, and in my opinion it follows from that conclusion, in the circumstances of this case, that the appeal must fail.

GALLIHER, J.A.: The facts of this case are sufficiently set out in the reasons for judgment of the learned trial judge.

The plaintiff sets up loss by perils of the sea and the defendants resist payment of the policy on the ground of unseaworthiness by reason of overloading. Evidence was given *pro* and *con.* as to unseaworthiness but the learned trial judge made no finding on this, holding that if the assured was in no way privy to the overloading and in no way connived at it then they were entitled to recover. The appellants strongly urge that they are entitled to have the case sent back to the learned trial judge for his finding as to unseaworthiness. If the owner himself had undertaken the voyage without the intervention of a third party (the charterer), in such case the authorities are that if the trial judge is in doubt as to what is the real cause of the loss, the plaintiff must fail, and, of course, here, not having made any finding, we have no means of knowing his state of mind and a reference back might be necessary: see *La Compania Martiartu* v. *Royal Exchange Assurance* (1923), 1 K.B. 650, Scrutton, L.J. at p. 657. But where, as here, the ship is chartered to a third party and there is nothing in the evidence that indicates the assured had any knowledge of the alleged overloading or was in any way privy to it, or connived at it, he cannot, in my opinion, as I read the authorities, fail to recover, because some one else is a wrongdoer (if he is) in connection with the loading

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of the ship not under his supervision. I am in agreement with the disposition of this question made by the learned trial judge. I think the plaintiff has satisfied the onus cast upon it in the first instance to raise the *prima facie* case of presumption of loss by perils of the sea. See *Green* v. *Brown* (1743), 2 Str. 1199, referred to and followed in *Munro, Brice & Co.* v. *War Risks Association, Lim.* (1918), 88 L.J., K.B. 509, and *La Compania Martiartu* v. *Royal Exchange, supra,* and if the defendants cannot rely on the defence of unseaworthiness raised, proof of which would be upon them, the plaintiff is entitled to succeed. As I am of the opinion that they cannot, in the circumstances of this case, the appeal should be dismissed. I think the case of the *Sylvan Arrow* (1923), P. 220, which was an action *in rem* for collision damages, is distinguishable.

Appeal dismissed.

Solicitors for appellants: *Mayers, Lane & Thomson.*
Solicitors for respondent: *Tiffin & Alexander.*

IN RE MEDAINI ESTATE.

Administration—Intestacy—Wife murdered by husband—Right of husband to share in wife's estate—Public policy—Forfeiture.

On the ground of public policy a murderer can take nothing under the will of his victim and this principle applies in the case of an intestacy.

APPLICATION by the administrator *de bonis non* of the estate of Mary P. Medaini for directions as to whether in the case of an intestacy a murderer is entitled to share in the distribution of the estate of the murdered person. Heard by MURPHY, J. in Chambers at New Westminster on the 26th of March, 1927. Mary P. Medaini was murdered at Napa, California, by her husband, Fortunato Medaini, who was found guilty of the crime by the Superior Court of California. The

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IN RE MEDAINI ESTATE

deceased died intestate, there being three children and her husband surviving. She left a small estate in British Columbia.

G. A. King, for the Administrator: "Public policy" has declared that where a will exists under which the murderer benefits, he shall be excluded. This principle applies in a case of intestacy. [He referred to *In the Estate of Crippen* (1911), P. 108 at p. 112; *Lundy* v. *Lundy* (1895), 24 S.C.R. 650 at pp. 652-3; Halsbury's Laws of England, Vol. 28, p. 539, sec. 1068; *Cleaver* v. *Mutual Reserve Fund Life Association* (1892), 1 Q.B. 147; *Re Carpenter's Estate* (1895), 170 Pa. 203; 32 Atl. 637; *Re Johnson's Estate* (1905), 29 Pa. Super. Ct. 255; *In re Houghton* (1915), 2 Ch. 173; *The Amicable Society* v. *Bolland* (1830), 4 Bligh (N.S.) 194; *Davies* v. *Davies* (1887), 36 Ch. D. 359; Law Quarterly Review, Vol. 32, p. 12; Harvard Law Review, Vol. 27, p. 280 and Vol. 28, p. 426; Ames Lectures on Legal History, p. 310; *Wall* v. *Pfanschmidt* (1914), 106 N.E. 785; *McAllister* v. *Fair* (1906), 72 Kan. 533; 84 Pac. 112; *Hill* v. *Noland* (1912), 149 S.W. 288; *In re Noble Estate* (1927), 1 W.W.R. 938].

Argument

H. O. Alexander, for the heirs.

5th April, 1927.

MURPHY, J.: The English Courts have decided that a murderer can take nothing under the will of his victim. The decisions are based upon public policy. I can see no reason why the principle is not applicable to cases of intestacy. The reason assigned in some American decisions for refusing to deprive a murderer of benefits accruing to him under the intestacy of his victim, is that to do so would be to contravene the express provisions of the Statutes of Distribution. This reason would be equally valid in the case of a will which also depends upon a statute for its validity. The Wills Act declares that the will speaks from the death of the testator. The English decisions binding on me have overridden this provision in the case of a murderer. There is nothing which makes the Statutes of Distribution more sacrosanct than the Wills Act. If public policy is a good ground for overriding the latter, it is equally so for acting likewise in regard to the former. I, therefore, hold the murderer takes nothing under the intestacy.

Judgment

Order accordingly.

REX v. SOO GONG.

MCDONALD, J. (In Chambers)

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Feb. 11.

REX v. SOO GONG

Criminal law—Charge of being in possession of drugs—Conviction—Deportation—Habeas corpus—Warrant of commitment—Conviction for an offence contrary to a certain Act and amending Act—Amending Act not in force when offence was committed—Can. Stats. 1923, Cap. 22, Sec. 4(d); 1925, Cap. 20, Sec. 3.

On an application for a writ of *habeas corpus* the keeper of the gaol made a return to the effect that the prisoner was held under a warrant of commitment made by the magistrate for Vancouver which recited that "accused had in his possession drugs, ... contrary to the provisions of section 4(*d*) of The Opium and Narcotic Drug Act, 1923, as amended by section 3 of chapter 20 of the Statutes of Canada, 1925," also an order of the minister of justice "to detain and deliver the said Soo Gong to the officer authorized by warrant of the deputy minister of immigration to receive the said Soo Gong with a view to his deportation under the provisions of the said Acts." The offence was committed on the 31st of January, 1925, and the above amending Act was not in force at the time the offence was committed.

Held, that the conviction was made under the Act of 1925 and as it was not in force at the time the offence was committed the conviction is bad, and as the deportation order is based upon a bad conviction it is ineffectual.

APPLICATION for a writ of *habeas corpus*. The facts are set out in the reasons for judgment. Heard by MCDONALD, J. in Chambers at Vancouver on the 11th of February, 1927. Statement

Mellish, for the defendant.
Brydon-Jack, for the Crown.

MCDONALD, J.: This is an application for a writ of *habeas corpus*. The prisoner was convicted on 30th June, 1926, of an offence alleged to have been committed on 31st January, 1925, and was sentenced to six months' imprisonment and to a fine of $200, and in default of payment of the fine to a further period of three months. His term of imprisonment has nearly expired. The keeper of the common gaol makes a return to the effect that the prisoner is held under a warrant of commitment made by the police magistrate of the City of Vancouver on 30th June, 1926,— Judgment

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"for that he, the said Soo Gong at the said City of Vancouver on the 31st day of January, A.D. 1925, did unlawfully have in his possession drugs, to wit: cocaine and morphine without the authority of a licence from the minister first had and obtained, or without other lawful authority, contrary to the provisions of section 4(*d*) of The Opium and Narcotic Drug Act, 1923, as amended by section 3 of chapter 20 of the Statutes of Canada, 1925."

"And also on an order of the Honourable the Minister of Justice in Form E under the Immigration Act and The Opium and Narcotic Drug Act, dated the 20th day of July, 1926, to detain and deliver the said Soo Gong to the officer authorized by warrant of the deputy minister of immigration, to receive the said Soo Gong from me with a view to his deportation under the provisions of the said Acts, which is also hereto attached, and for no other cause or reason whatsoever."

An examination of the Acts referred to shews that section 4 (*d*) of the Act of 1923, which was in force when the offence was committed, was in force until 12th June, 1925, when it was repealed and a new section, *viz.*, section 23 of Cap. 20, Can. Stats. 1925, enacted. For the purposes of this application section 4 (*d*) of the Act of 1923 may be read as follows:

"Every person who has in his possession any drug without lawful authority," etc.

And section 3 of Cap. 20 of the Act of 1925, may be read as follows:

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"Every person who has in his possession any drug save and except under the authority of a licence from the minister first had and obtained, or other lawful authority," etc.

(It will be noted that the words in the original section 4 (*d*) "without first obtaining a licence from the minister" have no reference to a charge of being in possession but only to manufacturing, selling, giving away or distributing.)

It is contended for the Crown that the meaning of the section in force when the offence was committed is the same as the meaning of the Act passed after the offence had been committed and before the trial. I doubt this, as the reference to a licence from the minister is new in so far as this offence is concerned. But whether this be so or not, I have, with the greatest reluctance (if I may say so) reached the conclusion that the conviction in this case was made under the Act of 1925 and not under the Act of 1923. As the Act of 1925 was not in force when the offence was committed the conviction is bad. I accept, without the slightest hesitation, the principle laid down in *In re Allison* (1854), 10 Ex. 561 at p. 568 that

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"there is no rule more wholesome than that which prevents technical objections from interfering with the administration of justice";

but the expression "technical objection," is unfortunately often loosely used by those who are not familiar with its meaning. The objection here raised is not a technical objection. It goes to the very root of the matter, for surely nothing can be clearer than that a man cannot be convicted of a statutory crime which is only made a crime after the offence has been committed. To put the matter briefly, I am of opinion that if a conviction is made "for that the accused committed an offence under the Act of 1923 as amended by the Act of 1925" that is a conviction under the Act of 1925, and no conviction could be made without looking at the Act of 1925.

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It was further contended by counsel for the Crown that, inasmuch as the return shews that the keeper of the gaol holds the prisoner also under an order for deportation made by the minister of justice, it would be idle to release him even although the conviction under which he is held be bad. This argument, I think, is not well founded for the return on its face discloses, I think, that the deportation order of the minister of justice is based upon a bad conviction and is therefore ineffectual.

Application granted.

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BROWN v. McINNESS.

BROWN v. McINNESS

Marriage—Petition for declaration of nullity—Prior marriage—Divorce in Washington State, U.S.A.—Domicil of first husband—Evidence of —Onus.

After the respondent and her first husband had lived together in Prince Edward Island for ten years, the husband, who was a carpenter by trade, came to Vancouver, B.C. and was followed shortly after by his wife and five children. They lived together in Vancouver, but within a year, owing to domestic troubles the husband left his home. Four years later the respondent went to Seattle, Washington, U.S.A. where she saw her husband on the street and she saw him again in Seattle a year later. She then commenced divorce proceedings in the State of Washington, the husband appearing and resisting, but a decree was granted on the 12th of November, 1903. The petitioner married the respondent on the 13th of February, 1907. On a petition to have the marriage declared null and void on the ground that at the time it was celebrated the respondent was the lawful wife of another:—

Held, that although the onus is on the respondent to prove that at the time she instituted divorce proceedings the husband from whom she was divorced was then domiciled, in the English legal sense of the term, in the State of Washington, the evidence sufficiently proved that he was so domiciled, and the petition should be dismissed.

PETITION for a declaration that a marriage between the petitioner and the respondent was null and void on the ground that at the time it was celebrated the respondent was the lawful wife of another. The facts are set out fully in the reasons for judgment. Heard by MURPHY, J. at Vancouver on the 21st of January, 1927.

Statement

Sloan, for petitioner.
Killam, for respondent.

11th February, 1927.

MURPHY, J.: I agree that the onus is on respondent to prove that McInness, to whom she was first married, was domiciled in the State of Washington at the time she instituted the divorce proceedings, which resulted in the decree of divorce dated November, 1903, and made by the Superior Court of the State of Washington. I agree that the domicil of origin of McInness is Prince Edward Island since it is proved he was born there

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and nothing was adduced in evidence, as to his parents' domicil or as to his father being alive or dead at the date of his birth. I agree also that there is no evidence that McInness ever acquired a domicil in Massachusetts. The only fact proved is, that he resided there for some years and mere proof of residence does not prove domicil. Apparently after his sojourn in that State, he returned to Prince Edward Island and lived there ten years with his wife. He then came to British Columbia and his wife followed him. I think it is a fair inference that he did not then intend to return to Prince Edward Island for she found him passing himself off as a single man and keeping company with a young girl. Whilst the statement is not directly made, I think it is a fair inference, that he deserted respondent and her five children when he came to British Columbia since she says she followed him out here and found him acting as above stated. Such intention would not in itself divest him of his domicil of origin. To effect this, he must be shewn to have taken up a new home *anima manendi*. If, however, he had such intention not to return, the fact is of importance as shewing that he was in a receptive mood to establish a domicil of choice. If, on the contrary, he did not desert his wife, but brought her and the children to British Columbia, that fact I think leads to the same conclusion. McInness was a carpenter who worked for wages. It would seem unlikely that he would come to British Columbia from Prince Edward Island and bring after him a wife and five children and still have any intention of returning to make his permanent home there. The expense involved, considering his situation, would seem to preclude any such idea. He established a home in Vancouver but that was broken up within a year because of domestic troubles. There is no evidence, as to where he lived from the time this happened until his wife saw him in Seattle some four years subsequently. For all that appears, he may have gone to Seattle shortly after the home was broken up. She remained here during this period and then went to the State of Washington admittedly to obtain a divorce. She could not obtain a divorce that would be recognized by British Columbia Courts unless at the time she instituted her proceedings, McInness was actually domiciled in that State. She met him there on the street

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shortly after she went over and saw him a second time there about a year after. The evidence indicates that McInness was resident in Seattle, to her knowledge, for about a year when she commenced divorce proceedings. He had his tools with him. He had joined a Carpenters' Union. He was personally served at the Carpenters' Hall, in Seattle, with the divorce proceedings. He appeared at the trial and strenuously, but unsuccessfully, resisted the granting of the decree. It is true that, even if not domiciled in Washington in the English legal sense, he could not successfully question the jurisdiction of the Washington Court before that tribunal because the law of Washington allows a wife after separation to acquire a domicil on which divorce proceedings will found by one year's residence in the State. Nor are the facts of his having appeared and contested the suit conclusive that the decree is valid here. Consent cannot give jurisdiction in divorce proceedings according to our law. But as bearing on the question, whether, at the time the wife's proceedings were launched in Washington, he had or had not his domicil there, these facts are of importance. Apparently, about a year after the decree, he returned to British Columbia and has resided here ever since. The decree is dated November 12th, 1903. The marriage of petitioner and respondent took place on February 13th, 1907. During all this period, McInness, though apparently resident in British Columbia, continued to pay to respondent the $15 per month which the Washington decree ordered him to pay to one, Thomas Page, who was given the custody of the children but which the evidence shews he paid to respondent. In my opinion, McInness had a domicil in the English legal sense in the State of Washington when respondent instituted her proceedings there and consequently this petition must be dismissed. Rule 17 set out in Dicey's Conflict of Laws, 4th Ed., p. 133, states:

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> "Residence in a country is *prima facie* evidence of the intention to reside there permanently and is so far evidence of domicil."

Residence is not even *prima facie* of domicil if such facts, as are referred to in rule 18, set out on page 147 of the same work, are proven but no such proof is adduced. This principle I think satisfies the onus on respondent and makes out a *prima facie* case of jurisdiction in the Washington Court. This *prima facie*

case is not met by shewing McInness had his domicil of origin in Prince Edward Island. If that were so, the rule cited could not exist as under English law every person has a domicil of origin. But even if I am in error as to this, I think the facts shew McInness had a Washington domicil when the divorce proceedings were instituted. He had left his domicil of origin and had so acted as to indicate an intention not to return, he had resided at least a year in Washington, taken his trade tools there and joined a Carpenters' Union there. He was personally served there and fought the case in the Washington Court. These facts would not alone, I think, be sufficient but there is the additional fact that he obeyed the decree by paying the money it directed to be paid. He paid this to the respondent for a period of over three years and only ceased doing so when she married the petitioner. He was resident in British Columbia for the greater part of this time. The evidence leads me to conclude that he made these payments not because he wished but because he felt he was legally bound to do so. He bitterly contested the case and, in my view, he did so from a fear that some such order would be made rather than from any desire to retain respondent as his wife. The evidence is all against the view that he valued her as a wife. For a large part of the time, during which he made these payments, he was in the jurisdiction of a Canadian Court. Everyone is presumed to know the law. He must be taken then as knowing that the Washington decree was enforceable against him in our Courts only if the Court making it had jurisdiction and that such jurisdiction, so far as Canadian Courts are concerned, would be recognized only if he had domicil in Washington in the English legal sense when the proceedings were instituted. He, of course, knew, and was the only person in the world who could be sure, whether he had, at that period, the requisite *anima manendi* in Washington or not, since that means the condition of his mind as to permanent residence there. The fact that he obeyed the Washington decree under the circumstances and for the period above set out, taken in conjunction with the other facts stated, leads me to conclude, as a matter of fact, that he did have a Washington domicil in the English legal sense. He may have acquired a British Columbia domicil subsequently. A domicil

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of choice may be repeatedly acquired though only one such domicil can be had at any one time. The essential question here is, what was his domicil when the Washington State proceedings were instituted?

The petition is dismissed with costs.

Petition dismissed.

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IN RE HADDON

IN *RE* HADDON.

Infant—Parents dead—Guardian—Appointment of—Consent of official guardian given and then withdrawn—R.S.B.C. 1924, Cap. 101, Sec. 17—Probate rule 29—R.S.B.C. 1924, Cap. 5, Sec. 9.

Where the Official Guardian's consent, as required by rule 29 of the Probate Rules, to the appointment of a guardian has been given by letter but before it is acted upon he withdraws the consent, such withdrawal should not be regarded as ineffectual. If, however, the consent had been given in open Court, the leave of the Court to withdraw it would have been necessary.

APPEAL by the Official Guardian from the order of MCDONALD, J. of the 7th of December, 1926, granting the petition of The Royal Trust Company to be appointed guardian of Philip Edwin Haddon for the purpose of obtaining letters of administration with the will annexed of the property of Gerald Philip Haddon, deceased, and of the property of Elsa Claire Haddon, deceased. Gerald Philip Haddon and his wife Elsa Claire Haddon, died in the Municipality of Oak Bay, Victoria, B.C., on the 8th of August, 1926, leaving one son Philip Edwin Haddon who at the time of their death was fourteen years old. Both father and mother made wills dated the 25th of January, 1924, the son being made sole beneficiary but they did not appoint a guardian. The son has no immediate relatives within the Province except a sister of the father, the state of her health, however, prevented her from undertaking the management of his affairs. The boy chose The Royal Trust Company to be his

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guardian for the purpose of obtaining administration with wills annexed of his parents' properties. Under a marriage settlement of the parents made on the 11th of July, 1910, The Royal Trust Company was made trustee and holds assets amounting to $20,262 of which the son is the sole beneficiary. Outside the marriage settlement the father's estate is valued at $14,890 and the mother's at $305. On the 5th of November, 1926, the Official Guardian wrote a letter to the solicitor for the petitioner agreeing to The Royal Trust Company being appointed guardian but on the 2nd of December following he wrote another letter to the said solicitor saying that he would oppose the petitioner's application.

Statement

The appeal was argued at Victoria on the 2nd of February, 1927, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

O'Halloran, for appellant: Under rule 29 of the Probate Rules it is essential that the consent of the public administrator be had before the order is made.

A. D. Macfarlane, for respondent: The rule referred to by appellant is directory only: see *The King* v. *The Inhabitants of Birmingham* (1828), 8 B. & C. 29 at p. 35. Under section 9 of the Administration Act the Court has discretion to appoint some one else: see Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., 336. The public administrator gave his consent in writing and having done so he cannot cancel it without evidence of mistake or misapprehension: see *Davis* v. *Davis* (1880), 13 Ch. D. 861.

Argument

O'Halloran, replied.

Cur. adv. vult.

11th February, 1927.

MACDONALD, C.J.A.: On the death of the natural guardians of an infant, and in the absence of a testamentary guardian, the Official Guardian, by virtue of the Equal Guardianship Act, becomes *ipso facto* the guardian both of the infant's person and estate.

MACDONALD, C.J.A.

The parents of the infant, Philip Edwin Haddon, died, each leaving a will appointing the other executor and making the

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infant beneficiary, but making no provision for his guardianship.

The Royal Trust Company is the trustee of a marriage settlement made by the father in the infant's favour. No relative of the infant has come forward asking for the guardianship of him. It is in evidence that the only relative in the Province is a sister of his father, who is not prepared to accept that responsibility. No personal representative has yet been appointed to administer the estates not included in the marriage settlement.

The Royal Trust Company applied to a judge, with the approbation of the infant, who is now 15 years of age, for an order that that Company should be given the guardianship of the infant's estate, with the object, as expressed in the petition, of applying later for letters of administration of the property not included in the settlement.

The Probate Rules of 1925 provide that the consent of the Official Guardian shall be required to all appointments of guardians, and to all grants of administration to guardians, under rules 25 to 28. To comply with this rule, the Trust Company, after its petition had been dismissed for want of such consent, but before the order had been drawn up and entered, obtained from the Official Guardian a letter which in effect consented to the prayer of the petition, but before that letter had been acted upon it was withdrawn. Thereupon the Trust Company applied to the judge to reconsider his order; they insisted upon the consent which had already been withdrawn, contending that a consent once given could not be withdrawn. The learned judge took that view of the matter, rescinded the first order and granted the prayer of the petition. The effect of the order is that there are now two guardians, one of the person, the other of the estate of the infant.

MACDONALD, C.J.A.

With respect, I do not think that the withdrawal of the consent could, in the circumstances above stated, be regarded as ineffectual. Had the consent been given in open Court, the leave of the Court to withdraw it would have been necessary, but it was not made in open Court and was not acted upon before the withdrawal.

I do not find it necessary to decide whether or not the Court could make the order without the consent of the Official Guar-

dian. It may be, I express no opinion either way upon it, that when circumstances make it expedient it could do so; in other words, it may be that the consent is not a condition precedent to the power of the Court to make the order prayed for; it may be that the Rule of Court does not displace the power of the Court in the premises, but I am satisfied that the Court ought not lightly to disregard the rule, where, as here, no special reasons therefor have been shewn and when no person having a higher claim to the guardianship has come forward as applicant. The only ground upon which The Royal Trust Company applied for the guardianship of the estate is founded upon the fact that it is trustee of the marriage settlement. Now, while it might be convenient and proper to appoint that Company the guardian of the person and the estate, if that could be done, and as administrator as well, so as to vest the control of the infant and of all property to which he is entitled in one person or corporation, yet, as that Company cannot take the guardianship of the person, since it has been denied that power by its charter, I think it would not be proper in this case to divorce the guardianship of the estate from that of the person.

MACDONALD, C.J.A.

The costs here and below must follow the event. We have no discretion over them except for good cause, of which there is a total absence.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

Appeal allowed.

Solicitor for appellant: *C. H. O'Halloran.*
Solicitor for respondent: *A. D. Macfarlane.*

COURT OF APPEAL

1926

June 10.

CAINE v. SCHULTZ

CAINE v. SCHULTZ.

Timber—Sale of timber on limit—Limit held under licence—Lapse of licence before removal of timber—Duty of vendor to maintain title—Reasonable time for renewal—Penalties imposed as trespasser—Right to recover from vendor—Damages—Obligation to mitigate—R.S.B.C. 1924, Cap. 93.

The defendant held a timber limit under a licence that expired in June, 1923. In January, 1923, he sold the timber to the plaintiff there being no time fixed within which the timber was to be removed. The licence fee for the year following June, 1923, was not paid and the plaintiff did not complete the removal of the timber until towards the end of 1923, when as trespasser he was obliged to pay the penalties provided for in the Forest Act. An action to recover the amount the plaintiff paid owing to the defendant's default in not renewing the licence was dismissed.

Held, on appeal, reversing the decision of ROBERTSON, Co. J., that the defendant was bound to maintain the title to the lease for such time as the plaintiff would reasonably require to remove the timber and the time taken to remove it not being unreasonable the plaintiff was entitled to recover the amount of the penalties imposed on him.

Held, further, that on the question of mitigation of damages there was no obligation on the plaintiff to renew the timber licence.

Statement

APPEAL by plaintiff from the decision of ROBERTSON, Co. J. of the 9th of February, 1926. In January, 1923, the plaintiff purchased the timber on a limit which was held under a licence by the defendant. The licence held by the defendant expired on the 23rd of June, 1923, and he failed to renew it for the following year. The plaintiff did not take the timber off the limit until after the licence had expired and being then a trespasser he was liable to the Crown for certain penalties which he was obliged to pay. He then brought action for the amount he had to pay owing to the defendant's default in not renewing the licence. The action was dismissed.

The appeal was argued at Victoria on the 10th of June, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, for appellant: The time within which they were to finish cutting was not mentioned in the contract so that it must

be assumed they were to have a reasonable time and in fact they were through the work before the end of the year 1923. It was the duty of the defendant to keep the property in good standing until the cutting was finished. There was no duty on the plaintiff to renew the licence and thereby avoid the penalties. As to mitigation of damages see *J. A. McIlwee & Sons* v. *Foley Bros., Welch & Stewart* (1915), 22 B.C. 38 at pp. 53 and 55 and on appeal (1916), 10 W.W.R. 5.

Moresby, for respondent: The question is as to measure of damages. The plaintiff could have avoided the penalties by renewing the licences even assuming it was the defendant's duty to renew. My submission is that it was the plaintiff's duty to look after the payment of licence fees: see *O'Connor* v. *The Bank of New South Wales* (1887), 13 V.L.R. 820 at p. 827; *Erie County Natural Gas and Fuel Company* v. *Carroll* (1911), A.C. 105.

Argument

Mayers, replied.

MACDONALD, C.J.A.: I think the appeal should be allowed. The plaintiff purchased in January, 1923, the timber on a limit owned by the defendant, or held under licence by the defendant. The licence would expire on June 23rd, 1923. There was no time fixed within which the timber should be removed and taken from the limit. As a matter of fact it was not taken until after June 23rd. The licence fee was not paid on June 23rd; therefore after that date the plaintiff was a trespasser upon the land. He might have cured what he had done, and been liable to no penalties at all, had he paid the licence fee for the year from June, 1923, to 1924. It was not paid, and he thereafter became liable to the penalties which he was obliged to pay. He now brings action against the defendant for his default in not paying the licence. He says it was his duty, having sold the timber on this property, to maintain title to the timber berth until the plaintiff had a reasonable time to take that timber off. No time being fixed, it is claimed he had a reasonable time within which to remove the timber. The learned trial judge has said he has not taken an unreasonable time to remove the timber. I think that that finding ought not to be interfered with.

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The question arose whether it was not the true construction of the contract, that the plaintiff purchased the timber knowing the title of the defendant and that it would expire on June 23rd, and therefore must be assumed to have known that he must get the timber off before that date, or if he could not do that he would have to obtain the extension of the licence at his own expense.

MACDONALD, C.J.A.

The best conclusion I can come to on these facts is, that the purchaser was, in the circumstances, not concerned with the vendor's title. He made a bargain for the timber, and he had a reasonable time to remove it, and the vendor was bound to maintain his title until that reasonable time had expired.

MARTIN, J.A.

MARTIN, J.A.: I am of the same opinion, and in the circumstances to which my brother has just alluded we should bear in mind the sections of the agreement to which he drew attention, providing for the payment of the balance due by the purchaser as being contingent upon the order to be received from the Canadian National Railways, as set out in paragraphs 2 and 6 of the contract for the purchase of the timber, whereby it is specially agreed that in case the contract cannot be completed by the date contemplated the purchaser shall not be answerable for that default: I regard that provision as being one which throws light upon the way in which the special terms of this contract should be construed, which involves no question of principle or general legal construction.

GALLIHER, J.A.

GALLIHER, J.A.: I agree. Once we ascertain exactly what was sold under the contract I think the result clearly follows. I was under the impression (as I overlooked for a moment the very terms of the contract itself) that what has been sold was the right to cut timber on the quarter-section by virtue of this licence, but Mr. *Mayers* pointed out to me the agreement itself is against that view. That was the only doubt I had in the matter.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal must succeed. I must say that the case is one of some nicety, as a great deal is left unsaid in this contract; but I think the only interpretation that can be put upon the contract is that it was a contract which

ensured the plaintiff being entitled to have the land covered by the licence under licence for a reasonable period of time. That period of time to enable the timber to be taken off was not fixed. The rule in equity is that in the absence of any precise stipulation as to time, it is a question of fact, and it shall be a reasonable time. We have the learned judge in the Court below saying:

"The plaintiff's evidence is that he took off the ties and timber within a reasonable time and I agree with him."

So that the learned judge has made a finding in favour of the reasonableness of the time.

Then it is contended that there should have been mitigation of damages by the payment of the licence fee within the period of time in which it could have been paid. There seems to be no reason in that. I can quite understand that it might be a very inconvenient rule of law, and might work great injustice if it were the rule of law, because there might be the inability to advance the licence fee or annual rental which is the present case, as well as the penalty for delay. I fail to find any authority which would warrant it being said that one is compelled to become the banker of the person who is in default, and not so becoming the banker of the person in default, and damages being suffered, they could not be recovered. I do not think the principle of law of mitigation of damages goes that far. And because it does not go that far, and not being supported by any authority, I do not see how I can give effect to the contention made.

MCPHILLIPS, J.A.

In the result it follows that the plaintiff being visited with damages on account of being a trespasser which was through the default of the defendant, it seems to me that the defendant cannot escape the responsibility of recouping the plaintiff these damages suffered by reason of that default.

MACDONALD, J.A.: I agree.

MACDONALD, J.A.

Appeal allowed.

Solicitors for appellant: *Wilson & Wilson.*
Solicitor for respondent: *James H. Lawson.*

COURT OF APPEAL

1927

Jan. 27.

SNYDER v. SNYDER.

Husband and wife—Custody of children—Wife's decree of divorce in foreign tribunal with custody of children—Husband's application for guardianship—Effect of foreign decree.

SNYDER v. SNYDER

Husband and wife resided in the State of Ohio, U.S.A., but owing to a depression that followed a successful business the husband was unable to provide sufficient money to satisfy the wife's social ambitions and differences arose between them that resulted in the husband moving to Vancouver with his children where he established his domicil and entered into business which appeared sufficiently remunerative to enable him to maintain and educate his children. His wife, who remained in Ohio, applied for and obtained a divorce with an order giving her the custody of the children, but previous to the granting of the divorce the husband launched these proceedings in Vancouver under the Equal Guardianship of Infants Act. The hearing, however, did not take place until after the divorce had been granted, the wife appearing at the hearing in Vancouver. The trial judge concluded the best interests of the children would be served by giving the guardianship to the father but he held he was precluded from doing so by the Ohio decree.

Held, on appeal, reversing the decision of GREGORY, J., that foreign guardians, as such, have no rights here, their powers and functions being confined to the limits of the country in which they have been appointed. The paramount consideration is the best interests of the infants and it has been found in the Court below that the children would be best served by giving the guardianship to the father. The father should therefore have the custody of the children.

Statement

APPEAL by the father from the decision of GREGORY, J. of the 6th of December, 1926, upon an originating summons to determine the rights of custody and guardianship of the three infant children of Russell P. Snyder and Martha W. Snyder, whereby he gave the custody of the children to the mother, the judgment not to be acted upon until an appeal therefrom be heard and disposed of. Mr. and Mrs. Snyder were married in Washington, D.C., in 1918. They immediately moved to Cleveland, Ohio, where the husband was successful in the real estate business until 1925 during which time three children were born. Then a slump in the real-estate business came about owing to the Florida boom and owing to lack of money they had to move to a smaller house where the wife being dissatisfied, quarrels

arose. The husband moved to Montreal in June, 1926, taking his children with him and in the month of August following he took them to Vancouver where he went into the real estate business. The wife remained in Cleveland and started divorce proceedings there in August, 1926, and obtained a decree of divorce with the custody of the children on the 11th of October following. In September, 1926, the husband started these proceedings under the Equal Guardianship of Infants Act to which the wife appeared. The learned trial judge having regard to the comity of nations, would not interfere with the order for the custody of the children made in the State of Ohio but the children were to remain with the father with liberty to the wife to have access to them at all reasonable times pending the disposition of an appeal. Statement

The appeal was argued at Victoria on the 26th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

A. Alexander (*W. C. Ross,* with him), for appellant: At the time the decree of divorce with custody of the children was made in Ohio, the children were living with the father in Vancouver and were wards of this Court on the application that was made here one month previously and the Court here has jurisdiction to deal with the question of their custody. The father's domicil is here and the welfare of the children is paramount: see *Woodworth* v. *Spring* (1861), 86 Mass. 321 at p. 322; *In re Befolchi* (1919), 27 B.C. 460. Discretionary matters are no part of the international law or comity of nations: see *In re C.* (1922), 1 W.W.R. 1196. Argument

Thomas E. Wilson, for respondent: These people have lived in the United States most of their lives and the children were born there. In such a case care should be taken not to interfere with the decree of divorce of the Ohio Court: see *Nugent* v. *Vetsera* (1866), L.R. 2 Eq. 704; 35 L.J., Ch. 777; *In re Ayers* (1921), 2 W.W.R. 171.

MACDONALD, C.J.A.: In the special circumstances of this case I would appoint the father of the infants their guardian. Mr. Justice GREGORY who heard the application in the first instance, would have made that order himself had he not felt MACDONALD, C.J.A.

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that he was not at liberty to disregard the order of the foreign Court appointing the mother such guardian.

Husband and wife resided in the State of Ohio; differences arose between them, caused by the wife's social ambitions which the husband found too costly to maintain, and failing to adjust this matter between themselves the husband removed to Vancouver in this Province, taking the children with him. He there established a new domicil and entered into business which appears to be remunerative, and which enables him to maintain and educate the children in a proper manner. The wife thereupon obtained a divorce in Ohio, the husband not defending, and obtained as incidental thereto, an order giving her the custody of the children. This divorce was not granted until after the husband had launched these proceedings. It was granted, however, before the matter came before the Court below.

On the proceedings before the learned judge, the wife, as well as the husband, appeared, and he had the benefit of hearing both sides fully. There was no moral delinquency involved in the case. GREGORY, J. came to the conclusion that the best interests of the children would be served by giving the guardianship of them to the father, but he held himself precluded from doing so by the Ohio decree.

MACDONALD, C.J.A.

In Eversley on Domestic Relations, 4th Ed., 629, it is said:

"The appointment of a guardian is territorial, that is, confined to the jurisdiction of a country in which he is appointed, and cannot, except by the comity of nations, be recognized by foreign countries. Mr. Dicey, in his work on Domicil, rule 28, p. 172 . . . . says: 'A guardian appointed under the law of a foreign country, has no direct authority as guardian in England; but the English Courts recognize the existence of a foreign guardianship, and will, in their discretion, give effect to a foreign guardian's authority over his ward.' This rule coincides with the opinion of Storey, who holds that 'notwithstanding that a foreign guardian has no absolute rights as such in a foreign jurisdiction, the fact that he is such is entitled to great weight in the Courts of another when called upon to determine, in their discretion, to whose custody a minor child shall be committed; and if it appears for the best interests of the child that he should be under the care and custody of a guardian appointed in a foreign State, the Court may so decree, even though another guardian has been appointed in the State where the minor subsequently is found.'"

After quoting these authorities, Eversley proceeds to say:

"Thus, it may be said that foreign guardians as such have no rights here

in England, their powers and functions are confined to the limits of the country in which they have been appointed."

In *Stuart* v. *Bute* (*Marquis*) (1861), 9 H.L. Cas. 440, Lord Campbell, at pp. 464-5, said:

"All that can be considered as judicially decided by the House was [referring to a previous decision], that if there be a foreign child in England, with guardians duly appointed in the child's own country, the Court of Chancery may, without any previous inquiry, whether the appointment of other guardians in England is or not necessary, and would or would not be beneficial for the child, make an order for the appointment of English guardians."

Thus it appears that both here and in the United States the power and right is recognized of the Court in the country in which the infant is found to appoint a guardian notwithstanding that a guardian may have been appointed in another country. Nor is it disputed that the paramount consideration, paying due respect to the law of nations, is the best interests of the infant.

MACDONALD, C.J.A.

I accept the opinion of the learned judge, and while reversing the order on the question of the jurisdiction would give effect to his judgment on the merits. He has taken the utmost pains to sift the facts and circumstances of the case in the presence of both father and mother, and his opinion is entitled to the greatest respect.

I would allow the appeal. As to the access by the wife to the children, the usual orders of this character provide that the other person shall have access to the children at all reasonable times.

MARTIN, J.A.: This is an appeal upon a statute which confers a very important jurisdiction and which was described in this Court in *In re Befolchi* (1919), 27 B.C. 460, as a new and wide one, and therefore something which should be looked at from correspondingly wide points of view. In that case, as I understand it, there was one principle laid down which was this: that the interest of the child itself is paramount and that the wide discretion of the judge below who exercises it will not be interfered with, unless there is a strong case and a lack of proper material for the exercise of that discretion.

MARTIN, J.A.

In the application of it to this particular case no difficulty would have occurred, were it not for the element of the comity of nations which is relied upon by the learned judge appealed from. He says:

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> "This man came to British Columbia (from the United States). . . . I am convinced from the evidence before me that the applicant, the father, has done no wrong to his wife, that he is a fit and proper person to have the care and custody of his children, and that he is now providing, and is able to continue providing a suitable home for them."

That finding by itself would be the end of the case, because the very minute that state of affairs was established there was only one thing to be done, that is to continue the father in the custody of the children in the home he has provided for them. The reason for not doing so is given on page 174:

> "If it were not for the Ohio decree, I would give the custody to the husband, but I think the husband has not established a domicil here."

Of course this is where, with all respect, the learned judge has misdirected himself, so to speak, in the application of the principle. It is quite true that the comity of nations should be given regard to, but not to such an extent as to deprive a man who is in that very strong position, of his custody over his own children. The case in particular that the learned judge relied upon to deprive him of that custody is *Nugent* v. *Vetsera* (1866), 35 L.J., Ch. 777, decision of Vice-Chancellor Bacon. I entirely agree with the view taken by the Vice-Chancellor in the circumstances before him, and with his application of the principle of the comity of nations to the decree of the Austrian Court which he had before him, under which the custodian of the children had brought them for temporary domicil for education in England, after both parents were dead, for a period of three and six years. But what possible application there can be of his view on those facts to this entirely different case I am, with respect, unable to discern; the more one studies it, the more it would appear that it has no application to the case at Bar.

MARTIN, J.A.

Therefore I say, briefly, that this case is one in which we would not be justified in applying the rule of comity of nations as relied upon by the learned judge below. The only proper course is to deal with it as we have it before us, *i.e.*, with these children under our jurisdiction. And it would be strange indeed to deprive the father of his custody upon the fact that after he had applied to us a decree was made in Ohio giving the custody of his children to his wife who had refused to come and live with him here after he had provided a fit and proper home for all his family.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed.

The opinion of the learned judge in the Court below is, that were it not for the decree of the Court of the State of Ohio giving the custody of the children to the wife, or more properly, the now divorced wife of the appellant, the father of the children should have their custody, the learned judge being of the opinion that as a matter of comity, the decree of Ohio should prevail.

There only remains, then, the one point as to the efficacy of the Ohio decree, as I agree, that if the decree should not be deemed a bar, the father should have the custody of the children. We are not affected in any way by any matter of comity; the children are in this Province with the father who is domiciled here and are being well cared for, a good home and all proper provision for care, maintenance and education. The English Courts have absolutely refused to pay attention to decrees of foreign Courts, made in divorce proceedings upon grounds that would be insufficient in England, especially where there was default in effecting personal service, where personal service could have been effected, which is the present case, and where service was by advertisement, and there was no attornment to the foreign jurisdiction. I do not feel that there is any obligation whatever to heed this decree or give it any consideration in the matter now before us. Foreign decrees, with the greatest respect to all foreign jurisdictions, cannot be allowed to interfere with the policy of this jurisdiction, as evidenced by our statute law. The view here expressed is well borne out by that admirable and very learned judgment of the Supreme Court of the State of Massachusetts, *Woodworth* v. *Spring* (1861), 86 Mass. 321 at p. 333, which well reviews the law of England; and the judgment is in conformity with the law of England and that of this Province. The Legislature of this Province has absolute jurisdiction over property and civil rights, and has enacted a statute known as "Equal Guardianship of Infants Act," and declared the governing policy, with regard to the custody of infant children; and section 13 of the Act reads as follows:

MCPHILLIPS, J.A.

"The Court may, upon the application of either parent of an infant, make such order as it may think fit regarding the custody of such infant

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and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian."

Now, in the face of this organic statute, which gives the Court absolute power to deal with infants, no foreign Court can be held to have jurisdiction, nor any decree have any force or virtue, which interferes with the policy enunciated here by Parliament, when we have the father domiciled here and the children here, the policy of the law is, the welfare of the children, and the facts are overwhelmingly that that welfare will be best conserved by the father. They should be left with the father, in whose custody they are now.

Appeal allowed.

Solicitor for appellant: *W. C. Ross.*
Solicitors for respondent: *Wilson & Drost.*

COURT OF APPEAL

1927

Feb. 14.

BOYD & ELGIE v. KERSEY

BOYD & ELGIE v. KERSEY.

Judgment—Garnishee order—Application to set aside by debtor—Denial of indebtedness by garnishee—Right to trial of issue between creditor and garnishee—R.S.B.C. 1924, Cap. 17, Sec. 15.

BOYD & ELGIE v. KERSEY

A judgment creditor obtained an order of the registrar of the County Court attaching all debts owing or accruing due from the garnishee to the judgment debtor which was served on the garnishee on the 21st of May, 1926. Before the garnishee entered a dispute note the judgment debtor moved to set aside the order and his affidavit in support included as an exhibit, a written contract between himself and the garnishee whereby he was paid $125 per month for delivering newspapers payable at the end of each month "if he should faithfully perform the terms of the contract on his part." He further deposed that no moneys were due him under the contract. It was held by the trial judge that as the monthly payment was conditional upon his performing his services in accordance with the contract it was not within the Act and the garnishee order should be set aside.

Held. on appeal, reversing the decision of LAMPMAN, Co. J. (MCPHILLIPS,

J.A. dissenting), that there was error in treating the May earnings under the contract as the only moneys attached under the order. The order attached all debts, etc., not the May earnings under the contract alone so that the written contract was not decisive of the matter. The attaching order raises an issue as between the judgment creditor and the garnishee which the judgment creditor is entitled to have tried in accordance with the procedure provided by the Attachment of Debts Act.

COURT OF APPEAL

1927

Feb. 14.

BOYD & ELGIE v. KERSEY

APPEAL by the judgment creditors, Boyd & Elgie, from the order of LAMPMAN, Co. J. of the 16th of June, 1926, setting aside a garnishing order of the 20th of May, 1926, made by the deputy registrar at Victoria, the Colonist Printing and Publishing Company, Limited being the garnishee. Boyd & Elgie having recovered judgment against Kersey for $72.05 obtained the above garnishee order. The judgment debtor appealed from the order on the grounds: (1) That at the time of service of the said garnishing order on the Colonist Printing and Publishing Company, Limited there were no debts, obligations or liabilities owing, payable or accruing due from the garnishee to the judgment debtor; and (2) a copy of the garnishing order was not served on the judgment debtor as required by section 7 (2) of the Attachment of Debts Act. From the affidavit of the judgment debtor it appeared that he was employed by the Colonist Printing and Publishing Company, Limited under written contract of the 14th of July, 1925, as a carrier at $125 a month should he faithfully perform his duties as a carrier for that month, the payments being due and payable on the last day of each month. From the order of LAMPMAN, Co. J. setting aside the garnishing order the judgment creditors appealed on the grounds: (1) That the learned judge erred in holding that the judgment debtor was entitled to move to set aside the garnishing order on the ground that the garnishee was not at the time of service upon it of the garnishing order indebted, under obligation, or liable to the judgment debtor; (2) in holding that the garnishee was not at the time of the service of the garnishing order indebted, under obligation or liable to the judgment debtor.

Statement

The appeal was argued at Victoria on the 7th and 8th of February, 1927, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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1927

Feb. 14.

BOYD & ELGIE v. KERSEY

P. R. Leighton, for appellants: The garnishee order was made on a proper affidavit so it cannot be set aside. All he can do is to say the money is not attached. There must be evidence of the garnishee that no money was due: see *Lake of Woods Milling Co.* v. *Collin* (1900), 13 Man. L.R. 154 at pp. 159-60; *Richards* v. *Wood* (1906), 12 B.C. 182; *Vinall* v. *De Pass* (1892), A.C. 90 at p. 95. This is a conditional contract but under the Act of 1904 such a debt is attachable. The Act was passed for the purpose of getting over the decision in *Gray* v. *Hoffar* (1896), 5 B.C. 56.

G. A. Cameron, for respondent: Under section 15 of the Attachment of Debts Act the learned judge may dispose of the matter summarily without an issue and he did so on the material before him: see *Hallson* v. *Brounstein* (1923), 3 W.W.R. 835; *McFadden* v. *Kerr* (1899), 12 Man. L.R. 487; *Hartt* v. *Edmonton Steam Laundry Co.* (1909), 10 W.L.R. 664. An appeal on a case involving less than $100 is allowed on a question of law only and he must bring himself within section 117 of the County Courts Act. This is a matter of procedure and he has no right of appeal: see *Hamilton Brass Manufacturing Co.* v. *Barr Cash and Package Carrier Co.* (1906), 38 S.C.R. 216. On the question of what is subject to attachment see *Lanning, Fawcett & Wilson Ltd.* v. *Klinkhammer* (1916), 23 B.C. 84 at p. 87; *Brookler* v. *Security Nat'l. Ins. Co.* (1915), 8 W.W.R. 861 at p. 865; *Central Bank* v. *Ellis* (1893), 20 A.R. 364; *Holmes* v. *Millage* (1893), 1 Q.B. 551; *Fallis* v. *Wilson* (1907), 9 O.W.R. 418.

Argument

Leighton, in reply, referred to *Jones* v. *Thompson* (1858), 27 L.J., Q.B. 234; *Webb* v. *Stenton* (1883), 52 L.J., Q.B. 584; *Tapp* v. *Jones; Pooley, garnishee* (1875), 44 L.J., Q.B. 127; *Howell* v. *Metropolitan District Railway Co.* (1881), 19 Ch. D. 508; *Canada Cotton Company* v. *Parmalee* (1889), 13 Pr. 308.

Cur. adv. vult.

14th February, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The judgment creditor obtained, in the regular way, an order of the registrar of the County Court attaching all debts, obligations and liabilities owing, payable or accruing due from the garnishee to the judgment debtor, to

answer a judgment recovered by the creditor. This order was served upon the garnishee together with a notice in these words:

"If you dispute your liability you should further file a dispute note and the registrar will then send you notice of the day upon which you are to appear in Court."

The notice indicates the procedure in such a case as this.

Some days afterwards, and before the garnishee had entered a dispute note, the judgment debtor moved to set the order aside on the ground that nothing was owing by the garnishee to him. He produced as an exhibit to his affidavit a written contract between himself and the garnishee for services to be performed in delivering newspapers to rural distributing centres, which provided that he should be paid monthly on the last day of each month the sum of $125 for such services, if he should have faithfully performed the terms of the contract on his part. He also deposed that at the time of the service of the attaching order no moneys were due to him by the garnishee. On the hearing of this application objection was taken by counsel for the judgment creditor, and he read, gratuitously I think, an affidavit of his own, in which he said:

"3. At the time of making the said service [on the garnishee] the said J. L. Tait [the garnishee's manager] informed me that the Colonist Printing & Publishing Company, Limited [the garnishee] was obligated to the defendant under a contract in writing under which monthly payments of over $100 accrue due to the defendant."

There is nothing in the last-mentioned affidavit to shew that the plaintiff's counsel consented to limiting the attachment to the sum which might accrue during May, the order having been served on the 21st of May. The learned judge, however, proceeded on the mistaken assumption that only the moneys which might become payable under the contract on the last day of May were attached and on the construction of the agreement he held that the money was payable conditionally only, and therefore set aside the order. If the fact had been as he assumed it to be his order could be sustained on the authority of *Lake of Woods Milling Co.* v. *Collin* (1900), 13 Man. L.R. 154, and cases of like import which he relies upon. The order attached all debts, etc., not the May earnings, under the contract, alone. Therefore the written contract was not decisive of the matter at all.

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It will be seen from what I have already said that up to the time of the argument before the judge, nothing had been done by the plaintiff or by his counsel or solicitor, to prejudice his position. Said paragraph 3 contains all there is upon that point, and in my opinion it does not assist the respondent.

Then did anything take place before the learned judge which could be construed as amounting to acquiescence in or consent to treating the May earnings under the contract as the only moneys attached by the order? Mr. *Leighton,* plaintiffs' counsel, took objection *in limine* to the application to set aside the order, and that objection having been overruled he contended, without waiving his objection, *inter alia,* that the May earnings were attachable; on this point he was also overruled, and the order was set aside. In these circumstances, it appears to me to be impossible to sustain the order appealed from. The Attachment of Debts Act provides the procedure to be followed in obtaining an attaching order and, when that procedure has been followed I think the registrar has no discretion to refuse it, though if not followed the order may be attacked subsequently for irregularity. The attaching order raises an issue as between the judgment creditor and the garnishee, which the judgment creditor is entitled to have tried in accordance with the procedure provided in that behalf. The County Court judge may direct an issue to determine whether the garnishee owes the judgment debtor or not, or he may try the matter summarily in Chambers; a denial by the judgment debtor, or for that matter by the garnishee himself, of the indebtedness, does not conclude the matter. The plaintiff may prove, notwithstanding such denial, that the garnishee is indebted to the judgment debtor.

The regular course was not adopted here, the plaintiff had had no opportunity of trying the issue between himself and the garnishee.

Assuming that the judgment debtor might make an application to set the order aside on a ground, such as existed in the *Lake of the Woods* case, *supra,* the facts would have to be admitted leaving only the question of the construction of the agreement to be decided by the Court; that was the decision there, where the Court refused to set aside two orders out of

three, and set aside the third only because no other question but the construction of the document was in controversy.

The amount involved in this dispute is very small; it may turn out on the trial of the issue or on the trial in Chambers, that no moneys except those which might be earned in May are owing by the garnishee to the judgment debtor. In that event the only question for the County Court would be the construction of the said agreement. It is, of course, not necessary to decide that question on this appeal, but as I am of opinion that the order served cannot attach it, it may save the parties further litigation if I express that opinion now.

MACDONALD, C.J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am in complete agreement with His Honour Judge LAMPMAN in setting aside the attaching order. The learned judge had jurisdiction to do so, as the authorities amply shew, and admittedly no debt was attached.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: While I am of the opinion that the learned County Court judge was right in holding that the moneys alleged to be due and accruing due under the contract between the defendant and the Colonist Company for the delivery of papers were not attachable, I cannot, with respect, agree with him in setting aside the garnishee order, as under it all "debts, obligations and liabilities," etc. were attached, not simply moneys said to be due under the contract referred to. If I could find from the material filed or from statements of counsel that by consent express or implied, or from admissions the only question before the County Court judge was whether or not moneys alleged to be owing under the contract were attachable, I would not disturb the order. But that is not so. The general garnishee order can only be disposed of in two ways, *viz.*, by trial or by the summary method provided for in section 15 of the Act, unless as stated above, it is dealt with solely as a question of law on admitted facts. The motion herein to set aside the order cannot be regarded as a summary disposal of the matter under section 15. It does not profess to be such an application. It is based upon the wrong assump-

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tion that because the judgment debtor makes an affidavit that no moneys are due to him the order may be set aside. It ignores the necessity of the garnishee admitting or disputing liability and submitting to trial in the manner referred to. If it is believed that other moneys are "due or accruing due," etc., from the garnishee to the judgment debtor the issue will have to be determined as the Act provides.

I would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Tait & Marchant.*
Solicitor for respondent: *G. A. Cameron.*

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KNOX AND LEWIS v. HALL AND IRWIN AND TORONTO GENERAL TRUSTS CORPORATION.

Contract—Arrangement for selecting cruising and checking timber berths—Repudiation—Damages—Measure of.

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The defendants were the owners of timber berth No. 507 in British Columbia, but owing to the Dominion Government approving of a plan of other parties that materially affected the value of the berth the Government agreed to allow the defendants to select for themselves other timber berths of equal value and acreage in lieu thereof. The plaintiffs had prior to this endeavoured to make a sale of berth No. 507 as the defendants' agents, and upon the Government agreeing to the exchange as above, the plaintiffs and defendants agreed that the plaintiffs should select, cruise, and check other berths with a view to making the exchange and the plaintiffs were to receive two-thirds of the proceeds from the sale of the selected properties over and above $100,000 which was to be retained by the defendants. Five tracts of timber were selected and reserved by the plaintiffs and they cruised portions thereof, but after a time the defendants complaining that the plaintiffs had not obtained proper information as to the properties for selection, proposed that another party who had information as to the value of the properties should be included in making a selection. The plaintiffs refused to agree to this and the defendants then refused to have any further dealings with the plaintiffs. Some time later the defendants not having come to any satisfactory arrangement as to the exchange of properties, the Government paid them $120,430 for all

their rights in berth No. 507. An action for damages was dismissed, the trial judge holding that the defendants were in the circumstances justified in repudiating the contract.

Held, on appeal, reversing the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that on the evidence the defendants were not justified in repudiating the contract and the plaintiffs were entitled to damages.

Per MACDONALD, C.J.A.: That the plaintiffs were entitled to recover $6,000.

Per MARTIN and GALLIHER, JJ.A.: That the plaintiffs were entitled to recover two-thirds of the balance over $100,000 obtained by the defendants from the Government for berth No. 507 less deductions for cruising and selecting, *i.e.*, $11,620.

APPEAL by plaintiffs from the decision of MACDONALD, J. of the 4th of June, 1926, in an action that arose over the Dominion of Canada licensed timber berth No. 507 situate in British Columbia near Lake Coquitlam. In 1914 the defendants, Hall and Irwin, became licensees of this timber berth and they employed the plaintiff Knox, who was a timber broker, to endeavour to sell the berth. He did not succeed in making a sale, and in 1920 it was discovered that the berth had depreciated materially in value for two reasons: first, that the City of New Westminster had succeeded in having a reservation put upon a portion of the reserve in order to protect its water supply, and secondly, the Vancouver Power Company had built a dam at the lower end of Lake Coquitlam for power purposes. These two causes materially reduced the value of the berth. They then applied to the Dominion Government, by way of compensation, to exchange berth No. 507 for other berths, and a contract was then entered into between Hall and Irwin on the one hand, and Knox and Lewis (Lewis being a timber-man of experience) on the other, whereby the plaintiffs were to look around and select other available Dominion timber which might be placed in reserve and an exchange effected. The contract further provided that when the exchange was effected the new berths should be held for the general benefit of both defendants and plaintiffs on the terms that when a sale was brought about $100,000 should first be paid to the defendants and any balance obtained over that sum should be divided in the proportion of two-thirds to Knox and Lewis, and one-third to Hall and Irwin. Subsequently in 1922 an order in council was passed providing for the exchange of berth No. 507 for other timber which the

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defendants might apply for. Knox and Lewis selected and made a reservation on five tracts of timber and arrangements were made with the Dominion Government whereby the defendants were to select a certain portion of those reserved in lieu of No. 507. The defendant Irwin then went out to British Columbia to make a final selection in 1923, but finding that the plaintiffs had not obtained accurate information as to the tracts reserved by careful cruising he repudiated the contract that was entered into with the plaintiffs and then entered into negotiations with one Shields for the purpose of finding suitable property to take in exchange for No. 507. This, however, came to nothing and finally in 1925 the Dominion Government instead of effecting the exchange, paid Hall and Irwin for their rights in berth No. 507 the sum of $120,430. It was found by the trial judge that there was a contract as above set out between the plaintiffs and defendants but that the defendants were, in the circumstances, justified in repudiating it.

The appeal was argued at Victoria on the 25th and 26th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

A. Alexander, for appellants: This case comes down to the question whether the learned trial judge was right in concluding that the plaintiffs were justified in repudiating the contract. We submit that the plaintiffs substantially carried out what they agreed to. As to estimating the sum to which the plaintiffs are entitled see *Clausen* v. *Canada Timber and Lands Ltd.* (1925), 35 B.C. 461. At the time of cancellation there was no reason for making it.

Burns, for respondent: The Court below found that in the circumstances we were justified in repudiating. It is largely a question of evidence and we submit there should be no interference with his finding. The contract was specifically that the plaintiffs were to "select, cruise and check" the parcels of timber land that we were to obtain in lieu of berth No. 507. They did select certain parcels and some cruising was done on two of the parcels but not on the others. This cruising was of an indefinite nature and they never got far enough in their work to do any checking at all. When Irwin went out in 1923 and found how

unsatisfactory their work was, he was justified in repudiating the contract. The Shields agreement does not affect the matter in any way. On the question of repudiation see *Varrelmann* v. *Phœnix* (1894), 3 B.C. 135.

Alexander, in reply referred to *Chaplin* v. *Hicks* (1911), 2 K.B. 786; *Wilson* v. *Northampton and Banbury Junction Railway Co.* (1874), 9 Chy. App. 279 and *McGee* v. *Clark* (1927), [*ante,* p. 156].

Cur. adv. vult.

1st March, 1927.

MACDONALD, C.J.A.: I make these deductions from the evidence: that the plaintiffs and defendants agreed to work together with the object of obtaining from the Government of Canada, timber berths equal, at least, in value or acreage to defendants' timber berth No. 507, and to effect, if possible, an exchange, and if and when such exchange should be effected to sell the exchanged timber berth or berths, and divide the excess of the purchase-money over $100,000, between them—one-third to the defendants and two-thirds to the plaintiffs.

The plaintiffs had been the agents to procure a purchaser for berth No. 507, prior to this time, but the Dominion Government having approved of a plan encroaching upon that berth it became desirable to exchange it for other Dominion timber lands. The plaintiffs were to endeavour to select available Government timber fit for such exchange, and defendants to put through the exchange at Ottawa. Timber berths were accordingly selected by plaintiffs, and in October, 1922, the defendant Irwin came to British Columbia to inspect them with a view to carrying out the exchange. He employed two men to go to one of these berths in company with the plaintiff Lewis, but they lost their way and did not reach the berth. When they returned and reported this mishap to Irwin he accused Lewis of not having seen the berth before selecting it, but of having got his information about it from others. He then interviewed the plaintiff Knox, and made the same complaint to him, and also told him that one Shields knew the berth and would give him information concerning it. Knox declined to have anything to do with Shields, and Irwin then declared that he would have nothing further to do with the plaintiffs.

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The defendants thereafter dealt with Shields and several berths, some of them selected by Shields and some theretofore selected by the plaintiffs, were put before the Government, who thereupon proposed six groups of these berths, any one of which they were willing to exchange for berth 507. These groups are set out at pages 496-7 of the appeal book. Four of the groups were valued at considerably more than berth 507 which was afterwards sold as hereinafter mentioned. The offer, however, was rejected by the defendants who instead accepted an offer by the Government of $120,430 in cash for berth 507.

The plaintiffs claim their share of the excess over $100,000, namely, two-thirds of $20,430, less some admitted deductions which would bring it down to $17,430, and in the alternative, damages or a *quantum meruit*.

From a perusal of the evidence and particularly of the voluminous correspondence, I am satisfied that the complaint which defendant Irwin made against Lewis was not well founded; on this I agree with my brother GALLIHER's statement of the facts and his deductions therefrom.

When asked at our Bar what his clients contended for, the defendants' counsel said: My position is, that if plaintiffs could submit to us other timber which we were willing to accept for berth 507, we should pay them a commission based on our profits when the new timber berths should be sold. I qualify this, he said, by saying that we must act reasonably in rejecting the timber offered in exchange. He also conceded that any differences of opinion between the parties in respect of "equal value" as against "equal acreage" had been smoothed out by the correspondence and also that when defendant Irwin spoke of Shields to Knox he meant that Shields should be given an interest in the transaction.

MACDONALD, C.J.A.

There being clearly a breach of the agreement, the law provides the remedy. I do not think the plaintiffs' loss can be determined under the contract, but on what basis are the damages to be assessed? Is the assessment to be made on the principle of *Chaplin* v. *Hicks* (1911), 2 K.B. 786, for the loss of the chance, or is there something in the case beyond that? The realization of the profit contemplated is dependent on factors not within the sole control of the parties; there might

have been no exchange effected and no profits gained such as were contemplated, but yet, as held in *Chaplin's* case, the Court may award substantial damages. When all the circumstances of this case are taken into account, their services in making selections and reservations of the berths sought to be exchanged for 507, it becomes a question whether the plaintiffs are not in a better position than the plaintiff in the above case, but however this may be, and treating their claim as governed by *Chaplin* v. *Hicks,* substantial damages should be awarded. The value of the plaintiffs' services ought to be viewed in the light of the business in hand in which the parties had the chance of nothing or much. Moreover, the parties hoped to obtain in the exchange, property worth more than could have been obtained for berth 507, and it is quite within the bounds of possibility that a profit much larger than that realized might have been made. The contingency of failure was much less remote here than in *Chaplin's* case.

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I would award the plaintiffs $6,000, and costs here and below.

MARTIN, J.A.: I agree with my brother GALLIHER.

MARTIN, J.A.

GALLIHER, J.A.: The learned judge below has set out the facts pretty fully in his reasons for judgment and I will not repeat them here to any great extent.

The contract seems clear enough from the correspondence and there is little if any dispute as to what it was.

Some time after it was entered into the plaintiffs selected certain areas of timber lands with a view to exchange for a relinquishment of timber berth No. 507, in the name of the defendants as trustees for a syndicate of owners. Application was made by the defendants to the Department of the Interior at Ottawa for an order in council authorizing an exchange of timber areas of equal value and which should be approved by the department.

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After long drawn out negotiations this order in council was finally passed on September 21st, 1922. Up to this time the plaintiffs and defendants seemed to be working in harmony and shortly afterwards, the defendant Irwin, in the month of October, 1922, came out to Vancouver, bringing with him two timber

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men, Conroy and Taylor, to examine the timber that had been selected by the plaintiffs for exchange.

Conroy and Taylor and the plaintiff Lewis, went out to examine what is referred to as the 15-mile timber, which was afterwards surveyed and cruised and numbered timber berth 609, block 2. They proceeded to within a short distance of the timber when Lewis apparently became confused as to the trail, but after finding it again, Taylor refused to go on (though Lewis wished to), claiming that from the nature of the ground they had traversed the expense of logging and getting out the timber rendered it undesirable. They then returned to Vancouver without inspecting the timber, where Lewis saw Irwin and admitted to him that he had not been in the timber, although he had seen it from a distance, and had information regarding it. The information Lewis had of this piece and another piece, known as the Garnet Creek area, afterwards surveyed as timber berth 609, block 3, was obtained from the Government office records at New Westminster, and from outside parties to one of whom he had paid $300 and agreed to pay a further $300 for his information should the deal go through. When Irwin learned this he not unnaturally was somewhat incensed, thinking that Lewis should at least have made an inspection of the properties that had been reserved.

It appears that the defendants had for some months prior to this been dealing with one Shields, in respect of selection of timber areas for the purpose of this exchange, which culminated in an agreement in writing (along the same lines as that with the plaintiffs) dated 23rd April, 1923, and when this interview took place between Irwin and Lewis, Irwin suggested that the plaintiffs join up with Shields. To this the plaintiffs refused to agree, and Irwin informed them the deal was off and thereafter they dealt entirely with Shields.

Two other pieces of timber in this area had been selected and reserved by the plaintiffs in addition to the aforementioned properties, also for the purpose of exchange, but these the defendants made no attempt to investigate.

The defendants acting through Shields had timber berth 609, blocks 2 and 3, as well as other properties selected by Shields, surveyed and cruised, and the department at Ottawa also sent

out cruisers on its own behalf for the purpose of estimating the value and quantity of the timber on these properties and also on timber berth 507. The result was that there was such a wide divergence between the two sets of cruises, the Government cruisers valuing timber berth 507 at much less than defendants' cruisers, and the property to be given in exchange at much more. The department then sent out a forest resources specialist, named Craig, to reconcile and adjust these differences and in his report he suggests to the defendants six different groups of claims in exchange for 507. Craig valued 507 at $120,430,

609, block 2, at.....$74,430.00
609, block 3, at..... 53,490.00

$127,920.00

The other areas were put in at different valuations but as 609, blocks 2 and 3 were the only ones submitted which the plaintiffs had reservations placed upon, I consider only these.

I think Craig's estimate could be taken as the one most nearly approximating the proper value. However, the department and the defendants could not agree upon an exchange and the matter was finally adjusted by the defendants accepting Craig's estimate of 507, and relinquishing their rights thereunder. The Government paid them this amount, $120,430.

GALLIHER, J.A.

It will be noted that the two areas 609, blocks 2 and 3, selected and reserved by the plaintiffs are slightly greater in value according to Craig's estimate than is 507.

It must be borne in mind that the defendants had the right to refuse acceptance of any timber areas submitted to them and I take it that if upon examination they rejected, plaintiffs would be entitled to a reasonable time to make other selections for submission, but the real point is, was Irwin justified in declaring the contract at an end at the time he undoubtedly did.

Now while it would strike any reasonable man that the plaintiffs might be expected to familiarize themselves more with the conditions by personal inspection of the areas reserved, we must recollect that the question of whether an order in council would go through authorizing exchange was long held in abeyance, and the plaintiffs might quite reasonably not wish to incur

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what might be unnecessary expense to any considerable extent before the order in council was passed.

We find from correspondence that Knox was pressing throughout for accelerating the passage of this order, to the end that they might get in and cruise the selected areas. This, not once, but several times, and when we find that it was in the month following that of the passing of the order that Irwin came out to look over the properties and failed to do so though plaintiffs were desirous that he should, we should not give too much weight to the fact that Irwin considered he was justified in calling everything off because, as he said, he did not want to accept hearsay and made it a condition that they should work with Shields thereafter. Supposing Lewis had personally inspected every bit of the areas selected and made an approximate estimate of quantity and value, the defendants to determine whether these areas were satisfactory would have done exactly what they afterwards did, cruise the timber. In other words, they would not have accepted the say-so of Lewis, more especially as the Government for its own information was bound to make a cruise.

GALLIHER, J.A.

I do not think this case depends so much on whether the defendants could reasonably or unreasonably reject any timber areas selected as it does on this: whether Irwin was justified in, on his part, seeking to put an end to the contract and preventing the plaintiffs from carrying out their part, and as I view it, he was not.

I do not lose sight of the fact that it was a contingent contract, but once having found that there was a breach of the contract, we are, I think, on the facts of this case, within *Chaplin* v. *Hicks* (1911), 2 K.B. 786. The head-note to that case is, in part:

> "The existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment."

In that case it was also held that the damages may be substantial and not merely nominal.

The plaintiffs are, in my view, entitled to damages and the question then is, what form should these damages take. This question was not argued by Mr. *Burns*. Mr. *Alexander's* views are stated in a note I took in these words:

"I say all I am contending for is two-thirds of $17,430, being $20,430, less deductions for cruising and selecting."

This would amount to $11,620, to be divided, I take it, among the three plaintiffs.

I think much can be said in favour of this being a joint venture and that the plaintiffs acquired a vested interest in that venture. That interest was sought to be taken from them when Irwin refused to further consider or co-operate with them, except upon conditions unacceptable to the plaintiffs, and while what eventually took place was not an exchange of timber areas as contemplated, the defendants accepted in lieu thereof a cash payment as an equivalent and if relations had continued between the parties up to that point it seems to me they would have been entitled to their proportion of that cash payment. The acts of the defendants prevented this relation being maintained, and while there can be no definite evidence as to the actual loss sustained (it might have been more or less than claimed) still, the Court once having found plaintiffs entitled to damages must proceed to assess them as best they may, and in this case we have the fact that in the actual settlement of this matter the defendants have received the sum of $20,430 over and above the limit of $100,000, provided in the agreement, and I think we are justified in awarding the plaintiffs a two-thirds interest in that amount less the deductions plaintiffs admit should be made for cruising and selecting.

GALLIHER, J.A.

I think the same may apply if we consider it from the standpoint of loss of chance as dealt with in the *Chaplin* case, *supra*.

I would therefore allow the appeal and give judgment for the plaintiffs for $11,620. The plaintiffs should have the costs of the appeal.

MCPHILLIPS, J.A.: I am in entire agreement with the learned trial judge, Mr. Justice W. A. MACDONALD, in dismissing the action.

The learned trial judge has in his reasons for judgment, in my opinion, succinctly set forth the material points of evidence that require consideration upon this appeal. It is a matter for regret that after a long lapse of time and considerable labour upon the part of the appellants, that their work should go unrewarded, but there was a precise contract entered into and

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there was failure to carry it out on the part of the appellants. The default was patent, there had not been that expedition shewn which the circumstances required and the obtaining of accurate personal knowledge of the timber which could be acquired to bring about the exchange or otherwise lead to the carrying out of the contemplated recoupment to the respondents for the moneys expended in connection with timber berth No. 507. In truth as I read the evidence the respondents might well conclude that there had been such failure upon the part of the appellants in the carrying out of the contract that the appellants had really desisted from the further carrying out of the same, in fact, had decided to abandon the contract, that is, their default afforded the respondents good reason to so conclude. Then we have the respondents suggesting that one Shields, a large operator in timber with knowledge of the timber area under consideration, should be called in to facilitate the selection of suitable commercial timber, and timber which would be capable of being economically got out. This suggestion the appellants would not hear of or agree to, as it would no doubt result in lessening the moneys that would be payable to the appellants, should in the end the contemplated exchange be accomplished. The situation certainly was an acute one, and in view of all the surrounding facts and circumstances I consider that the repudiation of the contract by the respondents was justifiable, that is the respondents were well entitled to take the view that the contract was at an end.

MCPHILLIPS, J.A.

In *Mersey Steel and Iron Co.* v. *Naylor* (1884), 53 L.J., Q.B. 497, the Lord Chancellor (Earl of Selborne) said at pp. 499-500:

> "It appears to me according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to release himself from a future performance of the contract. The question is, whether the facts here justify that conclusion?"

(Also see *Meadow Creek Lumber Co.* v. *Adolph Lumber Co.* (1918), 25 B.C. 298, and judgment of the Supreme Court of Canada reversing the judgment of this Court, (1919), 58 S.C.R. 306, Anglin, J. (now Chief Justice of Canada), and *Yukon Gold Co.* v. *Canadian Klondyke Power Co.* (1919), 27 B.C. 81).

Applying the Lord Chancellor's view of the law to the present case I am fully convinced that the learned trial judge, in holding that the repudiation of the contract was justifiable, arrived at the right conclusion, and it is a conclusion with which I wholly agree.

There is one final consideration that must not be forgotten in this case: the trial would appear to have extended over five days, the evidence is voluminous and a great deal depends upon the weight to be attached to the *viva voce* evidence, the learned trial judge had an advantage that we have not, and I am clearly of the view that nothing has been made out at this Bar which entitles the learned trial judge being disagreed with, and in this connection I would refer to the most recent pronouncement upon the question of disturbing a judgment when the trial judge saw and heard the witnesses. Lord Sumner in his speech in the House of Lords, in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8, saying:

"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shewn that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusion of fact should, as I understand the decisions, be let alone. In *The Julia* (1860), 14 Moore, P.C. 210, 235, Lord Kingsdown says: 'They, who require this Board, under such circumstances, to reverse a decision of the Court below, upon a point of this description, undertake a task of great and almost insuperable difficulty. . . . We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.'"

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Wood, L.J., in *The "Alice" and The "Princess Alice"* (1868), L.R. 2 P.C. 245, 248, 252; 38 L.J., Adm. 5, says:

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"The principle established by the decision in *The Julia* (1860), 14 Moore, P.C. 210, is most singularly applicable. . . . we should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made."

James, L.J., thus laid down the practice in *The Sir Robert Peel* (1880), 4 Asp. M.C. 321, 322; 43 L.T. 364:

"The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression."

Again, in *The Glannibanta* (1876), 1 P.D. 283, 287; 34 L.T. 934, the Court of Appeal, after referring to *The Julia* and *The "Alice,"* say that they would not be disposed to reverse "except in cases of extreme and overwhelming pressure;" but being of opinion that the trial judge (contrary to what is the fact here) did not proceed at all on manner or demeanour, but proceeded on inferences, which the Court of Appeal could draw as well as he could, they formed their own view of the facts and decided accordingly. I am not aware that this rule has ever been disowned and, if it has too often been neglected, still the current of authority on the subject runs all the other way.

MCPHILLIPS, J.A.

The learned trial judge in this case heard and saw the witnesses and had to decide the question as to whether the appellants had made out their case which could only be on the basis that there had been due and proper compliance upon their part with the terms of the contract and that the repudiation of the contract upon the part of the respondents was unjustifiable. He, however, came to the conclusion that it was justifiable, after most careful consideration and the weighing of all the facts, as I have already stated, I think the judgment of the Court below is right and this appeal should be dismissed.

Appeal allowed in part, McPhillips, J.A. dissenting.

Solicitors for appellants: *W. C. Ross.*
Solicitor for respondents: *Knox Walkem.*

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Criminal law — Murder — Evidence of child—Corroboration—Prisoner's statement—Admission of—Circumstantial evidence—Consistent with any other reasonable hypothesis—R.S.C. 1906, Cap. 145, Sec. 16.

On a trial for murder Crown counsel tendered the evidence of a girl ten years old to be taken without oath under section 16 of the Canada Evidence Act. Prisoner's counsel then said "I understand that this is because this child does not understand the nature of an oath." The trial judge accepted this as signifying that both counsel were agreed and after examining the child to test her intelligence and satisfying himself that she had sufficient understanding to justify the admission of her unsworn statements her evidence was taken.

Held, on appeal, affirming the ruling of McDONALD, J. (MARTIN and McPHILLIPS, JJ.A. dissenting), that although the learned judge might have examined her further as to her understanding of the nature of an oath, there was no substantial wrong amounting to a miscarriage of justice in taking her unsworn testimony.

Held, further, that the prisoner's statement made to a police officer after his arrest and after he had been warned was properly admitted in evidence.

Per MARTIN, J.A.: That the statement made by the accused to the inspector of police was not free and voluntary but was in effect procured by duress. The admission of the statement in evidence was a miscarriage of justice and a new trial should be ordered.

Per McPHILLIPS, J.A.: The conviction is impossible of being sustained by reason of the fact that there was error in law in admitting illegal evidence—that is the statement of the accused not being a voluntary statement and further the unsworn evidence of the young girl Haldis Sandahl.

[Reversed by the Supreme Court of Canada.]

APPEAL by the accused from the decision of McDONALD, J. and the verdict of a jury of the 24th of November, 1926, on a charge of the murder of one Loretta Chisholm. Miss Chisholm who was 21 years old was a school teacher in the public school at Port Essington a village up the Skeena River about 25 miles from Prince Rupert. On Sunday the 23rd of May, 1926, at about nine o'clock in the morning Miss Chisholm went for a walk down the river (on the east side). She was seen by a girl ten years old a short distance from where she started and further down she was seen and spoken to by a man named Rineholt as she passed his house. She was not seen again until her body

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was found next morning about one-third of a mile farther down the river than Rineholt's house. The same little girl saw the accused sitting on the grass close to her house when Miss Chisholm passed and Rineholt saw him pass his house on the sidewalk going down the river about five minutes after Miss Chisholm passed. About three hours later the accused was seen coming down what was known as the "pipe line" that supplied water to the town from a lake and ran substantially parallel with the river about a quarter of a mile east of the river. When the accused was arrested some blood was found on his clothes and he made a statement to the police as to his movements on the morning of the murder which was inconsistent with the evidence of the girl and of Rineholt. The jury found the accused guilty of murder and he was sentenced to be hanged.

Statement

The appeal was argued at Vancouver on the 25th to the 29th of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. E. Bird, for accused, applied to be allowed to submit further evidence to this Court. A child ten years old gave evidence without being sworn under section 16 of the Canada Evidence Act. She was not asked whether she understood the nature of an oath and my submission is she should have been sworn. There was no credible evidence corroborating that of the child: *Rex* v. *Turnick* (1920), 33 Can. C.C. 340; *Rex* v. *Steele* (1923), 33 B.C. 197 and on appeal (1924), 42 Can. C.C. 375; *Rex* v. *Bagley* (1926), 37 B.C. 353; *Rex* v. *Gardner and Hancox* (1915), 80 J.P. 135 at p. 136; *Rex* v. *Bundy* (1910), 5 Cr. App. R. 270 at p. 273; *Rex* v. *Chadwick* (1917), 12 Cr. App. R. 247; *Rex* v. *Baugh* (1916), 27 Can. C.C. 373; *Rex* v. *Paul* (1907), 18 Can. C.C. 219. The jury did not have proper direction as to how they should treat circumstantial evidence: see *Rex* v. *Demetrio* (1926), 59 O.L.R. 249; *Rex* v. *Charles King* (1905), 9 Can. C.C. 426; *Rex* v. *Collins* (1907), 12 Can. C.C. 402; *Rex* v. *Parkin* (*1*) (*2*) (1922), 37 Can. C.C. 35; *Veuillette* v. *The King* (1919), 58 S.C.R. 414. That the onus is on the Crown to the end see *Picariello et al.* v. *The King* (1923), 39 Can. C.C. 229 at pp. 236-7; *Rex* v. *Bottomley* (1922), 16 Cr. App. R. 184; *Rex* v. *Hayes* (1923), 38 Can.

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C.C. 348; *Rex Hogue* (1917), 28 Can. C.C. 419; *Rex* v. *Payette* (1925), 35 B.C. 81 at p. 90; *Rex* v. *Murphy* (1921), 15 Cr. App. R. 181; *Demers* v. *The King* (1926), 4 D.L.R. 991; *Rex* v. *Paris* (1922), 38 Can. C.C. 126; *Rex* v. *Allen* (1911), 16 B.C. 9; *Clark* v. *The King* (1921), 61 S.C.R. 608.

[C. Rineholt was called as a witness, examined by Mr. *Johnson* and cross-examined by Mr. *Bird.*]

A. M. Johnson, K.C., for the Crown, was not called upon.

Judgment

Per curiam: The application to be allowed to call further evidence is refused (McPHILLIPS, J.A. dissenting).

Argument

Bird, on the motion for leave to appeal on the facts: There was no reasonable ground on which the jury could find the prisoner guilty. The prisoner was roughly treated by the police and was practically forced to give his confession: see *Rex* v. *Bellos* (1926), 38 B.C. 89; (1927), 1 W.W.R. 471; *Rex* v. *Kay* (1904), 9 Can. C.C. 403; *Rex* v. *Kooten* (1925), 46 Can. C.C. 159; *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100; 16 Can. C.C. 77; *Rex* v. *Sylvester* (1911), 19 Can. C.C. 302 at p. 311. As to the Crown not calling a witness who should have been called see *Rex* v. *Gauthier* (1921), 29 B.C. 401 at p. 405; *Gouin* v. *The King* (1926), S.C.R. 539 at p. 543. Regarding the blood on accused's clothing see *Rex* v. *Walker and Chinley, supra.*

Johnson: The judge examined the child carefully before her evidence was taken: see *Rex* v. *Keightley* (1893), 14 N.S.W. L.R. 45 at p. 46; *Rex* v. *O'Brien* (1912), V.L.R. 133; *Rex* v. *Armstrong* (1907), 15 O.L.R. 47. On the question of the judge's charge see *Rex* v. *Meade* (1909), 1 K.B. 895 at p. 898; *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217 at pp. 245-6; *Rex* v. *Bagley* (1926), 37 B.C. 353; *Rex* v. *White, ib.* 43. On the judge's comment see *Rex* v. *Cohen and Bateman* (1909), 2 Cr. App. R. 197 at p. 208; *Regina* v. *Fick* (1866), 16 U.C.C.P. 379. That objection must be taken to evidence when tendered see *Rex* v. *Sanders* (1919), 14 Cr. App. R. 9; *Reg.* v. *Bertrand* (1867), L.R. 1 P.C. 520. That there was corroboration here of the child's evidence see *Rex* v. *Iman Din* (1910), 15 B.C. 476 at p. 487; *Rex* v. *McGivney* (1914), 19 B.C. 22 at p. 30;

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Rex v. *Schiff* (1920), 15 Cr. App. R. 63; *Rex* v. *Gay* (1909), 2 Cr. App. R. 327. On the question of circumstantial evidence see Wills on circumstantial evidence, 5th Ed., pp. 271-2; Taylor on Evidence, 11th Ed., p. 74, sec. 69; *Carlton* v. *People* (1894), 41 Am. St. Rep. 346; 150 Ill. 181; *State* v. *Clifford* (1892), 41 Am. St. Rep. 518; 86 Iowa 550; *State* v. *Atkinson* (1894), 42 Am. St. Rep. 877; 40 S.C. 363; Odgers's Law of Evidence, 1911, pp. 448-490; *Ibrahim* v. *Rex* (1914), A.C. 599. The Court of Appeal cannot deal with the weight of evidence: see *Rex* v. *Daun* (1906), 11 Can. C.C. 244 at p. 250; *Rex* v. *Pailleur* (1909), 20 O.L.R. 207 at p. 217; *Rex* v. *Steele* (1923), 33 B.C. 197. That there was not misdirection here see *Rex* v. *Wyman* (1918), 13 Cr. App. R. 163 at p. 165; *Rex* v. *Wolff* (1914), 10 Cr. App. R. 107. As to setting aside the verdict on the ground of insufficiency of evidence see *Rex* v. *Weisz* (1920), 15 Cr. App. R. 85 at p. 90.

Bird, replied.

Cur. adv. vult.

27th April, 1927.

MACDONALD, C.J.A.: I am unable to find in the case any good reason for interfering with the verdict of the jury.

It was argued that the learned judge erred in admitting the evidence of the young girl Haldis Sandahl, without the sanction of an oath. Crown counsel tendered her evidence under the provisions of section 16 of the Canada Evidence Act, that is to say, as a child whose evidence ought to be taken without oath. Prisoner's counsel then said:

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"I understand that this is because this child does not understand the nature of an oath."

The learned judge accepted this as signifying that both counsel were agreed. He then confined his examination of the child who was 10 years of age, to intelligence tests, and satisfied himself that she had sufficient understanding to justify the admission of her unsworn statements. He might have gone further but in view of what I have said I think it cannot be urged successfully that there was substantial wrong amounting to a miscarriage of justice in taking her unsworn testimony. It was also urged that there was no corroboration of the child's

evidence, but this contention cannot be sustained in the face of the evidence of Rineholt, and that of the child's mother.

A motion was made founded on affidavits filed on behalf of the prisoner for the admission of further evidence, which it was alleged could not have been obtained for the trial. On that motion we permitted witnesses to be examined in open Court upon the matter alleged in the affidavits and finding no good reason for admitting the further evidence the Court dismissed the motion.

Complaint is made of the admission of the prisoner's statement, made to a police officer, after his arrest and after he had been properly warned. I think the statement was properly admitted.

The prisoner's counsel then argued, as a question of law, that there was no legal evidence to support the conviction. He argued that because the verdict was founded on circumstantial evidence alone, the jury could only convict if the evidence was consistent with guilt, and inconsistent with any other hypothesis. If that were the law a conviction could never be legally obtained on circumstantial evidence. I think the true rule is that the evidence must be inconsistent with any other reasonable hypothesis. Many other hypotheses might be conjured up in this case consistent with the prisoner's innocence, but would they be reasonable? In the last analysis the test is, was the evidence of guilt such as might bring home to the minds of the jury the conviction of guilt beyond a reasonable doubt? If the Court be satisfied that there was such legal evidence then the verdict should, on the ground now under consideration, be sustained. I think there was such in this case.

MACDONALD, C.J.A.

I am also of opinion that the judge's charge was not unfair to the prisoner.

MARTIN, J.A.: Several grounds have been advanced in support of this appeal from the conviction of the appellant for the murder of Loretta Chisholm, on 23rd May last, as follows: First, it is submitted that no case was made upon which the jury could in reason return the verdict complained of. This involved a consideration of the facts before us, in the light of the very full argument that counsel presented thereupon, and

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I think it desirable only to say that the evidence, while not as strong in some respects as could be wished, is nevertheless of such a nature that it is impossible for me to say that reasonable men could not reasonably have reached the conclusion we are asked to set aside.

Second, certain objections were taken to the charge to the jury, and that one of weight, which I think merits special consideration here, is the alleged misdirection respecting the duty of the jury in reaching a verdict in a case of circumstantial evidence of this nature. The portion of the charge particularly complained of is as follows:

"It is pointed out to you that the evidence is circumstantial. That again need not trouble you greatly because all these cases do depend on circumstantial evidence, meaning the evidence of the circumstances surrounding. There is not one witness [of the killing], there very rarely is, and therefore the law says if the Crown has built up brick by brick such a wall of circumstances that the accused has failed to escape, has failed to explain it away, then a case has been made out, not a case of suspicion or innuendo or anything of that kind, but if the Crown has established to your satisfaction that so many circumstances are proven that the only reasonable inference you can draw is one of guilt, then the Crown has made out its case. You should before convicting conclude that the story told by the accused is inconsistent with his innocence, that the evidence on the whole is consistent with his guilt only, and not with his innocence."

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It is submitted that the illustration to a wall built up by the Crown around the accused through which he "failed to escape" conveys a wrong idea of the onus on the Crown and the duty of the jury, but while that was not perhaps, with respect, the most apt illustration of the view proper to be taken, yet the whole direction must be read together, as has been so often laid down (most recently by us in *Rex* v. *Bagley* (1926), 37 B.C. 353, 369; 2 W.W.R. 513) and after so doing I am unable to say that the proper direction was not in substance given. What has long been held in this Province to be such a direction is to be found in *Rex* v. *Jenkins* (1908), 14 B.C. 61, a decision of the old Full Court which there is no good reason for our not continuing to follow, and the rule stated in Wills on Circumstantial Evidence, 5th Ed., 262 was there adopted as follows:

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

That rule is based upon and is in essentials the same as the

direction given by Baron Alderson in *Hodge's Case* (1838), 2 Lewin, C.C. 227, which had long before been used as a guide, safe beyond question, and as the language the learned Baron employed in charging the jury is couched in a more popular way than the more technical digest thereof by Wills it is desirable to continue to use it as follows:

"They [the jury] must be satisfied, 'not only that those circumstances were consistent with *his* having committed the act, but they must also be satisfied *that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.*'"

The italics are in the report, which goes on to say:

"He then pointed out to them the proneness of the human mind to look for—and often slightly to distort the facts in order to establish such a proposition—forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt."

At p. 74 of *Rex* v. *Jenkins,* the above decision in *Hodge's Case* is relied upon and explained, and Wills, *supra,* at p. 64 cites it as being of "complete exactness."

It follows that this objection fails.

Third: It is submitted that the evidence of the little girl, Haldis Sandhal, aged ten years and nine months, should not have been received because she was not sworn. This depends upon section 16 of the Canada Evidence Act, *viz.*:

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"In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

"2. No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence."

The Crown counsel tendered her evidence under this section, whereupon the prisoner's counsel said:

"I understand that this is because this child does not understand the nature of an oath."

The presiding judge asked her the following questions:

"Where do you live, Haldis? Port Essington.

"See how loudly you can speak. How old are you? Eight—ten.

"And what is your daddy's name? Mr. Sandahl.

"What does he do, does he live up there? Yes.

"And your mother, does she live with you too? Yes.

"You go to school? Yes.

"Can you read a little bit? Yes.

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"And write your name? Yes.

"Do you know that it is very bad for little girls to tell lies? Yes.

"Did they tell you that little girls must never tell stories? Do you understand that? Yes.

"You must always tell the truth? Yes.

"We want you to answer the questions these men ask you and be sure to tell the truth."

No ruling was given according to the official report, but the Crown counsel proceeded to examine her without objection and prisoner's counsel cross-examined her at length. It is now submitted that she should have been sworn because the questions asked by the Court did not establish the fact that she did not "understand the nature of an oath" and hence the operation of the section was excluded; and also that if anything was established by the incomplete questions it was, at most, that she clearly understood she ought to tell the truth, which was quite consistent with an understanding of the nature of an oath to which matter her mind was not directed though it was essential for the invocation of the statute. This objection, if advanced at the time, would have been well taken in my opinion, in the absence of any questions directed to the crux of the matter, *i.e.*, the witness's primary understanding of the nature of an oath as distinguished from her secondary understanding of her "duty of speaking the truth," as the section puts it, and it is unfortunate, with all respect, that the customary questions were omitted, because if the proper materials for the due exercise of the "opinion of the judge" had been brought out by appropriate questions then the discretion ought not to be reviewed—*cf. Rex* v. *Harris* (1919), 12 Sask. L.R. 473, in which a child of the same age as this one was sworn. But it is due, here, to the learned judge below to say that by the practical acquiescence of the prisoner's counsel in the presentation of the witness as one who did not in fact understand the nature of an oath he was thrown off his guard and therefore, doubtless, did not probe the matter as in an ordinary case, and I am of opinion that the objection must be regarded in the circumstances as covered by the recent important and far-reaching decision of the Supreme Court in *Rex* v. *Boak* (1925), S.C.R. 525 (in which, unfortunately, the prisoner was not represented), and *vide* the subsequent action of this Court thereupon reported in 36 B.C. 190.

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In that case the Supreme Court went the length of holding that a verdict of a jury which included a juror who was "absolutely disqualified" from acting as a juror by the British Columbia Jury Act, Sec. 5 (1), Cap. 34, of 1913 (because of his undoubted deafness), was a valid conviction because the prisoner's counsel had "acquiesced in that course being taken." The complete facts of the case appear in the report of the proceedings before us in (1925), 35 B.C. 256, and in 36 B.C. *supra,* wherein at p. 192 the grave error of fact in the presentation of the case at Ottawa (and carried into the judgment thereupon) is pointed out. But the chief point of the decision of the Supreme Court is that no miscarriage can be said to arise if the prisoner's counsel "to suit his own purposes" consents to the inclusion of an "absolutely disqualified" person as one of twelve jurors, which is in effect an agreement to try the accused by eleven jurors instead of the twelve that the statute (Criminal Code 929) prescribes as the constitutional tribunal for that purpose, *viz.*:

"929. The twelve men who in manner aforesaid are ultimately drawn and sworn shall be the jury to try the issues on the indictment. . . . ."

In England recently to overcome to a limited extent the hitherto insuperable obstacle to reaching a verdict caused by the death or incapacity, etc., of a juror, section 15 of the Criminal Justice Act, 1925, Cap. 86, was passed as follows:

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"15. Where in the course of a criminal trial any member of the jury dies or is discharged by the Court as being through illness incapable of continuing to act or for any other reason, the jury shall nevertheless, subject to assent being given in writing by or on behalf of both the prosecutor and the accused and so long as the number of its members is not reduced below ten, be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly."

It will be noted that this statute does not permit the reduction by "assent in writing" of the jury below ten in any case, but in Canada there is no limit to the reduction if the "acquiescence in that course" of the prisoner's counsel can be established. But it is to be observed that this ruling is, I respectfully submit, at variance with the principles of the decision of the Privy Council in *Reg.* v. *Bertrand* (1867), L.R. 1 P.C. 520, which were again affirmed by the Privy Council in *Ibrahim* v. *Rex* (1914), A.C. 599, wherein the grounds upon which the Privy Council grants

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leave to appeal in criminal cases are thus stated, in the *Ibrahim* case, p. 615:

"There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future."

In the *Bertrand* case the Privy Council had also said, p. 531:

"On the other hand, it is alleged that a serious departure has been made from the ordinary course of conducting a criminal trial before a jury; and if this be true, it is obviously of the last importance to prevent this for the future; and it has not been seriously contended on either side that any mode of redressing these alleged miscarriages exists but that which has been resorted to. Their Lordships therefore will not decline to entertain the present appeal; and they proceed accordingly to consider the first ground on which it is rested—the grant of a new trial in a case of Felony."

Now it is beyond question that in the *Boak* case there was "a serious departure from the ordinary course of conducting a criminal trial before a jury," and it is also an "evil precedent" to convict an accused with a jury of less than twelve qualified persons.

It is further to be noted that the *Bertrand* case was again affirmed by the Privy Council in its recent very important decision in *Nadan* v. *Regem* (1926), A.C. 482; 28 Cox, C.C. 167; (1926), 1 W.W.R. 801.

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I have not overlooked the fact that in the *Bertrand* case and also in the *Ibrahim* case the appeals were from New South Wales and Hong Kong respectively, but in the *Nadan* case, *supra,* the Privy Council has very recently asserted its authority and jurisdiction over all appeals in criminal cases from Canada, despite section 1025 of our Criminal Code which prohibited appeals to that tribunal, and held the said section to be "void and inoperative" as being "repugnant" to the Colonial Laws Validity Act of 1865, and declared it to be "an enactment which is void by Imperial statute"; and that the Proceedings and Report of the Imperial Conference last November have produced no change in their Lordships' "Colonial" view of an "Appellate Court in a Colony regulated by English Law" (as they refer to the Appellate Court of Ontario) is apparent from their decision of a few weeks ago in *Robins* v. *National Trust Company, Limited* (7th February, 1927), 43 T.L.R. 243; (1927), 1 W.W.R. 692.

It is necessary in the disposition of two grounds in this appeal to consider, in view of these decisions of the Privy Council, the conflict between its decisions and those of our Supreme Court, and I find myself quite unable to reconcile them in principle and the result is consequently far from satisfactory, but as the Supreme Court seems (p. 530) to really found its decision upon section 1014 (2) of the Criminal Code by holding that if an "absolutely disqualified" deaf person acts as a juror by consent yet "no substantial wrong or injustice has actually occurred" to the accused thereby, I can only regard this as laying down the general principle that under the amendments of 1923 to the Code the accused is now bound by at least the active "acquiescence" of his counsel in matters and cases of the gravest kind (the *Boak* case being one of manslaughter which is punishable by life imprisonment) and it is obvious that it is a great advantage to an accused person to retain all the chances of the necessary unanimity of a completely qualified jury of twelve to secure his conviction instead of the lesser chances of disagreement if only eleven, or nine, or seven, or even a less number that his counsel may "acquiesce" in, sit to try him, because there is no line of demarcation in the number that may be "acquiesced" in once it is held that less than the statutory number of twelve may be dispensed with.

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Furthermore, in another important respect the same decision in the *Boak* case has applied a new cure to grave defects in criminal procedure, *viz.*, in "regarding" an admittedly defective order made by Mr. Justice MURPHY as valid, as follows. That learned judge, who was intending to and did later hold the assizes, made, on the application of the Crown, six days before the assizes were held an *ex parte* order (under section 31 of the B.C. Jury Act) which is set out in the report at 36 B.C. p. 266 (with the full circumstances surrounding it) by which he directed the sheriff to summon certain persons "to make up the number of persons drafted to serve on the petit jury" without any reference to the grand jury, but affidavits were filed with us, in answer to the objection taken that the sheriff had without any authority added five persons to the grand jury panel, to shew that the intention had been to "include both grand and petit jurors but by a slip and oversight the word 'grand jury'

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was not included in the order," and we were asked by counsel for the Crown to "act upon the order intended to be made." No apt authority was cited to support such a request, and to it the appellant, in brief, replied that the learned judge in making such an *ex parte* order at large before the assizes and not even in the case or in any other particular trial, was acting as *persona designata* and that it was not competent for this Court to supply any defects in his order made in that or any other capacity, even assuming that he could have done so himself if he had been properly applied to (which was not done) and that it would be both dangerous and unfair to read into the defective order anything based upon statements for the first time made after the appeal had been launched. This submission prevailed with this Court, which was of opinion, expressed during the argument, that we were confined to the order itself and could not act on alleged intentions which were absent therefrom. But the Supreme Court, on appeal from us, took the view (p. 531, *supra*), that the omission of the words "grand jury" was a "mere clerical error," and that the

"order as pronounced by the learned judge may be regarded as the order made by him rather than the order in the mistaken form it was drawn up. *Hatton* v. *Harris* (1892), A.C. 547; *Milson* v. *Carter* (1893), A.C. 638, 640."

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It is, I repeat, unfortunate that the prisoner was not represented at their Lordships' Bar because if he had he would doubtless have pointed out to them that the two cases relied upon, the first in the House of Lords and the second in the Privy Council, lay it down clearly that even in a civil case an Appellate Court has no power to amend or "regard" an order properly made otherwise than in accordance with its clear and plain terms, unless the other party has expressly consented thereto as the Attorney-General did in the former case (as the Lord Chancellor and Lord Macnaghten pointed out) and in which Lord Watson said (pp. 560-1):

"The correction ought to be made upon motion to that effect, and is not matter either for appeal or for rehearing. . . . . Had it not been for the concession very properly made by the Attorney-General, it would have been necessary for your Lordships to supersede the consideration of this appeal in order to enable the respondent to apply to the proper Court. Seeing, however, that the parties have enabled us finally to dispose of this appeal, it becomes unnecessary to discuss the point farther, or to consider whether

the Appeal Court, when the case was before it, would have had jurisdiction to correct the decree."

In the second case the Privy Council, after reciting the *Hatton* case, refused to depart from the terms of the order, alleged to be mistaken, saying, p. 641:

"Unfortunately the respondent did not take the proper course of applying to the Supreme Court to correct the accidental omission in the order granting leave to appeal. If he had done so no doubt the mistake would have been put right as a matter of course. Their Lordships will allow this application to stand over with liberty to amend, so that in the very improbable event of any difficulty occurring in correcting the order of the 26th of September, 1890, the respondent may be in a position to apply for special leave to bring up that order on appeal, together with any order that may be made on any application which the respondent may be advised to make with the view of having the slip corrected."

Now in the *Boak* case there was not only no consent but the stoutest objection before us, and no counsel even present to give consent before the Supreme Court, nor had any application been made to the judge to correct his order nor to us to adjourn the hearing of the appeal for that purpose.

Apart, however, from this view of the matter the Supreme Court, p. 531, went on to say:

"In any case, however, if the consequences of the mistake made in drawing up the order should afford a ground on which 'the appeal might be decided in favour of the appellant,' we are convinced that 'no substantial wrong or miscarriage of justice has actually occurred' as a result of such mistake."

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This, as in the former objection, makes the actual occurrence of "substantial wrong or miscarriage of justice" the test of the matter and since the Supreme Court has taken that view of it nothing can be done, while their decision stands, except to give effect to it however unexpected the consequences may be, and I have been forced to consider carefully their decision (in the light of those of the Privy Council) so as to see how far it does go in a new direction in order to apply it to the circumstances of this case which it affects materially, and as it will all other criminal appeals in future of this nature. Applying it, then I am of the opinion that it cannot be said in the circumstances, that the active (as I regard it) acquiescence of the prisoner's counsel in the wrongful treatment of the little girl as one who did not "understand the nature of an oath," occasioned any "substantial wrong or miscarriage of justice," but on the con-

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trary that the prisoner was, in the circumstances, benefited by the adoption of that course because it enabled him to take the strong position, on the facts before the jury and at this Bar, that the necessary corroboration of an unsworn witness was not forthcoming and the most was very plausibly and properly made of that position.

Coming then to the fourth objection, *viz.*, to the admission of the statement made by the accused to the inspector of police, Spiller, after he was under arrest and confined in the gaol in the Court house at Prince Rupert awaiting his preliminary investigation and trial, the objection is that it was not free or voluntary but was in effect procured by duress. The Courts of Canada and England are in accord with respect to the reception of evidence in such circumstances and the general principle is conveniently stated by the Supreme Court of Canada in *Prosko* v. *The King* (1922), 63 S.C.R. 226 (and by the Court of Criminal Appeal in *Rex* v. *Voisin* (1918), 1 K.B. 531 at pp. 537-8) where it adopts the language of the Privy Council in *Ibrahim* v. *Rex, supra,* p. 609, as follows:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

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This means, as is pointed out at p. 236, that the burden of proof in establishing the voluntary nature of the statement "undoubtedly rests" upon the Crown, and, in my opinion, the Crown's own evidence herein clearly shews that the submission of the appellant's counsel (that the burden has not been discharged in this case) has been fully sustained. It appears, briefly, from the evidence of the inspector himself that he had the accused brought before him for examination from the cells to his room no less than four different times on the 25th of May before he would speak, and there is no suggestion whatever that the prisoner had expressed any desire to make a statement or to be brought before any officer for that or any other purpose; on the contrary, it is clear that the inspector was conducting an investigation, tending to incrimination, on his own account and that though the prisoner did not wish to speak yet he was, in

effect, finally made to do so by being repeatedly brought back from the cells until he did. But still more, the accused has sworn that he was "rattled" because of the "rough treatment" he had received in the course of said investigation and no explanation is given of this very serious allegation though the inspector of police was present in Court at the time (sitting, indeed, with the Crown counsel, as he informed us and as appears from p. 352 of the appeal book) yet he was not called by the Crown to refute it.

In such circumstances, very unusual, I am glad to say, I am forced to the conclusion, after long and anxious consideration of the facts and the law relating to this vital point, that instead of the statement being a voluntary one, despite the formal sham of a warning having been gone through with, it was procured by duress, and evidence obtained in a manner so highly improper should not have been admitted. Such an examination, improper in any event, is the more to be condemned because the present subject of it is an Indian and therefore peculiarly susceptible to the influence of those in authority. It is, to my mind, beyond question that the result of the admission of this evidence seriously prejudiced the accused in his defence, as abundantly appears by the cross-examination of the accused thereupon, and the extended observations made by the learned judge in his charge to the jury, which could only have had an effect very unfavourable to the appellant.

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There is nothing in the recent decision of the Supreme Court in *Rex* v. *Bellos* contrary to this opinion, there being grave elements herein which were entirely absent therefrom and a consideration of *Prosko* v. *The King, supra,* upon which it is founded, confirms my opinion: at p. 234 Mr. Justice Idington, for example, points out that there was

> "a distinct categorical denial of having exercised any of these practices which would bring the evidence given within the rule against its admission."

But here the only person who could refute the Indian significantly refrained from going into the box to do so.

There seems to be an impression in some quarters that a police or magisterial or other officer can at any time and from time to time without limit cause to be brought before him, without any request, a prisoner awaiting trial and, after going through

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the form of warning him, then lawfully proceed inquisitorially to extract admissions from him, in response to questions, that will secure his conviction when placed upon his trial, but I have yet to see any authority of weight that will go the length of justifying such an inquisition so contrary to all the traditions of Canadian justice. Here the inspector admits that the "occasion" he had for "seeing him" (the prisoner) in his office was "to interview him as to his movements" on the day of the murder and the next day; the word "interview" is an obvious and disingenuous euphemism for "cross-examination" for he admits—"I told him I was going to ask him some questions" after warning.

Recently the Court of Criminal Appeal in England has adopted an attitude which is in substantial accord with mine; thus in *Rex* v. *Grayson* (1921), 16 Cr. App. R. 7 at p. 8 the Court said:

"This sort of proceeding—it was in fact an informal preliminary trial in private by the police—is not fair to prisoners and, as this Court has already observed, is not in accordance with principles of English justice."

It is true in that case a warning was not given but it is apparent that quite apart from that element the Court was condemning what are in fact "informal preliminary trials" even if prefaced by the form of a warning in the attempt to sustain highly improper proceedings in the nature of what the appellant's counsel fairly described as "third degree methods," in criminal parlance. The decision in *Grayson's* case was, in effect, followed by the same Court in *Rex* v. *Pilley* (1922), *ib.* 138, wherein it was said (p. 139):

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"According to the practice of this Court a conviction obtained by improper means will not be upheld without other evidence which must inevitably have resulted in convicting the appellant. There is no such evidence here, and the conviction cannot stand."

Still later in *Rex* v. *Taylor* (1923), 17 Cr. App. R. 109, the same Court said (p. 111):

"Although appellant was arrested on the spot, and there were no marks to suggest that an instrument had been used, evidence was given of an alleged jemmy having been afterwards found in his house. He was questioned by the police about the jemmy eight days after his arrest, and evidence was given of that questioning. There are other matters also which make the trial unsatisfactory. *Conviction quashed.*"

In the course of the argument, Mr. Justice Avory said, p. 110:

"This Court has laid it down as a rule that the police must not examine

accused persons after they are in custody. *Grayson*, 16 Cr. App. R. 7: 1921."

It is, however, urged that as no objection was taken at the trial to the admission of the statement its irregularity, if any, has been waived, and the learned judge said to the jury:

"Now, he is cross-examined and he is asked about this statement he gave to the police. Now, that statement is only admissible in the first place if it was voluntary. It was not questioned by counsel and I take it no issue arises there, and he made the statement voluntarily to the police explaining where he was on Sunday."

But as was said to the jury by Blackburn, J., in *Rex* v. *Franz* (1861), 2 F. & F. 580, 583:

"My duty is, to see that nothing comes to you except what is legal evidence."

And if, as I think, the evidence of the statement herein was illegal, then unless the doctrine of acquiescence by counsel's action, as laid down in the *Boak* case, can be invoked the verdict cannot stand. After a careful consideration of that decision in regard to this objection I do not think it can be relied upon to sustain the conviction because, first, I do not understand it as extending to mere passivity but only to activity, and here the acquiescence, if it can be deemed such in law, was of the former kind, and, second, in any event the result of the acquiescence, passive or active did, to my mind, unquestionably occasion "substantial wrong" to the accused.

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This vexed question of the effect of failing to take objections at the time of the trial engaged the attention of this Court at its first sittings in *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100, and is referred to at pp. 108, 117, 124, 127, 129 and 130, and while no general rule was attempted to be laid down yet the Chief Justice and I agreed, pp. 108, 127, that:

"It is now well established that in a proper case the Court will not refuse to grant a new trial in a case of felony because counsel for the defence did not take his objection at the trial, yet deliberate withholding of objection to something which might be remedied at the trial if objection had been taken ought to be discountenanced, and where the objection is one having reference to practice and procedure, I think that failure to take it ought, except under very exceptional circumstances, to be an answer to a motion of this kind."

In the case at Bar there is no suggestion of "deliberate withholding" of the objection and it is of grave substance and not one of "practice and procedure," and so it would not be in

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accordance with justice to refuse to entertain it, and after having done so I can only come to the conclusion that a new trial should be ordered because as the Criminal Code says (section 1014(*c*)) "there was a miscarriage of justice" at the former trial.

Such is my opinion, but I cannot, I feel, leave this solemn subject without expressing my regret at the refusal of the inspector of police of the request of the Indians, properly preferred at Port Essington by the Rev. Mr. Pierce, about six or seven hours after the discovery of the body, to investigate the unusual actions of two men in a boat who were then observed going down the river pulling strongly against the tide, towards Point Lambert (*i.e.*, westward towards the sea) and coming from the vicinity of the murder: in the peculiar circumstances of this crime special care should have been taken that no source of information remained unexplored if the means for immediate exploration were available, as it is admitted was the case.

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

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MCPHILLIPS, J.A.: At the outset let me say that I am in complete agreement with my brother MARTIN in holding that the statement of the accused reduced to writing and signed by the accused, who is unable to read, and extracted from the accused in the way it was, cannot be considered to be a voluntary statement. It was obtained in a manner and under circumstances that revolts one and contrary to natural justice. It was coercively obtained and this is putting it mildly indeed. Further, it is palpable that the Crown woefully failed to establish the onus which always rests upon the Crown of shewing in no uncertain way that it was a voluntary statement and the statement prejudiced the accused in the eyes of the jury. With great respect to the learned trial judge, it was used as an instrument to absolutely discredit the veracity of the accused. The accused was gibbeted as having failed to tell the whole story of his movements, the silence as to any of the facts later sworn to by the accused was portrayed to the jury as indicative of false swearing upon the part of the accused, and the conclusion the jury were to arrive at was plainly indicated and that was to

wholly disbelieve the testimony of the accused. To well understand the situation it must be borne in mind that the accused is an Indian, a youth in fact, only 22 years of age, of slight build. We had the opportunity upon the appeal of seeing him, as he was present in Court during the whole argument of the appeal and it was not shewn that he had been ever previously charged or convicted of any offence.

The evidence in the case establishes that on the evening of the day when the murder is supposed to have been committed, he attended the evening service of the church to which he belonged. It is true he went to a dance the night before and he admitted he drank a bottle of whisky, he had got from a boot-legger—no doubt vile stuff. The young woman was unknown to him, she was only 21 years of age, athletic and strong, well fleshed and evidently given to long walks for exercise. The murder exhibited features which lead one to believe that it is very unlikely to have been committed by one man alone —rather that it was the work of two or more, and nothing was established as against the accused to shew that he had been the perpetrator of this ghastly crime. The young woman's raincoat was torn to pieces and the physical wounds upon her head, throat and jaw indicate the exercise of great force, and there was not one indication upon the clothing of the accused or his person shewing that he had been engaged in doing to death this strong and athletic young woman, who undoubtedly resisted the attack upon her with all the force she could exercise. The evidence fails to establish even one particular which could be looked at as demonstrating that the accused was the guilty man. All that the Crown can point to is some spots of blood, few in number, all perfectly explainable by the fact that the accused had cut his finger while at work and it was an explanation that was not unreasonable and the Crown did not dispute the fact that he had cut his finger. There was no evidence that the young woman had been criminally assaulted and there was no evidence of any motive which would actuate the accused to perpetrate this awful crime. The evidence, if it can be called such, is purely circumstantial. In Will's Circumstantial Evidence (1896), at p. 17, we find this statement:

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"The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the *reductio ad absurdum*."

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I wish to state now that in my opinion there is no evidence in the whole case which entitled the jury to find the accused guilty of murder. It cannot be supported having regard to the evidence, and as well upon the ground that there was miscarriage of justice. Admittedly here we have not a case of certainty, there is no witness to testify that the accused did the killing. He is not even shewn to have been at the *locus in quo* —the nearest point at which one witness places him is a very considerable distance from where the body was found, if that was actually the scene of the murder, of which I have doubt. There is evidence that the exact spot where the body was found was searched over, and later the body was found, indicating that it is quite possible that the body was later deposited there, and unquestionably the accused could not have done this. It is susceptible of explanation that other persons who were about at the time were the perpetrators of this ghastly crime. I will later deal with these persons. Therefore, there being no certainty, it comes to moral probability, that is the highest form the Crown can put its case upon, *i.e.*, preponderance of probability, based on moral evidence. I fail to find it in this case. Can the fact alone that a person is seen going in the direction where later it is found that a murder was committed, fix that person with the guilt? That is this whole case and in this case, as we shall later see, there is no evidence even of identification of the accused, and there was error in law in the assumption that there was evidence of identification of the accused. The learned trial judge put the whole case to the jury upon this point. In his charge to the jury, he said:

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"It is purely and simply a question of identity and as to whether or not the officers of the Crown have brought before you the right man to bear his trial."

Now what was the identification? The identification of the accused can only be attempted to be supported by two witnesses, Haldis Sandahl and Rineholt. It really comes to Rineholt alone, as to the accused going past his place. He only sees an

Indian passing through a somewhat obscured window, he does not know him. The claimed identification comes when he is shewn the accused in jail and he says he was the Indian that passed his place that Sunday morning. This class of evidence is plainly inadmissible, and was illegal evidence. The practice is to have the prisoner picked out from a number of men in a room (*Rex* v. *Melany* (1924), 18 Cr. App. R. 2). The young girl's evidence that she saw the accused further up in the village is also illegal evidence, as the foundation for its reception was not, with great respect to the learned trial judge, properly laid. The young girl, although ten years of age, was unsworn, but to entitle this being departed from it was the statutory duty resting upon the judge to elicit by proper enquiries, whether the young girl understood the nature of an oath, and if he came to the conclusion that she did not, then, at his discretion to admit of her giving evidence unsworn. Commonly children at the age of seven have arrived at the age of reason, and understand right from wrong, and at ten years of age, with us children are quite able to testify under oath. Most of the children at that age have been three or four years at school and have had careful religious training. It is inconceivable that in the administration of justice, and in a capital case, evidence be taken unsworn upon such a vital point—identification of the accused. The key of the arch—to establish that the accused could reasonably be the murderer and be taken to the gallows and hanged as being guilty of this most terrible crime. Then, what does Rineholt say?

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"Well, I don't know, I see his face. I don't know what happens, I see his face.. I was thinking something, I won't tell what I was thinking of, to do with this, then I looked what kind of man it is, why it was so short after this girl."

Here we see a suggestion—no doubt the thought that the Indian was actuated by some motive sensual in its nature. Later, Rineholt says:

"I can take any man, girl or woman going along, when they go along, when I hear them come I would like to know who it is. The girl was different, she comes every day and I don't look at what she has got on. Here is this man, at this time of the day, an Indian, I don't never see in the morning at that time. It was a difference. I was thinking of something else and I was looking the man over too, after this I say to myself—'No, the girl not like this anyhow' and I let it go."

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Now, it is this evidence of Rineholt and the unsworn testimony of the young girl upon which the case for the Crown wholly turns—absolutely insufficient in my opinion in any case, to establish guilt—but it is upon this evidence only, that the Crown makes out identification, not identification of the murderer really, but that the accused is guilty because of "the preponderance of probability, resulting from the comparison and estimate of moral evidence. . . . " (Will's Circumstantial Evidence, at p. 7).

A motion was made in this appeal to adduce evidence discovered after the trial—most pertinent evidence in my opinion —and that was that Rineholt said to one Watkinson, the Dominion policeman (Indian police) that within ten minutes of the Indian passing he went by boat in the direction that the young woman had gone and as he claimed the Indian went, but he had put it at the trial about an hour afterwards. Watkinson was called before the Court for cross-examination—also Rineholt, and a Provincial policeman, one Markland (as Markland was with Watkinson when Watkinson interviewed Rineholt). Watkinson swore that Rineholt said he "went in ten minutes"

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and Watkinson had shortly after the interview written this down in his note-book in accordance with his rule. Markland said he did not hear "ten minutes," but it might have been said. Markland's recollection was half an hour to an hour. Rineholt said about an hour after. I would have allowed the further evidence to be adduced but the majority of the Court held otherwise. With great respect to my learned brothers, I still think the evidence vital and it should have been allowed in and would have had material bearing upon the question of whether a new trial should be granted. (*Rex* v. *Pitchforth* (1908), 1 Cr. App. R. 249; *Rex* v. *Murphy* (1921), 15 Cr. App. R. 181; *Rex* v. *Grosvenor* (1914), 111 L.T. 1116).

It is significant that the young woman passed, as he said, every day. He spoke to her that fatal morning. What did he say to her? He had suspicions, if they were actuated by a real moral and protective idea—the preservation of the virtue or life of the young woman. Why did he not act upon the prompting? Was it that that was passing through his mind? Did he go in "ten minutes time"? He may have. Then he would be at

the scene of the murder, and on the Crown's case of "preponderance of probability" he would have seen the accused commit the murder or would at least have heard the frantic cries of the young woman done to death in such a brutal way. Can this testimony of Rineholt be deemed to be corroborative evidence or evidence at all to identify the accused as the murderer, because of any "preponderance of probability"? In my opinion it is valueless.

Then it is a fair matter for remark that the Crown would appear to have gone from the outset upon the theory that the accused was the murderer and apparently disregarded the fact that Rineholt went either in ten minutes or from half an hour to an hour to the neighbourhood of the place of crime. There is no evidence that there was any inquiry here. The accused, though, is taken and stripped of his clothes. There is no like treatment of Rineholt, at least no mention of it. It was the duty of the Crown in my opinion to exhaust the probabilities of the case. It does not rest on this inaction only as there were two other persons that were pointed out to the officers of the Crown in the exact locality where the body of the young woman was found. The Reverend William Henry Pierce of Port Essington was a witness for the defence, being the minister in charge of the United Church at Port Essington. His testimony reads as follows:

"You are the United Church minister at Port Essington? Yes.

"You know the accused Joe Sankey? Yes.

"You remember the day on which Miss Chisholm was murdered or lost at Port Essington? Yes.

"Do you know Charles Rineholt? I do.

"You know Charles Rineholt? I do.

"On the morning immediately after Miss Chisholm's body was found did you have a conversation with Rineholt? I did.

"Where did this conversation take place? Right outside of the mission house.

"Where is the mission house? Just take this pointer, Mr. Pierce, and take a look at the plan first? Is that the front street?

"The front street? Yes, this will be the house up here.

"Mr. *Patmore*: Mr. Pierce points to a place marked 'Pierce's residence.'

"What kind of a fence is there? Picket.

"What colour? Dark grey.

"Where were you with regard to your house when you spoke to Mr. Rineholt? I was inside the fence.

"Where was he? Outside.

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"Now tell the Court just what this conversation was.

"Mr. *Johnson*: Before the witness answers I would like to know if this evidence is tendered in contradiction of Rineholt's story.

"Mr. *Patmore*: In contradiction of Rineholt's story.

"Witness: I saw Mr. Rineholt, he came down from Cunningham's way toward the mission house.

"THE COURT: You are not asked that, you are asked for the conversation.

"Witness: The first question I asked Charlie [Rineholt]: 'Is it true that Miss Chisholm is murdered?' He answered: 'Yes, the body is in the woods.'

"Mr. *Patmore*: Yes? The next question I asked: 'Your house is close to the road going down to the mill, did you see anybody went down before Miss Chisholm?' 'Yes,' he says, 'I saw two strange looking white men, they not look good to me, and after the two strange white men went then the teacher came. About five minutes after the teacher went the Indian man came.' I said, 'You know the Indian man?' 'I know him by sight, I don't know his name.' I said to him, 'Where you went after that yourself?' 'I went in my little boat, went down to the mill to bring some lumber that I got from the mill against the tide.' I said, 'Did you hear any screaming, any noise in the woods as you were going down to the mill, keeping close to the shore against the tide?' 'No.' That is the conversation.

"Cross-examination by Mr. *Johnson*:

"I want to get clear the remark Rineholt made about a girl's body being in the woods. It means that the body was found in the woods on Monday morning.

"And he told you that on Sunday, did he? No, Monday morning.

"THE COURT: This is Monday.

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Mr. *Johnson*: What time? About eight o'clock.

"Wouldn't be any earlier than that? It may be.

"How did you happen to come and talk to Rineholt? In this way, as there is no constable when the thing happened at our village and no magistrate and no councillors, the missionary is to be a leading man in the place so I wanted to find out how the thing happened so I can answer questions regarding the case.

"THE COURT: You were doing a little detective work on your own? Yes.

"Mr. *Johnson*: You took charge of the criminal investigation work connected with the disappearance of Miss Chisholm. You were getting busy on that investigation; you were or you were not, say yes or no? Yes.

"And you were so busy that 29 hours after the girl was murdered you called the attention of Inspector Spiller to two men in a boat rowing upstream on the Skeena River? About ten hours.

"About 29 hours? No, sir.

"The girl was murdered sometime between nine and eleven o'clock Sunday morning, is that correct? No.

"The girl was murdered between nine and eleven o'clock Sunday morning? I say like this about the row boat—

"Never mind, answer my question please. The girl was murdered between nine and eleven o'clock Sunday morning? I did not know that.

"You do know that it was in the afternoon of Monday between two and three o'clock that you talked to Inspector Spiller? I do know.

"It was at that time you saw these two men in a boat rowing against the tide, against the current? Not only me saw the two men.

"It was at that time the men were rowing against the current? Yes.

"And you told Spiller, 'Why don't you go out and arrest those men?' I did.

"Two men connected with the murder of the girl on Sunday morning between nine and eleven o'clock Sunday morning are going to stick around Essington and go out in the Skeena River with a row boat 29 hours after, after the police got there, is that your theory? I—

"Is that your theory, or was it your theory?"

Mr. *Patmore*: Let him explain.

Mr. *Johnson*: Was that your belief? Certainly, in this way, after the man told me two strange men went before Miss Chisholm my thoughts were leading up when I saw the row boat pulling against the tide towards Point Lambert coming out from Cunningham's sawmill my thought was leading on, I could not forget my thoughts, and that is the reason, the Indian people—

"THE COURT: Nobody asked that, you were not entitled to give that.

"I told Inspector Spiller why not you get the gasoline boat and go over to that row boat, it is going down there against the tide and the answer I got from Mr. Spiller, 'I am not afraid, there is four men watching the body.' That was the end of my talk to Mr. Spiller.

"THE COURT: You thought those two men would be hanging around in a boat so everybody could see them? Yes.

"All right. You are excused. Everybody is through with you."

I must say that the learned counsel for the Crown, in my opinion, pursued a course in cross-examination not permissible. Why should there be an attempt to throw discredit upon a clergyman or any reputable citizen who as a loyal subject of His Majesty makes an effort to assist the Crown, protect the public and society and bring possible offenders to justice? The Rev. Mr. Pierce is to be commended for what he did, and with great respect to the learned trial judge, the learned Crown counsel should have been checked in this form of cross-examination, calculated when not checked to prejudice the accused before the jury in this way, that they would disregard the presence of these two men in the case. This is particularly borne out by the question of the learned trial judge himself:

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"THE COURT: You thought those two men would be hanging around in a boat so everybody could see them? Yes.

"All right. You are excused. Everybody is through with you."

It may be that the last question as it is put down, but really an observation, is the observation of the Crown counsel, not the learned judge; in any case, all this constituted prejudice to the accused. Further the suggestion is that these two men would not stay around all that time. The accused did, if staying

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would mean innocence, and fleeing guilt, then the accused is to be credited with the fact that he did not flee the country.

It will be seen that nothing was done about these two men. Why were they not overhauled and proper enquiries, search and examination made of them? It is evident the Provincial inspector of police had formed his theory and would not take any other steps that might have elucidated this tragedy as these two men were in the exact locality of the murder. The Crown formed the opinion that the murder took place not later than eleven o'clock Sunday morning. Why was this opinion formed? Because the Crown's case was that the accused was the murderer, and if it had not been committed before eleven o'clock the accused could not be the murderer. What supports any such deduction? The body was not found until long afterwards and it is in evidence that the exact place where the body was found had been searched over. Was it impossible that the young woman had been abducted and murdered and her body later put where found? It was not at all impossible, and here we have another possible probability that was given no attention whatever.

MCPHILLIPS, J.A.

In my view of course there is no evidence entitling the jury to convict, but if I should be wrong in this, then the conviction is impossible of being sustained by reason of the fact that there was error in law in admitting illegal evidence—that is the statement of the accused not being a voluntary statement, and further, the unsworn evidence of Haldis Sandahl. It is clear that where there has been introduced at the trial evidence not legally admissible the conviction is bad and must be set aside and this is the case though there may be other evidence properly admitted and sufficient to warrant a conviction (*Reg.* v. *Gibson* (1887), 18 Q.B.D. 537; 56 L.J., M.C. 49). In *Allen* v. *The King* (1911), 44 S.C.R 331, the effect of the judgment of the Supreme Court of Canada is very succinctly put by the learned law reporter in the head-note:

"By section 1019 of the Criminal Code it is provided that 'no conviction shall be set aside or any new trial directed, although it appears that some evidence was improperly admitted or rejected or that something not according to law was done at the trial . . . . unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial.'

"*Held*, reversing the judgment appealed from (16 B.C. 9), Davies and Idington, JJ. dissenting, that where evidence has been improperly admitted or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been and cannot be shewn that it did, in fact, so operate, and although the evidence which was properly admitted at the trial warranted the conviction, the Court of Appeal may order a new trial."

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In the *Allen* case Sir Charles Fitzpatrick, C.J., said at p. 341:

"On the whole I am of opinion that the appeal must be allowed, the conviction quashed and a new trial directed, on the ground that important evidence, which, in the circumstances, was inadmissible, was put in by the Crown and this evidence may have influenced the verdict of the jury and caused the accused substantial wrong, and that is the opinion of the majority."

MCPHILLIPS, J.A.

In my opinion this is a case which should be disposed of as in the *Allen* case and a new trial directed. I am, though, of the view that apart from the introduction of illegal evidence which is the present case, and even if I were in error in holding that any of the evidence was wrongly admitted, there was no evidence which warranted the conviction.

MACDONALD, J.A.

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

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

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1927

Jan. 7.

REX v. DE BORTOLI.

Criminal law—Perjury—Three counts—Found guilty on third count only—Third count misquoted by judge in summing up—Effect of on jury—Admissions by accused as witness in former trial.

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The accused, on a charge of perjury of which there were three counts, was found guilty on the third count, namely, that he had sworn "that he did not know whether or not Joe Esposito had kept intoxicating liquor for sale, knowing the same to be false." On his charge to the jury the judge first recited the three counts correctly but in summing up he misquoted the third count by reciting "that he had not given evidence with regard to Esposito having kept intoxicating liquor for sale." Evidence of the accused on a former trial was put in disclosing his own admission that he had been a bartender on Esposito's premises and had sold liquor there at the time in question.

Held, on appeal (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the third count was clearly brought to the jury's attention not only by the evidence but at the beginning of the charge and they were not misled by the accidental slip of the learned judge in summing up. The accused admitted that he served liquor on Esposito's premises as a bartender during the period in question and there was ample evidence upon which the jury could find him guilty.

APPEAL by the accused from a conviction by GREGORY, J. of the 13th of October, 1926, on a charge of perjury. On the trial of a charge of keeping intoxicating liquor for sale against one Joe Esposito, the accused, who had been employed by Esposito, was called as a witness and gave evidence when it was alleged he committed perjury. There were three counts in the indictment. He was acquitted on the 1st and 2nd counts but was found guilty on the 3rd, which was that in giving evidence on the hearing of the case against Esposito he swore that he did not know whether or not Joe Esposito had kept intoxicating liquor for sale between the 1st of January, and the 21st of May, 1926, when in fact he did know that the said Esposito kept intoxicating liquor for sale during said period. The learned judge in addressing the jury read the charge properly in the first place but in summing up he misquoted the 3rd count by saying "that he, the said De Bortoli had not given any evidence during the year 1926 with regard to Joe Esposito dealing in liquor." The evidence given by the accused in a former trial

Statement

was put in by the Crown from which it appeared that he admitted he was a bartender on Esposito's premises and that he sold liquor there between the 1st of January and the 21st of May, 1926.

The appeal was argued at Victoria on the 5th and 6th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Bruce Boyd, for appellant: In summing up the learned judge misdescribed the charge quoting the second count instead of the third. This is misdirection that would substantially mislead the jury. Where there is more than one count the jury must be directed with great care in distinguishing: see *Rex* v. *Twigg* (1919), 14 Cr. App. R. 71; *Allen* v. *The King* (1911), 44 S.C.R. 331; *Gouin* v. *The King* (1926), S.C.R. 539 at p. 544. This error may reasonably be considered to have brought about the verdict and there should be a new trial: see *Rex* v. *Cohen and Bateman* (1909), 2 Cr. App. R. 197 at p. 207; *Rex* v. *Miller* (1923), 32 B.C. 298; *Rex* v. *Wann* (1912), 7 Cr. App. R. 135; *Rex* v. *Hilliard* (1913), 9 Cr. App. R. 171. On a charge of perjury every point must be proved. It is improper to conclude that because "whisky" or "gin" are mentioned that it is intoxicating liquor.

Argument

C. L. McAlpine, for the Crown: The accused admitted in another case that he sold liquor for Esposito. The word "Scotch" is sufficient to assume it is intoxicating liquor: see *Rex* v. *Lachance* (1920), 33 Can. C.C. 170, and the words "whisky" and "beer" are subject to the same interpretation: see *Rex* v. *Hayes* (1924), 43 Can. C.C. 398; *Rex* v. *Scaynetti* (1915), 25 Can. C.C. 40.

Boyd, in reply: The cases referred to by respondent are all liquor cases and do not apply. As to proper proof of it being intoxicating liquor see *Rex* v. *Nelson* (1922), 2 W.W.R. 381 at p. 386.

Cur. adv. vult.

7th January, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant's counsel argued that there was no legal evidence upon which the jury could found their verdict of guilty on the third count. The prosecution was

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for perjury. The indictment contained three counts, only the third need be considered since Crown counsel stated at the close of the case that he had not succeeded in offering sufficient evidence in support of the second. The prisoner was found not guilty on the first and second counts.

The third count charged that the prisoner had sworn in a prior proceeding that he did not know that Esposito had kept intoxicating liquor for sale between the 1st of January and the 21st of May, 1926, knowing the same to be false. On this count the jury found him guilty. There is, in my opinion, ample evidence to support the verdict, in fact I think it conclusive evidence. It may be summarized as follows: The prisoner himself in the said previous proceeding, gave evidence that he had at times sold liquor at Esposito's house in Gore Street up to about the 25th of March, 1926. True, he does not say it was intoxicating liquor. Two detectives were called by the Crown. Ward deposed that he had seen the prisoner on two or three occasions in May, 1926, serving liquor at Esposito's house on Keefer Street, and that on the 19th of May in particular, he had seen the prisoner and Esposito together in the latter's place when the latter in the prisoner's presence was serving liquor, whisky and gin, to customers, and that one of the customers had money in his hand. Tuley, the other detective, was present on this occasion and gave similar evidence to that of Ward. No witnesses were called on the prisoner's behalf, so that the evidence above recited remains uncontradicted, and is the evidence of men whose credibility has not been questioned. I have referred to this evidence for the purpose of shewing not only that there was evidence to go to the jury but particularly as shewing that no miscarriage of justice has occurred by reason of a mistake made by the learned trial judge in his charge to the jury, which is the other ground of appeal.

The learned trial judge summed up and referred to each count separately, stating the substance of each and instructing the jury thereupon. He stated the substance of the third count correctly, but unfortunately a few moments afterwards, he gave a short recapitulation in which by a slip of the tongue he misdescribed the substance of the third count.

The question is, was that a substantial wrong which brought

about a miscarriage of justice? As I have said, he had just before stated the substance of this count correctly. I assume that the jurors were intelligent men and understood what they were about, that is to say, understood what they had to find with regard to each count. I think that if they noticed the slip at all they would pay no attention to it; if they did not notice it, then it could not have affected their decision. The Crown counsel did not notice it, since if he had it would have been his duty to have drawn the judge's attention to it. The prisoner was not represented by counsel. Now, I think it has been stated on more occasions than one that where the evidence is such that the jury could not come to any other reasonable conclusion than that the prisoner was guilty, a wrong done at the trial will not be treated as a substantial wrong causing a miscarriage of justice, unless indeed the wrong be a very grave one. If this case went to a new trial on the same evidence the jury could not reasonably acquit the prisoner on the third count. Moreover, it is difficult to realize that the jury could have been misled by this slip. The indictment had been read over to them at the opening of the trial; each count had been properly stated to them just before this slip occurred, and they had been instructed with regard to each count; there could be no doubt about the evidence upon which they found the prisoner guilty. That evidence had nothing to do, and could have nothing to do with the count as erroneously stated, it could only have to do with the count which had just before been accurately stated, and the fact that the jury found him guilty on the third count to which the evidence was clearly applicable satisfies me that they were not misled, and that there was in fact no miscarriage of justice.

MACDONALD, C.J.A.

The prisoner was without counsel, therefore the learned judge as he himself stated, was bound to watch his interest with the greatest of care. I think he fulfilled that duty. At the close of the Crown's case he had the jury taken from the Court-room and in their absence advised the prisoner as to what his rights were. He told him that he had a right to give evidence if he chose, but that he was not bound to do it. I am satisfied that in one particular his language was wrongly taken down, that the reporter wrote the word "either" for "neither." In fact counsel for the appellant very frankly stated to the Court

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that he had no complaint to make on this score. Moreover, no comment was in fact made by the judge or by anyone else to the jury, and therefore reading the proceedings strictly, the learned judge committed no fault whatever in respect of this advice given in the absence of the jury.

For these reasons I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A. (oral): I would allow the appeal, and grant a new trial, on the ground that there was misdirection. If I may use the expression, I am inclined to shrink from setting aside a verdict of a jury on the ground of misdirection by the learned judge unless it appears to be quite plain that the jury had been misled substantially by his misdirection. In this case I have unfortunately to differ from my brothers in reaching the conclusion that that essential has not been fulfilled, and that though the learned judge did define the three counts of the indictment, the perjury on the three distinct assignments thereof, when he came to succinctly put it to the jury at the end in a graphic manner, he made such (I say it with respect) an unfortunate and substantial error in the way he instructed them upon the third count that it almost necessarily invited a conviction.

And there is this further element to be borne in mind, that this accused did not have the assistance of counsel, and therefore, as the learned judge below said, the theory of our jurisprudence is that the "Bench" in effect acts as counsel for him, and is vigilant to see that nothing is done that would prejudice him. To that must be added this further element, that assignments of perjury are always things of a technicality which it is not easy for a jury to understand. And in this particular case the refinements of these assignments are such that they require a clear definition. I am sorry to have to reach the conclusion that the definition instead of being of that clarity that is essential was left in an obscurity open to probable misconception.

Therefore I would allow the appeal and grant a new trial.

GALLIHER, J.A.

GALLIHER, J.A. (oral): I would dismiss the appeal on both grounds. Dealing with the ground of there being no evidence upon which the jury could convict, that to my mind is beyond

question; I think there was ample evidence upon which they could so do. There is the evidence of the man himself that during the period referred to he was engaged as a bartender serving drinks in this very place.

On the question as to the jury having been misled in any way as to what they were finding, I must say I cannot conceive, after these different counts being read at the beginning of the trial, after the evidence directed to the counts, and the evidence that had been given shewing the words used by the accused in the former trial, and the dealing by the learned judge in his charge with those counts—with all that in view I cannot see how the jury could in any way have been misled as to what they were dealing with when they brought in a verdict on the third count as they have done.

GALLIHER, J.A.

McPHILLIPS, J.A.: I may say that I would, as my brother MARTIN has said, grant a new trial. Dealing with the whole of the evidence of this case, it is not too much to say that the evidence is wholly unsatisfactory. The terminology of the counts is confusing and obscure. The count upon which the accused was found guilty is that the said Alex De Bortoli did not know whether or not Joe Esposito had kept intoxicating liquor for sale between the 1st of January and the 21st of May, 1926. There arises grave doubt in my mind as to the real meaning of the count. The learned judge—with great respect—by a slip in charging the jury, undoubtedly confused the jury. And when we find that, can it be said reasonably that the accused had a fair trial? In my opinion he did not have a fair trial upon the whole case.

MCPHILLIPS, J.A.

Further to dismiss the appeal we are called upon to say that that which happened at this trial could not have the effect of prejudicing the prisoner in the minds of the jury. We do not have to say that it would. The whole question is—may it have done so? *Allen* v. *The King* (1911), 44 S.C.R. 331 makes that perfectly clear, referred to in the present year in *Gouin* v. *The King*, a judgment of the Supreme Court of Canada (1926), S.C.R. 539. The principle is, that anything done at the trial which may have prejudiced the prisoner is ground for the granting of a new trial. And in my opinion there is such a case here.

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And that being so, the proper order would be the direction of a new trial.

In my opinion the conviction should be quashed, and a new trial directed.

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MACDONALD, J.A.

MACDONALD, J.A.: After considering the evidence, I do not think the jury were misled by the verbal slip of the learned trial judge in referring to the third count when summing up the evidence towards the end of his address. It was clearly brought to their attention by the evidence that the accused made the statement in a judicial proceeding that he did not know that Joe Esposito kept intoxicating liquor for sale between the dates named in the indictment. The fact was that he acted as a bartender selling liquor for Esposito, and must have known what he was dispensing. The statement therefore was knowingly false. As to whether it was intoxicating liquor there was uncontradicted evidence that it consisted of whisky and gin. The jury were justified therefore, in drawing the inference that it was intoxicating liquor. I would dismiss the appeal.

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

FOWKES v. MINISTER OF FINANCE.

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1927

March 1.

FOWKES v. MINISTER OF FINANCE

Succession duty—Husband and wife—Transfer of stocks by husband to wife—Dividends paid to credit of husband by wife's instructions—Death of husband—R.S.B.C. 1924, Cap. 244.

Shortly before his marriage in June, 1923, C. G. Denne informed his *fiancee* that he intended to give her his stocks and bonds that were at the time deposited in Lloyds Bank for safe-keeping. The transfer was made shortly after his marriage and his wife at the same time signed a request to the bank to have the dividends and interest paid to her husband's account. It appeared that the letter from the husband to the bank directing the transfer included a statement that it was his wish that the dividends should be deposited to his credit, and his will dealt with the dividends as though they were his own. During his married life the dividends were used for the joint benefit of husband and wife. A petition of the administrator of C. G. Denne's estate for a declaration that said stocks and bonds were not liable to succession duty was dismissed.

Held, on appeal, affirming the decision of MURPHY, J. (MARTIN, J.A. dissenting), that deceased retained an interest in the gift to his wife to the extent of the dividends to be derived therefrom and said stocks and bonds were subject to succession duty.

APPEAL by plaintiff from the order of MURPHY, J. of the 21st of September, 1926, dismissing the petition of Frederick G. Fowkes, the administrator of the estate of C. G. Denne, deceased, for a declaration that the estate of the above-named deceased is not liable for succession duty in respect of certain stocks and bonds. Denne became engaged to his wife on the 1st of June, 1923, and they were married on the 23rd of June, 1923. On their becoming engaged he immediately informed her that he intended to settle certain bonds and stocks on her. In pursuance of this he wrote to Lloyds Bank Limited, where his securities were deposited, on the 6th of July, 1923, instructing them to transfer all his securities to his wife and on the 25th of July the bank wrote a letter acknowledging receipt of his letter and setting out the securities, *i.e.*, £300 National War Loan Bonds 1929; £3,650 Funding Loan 1960/90; £1,163:3:5 Queensland Stock 1930/40; £1,228:15:1 India Stock; and £1,800 Victory Bonds, at the same time giving him instructions as to making the transfer. On the 15th of August, 1923,

Statement

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transfers were duly executed and sent to Lloyds Bank Limited and on the same date the wife signed a request to the bank to have the dividends and interest paid to her husband's account. The wife in giving her evidence stated that deceased declared emphatically that the securities were hers absolutely and that the dividends and interest were hers and he received the dividends and interest for disbursement for their joint maintenance. The deputy minister of finance issued a statement of the succession duty as follows: (1) Value of estate (which was a property at Sidney, B.C.) $8,952.35 and (2) assets transferred and liable under section 5(*c*) (being the stocks and bonds above transferred to his wife) $36,864.76. The petition prayed that the transfer to the wife of stocks and bonds was made in England and was *bona fide* and was not liable to succession duty.

Statement

The appeal was argued at Victoria on the 20th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Mayers, for appellant: Before marriage he gave securities valued at $36,000 to his future wife. She was the absolute owner to the entire exclusion of the donor: see *Attorney-General* v. *Seccombe* (1911), 2 K.B. 688; *Commissioner of Stamp Duties* v. *Byrnes* (1911), A.C. 386 at p. 392. There is no question that he gave the *corpus* to her. To take any of these assets from her there must be a contract to give him the right to demand: see *In re Cochrane* (1906), 2 I.R. 200.

Argument

Maclean, K.C., for respondent: If he gets any benefit from the property it is liable to succession duty under the Act: see *Attorney-General* v. *Worrall* (1895), 1 Q.B. 99. In this case deceased retained to himself the whole enjoyment of the interest and dividends that were paid on these securities.

Mayers, in reply: If the wife had become bankrupt or if she had sold the bonds he would have had no recourse whatever. She could do whatever she liked with these securities.

Cur. adv. vult.

1st March, 1927.

MACDONALD, C.J.A.

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

MARTIN, J.A.: After a careful perusal of the decision of the Privy Council in *Commissioner of Stamp Duties* v. *Byrnes* (1911), A.C. 386, I am of opinion that the facts before us constitute this to be an even stronger case in favour of the appellant, and therefore the principles of that decision entitle him to succeed.

GALLIHER, J.A.: The onus of shewing that the property in question falls within the provisions of the Succession Duty Act, R.S.B.C. 1924, Cap. 244, Sec. 5, Subsec. (*c*) rests upon the Crown. Has that onus been satisfied?

"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:—

"(*c.*) Any property taken as a *donatio mortis causa*, made by any person dying on or after the first day of May, 1899, or taken under a disposition made by any person so dying, purporting to operate as an immediate grant or gift *inter vivos*, whether by way of grant, transfer, delivery, declaration of trust, or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, including property taken under any grant or gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the grant or gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

GALLIHER, J.A.

Frederick George Fowkes is the administrator of the estate of Cecil Gordon Denne, deceased, and it is sought by the Crown to charge succession duty on certain personal property which had been transferred by the deceased during his lifetime to his wife, consisting of stocks and bonds to the value as assessed of $36,864.76. Against this the administrator has petitioned the Court for a declaration that the said stocks and bonds are not liable for succession duty.

The widow, Mary Cecilia Denne, has filed an affidavit in support of the petition and has been cross-examined thereon. This affidavit is to the effect that she became engaged to the deceased on the 1st of June, 1923, and they were married on the 23rd of the same month. That shortly after the engagement and before the marriage the deceased informed her that he was going to settle on her the stocks and bonds in question. This was carried out some time in August through Lloyds Bank Limited, in London, England, where the securities were being

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held on behalf of the deceased. The wife signed an authority to the bank in these words:

"I hereby request and authorize you to credit the dividends and interest from time to time falling due and becoming payable on the stocks and shares registered in my name to the account of Mr. Cecil Gordon Denne with yourselves."

This authority was requested by the bank and was forwarded to them together with all papers necessary to transfer the stock on August 15th, 1923, and was executed on the same date.

The Crown contends that this was not a gift of property of which *bona fide* possession and enjoyment was immediately assumed by the donee, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

The explanation of why this authority was given in respect of the interest and dividends is, that the deceased when he informed her that he had written to the bank to have the transfer made on July 6th, 1923, suggested that she arrange to have the dividends on the securities paid into his account at the bank, to which she assented, partly because she had no separate bank account and partly because she intended to use them for the joint maintenance of the deceased and herself, but denies that there was at any time any bargain or agreement between them as to the dividends or that the transfer was conditional or otherwise than absolute.

GALLIHER, J.A.

This letter of 6th July cannot be found, but in the reply from the bank dated 25th July, 1923, in answer thereto, and which is before us as Exhibit A, the bank state:

"We note you [C. G. Denne] wish all the dividends on the above stocks credited to your account, and therefore enclose a letter of authority . . . for favour of Mrs. Denne's signature."

Among the bonds and stocks intended to be transferred there were £260 War Savings Certificates which the bank in their letter of July 25th said could not be transferred and suggested another method of dealing with them and reinvesting the money in the name of Mrs. Denne, and in replying to this item on August 15th, the deceased, in effect, said he would not bother about this item "as the small amount of dividends does not signify in their case."

Opposed to the wife's affidavit that the gift was absolute is the fact that the deceased when he wrote the bank about having

the transfer made, apparently requested that the dividends should be paid into his account; that they were afterwards so paid; that the wife never in any way dealt with them; that in his will, dated March 10th, 1924, he conveys to his wife "dividends there may be on investments as transferred to her name," and the significance that may be attached to the words, I have quoted in the preceding paragraph.

The case in favour of the petitioner which I think most in point is, *Commissioner of Stamp Duties* v. *Byrnes* (1911), A.C. 386. That case was decided under a clause in the New South Wales Stamp Duties Act, 1898, similar to ours, but I think the case may be distinguished on the facts. There, the conversation as to payment of rents from the properties purchased for the sons took place after the transaction was closed, and there were no other attendant circumstances such as here. Here, during the negotiations for the transfer the deceased wrote to the bank requesting them to pay the dividends to his account; during the same period he and his wife agreed that should be done, and the papers for carrying that out prepared and forwarded with the transfers, and the whole transaction carried out at one and the same time. Again in his will at a later date, he deals with these dividends or such as may be as his own, and the further significance there may be attached to his letter in which he stated to the bank that he would not change the nature of the war savings certificates as the small amount of the dividends from that source did not signify.

GALLIHER, J.A.

On the whole, I am of the view that the deceased retained an interest in the gift to the extent of the dividends to be derived therefrom and that the learned trial judge came to the right conclusion. The appeal should be dismissed.

MACDONALD, J.A.: To escape liability for succession duty, there must be a *bona fide* transfer of the possession and enjoyment of property twelve months before death. There was not such a transfer in this case. On the facts, I find that the dividends were not transferred; enjoyment thereof was withheld. That is the true interpretation of the correspondence and it is confirmed by the will. I would dismiss the appeal.

MACDONALD, J.A.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Crease & Crease.*
Solicitor for respondent: *J. W. Dixie.*

MORRISON, J.

1927

March 10.

ANGLICAN SYNOD v. RUSSELL AND MAY.

Practice—Mortgage—Foreclosure—Insufficiency of mortgaged property—Default of defence—Motion for judgment—Immediate foreclosure.

ANGLICAN SYNOD *v.* RUSSELL AND MAY

On a motion for judgment in default of defence in a foreclosure action, judgment for immediate foreclosure absolute will be granted upon the Court being satisfied by evidence that the value of the property is insufficient to pay the amount of principal due on the mortgage and the wasting nature of the property is such that the longer the delay the greater the loss.

MOTION for judgment in default of defence. The action was for foreclosure of a mortgage of real estate, and the writ, statement of claim, and notice of motion all asked for immediate foreclosure without any period of redemption. The pleadings alleged, which was verified by affidavit, that the plaintiff's security was very inadequate, that the interest was about a year and a half in arrear and that the income of the mortgaged property was insufficient to pay accruing interest, taxes, and insurance. The defendants, executors of the deceased mortgagor, had entered an appearance but there was default in defence. Heard by MORRISON, J. at Victoria on the 10th of March, 1927.

Statement

D. M. Gordon, for plaintiff: The Court has power to abridge the six months usually allowed for redemption or to decree foreclosure absolute in the first instance, if a proper case is shewn: see Bell and Dunn on Mortgages, p. 243 and cases there cited. We ask for immediate foreclosure. The inadequacy of the security and the wasting nature of the property are good grounds. It is practically certain that the mortgagee will have to take over the property eventually, and the longer it is delayed the greater its loss will be. If it acquires title now, by repairing before the property depreciates too much, it may be able to effect a sale.

Argument

No one appeared for defendants.

MORRISON, J.: There will be an order granting foreclosure absolute in the first instance.

Judgment

Order granted.

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March 1.

WINTER v. CAPILANO TIMBER COMPANY LIMITED AND J. A. DEWAR COMPANY LIMITED.

WINTER v. CAPILANO TIMBER CO.

Landlord and tenant—Lease—Notice of forfeiture for non-payment of rent —No previous demand for payment—Whether lease under Short Form of Leases Act—Sub-lease by lessees—Power to give—R.S.B.C. 1924, Cap. 234, Sec. 3.

The Coast Shingle Company Limited having a lease of certain premises on False Creek from the J. A. Dewar Company Limited and being in financial difficulties, its creditors met in April, 1925, and appointed a committee to act for them. The committee then arranged to sub-lease said premises on False Creek to the Capilano Timber Company Limited for three months at $1,000 a month, said Company entering into possession on the 9th of July, 1925. On the 4th of June, 1925, the J. A. Dewar Company served notice of forfeiture of the lease to the Coast Shingle Company for non-payment of rent (the Coast Shingle Company being 8 months in arrears) but did not then make a re-entry. The Capilano Timber Company then having difficulty in carrying on owing to obstruction from the J. A. Dewar Company, entered into negotiations with the J. A. Dewar Company and on the 1st of October following the J. A. Dewar Company executed and delivered a lease of the premises to the Capilano Timber Company. The Capilano Timber Company then refused to recognize the Coast Shingle Company and the plaintiff as trustee of the Coast Shingle Company was authorized to bring action for a declaration that the Coast Shingle Company's lease was a good and subsisting one as there had been no legal demand for rent and no lawful re-entry that they were entitled to possession of the premises and to rent under the sub-lease to the Capilano Company. The action was dismissed.

Held, on appeal, reversing the decision of MCDONALD, J. in part, that there was no legal re-entry on the premises by the J. A. Dewar Company until delivery of its lease of the 1st of October to the Capilano Timber Company and the Capilano Timber Company must be deemed to have been the tenants of the Coast Shingle Company and been in possession under its agreement with said Company until the lease of the 1st of October terminated it. The Capilano Timber Company is therefore liable for three months' rent, less $600 for repairs.

Per MACDONALD, C.J.A. and GALLIHER, J.A.: A lease not in the form given in the statute nor expressed to be made pursuant thereto, although containing four or five covenants and a proviso which resemble the short forms mentioned in the Act, should not be construed as coming within the words "referring thereto" in section 3 of the Short Form of Leases Act. The fact that new tenants were in as tenants of the lessee at the time the new lease was granted did not militate against re-entry and the fact that the lessors elected to forfeit the lease for a

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wrong reason could not preclude them, if they can shew, as was done here, that there was another good ground of forfeiture.

Per MARTIN and MACDONALD, JJ.A.: In order to incorporate the Act with the lease it is sufficient if by any form of expression the Act be referred to as indicating the intention that the lease should be affected by it. In considering whether the forms used should be regarded as a reference to the Act, two questions should be borne in mind and distinguished, first, whether the words employed are sufficient to indicate the intention of the parties; second, whether any deviation from the words used in Column I., not expressly permitted by clause 4 in the second schedule gives the parties the benefit of the corresponding long form. Where, as in the present case, the words used in the covenants are, with possibly one exception, those set out in Column I., with authorized exceptions and qualifications, there is sufficient evidence of intention that the lease should be affected by the Act.

APPEAL by plaintiff from the decision of MCDONALD, J. of the 20th of September, 1926, in an action for a declaration that the plaintiff as trustee of the Coast Shingle Company Limited is entitled to possession of the premises comprised in a certain lease; that the Capilano Timber Company Limited give up possession; pay $1,000 per month while in possession or in the alternative, damages. The premises in question are on False Creek on which is situate a shingle plant and was first leased by the J. A. Dewar Company Limited from the Canadian Pacific Railway Company in 1910. The J. A. Dewar Company sub-leased the premises on the 6th of December, 1923, to the Coast Shingle Company. The last rent was paid on the 1st of September, 1924. In the spring of 1925 the Coast Shingle Company being in financial difficulties, the creditors met and a committee was appointed amongst them to take such action as they considered most beneficial for all concerned. One Johnson, the managing director of the Capilano Timber Company, was a member of the committee and in considering offers for a sub-lease of the premises they agreed to sub-lease to Johnson at $1,000 a month, for three months, on behalf of his Company, and Johnson went into possession. On the 4th of July, 1925, the J. A. Dewar Company gave the Coast Shingle Company notice of forfeiture, as they were eight months in arrears for rent. The J. A. Dewar Company then put obstacles in the way to prevent Johnson from carrying on, and he then entered into verbal negotiations with the J. A. Dewar Company,

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and such negotiations finally resulted in the execution of a lease of the premises dated the 1st of October, 1925, from the J. A. Dewar Company to the Capilano Timber Company Limited. Johnson then paid no more attention to the Coast Shingle Company, and paid no rent (except $100 at the beginning of his arrangement with them) and ignored any right that said Company or its trustee had in the premises. The action was dismissed.

Statement

The appeal was argued at Victoria from the 13th to the 18th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Alfred Bull, for appellant: The Coast Shingle Company paid rent until the 1st of September, 1924. It continued operating until April, 1925, but getting into financial difficulties paid no more rent. The creditors then had a meeting and appointed a committee to consider what should be done, one Johnson, managing director of the Capilano Timber Company Limited being one of the committee. After considering several applications for a sub-lease of the premises it was finally subleased to Johnson of the Capilano Timber Company at $1,000 a month, and he went into possession on the 9th of July, 1925. Prior to this on the 4th of June, 1925, the J. A. Dewar Company gave notice to the Coast Shingle Company of forfeiture of the lease. After Johnson went into possession the J. A. Dewar Company through its agents the Cotton Company Limited (lessees of an adjoining property) attempted to interfere with Johnson's operations. First, it cut off the water supply, and when Johnson managed to get water from another source it threatened to close the road giving access to Johnson's premises. We submit the notice of forfeiture was bad: (1) because there was no agreement as to forfeiture and (2) if there was a term in the lease that could be so construed, a mere notice is not sufficient if not followed by re-entry on an action for ejectment. The lease contained some of the words of the short form but was not made pursuant to the Short Form of Leases Act. There is neither notice under the rule nor a cross-appeal so we are entitled to treat the cross-appeal as abandoned: see *National Society for the Distribution of Electricity by Secondary Genera-*

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tors v. *Gibbs* (1900), 2 Ch. 280. After being threatened in carrying on his work Johnson obtained an assignment of the J. A. Dewar Company's lease from the Canadian Pacific Railway Company so the J. A. Dewar Company were no longer interested. But we say the Capilano Timber Company owe us three months' rent under the sub-lease obtained from us: see Williams on Landlord and Tenant, 1922, pp. 729-30; *Doe d. Darke* v. *Bowditch* (1846), 8 Q.B. 973. As to the lease not being under the Short Form of Leases Act see *Delamatter* v. *Brown Brothers Co.* (1905), 9 O.L.R. 351 at p. 361; *Clark* v. *Harvey* (1888), 16 Ont. 159; *Davis* v. *Pitchers* (1875), 24 U.C.C.P. 516; *Lee et al.* v. *Lorsch* (1875), 37 U.C.Q.B. 262. The judge below referred to *The King* v. *The Vancouver Lumber Co.* (1924), 33 B.C. 468 at p. 471 and on appeal (1925), 36 B.C. 53. To shew the strictness of construction in Ontario see *Alexander* v. *Herman* (1912), 21 O.W.R. 461; and Williams on Vendor and Purchaser, 3rd Ed., Vol. I., p. 127. Notice of forfeiture was given but nothing further was done. We had our watchman until the Capilano Timber Company went into possession: see *Moore* v. *Ullcoats Mining Company, Limited* (1908), 1 Ch. 575. There was no re-entry until the 1st of October, 1925, when Johnson made his arrangement with Dewar. They are estopped from disputing our title by what they did when they obtained possession from us.

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Mayers, for respondent: On the construction of the lease it is almost identical with the Act, and what is different is of no effect. The seven covenants are in the same order and in the same form as in the Act. He says the judge has no right to go into the intention of the parties but we submit that he has: see *Crozier* v. *Tabb et al.* (1876), 38 U.C.Q.B. 54; *Davis* v. *Pitchers* (1875), 24 U.C.C. P. 516 at pp. 521 and 524; *Lee et al.* v. *Lorsch* (1875), 37 U.C.Q.B. 262; *Barry* v. *Anderson* (1891), 18 A.R. 247 at p. 249. As to rectification to bring the lease under the Short Form of Leases Act see *Gwyn* v. *Neath Canal Co.* (1868), L.R. 3 Ex. 209 at p. 215; *Wilson* v. *Wilson and others* (1854), 5 H.L. Cas. 40 at pp. 66-8; *Fordham* v. *Hall* (1914), 20 B.C. 562 at p. 567; *Wight* v. *Dicksons* (1813), 1 Dow 141 at p. 147; *Roe, Lessee of Bamford* v. *Hayley* (1810), 12 East 464. Where adding a word gives

sense to the whole transaction see *In re Daniel's Settlement Trusts* (1875), 1 Ch. D. 375 at p. 377; *Bing Kee* v. *Mackenzie* (1919), 3 W.W.R. 221 at p. 227. The Coast Shingle Company is precluded from denying that this lease is under the Short Form of Leases Act as it induced the J. A. Dewar Company to cancel the former lease to the False Creek Shingle Company Limited, that lease being precisely the same as this one. They cannot take advantage of their own wrong. In the next place no demand was necessary as the Coast Shingle Company had abandoned the property. No watchman was there at all. This was merely an attempt by the creditors to get something out of the wreck. That no demand was required see *Manser* v. *Dix* (1857), 8 De G. M. & G. 703. The Coast Shingle Company by its conduct and of those interested is precluded from complaining of the notice of forfeiture. It was eight months in arrears in payment of rent. Its only string is the action of the committee. When a forfeiture has taken place no notice is required: see *Baylis* v. *Le Gros* (1858), 4 C.B. (N.S.) 537; *Hely* v. *The Canada Company* (1873-4), 23 U.C.C.P. 20 and 597; *O'Hare* v. *McCormick* (1871), 30 U.C.Q.B. 567. There was justification for the forfeiture and it makes no difference what was actually said or done: see *Baillie* v. *Kell* (1838), 4 Bing. (N.C.) 638 at p. 651; *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339 at p. 352; *Ridgway* v. *The Hungerford Market Company* (1835), 3 A. & E. 171 at p. 178; *Crowther* v. *Ramsbottom* (1798), 7 Term Rep. 654 at p. 657; *Etherton* v. *Popplewell* (1800), 1 East 139; *Phillips* v. *Whitsed* (1860), 29 L.J., Q.B. 164 at p. 165. Irrespective of arrears there are two independent causes justifying forfeiture: (a) On the ground of insolvency; (b) repudiation of the lessor's title. They were insolvent in April, 1925, and they were declared bankrupt in September following. As to repudiation of lessor's title see *Doe Daniels* v. *Weese et al.* (1849), 5 U.C.Q.B. 589 at p. 591; *Doe Nugent* v. *Hessell* (1846), 2 U.C.Q.B. 194; *Doe Clause* v. *Stewart* (1845), 1 U.C.Q.B. 512. There are many English cases on this question commencing with *Doe dem. Dillon* v. *Parker* (1820), Gow 180 until *Vivian* v. *Moat* (1881), 16 Ch. D. 730: see also *Glenwood Lumber Company* v. *Phillips* (1904), A.C. 405 at p. 408. The

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two causes for forfeiture justified re-entry and Ellis for the J. A. Dewar Company did re-enter in April, 1925: see *Hey* v. *Moorhouse* (1839), 6 Bing. (N.C.) 52. Ellis cut off the water and that constitutes a re-entry: see *Doe* v. *Wood* (1819), 2 B. & Ald. 724 at p. 742. The next point is that the plaintiff has no title to sue. Johnson was in fact not on the committee appointed by the creditors of the Coast Shingle Company and his taking over was subject to a proper contract: see *Chillingworth* v. *Esche* (1924), 1 Ch. 97; *Dean and Chapter of Rochester* v. *Pierce* (1808), 1 Camp. 466; Everest and Strode on Estoppel, 3rd Ed., p. 200; *Mayor, &c., of Poole* v. *Whitt* (1846), 15 M. & W. 571 at p. 577; *Delamatter* v. *Brown Brothers Co.* (1905), 9 O.L.R. 351; *Doe d. Darke* v. *Bowditch* (1846), 8 Q.B. 973.

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Bull, in reply: As to the lease being under the Short Form of Leases Act see *Doe d. Wyndham* v. *Carew* (1841), 2 Q.B. 317. They are not entitled to rectification: see Halsbury's Laws of England, Vol. 21, secs. 37, 39, 40 and 52; *Fordham* v. *Hall* (1914), 20 B.C. 562 at p. 564; *Elwes* v. *Elwes* (1861), 3 De G. F. & J. 667. He says no formal demand could be made, but some one was there continually until the 5th of July, 1925: see *Manser* v. *Dix* (1857), 8 De G. M. & G. 703; Halsbury's Laws of England, Vol. 18, p. 536, note (*f*). That he can support forfeiture on grounds of bankruptcy and repudiation see Woodfall's Landlord and Tenant, 20th Ed., 387; Foa on Landlord and Tenant, 6th Ed., 372; *Jones* v. *Carter* (1846), 15 M. & W. 718 at p. 725; *Arnsby* v. *Woodward* (1827), 6 B. & C. 519 at pp. 523-4. He says we have no title to sue, but see section 6 of the Bankruptcy Act (6 C.B.R. 23). We are in any event entitled to three months' rent.

Cur. adv. vult.

1st March, 1927.

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MACDONALD, C.J.A.: Plaintiff is the authorized trustee in bankruptcy of the Coast Shingle Company Limited. The defendant, J. A. Dewar Company Limited, the head lessee, granted a sub-lease to the said Shingle Company in 1923, of the property in question herein, under which the Shingle Company entered and expended, as they allege, a large sum of money in rebuilding a shingle mill thereon, and in the purchase of

machinery therefor, which by the terms of their lease they were at liberty to remove at the expiration of the term.

Early in 1925 the Shingle Company had become involved financially, and in April of that year called their creditors together. The creditors appointed a committee to act for them in the premises. At that time there were arrears of rent owing to the lessors amounting to some $1,800. The lessors, the Dewar Company, on the 4th of June, 1925, served a notice of forfeiture of the lease on the Shingle Company for non-payment of the rent but did not then make a re-entry. The committee of creditors on July 9th, let the defendant the Capilano Timber Company Limited, into possession of the mill and premises, and agreed or promised to obtain a lease to them from the Shingle Company at a rental of $1,000 per month. There is no evidence of the committee's authority to do this, but sometime afterwards a lease was in fact prepared by the Shingle Company which the Capilano Company refused to accept or execute. The lessors relying, presumably, on the said notice of forfeiture, agreed to lease the property to their co-defendant, and a lease was accordingly executed and delivered on the 1st of October of that year. The plaintiff was appointed authorized trustee in September, 1925, and on 26th February, 1926, Frank King, an officer of the Shingle Company, was authorized by order of the Court to bring this action for, *inter alia,* a declaration that the Shingle Company's lease was a good and subsisting one; that there had been no legal demand for the rent and no lawful re-entry upon the premises. The Dewar Company meet this by saying that the proviso in the Shingle Company's lease for re-entry falls under the Act respecting the Short Form of Leases, and that under that Act demand was dispensed with. They also allege that the lease to the Capilano Company was a sufficient re-entry. They also set up their right to re-enter without demand and without common law formalities under a proviso in the lease which does not depend for its construction upon the said Act.

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The Short Form of Leases Act provides that:

"Where a lease of lands made according to the form in the First Schedule, or any other lease of lands expressed to be made in pursuance of this Act or referring thereto, or expressed to be made in pursuance of the Leaseholds Act, or referring thereto, contains any of the forms of words contained in Column I. of the Second Schedule, and distinguished by any number

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therein, such lease shall have the same effect and be construed as if it contained the form of words contained in Column II., of the Second Schedule, and distinguished by the same number as is annexed to the form of words used in such lease; but it shall not be necessary in any such lease to insert any such number."

The model lease set out in the schedule is expressed to be made in pursuance of the Act, it contains in Column I. short forms of covenants and provisoes and in Column II., the equivalent of these at length. The proviso for re-entry in the short form reads as follows:

"Proviso for re-entry by the said lessor on non-payment of rent, or non-performance of covenants."

The corresponding long form dispenses with a formal demand and this is relied upon by the lessors as entitling them to re-enter without demand. The lease is not in the form given in the statute, nor is it expressed to be made pursuant thereto, but counsel for the lessors argued that because the lease contains four or five covenants and a proviso which resemble the short form mentioned in the Act, that that circumstance must be taken to be a reference to the Act. The language of the statute must receive its ordinary grammatical meaning, unless there be something in the context which is repugnant thereto, or which requires to be given some other meaning. The object of the Act was to shorten leases by providing that a short form of expression might be taken to represent a longer form. A stranger to our legislation reading the lease in question would get no inkling from it that such an Act as the Act respecting the Short Form of Leases existed, and could interpret it only on its own language.

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We were referred to several authorities upon the construction of this Act or of similar Acts, in this and other Provinces, but I need only refer to two of them. In *Davis* v. *Pitchers* (1875), 24 U.C.C.P. 516, the lease followed much more closely than the one here, the short forms in the Act, but this was not relied on. It referred, however, to a repealed Act instead of to that which consolidated it under a new title. The Court held that the reference to the repealed Act could be taken as a reference to the consolidated one and referred to legislation shewing that a consolidated Act is not to be regarded as a new law but a re-enactment of an old one. The like view was taken of the

lease in question in *Lee et al.* v. *Lorsch* (1875), 37 U.C.Q.B. 262. In none of the cases under similar statutes is it even suggested that an Act is "referred to" because the indenture incorporates, in some of its parts, language practically identical with some of the short forms contained in the Act. A demand for the rent was therefore not dispensed with and re-entry for non-payment of rent was not legally made.

But the lease contains another proviso, which declares that if the lessees shall become insolvent the lease shall, at the lessors' option, become void and cease to exist, and that they may re-enter. The notice of forfeiture served on the 4th of June is expressed to be a forfeiture for non-payment of rent only, and therefore has no bearing upon the question now under consideration. The lessors, however, rely upon the re-entry brought about by the lease to the Capilano Company as sufficient to effect the forfeiture under this proviso, and argue that none of the common law formalities attaching to re-entry for non-payment of rent need have been observed. The insolvency, I think, was sufficiently proven, *The Queen* v. *Saddlers' Company* (1863), 10 H.L. Cas. 404, and was indeed scarcely contested. The fact that the Capilano Company were in as tenants of the lessees at the time this lease was granted, would not militate against the re-entry, *Baylis* v. *Le Gros* (1858), 4 C.B. (N.S.) 537.

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The lessors elected to forfeit the lease but for the wrong reason, though this, I think, cannot conclude them if they can shew as they have done here, that there was another and a good ground for forfeiture though they did not profess to act upon it when they re-entered. *Ridgway* v. *The Hungerford Market Company* (1835), 3 A. & E. 171; *Phillips* v. *Whitsed* (1860), 29 L.J., Q.B. 164; *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339.

The defendants pray by way of counterclaim for rectification of the lease so as to bring it under the Short Form Act. There is no evidence to support this prayer. There is no evidence of an antecedent agreement, either written or verbal, nor of mutual mistake. The Short Form Act was not in the mind of either of the parties to it. It was not mentioned and was obviously never thought of. The solicitor who drew it said:

"Well, as to these other clauses, which are obviously taken from the

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Short Form Act, I naturally assumed that those clauses being obtained from the Short Form Act, would bring the lease under the scope of the Short Form Act."

He copied the lease from a former one, and in another place admits that he and the representative of the Shingle Company made no reference to the Short Form Act and that he himself thought nothing about it. The solicitor who settled the lease on behalf of the Shingle Company was not called as a witness. That which they may have intended when not expressed or admitted cannot be inserted in the lease by way of rectification. In these circumstances, the counterclaim must fail.

The plaintiff also claims (in the event of his failing to maintain the lease) the unpaid rent under the arrangement made by the committee of creditors with the Capilano Company. There is nothing to shew that the committee had authority to make any arrangement of the kind, but the evidence discloses this fact: that a lease from the Shingle Company to the Capilano Company was prepared in the terms upon which the defendants say the arrangement was entered into. Johnson, who represented the said defendant, the Capilano Company, admits that the arrangement with the committee prior to entry was that his Company was to be given a lease for three months at a rental of $1,000 a month payable in advance, with a deduction therefrom of $600 for replacement and repairs. That the Shingle Company have shewn a willingness to accept that arrangement is evidenced by the draft lease which they submitted to the Capilano Company. There is no evidence of formal resolutions of either company in this connection, but as both appear to have been agreed upon the terms of the arrangement it is unnecessary to inquire into the matter further. On this arrangement the Capilano Company must be deemed to have been the tenants of the Shingle Company. They have paid no rent and though the promised lease was not accepted they stayed in possession under that agreement until the October lease put an end to it. They have set up a number of deductions therefrom, other than those above referred to, as having been agreed to by the chairman of the creditors' committee after entry. There is no evidence of authority on his part to vary the original arrangement. There-

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fore the amount of rent due to the plaintiff from the Capilano Company is the sum of $2,400, for which I think there should be judgment for the plaintiff. To this extent then the appeal is allowed.

MARTIN, J.A.: I agree with my brother M. A. MACDONALD.

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

MACDONALD, J.A.: The first question to decide is whether or no the lease from the J. A. Dewar Company Limited to the Coast Shingle Company Limited, dated December 6th, 1923, should be regarded as made pursuant to the Short Form of Leases Act, Cap. 234, R.S.B.C. 1924. If it is, the notice for forfeiture given by the lessor for non-payment of rent on June 4th, 1925, was valid, although previous demand for payment was not made in compliance with common law requirements. It must, I think, be conceded that to hold it as within the Act is going beyond the decisions dealing with the same point on facts somewhat similar. The lease was prepared and approved by solicitors familiar with the Act and with the constant practice of inserting the familiar phrase in "pursuance of the Leaseholds Act" at or near the beginning of the document. The fact that this reference is omitted and that it is described as a "Memorandum of Agreement" might lead one to conclude, particularly as it contains many special clauses and conditions, that it was thought advisable for some reason not to bring it within the Act. It is comparatively easy to find in such cases as *Lee et al.* v. *Lorsch* (1875), 37 U.C.Q.B. 262, and *The King* v. *The Vancouver Lumber Co.* (1924), 33 B.C. 468, and (1925), 36 B.C. 53, where there was a clear but inaccurate reference to an Act respecting Short Forms, that the intention was clear but quite different, where, as here, in searching the document itself one has to extract intention from an incomplete use of the symbolic words set out in Column I. of the Second Schedule to the Act.

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I do not regard the oral testimony given in coming to a conclusion on this point. We must not draw any conclusions as to the intention of the parties except from indications found in the document itself. The submission by the respondent is, that

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because the lease contains a number of covenants similar to those found in Column I. of the Second Schedule it affords, not only evidence of intention, but constitutes a sufficient reference to the Act to bring it within the words "or referring thereto" used in section 3 thereof. A comparison of the covenants as they appear in the lease with the form of words in Column I. of the Second Schedule may be made from the following, only the words not italicized being contained in Column I. I do not note the omission or inclusion of the words "that" or "said," regarding them as immaterial.

1. "And the lessee covenants with the lessor to pay rent." 2. "And to repair *ordinary wear and tear, and damage by fire, water or tempest excepted.*" 3. "And *that* the lessor *or its agents* may enter and view state of repair." 4. "And that the lessee will repair according to notice *subject as aforesaid.*" 5. "And *the lessor covenants with the lessee* to pay *all and any* taxes *which may be assessed against the said lands, save and except the proportion of said taxes which apply to or are assessed upon the improvements placed on the said lands by the lessee. And the lessee will pay taxes on the lessee's improvements on said lands and water rates.*" 6. "And will not assign without leave *which leave shall not be unreasonably withheld in the case of a reputable assignee.*" 7. "And will not sublet without leave *which leave shall not be unreasonably withheld in the case of a reputable assignee.*" 8. "Proviso for re-entry by the lessor on non-payment of rent or non-performance of covenants *and this proviso shall extend to and apply to all covenants whether positive or negative.*"

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Is there internal evidence in the above quotations from the lease to shew that the parties intended the Short Form of Leases Act to apply? The answer depends upon whether or not these words can be regarded as sufficiently "referring to" the Act as provided for in section 3. Although the Ontario Act (R.S.O. 1887, Cap. 106) considered by Meredith, C.J., in *Delamatter* v. *Brown Brothers Co.* (1905), 9 O.L.R. 351, in so far as it is material to make comparisons, is similar to our own. I cannot, with the greatest respect for the opinion expressed, agree with the statement found at p. 355 (and it is quoted with approval in Williams's Canadian Law on Landlord and Tenant at p. 128) where it is said:

"It seems clear from these provisions that it was intended that in order that the Act should operate upon the words used two things must concur: (1) that the lease should be declared to be made in pursuance of the Act, and (2) that the very words of the short forms should be used, except where deviations from them are authorized by the Act, and the provisions of the Act as to the deviations are complied with."

There would be authority in the Act for the first proposition if section 3 did not contain the additional words referred to. A lease of lands which sufficiently refers to the Act in any manner to shew intention to use it is enough. I prefer the view of Gwynne, J., in *Davis* v. *Pitchers* (1875), 24 U.C.C.P. 516 at p. 524, where he says:

"In order to incorporate the Act with the lease, it is not necessary that the Act should be referred to by its title. It is sufficient, if, in any form of words, the instrument be expressed to be made in pursuance of that Act, or if by any form of expression the Act be referred to as indicating the intention that the lease should be affected by it."

It is here I think indicated that the form of expressions used in the covenants may, according to their tenor, be regarded as sufficient to bring the document within the Act.

In considering whether or not the forms used should be regarded as a reference to the Act within section 3, two features should be borne in mind and distinguished: first, in respect to words employed sufficient to indicate the intention of the parties, and second, as to whether any deviation from the words used in Column I. not expressly permitted by clause 4 in the Second Schedule gives the parties the benefit of the corresponding long form. It might be found that certain covenants contained in the lease were identical in wording with the short form of words in Column I. but contained additions which could not be regarded as "express exceptions from or express qualifications thereof." In that case such a covenant would not take effect by virtue of the Act and would have to be construed in accordance with section 6. And yet while that is true, it might be considered with others within the Act as throwing light on the question of intention. Of course, if the important covenant in this lease upon which the notice of forfeiture is based, relating to re-entry for non-payment of rent or non-performance of covenants should be found to contain unauthorized additions or variations it would have to be construed and applied as if the Act had not been passed. I will deal with that later. I merely point out at present that it is not necessary to find that all the covenants set out above are in strict compliance with the Act in order to find intention to employ it. This pathway to "intention" is not very clear. One is left in the realm of conjecture

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where the obvious method of invoking the Act is overlooked or ignored, but no other pathway is open to us.

Referring again to the covenants outlined, how far do they come within the ambit of the Act and the Second Schedule? The first is clearly within it. There is an exception added to the second covenant, but it is authorized by clause 4 of Schedule 2. The next two covenants as to entering to view the state of repairs and repairing are combined in Column I. The addition in the lease of the words "or its agents" and "subject as aforesaid," are qualifications permitted by said clause 4. The additional words in the next covenant in respect to payment of taxes while containing an authorized exception, so far ignores the words used in the short form that it would appear that the draftsman preferred a special covenant rather than to rely upon the short form with suitable exceptions and qualifications. The words "and to pay taxes" given in the short form are iterspersed with the others in such a way as to suggest that there was no intention to rely upon them. It may very well be that this covenant (it is divided in the lease into two clauses) would have to be construed apart from the Act. It is not necessary, however, to decide that point. The next two covenants in respect to not assigning or sub-letting without leave have the benefit of the Act as the additions amount to qualifications. In the covenant for re-entry—upon which notice of forfeiture is based—the short form in Column I. is correctly quoted, but the words "and this proviso shall extend to and apply to all covenants whether positive or negative," are added. This addition was unnecessary as it is provided for by section 8, subsection (2) of the Act. Can it be said that a form of words purely surplusage added to the exact words set out in Column I. must take the remainder outside the benefit of the Act? They have no more operative value than a blank line or a dash. Street, J., in *Clark* v. *Harvey* (1888), 16 Ont. 159 at p. 167, adopted the view that one must use the identical words prescribed in Column I. to obtain the benefit of the corresponding words prescribed in Column II., with power of course to add exceptions and qualifications. I do not think that an Act such as this is, must be so rigidly applied. Judicial opinion on the point is far from uniform and conclusions reached in some cases with great doubt. I do not think

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the Act should be regarded as so mechanical that we must adhere to the identical words used in Column I., although in the case at Bar with few exceptions and apart from authorized exceptions and qualifications the exact words are used. Section 3 of the Act does not require that the identical words should be used. It is enough if the draftsman uses "any of the forms of words contained in Column I." I think that permits a departure at least in the arrangement of the words and the addition of any others which may be necessary to convey the same meaning in view of the altered arrangement. Nor do I think that a wholly unnecessary addition of words, which the Act itself incorporates, in any event affects the remaining parts of the covenant, worded as it is strictly in the words of the short form. If, therefore, we conclude that the lease has the benefit of the Act, I would hold that this covenant in respect to re-entry is within its purview.

I find therefore that all the covenants referred to with one possible exception, are within the Act. What follows? If, for example, it should be found that in all cases the exact words of Column I. were adhered to, would that not be sufficient evidence of intention? I think it would. These words and forms can only be derived from one source, *viz.*, the Short Form of Leases Act. Are they not therefore identified with it and employed pursuant to it? They should be regarded as sufficiently "referring to" the Act as provided in section 3 to fall within it. If that is so, I think the same result should follow where as here, with possibly one exception, the words used are those set out in Column I., with authorized exceptions and qualifications. These Short Form Acts were drafted—as pointed out by Magee, J. (true in a dissenting judgment) in *Delamatter* v. *Brown Brothers Co.* (1905), 9 O.L.R. 351 at p. 362—for convenience only. The Act was passed as it appeared before the recent revision in R.S.B.C. 1924, Cap. 234, to "facilitate the granting of certain leases. . . . ." "They were for the convenience not the restriction of parties in making their contracts." On the whole, therefore, I am of the opinion this lease should be regarded as made pursuant to the Act.

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Counsel for appellant submitted, however, that if there was a right to re-enter under the lease for non-payment of rent—the lease being statutory—there must be an actual re-entry or a writ

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of ejectment issued to determine the tenancy. He argued that where, as here, the condition in the lease simply makes it lawful for the lessor to re-enter he must actually do so or take some step which in law is equivalent thereto. There is some evidence that the lessee through a committee of its creditors asked the lessor to waive the notice of forfeiture and treated with him on the basis that he must waive it before they could negotiate a contemplated sub-lease. There is also some evidence that after notice of forfeiture on Ellis was placed in charge of the demised premises to look after the interests of the J. A. Dewar Company Limited. However, although he interfered to prevent the lessee from dealing with the demised premises, still his actions do not appear to be unequivocally referable to a formal act of re-entry on behalf of the lessor. I rest my conclusion as to re-entry on an unequivocal act which in law amounts to re-entry, *viz.*, that on October 1st, 1925, the J. A. Dewar Company Limited, executed a lease of the same premises to the Capilano Lumber Company Limited, a co-defendant. Between the 4th of June, 1925, when the notice of forfeiture was given and the 1st of October no act was done, suffered or permitted by the lessor to waive the notice of forfeiture and the execution of the new lease referred to constituted an effectual re-entry. Whatever rights or equities the Coast Shingle Company may have had in the meantime were then finally determined. See judgments of Cockburn, C.J., and Crowder, J., in *Baylis* v. *Le Gros* (1858), 4 C.B. (N.S.) 537 at pp. 552 and 554.

The Capilano Lumber and Timber Company, however, should pay to the appellant three months' rental as agreed upon, less $600. The committee of creditors must be regarded as agents of the Coast Shingle Company Limited. This Company adopted the actions of the committee in submitting a lease duly executed, though not accepted by the Capilano Lumber Company. To this extent the appeal should be allowed.

Appeal allowed in part.

Solicitors for appellant: *Tupper, Bull & Tupper.*
Solicitor for respondent Capilano Timber Co.: *J. H. Lawson.*
Solicitor for respondent J. A. Dewar Co.: *W. J. Baird.*

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IN RE MAINLAND PORTLAND CEMENT CO.

[IN BANKRUPTCY.]

IN RE MAINLAND PORTLAND CEMENT COMPANY LIMITED.

Sale of land—Agreement for—Conveyance of property delivered and registered—Vendor to be paid from proceeds of sale of bonds—Proceeds from sale of bonds used for other purposes—Bankruptcy—Claim for rescission and reconveyance—Vendor's lien.

Under agreement for sale made in 1923, one Dr. Hall agreed to sell certain lands to the Mainland Portland Cement Company for which he was to be paid from the proceeds of the sale of bonds issued by the Company. He delivered a conveyance of the lands to the Company which was duly registered. The sale of bonds then proceeded but the proceeds were wrongfully used for other purposes and the Company became bankrupt in 1926. On a motion for rescission of the agreement and reconveyance of the lands:—

Held, that if any action lay it was not for a reconveyance as upon failure of consideration but for the amount of the purchase-money.

Held, further, that a claim as possessor of a vendor's lien in priority over the claims of other creditors is inconsistent with the claim for rescission and in the circumstances he has abandoned his lien if it ever existed.

MOTION in bankruptcy for an order directing that an agreement for sale of land be cancelled and set aside and that the trustees in bankruptcy do reconvey the lands to the original owner free from encumbrances. Heard by MCDONALD, J. at Vancouver on the 2nd of March, 1927. Statement

A. M. Whiteside, for plaintiff.

Oughton, Hogg, and *G. J. Thomson*, for defendants.

3rd March, 1927.

MCDONALD, J.: On 28th August, 1923, Dr. T. S. Hall entered into an agreement with the Mainland Portland Cement Company Limited, and the Montreal Trust Company whereby he agreed to convey certain lands and limestone and shale mining leases to the Cement Company, whereupon bonds were to be issued in the sum of $750,000 and the Montreal Trust Company was to be the trustee of the said issue and of the proceeds of the sale of the bonds. The purchase price of the property was to be $250,000 which was to be paid out of the Judgment

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proceeds of the bonds. Pursuant to this agreement, Dr. Hall conveyed the property to the Cement Company and the conveyance was registered and a debenture trust deed and mortgage to the Montreal Trust Company was registered on 1st September, 1923. The Cement Company proceeded to carry on certain business and issued bonds to a considerable amount. The directors of the Company, however, failed to get these bonds certified by the trustee, as required by the trust deed, and wrongfully used the proceeds of the bonds for other purposes. Dr. Hall received no part of his purchase-money. In 1926, the Company became bankrupt and one A. P. Foster was appointed trustee in bankruptcy.

Dr. Hall now moves the Court for an order directing that the agreement above recited be cancelled and set aside and declared null and void and that the trustees in bankruptcy do reconvey to Dr. Hall the lands in question free from all encumbrances. This claim is contested by the trustee in bankruptcy, by the Montreal Trust Company, by the purchasers of bonds and by the ordinary creditors of the bankrupt Company. The matter has been argued at considerable length but I think the true situation is set forth in the able and succinct argument of Mr. *Hogg,* who appeared for a creditor. The claim of the applicant is for rescission and reconveyance upon the ground that the applicant has not received his purchase-money. This was called upon the argument a failure of consideration but it is not properly so called. If any action lay it was not for a reconveyance as upon a failure of consideration but for the amount of the purchase-money. But the main argument was that Dr. Hall possesses a vendor's lien which has priority over the claims of all creditors and over the trustee in bankruptcy, and the trustee under the trust deed. This claim is, of course, inconsistent with the claim for rescission, as a claim for a vendor's lien must be based upon a claim for affirmation of the contract and not upon a claim for rescission; but, in any event, I am satisfied under all the circumstances of this case, Dr. Hall has abandoned his lien, if it ever existed.

Judgment

The application is, therefore, dismissed, and costs must follow the event.

Motion dismissed.

SHATFORD v. B.C. WINE GROWERS LTD.

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SHATFORD v. B. C. WINE GROWERS LTD.

Contract—Action for breach—Offer by letter for purchase of loganberries—Accepted after lapse of six days—Reasonable time for acceptance.

The defendant made an offer by letter to the plaintiff for the purchase of loganberries that should have been received at the latest by the plaintiff on the 24th of April, 1926. The plaintiff accepted the offer by letter mailed to the defendant on the 30th of April following. In an action for breach of contract:—

Held, that having regard to the commodity bargained for, the time of year and the necessity under the circumstances of prompt decision, the plaintiff did not accept the defendant's offer within a reasonable time and the action should be dismissed.

ACTION for damages for breach of contract. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 24th of February, 1927. Statement

Robert Smith, for plaintiff.
Grossman, for defendant.

4th March, 1927.

MURPHY, J.: Plaintiff's case, on his pleadings, is, that the letter of April 21st, 1926, Exhibit 3, with enclosure is an offer from defendant to plaintiff for the purchase of loganberries. The option, Exhibit 3, doubtless for good reason, is not relied upon in the statement of claim as furnishing any ground for plaintiff's action. Defendant's counsel objected when said option was tendered in evidence. I allowed it to be put in subject to this objection but I think the position is well taken that its existence cannot on this record be taken into consideration in determining the case. Judgment

Treating then Exhibit 3 as the original offer, I think plaintiff's action must fail because he did not accept this offer within a reasonable time. The causes of this delay are immaterial. The facts are that Exhibit 3 was mailed on April 22nd and was received probably on the 23rd or, at latest, on the 24th. Plaintiff did not sign the contract enclosed with Exhibit 3 until April 30th, a delay of at least some six days. He mailed the signed document to defendant on the evening of

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Judgment

April 30th. Ordinarily a proposal sent by mail calls for an acceptance, if not by return of post, at least during business hours of the day on which such offer is received. *Dunlop* v. *Higgins* (1848), 1 H.L. Cas. 381. In all cases the offer must be accepted within a reasonable time. Here, having regard to the commodity being bargained for, the time of year of the offer, and the necessity, under the circumstances, as shewn by the evidence of prompt decision, as to whether an offer would be accepted or not, I hold plaintiff did not accept defendant's offer within a reasonable time. Action dismissed with costs.

Action dismissed.

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REX v. DRAGANI.

Intoxicating liquors—In possession of wash—Conviction—Certiorari—Direction for payment of magistrate's costs—Amendment as to—R.S.C. 1906, Cap. 51, Sec. 180(e).

REX v. DRAGANI

Where on the conviction on a charge under section 180(*e*) of the Inland Revenue Act the magistrate erred in directing that the accused should pay him his costs, the Court may on *certiorari* amend the warrant of conviction by deleting the order as to costs.

Statement

MOTION by way of *certiorari* to quash a conviction by the police magistrate at Fernie, under section 180(*e*) of the Inland Revenue Act. Heard by MCDONALD, J. at Vancouver on the 4th of March, 1927.

Mayers, for the motion.

A. B. Macdonald, K.C., and *Thomas E. Wilson,* for the Crown.

Judgment

MCDONALD, J.: Motion by way of *certiorari* to quash a conviction of the defendant by the police magistrate of the City of Fernie for that the defendant,—

"unlawfully did have in his possession . . . a wash suitable for the manufacture of spirits without having given notice as required by this Act,

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contrary to section 180, subsection (*e*) of the Indand Revenue Act of Canada and amendments thereto."

Three grounds of objection to the conviction are pressed by counsel for the applicant. The first is, that the conviction fails to include the words "without having a licence under this Act then in force," which words are contained in said section 180. This objection, I think, is met by sections 717, 1124 and 1125 of the Code, as well as by the statement in the warrant that the defendant "had the wash in his possession contrary to subsection (*e*) of section 180 of the Act," as was pointed out by Clarke, J.A., in the very similar case of *Rex* v. *Wong Mah* (1922), 1 W.W.R. 67.

The second objection is that inasmuch as there is no section of the Act requiring that notice of possession shall be given, as referred to in said subsection (*e*), there is no such offence under the Act as "being in possession of a wash suitable for the manufacture of spirits without having given notice," etc. I think this objection is really disposed of by the decision of Mr. Justice Middleton in *Rex* v. *Banni* (1919), 31 Can. C.C. 55. It is true that the report does not shew that the particular argument now advanced was addressed to his Lordship in its present form. Nevertheless, it is a decision of a very able judge and I am satisfied that if the point now raised could be well taken, it would have been taken there.

Judgment

The third objection is that the magistrate erred in directing that the accused should pay to him (the magistrate) $5 for his costs. This would appear to be well-founded but it does not follow that the conviction should therefore be quashed. On the contrary, I think the warrant of conviction should be amended by deleting the order as to costs. See *Rex* v. *Marcinko* (1912), 19 Can. C.C. 388, and *Rex* v. *Gage* (1916), 27 Can. C.C. 330.

The warrant of conviction is amended accordingly and the motion is dismissed.

Motion dismissed.

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March 8.

CAMPBELL v. LENNIE.

Practice—Trial—Jury—Application for—Action for damages for negligence —Pleadings and proceedings read—No affidavit in support—Marginal rules 426 and 430.

CAMPBELL v. LENNIE

In an action for damages alleged to have resulted from the defendant's negligence, the plaintiff applied for a jury on the pleadings there being no affidavit submitted in support. The application was dismissed.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MCPHILLIPS, J.A. dissenting), that the application was properly made on the pleadings which shew that the action is one for damages and does not fall within any of the marginal rules preceding rule 430. The judge has therefore no discretion and must order that the trial be had with a jury.

APPEAL by plaintiff from the decision of HUNTER, C.J.B.C. of the 21st of December, 1926, dismissing an application that this action be tried before a judge with a common jury. The action is for damages for personal injuries to the plaintiff caused by the defendant negligently driving an automobile on Granville Street in Vancouver on the 12th of October, 1925, the plaintiff having been knocked down by the defendant's said automobile.

Statement

The appeal was argued at Vancouver on the 3rd of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Maitland, for appellant: It was held below that an affidavit in support of the application is required. This application is under marginal rule 430 and all that is required is the pleadings. This is an action for damages and we are entitled to a jury as a matter of right under said rule: see *Williams* v. *B.C. Electric Ry. Co.* (1912), 17 B.C. 338; *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), *ante,* p. 56.

Argument

Molson, for respondent: This application was made entirely on the pleadings and proceedings and it was properly held by the Chief Justice of British Columbia that the application was improper without an affidavit. Marginal rule 426 is the governing rule. The trial does not go to a jury now unless it is so ordered and to make an order the material should be properly before the Court. The case of *Wilson* v. *Henderson* (1914), 19

B.C. 46 may appear against me but that was before the change in the rules.

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Cur. adv. vult.

8th March, 1927.

MACDONALD, C.J.A. (oral): This was an application to Chief Justice HUNTER for the trial of the action I think with a jury. He ordered it to be tried without a jury. I have looked through the new rules of 1925 and find that they are practically the same, though differently arranged, as the old rules.

It was submitted and apparently emphasized by the Chief Justice, that no affidavit had been produced. The application was made on the pleadings which was quite proper. Now, the pleadings shew that the action is the ordinary one of damages and does not fall within any of the rules preceding rule 430, so that it was a plain case in which the learned judge had no discretion except to order that the trial be had with a jury. The appeal is therefore allowed.

MACDONALD, C.J.A.

MARTIN, J.A. (oral): Though there has been a change in the arrangement of the rules and some slight change in the phraseology, yet the substantial result is the same, and it is this in brief—that while under rule 426 it says that in "every cause, matter or issue, unless under the provisions of rule 6 of this Order, a trial with a jury is ordered, the mode of trial shall be by a judge without a jury," yet, nevertheless, the exceptions to that contained in the sub-rule 6, marginal rule 430, continue to embrace a very large proportion—I should say an exceedingly large proportion—of the cases that would formerly have been tried by a jury, and therefore there is no essential change in the practice, and it never has been that in determining the ordinary question of a trial by jury under 430 (*i.e.*, the trial of those actions which, ordinarily, from time immemorial would be tried by a jury) it never has been the practice, and is not now the practice to require affidavits. That is, if I might say so—adopting the expression of the Lord Chancellor Loughborough—with respect, a "pernicious innovation" which should not be countenanced by this Court; it would introduce an element which is foreign to our jurisprudence.

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There are cases of course where affidavits might be required,

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and that class of cases is to be found, *e.g.*, in rule 429 regarding the prolonged examination of documents or scientific or local investigations, etc. In these matters, if there is any controversy, the applicants must then fortify themselves by affidavits, such as we had recently in the case that the Chief Justice has referred to—*Bradshaw* v. *B.C. Rapid Transit Co.* (1926), [*ante*, p. 56]; but I repeat that in an ordinary case it is entirely contrary to the practice that affidavits should be required. The judge on ordering a jury under rule 430, will continue to do what always has been done in this Province, and by looking first at the issues upon the record, and if they are in themselves sufficient, as they would be in the vast majority of cases and as they are here, to determine as to whether or no they were of that kind which should properly be tried by a jury, then there would be no necessity for an affidavit; and if not, then it should not be required. I am, therefore, likewise of the opinion that the appeal should be allowed.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A. (oral): I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I would dismiss the appeal. I think that it only leads to loose practice to make an application in Chambers on the material that was embodied in this case. There was no verification of the pleadings whatever; it would be a different thing if the filed pleadings had been brought in by the registrar himself, but that is not this case. The learned judge of the Supreme Court might be sitting in Chambers in a place remote from the registry in which the pleadings were filed, and this course would not be possible. I think it a matter of first importance for certainty of practice that properly-verified material should be before the learned judge, that is, verified by affidavit.

I do not find it necessary to pass upon the other questions debated, because I think the learned Chief Justice of British Columbia was quite right, in the absence of proper material, in refusing to order a jury.

MACDONALD, J.A.

MACDONALD, J.A. (oral): I would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Maitland & Maitland.*
Solicitors for respondent: *Walsh, McKim & Housser.*

REX v. MOORE.

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1927

March 25.

REX v. MOORE

Children of Unmarried Parents Act—Evidence of mother as to father of child—Corroboration—"Other material evidence"—Cumulative effect of facts—Maintenance by father—R.S.B.C. 1924, Cap. 34, Secs. 7, 9, 11 and 14.

An affiliation order was made by a magistrate under section 9 of the Children of Unmarried Parents Act providing for the payment by the putative father of $10 a week to the mother for the maintenance of his child. On appeal to the Supreme Court it was held that sufficient corroborative evidence within the meaning of the Act was not shewn by the case stated.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MCPHILLIPS, J.A. dissenting), that although there was nothing to prove that the defendant lived with the complainant after 1923, and the child was born in January, 1925, the evidence disclosed that he lived with her during the year 1923; that he was co-respondent in divorce proceedings against the complainant; that after the child was born he made an allowance to the mother of $100 a month for the support of herself and her two children of which the child in question was one; and he paid the hospital expenses of the children. These facts are sufficient corroboration of her statement that he was the father of the child.

APPEAL by the Crown from the decision of HUNTER, C.J.B.C. of the 1st of February, 1926 (reported, 37 B.C. 86), vacating the order of the stipendiary magistrate at Vancouver whereby he adjudged Nelson Moore to be the father of the child of one Blanche Hart and ordered him to pay her $10 per week for the maintenance of the child. The facts and case stated are set out in 37 B.C. pp. 86-7. Statement

The appeal was argued at Vancouver on the 24th and 25th of March, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

G. W. Scott, for appellant: The sole question is whether there was corroboration of the woman's evidence as required by section 14 of the Children of Unmarried Parents Act. The evidence of his intimacy with the woman previously is sufficient corroboration: see *Reffell* v. *Morton* (1906), 70 J.P. 347; *Ex* Argument

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parte Moore (1909), 9 S.R.N.S.W. 233; *Rex* v. *Steele* (1923), 33 B.C. 197.

Remnant, for respondent: There is complete absence of proof that Moore was the father of this child, and the Chief Justice of British Columbia has so held: see also *Thomas* v. *Jones* (1921), 1 K.B. 22; *Bessela* v. *Stern* (1877), 2 C.P.D. 265.

Scott, replied.

MACDONALD, C.J.A.: I would allow the appeal. I think there was ample corroboration of the woman's statement that the respondent is the father of the child in question. The undisputed evidence that the respondent lived with the appellant during the year 1923; that he was the co-respondent in the divorce proceedings, and that after this child was born he made an allowance to the appellant of $100 a month for the support of herself and her two children, including this child, and paid hospital expenses of the two children, establish facts which would appeal to the mind of any reasonable person at once as corroboration of her statement that he is the father. Why else would this man undertake the maintenance of the woman and that of the child? He was under no obligation until this order was made to support her or to support the child, and yet though having no very high ideals of morality or philanthropy he pays $100 a month for maintenance. There is only one conclusion I can draw from that, and that is that he felt himself under obligation to do it because the child was his.

MACDONALD, C.J.A.

MARTIN, J.A.: An affiliation order was made by the magistrate under section 9 of the Children of Unmarried Parents Act, Cap. 34, R.S.B.C. 1924, and an appeal was taken from that order—that is what it amounts to, it is called a variation, that is what it amounts to—under section 11 of that statute to the Chief Justice of British Columbia and he set aside the said affiliation order which provided for the payment of $10 a week, for the maintenance of one child, to the mother, on the sole ground there was not the corroborative evidence as required by section 14 of the said Children of Unmarried Parents Act. That was on a case stated, which is likewise before us, on the sole question which was raised on that

MARTIN, J.A.

appeal to the Chief Justice, and to that case we are likewise restricted, and no ground whatever has been shewn under circumstances which are at all similar to these, nor has any precedent been cited, and I venture to say cannot be cited, where a departure from that case stated could be allowed. Therefore, I agreed with the majority of my brothers in refusing to allow anything to be added to the case. Such being the situation the sole point left to us is very simple, *i.e.*, on the question of corroboration; and I see no substantial difference between the corresponding English Act and our own Act on the nature of that evidence which is required, and I adopt what the Chief Justice has just said as to the sufficiency of the mother's testimony upon it, and so would allow the appeal.

MARTIN, J.A.

GALLIHER, J.A.: I am of the same opinion.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. I have no hesitation whatever in stating that it is absolutely futile to contend—and I say this with every deference to the opinion of my brothers who take a contrary view—that there is any corroboration within the purview of the statute, and I am largely guided in this view by the judgment of the learned Chief Justice of British Columbia who had the matter before him and who set aside the affiliation order. Certainly the Chief Justice's judgment is entitled to great weight and consideration. I do not see a scintilla of evidence by way of corroboration of the paternity of the child and fixing it upon the defendant as required by the statute. Section 14 reads:

MCPHILLIPS, J.A.

"No affiliation order shall be made upon the complaint of the mother of a child born out of wedlock or of an unmarried woman pregnant with a child likely to be born out of wedlock unless her evidence as to the paternity of the child is corroborated by some other material evidence."

Now, what evidence of the paternity is there here? I quote the pertinent statement of facts:

"(a) The defendant and the complainant lived together as man and wife in 1923 (but were not married). No evidence was adduced that since then they lived together as man and wife or otherwise."

Now, when did this lady give birth to this child? She gave birth to it on the 7th of January, 1925. It is patent that without evidence of the necessary relationship as being known to have been together after 1923, there is nothing to suggest that

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the defendant is the father of the child. And there is an entire absence of any such evidence.

"The defendant was co-respondent in divorce proceedings brought by the complainant's husband when a decree of divorce was granted the husband."

One cannot commend what the defendant did but this was long anterior to the birth of the child, at the same time there is also the power to reform, the right to reform. Regeneration is possible, if not, then there is a doctrine of despair. That the defendant did wrong a couple of years before the birth of the child and desisted from the relationship is cogent evidence against any presumption of paternity of the child.

"The plaintiff has two children, the younger child being the subject of this action. The defendant paid to the complainant sums of money approximating in amount $100 per month for the support of herself and children. The defendant paid the children's hospital and doctor's bills."

Upon these facts it is attempted to be claimed that it is proved —within the language of the statute—that there is corroborative evidence of the paternity of the child. I fail to see in what particular it does. It may well be that this lady has not changed her way of living, and I suppose it must be said to be the case, if she is divorced and not married again and has given birth to a child, but can it be even suggested upon the above stated facts that the defendant was responsible for that which has happened? I see no evidence whatever. It would be a sad day in the lives of men if there should not be the power to reform, and this evidence as stated here does not shew there was no reformation, and it would be a sad thing in the lives of our people if one, as in this case, committed a wrong against this lady at one time in his life, should not be later and after the lapse of some years be entitled by motives of charity to come forward and pay money to the lady although he was in no way connected with the paternity of the child. I find it, in the face of this case stated, impossible of proof that the paternity of the child has been established as against the defendant. There has been absolute failure of establishment of corroboration called for by the statute. The statute, as it is seen, requires other evidence than that of the mother, and it must be material evidence directed to the paternity of the child—something absolutely absent here. Courts cannot legislate, nor can Courts flout or disregard the

MCPHILLIPS, J.A.

statute law, and with the greatest respect to the opinions of my brothers I consider that to restore the affiliation order set aside by the learned Chief Justice of British Columbia means the restoration of an invalid order—one made without jurisdiction as the learned magistrate had not before him that which was a condition precedent, *i.e.*, evidence corroborating the mother's testimony as to the paternity of the child which evidence had to be in the language of the statute "some other material evidence." Scan and analyze the case stated as you will, it is impossible to find any evidence which established or seemed to establish the required corroboration. It, therefore, follows, in my opinion, that the order was rightly set aside and the learned Chief Justice of British Columbia in so doing was right and made the proper order and the order should be affirmed and the appeal, therefore, should be dismissed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I think there is sufficient corroboration in respect to paternity, by the party charged, within the meaning of the section.

MACDONALD, J.A.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *McKay, Orr, Vaughan & Scott.*
Solicitors for respondent: *Maitland & Maitland.*

MCDONALD, J. (In Chambers)

1927

March 18.

BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT COMPANY LIMITED. (No. 4).

Costs—Counsel fees—Applications for order for jury—Appendix N—Tariff items 6 and 13.

BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT CO.

On appeal from the taxation of the plaintiff's costs by the district registrar of several interlocutory applications made in respect of a jury and one application for an adjournment of the trial:—

Held, that the word "process" in item 13 of Appendix N of the Supreme Court Rules is not intended to include counsel fees and the plaintiff is entitled to tax for "process" under item 13, and for counsel fees under item 6.

APPLICATION by way of appeal from the taxation of the plaintiffs' costs by the registrar at Vancouver. Several interlocutory applications were made in respect of a jury and one application for the adjournment of the trial. The defendant's submission was that the plaintiffs could tax only such amount as is allowed under Tariff item 13 of Appendix N of the Supreme Court Rules and that no further allowance could be made under Tariff item 6. Heard by MCDONALD, J. in Chambers at Vancouver on the 16th of March, 1927.

Statement

A. H. MacNeill, K.C., for plaintiffs.

Molson, for defendant.

18th March, 1927.

MCDONALD, J.: On this appeal from the taxation of the plaintiffs' costs by the learned deputy registrar, I reserved the question of whether or not the plaintiffs should be allowed their counsel fees under item 6, Appendix N, for each interlocutory application in respect of the order for trial by jury notwithstanding the terms of item No. 13. I have conferred with the learned deputy registrar and we have considered carefully the two items in question and on such further consideration the learned deputy registrar agrees with me that the word "process" in item 13 was not intended to include a counsel fee and that, therefore, the plaintiffs would be entitled to tax for "process" under item 13 and for counsel fees under item 6. To hold otherwise is really a straining of the ordinary meaning of the word "process" and having regard to the very low charges which are allowed under Appendix N one is not disposed to strain the meaning of any word with a view to making such charges lower.

Judgment

IN RE MUNICIPAL ACT AND McBRIDE.

MCDONALD, J. (In Chambers)

1927

March 16.

IN RE MUNICIPAL ACT AND McBRIDE

Municipal law—Assessment—Court of revision—Appeal—Land—Wrongfully entered upon the roll—"Parcel"—Meaning of—R.S.B.C. 1924, Cap. 179, Sec. 216 (1) and (3).

Section 216 (1) of the Municipal Act provides that the assessor shall prepare an assessment roll, "in which he shall set down with respect to each and every parcel of land within the municipality a short description thereof by which the same can be identified on the books of the land registry office" and subsection (3) thereof provides that "for the purposes of subsection (1) reference shall be had to the records of the Land Registry office as of the 1st day of December in each year." The appellant owned block 12, D.L. 311 according to plan No. 847. He sold a right of way to a railway company which cuts his parcel of land leaving 4.295 acres south of the right of way and 27.11 acres north of it. The assessor assessed the land in two parcels (1) north part excluding right of way 27.11 acres at $500 per acre and (2) south part excluding right of way 4.295 acres at $1,000 per acre. The north parcel was assessed as agricultural land from which there is no appeal and the appeal is confined to the south parcel which was assessed as land suitable for industrial purposes. On the appellant's submission that the land in question "has been wrongfully entered upon the rolls":—

Held, that block 12 in question is a "parcel" within the meaning of said section 216 (1) of the Municipal Act and as such must be entered upon the roll. This not having been done the appeal must succeed as to that portion of block 12 which lies south of the right of way.

APPEAL by Robert McBride from the decision of the Court of Revision for the Corporation of the District of South Vancouver as to the assessment of block 12, district lot 311 according to plan No. 847. The facts are set out in the head-note and reasons for judgment. Heard by McDONALD, J. in Chambers at Vancouver on the 16th of March, 1927. Statement

A. J. Cowan, for McBride.
D. Donaghy, for District of South Vancouver.

McDONALD, J.: In this appeal two points are raised by the appellant: (1) That the land in question "has been wrongfully entered upon the roll"; and, (2) that, in any event, the land has been assessed at too high a value. It is necessary, under the Judgment

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statute, that I should determine the matter before the 17th instant, and I have, therefore, not had the time to give it the consideration which I would desire. I have, however, reached the conclusion that on the first point, the appellant is entitled to succeed. The appellant is the owner, according to the records of the Land Registry office, of block 12, D.L. 311, according to plan No. 847. He sold a right of way to a railway company, which right of way cuts his parcel of land leaving some 4.295 acres south of the right of way, and bordering on the north arm of the Fraser River, and 27.11 acres north of the right of way. The whole parcel has been rented to a truck gardener who uses it for growing garden produce. The assessor assessed the land in two parcels as follows: (1) North part, excluding right of way, 27.11 acres at $500 per acre, and (2), the south part, excluding right of way, 4.295 acres at $1,000 per acre.

A Court of Revision for the Municipality has declared that the north part is assessed as agricultural land, and, under the statute, there is accordingly no appeal from that assessment. This appeal is confined, therefore, to the part south of the right of way. The reason for the division by the assessor is that, in his opinion, the 4.295 acres are properly assessable as land suitable for industrial purposes, and, if it is properly so assessed, I would be of the opinion, on the evidence offered, that the overwhelming weight of evidence before me would go to shew that the 4.295 acres are suitable for industrial purposes and have a market value of more than $1,000 per acre. As stated above, however, in my opinion the land "has been wrongfully entered upon the roll" and this assessment, therefore, cannot stand. Section 216(1) of the Municipal Act provides that the assessor shall prepare an assessment roll "in which he shall set down with respect to each and every parcel of land within the municipality a short description thereof by which the same can be identified on the books of the Land Registry office" and by subsection (3) of the same section it is provided that "for the purposes of subsection (1) reference shall be had to the records of the Land Registry office as of the 1st day of December in each year."

Judgment

There appears to be no definition of the word "parcel" in the Municipal Act, but in the Land Registry Act it is defined

as "any lot, block, or other area in which land is held or into which land is subdivided." In my view block 12 in question is a "parcel" and as such must be entered upon the roll. This not having been done, it is my determination that this appeal must succeed.

Appeal allowed.

MCDONALD, J. (In Chambers)

1927

March 16.

IN RE MUNICIPAL ACT AND MCBRIDE

IN RE WALTER EDWARD GEHM, AN INFANT.

MCDONALD, J. (In Chambers)

1927

March 24.

IN RE GEHM, AN INFANT

Infant—Parents separated—In charge of maternal grandmother—Death of mother—Application by father for custody—Welfare of child.

Where a child's mother is dead and the father is entitled to its custody, unless it can be conclusively shewn that it would be contrary to the welfare of the child, if it appears from the evidence that the child is delicate and requires tender care and attention, and since his birth was almost continuously under the care of his maternal grandmother; that he was subject to fits in California where the father lives, but did not suffer from them in Vancouver; that he is of a highly nervous temperament as appears from the demonstration he made in Court when separated from his maternal grandmother, in such circumstances the Court is justified in concluding that it would be contrary to the welfare of the child to take him away from this maternal grandmother to California and the father's application for the custody of the child should be refused.

APPLICATION by the father claiming the custody of his child born in California on the 11th of November, 1924. The facts are set out in the reasons for judgment. Heard by MCDONALD, J. in Chambers at Vancouver on the 23rd of March, 1927.

Statement

Thomas E. Wilson, for the application.
Wismer, contra.

24th March, 1927.

MCDONALD, J.: Application, by way of *habeas corpus,* by a father domiciled in California, who claims the custody of his infant son born in California the 11th of November, 1924. The parents of the child were married in California on the 15th of

Judgment

MCDONALD, J. (In Chambers)

1927

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IN RE GEHM, AN INFANT

April, 1924, the husband being then nineteen years of age and the wife seventeen. They lived together only during the months of July and August of 1924 when they quarrelled and separated. On the 23rd of March, 1926, the wife obtained a decree of divorce in California upon grounds set up in her petition of cruelty and gross ill-treatment. The action was not defended. The father has seen his child on three occasions, once on the date it was born, once in January, 1925, and again at his wife's funeral in November, 1926.

The child has been in the constant care and custody of his maternal grandmother ever since its birth except for a short period during the summer of 1926, when the mother of the child came to Vancouver, where she was married and where she formed the intention of making her permanent domicil. By the decree of divorce granted in California, the mother was given custody of the child and brought the child with her to Vancouver in 1926. After her marriage in Vancouver, she returned, for a temporary purpose, to California taking the child with her. While in California, at this time, she died expressing the wish that her mother should have the permanent care and custody of her child. Immediately after the funeral, the maternal grandmother left with the child for Vancouver and has remained here ever since. On the 4th of December, 1926, the father applied *ex parte* to the California Court and had the decree of divorce modified so as to provide that he should have the custody of the child.

Judgment

The father, who is now 22 years of age, is employed as a salesman in San Francisco and makes about $130 a month. He lives with his father and mother, his father having an income of about $5,000 a year. His father and mother are assisting him in these proceedings and are very anxious that he should obtain the custody of the child and bring it to live with them. In fact, to put the situation briefly, this is really a contest between the two grandmothers of the child for his possession. Neither of them has in law any right to such possession. The maternal grandmother is a woman with ample means at her command to give the child a good home, a good education and a good start in life.

After the argument, it was conceded by counsel, that, unless

it could be shewn conclusively that it was contrary to the welfare of the child, the application of the father must be granted. In my opinion, it has been shewn in this case that it is not for the physical welfare of the child that this application should succeed. The child has not been robust and has required the most delicate care and attention. In California he was subject to fainting fits. He did not suffer from these fits when visiting Vancouver last Summer. They recurred on his return to California in the Fall and they have ceased since his coming back to Vancouver. He is "highly strung" and it was obvious, from the demonstration he made in Court, when separated for a few moments from his maternal grandmother, that he is of a highly nervous temperament and I feel satisfied that, if he is separated from his grandmother and taken to California, it will be extremely detrimental to his health.

Judgment

The application must, therefore, be dismissed.

Application dismissed.

HAGLUND v. DERR *ET AL.*

Woodman's lien—Contract to do work—Loading pine logs and poles—Removing poles and posts to make room—Pulling down building—Supplying car-sticks for loading—Freighting gasoline—R.S.B.C. 1924, Cap. 276.

Under the employment of the defendant Derr the plaintiff performed various services in connection with logging during the winter of 1926-7 and he duly filed a lien for his wages under the Woodman's Lien for Wages Act. In an action on the lien:—

Held, that the lien attached for his wages in loading poles and logs at Erie which were shipped to the defendant the W. W. Powell Company and for such wages said Company was liable.

Held, further, that as to other services performed at the instance of Derr, namely, (1) moving poles and fence posts to provide room; (2) pulling down a building for the lumber in it; (3) cutting car-sticks for loading timber on cars and (4) freighting gasoline to the camps; do not come within the Act so as to give a right of lien, but the plaintiff is entitled to judgment for such services as against the defendant Derr.

FORIN, CO. J.

1927

April 14.

HAGLUND
v.
DERR

Statement

ACTION on a lien for wages for various services performed in connection with loading poles and logs at Erie during the winter of 1926-7. The plaintiff was employed by the defendant John O. Derr of Salmo and the various services performed by him were: (a) Removing poles and fence posts to make room for piling white pine in September, 1926; (b) pulling a building down for the lumber which was taken up to a logging camp in October; (c) cutting car-sticks for loading timber on cars taken from lands other than the defendant's; (d) freighting gasoline to the lumber camps; (e) labour performed in loading logs or poles which were shipped to the defendant the W. W. Powell Company. Tried by FORIN, Co. J. at Nelson on the 13th of April, 1927.

Matthew, for plaintiff.
Wragge, and *Dawson,* for defendants.

14th April, 1927.

Judgment

FORIN, Co. J.: The evidence of the plaintiff shews that work was done removing poles and fence posts to make room for piling white pine logs in September, 1926. In October work was performed in pulling a building down for the lumber, which was hauled to a logging camp. On other occasions the plaintiff cut car-sticks for loading timber on cars at 20 cents a stick, these he cut off his own and other lands in which the defendants had no interest. He also freighted gasoline up to the logging camp. None of the above is labour or services in connection with logs or timber of such a kind as to give the person claiming the right to a lien under the Woodman's Lien for Wages Act. On the other hand, any work done in loading timber, either logs or poles, clearly comes under the Act. The lien in this case has been filed within the statutory period.

The plaintiff in his evidence stated that he was working for the defendant, Derr, when he loaded the white pine logs, as in the case of loading the poles. When a person is employed at a loading yard or place and loads poles and logs, his right to a lien for "performing any labour or services in connection with any logs or timber" cannot be questioned if he has observed the formal requirements of the Act. The interpretation-clause is

clear as to what constitutes "logs or timber." The last day the plaintiff loaded timber, which in that case were poles, was on January 27th, 1927; he filed his lien against the white pine logs on February 24th, 1927. I do not think that the workman loading a number of the kinds of "logs or timber" as detailed in the interpretation clause can be confined to placing his lien on any one specific kind; the poles are not available for a lien, the logs are available.

If a workman loads a carload of ties, then a carload of posts or a mixed carload of each, and also a carload of poles and two carloads of white pine, for the same employer, and only one class of timber is available for a lien he is entitled to a lien on this class for all labour performed in connection with the timber.

Doubt has been thrown on the statement of the plaintiff that he did not know that the defendant, Cawley, owned the logs on which the plaintiff worked in loading. I question if such an issue has any effect on the plaintiff's right to a lien. He did the work for Derr and if Derr were acting for Cawley then the lien follows the logs. Nor does it make any difference in whose name the logs were shipped. The clear fact remains: labour was performed by the plaintiff in connection with timber which formed a part, although a small part, of shipments to the defendant, the Powell Company; the plaintiff has filed a lien against the timber, and I must find he is entitled to be paid for such labour as he performed in connection with loading timber at the Erie railway yard. He is not entitled to be paid for the work first set out in this judgment, as a lienholder, but he is entitled to judgment against the defendant, Derr, for such work.

Judgment

If the parties cannot agree on the amount covered by the lien I will take necessary accounts.

MARTIN, LO.J.A.

1927

March 29.

EMPIRE STEVEDORING CO. *v.* THE "EMPRESS OF JAPAN"

EMPIRE STEVEDORING CO. LTD. *ET AL.* v. THE "EMPRESS OF JAPAN."

Admiralty law — Shipping — Action against ship dismissed — Appeal— Rearrest pending appeal—Motion for—Dismissed—Renewal of motion in case of altered circumstances—Admiralty rule 173.

The plaintiffs' action against the steamship "Empress of Japan" was dismissed. They appealed to the Exchequer Court and then launched a motion that the bail bond in Court be retained or in the alternative that the ship be rearrested pending the appeal on the ground that the ship was being broken up and would be demolished before the appeal was decided. The defendant filed an affidavit that it would be five and one-half months before the value of the ship would be reduced to the sum claimed.

Held, that as the defendant's affidavit is uncontradicted it must be taken as true and in the ordinary course the appeal would be determined long before the five and one-half months had expired; the motion should therefore be dismissed.

Held, further, that this view does not preclude a reconsideration of the matter should altered circumstances warrant a renewal of it.

Statement

MOTION to retain bail bond or in the alternative to rearrest the ship after judgment had been delivered dismissing the action, pending an appeal that had been taken to the Exchequer Court of Canada. Heard by MARTIN, Lo. J.A. in Vancouver on the 24th of March, 1927.

Desbrisay, for plaintiff.
Hossie, for defendant.

29th March, 1927.

Judgment

MARTIN, Lo. J.A.: This is a motion, primarily under rule 173, to stay execution and all proceedings in this action pending the determination of an appeal (launched on the 19th instant) to the Exchequer Court of Canada from the judgment of this Court delivered on the 14th instant dismissing the action and condemning the plaintiffs in costs, or, in the alternative, that the bail bond now in Court be retained for the same purpose, or that the ship be rearrested to answer the judgment that may be given on said appeal. Rule 173 is as follows:

"An appeal shall not operate as a stay of execution or of proceedings

under the decision appealed from, except so far as the Local Judge in Admiralty, or the Exchequer Court may order; and no intermediate act or proceeding shall be invalidated, except so far as the Judge of the Exchequer Court may direct."

The sole ground upon which the motion is based is that the defendant ship is now being broken up in Vancouver harbour and is already reduced to the condition of a hulk which can only be moved by towing, and that "there is grave danger that the ship will be completely demolished before an appeal can be decided by the Exchequer Court of Canada": the notice of appeal is given for a hearing to be had on the 17th of May next, but there is no information before me as to the certainty of its being heard on that date.

In reply an affidavit is filed stating, in its conclusion, that—

"3. The said ship 'Empress of Japan' will not be completely scrapped for at least six months and it will be at least five and one-half months until the value of the said ship has been reduced to the sum of $3,500."

This statement, in the absence of any contradiction, must be taken to be true, and, if so, the appeal, if due diligence be observed, should, in the ordinary course, be determined long before that date, because the question at issue is one of fact simply. In such circumstances no authority has been cited that would justify an order of rearrest or any direction being given out of the ordinary course, but this present view of the matter would not preclude a reconsideration of it should altered circumstances warrant a renewal of it hereafter and bring it within the principles governing my previous decisions in *The "Freiya"* v. *The "R. S."* (1921), 21 Ex. C.R. 147; 30 B.C. 132; (1921), 2 W.W.R. 749; and *Vermont Steamship Co.* v. *Abbey Palmer* (1904), 10 B.C. 383; 8 Ex. C.R. 462 (wherein the money was in Court); and see also *Williamson* v. *Grigor* (1912), 17 B.C. 334.

Judgment

It is to be noted that the judgment here does not direct the payment of any damages, but costs only and, therefore, no question of repayment arises but even where the defendant is held answerable, as in *The Ratata* (1897), P. 118, the Court of Appeal held, p. 132, on a similar, in part, application by defendant on appeal to the House of Lords, that "it is a pure matter of discretion, depending on the particular circumstances of each case." And *cf.* also *The Annot Lyle* (1886), 11 P.D. 114.

MARTIN, LO.J.A.

1927

March 29.

EMPIRE STEVEDORING CO. v. THE "EMPRESS OF JAPAN"

In the present case the defendant's solicitors are, and have always been, willing to give the usual undertaking to return any costs paid to them if the appeal shall be successful, and I do not think that more should be required of them in the present circumstances; and so this application should be dismissed with costs to the defendant in any event.

Motion dismissed.

MARTIN, LO.J.A.

1927

May 27.

DAGSLAND v. THE CATALA

DAGSLAND v. THE CATALA.

Admiralty law—Action for damages—Workmen's Compensation Board—Adjudication and determination by—Power conferred by section 12 (3) of Workmen's Compensation Act—Jurisdiction—Acceptance of benefits under the Act—No bar to this action—R.S.B.C. 1924, Cap. 278, Sec. 12, Subsec. (3).

The plaintiff brought action in the Admiralty Court for damages against the defendant ship for the death of her husband through a collision between the ship and a fishing boat in territorial waters of Canada. On the application of the Union Steamship Company while the action was pending the Workmen's Compensation Board made an adjudication and determination under section 12, subsection (3) of the Workmen's Compensation Act declaring that the said action is one, the right to bring which is taken away by Part I. of the said Workmen's Compensation Act.

Held, that the Workmen's Compensation Board has no jurisdiction over rights of action or proceedings in the Admiralty Court and the said adjudication is wholly null and void.

The Kwasind (1915), 84 L.J., P. 102 and *The Moliere* (1925), P. 27, distinguished.

Held, further, that as the Workmen's Compensation Act does not apply to the right the plaintiff is seeking to establish, the fact of her having accepted benefits under the said Act is not a bar to her right of action in this Court.

Statement

ACTION for damages by the widow and two children of Erik Dagsland whose death was due to a collision between the S.S. Catala and a fishing-boat on the 31st of July, 1925, in Middle Passage near the mouth of the Skeena River on the Pacific Ocean and within the territorial waters of Canada. The facts

are set out in the reasons for judgment. Tried by MARTIN, Lo. J.A. at Vancouver on the 22nd, 23rd and 24th of November, 1926.

Mayers, and *Shannon,* for plaintiff.
Macrae, for defendant.

27th May, 1927.

MARTIN, Lo. J.A.: This is an action for damages against the S.S. Catala by the widow and two infant children of Erik Dagsland whose death was brought about by a collision between that vessel and a fishing-boat in which were the deceased working as a boat puller and one Albert Carlson (the licensee and person in authority thereof) on the 31st of July, 1925, in Middle Passage near the mouth of the Skeena River in the territorial waters of Canada on the Pacific Ocean.

With respect to the cause of the death of Dagsland I find that it was due to the negligence of the ship and I award damages against her to the amount of $20,000, bearing in mind the increased cost of living and consequent reduction in the pre-war value of money as pointed out in *Wand* v. *Mainland Transfer Company* (1919), 27 B.C. 340, 345.

Apart from the questions of fact the following objections in law were taken to the jurisdiction of this Court, and otherwise, *viz.*:

Judgment

First: It was submitted that the pending proceedings in this action could not be further entertained because of an "adjudication and determination" made after their inception by the Workmen's Compensation Board on the 22nd of November last in the exercise of its supposed powers under section 12 (3) of the Workmen's Compensation Act of this Province, being Cap. 278, R.S.B.C. 1924, said section being:

"12. (3.) Where an action in respect of an injury is brought against an employer by a workman or a 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 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 said adjudication was made upon the application of the Union Steamships Limited purporting to be the owners of the

MARTIN, LO.J.A.

1927

May 27.

DAGSLAND v. THE CATALA

defendant ship herein and after reciting the proceedings the adjudication thus concludes:

"And this Board does further find and declare that the said action is one the right to bring which is taken away by Part I. of the said Workmen's Compensation Act."

It must be conceded that if the Board had the power to make that adjudication this Court cannot exercise any further jurisdiction in this action because it is not only "for ever stayed" but the "right to bring" the action itself is "taken away" by the Provincial Act. I am, however, of opinion that the submission of the plaintiff that the Provincial Board has no jurisdiction over rights of action or proceedings in this Court is correct, and therefore the adjudication is, speaking with all respect, wholly null and void within the principles and authorities cited in *The Leonor* (1916), 3 P. Cas. 91; (1917), 3 W.W.R. 861.

There was much learned and instructive argument upon this interesting and important question but I may summarize my conclusion thereupon by saying that as the jurisdiction exercised and remedies afforded by this Court, through the Vice-Admiralty Court (the lineal descendant of the Court of the Lord High Admiral* and of the High Court of Admiralty) pursuant to Imperial and Federal legislation, are in no way based upon common law rights but exist "to deal with matters arising at sea outside the purview of other Courts" (Anson on Constitution, 3rd Ed., 283), the invocation of principles founded upon the common law does not advance this matter, and just as it is impossible for this Court to expand its jurisdiction by Provincial laws so it is impossible for such laws to curtail its jurisdiction in any degree, any more than they could that of another tribunal established by Federal legislation, the Supreme Court of Canada—*Crown Grain Company, Limited* v. *Day* (1908), A.C. 504, wherein the Privy Council said (there being an attempt by the Province of Manitoba to deprive the Supreme Court of Canada of jurisdiction) p. 507:

Judgment

*NOTE:—"The jurisdiction of the Lord Admirall is verie antient, and long before the reigne of Edward the third, as some have supposed, as may appeare by the lawes of Oleron (so-called, for that they were made by King Richard the first when he was there) that there had beene then an admirall time out of minde, and by many other antient records in the reignes of Henrie the third, Edward the first, and Edward the second, is most manifest."—2 Co. Lit. 260. b.—A. M.

"But, further, let it be assumed that the subject-matter is open to both legislative bodies; if the powers thus overlap, the enactment of the Dominion Parliament must prevail."

By section 6 of The Maritime Conventions Act, 1914, Cap. 13, Can. Stats. 1914, it is enacted:

"Any enactment which confers on any Court Admiralty jurisdiction in respect of damages shall have effect as though references to such damages included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *personam*."

The new Federal right thus conferred would, in my opinion, continue to exist throughout Canada (save as excepted by section 10) if the Provincial Families' Compensation Act, Cap. 85, R.S.B.C. 1924 (conferring certain causes of action for death occasioned by tortious acts), or similar Acts in other Provinces were repealed, and the only limitation upon it is that the action must be commenced within two years unless the time is extended by the Court having jurisdiction—section 9. In coming to this conclusion I have not overlooked the decisions of the English Courts in *The Kwasind* (1915), 84 L.J., P. 102, and *The Moliere* (1925), P. 27, which are based upon very different circumstances in the constitution of the Admiralty Court as a division of the High Court of Justice which exercises all ordinary civil jurisdictions, and on the existence of one British Legislature only with undivided and complete jurisdiction over all subject-matters. Furthermore, I do not, with respect follow the grounds or the object of the reasoning of Buckley, L.J., in the former case respecting Lord Campbell's Act, because the decision really turned upon the proper exercise of judicial discretion in ordering the assessment of damages by a jury instead of assessors under English High Court rule 2 of Order XXXVI. giving the judge power to order the trial of the cause, matter or issue to be had with a jury, or assessors, or referee as therein directed, whereas by our Admiralty rule 124 the most that the judge can do is to "refer the assessment of damages and the taking of any account to the registrar either alone or assisted by one or more merchants as assessors." In the note upon the decision in Roscoe's Admiralty Practice, 4th Ed., 1920, p. 356, it is said that the order for a jury thereby authorized was "never acted upon as the case was subsequently settled

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by agreement." I can only regard the decision as *obiter* and inapplicable to the said radically different conditions in Canada both curial and legislative. To place them on a parity as regards the case at Bar, there should at least be a general Federal Act in Canada similar to Lord Campbell's in England and one Court entertaining all actions for damages for personal injuries founded upon the common law or special statute. As to *The Moliere,* the same observations as to different conditions apply, and moreover, it does not touch the exact point raised here. I cannot bring myself to the conclusion, in the absence of express authority upon the point, that said Federal section 6 has conferred no additional Federal rights or benefits upon litigants of this class in Canada unless there happens to be a statute of the nature of Lord Campbell's Act in existence in the Province wherein the damage was suffered.

Since this Court had already under section 7 of the Imperial Admiralty Act, 1861, Cap. 10, "jurisdiction over any claim for damage done by any ship" I regard the effect of said section 6 of 1914 as now conferring in a clear, simple and full way one and the same maritime lien and remedy for damage to the person or property "done by any ship" and the two jurisdictional sections should now be read together in their amplitude, speaking and operating as though originally so enacted, and hence it is just as impossible to deprive a litigant in this Court of the later as of the earlier right he has become entitled to: in other words, as applicable to this case, section 7 of 1861 is, by section 6 of 1914, simply rewritten and re-enacted to include "jurisdiction in respect of damages . . . for loss of life or personal injury"; the decision of the Privy Council in *McColl* v. *Canadian Pacific Ry. Co.* (1923), A.C. 126, though relied upon by the defendant really supports the plaintiff, and is in accord with *Crown Grain Company, Limited* v. *Day, supra.*

Judgment

It follows that the objection to the jurisdiction of this Court is overruled.

Then, second, it is submitted that the plaintiff has barred her right of recovery because she has accepted benefits under the said Workmen's Compensation Act, the result of which is that she has "elected," under section 10 thereof, to resort to that Act for relief, and further, that the effect of such acceptance is

to deprive her, apart from the Act, of a right to recover more than one sort of compensation and reliance is placed upon the cases of *Scarf* v. *Jardine* (1882), 7 App. Cas. 345; *Wright* v. *London Omnibus Co.* (1877), 2 Q.B.D. 271; and *McClenaghan* v. *Edmonton* (1926), 1 W.W.R. 449, to which I add *Birmingham Corporation* v. *Allsopp & Sons, Lim.* (1918), 88 L.J., K.B. 549, which is an exact application of the principle of the *Wright* case, and the *McClenaghan* case is likewise based thereupon and on *Scarf* v. *Jardine* (an action by a creditor of a partnership) the general principle of which is thus laid down by Lord Blackburn, pp. 360-1:

"The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

Judgment

If I am right in my view that the Workmen's Compensation Act does not apply to the right the plaintiff is seeking to establish its provisions do not bar her, and otherwise the evidence does not bring the plaintiff within Lord Blackburn's principle, nor does, I think, the *Wright* case support the defendant. That decision was based upon a statute which provided that where a cab-driver was convicted of "wanton or furious driving," etc., he should be fined three pounds and, in addition—

"where any such hurt or damage shall have been caused, the justice, upon the hearing of the complaint, may adjudge as and for compensation to any party aggrieved as aforesaid a sum not exceeding ten pounds."

The cab-driver was prosecuted by the police and convicted, and the magistrate awarded the plaintiff, who was a witness at the hearing, the sum of £10 for compensation to his cab which the plaintiff received though stating it was an inadequate sum. The view taken by the Court of the statute and its effect is best stated by Mellor, J., thus, pp. 275-6:

"The provision appears to me to be a very advantageous one with regard to the cases it was intended to meet, though in the present case the plaintiff seems to have availed himself of it in ignorance of the legal effect of what

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he was doing. It is intended to give to the party aggrieved a speedy and convenient mode of recovering in respect of slight injuries by means of the summary jurisdiction of the magistrate, so that when the complaint is brought before the magistrate with regard to the driver's misconduct, the whole matter may be settled, and the party injured may recover his compensation without being sent to the County Court or compelled to engage in further litigation. It appears to me that there is no reservation of any further right of compensation, and that if the party aggrieved avails himself of the summary remedy given by the section he cannot afterwards proceed elsewhere. The plaintiff in the present case submitted himself to the magistrate's jurisdiction, in my opinion, by accepting the amount of compensation awarded. The matter thus became *res judicata*, and cannot be re-opened."

I am unable to see how a maritime lien upon, and a right *in rem* against a ship in a Court of Admiralty can be compared to the special statutory circumstances upon which that decision was based.

In the latest edition of Maclachlan on Shipping (6th), pp. 238-9, it is said, after noting the said section of the Maritime Conventions Act, and the leading cases on the point:

"In addition to the jurisdiction *in rem* possessed by the Admiralty Court for damage done or received by a ship, which was correlative with a maritime lien over the vessel which was the instrument of mischief, the Legislature has given certain powers for the detention of vessels in any part of the territorial waters of the United Kingdom. . . . A maritime lien for damage done by a ship attaches that instant upon the vessel doing it, and, notwithstanding any change of possession, travels with her into the hands of a *bona fide* purchaser though without notice, and being afterwards perfected by proceedings *in rem*, relates back to the moment when it first attached. . . . Before the Maritime Conventions Act, 1911, the lien remained inchoate for an indefinite period, provided proceedings were taken with reasonable diligence and followed up in good faith. The Maritime Conventions Act has altered the law in this respect, in that it has set up a period of limitation within which actions for damages must be brought."

Judgment

But fortunately there is clear authority upon both the principle and the practice of this Court in cases of maritime liens arising out of wages and damage by collision: I refer to the two decisions of Dr. Lushington in *The Bengal—The John and Mary* (1859), 5 Jur. (N.S.) 1085; Swabey 468, 471, the former being a joint report from which I quote the judgment in the latter case, p. 1086, though both reports should be considered:

"With respect to The John and Mary, the only difference between it and The Bengal is, that that is a suit for wages, and this is a cause of damage. In this case an action was brought at common law, but the parties could not realise the fruits of their judgment. It quite comes within the decision

of the case in Douglas's Reports [*Burnell* v. *Martin* (1780), 2 Dougl. 417]. Where a party suffers damage by collision, he is entitled to recover at common law, or to avail himself of the lien he has, for the loss he has sustained. If there had been a *lis pendens*, it would have been a different thing; for I certainly would not allow, where an action was pending at common law, a suit to be promoted in this Court to a precisely similar effect. I would not allow both suits to go on at the same time, because, in the action originally commenced, there might be full and complete indemnity for the injuries suffered; but if it so happened that in the Court of Common Law the party could by no means obtain full compensation, I would then allow him to proceed against the ship in this Court. I see no substantial difference between this and the case of *The Bengal;* and therefore my judgment must be to allow the parties to proceed in this case as in the other, and I give them their costs."

The judgment in the former case points out, citing *The "Bold Buccleugh"* (1851), 7 Moore, P.C. 267, 286, that:

"We have already explained, that in our judgment a proceeding *in rem* differs from one *in personam;* and it follows that, the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other."

In the former case the master had recovered a personal judgment in the Court of Exchequer against the owner for his wages but could not realize it because of the defendant's bankruptcy though he had filed a proper claim with the assignee against the bankrupt's estate based on his judgment; in the latter the plaintiff had recovered in the same Court a personal judgment against the owners of the ship for damages for collision but further proceedings arising therefrom were pending in that Court respecting the ownership of the vessel, and the same question of barring a remedy by "election" was raised by counsel (Swabey p. 472) as is raised here.

Judgment

It follows from these cases that unless the actions are to a "precisely similar effect" and "full and complete indemnity" can be recovered in the other tribunal this Court will not refuse the appropriate, distinct and complete remedy it can afford. In the case at Bar the amount awarded by the Workmen's Compensation Board is in any event so inadequate that it cannot be regarded, in my opinion, as anything approaching that "full compensation" contemplated by the learned Doctor Lushington, but as plaintiff's counsel has very properly offered to accept a reduction of all sums already received by her from the said Board from my said award of $20,000, judgment will

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be entered for that reduced amount after ascertainment by the registrar if not agreed upon.

To the Admiralty decisions already cited I add an instructive later one in the Court of Common Pleas, *Nelson* v. *Couch* (1863), 33 L.J., C.P. 46, wherein they were unanimously approved and applied in principle by permitting proceedings to be taken at common law for damages for collision after those in Admiralty had proved insufficient to satisfy the injured party—as Willes, J., puts it, p. 48, the plaintiff is entitled to recover at law *in personam* "the excess of damage which the ship is insufficient to satisfy"; and he concludes:

> "It is clear from the case of *The John and Mary* that a proceeding *in rem* in the Admiralty Court may follow proceedings against the owners in a Court of law."

Judgment

And *cf. The Chieftain* (1863), Br. & Lush. 212.

These above reasons being sufficient, in my opinion, to support this action I do not deem it necessary to consider the other answers advanced by the plaintiff to the said objections, but will content myself by citing the decision of the Court of Appeal in *The Burns* (1907), P. 137, on general statutes of limitation of action not barring "action" in Admiralty *in rem* and in particular the observations of Lord Collins, M.R. on pp. 146-7 which support the submission of plaintiff's counsel on the meaning of "action" in sections 11 and 12 of said Workmen's Compensation Act.

Judgment for plaintiff.

IN RE LAING ESTATE.

MURPHY, J. (In Chambers)

1927

Jan. 8.

IN RE LAING ESTATE

Will—Bequest for maintenance of burial plots—Perpetuity—Agreement between donees and testator's trustees condition precedent to vesting—Donees incapable of contracting—Bequests void.

Under a testator's will after payment of debts and funeral expenses the balance of the estate was to be divided into two equal shares, one share to be turned over to Westminster Hall, Vancouver, upon said Westminster Hall entering into an agreement with her trustees to properly care for and keep in good condition for all time her burial ground; the other share to be paid to the Guelph Presbytery of the Presbyterian church at Guelph, Ontario, upon entering into a like agreement as to the family burying ground of her father.

Held, that in each case it is a condition precedent to the vesting of the bequest that the intended beneficiary enter into the agreement mentioned but as there is want of capacity in both donees to execute the agreements required by the will, the bequests are void and as there is no residuary clause in the will into which these bequests would fall there is an intestacy.

Held, further, that as the sums bequeathed are intended to provide funds in perpetuity so far as required to keep up the burial plots mentioned, such gifts are not charitable and as they severally involve a perpetuity they are void.

APPLICATION by two donees to ascertain as to the validity of certain bequests under the will of Jennie Imlay Laing who died on the 29th of April, 1923. The testator left all her estate to trustees upon trust to convert into money and apply the proceeds as follows:

"(1) In payment of all my just debts, funeral and testamentary expenses. (2) The balance to be divided into two equal shares, and one share to be turned over to Westminster Hall, of the City of Vancouver, in the Province of British Columbia, upon said Westminster Hall entering into an agreement with my trustees to properly care for and keep in good condition for all time my burial ground, being lots nine (9) and ten (10), in plot twenty (20), in block nine (9), in Mountain View Cemetery, in the City of Vancouver, Province of British Columbia; and the other share to be paid to the Guelph Presbytery of the Presbyterian Church of Canada at the City of Guelph, in the Province of Ontario, on the said Guelph Presbytery entering into an agreement with my trustees to care for and keep in good condition for all time lots three (3), four (4) and five (5), in the fifth row, range 'B,' being the family burial ground of my father the late Alexander Imlay, in the Cemetery in the Village of Winterbourne, Province of Ontario, and lots seven (7), eight (8), nine (9) and ten (10),

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row eleven (11), range 'A,' being the family burial ground of the late George Loggie in the said cemetery in the Village of Winterbourne."

Since the death of the deceased the Guelph Presbytery of the Presbyterian Church of Canada has become merged in the United Church of Canada. Under section 5 of Cap. 100, Can. Stats. 1924, the United Church of Canada now has vested in it all the rights which the former Guelph Presbytery had. Heard by MURPHY, J. in Chambers at Vancouver on the 4th of January, 1927.

David Whiteside, K.C., for the donees.
W. J. Whiteside, K.C., for the executors.
J. R. Grant, for the heirs.

8th January, 1927.

MURPHY, J.: In my opinion the purported bequests to Westminster Hall and to Guelph Presbytery are both void and there is an intestacy as to these amounts. Though there is a slight difference in phraseology, I think it is clear that in each case it is a condition precedent to the vesting of the bequest that the intended beneficiary enter into the agreement mentioned in the clause giving the bequest.

Westminster Hall was incorporated by Cap. 67, B.C. Stats. 1909, which enactment was amended by Cap. 62 of 1912. It is an educational institution. I have carefully read these statutes and can find no power granted thereby to enter into such an agreement as the will requires.

Judgment

Guelph Presbytery of the Presbyterian Church of Canada has now become Guelph Presbytery of the United Church of Canada.

Neither one nor the other body was or is an entity known to the law. Both were or are ordinary church congregations which in common with many other associations of persons must so far as the law is concerned act through trustees. The bequest here, however, is simply to Guelph Presbytery of the Presbyterian Church of Canada—a body legally incapable of entering into the agreement called for by the will as a condition precedent to the vesting of the bequest.

If these bequests were for charitable uses, the Court would not allow them to fail for lack of a trustee. They are, however, in my opinion, not gifts to charity.

It is clear I think that the sums bequeathed are intended to provide funds in perpetuity so far as required to keep up the burial plots mentioned in the will. Such gifts are not charitable and if they severally involve a perpetuity, as I hold they do, they are void: *Rickard* v. *Robson* (1862), 31 Beav. 244; 31 L.J., Ch. 897; *Fowler* v. *Fowler* (1864), 33 Beav. 616; 33 L.J., Ch. 674; *Hoare* v. *Osborne* (1866), L.R. 1 Eq. 585; 35 L.J., Ch. 345; *In re Rigley's Trusts* (1866), 36 L.J., Ch. 147; *In re Vaughan* (1886), 33 Ch. D. 187; 55 L.T. 547; *Toole* v. *Hamilton* (1901), 1 I.R. 383; *In re Porter* (1925), Ch. 746; 95 L.J., Ch. 46; *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381.

As there is no residuary clause here into which these bequests would fall (*Dawson* v. *Small* (1874), L.R. 18 Eq. 114; 43 L.J., Ch. 406; *In re Williams* (1877), 5 Ch. D. 735; 47 L.J., Ch. 92; *In re Birkett* (1878), 9 Ch. D. 576; 47 L.J., Ch. 846) I must hold there is an intestacy. If it were not for the want of capacity in both Westminster Hall and the Guelph Presbytery to execute the agreements required by the will the cases of *In re Tyler* (1891), 3 Ch. 252; 60 L.J., Ch. 686, and *Roche* v. *McDermott* (1901), 1 I.R. 394, would require consideration but as I hold there is such want of capacity the result is that the will calls for an illegal act in each instance and in each of these decisions it is laid down that in such an event the bequest would be void.

Judgment

Costs of all parties out of the estate.

Order accordingly.

MURPHY, J. (In Chambers)

1927

April 30.

REX v. MARINO

REX v. MARINO AND CRISOFI.

Criminal law—Conspiracy—Information—Conviction—Habeas corpus.

Where an information charges a conspiracy between A, B, C and D, together with E and F and others and a conviction finds A guilty of a conspiracy with B and with E and F the Court will not hold that the conspiracy on which A is convicted is a different conspiracy from the one on which he was charged.

Statement

APPLICATION for a writ of *habeas corpus*. The facts are set out in the reasons for judgment. Heard by MURPHY, J. in Chambers at Vancouver on the 22nd of April, 1927.

Brown, K.C., for the Crown.
Stuart Henderson, for Marino.
Wismer, for Crisofi.

30th April, 1927.

Judgment

MURPHY, J.: All that is before me is the information and conviction. The information charges that accused did unlawfully conspire and agree together with some seven named persons and with Parlow and Hacket and certain other persons to do an unlawful act. The conviction states that accused did unlawfully conspire and agree together with one of the original named seven and with Parlow and Hacket and certain other persons to do an unlawful act described in the exact language of the information.

The bald question, therefore, is, if an information charges a conspiracy between A, B, C and D together and with E and F and others and a conviction finds A guilty of a conspiracy with B and with E and F and others must the Court hold that the conspiracy on which A is convicted is a different conspiracy from the one on which he was charged? I think not. The essence of a conspiracy is the agreement. The nature of an agreement is not changed by the number of the parties to it. There must be of course two parties otherwise there can be no agreement but the fact that it is charged that several others were parties to it who were not proven to be so does not *per se* alter the agreement.

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REX v. MARINO

There was no suggestion in the argument before me that the agreement charged was a different agreement to the one proved. All that I have is that some persons named as parties to the agreement in the information are not named as proven guilty of the conspiracy in the conviction.

The application is dismissed.

Application dismissed.

MURPHY, J. (In Chambers)

1927

May 20.

PACIFIC COAST COAL MINES v. ARBUTHNOT

PACIFIC COAST COAL MINES LIMITED *ET AL.* v. ARBUTHNOT *ET AL.*

Practice—Argument on motion—Facts in dispute and cross-examinations on affidavits read—Counsel fees—Supreme Court Rules—A "hearing" within item 214 of Appendix M.

On a motion to compel a person not appearing on the record to indemnify the applicant against costs on the ground that he was the instigator of the action, the facts being in dispute and cross-examinations on affidavits being read:—

Held, that the argument of the motion is a "hearing" within item 214 of Appendix M to the Supreme Court Rules and higher counsel fees than upon an ordinary motion can be taxed.

APPLICATION by John Arbuthnot for an order to review the taxation of the respondent Hill's costs, taxed under the judgment of McDONALD, J. dated the 7th of January, 1926 (reported, 36 B.C. 321). The chief point raised was what allowance could be made to counsel upon the main argument before McDONALD, J., which lasted several days. The registrar had ruled that the proceedings were not an ordinary motion, but that the argument constituted a "hearing" within item 214 of Appendix M to the Supreme Court Rules, and he allowed $100 counsel fees for each full day. Heard by MURPHY, J. in Chambers at Victoria on the 13th and 16th of May, 1927.

Statement

J. R. Green, for the application: There can be only one hearing in an action, for a hearing means a trial and this action

Argument

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was tried several years ago. The proceedings here were interlocutory, and there can be a hearing only when final judgment is given: see *St. Lawrence Underwriters' Agency of the Western Assurance Company* v. *Fewster* (1922), 63 S.C.R. 342. These proceedings were begun by ordinary notice of motion, so only $35 a day can be allowed.

Argument

D. M. Gordon, for respondent Hill: The registrar followed several unreported cases of which he has notes. These shew there may be a hearing in a matter begun by notice of motion, especially where there are issues of fact, and cross-examinations on affidavits, as here. See also *Ex parte Hasker* (1884), 14 Q.B.D. 82 and *Dyer* v. *School Board for London* (1903), 19 T.L.R. 413. There can be several hearings in one action: see Byrne's Law Dictionary "Hearing." The issues on this motion were quite different than upon the original pleadings. That the judgment was interlocutory is *nihil ad rem*: an interlocutory judgment, *e.g.*, for damages to be assessed, can be given even at a trial.

20th May, 1927.

Judgment

MURPHY, J.: When this matter first came before me I thought that the proceedings on the notice of motion could not be considered as a "hearing" under the tariff of costs. Upon reflection, however, I think the registrar is right. It was in fact a hearing of an extended character, and in the absence of authority, I do not think a narrow technical meaning should be given to that word as it occurs in the tariff. Previous rulings, of which the registrar has notes, whilst not altogether in point, seem to support the view here taken.

The application is dismissed with costs.

Application dismissed.

SUTTON v. SMITH.

COURT OF APPEAL

1927

March 1.

SUTTON v. SMITH

Trial—Jury—Verdict—General verdict—Voluntary reasons added—Reasons not to be ignored—Whether appeal should be allowed or a new trial ordered—Interpleader—Directing of pleadings in.

On an interpleader issue as to the ownership of certain logs in Cowichan Bay, Vancouver Island, the jury when rendering their verdict gave reasons without stating precisely in whose favour the verdict was given. On being sent back to reconsider, they returned and gave the same reasons adding thereto the words "We find a verdict for the defendant Smith." Judgment was entered for the defendant.

Held, on appeal, reversing the decision of McINTOSH, Co. J. (McPHILLIPS, J.A. dissenting), that the reasons given by the jury cannot be ignored and as the verdict cannot be supported on the reasons given or on proper deductions from the facts the appeal should be allowed.

Per MACDONALD, C.J.A.: It would be a mistake to send this issue back for new trial, since it is manifest that the only course which was open to the jury, according to the logic of their own verdict, was to have found a verdict for the plaintiff.

Per MARTIN, J.A.: It is desirable to record here the disapproval we expressed during the argument of the confusing innovation that was wrongly adopted herein of directing pleadings to be delivered after the usual and proper interpleader issue had been drawn up and delivered in accordance with the established and entirely sufficient practice.

APPEAL by plaintiff from the decision of McINTOSH, Co. J. of the 4th of November, 1926, and the verdict of a jury on an interpleader issue to determine the ownership in certain cedar poles in Cowichan Bay. The facts are that at the beginning of 1926, two men named Brooks and Caulfield were taking out poles and selling them on the market, and during these operations they obtained certain moneys from the plaintiff Sutton agreeing to pay him one cent per lineal foot sold. On the 26th of February following Brooks and Caulfield formed themselves into the Cowichan Pole Company Limited. Sutton continued to lend them money and on the 27th of March, 1926, when about $10,000 was owing, the Company gave him a chattel mortgage to cover this sum on all their goods and chattels including the poles which were lying on their timber premises and which were in the water at Cowichan Bay. He continued to lend the Company

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money, some of which was paid back, but the debt increased and on the 31st of May the debt amounted to over $13,000. He then obtained an assignment of the goods named in the chattel mortgage and went into possession and stayed there for some days but later going to Vancouver he left a man in charge. On the 10th of July following the sheriff of Nanaimo, at the instance of a judgment creditor of the Cowichan Pole Company Limited, seized the logs of the Pole Company. An interpleader was directed and the jury found that there was a partnership between the plaintiff and the Company and he therefore had no legal right to secure himself by way of chattel mortgage. Judgment was entered for the defendant.

Statement

The appeal was argued at Victoria on the 10th and 11th of January, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Cunliffe, for appellant: Sutton was in possession and carrying on himself when the sheriff seized. He had an assignment of the poles from the Company. As to the finding of a partnership there was no evidence upon which the jury could reasonably so find: see section 4 (*c*) (iv.) of the Partnership Act. All interest he had before merges in the assignment: see Leake on Contracts, 7th Ed., 699. He has proved such an interest sufficient to make it wrongful as against him that the goods should be seized for a debt due from the execution debtor: see *Peake* v. *Carter* (1916), 1 K.B. 652 at p. 660. On the verdict as given, judgment should have been entered for the plaintiff.

Argument

Maclean, K.C., for respondent: The verdict is a general verdict and any reasons the jury give should be disregarded; that is the practice. The jury gave a verdict for the defendant, then counsel for the plaintiff asked whether that was the whole verdict and the judge then asked them if they had anything to add. Then the jury gave reasons for the verdict. We say the judge had no business to do this as they had given their verdict and the matter was closed: see *Arnold* v. *Jeffreys* (1914), 1 K.B. 512; *Brown* v. *The Bristol and Exeter Railway Company* (1861), 4 L.T. 830 at p. 831; Halsbury's Laws of England, Vol. 18, p. 259 (note to sec. 632); *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R.

512. The true consideration was not truly stated in the bill of sale and it is a nullity: see *Kinnersley* v. *Payne* (1909), 100 L.T. 229; *Parsons* v. *Equitable Investment Company, Limited* (1916), 2 Ch. 527 at p. 531. As to possession Sutton was not in possession when the seizure was made, Brooks was in charge: see *Ex parte Jay. In re Blenkhorn* (1874), 9 Chy. App. 697. There was no proof that the bill of sale was registered.

Cunliffe, in reply: The jury may bring in a general verdict or special verdict as they wish and their first verdict was given with reasons, then they were sent back and they later gave a general verdict: see Halsbury's Laws of England, Vol. 18, p. 257; *Newberry* v. *Bristol Tramways and Carriage Co. Lim.* (1912), 107 L.T. 801. As to consideration in the bill of sale see *Credit Co.* v. *Pott* (1880), 6 Q.B.D. 295. That Sutton was in possession see *Brackman et al.* v. *McLaughlin* (1894), 3 B.C. 265; *Davies* v. *Jones* (1862), 7 L.T. 130.

Argument

Cur. adv. vult.

1st March, 1927.

MACDONALD, C.J.A.: This was an interpleader trial in which the jury found the following verdict:

"The fact that Mr. Sutton had no visible security for the moneys advanced to the Cowichan Pole Company Limited, he is, in our opinion, having in view the provisions of the Partnership Act, a partner in the company, therefore, he has no legal right to secure himself by way of a chattel mortgage."

This verdict being unsatisfactory to the learned judge the jury were sent back to reconsider it and returned with the same verdict, with the following words added thereto:

"We find a verdict for the defendant."

MACDONALD, C.J.A.

It will be noticed that they add nothing of substance to the first verdict since the first verdict found that the plaintiff "had no legal right to secure himself by way of a chattel mortgage," his only title to the logs seized by the sheriff. I think the reasons for their conclusion cannot be ignored. That question was canvassed in this Court in *Bank of Toronto* v. *Harrell* (1916), 23 B.C. 202, and in appeal (1917), 55 S.C.R. 512, in which the question was whether the general verdict should be ignored in favour of incomplete answers to questions submitted. Sharp differences of opinion were expressed in that case but without

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definite conclusions. The verdict here is neither an answer to questions submitted, nor is it in strictness, a special verdict, as that term was understood before the Judicature Act, nor was it elicited by questions asked by the judge after a general verdict had been announced. In view of these conflicting opinions, the judgment in *Newberry* v. *Bristol Tramways and Carriage Co. Lim.* (1912), 107 L.T. 801 at p. 804, I think ought to be followed. The language of Hamilton, L.J., in that case, which was approved by Anglin, J., in *Harrell's* case, and of Cozens-Hardy, M.R., is, I think, applicable to the present situation. There the verdict was a general one but the judge questioned the jury as to how they had arrived at it, a course which was disapproved of in some of the older cases. Nevertheless, neither counsel nor judges in the *Newberry* case appeared to have seen anything improper in it. Cozens-Hardy, M.R., observed that if the jury had simply given a general verdict the Court could not have interfered, but that they had told the Court what they meant by their verdict. The Court there set aside the verdict and entered judgment in favour of the defendants. This is at least clear authority against ignoring all but a general verdict.

MACDONALD, C.J.A.

The jury I think must be assumed to have decided the questions not specifically mentioned in their verdict against the defendant, who raised them. Before the case came to the jury counsel agreed that there were only two points to be submitted to them, namely, that sections 8 and 11 of the Bills of Sale Act, which deal with registration and consideration, had or had not been complied with, and secondly, a question of partnership between the plaintiff and the Cowichan Pole Company Limited. The jury must be taken to have found no fatal defects in respect of registration of the chattel mortgage, and no fault in the statement of the consideration, so that defendant has failed in his first point. The verdict is therefore founded wholly on the points specifically dealt with by the jury; that is to say, the plaintiff was a co-partner of the Cowichan Pole Company Limited, and therefore not entitled to enforce his mortgage security. Now whether or not he had security for his advances before obtaining the chattel mortgage, has, in my opinion, nothing to do with the case, nor has the Partnership Act. There was, moreover, no evidence of profit-sharing. Plaintiff was

entitled by agreement to one cent per lineal foot on poles manufactured, whether there were profits or not.

The question which has given me some trouble is as to whether or not we should direct a new trial or, on the other hand, direct judgment to be entered for the plaintiff. In *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, the Court laid down a rule which in their opinion should govern in such cases as this, and Duff, J., again refers in *Harrell's* case, *supra,* to the same rule, and cites with approval from Halsbury's Laws of England, Vol. 13, at pp. 433 and 434, as determinative of the point here. He concedes that this Court might, in the event of facts bringing the case under the second part of said quotation, which concerns onus of proof, exercise the power given by rule 5, of the Court of Appeal Rules, 1924, formerly Order LVIII., r. 4, of the Supreme Court Rules. Now, while the order directing the issue in this case makes Sutton the plaintiff in the issue it turned out on the trial that the onus was not in the last analysis on him but on the defendant. It would be a mistake therefore to send this issue back for retrial, since it is manifest that the only course which was open to the jury, according to the logic of their own verdict, was to have found a verdict for the plaintiff.

MACDONALD, C.J.A.

The appeal should be allowed, with costs here and below.

MARTIN, J.A.: This appeal turns, I think upon the view to be taken of the verdict of the jury, returned in the following circumstances:

"The Jury retired, and returned in five minutes:

"The Registrar: Gentlemen of the jury, have you agreed upon a verdict?

"Foreman: We have. Do you wish me to read the whole of the verdict?

"THE COURT: Read the whole of it.

"The Foreman: We find a verdict for the defendant Smith.

"Mr. *Cunliffe*: Your Honour, the foreman indicated that there was something else. I think the whole of the verdict should be put in, if there is anything else to the verdict.

MARTIN, J.A.

"THE COURT: I will ask the foreman again: what is your verdict?

"Foreman: The fact that Mr. Sutton had no visible security for the moneys advanced to the Cowichan Pole Company Limited, he is in our opinion, having in view the provisions of the Partnership Act, a partner of the company. Therefore he has no legal right to secure himself by way of chattel mortgage. We find a verdict for the defendant Smith."

A somewhat similar, but not identical question came before

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us in *Bank of Toronto* v. *Harrell* (1916), 23 B.C. 202, and on appeal to the Supreme Court (1917), 55 S.C.R. 512, and Mr. Justice Davies said in the latter Court, pp. 517-8:

"The law of British Columbia on this question is the same as that of England. The jury have the right to find a general verdict and ignore specific questions put to them. If they do so and render a general verdict only or if no questions are asked them, then any reasons which of their own motion they may give for their general verdict may be treated as surplusage and the general verdict alone considered. There seems to be some conflict between the authorities as to whether the same result would follow answers given to questions of the trial judge as to their reasons for their general verdict, after it has been rendered in cases where they had not been asked previously to giving their verdict to give their reasons.

"In this case, however, and apparently with consent of both parties and certainly without any objections, questions were put to the jury by the trial judge and they were told they were not obliged to answer them unless they chose. They however did answer most of them and added a general verdict for defendant.

"Under these circumstances, I think the general verdict being inconsistent and irreconcilable with the jury's specific answers to the questions put must be ignored and the verdict entered as was done by the trial judge on these specific answers for the plaintiffs."

MARTIN, J.A.

But this view, so far as it relates to purely voluntary reasons was merely *obiter* and not concurred in by any other member of the Court, and I am of opinion, with all respect, that the sounder view is that such reasons cannot be ignored and therefore we should consider them in this case with the result that I think the appeal should be allowed, because the verdict cannot be supported on said reasons nor on proper deductions from the facts apart therefrom, which are not in dispute upon essential points.

It is desirable to record here the disapproval we expressed during the argument of the confusing innovation that was wrongly adopted herein of directing pleadings to be delivered after the usual and proper interpleader issue had been drawn up and delivered in accordance with the established and entirely sufficient practice, thereby also creating much unnecessary and unjustifiable expense.

GALLIHER, J.A.

GALLIHER, J.A.: There are only two points necessary for us to consider which were relied on by the defendant to maintain his judgment: 1. Was Sutton a partner of the Cowichan Pole Company? 2. The consideration in the chattel mortgage to

Sutton was not truly stated. The evidence as to partnership is very scant, and is that Sutton was to advance certain moneys to Caulfield and Brooks for which he was to receive a cent a foot on the poles taken out by them. These poles were being taken out by Caulfield and Brooks under the name of the Cowichan Pole Company. They were afterwards incorporated as the Cowichan Pole Company Limited, which took over the assets and assumed the liabilities of the Pole Company and Sutton continued advancing moneys to the incorporated company. The dealings between Sutton, the Pole Company and the incorporated company do not at any stage suggest that Sutton was advancing these moneys as a partner or that these moneys could be considered as a contribution to the partnership or to the Company. On the contrary they shew that what was intended was that the moneys were advanced to assist them in carrying on their enterprise and for the use of this money Sutton was to receive by way of remuneration one cent per foot per pole. This might be looked upon as interest upon the moneys advanced or as an equivalent for the accommodation, but in whichever light it may be regarded I think in the circumstances of this case it does not constitute a partnership. The allegation that the giving of this chattel mortgage was a fraud upon creditors was withdrawn at the trial.

GALLIHER, J.A.

As to the consideration in the mortgage not being truly stated, this defect, if it existed was cured by the taking possession on June 1st, before any rights of the defendant accrued. I hold that this possession was taken and continued up to the time of seizure by the sheriff.

It follows that there should have been judgment for the plaintiff and the appeal is allowed.

MCPHILLIPS, J.A.: This appeal calls for consideration as to what the learned trial judge should have done upon a verdict which was finally rendered by the jury in the following words: "We find a verdict for the defendant."

MCPHILLIPS. J.A.

The trial was in an interpleader issue between the plaintiff and defendant, the plaintiff claiming under a chattel mortgage. The chattel mortgage was attacked upon the ground that there was defect in registration and the consideration was not truly

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stated, and that it was void and of no effect. There was ample evidence to admit of the general verdict as found being rendered. No questions were asked of the jury but when first rendering their verdict they gave certain reasons that have been set forth in the judgment of my brother the Chief Justice. As I read the transcript of the evidence when the jury returned the second time after the learned judge had directed them that their verdict with their volunteered reasons was not satisfactory, returned a general verdict *simpliciter* and it was only when pressed for reasons by the learned judge upon the request of counsel for the plaintiff that the selfsame reasons as at first given—purely volunteered reasons from the jury—were again stated. I am not of the opinion, with great respect to the learned trial judge, that it is right or proper for the trial judge to press for reasons from a jury when they bring in a general verdict. The difference between the judgment of a learned judge and the verdict of a jury is this—the learned judge gives reasons, the jury do not, and should not be urged to do so. In *Lodge Holes Colliery Co. Lim.* v. *Wednesbury Corporation* (1908), 77 L.J., K.B. 847,

MCPHILLIPS, J.A.

Lord Loreburn, L.C., at p. 849, said:

> "When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons."

It is quite a different case where questions are put to the jury by the trial judge—if they are answered—it is upon the answers given that judgment will be entered.

Here we have in terms a general verdict given in favour of the defendant and in my opinion, the learned trial judge was right in entering judgment for the defendant in conformity therewith. The reasons previously given were not really persisted in by the jury but by the course adopted the jury being pressed for reasons after the general verdict, improperly, as I think, again gave the same reasons, they should, in my opinion, be ignored, and the learned judge in the end was right in ignoring them. They were valueless in any case and cannot be held as in any way varying the general verdict for the defendant, which was the specific verdict found.

In *Bank of Toronto* v. *Harrell* (1916), 23 B.C. 202; (1917), 55 S.C.R. 512, Mr. Justice Davies (later Chief Justice of

Canada) covered the exact situation present here and the view I take, in this language, at p. 517:

"The law of British Columbia on this question is the same as that of England. The jury have the right to find a general verdict and ignore specific questions put to them. If they do so and render a general verdict only or if no questions are asked them, [which was the case here] then any reasons which of their own motion they may give for their general verdict may be treated as surplusage and the general verdict alone considered."

It is evident that the proper course was here adopted by the learned trial judge, the reasons were rightly ignored, and "the general verdict alone was considered." The reasons in any case are innocuous and do not constitute any finding that even if considered would disentitle the entry of judgment for the defendant—certainly they do not warrant judgment being entered for the plaintiff.

Upon the whole case I am unhesitatingly of the opinion that the learned judge was right in entering judgment for the defendant in that there was a general verdict found by the jury for the defendant. The reasons given by the jury were really not persisted in by the jury when coming in the second time and they were wrongly extracted from the jury, and in the language of Mr. Justice Davies "may be treated as surplusage and the general verdict alone considered." Further, as I have already pointed out, the reasons are innocuous in their effect in any case and do not detract from the general verdict or entitle the entry of judgment for the plaintiff and the vacating of the judgment in favour of the defendant. At the very most a new trial might be directed if the reasons are to be considered as affecting the general verdict. There can be no right to set aside the judgment for the defendant and enter judgment for the plaintiff. In my opinion the learned trial judge was right in entering judgment in accordance with the general verdict as the general verdict alone was entitled to be considered. I would therefore affirm the judgment of the learned trial judge and dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: This appeal is from a judgment for the plaintiff on a verdict of a jury in an interpleader issue. The plaintiff claimed title to a quantity of cedar poles, and a truck under a chattel mortgage given him by the Cowichan Pole

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Company Limited, on March 27th, 1926, to secure advances aggregating $10,000, and under which he claims to have entered into possession. He made advances first to Caulfield and Brooks engaged in logging operations as the Cowichan Pole Company. Later they incorporated the company referred to and the plaintiff continued to make advances regardless of the change. When the chattel mortgage was executed advances were made totalling approximately $10,000, of which only $5,590 was advanced after incorporation, less a repayment of $3,056.61. The consideration, therefore, of $10,000 set out in the chattel mortgage executed by the Cowichan Pole Company Limited, was, it is alleged, not truly stated because advances made to Caulfield and Brooks before incorporation were included.

In consideration of these advances, the plaintiff arranged with Caulfield and Brooks for the payment to him of "one cent per foot profit on the poles." Presumably the $3,056.61 referred to was received by the plaintiff pursuant to this agreement.

MACDONALD, J.A.

The plaintiff feeling insecure demanded and, he alleges received, an assignment of the interest of the Cowichan Pole Company Limited, in the chattels covered by the chattel mortgage. It is not shewn that an assignment in writing was executed. On this and several other points the evidence is left in a very fragmentary state. However, if the plaintiff entered into possession before the rights of the defendant intervened, this is of no importance. I have no doubt the plaintiff did enter into possession and remained in possession until the 6th of July, 1926, closing down the plant in the meantime. The mere fact that the man he left in charge was absent for a short time when the actual seizure was made is not material. On that date the sheriff seized the poles and truck under a warrant of execution issued under a judgment obtained by R. M. Smith & Co., the defendant herein against the Cowichan Pole Company Limited, in an action commenced after possession was taken by the plaintiff.

The defendant claims title to the chattels on two grounds: (1) that the chattel mortgage is void inasmuch as the consideration was not truly stated therein; (2) that the plaintiff was a

partner with the company and the execution creditor could and did seize the partnership property.

The jury first returned a verdict in these words:

"The fact that Mr. Sutton had no visible security for the moneys advanced to the Cowichan Pole Company Limited, he is, in our opinion, having in view the provisions of the Partnership Act, a partner of the company. Therefore he has no right to secure himself by way of chattel mortgage."

Counsel for defendant asked the Court to reinstruct the jury. This was done and the jury, after retiring, repeated as their verdict the words quoted, with the addition: "we find a verdict for the defendant Smith." There is no finding on the question of "consideration," unless it can be regarded as included in a general verdict for the defendant, if it is a general verdict. Nor is there a finding on the question of the "apparent possession" of the Cowichan Pole Company Limited, on the 6th of July. The defendant contended that on the facts "apparent possession" within the meaning of the Act was in the Cowichan Pole Company Limited, when he seized the chattels. That is a question of fact for the jury (*Davies* v. *Jones* (1862), 7 L.T. 130). However, the facts are not in dispute and a finding adverse to the plaintiff would not be warranted. The taking of possession by the plaintiff, coupled with closing down the plant and placing a man in charge, was too open and notorious to admit of doubt. The mere fact that Brooks was there on the 6th of July sorting out culls for another man who purchased them from the plaintiff is not enough, in view of all the facts to shew that "apparent possession" was in the defendant.

MACDONALD, J.A.

The verdict of the jury is very unsatisfactory. If there is no evidence to sustain the finding of a partnership, it is bad; or if having properly found a partnership that as a matter of law does not entitle the defendant to succeed, the judgment cannot stand. The evidence in respect to the plaintiff receiving "one cent per post profit on the poles" is vague and inconclusive for want of a few questions to elucidate it, and the onus of proving partnership was on the defendant. It might mean that he would receive it only if a profit was made or that regardless of profit or loss one cent per post would be paid on every pole produced. Section 4, subsection (*c*) (iv.) of the Partnership Act, Cap. 191, R.S.B.C. 1924, does not assist the defendant as it was not shewn that the plaintiff was to receive "a rate of

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interest varying with the profits," or "a share of the profits arising from carrying on the business." The chattel mortgage was not therefore taken from a concern with which the plaintiff should be held to be in partnership, and there was no reasonable evidence to warrant such a finding.

It was urged, however, that the reasons given by the jury may be disregarded and their finding for the defendant may be treated as a general verdict which should be upheld if supported by evidence, and it was submitted that there is evidence that the consideration in the chattel mortgage was not truly stated. I cannot agree. If the general verdict is inconsistent with the reasons given it cannot stand. I cannot see any distinction between reasons given by a jury inconsistent with a general verdict and answers to questions which are irreconcilable with it. I think the views of Anglin, J. (now Chief Justice of Canada) expressed in *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512 at p. 538, are sound. His Lordship says:

> "I am also of the opinion that inasmuch as the jury saw fit to answer the questions put to it, thus informing the Court of the findings of fact upon which it based the conclusion expressed in its general verdict, those specific findings cannot be ignored. If they are inconsistent with the general verdict the latter cannot be sustained."

MACDONALD, J.A.

The jury outlined the reasons for their verdict and it is on that basis that we must consider it.

Counsel for the respondent submitted, however, in an effort to get free from the reasons attached, that the Court after the verdict had no right to interrogate (or I take it, reinstruct) the jury, relying on the authority of *Brown* v. *The Bristol and Exeter Railway Company* (1861), 4 L.T. 830, followed in *Arnold* v. *Jeffreys* (1914), 1 K.B. 512. The request for further consideration was made by counsel for the defendant who now complains that it should not have been granted. Where a general verdict is rendered the Court is not entitled to require the jury to state the grounds upon which the verdict was reached. Here, apart from the fact that defendant's counsel seeks to approbate and reprobate, the verdict was not a general one. It was a mixed statement of law and fact, not conclusive of the issue presented to them. To regard it as a general verdict for the defendant as first returned, one would have to hold that their conclusion was right although their reasons for

reaching that conclusion were wrong. It is one thing to decline to hear the reasons upon which a proper verdict of a jury is based and quite another to require elucidation of a verdict wholly or partially meaningless or inconclusive.

It is submitted, however, that as the second verdict contained the additional words—"we find a verdict for the defendant" it can be sustained if there is any evidence to support it on any issue in the action, *e.g.*, that the consideration was not truly stated. Here again the facts are not in dispute, and I am not at all sure that they support the defendant's submission. The plaintiff's total advances, after allowing for credits, amounted to over $10,000, when the chattel mortgage was given, less than half of which, as already pointed out, was advanced to the company actually executing the mortgage. Morally the plaintiff was justified under all the facts to include the larger amount in the chattel mortgage. It was a *bona fide* transaction. Further, the incorporated company assumed the liabilities of the partnership it superseded. The first agreement for advances was with Caulfield and Brooks. But that agreement was discharged by the new contract contained in the bill of sale, through the introduction of a third party, *viz.*, the incorporated company and it was accepted by the plaintiff in place of the original debtor.

We were referred to several English authorities shewing that slight discrepancies in setting out the consideration avoided the bill of sale. As pointed out by Osler, J., in *Marthinson* v. *Patterson* (1892), 19 A.R. 188 at p. 195, English authorities are not altogether applicable to the Ontario Act, nor, I would add, to our own Act. However, in the view I take, although I raise the point, it is not necessary to decide it, because finding as I do that possession was taken before the rights of the defendant intervened, he cannot be heard to impeach the validity of the chattel mortgage. The *Marthinson* v. *Patterson* case, *supra*, is authority for the converse of that proposition. A mortgagee may find that through technical defects his bill of sale is invalid as against creditors, but if it is good *inter partes* he can perfect it by taking possession before the rights of others intervene. He may do so at any time so long as no one else is

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in a position to impeach the transaction and *mala fides* cannot be charged. *Parkes* v. *St. George* (1884), 10 A.R. 496.

I would therefore allow the appeal, and direct that judgment be entered for the plaintiff.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent: *C. F. Davie.*

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Elections, municipal—Booth closed during polling hours—Irregularity, whether materially affecting result of election.

Quo warranto—Municipal Elections Act, R.S.B.C. 1924, Cap. 75, Secs. 98(2), 99—Crown Franchises Regulation Act, R.S.B.C. 1924, Cap. 215.

Costs—Petitioner ordered to pay respondent's costs.

Where an election is conducted in accordance with the provisions of the statute, but an irregularity is committed by the deputy returning officer, if such irregularity does not materially affect the result, the Court will not void the election.

Held, also, that in this case, the respondent had satisfied the burden that section 98 of the Municipal Elections Act had been properly invoked.

MOTION in *quo warranto,* on the return of an order *nisi,* to shew cause why the respondent John Newell Evans, should not be declared as usurping the office of Reeve of the Municipality of North Cowichan, Vancouver Island.

The election at which the respondent was declared elected was held on the 15th of January, 1927, and the return by the returning officer was made on the 18th. A notice of motion, in *quo warranto,* was issued on the 12th of February, returnable on the 25th. There were not any grounds present on which to found a petition under section 98 of the Municipal Elections Act, and the petitioner proceeded by way of *quo warranto.*

Statement

On election day, at a small polling-station, the last vote had been polled about 4.30 o'clock in the afternoon. The deputy

returning officer waited until six o'clock or a little later, when, having no light, he locked up the station, took the ballot-box and papers with him and went to his house for a lamp. He returned before seven o'clock, the closing hour. During his absence one voter presented himself. There was no evidence that any others appeared. The statute contains a provision (section 23) giving the voters a right to vote for reeve at any of the polling-stations. The respondent was declared elected with a majority of ten votes.

Statement

The motion came on before MACDONALD, J. at Victoria (on the return of an order *nisi* made by GREGORY, J.) on the 12th and 14th of April, 1927.

R. O. D. Harvey, for the relator.

Bass, for respondent, raised the preliminary objection that the proceedings were out of time, under subsection (8) of section 98 of the Municipal Elections Act, the return having been made on the 18th of January, and the notice of motion for order *nisi* made returnable the 25th of February. Further, under the Crown Franchises Regulation Act, R.S.B.C. 1924, Cap. 215, the relator should have obtained permission to use the name of the King in these proceedings. That statute, while permissive in its language, casts a duty on the Attorney-General. He is the officer who must determine whether proceedings in *quo warranto* shall be brought in respect of municipal offices, and the Statute of Anne (1710), Cap. 20 is not in force in British Columbia.

Argument

Harvey: The subsection gives an aggrieved person 30 days within which to institute proceedings. The Crown Franchises Regulation Act does not take away any right formerly vested in an aggrieved person, therefore remedy by way of *quo warranto* in such a case as this remains.

The point was reserved, and argument proceeded on the merits.

MACDONALD, J.: Richard Henry Smiley, who was a candidate for the position of Reeve for the District of North Cowichan, at the election, held in January last, seeks, by way of *quo warranto* proceedings to have it declared, that John Newell Evans was not duly elected, to the position of Reeve of that Municipality.

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The application is made under the Crown Office Rules, as applicable to this Province. It is contended by counsel for Evans that such proceedings cannot properly be taken, on account of the provisions of subsection (8) of section 98 of the Municipal Elections Act, which reads as follows:

"No writ of *quo warranto* shall hereafter issue in respect of any municipal election after the expiration of 30 days from the declaration by the returning officer of the candidate elected."

It is contended, however, that this section is not applicable to the present application. And in support of that contention I am referred to the case of *Rex* v. *Balment et al.* (1915), 8 W.W.R. 111. It appears from the short judgment in that case, that the learned Chief Justice held that the subsection, to which I have referred, merely provides that no proceedings by way of *quo warranto* shall be instituted, after the expiration of such 30 days. So that, assuming that the learned judge is correctly reported, the objection thus taken by counsel for Evans should not prevail. However, I deem it unnecessary to give effect to this objection, in the view, which I take, of another most important branch of the application. Whether the subsection to which I have referred might or might not stand by itself, and operate as a bar to *quo warranto* proceedings, is to my mind immaterial, in view of what I will term, the saving clause, contained in section 99 of the Municipal Elections Act. This section reads as follows:

Judgment

"99. No election of a member of any Municipal Council shall be declared invalid by reason of a non-compliance with the rules contained in this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and in the by-law or resolution (if any) of the municipality in which the election was held relating to elections, and that such non-compliance or irregularity did not materially affect the result of the election."

I draw particular attention to the portion of this section which states, that no election of a member of any Municipal Council shall be declared invalid by reason of any irregularity, if it appears to the Court that the election was conducted in accordance with the principles of the Act, and that the non-compliance or irregularity did not materially affect the result of the election. Here the non-compliance or irregularity that is complained of, is that the returning officer, at a schoolhouse at

Crofton, closed the poll about six o'clock, and did not reopen it until nearly seven o'clock on the polling day. His affidavit explains why that event took place. And if I accept it, as I do, it appears that at 4.30 in the afternoon, it being a small poll, he had come to the conclusion that practically all the voters who intended to vote at that poll had exercised their franchise. However, he remained until six o'clock, and then, it becoming dark, he concluded he had better obtain light for use in the schoolhouse, and for that purpose went to his home, staying longer than he should have done. The complaint, then, is that he should have remained under any and all circumstances, and thus held the poll open during the time prescribed by law. Strictly speaking, this contention is well founded.

It is submitted that the burden rests upon the sitting Reeve in the circumstances to sustain his position, and that he is required to satisfy the Court that the irregularity, terming it such, did not materially affect the result of the election. It appears that one voter, Devitt, did attempt to exercise his franchise, and the poll being closed, he failed to be afforded that privilege. It is also suggested that a number of voters might have voted at that point, had the poll remained open during that period. But there is no evidence before me to shew that there was any attempt and failure on the part of any other voters to exercise their votes through the temporary closing of the poll; nor is it shewn that they could not have polled their votes at some other polling-place in that district.

Judgment

Under the Ontario Act, there are a great number of cases cited where irregularities in that Province have been cured by a similar section; and then, again, it would appear a number of seeming irregularities have been held not to come within the scope of the saving clause in the Act. I do not deem it necessary to canvass these numerous cases. The section in Ontario enabling the Court to allow an election to remain valid notwithstanding mistakes or irregularities, has this important difference (before the section had been amended and amplified of late years); the section in our Province, provides that the Court may exercise the benefit of the section in favour of upholding the election, if non-compliance or irregularity did not "materially" affect the result of the election; and in the Ontario Act the word

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"material" did not appear in the section as it stood prior to 3 & 4 Geo. V.

Anglin, J., now Chief Justice of the Supreme Court of Canada, in his judgment in *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317 at p. 328, in dealing with the situation, as presented in that case, and the application of the Ontario section as it then stood, said as follows:

"The cardinal principles underlying the various provisions of the Act governing municipal elections appear to me to be that the electors shall have a fair opportunity for polling their votes and that the secrecy of the ballot shall be preserved. If a reasonable opportunity for voting has not been afforded, or if there has been a substantial disregard of the regulations prescribed to ensure the secrecy of the ballot, the election cannot, in my opinion, be said to have been conducted in accordance with the principles of the Act, and it is difficult to perceive how the respondents could satisfy the Court that the irregularity did not affect the result of the election."

Street, J., in *Re Young and Township of Binbrook* (1899), 31 Ont. 108 at p. 111, expressed the view that,—

"as a general rule an election should be held to have been conducted in accordance with the principles laid down in the Act, when the directions of the Act have not been intentionally violated, and when there is no ground for believing that the unintentional violation of them has affected the result."

Judgment

Without further discussion of the facts here present, I find that a reasonable opportunity for voting has been afforded, and there has not been substantial disregard of the law, on the part of the deputy returning officer, in holding the election at Crofton. The election was held in accordance with the principles of the Municipal Act. While accepting the contention made by counsel for Smiley, that the burden rests upon the respondent of shewing that section 98 of the Act should be invoked, I find that this burden has been satisfied. Upon all the facts as disclosed in the affidavits, while an irregularity or non-compliance, as I have mentioned, occurred in connection with that election, still I find that irregularity or non-compliance did not, in the words of the statute, "materially affect the result of the election."

The rule *nisi* is discharged, and I reserve the question of costs.

[Subsequently judgment for costs in favour of the respondent was given].

Election sustained.

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June 7.

BROWN v. BROWN

Deserted Wives' Maintenance Act—Magistrate's order—Appeal to County Court—Garnishee—Attachment of Debts Act—R.S.B.C. 1924, Cap. 17, Sec. 3; Cap. 67, Secs. 4, 11 and 15.

The plaintiff obtained an order from a magistrate under section 4 of the Deserted Wives' Maintenance Act for payment by the defendant of $8 per week and this order was affirmed on appeal to the County Court. The defendant later became in arrears and the plaintiff obtained a garnishing order from the registrar of the County Court attaching the amount of the judgment in the hands of the City of Vancouver as being wages due from the City to the defendant and the City paid into Court $137.92. This sum was then ordered by the County Court judge to be paid to the plaintiff without any deduction by way of exemption from attachment.

Held, on appeal, reversing the decision of GRANT, Co. J., that although after the original order was affirmed on appeal, an order for attachment could have been made by the magistrate under section 11 of the Deserted Wives' Maintenance Act, the procedure here invoked was that of the County Court and in so doing the provision of the Attachment of Debts Act which provides for an exemption of $60 must be complied with. The order, having made no provision for exemption, must be set aside.

APPEAL by defendant from the order of GRANT, Co. J. of the 10th of March, 1927, that $137.92, paid into Court under a garnishee order of the 25th of February, 1927, be paid out to the judgment creditor, and that an application of the judgment debtor to set aside the said garnishee order be refused. The plaintiff obtained judgment against the defendant under the Deserted Wives' Maintenance Act and the defendant was ordered to pay the plaintiff $8 per week as maintenance. The defendant was $190.79 in arrears in his payments when the garnishee order was issued.

Statement

The appeal was argued at Vancouver on the 30th of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: The attaching order was made against the husband's wages and the whole question is whether said order is valid. Under section 11 of the Deserted

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Wives' Maintenance Act an attaching order is issued by a magistrate only. Under section 3 of the Attachment of Debts Act either a judge or the registrar may make the order but in the latter case provision must be made for an exemption of $60 in case of an employee. The attaching order in this case was made from the County Court but no provision was made for the $60 exemption. My submission is that the attaching order was bad. Further, the garnishee order recited that the affidavit in its support was filed on the 26th of August, 1926, whereas it was not filed until the 27th of February, following. The order was amended by correcting the date in the application for payment out but that was improper.

Argument

Killam, for respondent: The date of filing the affidavit was a mere slip and the correction was in order: see *International Harvester Co.* v. *McCurrach* (1920), 1 W.W.R. 158. The order in question became a County Court order under the Summary Convictions Act, Sec. 82, Subsecs. (2) and (3). The application was made under section 15 of the Deserted Wives' Maintenance Act. The exemption is a substantive right and it is the process that applies.

Farris, replied.

Cur. adv. vult.

7th June, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The question is one relating to attachment of a debt, under a magistrate's order for maintenance, in favour of a deserted wife, which was afterwards affirmed on appeal to the County Court. The Deserted Wives' Maintenance Act, Cap. 67, R.S.B.C. 1924, makes provision for attaching debts due by a third person to the husband. If the order were not appealed and perhaps, as well after appeal, the wife could apply to the magistrate who is empowered to issue an attaching order but could do nothing more unless the garnishee chose to pay the money. If the garnishee disputed his liability the magistrate's attaching order could be carried into the County Court for enforcement, that is to say, to try the liability of the garnishee and enforce payment.

Where, as here, there has been an affirmation of the order by the County Court the order may be treated as a judgment of

the County Court and may "be enforced with costs by process of the County Court." That is what was attempted here. That Court's jurisdiction in attachment is derived from the Attachment of Debts Act, Cap. 17, R.S.B.C. 1924, the provisions of which must be followed. That Act provides that where the debt is for wages, the excess only over $60 may be attached.

The debt in question is for wages, but the County Court ignored the exemption and attached the whole debt. I think this was error. It was argued that because the exemption could not be claimed in the magistrate's Court if the attachment had been sought there it could not be claimed in proceedings under the Attachment of Debts Act. This, I think would be to disregard the plain and imperative language of the Act itself, without which no attachment could be effected.

MACDONALD, C.J.A.

The appeal must be allowed.

MARTIN, J.A.: An order was made by a magistrate under section 4 of the Deserted Wives' Maintenance Act, Cap. 67, R.S.B.C. 1924, for the payment of $8 per week by defendant appellant to his wife and the order was affirmed upon the defendant's appeal therefrom to the County Court under section 15, which goes on to declare:

"(2.) In addition to all other provisions of this Act for the enforcement of orders, any order of a magistrate for the payment of money to a deserted or destitute wife under the provisions of this Act may, if affirmed on appeal, be enforced with costs by process of the County Court."

After such affirmance the plaintiff (respondent) obtained a garnishing order from the same County Court attaching the amount of the judgment ($190.79) in the hands of the City of Vancouver as being wages due from it to the defendant, and the City paid into Court the sum of $137.92, for wages due and that sum was ordered by the learned County Court judge to be paid out to the plaintiff without any allowance or deduction by way of exemption from attachment. It is conceded that after the affirmance upon appeal of the original order a further order for such attachment could have been made by the magistrate under sections 11-2, but it is submitted that it cannot be made under section 15 and that the exercise of the right to attachment conferred by the Attachment of Debts Act, Cap. 17, R.S.B.C. 1924, is not an "enforcement" of the original

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order by the "process of the County Court," and further, if so, then it must conform to the requirements of the Attachment Act.

The point is a nice one and of general interest, hence I have examined it closely, with the result that in my opinion the County Court attaching order, having regard to the interpretation section 2 and to section 3, may properly be described as "process of the County Court" being one of the lawful "proceedings" (*cf.* section 2) taken to secure the realization of its judgment as prescribed either by the general County Courts Act or by special statute. But if that process be resorted to as an "addition" to appropriate and ample magisterial powers specially conferred by said section 11 (and which were affirmed and not supplanted by said appeal) by such resort these can, I think, only be acquired by such rights which the enactment invoked confers, and the proviso in said section 3 declares that

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" . . . no debt due or accruing due to a mechanic, workman, labourer, servant, clerk, or employee for or in respect of his wages or salary shall be liable to seizure or attachment under this Act, whether before or after judgment, unless the debt exceeds the sum of sixty dollars, and then only to the extent of the excess," etc.

To secure this exemption the statutory form (*vide* section 5) of affidavit prescribes certain necessary statements to be made respecting the debtor's wages, etc., so that a proper order for payment may eventually be made, but in the present case all those necessary particulars have been intentionally omitted and the form altered in accordance with the mistaken view that the exemption does not apply to this process; and in these circumstances I can only reach the conclusion, not without reluctance, that the order appealed from (*i.e.*, for payment out as aforesaid) must be set aside.

GALLIHER, J.A.

GALLIHER, J.A.: Under the Deserted Wives' Maintenance Act of British Columbia the respondent obtained an order from a magistrate which entitled her to payment of certain monthly sums of money by the appellant. Provision is made in said Act by which attachment proceedings may be had by way of garnishment of moneys due by a third party to the person ordered to pay and the magistrate who made the order in the first instance may issue these proceedings. As I read the Act there is no exemption even where the moneys due are for wages.

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The appellant being dissatisfied with the magistrate's order took the matter up to the County Court where the order was affirmed on appeal. The matter then being in the County Court proceedings were taken in that Court, as provided for in the Deserted Wives' Maintenance Act, Sec. 15, by way of garnishee, and the registrar issued the garnishee order complained of. The right of enforcement of the magistrate's order is given in addition to all other provisions of the Deserted Wives' Maintenance Act.

GALLIHER, J.A.

It is objected that the registrar had no jurisdiction to issue this order as the affidavit and order itself were not in conformity with the provisions of the Attachment of Debts Act, no mention having been made in either and no exemption allowed for in respect of attachment for wages due.

The procedure here invoked was that of the County Court and in so doing the provisions of the Attachment of Debts Act must be complied with.

I would allow the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.

MCPHILLIPS and MACDONALD, JJ.A. agreed in allowing the appeal.

Appeal allowed.

Solicitors for appellant: *Farris, Farris, Stultz & Sloan.*
Solicitors for respondent: *Killam & Beck.*

HIGGINS AND CHAN SING v. COMOX LOGGING COMPANY.

MURPHY, J. (In Chambers)

1927

May 27.

HIGGINS v. COMOX LOGGING CO.

Practice—Costs—Taxation—Tariff—Appendix N, column 3—Maximum—Disbursements not included in.

The maximum amount taxable as between party and party under Appendix N is exclusive of disbursements.

The recovery of disbursements on the scale set out in Appendix M is not affected by the fixing of a maximum in Appendix N.

Statement

APPLICATION to review the taxation of defendant's bill of costs on the ground that the registrar erred in not allowing the

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defendant disbursements. The bill of costs was made up under column 3 of Appendix N of the Tariff of Costs and claimed considerable disbursements in addition. The registrar at Victoria allowed the defendant the maximum of costs under said column but disallowed all disbursements holding that the maximum amount of costs taxable under said column was inclusive of disbursements. Heard by MURPHY, J. in Chambers at Victoria on the 25th and 26th of May, 1927.

Argument

Lowe, for the application: The whole scheme of the new tariff is to provide a definite limit in the amount of costs taxable but disbursements are to be in addition to the costs limited and are not to be included in the limited amount. No language could be clearer: see *Cox* v. *Canadian Bank of Commerce* (1912), 3 W.W.R. 397; 2 C.E.D. 344.

Higgins, K.C., contra: The word "costs" includes disbursements. The limited amount set forth in the appendix includes all disbursements, and disbursements cannot be allowed in addition to the amount of costs taxable.

27th May, 1927.

Judgment

MURPHY, J.: In my opinion the word "costs" as used in the paragraph of Appendix N fixing a minimum taxable by any party against any other party must be read in the light of the opening statement of said Appendix N. Said opening statement shews what follows to be a tariff of costs between party and party exclusive of all disbursements. The recovery of disbursements on the scale set out in Appendix M authorized by rule 983 is therefore not affected by the fixing of a maximum in Appendix N.

I would allow the appeal and direct the registrar to tax and allow the disbursements in addition to such maximum.

Application granted.

[IN BANKRUPTCY.]

IN RE WILLIAMSON.

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

1927

June 15.

IN RE WILLIAMSON

Bankruptcy—Rented premises—Trustee in possession—Rent payable by trustee—Can. Stats. 1921, Cap. 17, Sec. 18—B.C. Stats. 1924, Cap. 27, Sec. 2.

Under section 33 of the Landlord and Tenant Act as re-enacted by section 2 of chapter 27 of the statutes of 1924, irrespective of whether the bankrupt's premises are held under lease or not, the trustee in bankruptcy in possession can only be charged by the landlord proportionate rent for the time the premises are actually used by him.

APPLICATION by the trustee in bankruptcy of Nicholas Williamson (trading as Radioland) bankrupt, under subsection (*d*) of section 18 of The Bankruptcy Act as enacted by Cap. 17, Sec. 18, Can. Stats. 1921. Williamson was the sub-tenant of David Kinnon (trading as the Vancouver Barbers' Supply), he being a tenant of A. J. Buttimur, landlord. On the 12th of March, 1927, Williamson made an assignment under The Bankruptcy Act, to A. W. Rudolf, as trustee, whose appointment was subsequently confirmed. The landlord, Buttimur, under a distress warrant for rent owing by David Kinnon (trading as the Vancouver Barbers' Supply) seized the radio stock and fixtures of Williamson, bankrupt (trading as Ralioland), found upon the premises in question, No. 162 Hastings Street West, Vancouver, B.C., on the 7th of April, 1927. The trustee in bankruptcy, A. W. Rudolf, paid the bailiff what he considered was the correct amount of rent due the said David Kinnon (trading as the Vancouver Barbers' Supply), by the estate of the bankrupt, and had the seizure removed on the 11th of April, 1927. The trustee then sold the radio stock of the bankrupt, Williamson, which was removed by the purchaser on the 11th of April, 1927, and the keys of the premises were handed to the said David Kinnon by the trustee, on the morning of the 12th of April, 1927. The rent paid the bailiff by the trustee covered one month and eleven days, the period from the 1st of March, up to and including the 11th of April, 1927, at $160 per month,

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or $218.66 in all. The trustee gave up possession of the premises No. 162 Hastings Street West, on the 11th of April, 1927, to the Vancouver Barbers' Supply. The Vancouver Barbers' Supply now claims from the trustee the sum of $101.34, being the balance of the rent for the month of April, 1927, as a preferred claim, on the ground that such rental was payable in advance on the 1st of April, 1927. The question of law is what is the estate liable for to the said David Kinnon? Has the estate to pay the rent for the balance of the month of April, 1927, or only for the time the premises were occupied by the trustee in bankruptcy, up to the date of giving up possession by the trustee? There is also the construction by the Court of section 33 of the Landlord and Tenant Act, R.S.B.C. 1924, Cap. 130, as re-enacted by section 2 of the Landlord and Tenant Act Amendment Act, 1924, B.C. Stats. 1924, Cap. 27. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 15th of June, 1927.

D. W. F. McDonald, for trustee in bankruptcy.
A. M. Whiteside, for Vancouver Barbers' Supply.

Judgment

HUNTER, C.J.B.C.: Irrespective of whether there is a lease or not the landlord can claim from the trustee only proportionate rent for the time the premises are actually used by the trustee. I think this is the proper interpretation to be placed upon section 33 of the Landlord and Tenant Act as re-enacted by the 1924 statute.

Order accordingly.

CARRICK v. CORPORATION OF POINT GREY.

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March 1.

CARRICK v. CORPORATION OF POINT GREY

Municipal law — By-law — Validity — Ultra vires—Mandamus—Appeal— R.S.B.C. 1924, Cap. 179, Sec. 54, Subsec. (250).

Section 54 of the Municipal Act empowers municipalities to make, alter and repeal by-laws not inconsistent with any law in force in the Province for any of the purposes set out in certain subsections of which number 250 enacts: "For preserving areas within which no buildings shall be erected for any purpose other than that of a private dwelling-house either with or without stables, private garages, coach-houses, greenhouses and necessary outbuildings."

The defendant Corporation passed a town-planning by-law whereby the municipality was divided into "residential," "commercial," and "industrial" areas and clause 4 provided that "No person shall erect or maintain a building within any of said residential areas for any purpose other than that of a private dwelling-house, either with or without stables, private garages, coach-houses, greenhouses and necessary outbuildings: or a dwelling in which the occupant has an office as a physician, surgeon, lawyer, dentist, artist or musician, or a church, school, library, public museum, philanthropic or eleemosynary institution (other than a correctional institution), railway passenger station, nursery, greenhouse, barn, farm building, or a club (other than one where the chief activity is a service carried on as a business) or any other building the use of which is accessory, customary or incident to the use of any of the foregoing buildings.

The plaintiff sought to compel the Municipality to issue to her a permit to build a public garage on her property within the "residential" area, claiming that the by-law is *ultra vires* of the Municipality. It was held on the trial that the by-law was *ultra vires*.

Held, on appeal, affirming the decision of GREGORY, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that clause 4 of the by-law permits the erection within the "residential" areas of several classes of buildings which are not private dwelling-houses and therefore not within the provisions of the Act, and although the good may easily be separated from the bad, it would leave the by-law in such a truncated condition that it is apparent on its face that the Municipality would not have originally entertained it in that form.

APPEAL by defendant from the decision of GREGORY, J. of the 29th of November, 1926 (reported, 38 B.C. 92) in an action for a *mandamus* compelling the defendant Corporation to issue a permit for the erection of a gas-station and for a declaration that by-law No. 44 of 1922 of the said Municipality is *ultra vires* of the powers given the Municipality by the

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Municipal Act. The plaintiff applied for a permit to build a gas-station on a lot at the corner of 49th Avenue and West Boulevard, and within one of the residential areas as fixed by the by-law. It was held by the trial judge that the by-law was *ultra vires* of the Municipal Act and could not be segregated and was wholly void and that a permit must issue to the plaintiff.

The appeal was argued at Victoria on the 6th and 7th of January, 1927, before MACDONALD,, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

A. G. Harvey, for appellant: It was held that by-law No. 44 of 1922 of the Municipality was wholly *ultra vires.* We say that assuming the by-law was *ultra vires* in part there was sufficient left to give the Municipality authority to refuse this permit. The by-law was passed under the authority of section 54, subsecs. 250-4 of the Municipal Act. As to clause 4 of the by-law including "churches," etc., in the restricted area and exceeding the authority of subsection (250) of the Act see *The City of Montreal* v. *Morgan* (1920), 60 S.C.R. 393 at p. 404; Biggar's Municipal Manual, 11th Ed., 333; *Fazakerley* v. *Wiltshire* (1721), 1 Str. 462 at p. 469; *Attorney-General for Manitoba* v. *Attorney-General for Canada et al.* (1925), 2 D.L.R. 691 at p. 695. As to whether the illegal part of the by-law can be segregated from the legal part see *Re Grain Futures Taxation Act (Man.)* (1924), 3 D.L.R. 203 at p. 208; *Attorney-General of Ontario* v. *Attorney-General of Canada* (1925), 2 D.L.R. 753; *Morden* v. *South Dufferin* (1890), 6 Man. L.R. 515; *Brunet* v. *La Cite de Montreal* (1913), 22 Que. K.B. 188; *Fennell and the Corporation of Guelph* (1865), 24 U.C.Q.B. 238; *El Paso & N.E. Ry.* v. *Gutierrez* (1909), 215 U.S. 87 at p. 95: *Strickland* v. *Hayes* (1896), 1 Q.B. 290. He held that the plan or scheme of the by-law was an entire one but see *Kruse* v. *Johnson* (1898), 2 Q.B. 91 at p. 96; *Re Dinnick and McCallum* (1912), 26 O.L.R. 551.

Macrae, for respondent: That the by-law is *ultra vires* see *Attorney-General* v. *Campbell* (1872), 19 Gr. 299; *City of Toronto* v. *Elias Rogers Co.* (1914), 31 O.L.R. 167 at p. 176. On the question of severance of the by-law see *In re Clay* (1886), 1 B.C. (Pt. II.) 300 at p. 305. It is not possible to

separate the good from the bad in this by-law as it is connected throughout: see *Regina* v. *Russell* (1883), 1 B.C. (Pt. I.) 256; *Regina* v. *Petersky* (1895), 4 B.C. 385; *Meldrum* v. *District of South Vancouver* (1916), 22 B.C. 574; *Doble* v. *Canadian Northern Ry. Co.* (1916), 19 Can. Ry. Cas. 312.

Harvey, replied.

Cur. adv. vult.

1st March, 1927.

MACDONALD, C.J.A.: The plaintiff in this action sought to compel the appellant Corporation to issue to her a permit to build a public garage on her property within the appellant Municipality, which had been refused because its erection was claimed to be contrary to the provisions of a by-law passed by the appellant. The plaintiff contends that the by-law is *ultra vires* of the appellant.

The by-law in question purports to be a town-planning by-law, and *inter alia,* sets apart, or to use the words of the statute, "preserves" all those portions of the Municipality uncoloured on a map, as "residential areas," and those coloured red and yellow respectively as "commercial areas" and "industrial areas." Thus the whole municipal area is divided into these three classes. The by-law then proceeds to enact that:

"4. No person shall erect or maintain a building within any of the said residential areas for any purpose other than that of a private dwelling-house, either with or without stables, private garages, coach-houses, greenhouses, and necessary outbuildings."

MACDONALD, C.J.A.

So far the by-law conforms to the power conferred by the Municipal Act, but the clause proceeds and permits the erection within said "residential areas" of several classes of other buildings, which are not private dwelling-houses.

The appellant's rights in this respect are to be found in the Municipal Act now contained in the Revised Statutes, Cap. 179, which empowers appellant, from time to time, to make, alter and repeal by-laws not inconsistent with any law in force in the Province, for any of the following purposes, that is to say:

"54 (250): For prescribing areas within which no buildings shall be erected for any purpose other than that of a private dwelling-house either with or without stables, private garages, coach-houses, greenhouses, and necessary outbuildings."

It will be seen that this section permits a municipality to set

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apart an area or areas for one purpose only, the erection of private dwelling-houses and their appurtenances. This implies a prohibition of any others.

The facts of this case are so peculiar that I can get very little assistance from the cases to which we were referred, except as regards the second point in the case, namely, whether that part of the clause which is authorized may be separated from that part which is not. In this case the good is easily separated from the bad, but as Lord Haldane said in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), A.C. 561, it would, I think, leave the by-law in such a "truncated" condition that I cannot believe that the appellant would have originally entertained it in that condition; that is, I think, apparent on the face of the by-law.

It was argued, moreover, that the whole clause is unimpeachable since the second part of it merely gives a licence to the owners to erect buildings of the several classes there specified. In other words, that the objectionable part of clause 4 is innocuous. This argument, however, is manifestly unsound; it ignores the very purpose and limits of the power given by subsection (250), since the power is to set apart an area within which no building should be erected except dwelling-houses. That power is not legally exercised by a by-law which sets apart an area within which no buildings shall be erected except dwelling-houses and some fifteen other classes of buildings. The consequence of the misconception of the power is well illustrated by this by-law. Instead of selecting residential areas and confining the exercise of the power to them, the appellant has embraced within those set apart almost the whole of the Municipality, some 20 or 25 square miles in extent, and has permitted such erections as schools, churches, libraries, public museums, and many others, though not asylums for the insane. As the purpose of the by-law is town-planning, as its title declares, and as its principal, if not its sole object is the setting apart of residential areas, and as its declared intention is not to exclude the erections aforesaid, which no sane council would think of excluding from the Municipality, it would, in my opinion, be idle to amend the by-law so as to bring about a result never contemplated by the Council.

I would dismiss the appeal.

MARTIN, J.A.: This appeal should, I think, be allowed, because whatever may be said about the confused language of section 4 of the by-law, its 6th section sufficiently covers the case (under subsections 251-2 of the Municipal Act, Sec. 54), and no real or practical difficulty is experienced in severing the valid parts thereof from the valid ones relating to apartments and tenement-houses.

Much reliance was placed below and here on the *Manitoba Grain Futures* case (1924), S.C.R. 317, and the remarks of Mr. Justice Duff at p. 323 and their approval by the Privy Council in (1925), A.C. 561 at p. 568, but when read as they ought to be in connexion with the facts therein they have no application to this case because to sever here would not leave the enactment in that "highly truncated form" described by Lord Moulton, as is shewn by the essential fact quoted in the judgment of Mr. Justice Mignault, p. 326, wherein he points out that the objectionable portion of the Act would apply to the "vast majority of sales" thereunder, which is precisely the opposite to the effect of the by-law before us.

It was not suggested during the argument, nor, with respect, do I think it can be held to be the case, that the by-law by its third section, did not *de facto* as well as *de jure* set apart and establish the "areas" which are dealt with by its subsequent sections, and though there have been attempts to deal with the areas from certain aspects and in certain ways which are *ultra vires,* yet a very substantial and salutary body of lawful legislation remains which may easily and practically be severed as aforesaid from the unlawful, and we should bear in mind the well-known decision of the Queen's Bench Division, by a special Court of seven judges, in *Kruse* v. *Johnson* (1898), 2 Q.B. 91, wherein Lord Russell said, p. 99, that the consideration of by-laws such as this

"ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered."

Applying this principle, I have no doubt that the by-law in question should be sustained. And where there is room for reasonable doubt about the illegality (and it cannot be suggested that much doubt does not exist here) there is high

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authority of long standing to warrant the Court in refusing to declare a by-law unlawful—*vide, e.g.,* the decision of the Upper Canada King's Bench *in banco* in *Fennell and the Corporation of Guelph* (1865), 24 U.C.Q.B. 238, which is also an apt and striking illustration of the application of severance.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: Having had the advantage of reading the judgment of my brother MARTIN, I am wholly of the same opinion. The by-law in no way, in my opinion, transcends the power conferred by the Legislature upon the Municipality to pass by-laws defining what buildings may be erected in defined residential areas. Notably we have here a by-law confining the buildings to private dwelling-houses, a reasonable provision and one fitting and proper when the territory covered is borne in mind. The decisions upon the upholding of by-laws are uniformly in support of a beneficial interpretation thereof. It is vital that it be not permissible to invade residential areas with obnoxious erections and businesses, as it may not be always possible to cope with these invasions upon the ground that they are nuisances. It is clear that the statute law intended to clothe the municipalities with the power to pass by-laws of the tenor of the one now challenged and the Courts are at liberty to apply the principles of equity to the construction of statute law to carry out the intention of the Legislature, *i.e.,* interpret the statute law in accordance with its spirit and not be confined too strictly to the form of expression therein, likewise there should be the same rule of construction in the case of a by-law when within the ambit of the power statutorily conferred. The intention of the by-law is certainly made manifest in no uncertain language. The intention of the by-law being clear and not beyond the conferred powers it is not within the province of the Court to declare the by-law *ultra vires.* In *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627 at p. 634, it was laid down that:

> "It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of justice to come to such a conclusion, but their Lordships hold that nothing

can justify it except necessity or the absolute intractability of the language used."

The language of the by-law in my opinion is, when taken as a whole, *intra vires* and supportable by the conferred statutory power. In *Brett* v. *Brett* (1826), 3 Addams Ecc. 210, Sir John Nicholl, at p. 216, said:

"The key to the opening of every law, is the reason and spirit of the law —it is the '*animus imponentis*,' the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connexion with its whole context—meaning, by this, as well the title, and preamble, as the purview, or enacting part, of the statute."

Applying this principle of construction it would seem to me to be conclusive that the by-law is in its terms clearly valid, not being in excess of the statutory authority granted. The real intention is manifest, and it is the duty of the Court to give effect to the by-law unless it is palpably in its terms beyond the conferred statutory authority (*Doe dem. Bywater* v. *Brandling* (1828), 7 B. & C. 643, Lord Tenterden, C.J., at p. 660).

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I would refer to what Lord Justice Selwyn said in *Smith's Case* (1869), 4 Chy. App. 611 at p. 614:

"It is not the duty of a Court of Law or of Equity to be astute to find out ways in which the object of an Act of the Legislature may be defeated."

The same observation is equally applicable to the construction and validity of a by-law. Municipalities have grave duties and must see to it that there be all proper safeguards in town-planning and the preservation of residential areas and that there be inhibition against other than the desired residential occupation. Were this not done it would be destructive of quietude and the denial of the benefits held out to the residents in the areas covered by the by-law. I cannot persuade myself that the by-law taken as a whole is other than *intra vires,* and I would allow the appeal.

MACDONALD, J.A.: The point in issue is the validity of Town-planning By-law No. 44 (1922) of the defendant Municipality.

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The plaintiff was refused a permit to erect a gas-station (or as it has also been called a "store" inasmuch as motor supplies would be kept for sale) within an area restricted by the by-law

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for "residential" purposes. It is admitted that the property is within the "residential area" designated in the by-law.

Section 4 of the by-law reads as follows:

"No person shall erect or maintain a building within any of said residential areas for any purpose other than that of a private dwelling-house, either with or without stables, private garages, coach-houses, greenhouses and necessary out-buildings: or a dwelling in which the occupant has an office as a physician, surgeon, lawyer, dentist, artist, or musician, or a church, school library, public museum, philanthropic or eleemosynary institution (other than a correctional institution), railway passenger station, nursery, greenhouse, barn, farm building, or a club (other than one where the chief activity is a service carried on as a business) or any other building the use of which is accessory, customary or incident to the use of any of the foregoing buildings."

The alleged statutory authority for this clause is found in the Municipal Act, Cap. 179, Sec. 54, Subsec. (250), reading as follows:

"In every municipality the council may from time to time make, alter, and repeal by-laws not inconsistent with any law in force in the Province for any of the following purposes, that is to say:

"(250). For prescribing areas within which no buildings shall be erected for any purpose other than that of a private dwelling-house, either with or without stables, private garages, coach-houses, greenhouses, and necessary outbuildings."

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Subsection (251) of section 54 is also relied upon, reading as follows:

"For prohibiting within any prescribed area the erection of buildings for any or all of the following purposes namely: factories, warehouses, public garages, shops, stores, and apartment-houses."

It will be noticed that there is no authority in the statute to insert the words "or maintain" in the by-law. It is not "erect and maintain." If it were it might be held not applicable to any buildings erected before the passing of the by-law. With the disjunctive "or," however, it is clear that a prohibition is inserted against the maintenance of any building as well as its erection, and there is no statutory authority for this provision. There is, in fact, only statutory authority for the first five lines of clause 4 of the by-law, ending with the words "necessary out-buildings," if we omit the words "or maintain." The remainder of the clause is ambiguous. Strictly and grammatically interpreted, it does not convey the meaning intended. Having regard to the semicolon it may mean that "no person shall erect or maintain" the classes of buildings mentioned in the last ten

lines of the clause. It may be capable of the interpretation suggested by counsel for the appellant, *viz.*, that the buildings mentioned in the last ten lines are permitted within the residential area, but if so, they are without statutory support. Certainly the language of the whole clause is not clear, precise and definite, and by-laws in restraint of property rights should be reasonably explicit, notwithstanding the rule that they should be "benevolently" interpreted, and supported, if possible.

Again, if this clause is divided in an attempt to hold the first part valid with the exception of the words "or maintain," following the principle that a by-law may be good in part and bad in part when the two parts are entire and distinct from each other, the intention of the Municipality in passing the by-law would not be carried out as it was intended to permit the erection of churches and schools within the residential area. True, as pointed out by Anglin, J., now Chief Justice of Canada, in *The City of Montreal* v. *Morgan* (1920), 60 S.C.R. 393, at p. 404, the word "residential" may be employed in contradistinction to "business and industrial," and as "schools and churches" do not belong to the latter class they may be regarded as included in the former. If this were the only objection to clause 4 of the by-law, it might not be fatal. But it is apparent from the latter part of clause 4, if it is read as counsel for appellant suggested, that the Municipality intended to include other buildings within the residential area in addition to churches and schools, such as railway passenger stations, nurseries, farm buildings. These buildings, unlike churches and schools, cannot by implication be regarded as included in the residential area. They might more properly be assigned to the business or commercial sections. The result is that the only words of clause 4 which might be regarded as valid are:

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> "No person shall erect a building within any of said residential areas for any purpose other than that of a private dwelling-house, either with or without stables, private garages, coach-houses, greenhouses and necessary outbuildings."

This, however, is not entire and distinct in itself because it would not, standing alone, give effect to the general purpose of the by-law.

Clause 6 of the by-law reads as follows:

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"No person shall erect a public garage, public stable, shop or store or a building partly one or partly another, or any apartment or tenement-house, within any of said residential areas."

There was no statutory authority in subsection (251) of section 54, or elsewhere, for the words "or any apartment or tenement-house." True, the remaining portion might be regarded as valid and sufficient without those words, and if so, it would prevent the erection of the gas-station in question. The by-law, however, without clause 4 cannot stand, as without it a residential area would not be established as intended. If clause 4 must go then clause 6 becomes meaningless regarded as it must be as part of the general scheme.

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The by-law was designed to carrying out a town-planning scheme with three main divisions into residential, commercial and industrial areas. If the scheme is destroyed by eliminating, or even partially destroying one important division, *viz.*, the residential area, we have a by-law in a "truncated" form which the Municipality never intended to pass. The valid portion is not sufficient without that which is void to constitute a complete by-law.

I would dismiss the appeal.

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

Solicitor for appellant: *A. G. Harvey.*
Solicitors for respondent: *Abbott, Macrae & Co.*

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REX v. WAH SING CHOW

Criminal law—Opium in possession—Knowledge of accused—Onus—Sec. 16, The Opium and Narcotic Drug Act, 1923, Can. Stats. 1923, Cap. 22—Power of Court of Appeal to draw inference from facts different from that drawn by trial judge.

Where facts and circumstances, coupled with the actions of the accused are taken by the trial judge as indicating a guilty mind, the Court of Appeal is free to draw another inference from the same facts if it believes that the inference drawn below was unwarranted.

Guilt should be brought home to an accused person by evidence which is reasonably conclusive.

Held, on the facts, that in this case there was no such evidence. Decision of McIntosh, Co. J. reversed, and conviction set aside.

CRIMINAL APPEAL from a conviction by His Honour Judge McIntosh at the trial at Duncan on the 14th of January, 1927.

A firm in Hong Kong, with whom the accused had had one business transaction about a year and a half previously, shipped a quantity of merchandise to him at Duncan for sale on consignment. There was no previous correspondence between the accused and the shippers relating to the shipment or any other matter, but there was the letter of advice, with the invoices and bills of lading, which arrived by the same steamer as the goods.

On arrival at Duncan, the goods were cleared by the local Customs officer after a partial examination, the duty and freight paid by accused, and the examined goods with others which the collector declined to inspect, were loaded on a truck for removal to accused's premises. He testified that he had already sold these parcels and took the cases away for repairing those opened for Customs examination or damaged in transit. The remainder of the shipment he left at the railway station, intending to distribute it along the line in various logging camps where Chinese were working. When the truck reached his premises, a couple of blocks away, it was seized by Customs preventive officers who had had surveillance of the shipment from Vancouver. Accused asked the officers if they desired to examine

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the cases, and procured a hammer and hatchet for the purpose. Before the truck left the freight-shed, he noticed one of the preventive officers, whom he knew, look into the shed and the truck, but paid no attention to the fact. Examination shewed that one of the cases containing a quantity of Chinese slippers had concealed in the toes, wrapped in tissue paper, a quantity of opium. Accused was thereupon arrested and charged.

At the trial, it developed that the authorities had obtained knowledge of the opium through intercepting a letter in the mails addressed to a Victoria Chinaman, the envelope of which enclosed various communications, one addressed to Jong Pak, and apprising him of the opium in this shipment. This letter was photographed, restored to its covering envelope with the other correspondence and allowed to proceed to the addressee. On a raid on the premises of the Victoria Chinese at the time of the seizure at Duncan, this envelope was found with its contents, except the communication to Jong Pak. The evidence shewed also that the authorities had knowledge of the opium in the shipment some three days before the steamer arrived at Victoria from the Orient, and that it was under observation from that time until the seizure.

During the search of accused's business premises, a small tobacco-box containing "opium dross" was discovered. This box was resting on the shelf of a bookcase, in open view, and in the search was brushed to the floor. Accused's explanation of its presence was that there had been a Chinese Masonic celebration and public procession in Duncan on the Sunday previous. A Chinaman, living several miles out, was a participant in this procession, and that he had left this box in the store, or office, until he was leaving for home. He did not tell the accused what it was, and did not return for it that day.

At the trial this Chinaman appeared and admitted that the box was his property; that he had left it as stated by accused; that in the rush for the last stage to his working place, he did not go back for the box, but intended to do so the following week-end. He stated that he used this opium dross for bronchial trouble brought on from cedar lumber dust at the mill, and he gave the name of the Chinaman from whom he obtained it.

Maclean, K.C., for the Crown.
Higgins, K.C., and *Bass*, for accused.

McINTOSH, Co. J.: The accused is charged that he did have in his possession on the 24th of November, 1926, in the City of Duncan—unlawfully did have in his possession a drug, to wit: opium, without the authority of a licence from the minister first had and obtained or other lawful authority, contrary to subsection (*d*) of section 4 of The Opium and Narcotic Drug Act, 1923, as amended by chapter 20 of the Statutes of Canada, 1925, the statute in such case made and provided. He is thus charged with having opium to the extent of some 80 tins, which was found by the authorities among goods consigned to him from the Port of Hong Kong. He has given evidence in his own behalf and has stated that he has no knowledge of the presence of this opium in the goods which were consigned to him from Hong Kong. That in fact he did not order these goods at all but that they were shipped by certain merchants there as has been suggested is the habit of the business people of Hong Kong, on a consignment for shipment here. If the facts were simply these, then undoubtedly having regard to the accused's own evidence, he would be entitled to the benefit of the doubt and be discharged, but we must not only take his evidence, but we must take the actions of the accused regarding the shipment, and see if they are the actions of an innocent man. He is undoubtedly found with the opium in his possession, but, as he suggested, he claims he had no knowledge of its being there. This shipment comes to Duncan on the morning of the 24th of November. He has been advised some days previous, and has made arrangements for the clearing of these goods from the Customs, and on the 24th he goes to the E. & N. station and requests the Customs officer for permission to receive the goods. The Customs officer refuses until he has received a proper order, and he is told that such is required. He then goes to the E. & N. and pays his freight and pays the Customs charges and receives delivery orders, and goes back to the E. & N. station. He telephones to a man named Armour, a truckman, to carry the goods away which consist of 128 pieces. Armour has a five-ton truck capable of carrying not only the whole consignment

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of the accused's, but more in addition if necessary. Armour goes to the place usual to receive the goods, but finds that they are not there, that they have been placed on another portion of the platform; as it turns out, having been placed there by an employee of the E. & N. Railway Company on the instructions of the accused, who has only curiously enough, selected five or seven pieces and had them placed upon this portion of the platform. The truckman drives around to where he expected to receive the shipment and is usual to receive such goods, to the place in which he is told these goods are, and loads them up; and then proceeds to the freight-car, having possessed himself of a truck, and proceeds to load up the other portion of the consignment, when he is stopped by the accused and told that only these particular pieces are to be taken by him to his house. These goods are taken by the truckman to his house, and the accused is put under arrest, and the goods examined, and amongst these cases, concealed in slippers, are found 80 tins of opium. Now, do the actions of the accused shew absolute want of knowledge of the presence of the opium? I do not think they do. He tells us that the goods were taken to his house and not to his shop because they had been tampered with by the Customs officials in the examination, and had to be readdressed to a firm of Chinese merchants in Nanaimo, to whom he had sold this particular consignment. Is that the action of an innocent man, having regard to the fact that this truckman could have taken the whole consignment easily to his shop, and there the accused, if he so desired, could have redirected the portion which he claims to have sold in Nanaimo? I cannot accept the evidence of the accused regarding this. I think those particular pieces were taken for one purpose only, namely, so that the opium might be extracted; and undoubtedly the portion of his story having regard to the sale of these goods to Chinese merchants in Nanaimo is possibly true, that the goods would of course have gone forward without the opium, which of course had been concealed. After his arrest he is taken to his shop, and while there one of the officers hears something drop and looks towards the accused who is standing with his back to the shelves, and there was a small parcel on the floor, which has been produced in Court, and has been examined,

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and contains what is known as "dross opium"; that is to say, Yen She, opium that has been once used and is in demand by Chinese, as a Chinese medicine. Evidence is given by the accused that it was brought there by a Chinaman by the name of Duck Dan. Duck Dan a few days before had left it there. Duck Dan says that he took this parcel to the shop of the accused and left it there, and not telling the accused what it consisted of, but telling him that he would not need the parcel until he left for the lumber camp where he was working, but that in leaving he was asked to hurry up and left for the work in which he was to be engaged without taking away his parcel, and that the parcel lay there until the arrest of the accused, and the finding of the parcel which contained this *residuum* of opium by the authorities. I cannot accept this story either. The parcel is one of small dimensions, and once in the possession of a Chinaman it would not have been parted with. He would not leave it in the office connected with the store in which hundreds of his fellow countrymen are in the habit of coming in and out each week, and in a place easily accessible. I think that the opium was the property and in the possession of the accused.

From this decision the accused appealed, and the appeal was argued at Vancouver on the 16th of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Bass, for appellant: There is no element of doubt present in this case. There is neither knowledge, consent nor authority on the part of the accused in connection with the presence of the opium on his premises. In strictness there is no possession without knowledge, and the evidence displaces any knowledge whatever on the part of the accused. The merchandise in which the contraband was concealed, was sent to him from China without any request, order or invitation from him. His actions throughout display an entire absence of knowledge of the opium. This is confirmed by his observation of the Customs preventive officer looking into the truck on which the goods were loaded. That constituted a warning to him had he been guilty, because he knew the officer. But as this shipment was under official

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observation from the time of arrival at Victoria, until its delivery at Duncan, and was convoyed by officers until it reached the premises of the accused, it cannot be said that he was really ever in possession. Possession presumes control, and he had no control at any time. The trial judge has not only misconceived the evidence, he has misstated it in several particulars, and has therefore misdirected himself. Also he has doubt in favour of the accused in several instances and has withdrawn the benefit of it. He has drawn inferences of guilt from actions which were equally consistent with innocence, while at the same time accepting the statements of the accused as truthful.

Higgins, K.C., on the same side: The learned trial judge should have found, under section 16 of The Opium and Narcotic Drug Act, that the accused, on the evidence, had satisfied the onus that the opium was not there with either his knowledge, consent or authority. Having found doubt, his Honour was bound under the authorities to give the accused the benefit of it. See remarks of Reading, L.C.J., in *Rex* v. *Schama and Abramovitch* (1914), 11 Cr. App. R. 45. See also *Rex* v. *Gosling* (1921), 37 Can. C.C. 66; *Rex* v. *Dean* (1924), 41 Can. C.C. 423; *Rex* v. *Mooney* (1921), 36 Can. C.C. 165 at p. 168; *Rex* v. *McEwan* (1920), 19 O.W.N. 149; *Rex* v. *Hayes* (1923), 38 Can. C.C. 348 at p. 360; *Rex* v. *Badash* (1917), 13 Cr. App. R. 17 (*per* Darling, J.); *Rex* v. *Bailey* (1917), *ib.* 27 (*per* Avory, J. at p. 31); *Rex* v. *Hamilton* (1917), *ib.* 32 (*per* Darling, J.).

Argument

Maclean, K.C., for the Crown: The accused was clearly in possession of this opium, shipped to him in this merchandise from Hong Kong. He has not satisfied the onus on him, and his actions shew that he hoped to get away with it. It is suspicious that he ordered the cases containing the opium to be taken to his residence instead of to his business premises. The statement that he had better facilities there for repairing the cases and readdressing them, is subterfuge. He could have done that at the railway station. What he hoped to do was to take the cases to his residence, extract the opium, and then forward the merchandise on to the party to whom he had sold it. Taking the goods away from the northerly end of the

freight-shed was also suspicious. The judge has found that all the actions of the accused were of a character shewing guilty knowledge.

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MACDONALD, C.J.A.: Being a question of fact, only one judge should deliver judgment, and I have asked my brother MACDONALD to deliver the judgment of the Court.

MACDONALD, J.A.: Apart from any question of doubt, there is enough direct evidence in this case to support the plea of not guilty. Guilt should be brought home by evidence reasonably conclusive. With respect, I think the trial judge misconceived the evidence. He regarded, as a suspicious circumstance, the manner in which this consignment of goods was segregated and dealt with at the Duncan railway station, whereas every move that was made was readily explainable and consistent with innocence.

Further the learned trial judge reached his conclusion by drawing an inference of guilty knowledge from undisputed facts, and this Court is free to draw another inference from the same facts if it believes that the inference drawn below was unwarranted. He sets out in his reasons for judgment the actions and conduct of the accused. He does not disbelieve the evidence of the accused in his narration of the facts. That is common ground. He does find, however, that his actions were indicative of guilt, whereas the reasonable inference is that they were performed in the usual course of legitimate business transactions.

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The learned trial judge was not called upon to find evidence to support some theory that an enemy planted this opium on the accused or that he was used by others, without his knowledge, to bring opium into the country. He had to find evidence pointing to guilt with reasonable certainty and, in my opinion, there is no such evidence in this case. I think the accused established by evidence that the drug was concealed in the shipment without his authority, knowledge or consent. He did not order the goods nor make a request through any source to have

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them forwarded, as the consignor's letter shews. The goods were shipped to the accused from China on consignment—a common practice—to be sold on commission. They were on the way with opium concealed therein before he knew anything about the shipment. Before arrival the accused disposed of the cases in which the opium was found to a merchant in Nanaimo and were it not for the intervention of the Customs officials this part of the consignment would have been forwarded to Nanaimo with the opium concealed therein. A letter was discovered from someone in China addressed to a Chinaman in Victoria—not the accused—referring to this shipment and the presence of red tea (meaning opium) therein. There is no proof that the accused knew that opium was hidden away in the goods but this letter shewed beyond doubt that someone else knew it. What was to prevent someone in China with or without the knowledge of the consignor, making use of this shipment to conceal opium therein and arranging (as they were for sale on arrival) to obtain by purchase or order this portion of the shipment at Duncan? The fact that the accused bore a good reputation might very well cause the guilty parties to believe that it was a safe way to get opium into this Province. Every possible ruse known to human ingenuity is resorted to in this traffic, and the accused should not be convicted in view of all the facts, because for the moment, while he was arranging to tranship the goods to Nanaimo, they were found in his possession. Every move made by the accused was consistent with innocence and his evidence is corroborated. The evidence of the empty can found in his store is of no importance and as for the can of "dross opium" found the evidence of the two witnesses explaining its presence is more consistent with innocence, in view of the fact that it was found, not concealed, but in open view in the store of the accused.

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Bass & Bullock-Webster.*
Solicitor for respondent: *H. A. Maclean.*

GOSSE-MILLERD LIMITED v. DEVINE *ET AL.*

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GOSSE-MILLERD LTD. *v.* DEVINE

Lease—Action for rent—Counterclaim—Misrepresentation—Damages—Jury —General verdict.

The plaintiff leased a sawmill and equipment to the defendants on the 3rd of March, 1925, for one year with the right of renewal and right to purchase for $30,000. The plaintiff brought action under the lease to recover rent, etc., and the defendants counterclaimed alleging that Richard Gosse, manager of the plaintiff Company, had, during negotiations for the leasing of the sawmill, represented that he held a contract with the Clayton Logging Company whereby said Company was to supply him with 2,000,000 feet of spruce at $11 per thousand and that the contract would be available to the defendants; that it subsequently appeared that Gosse had in January of that year repudiated the Clayton contract by letter the result being that timber not being available the defendants suffered a loss of $22,000. A general verdict was given for the defendants for $19,460.

Held, on appeal, affirming the decision of MACDONALD, J. (MACDONALD, C.J.A., and MCPHILLIPS, J.A. dissenting), that the jury are not bound to give reasons, and when a general verdict is given it must be assumed that all findings necessary to maintain the verdict are made in favour of the party on whose behalf the verdict is rendered. Having regard to the course of the trial the general verdict must stand.

[Reversed by Supreme Court of Canada].

APPEAL by plaintiff from the decision of MACDONALD, J. of the 13th of December, 1926, in an action to recover $2,817.43, rent payable by the defendants to the plaintiff under a lease of the 3rd of March, 1925, and for goods sold and delivered by plaintiff to defendants and for work done and services performed and for advances made and board and lodging furnished by plaintiff to defendants. The facts are that the plaintiff Company owned a sawmill and cannery at Namu, B.C. where previous to 1925, it had operated the sawmill unsuccessfully. In March, 1925, Richard Gosse, manager of the plaintiff Company discussed the leasing of the sawmill to one A. C. Devine and the defendants claim that during the discussion Gosse represented that he had a contract with the Clayton Logging Company whereby said company was to supply him with 2,000,000 feet of spruce at $11 per M. and that the contract would be available to A. C. Devine. On the 3rd of March, 1925, an agreement was entered into between the plaintiff and defend- Statement

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ants whereby the sawmill equipment and effects appertaining thereto were leased to the defendants for one year with the right of renewal and a right to purchase for $30,000. On the 16th of March following, with the plaintiff's consent, the said lease was assigned to the defendant Company. It subsequently appeared that on the 23rd of January, 1925, the plaintiff had by letter repudiated the Clayton contract. The defendants claimed damages by way of counterclaim in the sum of $22,000 being the loss suffered by them owing to the plaintiff's misrepresentation. The jury brought in a verdict in favour of the defendants for $19,460 and judgment was entered for this sum.

Statement

The appeal was argued at Vancouver on the 21st to the 24th of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C., for appellant: The plaintiff recovered $2,108.63, and there is no dispute as to that. The appeal is as to the $19,460 recovered by the defendants on the counterclaim. We are entitled to a verdict on both the plaintiff's claim and on the defendants' counterclaim but the verdict was given in a lump sum: see *Newberry* v. *Bristol Tramways and Carriage Co. (Lim.)* (1912), 107 L.T. 801; 29 T.L.R. 177; *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512. The counterclaim is not founded on a substantial ground for damages: see *Allen* v. *Flood* (1898), A.C. 1. On remoteness of damages see *Hobbs* v. *London and South Western Railway Co.* (1875), L.R. 10 Q.B. 111; *Wilson* v. *The Newport Dock Co.* (1866), L.R. 1 Ex. 177. As to one's duty to minimize damages see *American Braided Wire Company* v. *Thomson* (1890), 44 Ch. D. 274 at p. 288. The reason for his failure was that he tried to operate this business without sufficient money.

Argument

Mayers, for respondents: The judgment was rendered on the verdict and the findings of the jury are conclusive. The jury found in favour of the plaintiff for the amount claimed and deducted it from the sum they found was due the defendants on the counterclaim: see *Scott* v. *Fernie* (1904), 11 B.C. 91 at p. 95; *Alaska Packers* v. *Spencer* (1904), 10 B.C. 473 at pp. 480 and 490 and on appeal 35 S.C.R. 362 at p. 373; *Schnell* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 378; *Victoria Corporation*

v. *Patterson* (1899), A.C. 615 at p. 619; *Parsons* v. *The Queen Insurance Co.* (1878), 43 U.C.Q.B. 271; *Hepburn* v. *Beattie* (1911), 16 B.C. 209 at p. 213; *Macdougall* v. *Knight* (1889), 14 App. Cas. 194 at p. 199; *Nevill* v. *Fine Art and General Insurance Company* (1897), A.C. 68 at p. 76; *Seaton* v. *Burnand*. *Burnand* v. *Seaton* (1900), A.C. 135 at p. 145; *Wilson* v. *United Counties Bank, Ld.* (1920), A.C. 102 at p. 142; *Gavin* v. *Kettle Valley Ry. Co.* (1921), 29 B.C. 195; *Weber* v. *Birkett* (1925), 2 K.B. 152.

Argument

Craig, in reply: We are entitled to a verdict on each cause of action. The jury cannot give one verdict on two causes of action: see *Ogle* v. *Earl Vane* (1868), L.R. 3 Q.B. 272; *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598.

Cur. adv. vult.

7th June, 1927.

MACDONALD, C.J.A.: Only the counterclaim is in question in this appeal. The respondents recovered judgment on it for $19,460 and the complaint was that the appellant had, as an inducement to its accepting a lease of defendants' sawmill, fraudulently represented to them that appellant had an agreement with the Clayton Logging Company for the purchase of logs of which the respondents should have the advantage. They also claim that a term was inserted in the lease giving them this right.

MACDONALD, C.J.A.

The impression I get from the evidence is that there was no fraud. The evidence coupled with the facts surrounding the transaction points definitely to the other conclusion, but as the respondent, A. C. Devine has sworn that the representation complained of was made, my opinion may not prevail against that of the jury. That witness makes much of the conversations which took place between himself and Richard Gosse, manager of the appellant Company. No doubt those conversations did take place and no doubt the question of the supply of logs to be got in the locality was one of some interest to the respondents, and the price at which they could be got was also a subject discussed. I have no doubt that appellant's contract with the Clayton Logging Company was referred to as evidence on both these subjects. In view of the fact that that contract

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had been cancelled only a short time before by the appellant, or to put it more accurately, that it had written the Clayton Company cancelling the contract, that circumstance must have been in Gosse's mind at the time. Therefore if he represented that the contract was still in existence the representation was in one view of it false, and I think the jury, if they took that view, might infer that it was knowingly false. But Gosse's explanation is that that contract was discussed only as shewing that logs could be obtained at the prices there agreed upon, and further that the letter of cancellation was brought to Devine's attention. There was some question as to whether that letter could be regarded as a cancellation or as only expressing the appellant's mind, which to effect a cancellation must have the assent of the Clayton Logging Company, which was not given until after the lease. As I have said, those and other circumstances convince me that there was no fraud on the appellant's part, but I must concede that a jury might not unreasonably take the other view of it.

MACDONALD, C.J.A.

But there is a fact in the case which in my opinion eliminates the representation altogether, assuming it to have been made and to have been fraud. When the parties came to settle the lease the respondents objected to the draft on the ground that it did not refer to the Clayton logs, and insisted upon a change. Respondent, A. C. Devine, who conducted the negotiations for the lease says that he told appellant that "I wouldn't go up there unless I knew I was getting those logs." The respective solicitors of the parties were then called in and a term of the lease was changed so as to satisfy the said respondent. That term as amended at his request, reads as follows: The respondents agree

> "to take up all logging contracts that now exist between loggers and the lessor, and assume all liability thereon with the Clayton Logging Company and Stensvick and Torkelsen."

This term is pleaded in the defendants' counterclaim as "an implied term of the said indenture that the contract between the plaintiff [appellant] and the Clayton Logging Company was a valid and subsisting agreement." Devine's refusal to have anything to do with the lease until the appellant had, as he puts it, agreed that its contract with the Clayton Logging Company was valid and subsisting, eliminates in my opinion, the repre-

sentation complained of as a factor in the case. They refused to act upon it and required it to be put in writing in the form of an agreement.

This term of the lease, if it means what respondents say it means, has unquestionably been broken, and this breach might entitle the respondents to damages. The lease was put in evidence and was before the Court. I think it was the learned trial judge's province to construe it and to say whether or not the respondents' contention with regard to its meaning was well founded. If he had done this, and had found that the term was as respondents contended for, then the case should have been put to the jury on that footing. But whether put to the jury on that footing or not, and even assuming that that issue was withdrawn from the jury as a separate cause of action by the consent of both counsel, which is not admitted, still it was there as evidence that the alleged fraudulent representation had not been relied upon and could therefore not have formed a sufficient ground of the jury's verdict. Counsel for both parties admitted that the measure of damages for breach of contract and for fraudulent representation would be the same but that admission does not touch the matter now in question. The measure of damages may be the same, but it is one thing to charge breach of contract and another thing to charge fraud. The verdict cannot be supported on the wrong ground, because it might have been supported on another one.

MACDONALD, C.J.A.

Now, the learned judge told the jury that they need only consider the alleged fraud, he neither construed the lease nor instructed the jury upon it, the verdict being a general one must have been founded on fraud alone since the question of contract had not been put to the jury.

Misdirection or non-direction in this respect, however, was not made a ground of appeal, nor was exception taken at the trial but the latter difficulty is removed by section 60 of the Supreme Court Act. While the question of misdirection or non-direction has not been raised in the appeal, yet this ground was taken:

"That on the evidence the jury should have found a verdict in favour of the plaintiff [appellant] dismissing the defendants' [respondents] counterclaim."

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That is a claim the jury were not justified on the evidence before them, which included the said term in the lease, in founding their verdict on fraudulent misrepresentation, and if I am right in what I have said then this ground of appeal was well taken.

The respondents have not appealed from the judge's failure to construe the said term in the lease and to instruct the jury thereon, nor did they take exception thereto at the trial. I think the appellant has made out a case for the dismissal of the counterclaim, since their counsel contended all the way through that all the damages claimed by them were the consequences of the said fraudulent representation.

MACDONALD, C.J.A.

The appeal should be allowed; and the counterclaim dismissed with costs here and below.

MARTIN, J.A.

MARTIN, J.A.: Having regard to the course of trial (by which the parties are bound—*Victoria Corporation* v. *Patterson* (1899), A.C. 619, and *Scott* v. *Fernie* (1904), 11 B.C. 91—I am of opinion that this general verdict must stand, and being so much in accord with my brother GALLIHER that I shall only say that I view the answer of the jury to the learned trial judge as a polite and proper way of declining to be interrogated by him respecting the general verdict they had returned. And it is much to be regretted, with every respect, that the learned judge did not submit to the jury the questions he had prepared for them but withdrew merely because both counsel said they "were content that it should go to the jury without questions." The case was one requiring questions for its proper elucidation and if they had been submitted in all probability all the very heavy subsequent expense would have been avoided. It was too late to try to question the jury after their verdict instead of before it in the usual and necessary way in actions of this description.

GALLIHER, J.A.

GALLIHER, J.A.: What took place when the jury came in to render their verdict was as follows:

"The Registrar: Gentlemen of the Jury, have you agreed upon your verdict?

"Foreman of Jury: We have. We find in favour of the defendant Devine, my Lord.

"THE COURT: In favour of whom?

"Foreman of Jury: The defendant, Devine.

"THE COURT: That is on the issue of fraud, is it?
"Foreman of Jury: I am not prepared to state that, my Lord.
"THE COURT: Well, what is the rest of your verdict?
"Foreman of Jury: As to the amount of damages?
"THE COURT: Yes.
"Foreman of Jury: $19,460 in favour of Devine, the defendant.
"THE COURT: That is, there is no segregation in the amount between giving the verdict on two different issues. You are just giving a broad verdict?
"Foreman of Jury: Yes, my Lord."

It was submitted that the jury did not find fraud, and whether they did or not, would have a bearing as to the amount of damages assessed.

The fraud or misrepresentation complained of is in respect of the Clayton Logging contract and most of the claims for damages in fact, I think all of them, except the breach of the verbal contract complained of in respect of the cutting of lumber for shooks would arise if at all, out of fraud. I should perhaps also except the charge of the plaintiff setting itself to ruin the defendants under the headings (a) and (h) inclusive of paragraph 29 of the counterclaim, but as I do not think the jury could reasonably have found (if they did) this charge proved, I would conclude that apart from fraud in respect of the Clayton contract and what may be shewn to have flowed therefrom, the only damages I would have to consider would be as to breach of the lumber contract.

GALLIHER, J.A.

From my point of view it is important as to whether the jury based their findings on fraud or not. The jury may, but they are not bound to give any reasons for their findings and where a general verdict is brought in without more, it must be assumed that all findings necessary to maintain the verdict are made in favour of the party in whose behalf the verdict is rendered. But here, the learned judge, as there were two distinct issues, one upon fraud and one upon breach of the verbal contract, being tried together, and not dependent one upon the other, asked the jury:

"That is on the issue of fraud, is it?" To which the foreman replied: "I am not prepared to state that, my Lord."

Did that mean, in effect, we are giving no reasons, or did it mean they were not prepared to go that far and say there was fraud? It is somewhat uncertain what is meant and in such a

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case one might consider ordering a new trial, but if I am right in thinking that apart from fraud and its incidents, the only question here to be considered would be damages for breach of contract, then the jury could not have found the amount mentioned in their verdict which I think would oblige me to find that their answer should be construed as meaning that they declined to disclose their grounds.

Assuming fraud found which I think I must (and although I disagree with same) the finding of the jury must prevail. The question as to the amount of damages is still open. But before dealing with that I may as well dispose of another question raised. The verdict is for a lump sum and may be based partly upon the ground of fraud and partly on the breach of contract independent of the fraud, and it is submitted by counsel for the plaintiff that a separate verdict on each should have been brought in. It is true the learned trial judge refers to this in his charge to the jury but I find nothing in his charge which directs the jury so to do and moreover, in my opinion, they are not obliged to do so and what we have to deal with is whether fraud having been found the verdict can be maintained on one or both issues.

GALLIHER, J.A.

Now, coming to the question of damages there is a sharp conflict between counsel as to what is the proper measure of damages, Mr. *Craig* maintaining that the measure of damages is the difference between what the Clayton logs would have cost the defendants and what they could have purchased like logs in the open market for. This would apply to the damages for fraud and what incidentally flowed therefrom, and would not include damages for breach of contract not connected with the fraud.

Mr. *Mayers* for the defendants, contended that the measure of damages could not apply in a case such as disclosed here, but that the proper measure of damages should be what the defendants could demonstrate they had lost by reason of the fraud and breach of contract on the part of the plaintiff, such as loss of profits.

As to the purchase of logs to replace those in the Clayton contract, I think we should consider whether there was within a reasonable distance from Namu, where the mill was, and where

logs would have to be towed, other logs which could have been purchased to take their place. It would appear from the evidence that most of the logs produced in that vicinity were produced by hand-loggers, and were what is known as camp run, and included spruce, fir, hemlock and sometimes balsam, in other words, a mixed class of logs mostly sold to pulp mills and in order to get what spruce logs were in these booms the defendants would have to purchase the other classes of logs as well which he says he did not want. Now, where we find these conditions I do not think we should apply the same principle as, say, in a case of a cargo of tea, sugar or cotton, readily purchasable in the open market. It would appear to me, therefore, that Mr. *Mayers's* contention is correct. Assuming I am correct in this, I have gone carefully into the different headings under which damage is claimed, and after rejecting several which I do not think a jury would be warranted in considering in their estimate, there is still sufficient remaining upon which their verdict can be sustained, taking the view of the evidence they apparently have.

GALLIHER, J.A.

I would dismiss the appeal.

McPHILLIPS, J.A.: I am in complete agreement with the judgment of my brother the Chief Justice, and would allow the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I doubt if any judge trying the case would find fraud on the part of the appellant. The question, however, was submitted to a jury. The fraud alleged is this. The respondents say that they accepted the lease by reason of a false representation by the appellant, that respondents would have the benefit of a certain contract with the Clayton Logging Company for the supply of spruce logs at favourable prices and that when said representation was made that contract was to the knowledge of the appellant cancelled. This, respondents say, was the sole basis of their hope of operating the mill successfully. The appellant on the other hand alleges that respondents knew the exact *status* of this contract when the lease was entered into. Issue was joined on this point, and we must assume that the jury accepted the respondents' evidence.

MACDONALD, J.A.

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MACDONALD, J.A.

The question arises—did the jury have before them reasonable evidence to sustain the verdict or is it clearly wrong? The jury would have to find that a business firm, for the purpose of inveigling the respondents into signing a lease and several collateral contracts made a false representation knowing that it would be discovered almost at once. They would have to ignore the conduct of respondents in proceeding in company with the appellant to procure a new contract from the Clayton Logging Company instead of relying solely upon the appellant to make good its representation. They would also have to accept the explanation of the respondent Devine in respect to the letter, Exhibit 9, given to R. G. Gosse authorizing him "on our behalf . . . . to get this matter lined up with the proper authorities." The matter referred to was the procuring of the Clayton logs and certainly "the proper authorities" were the creditors of the Clayton Logging Company who then controlled them. Devine explained that he meant Gosse to take the matter up with his own company as the parties responsible for the *impasse*. That construction to my mind is so unreasonable that if the finding solely depended upon it I would say it was clearly wrong. The jury would also have to accept the respondents' story that the Clayton logs were of such importance that without them they would not have entered into the lease and yet took no steps to procure an assignment of it in proper form. These logs, in any event, would only keep the mill going for 45 days and the lease was for one year with the privilege of renewal. It is difficult to understand the true situation. The mystery deepens when one remembers that it was quite immaterial whether they procured these logs from the Clayton Logging Company or from the creditors. They were for sale. Why did the respondents not take active steps to procure them and if lack of finances prevented it, they might have asked the appellant to guarantee payment. Their assistance was asked for and promised in other directions. As it turns out from the jury's verdict, it was more profitable to have an ultimate grievance than an immediate remedy.

On the other hand, the jury had before them the lease, Exhibit 3, wherein the lessee covenants

"to take up all logging contracts that now exist between loggers and the lessor and assume all liability thereon with the Clayton Logging Company . . . ."

Here the appellant is on the defensive and its explanation that this clause was inserted for the purpose of limiting the liability of respondents is not at all convincing.

This clause in the lease raises another question. Were the alleged oral representations reduced to writing and incorporated in the lease in the covenant quoted? If so, as pointed out by the Chief Justice (I had the opportunity of reading his judgment) this clause should have been construed by the Court, and the jury required to find whether or not (assuming that it was made a condition of the written contract that the respondents should have the benefit of the Clayton contract) there was a breach of this condition, and if so, the damages which should be awarded.

I do not think, with deference, on the whole facts that all that took place before the lease was executed may be disregarded. That point was not taken before us in argument nor apparently at the trial. The learned trial judge in his charge to the jury dealt with the general issue before them, and with this particular covenant in the lease, as follows:

MACDONALD, J.A.

"At this point let me draw your attention to the fact that counsel for the plaintiff in his address to you took as the sole issue to be decided by you the issue of fraud and misrepresentation in regard to the lease. The defendants contend that they entered into this lease upon a representation made that there was then in existence and in full force and effect a contract for the supply of logs which has been termed the Clayton contract. I think it is quite apparent from the trend of the trial that the position taken by counsel for the plaintiff is the correct one. That is, that the main issue for you to determine is whether there was fraud and misrepresentation on the part of the officers of the plaintiff Company with respect to this lease."

And again he says:

"The lease, as you will recollect, provides for the leasing of the mill, and in connection therewith certain covenants are introduced into the lease—additional covenants to those that usually pertain to an ordinary lease."

And again:

" . . . the question arose as to some changes [*i.e.*, in the lease]. There is a flat contradiction between the parties as to where those changes took place. It is not very long ago—March, 1925. This action started in the fall, so presumably the mind of each individual once the claim was made as to fraud would begin to recount what had occurred—to let his memory go back. So only from March until the fall of 1925 was there a chance of failure of recollection as to what had occurred.

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"The statement of Devine (and as far as statements go, rely upon your own recollection and not on mine) is that the change was made not only with reference to the Clayton contract, but other changes in Mr. *Wallbridge's* office."

"But here is the important point. In order to put Mr. *Wallbridge* aside, as an element to what really occurred, it is stated by both Divine and his solicitor that *Wallbridge* was not present when the documents were executed, but he came in afterwards as they were going out. Of course, the probability of that as being correct is one for you to consider. The documents had been prepared by the solicitor, who was not only a solicitor but also an interested party; and changes more or less of importance were being introduced; and whether those would take place through a telephone communication or in the office a short distance away is a matter for you to consider. And it is also a matter for you to consider whether Mr. *Wallbridge* is correct in his statement as to the reason why the change was made . . .

"Now, the portion of the lease which is affected by this change comes under the head of 'Lessees' Covenants.' The heading of the different paragraphs reads as follows:

" 'The Lessees further covenant and agree with the "lessor."—

" '(6) To take up all logging contracts that now exist between loggers and the lessor and assume all liability thereon with the Clayton Logging Company and Stensvick and Torkelsen.'

"But it is a question of construction. On its face it might read one or two ways. It might read to take up all logging contracts that now exist. And then carry it on, it might impliedly be stating that the Clayton Logging Company and Stensvick and Torkelsen's contracts were existing; or it might read that the latter part simply covered the question of liability; and assumed all liability thereon with the Claytons.

MACDONALD, J.A.

"However, this discussion of exactly what those words mean is really foreign to the point you have to decide, because questions of fraud are not determined in a case of this kind simply on the particular wording of a document. They come right back to the whole heart of the question to be decided. Was there deception? Was there deceit on the part of the plaintiff Company, through its officers?"

I make these extended references to shew that the question of the changes in the lease was placed before the jury as an important element in the case. Whether or not it was presented in the right light requires consideration. The suggestion is that the learned trial judge should have construed it for the jury. He did point out several possible constructions, and it is open to more than one construction. Counsel so argued before us, and no doubt dwelt upon it in addressing the jury placing their own interpretation on the clause. This clause, *viz.*, "and assume all liability thereon with the Clayton Logging Company" is so worded that it invites oral evidence of antecedent facts to

explain its true significance, because it is only in the light of all the facts that it can be properly explained. If that is true it follows that all the conversations preceding execution of the lease forms material evidence on the issue. There was no assignment of this contract. This additional clause while not amounting to an assignment did identify it as part of the assets to be acquired by the respondents. To that extent at least it corroborated respondents' story.

In my view therefore this clause formed only one piece of evidence which may be considered with the whole evidence in deciding the question as to whether or not there was a representation by the appellant that the Clayton contract was in good standing and no honest belief in the truth of that assertion. It was treated in this way at the trial. It corroborates but does not displace the evidence of what occurred before the lease was signed, and it was in this light properly placed before the jury.

That being so, viewing the whole evidence, not only the contradictory testimony as to facts, antedating the signing of the lease but also the conflicting evidence as to what took place on its execution including the additional light thrown upon it by the clause referred to, I cannot say that the jury were clearly wrong in the conclusion they arrived at. While I would not reach the same conclusion there is evidence to sustain the verdict. The jury's functions cannot be invaded because we might view the facts differently.

MACDONALD, J.A.

I may add that notwithstanding the statement by the foreman of the jury, elicited by the learned trial judge after the verdict was rendered, it must still be regarded as a finding of fraud. The damages although large, are not so excessive as to warrant interference. I think too, on the case made out by the respondents, as to the part the Clayton logs were to play in the operation of the mill and the relation they bore to the entire operation, coupled with local conditions, that the jury were not misled by the learned trial judge in his directions as to the method of computing damages. Nor would I give effect to appellant's contention that as there were several causes of action a definite amount should have been awarded on each. There were at least two causes of action; one already discussed and another in

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respect to cutting a half million feet of lumber. This was wholly disassociated from the Clayton Logging Company contract. I do not agree, however, that a jury cannot award general damages in respect to several causes of action tried together. I would dismiss the appeal.

Appeal dismissed, Macdonald, C.J.A., and McPhillips, J.A. dissenting.

Solicitors for appellant: *Reid, Wallbridge & Gibson.*
Solicitor for respondents: *H. Castillou.*

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COLLINS v. GENERAL SERVICE TRANSPORT LIMITED AND MYERS.

Negligence—Collision—Motor-truck and motor-car—Intersection of cross-roads—Right of way—Damages.

COLLINS v. GENERAL SERVICE TRANSPORT LTD.

At about 5.20 p.m. on the evening of the 14th of November, 1925, the plaintiff was driving his automobile northerly on Quadra Street in the City of Victoria and the defendant's motor-truck driven by the defendant Myers was proceeding easterly along Johnson Street, both vehicles approaching the intersection of the two streets. The motor-truck was of a dark-grey colour and did not have its lights on. There was an arc light in the middle of the crossing and there was a cluster of electric lights at each corner. The motor-truck reached the intersection a few feet ahead of the plaintiff's car and had nearly reached the opposite side when it was struck at the rear end by the plaintiff's car. Both cars were travelling at about ten miles an hour and neither sounded its horn when approaching the intersection. The trial judge held in favour of the plaintiff, finding that the defendants were negligent in travelling without lights and in the circumstances the plaintiff was not negligent in failing to see the truck.

Held, on appeal, reversing the decision of LAMPMAN, Co. J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the defendant's motor-truck was sufficiently ahead of the plaintiff in entering upon the crossing to give him the right of way; that the street was well lighted at the crossing notwithstanding the fact that the defendant had no lights and the accident occurred by reason of the plaintiff not keeping a proper look-out.

Statement APPEAL by defendants from the decision of LAMPMAN, Co. J. of the 24th of February, 1926, in an action for damages for

negligence. The defendant's truck (a gravel truck) was going easterly on Johnson Street at about 5.20 p.m. on the 14th of November, 1925. It was a dark and muggy evening. The plaintiff's automobile was being driven northerly along Quadra Street. The vehicles came into collision at the intersection of Johnson and Quadra Streets. Both cars were travelling at about ten miles an hour. By the rule of the road the plaintiff had the right of way. It appeared that the defendant's truck, which was of a dark-grey colour, did not have its headlights on it being shortly after lighting-up time. The street lights (arc) were on at the corner; also cluster lights at each corner. It appeared from the evidence that the defendant's truck had reached the crossing slightly ahead of the plaintiff's car.

Statement

The appeal was argued at Victoria on the 21st and 22nd of June, 1926, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Clearihue, for appellant: The only act of negligence on the part of the defendants alleged is want of light but at most it was only a few minutes after lighting-up time and there was ample light at the corner: see *Waldron* v. *Rural Municipality of Elfros* (1923), 2 W.W.R 227 at p. 229. Notwithstanding his having the right of way under the by-law it is the plaintiff's duty to be on the alert to see that no traffic is coming on his left: see *Harbour* v. *Nash* (1921), 60 D.L.R. 232; *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134; *Kirk* v. *Reade* (1923), 1 W.W.R. 1355; *Carter* v. *Vadeboncoeur* (1922), 2 W.W.R. 405; *Milligan* v. *B.C. Electric Ry. Co.* (1923), 32 B.C. 161. On the question of inevitable accident see *Winch* v. *Bowell* (1922), 31 B.C. 186.

Argument

E. L. Tait, for respondent: The defendant's truck was a menace. It was after lighting-up time and the truck had no lights and it was of a dark grey battleship colour and very hard to see. The street lights are not good at that corner. We had the right of way under the by-law and they had no right to proceed to cross in front of us unless they had time to cross before we entered the intersection: see *Wabash Railway Co.* v. *Follick* (1920), 60 S.C.R. 375.

Clearihue, replied.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal should be allowed. This is a case in which an automobile and truck collided at a street corner. The plaintiff was driving north on Quadra Street, near to the middle of the city. The defendant was coming along Johnson Street, east, crossing Quadra Street. They were both on their proper side of the road. The Motor-vehicle Act gives the right of way to the plaintiff. That is to say, if these parties had come to the street line at the same time, the plaintiff would have had the right of way under the Act. But the defendant came there first, I do not say within a second or two, but reasonably first, he then had the right of way by reason of his being there first; and having got almost across the intersection, the front of his motor being almost to the opposite street line, he was struck in the rear axle by the plaintiff. It is said that the distance between the street line where the defendant entered the intersection and the place where he was struck was some 46 feet. The plaintiff could only have entered probably 10 feet, or at most 15 feet, on Johnson Street when he struck the defendant; so that he must have been 30 feet at least back in Quadra Street when the defendant entered the intersection. Now all he had to do was to look ahead. There was plenty of light there; there were 40 lights around that corner; there were no weather conditions to interfere, nor any obstacles. Instead of looking out he comes on; he says, "I did not see him until I struck him."

It is said that the defendant had not a head-light, and neither of them blew his whistle nor sounded a gong. I am assuming for the purpose of this judgment that the defendant was negligent—I do not find he was negligent—I am not sure whether he was negligent or not—drivers usually are negligent in crossing the street—but how can the plaintiff be excused of contributory negligence when under these conditions, having plenty of time to stop, he goes on and strikes the truck?

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from the judgment of the County Court judge on a matter wherein there is a decided conflict of evidence, and in such case the consistent rule of this Court is that we must not and do not set aside such a judgment unless we are able to say the learned judge was clearly wrong in the view he took of the evidence before him.

We have here a dark night, as the defendant admits, with a fair amount of illumination (as an independent witness states, the City electrician) at the corner in question, because of cluster lights, which he says are not lights of great intensity, and we have also the admitted fact that the defendant (provided the time is as the learned judge has found) was violating a by-law in not exhibiting the necessary lights. In that circumstance of course the negligence of the defendant cannot be questioned, but the excuse is that the plaintiff contributed to that negligence himself, which in this case can be only based upon one thing, *viz.*, that the plaintiff did not look when he ought to have looked, to see when he was approaching the intersection that his crossing was clear. That is the basic fact, and is the crux of this whole case; and his own statement is that "I did look to the left and to the right and saw that it was clear, and finding it was clear I went on." There is nobody to contradict him, and if the learned judge believes him, upon what ground are we going to disbelieve him? The learned judge did believe him, because he must have given judgment the other way if he did not believe him. But he says specially this. "He looked to left and to right and rear—went ahead and—smash." Then the judge says, "I am satisfied that if the truck had carried lights, plaintiff would have had a better opportunity of seeing it, and I am not satisfied that plaintiff was negligent in not having seen the truck earlier than he did see it."

MARTIN, J.A.

This truck having been hauling gravel that day was of a gravelly colour—"gravel truck—colour of gravel—no lights," is the judge's note. How can it be said that he is not right when he took the view that with the truck having no lights, and being the colour it was before him, there was a reasonable excuse on the part of the plaintiff for not sooner fully apprehending the situation?

The learned judge in his judgment perhaps did not set his reasons out so clearly and distinctly as he might have, but it must have been based on the fact that because of the lack of lights the ordinary alertness of vision of the plaintiff was disarmed, and though he did look, yet for two causes (the colour of the truck itself, which was merged in these houses on the left-hand side, and the lack of lights) he did not get that full

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perception of the situation which he otherwise would have had. With all due respect to other opinions, I cannot say that this is a case where we are justified in saying that the learned judge took the wrong view, and so I do not think we should be justified in disturbing the judgment.

GALLIHER, J.A.: In my opinion the defendant in this case was negligent in two ways; negligent in not having lights on his motor-car, and I do not think we can disturb the learned judge's finding that it was then after the hour when lights should have been on motor-cars, or on this truck. He was negligent in travelling without lights at that period, in not sounding his horn when he approached the crossing. Now having seen the other man approaching, and considering that he was travelling without lights, it seems to me that he should have given some warning of his approach. I do not think it can be successfully contended that the motor-truck was not first over the line of the street, the intersection, and the question then is, was the defendant himself guilty of negligence in the manner in which he made the approach? We have to take into consideration the street lights that were on at the intersection. Was that well lighted? Can we say that an object such as a truck travelling there could not be seen, even although it had no headlights on? It seems difficult to understand why it should not be seen under such circumstances. There seems to have been a doubt in the mind of the judge below as to whether it could have been seen, or whether it could not. At all events, he goes so far as to say had there been lights upon the truck it would have assisted to a certain extent the driver of the motor-car in ascertaining that something was on the road in his way.

GALLIHER, J.A.

The driver of the motor-car says he looked to the right and looked to the left, he does not say at what point. He said the road then appeared clear to him and he started to come on; and the difficult point to my mind is to determine why he should have run right into this car before seeing it at all. If he had seen it a few feet distant—ten feet distant—he might have, and would have, I think, had an opportunity of turning out of the way, or even stopping his car. These are all matters that must be taken into consideration; and it would appear that this

man went recklessly on, without taking any more notice of anything, and ran into the truck.

The learned judge, with every respect, is not very specific in the findings he makes, and more or less it is left for us to decide on this phase of the question. Personally I cannot see why a man coming up there, in that lighted area, if he had been looking as he should have been looking, could not have seen that truck; and I must say that I think the plaintiff himself was also negligent, and being negligent, and the defendant being negligent, and the plaintiff himself having neglected to take the precautions necessary, he is not entitled to succeed in his action.

MCPHILLIPS, J.A.: I am of the opinion that the appeal should be dismissed.

With deference to all contrary opinion, it seems to me it is a very simple one, and the principle upon which we must proceed is also very well defined. The learned County Court judge had before him the witnesses and he decided upon facts there adduced before him. It was for him to determine the question of fact, and the judgment of that Court should not be disturbed unless this Court comes to the conclusion that it could not have been reasonably arrived at. I am clearly of the opinion that the learned judge arrived at a proper conclusion. I am not called upon to go so far as to say it was right, if the learned judge had evidence upon which he could reasonably so find; and the learned judge had evidence upon which he reasonably could find as he did.

I do not propose to canvass the evidence at any length. Admittedly the defendants were operating the truck on the street contrary to law, being without lights. The man in charge of the truck knew he was on the street contrary to law; and if I can rightly visualize this occurrence, I would say that this man driving with his truck, knowing that he should not be on the street at the time, being without lights, was making great haste to get his truck under cover.

Further, if I were to be asked how to disguise the truck under the circumstances attendant upon this accident, I do not think that the greatest expert would say that it could be better disguised than it was. It was of a grey-sand colour. A great

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heavy truck thrusts itself out in front of the plaintiff, a farmer returning to the country-side, and rightly assuming that the law would be carried out and that warning lights would be shewn on all vehicles, suddenly the truck is in front of him and he had no time to prevent the accident. As I said during the course of argument, and do not hesitate to say, the defendants ought to be satisfied and thank Providence that no one was killed and that they did not have to answer for this happening in another Court. We have heard a great deal about disguising objects. In the Great War the practice of "camouflaging" was frequently indulged in. This truck was in the best form possible camouflaged and thrust out on the street to the danger of all other traffic. When the plaintiff's car was seen approaching is the truck pulled up? No. The truck is rushed across the street in front of the plaintiff's on-coming car. When it becomes a matter of a 17th of a second—and that is about what it was—I refuse to speculate that the truck was at a certain point and could have been seen by the plaintiff and the collision prevented. I, on the other hand, am clearly of the view that the collision was solely due to the negligence of the defendants.

MCPHILLIPS, J.A.

In my opinion there is no doubt, in conformity with the judge's view that if there had been a light on this truck the plaintiff would have been better able to see the truck.

When we have this judgment under review and are asked that it be set aside, we are in certain defined lines. I refer to *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326, where Lord Loreburn said:

> "When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons."

That is the position here. The learned trial judge saw the witnesses, weighed the evidence and gave his judgment. We are asked to set it aside, in a case involving only $135, and one in which the defendants ought to be satisfied that they did not have to answer before another Court for negligence within the meaning of the Criminal Code.

I would also refer to the case of *Toronto Power Company, Limited* v. *Paskwan* (1915), A.C. 734, the judgment being

delivered by Sir Arthur Channell. The judgment of Mr. Justice Middleton was under consideration. This point was dealt with (p. 739):

"It is enough to say, as both the judge who tried the case and the judges on appeal in the Supreme Court have said, that there was a case which could not have been withdrawn from the jury, and that the jury have found against the defendants. The learned judge could not have ruled that as a matter of law the answer of the defendants was necessarily conclusive in their favour."

It is unnecessary for us to say that the learned judge came to the right conclusion (*Toronto Power Company, Limited* v. *Paskwan, supra*), but I consider the learned judge did come to the right conclusion. It is purely a question of fact, and the learned judge had the best opportunity to pass upon the questions of fact.

MCPHILLIPS, J.A.

MACDONALD, J.A.: It is quite clear to my mind that the defendant had actually entered upon the crossing before the plaintiff got near it and therefore had the right of way.

As to the ground upon which the learned County Court judge based his decision, *viz.*, the absence of lights, while that might be *prima facie* evidence of negligence, still it was not the real cause of the accident.

I think the truck itself in view of the relative positions of the parties, and the lighted condition of the street, even without lights would be clearly visible to the plaintiff if he had been taking ordinary precautions. The accident occurred because the plaintiff was not keeping a proper look-out, thus causing him to run into the defendant's truck.

The suggestion that this truck on account of its colour was practically invisible is, I think, altogether too far-fetched. To say that the plaintiff looked and did not see it, would indicate either that his line of vision was improperly obscured by the side curtains of his car, or that he had defective eyesight.

I would allow the appeal.

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

Solicitors for appellants: *Clearihue & Straith.*
Solicitors for respondent: *Robertson, Heisterman & Tait.*

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Negligence—Injury to passenger in motor-bus—Damages—Special and general.

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The plaintiff was a passenger on defendant's motor-bus from Port Moody to Vancouver on a very foggy morning. They were proceeding along Hastings Street and on reaching Slocan Street the bus proceeded down hill towards Clinton Street at about 12 miles an hour. The street at this point was of wooden-block pavement and at the time was in a very slippery and icy condition. On nearing Clinton Street the driver saw that a street-car in front, and headed west, had stopped for passengers, a Ford truck waiting just behind it. The driver tried to stop but lost control and in order to avoid the Ford truck and the passengers getting on the street-car he turned sharply to the right, crossing the sidewalk and bringing the motor-bus to rest with its front through a store window and its left side against a pole of the B.C. Electric Ry. Co. The plaintiff's legs were jammed, and severely injured and he suffered from a hernia as a result of the accident. He recovered judgment for $800 special damages and $3,000 general damages on the trial.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN and GALLIHER, JJ.A. dissenting), that in view of the evidence and the surrounding circumstances the trial judge was justified in his findings that the appellant's driver was travelling too fast at the point in question and the appeal should be dismissed.

[Reversed by Supreme Court of Canada.]

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 8th of December, 1926 (reported, 38 B.C. 81), in an action for damages for negligence. On the 13th of January, 1926, the plaintiff was a passenger on one of the stages of the defendant Company which was travelling west on Hastings Street, Vancouver. The bus had gone east from Vancouver on Hastings Street earlier in the morning and on the way back reached Slocan Street at about 9 o'clock. It was a cold, foggy morning and when the driver started down the hill going west he found the pavement was a sheet of ice. When half way down he saw a street-car had stopped to take on passengers near the bottom of the hill (going west as he was) and a Ford truck was behind the street-car. The driver of the bus then tried to stop but the car slipped on the pavement and seeing

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that he could not stop and that if he went straight on he would run into the passengers getting on the street-car he turned sharply to his right, ran over the curb, the side of his bus colliding with a pole of the B.C. Electric Ry. Co. and its front going through a window beyond. According to the evidence of those in the Ford truck the defendant's bus struck the Ford truck behind the street-car and drove it across the road to the south side and up onto the sidewalk. The plaintiff was injured when the bus ran into the pole, he having been jammed in his seat.

Statement

The appeal was argued at Vancouver on the 3rd and 4th of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: Our position is that in the circumstances, due foresight could not have prevented the accident, and the driver did the best he could to prevent damage. The motor-bus unexpectedly ran into ice as it came down the hill. There was no negligence: see *Wing* v. *London General Omnibus Company* (1909), 2 K.B. 652.

Argument

Stockton, for respondent: Because four motor-cars following came down out of control is no ground for assuming that he was not negligent. He was negligent initially in starting from the top of the hill when he should have known the dangerous condition of the pavement.

Mayers, replied.

Cur. adv. vult.

7th June, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The finding of the learned trial judge in favour of the plaintiff should not be disturbed. The stage was being driven on a foggy and frosty morning, down a 4½ per cent. grade on block pavement, which was undoubtedly in a slippery condition. The driver had driven up the same hill earlier in the morning. He knew the place well. On his return, when the accident happened, he had ascended the opposite side of the hill to the summit, and proceeded down the icy surface, at the rate of 15 miles an hour in the fog, which the learned judge found, in the circumstances, to have been an excessive rate of speed which disabled him from stopping before

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he reached the standing street-car some four or five hundred feet ahead of him. Failing to stop he ran his stage across the sidewalk, struck a telephone pole and injured the plaintiff. By our traffic laws a following vehicle is bound to stop ten feet behind a car standing to take on or let off passengers. Knowing this the stage-driver should immediately on coming in sight of the car, which he saw almost immediately after he got to the crest, have brought his stage under control. The icy condition of the street, if indeed it was as bad as was pretended, ought to have made him more careful. It appears to me to be a very extraordinary thing that the driver should have ascended that hill two hours before and should not have noticed its condition, or not have felt the iciness when he came upon it. The principal witness for the defendant was a police officer driving down the same hill with his chauffeur. He said he had the best chauffeur in the country, but his chauffeur on cross-examination was obliged to admit that he did not do what he ought to have done, namely, put his car into second.

MACDONALD, C.J.A.

I cannot say that the learned trial judge came to a wrong conclusion, and therefore, would dismiss the appeal.

MARTIN, J.A.: This appeal should, in my opinion, be allowed because on the decisive facts there is no real dispute and no question of credibility and upon these facts it is not legally possible, I think with all respect, to find the defendant guilty of negligence in the most exceptional conditions which had suddenly arisen.

MARTIN, J.A.

GALLIHER, J.A.: With respect I cannot agree that negligence on the part of the defendant's driver has been shewn. Everything points to his having been faced with a situation (without fault on his part) in which he acted reasonably and I think pursued the best course.

GALLIHER, J.A.

The accident is regrettable, as all accidents are, but when I consider the situation as disclosed in the evidence, it seems to me negligence cannot be imputed to the driver.

The learned trial judge in his reasons for judgment refers to the fact that he believes all the witnesses told the truth as best they could but adds, that the driver of the bus was proceeding

at too great a speed considering the short range of visibility; that there was a street-car line on the road, and the condition of the pavement as it was, or ought to have been, known to the driver. I think the governing factor in the learned judge's mind was the latter condition as the evidence would not seem to indicate that had the pavement not been in an icy condition any difficulty would have been encountered in coming to a stop in time. The main feature then is, did the driver know, or should he have known, of the icy condition of the pavement? He had passed over the same pavement an hour or two before that same morning. Other witnesses had done the same and they all say that the condition of the pavement had undergone a marked change in the meantime not observable until they attempted to stop, and when we find that all but one of a number of cars that came over the brow of the hill at that time and attempted to stop, mixing up and going out of control it would seem to indicate that no one expected to encounter the conditions they were met with. Under such circumstances can it reasonably be said that the driver knew, or ought to have known, the condition of the pavement? I think the driver was faced with an unexpected situation which, had it not existed, no difficulty would have been experienced in negotiating the hill and it should not be held that he knew, or ought to have known of the condition of the pavement.

GALLIHER, J.A.

I would allow the appeal.

McPHILLIPS, J.A.: This is an appeal in a negligence action for personal injuries sustained by the respondent against the appellant, proprietor of a motor-bus operated on Hastings Street in the City of Vancouver, upon which the respondent was a passenger. The proximate cause of the accident was the failure of the driver of the bus to control it upon the descent of a steep incline from the intersection of Slocan Street with Clinton Street, upon Hastings Street, going west towards the City of Vancouver. It was in the early morning and the condition of the hill was very slippery owing to a thin coating of ice upon the pavement. The bus had earlier, in going east upon Hastings Street, passed up the hill and the evidence upon the part of the appellant was that the hill was wet but not icy, but upon the

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return trip it was found to be icy and very slippery and the bus got out of control and the driver of the bus found it necessary to make a quick turn to the right over the curb and sidewalk to avoid striking a truck and street-car which were ahead and at about the foot of the hill. The bus was designedly, by the driver of the bus, brought to a stand-still by striking a pole at the point of turning out and across the curb and sidewalk. The respondent suffered severe personal injuries in consequence of the impact and collision.

I have carefully read all the evidence, and after due weighing of same I am constrained to say that I am fully and completely of the same opinion as the learned trial judge, Mr. Justice MCDONALD, and have come to the conclusion without the slightest hesitation upon the whole evidence, that the appellant is guilty of actionable negligence and that the judgment in favour of the respondent should be affirmed.

I will, as briefly as possible, refer to salient points of evidence that have convinced me of the justice of the decision the learned trial judge arrived at. The street-car was at the foot of the hill proceeding westerly in the same direction as the truck, and the motor-bus at that time came over the hill. The truck pulled up as the street-car was taking on passengers. The driver of the truck swore that the hill was icy. He said:

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"It shewed like very thin ice on the top of the wood pavement."

The respondent swore that "it was foggy all the way along." Now the driver of the bus had warning that the condition of the road was dangerous, as when he was proceeding up the hill before he arrived at the apex thereof at Slocan Street, he stopped the bus owing to the horse of a Chinese vegetable gardener having fallen down and it was frosty at that point. The bus started up again and was being driven very fast according to the evidence of the respondent; his view was that the bus was being driven at about 25 or 30 miles an hour and he noticed no appreciable change of speed right up to the impact. The visibility did not extend beyond 15 to 20 feet ahead. In the evidence adduced by the appellant, there is really no essential conflict with the material evidence in the case for the respondent, save, perhaps, as to the speed of the bus. The chief of police for the City of Vancouver came down the hill the same morning and

at about the same time. He swore that it was pretty foggy that morning and his chauffeur, an experienced man had difficulty in controlling the motor-car. His view was that there was visibility for about 35 to 40 feet. The car skidded badly. The chief of police considered that even a speed of 18 miles an hour under the conditions there present, would be too high a speed, would in fact be dangerous, saying in relation to 18 miles this:

"Yes, probably if they had to put their brakes on suddenly, yes. Yes, that would be."

Murphy, the experienced chauffeur for the chief of police of Vancouver, who was driving the chief of police that morning, a witness for the appellant, swore that even on a greasy pavement apart from an icy condition one driving a motor-car should have his car running at such a speed that he could ease that car and be able to bring it to a stop by the time he reached the grocery store—that would be at the foot of the hill, where the accident occurred; his answer to the question put in cross-examination in the above terms was:

"There is no question about that."

The driver of the bus, a witness for the appellant, said, that in going east that morning it was foggy and in going west to Vancouver—and this would be at the time of the accident—said:

"I do not remember the conditions going out; it was foggy I remember. But coming back there was bad fog. It was rolling in in banks."

He went on to say that when he was at the top of the hill down which the accident occurred, he was going anywhere from ten to fifteen miles an hour. The bus-driver was asked in cross-examination about the hill upon which the accident occurred. The questions and answers follow:

"You knew this hill from Slocan to Clinton Street? Yes.

"A pretty bad hill? Yes, a bad hill."

The bus-driver put his speed at twelve miles an hour when he was over the hill some 100 or 150 feet, and later, and before the accident, somewhat less. This is difficult to understand, as it is patent the bus was as to speed out of control before the accident. Upon the most careful consideration I can give of the evidence, I am in complete agreement with the learned trial judge. When reviewing the evidence, we have the learned trial judge saying:

"The driver says that he went down the hill in second gear, at about ten or twelve miles an hour. In my opinion on the whole of the evidence the

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motor-bus was proceeding at too great a rate of speed. Having regard to all the conditions, the short range of visibility, the fact that there was a street-car line upon the road known to the driver, the motor-bus ought to have been, and might have been kept under such control that it could have been stopped without doing any damage."

The truth is the driver of the bus was not exercising due or proper care under the circumstances, he should have had his vehicle under control and should have seen the truck and street-car ahead of him and have brought his car to a stop and not have allowed it to get out of control owing to excessive speed upon an icy surface with fog present. Upon all the facts the case is one, in my opinion, that can be well classed as actionable negligence and entitles the respondent to damages.

The appellant being a carrier of passengers is liable for injuries done to them. Of course there must be negligence shewn on the part of the carrier. Here we have a case where the bus was under the absolute control of the servant of the appellant and *prima facie* the appellant is liable for the injuries sustained by the respondent, a passenger in the bus. It is true in law that the contract of a carrier of passengers can only be said to be to carry safely in so far as reasonable care and forethought can extend. If it be that the accident was one that, notwithstanding the exercise of all proper and reasonable care and forethought in view of all the circumstances, was not possible of prevention, then the carrier is under no liability. Was that the position of affairs in the present case? Unquestionably it was not. Here there was an absence of proper and reasonable care and the non-exercise of any forethought. It is clear that it was very foggy—it was well known to the driver of the bus, he admits it—he also admitted that the hill upon which the accident occurred was a very bad hill and if he was not aware before he entered upon the downward descent of the hill that it was covered with ice he at least knew that it was wet and slippery, and considering the state of the weather and the knowledge of the Chinaman's horse falling upon the other side of the hill owing to the frosty condition of the road, it is inconceivable that the driver of the bus could have been ignorant of the fact that the hill was icy and that it would be necessary to go slowly and have the bus under complete control in descending that very bad hill. It would appear that there was absolute neglect to take

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those necessary precautions which the state of circumstances required. There was excessive speed in view of all the circumstances and reckless conduct in descending the hill in the manner in which he did, there was complete failure to exercise reasonable care, and an absence of forethought amounting to a disregard of the duty of a carrier towards its passengers. That being the case, there can be in my opinion but one result, and that is that the judgment under appeal should be affirmed.

The defence advanced was inevitable accident, but that defence can only avail where the accident was one that could not be reasonably foreseen and where it has occurred without the slightest particle of negligence. That is not the present case. Here we have active acts of negligence upon the part of the appellant (*Wakeman* v. *Robinson* (1823), 1 Bing. 213; 25 R.R. 618; *Hall* v. *Fearnley* (1842), 3 Q.B. 919; *Holmes* v. *Mather* (1875), 44 L.J., Ex. 176). The bus being under the control of the carrier (the appellant) negligence as we have seen is *prima facie* presumed from the very circumstances and the onus of proof was on the carrier to shew that there was no negligence on its part (*Flannery* v. *Waterford and Limerick Ry. Co.* (1877), 11 Ir. R. C.L. 30) and that onus the appellant failed to discharge.

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In coming to this conclusion I am the more impelled to so decide, because of the governing rule in cases where the trial judge has the advantage, which we have not, of seeing and hearing the witnesses and where the demeanour of the witnesses is important, and the present case is within that category. Very recently we had Lord Sumner in the House of Lords in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8, saying:

"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and unless it can be shewn that he has failed to use or has palpably misused his advantage, the higher Court

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ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In *The Julia* (1860), 14 Moore, P.C. 210, 235, Lord Kingsdown says: 'They, who require this Board, under such circumstances, to reverse a decision of the Court below, upon a point of this description, undertake a task of great and almost insuperable difficulty. . . . We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.' "

In arriving at a final conclusion upon this appeal it is well to also bear in mind what Lord Loreburn, L.C., said in *Lodge Holes Colliery Co., Lim.* v. *Wednesbury Corporation* (1908), 77 L.J., K.B. 847 at p. 849:

"When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons."

What Lord Esher, M.R., said in *Colonial Securities Trust Co.* v. *Massey* (1895), 65 L.J., Q.B. 100 at p. 101:

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"Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant."

What Lord Gorell said in *Canadian Pacific Railway Co.* v. *Bryce* (1909), 15 B.C. 510 at p. 513 (and this was a case in which the Judicial Committee restored the judgment of my brother MARTIN then one of the Justices of the Supreme Court of British Columbia):

"Their Lordships consider that the facts appear to have been very fully and carefully investigated by MARTIN, J., with the assistance of assessors, and that no adequate ground has been shewn for an appellate court to take a different view of the facts from that taken by the learned judge. He had the great advantage of seeing and hearing the witnesses, and unless it could be shewn that he had taken a mistaken or erroneous view of the facts, or acted under some misapprehension, or clearly came to an unreasonable decision about the facts, he should not, in accordance with well recognized principles, be overruled on matters of fact which depended mainly upon the credibility of the witnesses."

In *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96, Lord Buckmaster said:

"But upon questions of fact an Appeal Court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their

contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

In the present case we have the learned trial judge sitting without a jury making a finding of fact upon oral evidence. Presumptively that finding is right—it has not been displaced. In my opinion the conclusion at which the learned judge arrived was not unreasonable. I think he was amply justified by the evidence adduced at the trial in arriving at that conclusion, and in my opinion the appeal fails.

MACDONALD, J.A.: The judgment of the trial judge who tried the case and viewed the *locus*, should not be set aside unless we are satisfied, on the evidence, that he was clearly wrong. It was suggested that because he testified to the credibility of the witnesses and based his decision upon inferences drawn from the evidence that a Court of Appeal would not be embarrassed in drawing different inferences from the same facts. That is stating it broadly. If there is reasonable evidence to support the inference drawn by the trial judge, even though another inference may be drawn from the same evidence, I think we should not set aside the judgment under appeal.

It was urged that some of the findings of the learned trial judge were favourable to the appellant. For example, he states in his judgment:

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"The evidence goes to shew that this condition [*viz.*, the icy street] was not observable to a driver [on account of the fog] and it is suggested that this particular block was in worse condition than any other part of the road. It seems difficult to understand why this should be so."

And it was suggested that it could not be said that the driver of the appellant's motor-bus ought to have known that the street was slippery thus demanding additional precautions. I do not think the learned trial judge meant to say so; or in fact did say so. The sentence "It seems difficult to understand why this should be so" refers to the two statements in the preceding sentence. This view is strengthened by the statement later in the judgment that the condition of the pavement "ought to have been known to the driver." True the onus was on the plaintiff to shew that the driver "ought to have known" but that fact may be established, by inference from the evidence adduced. There was a visibility of from 40 to possibly 50 feet and

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although the icy pavement and fog would be of similar colour still the close observation which should be maintained by a driver proceeding through a fog should, I think, reveal the icy condition of the pavement on reaching the crest of the hill. However, I do not rest on this suggestion; it is not free from doubt. Apart from this feature, the judgment should be sustained. The finding of fact, by way of inference, is that the appellant's driver was proceeding at too great a rate of speed and that having regard to all the conditions the car "ought to have been and might have been kept under such control that it could have been stopped without doing any damage." Is there evidence to support that finding; or is that conclusion fairly deducible from the evidence given? I think it is. I do not think that the learned trial judge necessarily found that the driver of the motor-bus drove down the hill at from ten to twelve miles an hour. He states that the driver so testified but follows with the statement that he was proceeding at "too great a rate of speed" suggesting, I think, that the rate was more than ten or twelve miles per hour. This view is not inconsistent with the statement that the driver was a credible witness and told

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the truth as best he could. The respondent was also treated as a credible witness and he placed the rate of speed at from 25 to 30 miles an hour. It was open to the trial judge to find that the grade could have been negotiated with safety at a proper rate of speed. A Ford motor-truck was safely brought down the same grade by the witness Barnes a moment before without skidding. The learned trial judge based his judgment on all the evidence, not on that of appellant's driver alone. True, the Ford truck was lighter but its tires had less surface traction. The driver of appellant's motor-bus testified that its traction was good. The fact is that appellant's car did not skid or slip to any appreciable extent; not to such an extent as to deprive him of control. When a car really skids it is beyond control and the driver is helpless. Far from being in that situation this driver was able, when he saw that passengers boarding a street-car were exposed to danger, to direct his car off the travelled portion of the street over the curb bringing it to rest partly against a telephone pole and the front of a store into which it crashed. He did not, therefore, lose control

through skidding. It was not skidding but the rate of speed he maintained that prevented him from stopping his motor behind the street-car in the usual way. The car not only mounted a six-inch curb but also a platform of the same height in front of the store. This throws some light on the question of speed. He acted with commendable judgment when he saw that he could not bring the car to a stop in time to avoid trouble but the point is—could he, by the exercise of due care have avoided the accident resulting in injury to the respondent?

We were asked to say that because several other cars a short time afterwards skidded down the grade out of control, it should not be regarded as evidence of negligence that appellant's car also met with unexpected difficulties. The other cars, however, were suddenly warned to stop and in such an emergency it is reasonable to surmise that the drivers would instinctively apply the brakes so rigidly that skidding would follow. Some too, attempted to change gears on the down grade causing momentary loss of control. Further, the appellant's motor-bus, as already pointed out, did not skid to any appreciable extent. It was under control in so far as preventing skidding was concerned. It was the rate of speed at which he was travelling that prevented him from stopping behind the street-car. Courts ought to require in the interest of public safety that drivers should proceed with the utmost caution in foggy weather and at a greatly reduced speed, doubly so on a down grade and on a busy street where street-cars run. The driver knew or ought to have known, that on the grade itself he might be required to stop behind a street-car. He knew too that the street was wet, if not icy, and admits that on a wet street it would be safe to drive down at ten miles an hour or probably at a little greater speed. He admits that he might have been travelling at twelve miles an hour at this point. I think, from all the evidence, his speed was greater and I am convinced the learned trial judge also thought so. If his rate was 15 miles an hour he admits that on a wet street he could not stop his car in from 20 to 25 feet. That is not allowing sufficient margin under the conditions prevailing. Appellant's witness Murphy stated that, if he knew there was a frosty condition (similar, I take it to a wet pavement) he would be foolish to hit the hill—as he put it—at 15

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miles an hour. The chief of police testified that it is a grade one has to watch in slippery weather and that a rate of 18 miles an hour would be too fast. In view of this evidence—the admission of the driver that his rate at this point was from 10 to 15 miles; the testimony of the plaintiff that it was much greater; the fact that his car was not beyond control to any serious extent through skidding, the force of the impact, and all the surrounding circumstances, the learned judge was justified in his findings that the appellant's driver was travelling too fast at the point in question.

I would dismiss the appeal.

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

Solicitors for appellant: *Walsh, McKim & Housser.*
Solicitor for respondent: *R. P. Stockton.*

MURPHY, J.

IN RE ALL RISK INSURANCE AGENCIES LIMITED.

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IN RE ALL RISK INSURANCE AGENCIES LTD.

Insurance, fire and automobile—Company granted licence—Renewal thereof refused—Absence of good faith alleged as ground for refusal—Mandamus—B.C. Stats. 1925, Cap. 20, Sec. 66.

Three shareholders, who held nearly all the shares in a company engaged in loaning money on motor-cars, were the sole directors of a fire and automobile insurance company in which the majority of the capital stock was held by the shareholders of the loan company. In a year's business the insurance company wrote 950 policies and of these only 63 were on motors in which the loan company had no interest.

Held, that the circumstances did not justify the refusal of renewal of the insurance company's licence on the ground that it was not carrying on business in good faith.

Held, further, that the two companies did not constitute a scheme to enable the shareholders to obtain rebates by insuring their own property.

MOTION for an order *nisi* directed to the superintendent of insurance for British Columbia to shew cause why there should

not be a writ of *mandamus* directing him to issue to the above Company a licence under the Insurance Act as an agent for writing fire and automobile insurance, on the grounds: (1) That the Company being incorporated under the Dominion Insurance Act the superintendent had no discretion but to issue a licence upon payment of the prescribed fee; (2) that his refusal to issue a licence on the ground that the Company had not complied with section 66 of the Act was improper. The case first came up on April 4th last when MURPHY, J. directed that the superintendent should state his reasons for refusing the licence holding that non-compliance with said section 66 was no answer. The superintendent stated that in November, 1925, one John Scott of Vancouver applied for a licence as an insurance agent to solicit for fire and automobile insurance. He had never been an insurance agent before and stated his object was to be in a position to better look after the protection of his own interests as the owner of the Motor-car Loan Company carrying on the business of financing the purchase of motor-cars. He told Scott that he would have to satisfy him that he carried on business in good faith as an insurance agent, but after consideration he gave him a licence. In the following year Scott was refused a renewal of his licence on the ground that he had not carried on his business in good faith as an insurance agent as he appeared to have written policies only for the protection of the Motor-car Loan Company. Shortly afterwards an application was made for a licence in the name of the All Risk Insurance Agencies Limited coupled with the name of John Scott as an officer. It appeared to the superintendent that it was merely an attempt to obtain in effect a renewal of Scott's licence but on being assured that a genuine insurance business would be carried on he issued the company a licence. During 1926, the company wrote 950 policies with a total in premiums of $23,700 and of these only 63 were on cars in which the Motor-car Loan Company had no interest, the total of premiums on these being $2,298.75. The superintendent came to the conclusion, on these facts, that the Company was not carrying on in good faith and refused to renew the licence. He further pointed out that by the policies written on cars in which the Motor-car Loan Company had an interest insurance

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had been placed for an amount greater than the interest of the Motor-car Loan Company in such cars, and further that the policies had been written covering property damaged and public liability incurred by the operation of the cars, but the principal result, if not the principal object, of the business done by the All Risk Insurance Agencies Limited is to benefit the Motor-car Loan Company by saving 15 or 20 per cent. in insurance premiums rather than to carry on *bona fide* the business of an insurance agency. Scott owns 348 of the 358 shares in the Motor-car Loan Company and he and two other shareholders comprise the directors of the All Risk Insurance Agencies Limited. There appear to have been only 10 shares of capital stock in the All Risk Insurance Agencies Limited, the directors of the Motor-car Loan Company owning the majority of these shares.

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Argument was again heard by MURPHY, J. at Vancouver on the 13th of April, 1927.

Wood, (*Hogg,* with him), for the motion, referred to Halsbury's Laws of England, Vol. 10, p. 98; *Reg.* v. *Justices of Kesteven* (1844), 3 Q.B. 810; *In re Charleson Assessment* (1915), 21 B.C. 281; *Rex* v. *Stepney Corporation* (1902), 1 K.B. 317; *Rex* v. *Rural Municipality of Cartier* (1922), 2 W.W.R. 670; *Reg.* v. *Thomas* (1892), 1 Q.B. 426; *B.C. Mills, etc., Co.* v. *Mayor and Council of Vancouver* (1926), 2 W.W.R. 84; *Rex* v. *The Bank of England* (1819), 2 B. & Ald. 620; *In re Barlow, Rector of Ewhurst* (1861), 30 L.J., Q.B. 271.

Argument

Wismer, for the Inspector of Insurance.

29th April, 1927.

MURPHY, J.: The inspector has held that the All Risk Insurance Agencies Limited has not held itself out and carried on business in good faith because it wrote 950 policies with a total premium of $23,700 and only 63 of the policies were cars in which another company, the Motor-car Loan Company, had no interest. Because the shareholders of the two concerns are practically identical, the inspector seems to think that the Insurance Company is not carrying on business in good faith. What is really troubling him apparently is that the Motor-car Loan Company shareholders are interested in the profits of the

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insurance. But, as I read the Insurance Act, this is no indication of bad faith. The Motor-car Loan Company does not own the cars on which the policies are issued. It loans money on such cars and holds the insurance policies as security that the car which is the asset on which the money is loaned be not lost or damaged. The owners of the cars are the borrowers from the Motor-car Loan Company. There can therefore be no suggestion that these two companies constitute a scheme to enable shareholders to obtain rebates by insuring their own property. The fact that the Motor-car Loan Company does not own the cars at all on which it loans money is, to my mind, the essential matter. Owing to the constitution of the appeal board, I think justice requires that a *mandamus* should issue and it is so ordered.

Motion granted.

MANNING AND MANNING v. NICKERSON.

Trespass—Search warrant—Issued on information over telephone from unknown person—Reasonable and probable cause—Malice—R.S.B.C. 1924, Cap. 146, Sec. 73.

Section 73 of the Government Liquor Act authorizes a police constable to lay an information upon oath before a justice of the peace "that he suspects or believes that liquor is unlawfully kept or had, or kept or had for unlawful purposes in any building or premises . . . ." The defendant, a police officer in Vancouver received a telephone message in the police department from a woman who would not give her name, that intoxicating liquor was being unlawfully stored in the plaintiffs' house, and that persons carrying grips had been seen going in and out of the house. On this information the defendant laid an information setting forth "that he suspects and believes that liquor is unlawfully kept in the plaintiffs' premises." Upon this information a magistrate issued a search warrant and the defendant, with another officer, entered and searched the plaintiffs' house but found no liquor. In an action for damages for trespass and for maliciously and without reasonable and probable cause swearing out and executing a warrant the plaintiff recovered $850.

Held, on appeal, affirming the decision of MCDONALD, J. (MACDONALD,

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C.J.A. and GALLIHER, J.A. dissenting), that in such a case the defendant cannot escape liability by virtue of the Act without shewing that he took reasonable care to inform himself as to the facts and that he honestly believed in the case laid before the magistrate and was not actuated by malice.

[Affirmed by Supreme Court of Canada.]

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 21st of January, 1927, and the verdict of a jury, in an action for damages for trespass by the defendant on the property and house of the plaintiffs at 577, 8th Avenue East, Vancouver, and for maliciously and without reasonable and probable cause swearing out, obtaining and executing a warrant to search the plaintiffs' said house. The defendant, who is a police officer, was telephoned to by an unknown person on the 14th of September and told that liquor was being taken from the basement of the plaintiffs' house. He told his chief officer of this and was then instructed to get a search warrant and search the place. On the following day the defendant swore out an information against the plaintiffs upon which a search warrant was issued by magistrate Findlay, and the defendant, in company with Officer McCready, then proceeded to the plaintiffs' house at about three o'clock in the afternoon. The plaintiff was away but Mrs. Manning allowed them in. They searched the house but found nothing. The plaintiffs recovered $850 in damages.

The appeal was argued at Vancouver on the 7th of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

McCrossan, for appellant: This search was made under a warrant issued under section 73 of the Government Liquor Act. Nothing was found in the house. My submission is that there was misdirection on the question of malice. There must be malice in fact: see Halsbury's Laws of England, Vol. 19, p. 679, sec. 1447; *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167 at p. 175; *Prentiss* v. *Anderson Logging Co. and Jeremiason* (1911), 16 B.C. 289 at pp. 290 and 295; *Scott* v. *Harris* (1918), 14 Alta. L.R. 143 at pp. 144-5.

Wood (*E. I. Bird,* with him), for respondents: In law "suspect" means "suspicion in nature of belief": see Halsbury's

Laws of England, Vol. 16, p. 687. Malice is a question of fact and is for the jury: see *Corea* v. *Peiris* (1909), A.C. 549; *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588; *Stevens* v. *Midland Counties Railway Co.* (1854), 10 Ex. 352; *Brown* v. *Hawkes* (1891), 2 Q.B. 718. Section 73 of the Government Liquor Act says "suspects or believes on reasonable and probable cause": see *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521; *Archibald* v. *McLaren* (1892), 21 S.C.R. 588; Halsbury's Laws of England, Vol. 9, p. 310; *Rex* v. *Bedford* (1916), 27 Can. C.C. 107. The warrant was faulty in two respects: (1) Not directed to the constable as required by section 73 of the Act; (2) he did not enter at time indicated in warrant: see *Grant* v. *Bagge* (1802), 3 East 128.

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McCrossan, in reply: As to specific name of constable not being on the warrant see *Sleeth* v. *Hurlbert* (1896), 25 S.C.R. 620 at p. 625. It is sufficient to follow the form: see *McGrath* v. *Scriven* (1921), 1 W.W.R. 1075 at pp. 1081-3; *Jones* v. *Vaughan* (1804), 5 East 445; *Renton* v. *Gallagher* (1910), 19 Man. L.R. 478.

Cur. adv. vult.

7th June, 1927.

MACDONALD, C.J.A.: The judgment should be set aside. There may be a question whether the defendant, a police officer, made sufficient enquiry to establish reasonable and probable cause for what he did. He was a member of the "dry squad." Someone, he thinks it was a woman, rang his department by telephone and complained that intoxicating liquor was being unlawfully stored in a house, giving the number of it, and that persons carrying grips had been seen going out of the house. She declined to give her name and did not give the name of the occupant of the suspected house. The defendant received the message and reported it to his inspector, who told him to look into the matter and procure a search warrant, and make a search of the house. By means of the telephone directory the defendant found the name of the occupant of the house. He then obtained a search warrant and went with another officer, both in plain clothes, to the house. They were quietly admitted by the plaintiff Mrs. Manning, and after a search found no liquor

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there. The defendant had never heard of the Mannings before this and made the search, as he believed, in the course of his duty merely.

The learned judge rightly directed the jury that the question of reasonable and probable cause was a question for him to decide and that the onus of proving want of it was upon the plaintiff.

There were two factors in this question: did defendant take reasonable care to inform himself of the facts before laying the information upon which the search warrant was issued? and did he honestly believe in the case? The authorities are clear enough that when the facts upon which the judge's decision is to depend are in dispute he may ask the jury to decide them. Where the facts of either are not in dispute the rule is not so clear. In this case the facts of neither are in dispute, but if it can be said that the facts relating to reasonableness should have been left to the jury; I think those relating to honest belief and the inference to be drawn therefrom ought to have been found by the judge himself.

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Now, assuming that the jury might have found that the defendant had not made sufficient enquiry, what warrant is there for finding that he had acted maliciously, and why did the learned judge leave that question to the jury, there being no dispute about the facts?

I agree with what Cave, J. said in *Abrath* v. *North Eastern Railway Co.* (1886), a *dictum* referred to in the House of Lords, 11 App. Cas. 247, with apparent approval.

The Government Liquor Act, Cap. 146, R.S.B.C. 1924, Sec. 73, enables a constable to procure a search warrant on an information that he "suspects or believes" that liquor is being unlawfully kept. Defendant laid an information in which he said that he did suspect and believe that intoxicating liquor was unlawfully kept in the house in question. It was enough to have said he "suspected"; it was enough to have said he "believed," the saying of both, I think, casts no additional burden upon him.

Now, when it is remembered that a search warrant is procured merely for the purpose of confirming or dissipating a suspicion or belief, and is not in the proper sense of the term

a prosecution for crime at all, though I must concede that our Courts have held it a good foundation for an action for malicious prosecution and perhaps, rightly so, still I think that the trial judge, if it be open to him to do so, should draw the inference from undisputed facts and not submit it to the caprice of a jury. Cases of this sort are peculiarly calculated to arouse unjudicial feeling. The jury in this case paid no attention to the absence of any evidence of actual malice; they disregarded the overwhelming probabilities of the case, and recklessly found malice without any justification.

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I would go a step further than Cave, J. and say, with great respect, that I think the learned judge might not only draw the inference himself, but that on the undisputed evidence he ought to have done so. I also think that the jury's finding that defendant did not believe in his charge, cannot be supported. In these circumstances, malice cannot be inferred. *Brown* v. *Hawkes* (1891), 2 Q.B. 718.

The appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: Section 73 of the Government Liquor Act, Cap. 146, R.S.B.C. 1924, authorizes a police constable to lay an information upon oath before a justice of the peace

> "that he suspects or believes that liquor is unlawfully kept or had, or kept or had for unlawful purposes, in any building or premises . . . ."

and under that section the defendant, a police constable of the City of Vancouver, laid an information upon oath setting forth "that he suspects and believes that liquor is unlawfully kept in the building and premises mentioned below" (being occupied by plaintiffs as a residence) and upon that information a magistrate issued a search warrant under said section and a search was made of the specified premises but no liquor was found, and thereupon this action was brought for damages for malicious prosecution and a verdict obtained for $850, though the search was conducted in a very considerate and unobtrusive manner, but as no objection was taken to the amount awarded I express no opinion on it, and only note that in a somewhat similar case of much graver cause of complaint, involving actual arrest, the damages awarded were ten pounds—*Busst* v. *Gibbons* (1861), 30 L.J., Ex. 75.

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The strange thing about the information is that though the said section authorizes the information to be laid either upon suspicion or belief yet the defendant in fact laid it upon both, *i.e.*, saying he "suspects and believes," and since he has elected to do so he must abide by the consequences though why he did not assume the lighter obligation of suspicion only, especially in the unusual circumstances, is not apparent.

I pause here to say in view of some observations which were made by the learned judge below in his charge to the jury (which probably account for the size of the verdict) that the issue of search warrants in cases of this nature is neither novel nor contrary to "principles that have been brought down through the history of the British race," because for example, in 1839, 2 & 3 Vict., Cap. 47, the Metropolitan Police Act, Sec. 64, provided that:

" . . . it shall be lawful for any constable belonging to the Metropolitan Police to take into custody, without a warrant, all loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanor, or breach of the peace, and all persons whom he shall find between sunset and the hour of eight in the morning lying or loitering in any highway, yard, or other place, and not giving a satisfactory account of themselves."

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This power to seize the body without warrant upon "good cause" of suspicion, not merely after felony committed as at common law, but also in case of anticipated misdemeanours or breaches of the peace or mere "lying or loitering," is a much greater interference with the "historic" liberty of the lieges than the authorization of a mere right to search their "buildings or premises" after warrant upon information sworn.

Furthermore, by section 34 of the same Act a very wide power of entry and search without warrant is conferred upon any police superintendent or inspector, simply "by virtue of his office" and "at all times, as well by night as by day," into and upon every such ship, boat, or other vessel," etc., for various specific purposes including the "inspecting and observing the conduct of all other persons who shall be employed on board of any such vessel, on or about the loading or unloading thereof." Fifteen years before this, in 1824, by 5 Geo. IV., Cap. 83, Sec. 13, justices of the peace were authorized to issue

warrants to search lodging-houses, inns, etc., for vagrants and incorrigible rogues, etc., "upon information on oath" that such persons are "reasonably suspected" of being harboured or concealed therein. And coming to more recent times, by the English Petroleum Act, 1871, Cap. 105, Sec. 13, Courts of summary jurisdiction are empowered to grant warrants ("upon information on oath that there is reasonable ground to believe") to search for petroleum unlawfully kept contrary to the Act, in any place whether a building or not, or in any ship or vehicle, etc., and to sample, seize or remove such petroleum with a view to its forfeiture. Now I am quite unable to see any distinction in principle between searching buildings for "illicit" petroleum in England and "illicit" liquor in Canada, or why the one or the other practice should occasion any "surprise" in any quarter especially bearing in mind that the liquor business in this Province, as in many others, has become a monopoly of the Crown, which monopoly it may take the usual means for protecting by search without warrant and otherwise as under customs and excise laws, and also *e.g.,* The Public Stores Act, 1875, 38 & 39 Vict., Cap. 25, Sec. 6.

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But still further in case of liquor itself, for very many years the English Liquor Licensing Acts have contained provisions, like ours, authorizing searches by justices' warrant for illicit liquor sold or kept for sale in any place, whether a building or not—*vide, e.g.,* section 35 of The Licensing Act, 1872, Cap. 94; and the current Licensing (Consolidation) Act, 1910, of which section 82 (1) deals with "places" and "buildings" in general and section 96 (1) with clubs in particular the books and papers of which may also be seized under the search warrant. And in our own country, at least as early as The Canada Temperance Act, 1878, Cap. 16, Sec. 108, power was given to search for liquor under a justices' warrant issued on the information of a "credible witness . . . that there is reasonable cause to suspect" its presence in "any dwelling-house, store, ship," etc., and a leading case out of many on such legislation is *Townsend* v. *Cox* (1907), A.C. 514, before the Privy Council and *Townsend* v. *Beckwith* (1907), 42 N.S.R. 307, wherein at p. 309 sound reasons are given, if any be needed, for legislation of this kind. In view of the foregoing enactments, and many more

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could be cited, I can only regard, with the greatest respect, the observations of the learned trial judge as being unfortunate in their direct consequences. In *Hadley* v. *Perks* (1866), 35 L.J., M.C. 177, Mr. Justice Blackburn draws attention to the new "very extensive, very arbitrary and summary power" conferred by the said Metropolitan Police Acts, and the change in the common law effected thereby.

Turning to the objections taken to the charge I am of opinion that they are not sustainable in the circumstances, nor can it be said that there was no evidence upon which the finding of malice could be founded. Even if the information had been based upon suspicion alone, that suspicion must have a reasonable foundation and I have found no case going to the length of holding that an anonymous communication, either by telephone or letter, is a justification for setting the law in motion. In *Hogg* v. *Ward* (1858), 3 H. & N. 417, Baron Bramwell at p. 422 refers in illustration of arrest upon suspicion to section 64 of the Metropolitan Police Act, *supra,* and says:

"This does not say that any charge is enough, but by implication says only such a charge as gives the constable good cause to suspect the person charged."

MARTIN, J.A. And Baron Watson said, p. 423:

"Now, every case must be governed by its own circumstances, and the charge must be reasonable as regards the subject-matter and the person making it. If an idiot made a charge the constable ought not to take the person so charged into custody."

How can anyone form an opinion on the mental capacity of an informant who keeps himself in concealment? In *Davis* v. *Russell* (1829), 5 Bing. 354, the distinction is drawn, p. 364, between reasonable suspicion and "'bare surmise,' which is a very different thing." At p. 363, Best, C.J., said:

"If the direction to the jury were, on the whole, substantially right, a mere inaccuracy of expression will not render it necessary to have recourse to a new trial."

And in *Busst* v. *Gibbons, supra,* Pollock, C.B. said, p. 77:

"We ought to be very careful before we disturb the verdict of a jury, and therefore we shall not interfere in any way."

Doubtless reasonable suspicion may be founded on hearsay—*Townsend* v. *Beckwith, supra,* p. 312—but it should come from a credible and known source—*Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167, 174.

Reliance was placed by appellant's counsel upon our decision in *Prentiss* v. *Anderson Logging Co. and Jeremiason* (1911), 16 B.C. 289, and that of the Supreme Court in *Sleeth* v. *Hurlbert* (1896), 25 S.C.R. 620, but the circumstances were very different and the latter case is one on the said Canada Temperance Act and is founded upon the existence of "just and reasonable cause to suspect" alone, as the warrant discloses, p. 623.

In considering the issue of malice it is to be noted that the jury took the same view as the learned trial judge upon the absence of reasonable and probable cause and so the following observations of Lord Justice Bowen in the leading case of *Brown* v. *Hawkes* (1891), 61 L.J., Q.B. 151 are in point, p. 153, *viz.*:

"Now, ordinarily, it is the law, as the counsel for the plaintiff has argued, that if the jury agree with the judge that there has been a want of reasonable and probable cause, that is evidence from which they may infer malice when that issue comes before them. That seems to be supported by what Lord Mansfield states in the case of *Johnstone* v. *Sutton* [(1786)], 1 Term Rep. 510 at p. 545, that if in such a case there is an absence of reasonable and probable cause, the jury may think that the defendant knew there was no probable cause."

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See also *Hicks* v. *Faulkner, supra,* cited in Clerk and Lindsell on Torts, 7th Ed., 652, and the excellent work on the same subject by the late Mr. Justice Salmond, 2nd Ed., 552.

In the case at Bar I agree with my brother M. A. MACDONALD that there are present those other independent indications of malice that he cites in justification of the jury's view and as he has set them out so clearly I shall not presume to repeat them.

It follows that in my opinion the appeal should be dismissed.

GALLIHER, J.A.: This is an appeal from the decision of MCDONALD, J., upon the verdict of a special jury.

Nickerson is a constable employed by the City of Vancouver, his duties being to aid in bringing to justice offenders against the Government Liquor Act. He is one of the officials of what is termed the "dry squad." Nickerson having obtained information over the telephone from some person who refused to give her name, that liquor was being kept in certain specified premises, which turned out to be the premises of the plaintiffs, went before J. A. Findlay, Esquire, stipendiary magistrate in and for the City of Vancouver, and laid the following informa-

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tion: [After setting out the information the learned judge continued].

Whereupon the magistrate issued to him a search warrant in the words following: [The learned judge set out the search warrant and continued].

Nickerson with another constable entered the premises under the search warrant, made search, but no liquor was found. The plaintiffs then brought this action for maliciously and without reasonable and probable cause, swearing out, obtaining and executing a warrant to search the house of the plaintiffs. The search warrant was issued under section 73 (1) of the Government Liquor Act, R.S.B.C. 1924, Cap. 146, which is in these words:

"Upon information on oath by any Inspector appointed under this Act or by any constable that he suspects or believes that liquor is unlawfully kept or had, or kept or had for unlawful purposes, in any building or premises, it shall be lawful for any Justice by warrant under his hand to authorize and empower the Inspector or constable, or any other person named therein, to enter and search the building or premises and every part thereof; and for that purpose to break open any door, lock, or fastening of the building or premises or any part thereof, or any closet, cupboard, box, or other receptacle therein which might contain liquor. It shall not be necessary for any Inspector or constable to set out in the information any reason or grounds for his suspicion or belief."

GALLIHER, J.A.

This is pleaded as a bar to the plaintiffs' right to recover and if it appeared from the above section that the magistrate was called upon to decide anything or satisfy himself on any points and that the warrant was issued after so satisfying himself, in other words, perform some judicial act, then this case would be within the decisions of *Hope* v. *Evered* (1886), 55 L.J., M.C. 146, and *Lea* v. *Charrington* (1889), 58 L.J., Q.B. 461. But I cannot deduce this from our Act and the magistrate here exercised no judicial function. That contention I think, fails, so that we have to get down to the findings of the jury.

The authorities which are discussed in *Scott* v. *Harris* (1918), 14 Alta. L.R. 143, and others, I have read establish this, that where want of reasonable and probable cause is found, it is some evidence from which malice may be inferred.

In *Brown* v. *Hawkes* (1891), 2 Q.B. 718, Cave, J. says, at p. 723:

"Of course, there may be such plain want of reasonable and probable

cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge made, and in that case want of reasonable and probable cause is evidence of malice. But I am not prepared to assent to the proposition that, where there is want of reasonable and probable cause, the jury may always find malice, no matter what the circumstances may be."

In other words, if I understand his Lordship's language rightly, it is to this effect—that though want of reasonable and probable cause may be found (and that is some evidence of malice) yet if apart from that, all the circumstances disclosed tend to shew the absence of *malus animus* which the plaintiffs have to prove (see Halsbury's Laws of England, Vol. 19, sec. 1447, p. 679) then in such case his Lordship would not assent to the proposition that the jury may find malice.

Apart from the finding of want of reasonable and probable cause, what are the facts and circumstances deposed to here and not contradicted? That the City of Vancouver at that time was being flooded with unsealed liquor—the officials were trying to clean up the situation and bring offenders to justice. This was all in the performance of their duty. The defendant here could have had no other object—he says so—he could have no personal feeling against the plaintiffs, he did not know of their existence before he had the information he acted upon, though this latter in itself would not exclude malice if it were otherwise shewn. He may have made a mistake or been overzealous in his duties, but that is not necessarily proof of malice.

GALLIHER, J.A.

Again quoting from the judgment of Cave, J., in *Brown* v. *Hawkes* (p. 722):

"He [the defendant as prosecutor] may also have been hasty, both in his conclusion that the plaintiff was guilty and in his proceedings; but hastiness in his conclusion as to the plaintiff's guilt, although it may account for his coming to a wrong conclusion, does not shew the presence of any indirect motive."

With every sympathy for the plaintiffs in the position in which they were placed and fully understanding their resentment, I find myself unable to conclude that the jury could reasonably find that the defendant was actuated by malice in the sense in which malice has to be established. No act of the officer upon the premises could be construed as indicating any malicious intent, in fact, the reverse.

I would allow the appeal and dismiss the cross-appeal.

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MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal calls for the consideration of the law bearing upon what is known as malicious prosecution. The cause of action sued upon was damages because of the application for a search warrant to search the dwelling-house of the respondents upon the sworn allegation that liquor was unlawfully kept and concealed therein contrary to the provisions of the Government Liquor Act (Cap. 146, R.S.B.C. 1924), the obtaining of same and the execution thereof.

The appellant upon whose oath the search warrant was obtained is a member of the police force of the City of Vancouver and was actively employed as a detective upon what is known as the dry squad at the time when the application for the search warrant was made.

I am in agreement with the learned trial judge, Mr. Justice D. A. MCDONALD, that the issuance of a search warrant in its gravaman is in principle the same as the initiation of other legal proceedings leading to prosecution for unlawful acts which if well founded will result in the imposition of fine or imprisonment. In my opinion the issuance of the search warrant constitutes no protection to the appellant—it certainly issued without jurisdiction, not being based upon proper material and must be viewed as being invalid. Further, there is no protection to the appellant under the Constables Protection Act (24 Geo. II., c. 44) that statute in my opinion not being applicable or introduced into British Columbia.

The learned counsel for the appellant Mr. *McCrossan,* in his very able argument in the main confined himself as I think rightly to the question of malice, contending that the evidence did not warrant the verdict of the jury in finding as they did, that there was malice. I am of the view that the only point that needs serious consideration is—was there or was there not malice established as required in law? Malice is said to be of two kinds, that is, malice in law and malice in fact (*per* Bayley, J., in *Bromage* v. *Crosser* (1825), 4 B. & C. 255). Malice in law does not necessarily mean any ill will against any person but is established by a wrongful act done intentionally without just cause or excuse. It has been at times stated that malice in law is alone sufficient to found an action for malicious prosecution but that contention is not a tenable

one (see Parke, J., in *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588; *Brown* v. *Hawkes* (1891), 2 Q.B. 718 at p. 722).

The essentials necessary are absence of reasonable and probable cause and actual malice (see *per* Hawkins, J. in *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167; 51 L.J., Q.B. 268; 30 W.R. 545). The question of reasonable and probable cause is for the judge and the question of malice is for the jury. The learned trial judge held that there was an absence of reasonable and probable cause a decision with which, upon the facts of the present case, I wholly agree.

In *Hicks* v. *Faulkner, supra,* p. 171, Mr. Justice Hawkins said:

> "I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

The jury found the absence of reasonable and probable cause and found as well in express terms that the appellant was guilty of malice, the second essential. So that we have here the essential findings, the absence of reasonable and probable cause and malice. It was well within the province of the jury to infer malice from the surrounding facts and circumstances of the case and the very circumstances which led the learned trial judge to the conclusion that there was no reasonable and probable cause. Upon the basis that malice in fact was necessary in the present case it is clear to me that the learned trial judge having found there was no reasonable and probable cause warranting the application for the search warrant and the search of the dwelling-house of respondents thereunder the jury were justified in finding that there was malice.

MCPHILLIPS, J.A.

Turning to the facts of the present case it is manifest that the appellant acted recklessly and without proper evidence warranting the steps he took. A telephonic message comes in, the informant refusing to disclose her name, charging that the dwelling-house of the respondents was in effect a bootlegging establishment where liquor was kept and upon that information alone the sworn statement was made that there was reason to suspect that liquor was unlawfully kept in the premises contrary

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to the provisions of the statute. It was on September 14th, 1926, and the appellant was on duty with the dry squad when he got the aforementioned telephone message regarding the premises of the respondents, a dwelling-house in a good residential district in the City of Vancouver, 577 8th Avenue East, the party telephoning also saying that liquor was stored in the basement and had been taken away in grips—suit-cases. Here we have a very serious invasion of the home and disturbance of the privacy of the home, the dwelling-house of people of standing and respectability in the community without justifiable cause. The facts of the case well warrant this statement—the law is very precise upon any invasion thereof—"*domus sua cuique est tutissimum refugium.* (5 Rep. 92.)—Every man's house is his castle"—Broom's Legal Maxims, 8th Ed., 336, and at p. 337:

"1. The house of every one is to him as his castle, as well for his defence against injury and violence, as for his repose. . . ."

This has long been the law of England (*Semayne's Case* (1604), 5 Rep. 91).

MCPHILLIPS, J.A.

It is only necessary to read a portion of the evidence of the appellant when under cross-examination to demonstrate the recklessness of procedure: [The learned judge set out the evidence and continued].

I do not propose to canvass the evidence in detail but there was not a scintilla of evidence to shew that any liquor was or had been kept on the premises and the plaintiffs are people of good standing in the community in which they live. The conduct of the police was indeed misguided conduct and to be deplored—in truth, deserving of the severest animadversion.

I have given the whole evidence careful study and upon the basis—which is the true basis—that the onus is not on the defendant (the appellant) to prove reasonable and probable cause but on the plaintiffs (the respondents) to prove the absence of any reasonable and probable cause: *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247; 55 L.J., Q.B. 457). I am convinced that the learned trial judge, as I have previously stated, was right in ruling that there was an absence of any reasonable and probable cause and on the whole case and in view of the fact that the learned trial judge ruled that there

was an absence of any reasonable or probable cause it was upon the facts of the present case the manifest duty of the jury to find malice. However, quite apart from what I conceive to have been the manifest duty of the jury, the facts of the case fully warranted the jury in finding actual malice upon the facts. It is a reasonable finding, and there is ample evidence to support it, therefore the verdict of the jury not being shewn to be unreasonable must stand. It is not necessary for this Court to say that the jury arrived at the right but only a reasonable conclusion upon the relevant facts, upon an issue that was for them alone.

I have to say, though, without the slightest hesitancy on my part, that in my opinion the jury in their findings in this case not only came to a reasonable conclusion, but one manifestly in the interest of the due administration of justice.

Upon the question of damages I am not of the opinion that the learned trial judge erred in law in any respect in his charge to the jury—it is not a case in which it can be said that the damages have been allowed at a sum at all excessive.

Reverting to the question of malice we have not here the finding of the jury of "honest belief" (as in *Brown* v. *Hawkes*, *supra*) in the appellant in making the sworn statement and obtaining the search warrant; in truth, we have in effect by the answers of the jury the contrary found. Here we have the police authorities of the city of Vancouver of the belief that there was in the city a large quantity of unsealed liquor, *i.e.*, liquor not purchased from the Government Liquor Control Board and therefore illegally held. Being of that opinion it is plain that recklessly and not apparently caring whether persons were or were not contraveners of the law—with the idea of striking terror into such persons—they were willing to launch proceedings upon no evidence or flimsy evidence to say the least, as in this case, and now, in this concrete case, the appellant, who has been patently shewn to have done this, seeks to escape liability therefor. *Stevens* v. *Midland Counties Railway Co.* (1854), 10 Ex. 352 at p. 356; 23 L.J., Ex. 328, is an illuminating case upon this point. There it was the case of "flimsy materials" which the present case is, "for the purpose of frightening others and deterring them from committing depredations" and

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proceeding in this way as the appellant did in this case, renders persons so proceeding open to the charge of being influenced by malice. Then as I have previously stated, if in the opinion of the judge—which is the present case—there was no reasonable or probable cause the jury might from that fact alone infer malice (*Johnstone* v. *Sutton* (1786), 1 Term Rep. 510 at p. 545).

In the present case the essential findings have been made by both judge and jury, and the verdict of the jury and the judgment entered thereon in my opinion should not be disturbed. It is significant to note what Sir Arthur Channell said in *Toronto Power Company, Limited* v. *Paskwan* (1915), A.C. 734 at p. 739:

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

Certainly in the present case there has been no unreasonableness, it is a patent case for the imposition of damages and as I have previously stated, they are in no way excessive, in truth, might have been much greater and they could have been supported (*Leith* v. *Pope* (1779), 2 W. Bl. 1327; *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309).

In my opinion the appeal fails.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal by the defendant from a verdict of a jury in an action for malicious prosecution. The defendant is a detective and a member of the "dry squad" on the Vancouver police force. On the 15th of September, 1926, he caused a search warrant to be issued by a stipendiary magistrate to enable him to enter the home of the plaintiffs to search for liquor alleged to be kept by them contrary to the provisions of the Government Liquor Act, Cap. 146, R.S.B.C. 1924. In the sworn information laid by the defendant, to obtain the search warrant, he said that "he suspects and believes that liquor is unlawfully kept" in the plaintiffs' premises and that he "has received information that liquor is being unlawfully kept and dealt with in the said premises"; also that he had "just and reasonable cause to suspect and suspects that the said liquor is concealed" in the said premises, whereupon a search warrant was issued as aforesaid. The defendant, with

another officer, searched the plaintiffs' private dwelling-house and, although afforded every assistance by the wife, failed to find any liquor.

This activity on the part of the defendant was prompted by a telephone message he received from a lady who refused to give her name to the effect that some one was noticed going in and out of the plaintiffs' home carrying a suit-case. There was not —apart from the message—the slightest warrant for the suspicion that liquor was unlawfully kept or dealt in by the plaintiffs. It would appear that they have been respectable residents of Vancouver for many years. No doubt, feeling aggrieved at this undeserved indignity, they launched this action.

The learned trial judge submitted the following questions to the jury and the answers are added thereto:

"(1) Did the defendant take reasonable care to inform himself of the facts of the case? No.

"(2) Did he honestly believe in the case which he laid before the magistrate? No.

"(3) Was the defendant actuated by malice? Yes.

"Damages? $850."

Counsel for appellant objected to the following portion of the charge to the jury:

"Now, having dealt with that question, the fourth point comes up. The plaintiffs must settle another point, one more step, and that is the fourth requisite, that they must shew malice. Now, malice has been defined in law as being a wrongful act done intentionally without just cause or excuse. It does not mean spite in the ordinary sense that we use it, that I did something to spite a particular individual whom I knew. I might very well be found to have been actuated by malice against a person about whom I never heard before. The word is used in its legal sense. Now, in order that the plaintiffs must succeed, you must find that the defendant was moved by an improper desire other than to bring the plaintiffs whom he believed committed a crime, to justice, and you may infer from lack of honesty and belief, if you find so, that there was lack of honest motive. You may find that the defendant could not possibly on the evidence before him have had an honest belief in the plaintiffs' guilt, and you may infer, if you see fit, that he was actuated from improper motives. You must consider from what has been brought before you by counsel the evidence given to the effect that there was an improper motive, that the motive was not to bring to justice an individual whom they thought, on reasonable grounds, to be guilty of an offence, but to put down a barrage or to throw out a drag-net to catch all and sundry who might by any chance be in possession of unsealed liquor, and you may give that whatever consideration you may think it deserves."

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I think it will be evident from a discussion of the law which follows that while the charge may possibly be criticized it is not open to objection on legal grounds considered as a whole.

It was I think conceded—at all events it is the law—that an action for maliciously obtaining a search warrant to issue must be supported by evidence similar to that required in the more usual actions of malicious prosecution following an acquittal on a criminal charge. No serious exception was taken to the answer of the jury to the first question. The jury were justified in answering it in the negative. Police officials must often act in some manner (not necessarily as this defendant acted) on information obtained anonymously but it was open to the jury to find that the defendant did not take reasonable care to inform himself of the facts. I think too the answer to the second question cannot be set aside for want of supporting evidence. The inference drawn by the jury was not unreasonable. Hawkins, J., in *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167 at pp. 173-4, said:

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"It cannot of course be laid down as an abstract proposition that an accuser is justified in acting either upon the credited statement of an informant, or upon his own memory. The question must always arise according to circumstances whether it was reasonable to trust either the one or the other. A person who acts upon the information of another, trusts the veracity, the memory, and the accuracy of that other, in each of which he may be completely deceived. His informant's veracity may be questionable; his memory fallacious; and his accuracy unreliable. Yet it does not follow that it was unreasonable to believe in his information if he never had cause to doubt him. . . . The reasonableness or otherwise of this reliance, I have already said, it is for the jury to determine."

Here the defendant did not know his informant and could form no honest opinion whether or not she was a reliable witness or simply mischievous and malicious. The jury therefore were justified in answering the first two questions in the negative and upon these findings the judge properly found want of reasonable and probable cause.

Strenuous objection was raised, however, to the jury's finding of malice, without which the verdict cannot stand. It was argued that the defendant who had no previous acquaintance with the plaintiffs was not actuated by spite or ill will against them and that there was no evidence to support such a finding inferentially or otherwise. *Malus animus* in fact it was urged

must be established. Malice is a question of fact standing by itself for a jury to determine but want of probable cause may be evidence of it. To quote further from the judgment of Hawkins, J., in *Hicks* v. *Faulkner, supra,* at p. 175:

"The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act, but malice in fact—*malus animus*—including that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. In order to arrive at a conclusion on the question, the jury are to take into consideration all the circumstances of the case and to form their own opinion upon them uninfluenced by any opinion of the judge unless that opinion accords with their own view. If among the circumstances it appears to the jury that there was no reasonable ground for the prosecution, they may—though by no means bound to do so—well think that it must have been dictated by some sinister motive on the part of the person who instituted it."

This statement of law is applicable to the facts in this case unless different considerations arise on the proper construction of certain sections of the Government Liquor Act which will be later considered.

If the jury found that the defendant honestly believed in the case he laid before the magistrate the difficulties in the appellant's way would be removed. If there was a finding of honest belief and no other evidence of improper or indirect motives a finding by the jury of malice could not be supported. *Brown* v. *Hawkes* (1891), 2 Q.B. 718. The answer in the negative to the second question compels further consideration before the finding of malice can be interfered with.

MACDONALD, J.A.

Malice is a state of mind and may be imputed from evidence shewing an indirect and improper motive in instituting a prosecution or as here in swearing out a warrant. To quote Cave, J., in *Brown* v. *Hawkes, supra,* at p. 722:

"Now malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice may be proved, either by shewing what the motive was and that it was wrong, or by shewing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor."

The jury were at liberty—but not bound—to infer it from the want of reasonable and probable cause. In *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588, Denman, C.J., at pp. 593-4, says:

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> "In that action, however, it is still incumbent on the plaintiff to allege and to prove malice as an independent factor; though it may in some instances be fairly inferred by the jury from the arrest itself, and the circumstances under which it is made, without any other proof."

And again, Parke, J., at p. 595:

> "The term 'malice' in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives."

The foregoing extracts correctly summarize the law. The question remains—is there any reasonable evidence to sustain the finding of malice by the jury? I have already referred to the finding that the defendant had no honest belief in the case which he laid before the magistrate. He might have hoped that his information was accurate but how could he honestly believe in a state of facts unsupported by evidence that reasonable men usually act upon? With that finding, as a basis for further enquiry, the jury were at liberty to sift the evidence to see if in fact the defendant was moved by indirect and improper motives; not to further the interests of justice. That evidence —if it is sufficient—is contained in part in a general statement of policy given in these words:

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> "Well the city was flooded with unsealed liquor which was being shipped in from outside points, and the situation was getting out of hand and we had to just do something and do something fast to get the situation into hand again."

That situation, if true, called for action but in what form? Would it justify swearing out search warrants to cover a whole neighbourhood without any evidence beyond a general belief? If the foregoing statement of policy justified the issue of one search warrant, it would justify the issue of many warrants indiscriminately. It may be said that this policy was intended to further the interests of justice generally but we are dealing with one case, the complaint of the plaintiffs and a motive of striking generally in this vague manner is somewhat indirect, if not improper, in so far as innocent people are concerned who may be the victims of a mistaken policy. A jury might well say—"that may be your motive but it is entirely wrong—improper." To obtain the search warrant in the case at Bar a sworn statement of belief was made that liquor was kept and dealt in by the plaintiffs. If the defendant had no information at all by telephone or otherwise and nothing to guide him except

the general policy referred to, could it be said his motives were proper in swearing out a warrant against one individual because many individuals were suspected of keeping it? And if improper to do so, in the absence of any specific information, is the situation redeemed by acting on evidence which, as the jury found, he did not honestly believe in and upon which no reasonable man would act? To set the criminal law in motion, is a serious step and should not be taken with mixed motives. Even if the motive referred to might be regarded as proper, it would seem at least to be an indirect one. One can understand that a police officer, with such an indirect motive, might search premises in a whole neighbourhood with the idea that others learning of it would stop trafficking in liquor for fear the axe might fall on them. That would be a motive but it would be both indirect and improper, and therefore evidence of malice.

The jury no doubt also drew inferences from the evidence of the defendant given at the trial. When asked, if he thought after searching the plaintiffs' home, that they were entirely innocent, he replied: "No, I would not say that" and added: "there might have been something to the complaint—there might have been liquor stored there at one time."

This was adding insult to injury. The jury doubtless believed, from all the evidence—they could scarcely do otherwise—that there was no excuse for this ungracious answer and inferred from it a state of mind. He tried to leave the impression on the Court that he was simply unfortunate in not finding liquor there when the search was made. A further answer to a question in cross-examination indicated that the defendant felt, as he testified, "put out that we had not—that there was nothing there," adding, as if reflecting that such a remark was not justified, no matter what he thought, that "we don't like to upset anybody or the like of that." That was his state of mind, according to his own testimony, when he executed the warrant.

The jury also heard questions directed to the plaintiff George Manning, by defendant's counsel conveying the suggestion that he (Manning) was engaged in illicit trafficking in liquor. The plaintiff was employed as a watchman at the Ballantyne pier where large quantities of liquor were stored in the course of transit. He was asked if there had not been "a very pronounced

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leakage of liquor through the warehouse at the Ballantyne pier." That question plainly conveyed an intimation to the jury that it was at least suspected that the plaintiff abstracted liquor from that source. It may be said that no such suggestion was meant. I cannot agree. This alleged leakage at the place where the plaintiff was employed was not put forward as a basis for issuing the search warrant. That was based on other information. The question coupled with the defendant's evidence, clearly conveyed the insinuation and juries are usually alert where a man's character is concerned and it is questioned without warrant. The superintendent of the pier was called by the plaintiffs to rebut the suggestion of a suspicious leakage in that quarter and testified that there was no leakage which should arouse the slightest suspicion. Were the jury justified on this evidence in finding that a defendant, who, as found, had no honest belief in the case laid before the magistrate exhibited a state of mind which in law amounts to malice? Without saying that a judge would necessarily reach the same conclusion, if it was a question for the judge, I am unable to say that the jury were clearly wrong in so finding in view of what I deem to be the law governing the question. They found or inferred "malice" and that finding should not be disturbed unless the position is entirely changed by certain sections of the Government Liquor Act. There is no doubt that the Government Liquor Act (Chapter 146, R.S.B.C. 1924) is framed to make it possible to a reasonable degree to enforce an admittedly difficult law aimed at controlling a traffic carried on secretly by those who violate its provisions. We were referred to section 73 (1) which reads as follows: [already set out in the judgment of GALLIHER, J.A.]

MACDONALD, J.A.

It was suggested that if the defendant in a sworn information sets out that "he suspect" that liquor is unlawfully kept, he is within this section and the magistrate must issue a search warrant. The latter, however, is not required to do so on such an information. The section simply provided that "it shall be lawful for any justice" to do so. True, by the latter part of the section,

> "it shall not be necessary for any . . . constable to set out in the information any reason or grounds for his suspicion. . . ."

That does not mean that it is unnecessary to have legitimate reasons for so doing. The reasons need not be spread on the records but he must disclose them in Court if called upon as here to shew reasonable and probable cause for this action and to enable a jury to decide whether or not he honestly believed in the case laid before the magistrate. Fundamental principles of long standing or a common law liability or obligation will not be overturned by a statute in the absence of express words. The object and purpose of section 73 can be carried out in its entirety without impinging on the principles which have long prevailed in actions for malicious prosecution. It would be surprising, if by implication these principles should be swept away. It is true that one might more readily swear to the truth of the statement "I suspect" than to the more serious statement "I believe." The Legislature, however, must be taken to use the word "suspect" with the legal implications which in law are associated with it. It is impossible to disassociate it from "reasons" or "grounds" of suspicion. In Form 1 in the Summary Convictions Act (Cap. 245, R.S.B.C. 1924) the words used are "just and reasonable cause to suspect." In the Government Liquor Act no forms are provided. In my opinion there is no distinction between the requirements in this respect in the two Acts. True "suspicion" may be entertained on more slender grounds than "a belief," but there must be some grounds even for a suspicion. It is one thing to entertain a general suspicion and quite another to entertain a suspicion of a particular breach of the law where the constable laying the information specifies the violation of the Act complained of. In the information laid by the defendant he made oath (not merely that "I suspect") but "I believe" that liquor was not only unlawfully kept but also dealt with on the plaintiffs' premises. We have, therefore, more than an allegation of suspicion. There is an assertion of a belief. I cannot, therefore, find, from the Act, any basis for the view that it relieves police officers from the observance of those safeguards intended to protect citizens against unwarranted prosecution, nor does it permit sworn statements to be made with impunity without a reasonable or honest belief in the truth of the allegations. A defendant, by virtue of this Act, cannot escape liability in an

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action for malicious prosecution without shewing that he took reasonable care to inform himself as to the facts, that he honestly believed in the case laid before the magistrate and was not actuated by malice. It would require very explicit language to sweep away these requirements. I would dismiss the appeal.

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

Solicitor for appellant: *J. B. Williams.*
Solicitor for respondents: *H. S. Wood.*

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MINISTER OF CUSTOMS AND EXCISE v. BRADSHAW

MINISTER OF CUSTOMS AND EXCISE v. BRADSHAW.

Revenue—War tax—Flowering plants and potted plants—The Special War Revenue Act, 1915, Can. Stats. 1915, Cap. 8, and amendments—Exemptions from taxation—Nursery stock—Meaning of—Can. Stats. 1922, Cap. 47, Sec. 13.

Flowering plants raised for the purpose of producing cut flowers for sale to the retail trade or otherwise, and potted plants raised under entire or partial protection by glass or otherwise for the like object, do not come within that primary and ordinary meaning of "nursery stock" which the Special War Revenue Act, 1915, and amendments thereto, intended to exempt from taxation.

[Affirmed by Supreme Court of Canada.]

Statement

APPEAL by defendant from the decision of MURPHY, J. of the 7th of January, 1927 (reported, 38 B.C. 251), in an action, by the Minister of Customs against the defendant as a florist and grower of plants and vegetables, for excise tax on the sale of his flowers and vegetables under The Special War Revenue Act, 1915, the defendant claiming exemption under subsection (4) of section 19BBB of the Act. The question is the interpretation of said subsection and especially the words "nursery stock" (line 13) in said section and whether it includes the produce raised by the defendant. The defendant admits that

in 1922 he produced floriculture, plant culture and vegetable culture. That in 1926 he produced flowering plants of miscellaneous varieties and having cut flowers from them sold the flowers and did not pay customs revenue. In the same year he also sold potted plants without paying revenue on the sales.

The appeal was argued at Vancouver on the 17th and 18th of March, 1927, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Reid, K.C., for appellant: The defendant is a florist and nurseryman. In 1926 he sold flowers from plants and potted plants without paying duty on the revenue from sales. The sole question is whether the plants he sold come within "nursery stock" in subsection (4) of section 19BBB of the Act. The Act must be construed under the strict rule requiring clear and unequivocal language: see *Attorney-General of Canada* v. *Reed* (1925), 36 B.C. 366; *In re Finance Act, 1894, and Studdert* (1900), 2 I.R. 400 at p. 410. Definitions of the term "nursery stock" will be found in the Oxford Dictionary, Vol. 6, p. 267, and other dictionaries. Item 82 of Schedule A of The Customs Tariff, 1907, Can. Stats. 1907, Cap. 11, gives no definition of the term. The War Revenue Act shews by its terms it did not intend to include anything in The Customs Tariff, 1907, except where specifically mentioned: see *Attorney-General* v. *Westminster Association* (1876), 45 L.J., Q.B. 886; *Palmer's Case* (1784), 1 Leach, C.C. 352; 168 E.R. 279 at p. 280; *The King* v. *Banque D'Hochelaga* (1926), 3 D.L.R. 91; *The King* v. *Karson* (1922), 21 Ex. C.R. 257. There is no strict definition so there must be some doubt.

Argument

Elmore Meredith, for the Crown: The judgment is supported by the ordinary definition of the term "nursery stock." My submission is The Special War Revenue Act, 1915, and the Customs Tariff, 1907, are *in pari materia*. Vegetable plants were excluded from the section by the 1925 amendment and previous to that, vegetable plants were taxed so that "nursery stock" does not include vegetable plants: see *Rex* v. *Loxdale* (1758), 1 Burr. 445 at p. 447; *The King* v. *Hall* (1822), 1 B. & C. 123. "Nursery" refers to out-of-doors growth alto-

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gether: see Americana, Vol. 20, p. 503. On *in pari materia* see Craies's Statute Law, 3rd Ed., p. 123.

Reid, in reply, referred to *Purser* v. *Worthing Local Board of Health* (1887), 56 L.J., M.C. 78.

Cur. adv. vult.

7th June, 1927.

MARTIN, J.A.: This is in substance an action to assert the right of the Crown to recover certain taxes under Part IV., section 19BBB of The Special War Revenue Act, 1915, but which the defendant submits are exempt from taxation as being based on "sales or importations . . . of nursery stock" within that exception in subsection (4).

Owing to formal admissions made in the record by both sides there is little dispute upon the facts and the substantial question really is—do flowering plants raised for the purpose of producing cut flowers for sale to the retail trade or otherwise, and potted plants of divers kinds raised under entire or partial protection by glass or otherwise for the like object come within the said expression "nursery stock"?

MARTIN, J.A.

In deciding this question on a national statute of the widest effect it does not seem desirable to attempt a comprehensive definition of that expression, which might well have minor local variations in so vast a country as Canada, but rather to decide what it does or does not include upon the particular facts that may arise, and after a careful consideration of those at Bar, in the light of the many helpful citations that counsel have collected from standard authorities, we are of opinion that the said flowers and plants clearly do not come within that primary and ordinary meaning of "nursery stock" which the statute intended to exempt from taxation.

Such being our opinion it is not necessary to go further seeing that plaintiff's counsel informed us that at present the Crown is only seeking confirmation of the right to tax sales of said flowers and plants. It follows that the appeal should be dismissed.

GALLIHER, J.A.
MCPHILLIPS, J.A.

GALLIHER and MCPHILLIPS, JJ.A. would dismiss the appeal.

MACDONALD, J.A.: The point in appeal is as to whether or not cut flowers, potted plants and vegetable plants are exempt from sales tax under The Special War Revenue Act, 1915, section 19BBB (4) on the ground that they are included within the term "nursery stock," the latter being exempt. I was of the opinion at the hearing that they were not exempt from payment of this tax and further enquiry confirms that view. I think it is only necessary to take the ordinary and accepted meaning of the words employed to decide the point. "Nursery stock" is grown from soil in which young plants, trees and shrubs are reared until ready for transplantation or for use in grafting. I am satisfied that the word was used by the draftsman of the Act in the ordinary sense as referring to the product of an establishment where the hardier and more woody plants are grown. The nursery trade developed along with the industry of orchard-planting and although not limited to fruit trees it indicates the nature of the plants it embraces. It did not originate with the trade of the florist. True, the two industries merge to some extent but that does not make it impossible to assign cut flowers and potted plants to its natural classification under floriculture. Vegetable plants are now specially exempted by statute (Can. Stats. 1925, Cap. 26, Sec. 7), but were not prior thereto. They cannot be regarded as "nursery stock."

MACDONALD, J.A.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Dickie & De Beck.*

Solicitors for respondent: *Congdon, Campbell & Meredith.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

KNOX AND LEWIS v. HALL AND IRWIN (p. 348).—Reversed by Supreme Court of Canada, 31st October, 1927. See (1928), 1 D.L.R. 193.

REX v. BELLOS (p. 89).—Reversed by Supreme Court of Canada, 24th February, 1927. See (1927), 3 D.L.R. 186.

REX v. DE BORTOLI (p. 388).—Affirmed by Supreme Court of Canada, 3rd May, 1927. See (1927), S.C.R. 454; (1927), 3 D.L.R. 193.

REX v. GURDITTA (p. 66).—Leave to appeal to the Supreme Court of Canada refused, 18th January, 1927. See (1927), S.C.R. 80; (1927), 2 D.L.R. 577.

REX v. SANKEY (p. 361).—Reversed by Supreme Court of Canada, 17th June, 1927. See (1927), S.C.R. 436; (1927), 4 D.L.R. 245.

WINTER v. CAPILANO TIMBER COMPANY LIMITED AND J. A. DEWAR COMPANY LIMITED (p. 401).—Reversed by Supreme Court of Canada, 31st May, 1927. See (1927), 4 D.L.R. 36.

Cases reported in 37 B.C., and since the issue of that volume appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council:

ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA v. CANADIAN PACIFIC RAILWAY COMPANY AND UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA LIMITED (p. 481).—Decision of the Supreme Court of Canada affirming the decision of the Court of Appeal affirmed by the Judicial Committee of the Privy Council, 18th July, 1927. See (1927), A.C. 934; 43 T.L.R. 750; (1927), 3 W.W.R. 460; (1927), 4 D.L.R. 113.

CAPTAIN J. A. CATES TUG AND WHARFAGE COMPANY LIMITED v. THE FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA (p. 539).—Affirmed by the Judicial Committee of the Privy Council, 20th June, 1927. See (1927), A.C. 698; (1927), 3 W.W.R. 43; (1927), 3 D.L.R. 1025.

HIGGINS AND CHAN SING v. COMOX LOGGING COMPANY (p. 525).—Affirmed by Supreme Court of Canada, 8th March, 1927. See (1927), S.C.R. 359; (1927), 2 D.L.R. 682.

Case reported in 34 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

DONOVAN STEAMSHIP CO. (INC.), THE WM. v. THE S.S. HELLEN (p. 461).—Decision of the Supreme Court of Canada affirming the decision of MARTIN, Lo. J.A. affirmed by the Judicial Committee of the Privy Council, 16th June, 1927. See (1927), 3 W.W.R. 67; (1927), 3 D.L.R. 1089.

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retained by the defendants. Five tracts of timber were selected and reserved by the plaintiffs and they cruised portions thereof, but after a time the defendants complaining that the plaintiffs had not obtained proper information as to the properties for selection, proposed that another party who had information as to the value of the properties should be included in making a selection. The plaintiffs refused to agree to this and the defendants then refused to have any further dealings with the plaintiffs. Some time later the defendants not having come to any satisfactory arrangement as to the exchange of properties, the Government paid them $120,430 for all their rights in berth No. 507. An action for damages was dismissed, the trial judge holding that the defendants were in the circumstances justified in repudiating the contract. *Held*, on appeal, reversing the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that on the evidence the defendants were not justified in repudiating the contract and the plaintiffs were entitled to damages. *Per* MACDONALD, C.J.A.: That the plaintiffs were entitled to recover $6,000. *Per* MARTIN and GALLIHER, JJ.A.: That the plaintiffs were entitled to recover two-thirds of the balance over $100,000 obtained by the defendants from the Government for berth No. 507 less deductions for cruising and selecting, *i.e.*, $11,620. [Reversed by Supreme Court of Canada]. KNOX AND LEWIS v. HALL AND IRWIN AND TORONTO GENERAL TRUSTS CORPORATION. - - - - - - **348**

4.——*Mines and minerals—Transfer of claims under agreement—Transferee to do assessment work and pay certain sum when claims sold—Assessment work done for two years—Claims allowed to lapse—Damages—Measure of.*] The defendant obtained a transfer of the plaintiff's mineral claim under an agreement that he would pay her $1,000 in the event of his being successful in making a sale of the claim and that he would protect the claim by doing the assessment work until the claim be sold. The claim was worked in conjunction with two adjoining claims for two years and certificates of work were taken out. The defendant then wrote the plaintiff that he intended to abandon the claims as he was of opinion they were of no value. The claims lapsed and were relocated by others. The plaintiff stated she did not receive the defendant's letter as to abandonment. An action for damages was dismissed. *Held*, on appeal, reversing the decision of CALDER, Co. J., that the plaintiff was entitled to damages for breach of contract, the measure of damages being the value of the property lost by the plaintiff. MCGEE v. CLARK. - **156**

5.——*When completed—When effective.* - - - - - - - - - - **161**
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2.——*As against Crown—Appeal as to.* - - - - - - - - - - **306**
See CRIMINAL LAW. 7.

3.——*Counsel fees.* - - - - **453**
See PRACTICE. 4.

4.——*Counsel fees — Applications for order for jury—Appendix N—Tariff items 6 and 13.*] On appeal from the taxation of the plaintiff's costs by the district registrar of several interlocutory applications made in respect of a jury and one application for an adjournment of the trial:—*Held*, that the word "process" in item 13 of Appendix N of the Supreme Court Rules is not intended to include counsel fees and the plaintiff is entitled to tax for "process" under item 13, and for counsel fees under item 6. BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT COMPANY LIMITED. (No. 4). - **430**

5.——*Magistrate's—Direction for payment of.* - - - - - - **420**
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and had sold liquor there at the time in question. *Held*, on appeal (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the third count was clearly brought to the jury's attention not only by the evidence but at the beginning of the charge and they were not misled by the accidental slip of the learned judge in summing up. The accused admitted that he served liquor on Esposito's premises as a bartender during the period in question and there was ample evidence upon which the jury could find him guilty. REX v. DE BORTOLI. - - - - - **388**

11.——*Sale of liquor—Venue—Sale made in one county—Trial and conviction by justice of the peace in another county—Jurisdiction — Certiorari — Appeal.*] An accused was convicted of selling liquor contrary to the provisions of the Government Liquor Act by a justice of the peace at Alert Bay in the county of Vancouver, the offence having been committed at Hardy Bay in the county of Nanaimo. A motion by the accused for a writ of *certiorari* on the ground that the justice of the peace had no jurisdiction was refused. *Held*, on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that there never was either by custom or statute a local venue in cases before a justice of the peace in this Province and the appeal should be dismissed. REX v. LYNCH. - **124**

12.——*Sale of liquor to minor—Mens rea—R.S.B.C. 1924, Cap. 146, Secs. 40 and 75—B.C. Stats. 1924, Cap. 30, Sec. 12.*] The accused, a waiter in a beer-parlour, in the course of his duties, served a minor with beer. On a charge for an infraction of section 40 of the Government Liquor Act his only defence was that he thought the boy was over age. The complaint was dismissed and an appeal to the County Court was dismissed. *Held*, on appeal, reversing the decision of ROBERTSON, Co. J., that considering the object and scope of the statute although there is no express language to that effect, it was evidently the intention of the Legislature to deprive the accused of the application of the doctrine of *mens rea* and he must be found guilty of the charge laid. REX v. MCDONALD. - - - - **298**

13.——*Murder—Evidence of child—Corroboration — Prisoner's statement — Admission of—Circumstantial evidence—Consistent with any other reasonable hypothesis—R.S.C. 1906, Cap. 145, Sec. 16.*] On a trial for murder Crown counsel tendered the evidence of a girl ten years old to be taken without oath under section 16 of the Canada

Evidence Act. Prisoner's counsel then said "I understand that this is because this child does not understand the nature of an oath." The trial judge accepted this as signifying that both counsel were agreed and after examining the child to test her intelligence and satisfying himself that she had sufficient understanding to justify the admission of her unsworn statements her evidence was taken. *Held*, on appeal, affirming the ruling of MCDONALD, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that although the learned judge might have examined her further as to her understanding of the nature of an oath, there was no substantial wrong amounting to a miscarriage of justice in taking her unsworn testimony. *Held*, further, that the prisoner's statement made to a police officer after his arrest, and after he had been warned was properly admitted in evidence. *Per* MARTIN, J.A.: That the statement made by the accused to the inspector of police was not free and voluntary but was in effect procured by duress. The admission of the statement in evidence was a miscarriage of justice and a new trial should be ordered. *Per* MCPHILLIPS, J.A.: The conviction is impossible of being sustained by reason of the fact that there was error in law in admitting illegal evidence—that is the statement of the accused not being a voluntary statement and further the unsworn evidence of the young girl Haldis Sandahl. REX v. SANKEY. - - **361**

14.——*Unlawful possession of morphine—Summary trial of offence—Conviction—Legality—Habeas corpus—Can. Stats. 1923, Cap. 22—R.S.C. 1906, Cap. 1, Sec. 28.*] The accused having been charged with being in unlawful possession of morphine, and having consented to summary trial, was found guilty and convicted. On *habeas corpus* it was urged that summary trial with the consent of the accused is not legal in the case of offences under The Opium and Narcotic Drug Act, 1923, on the ground that the Act is a code in itself and as it provides that the offence may be prosecuted either by indictment or by way of summary conviction the provisions of the Criminal Code as to election are inapplicable. *Held*, that there is no reason why the right of election should not be open to the accused and there is nothing in The Opium and Narcotic Drug Act, 1923, inconsistent with the existence of the right which is absolute. Moreover section 28 of the Interpretation Act provides that all the provisions of the Criminal Code relating to indictable offences or offences, as the case may be, shall apply to such an offence. REX v. LEW HING LOY. - - - **109**

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the action on the 2nd of June, 1926. Notice of appeal was served on the defendants on the 3rd of September for the October sittings of the Court in Vancouver. The appeal not having been entered for hearing the defendants' solicitors wrote the plaintiffs' solicitor on the 11th of November following that he intended advising the defendants that the appeal was definitely and finally abandoned. The plaintiffs' solicitor immediately replied that he had just received instructions from the plaintiffs to apply to extend the time for appeal and for leave to set the case down for hearing at the next sittings of the Court at Victoria. The application was accordingly made on the 18th of November, 1926. The only excuse submitted for being out of time was that the evidence was very voluminous and costly and the plaintiffs lacked funds for prosecuting the appeal but were now in a position to proceed with the appeal. *Held*, GALLIHER, J.A. dissenting, that in the circumstances the motion should be acceded to, that the extension should be granted and notice of appeal be given for the next Victoria sittings of the Court, the applicant to pay the costs of this motion and perfect his security for $500 before the 20th of December, 1926. KNOX AND LEWIS v. HALL *et al.* - - - - - **78**

3.——*Appeal—Notice of—Delay in settling order—Interlocutory—Notice out of time—Appeal struck out.*] After an order had been made for the taking of accounts of the executor of an estate, one of the executors applied for an order fixing his remuneration and for his discharge. An order was made fixing his remuneration but the question of his discharge was left over for further hearing. The order was made on the 12th of November, 1926, but owing to disputes as to the form of the order it was not signed and entered until the 25th. Notice of appeal was served on respondent's solicitors on the 3rd of December. On motion to quash the appeal on the ground that it was out of time:—*Held*, that the order was an interlocutory one and as the notice of appeal was not given within the time provided by the rule the appeal should be quashed. *In re* ESTATE OF JOHN HENRY DAVIES. DAVIES v. DUGGAN. - **249**

4.—*Argument on motion—Facts in dispute and cross-examinations on affidavits read—Counsel fees—Supreme Court Rules—A "hearing" within item 214 of Appendix M.*] On a motion to compel a person not appearing on the record to indemnify the applicant against costs on the ground that he was the instigator of the action, the facts being in dispute and cross-examinations on affidavits being read:—*Held*, that the argument of the motion is a "hearing" within item 214 of Appendix M to the Supreme Court Rules and higher counsel fees than upon an ordinary motion can be taxed. PACIFIC COAST COAL MINES LIMITED *et al.* v. ARBUTHNOT *et al.* - - - - **453**

5.——*Change of venue—Preponderance as to witness expenses—View—Fair trial—Onus.*] The plaintiff commenced action in Kamloops against the City of Revelstoke for damages for closing a street and erecting a rink thereon adjoining his property on which he had erected a residence and from which he had access to the street that was closed. The defendant applied for a change of venue from Kamloops to Revelstoke on the grounds that the plaintiff had only one witness in Kamloops and one in Vancouver, whereas the defendants in addition to themselves had nine witnesses in Revelstoke; further that a view of the *locus in quo* was necessary. The plaintiff claimed he would not have a fair trial in Revelstoke, as the public generally were interested in the erection of the rink and would be adverse to him. The application was dismissed. *Held*, on appeal, affirming the decision of MCDONALD, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that although there is preponderance of convenience in favour of the defendants nothing short of great preponderance of convenience and expense would justify the taking from the plaintiff the right that the law gives him to select the place of trial; that in such a case as this a view would be of no benefit and is not necessary and the onus is on the defendants to displace the plaintiff's right to lay the venue at Kamloops by proving that a fair trial would be obtained in Revelstoke, but they have failed to do so. ARMSTRONG v. THE CORPORATION OF THE CITY OF REVELSTOKE *et al.* - - **253**

6.——*Costs—Appeal from the County Court — Appendix N — Application — B.C. Stats. 1925, Cap. 45, Sec. 2(5).*] Appendix N to the Rules of the Supreme Court of British Columbia applies to the costs of an appeal from the County Court under section 2(5) of the Court Rules of Practice Act Amendment Act, 1925. Further, section 35 of the Court of Appeal Act provides that the tariff in force in the Supreme Court applies to the costs in the Court of Appeal. ROBINSON v. CORPORATION OF POINT GREY. - **54**

7.——*Costs—Dismissal of action—Indemnity against costs—Refusal of costs to indemnified defendant.*] One defendant

agreed to indemnify the other defendant against all actions, claims and demands which may be brought by reason of the execution of a certain lease. The plaintiff's action for a declaration that notice of forfeiture of said lease is void and that the lease is valid and subsisting was dismissed with costs. *Held,* that the indemnified defendant was not entitled to costs against the plaintiff. *Esquimalt and Nanaimo Ry. Co.* v. *Hoggan* (1908), 14 B.C. 49 applied. WINTER v. CAPILANO TIMBER COMPANY, LIMITED AND J. A. DEWAR COMPANY LIMITED. - - - - - - **45**

8.——*Costs — Taxation—Tariff — Appendix N, column 3—Maximum—Disbursements not included in.*] The maximum amount taxable as between party and party under Appendix N is exclusive of disbursements. The recovery of disbursements on the scale set out in Appendix M is not affected by the fixing of a maximum in Appendix N. HIGGINS AND CHAN SING v. COMOX LOGGING COMPANY. - - - - - - **477**

9.——*Costs—Taxation review—Rules 141 and 228.* - - - - - - **240**

See ADMIRALTY LAW. 2.

10.——*County Court—Appeal—Judge's notes of evidence—Order to supplement notes of no avail—Motion to admit affidavits disclosing evidence at trial.*] A motion by the appellant to the Court of Appeal to admit affidavits disclosing the evidence given at the trial before the County judge on the ground that the judge's notes obtained did not sufficiently set out the evidence was adjourned in order to give the appellant an opportunity to apply to the County judge to supplement his notes. The County judge refused to accede to this on the ground that his memory would not permit his doing so. The appellant then renewed his application to admit the affidavits. *Held,* MCPHILLIPS, J.A. dissenting, that where the evidence cannot otherwise be obtained it may, in a proper case, be supplemented from other sources, and that in the special circumstances of this case the affidavits should be admitted. *Per* MACDONALD, C.J.A.: It is very dangerous to admit extraneous evidence and a motion to be allowed to do so should be acceded to with great caution. KYLE v. WILBRAHAM-TAYLOR. - - - - **72**

11.——*Injuries sustained in a collision—Nature of—Scientific investigation—Action for damages—Trial by jury—Marginal rules 426, 429 and 430.*] A woman and her daughter were passengers on an automobile

stage when it collided with a street-car. In an action for damages the mother claims that in addition to bodily injuries the nervous shock was so severe as to render it permanent. The daughter claims she was so severely cut about the face that she is permanently disfigured, and further claims she had great talent as a vocalist and had been training for a long time to become a professional singer, but the nervous shock she had sustained destroyed all chances of development as a singer. The plaintiffs obtained an order for trial by jury. *Held,* on appeal, affirming the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that where damages are claimed for personal injuries sustained in an accident although the evidence of medical men in regard to the nature and extent of the injuries are in a sense scientific, it is not a scientific or local investigation that brings the case within marginal rule 429. BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT COMPANY LIMITED. - - - - - **56**

12.——*Leave to appeal to Privy Council—Application for—Action for damages for injuries—Order for jury—Sustained by Court of Appeal.*] In an action for damages for injuries sustained by the plaintiffs in a collision between a motor-bus in which they were passengers and a street-car, an order obtained by the plaintiffs for a jury was sustained by the Court of Appeal. An application for leave to appeal to the Privy Council was refused (MCPHILLIPS, J.A. dissenting). BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT COMPANY LIMITED. (No. 2). - - - - - - - - - - **111**

13.——*Mortgage — Foreclosure—Insufficiency of mortgaged property—Default of defence—Motion for judgment—Immediate foreclosure.*] On a motion for judgment in default of defence in a foreclosure action, judgment for immediate foreclosure absolute will be granted upon the Court being satisfied by evidence that the value of the property is insufficient to pay the amount of principal due on the mortgage and the wasting nature of the property is such that the longer the delay the greater the loss. ANGLICAN SYNOD v. RUSSELL AND MAY. - - - - - - - - - - **400**

14.——*Order for jury—Word "common" inadvertently inserted—Accidental slip—Amendment—Marginal rule 315.*] Upon an order for a jury being granted the order was drawn up with the word "common" inserted before the word "jury." Subsequently the plaintiff applied to amend the

order by striking out the word "common" under the "slip" rule. *Held*, that as counsel on the first application directed their submissions solely to the question of jury or no jury the "slip" rule applied and the amendment should be granted. BRADSHAW v. BRITISH COLUMBIA RAPID TRANSIT COMPANY LIMITED. (No. 3). - - **64**

15.——*Pleading — Document — Meaning and effect of cannot be pleaded—Estoppel—Cannot be pleaded in counterclaim.*] The defendants having pleaded a document *verbatim* will not be allowed to plead the meaning and effect of it as the construction of a document is a matter for the Court. The rule that a plea of estoppel is not allowed to appear in a statement of claim applies to a counterclaim. In an action to recover the balance due in respect of the sale of certain timber lands the defendants counterclaimed setting up fraud on the part of the plaintiff in negotiating the sale and pleaded by way of counterclaim that "the plaintiff fraudulently misrepresented to the defendants that a certain cruise shewn to the defendants and made by the Portland Engineering Company was a true and correct cruise of the timber in question, whereby the defendants were fraudulently misled into paying for a large quantity of timber which was in fact non-existent, and the plaintiff was at the time in possession of another cruise made by Brown & Brown shewing a much smaller quantity of timber, which later cruise was true in substance and in fact, and shewed the actual amount of timber upon the lands." This was followed by a plea that "a few days prior to the sale the plaintiff filed with the Government of British Columbia in the department having the conduct of assessment and taxation the said Brown & Brown's cruise as shewing truly the amount of standing timber upon the lands, and the defendants had no knowledge or notice of such filing." *Held*, to be a good plea and should not be struck out. THE VICTORIA LUMBER & MANUFACTURING CO. LTD. v. THOMSEN & CLARK. - - - - - - - - - - - **46**

16.——*Taxation — Witness fees—Allowance for preparation to give testimony—Marginal rule 1002, regulations (9), (25), (41) and (42).*] Under regulation (9) of marginal rule 1002 the registrar after hearing evidence allowed certain amounts to various witnesses for time occupied in preparing themselves to give testimony at the trial. The registrar made no notes of the evidence. On an application to review the taxation objection was taken that under

regulation (42) of said marginal rule the Court must determine the matter on the evidence given before the registrar which was not before the Court. *Held*, that the objection must be sustained as under said regulation (42) the judge is precluded from ordering that the evidence given before the registrar be repeated before him. *Held*, further, that the submission that the registrar has no power to take verbal testimony is answered by regulation (25) of said marginal rule 1002. CAPTAIN J. A. CATES TUG & WHARFAGE COMPANY LIMITED v. THE FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA. - **95**

17.——*Trial — Application for jury—Sufficiency of affidavit in support—Right to supplementary or counter affidavits—Orders as to procedure—Power to make—Marginal rule 430.*] An application under Order XXXVI., r. 6 ought to be supported by an affidavit which should either verify the claim or state the cause of action in clear and positive terms so that the judge can have no doubt as to the plaintiff's right to the order. No counter affidavit ought to be allowed nor supplementary affidavits, except to supply immaterial omissions or to correct clerical errors. If the plaintiff makes out that his cause of action comes within the terms of the rule the judge has no discretion to refuse the order. The Court has a discretion to make any order about a matter of procedure which it considers the circumstances require, when the rules are silent on the subject and especially when it tends to prevent misuse of the process. BELL v. WOOD AND ANDERSON. - - **310**

18.——*Trial—Jury — Application for—Action for damages for negligence—Pleadings and proceedings read—No affidavit in support—Marginal rules 426 and 430.*] In an action for damages alleged to have resulted from the defendant's negligence, the plaintiff applied for a jury on the pleadings there being no affidavit submitted in support. The application was dismissed. *Held*, on appeal, reversing the decision of HUNTER, C.J.B.C. (MCPHILLIPS, J.A. dissenting), that the application was properly made on the pleadings which shew that the action is one for damages and does not fall within any of the marginal rules preceding rule 430. The judge has therefore no discretion and must order that the trial be had with a jury. CAMPBELL v. LENNIE. - - **422**

19.——*Writ of summons—Garnishee—Action premature—Application to set aside—Application dismissed and plaintiff given*

WILL—*Bequests for maintenance of burial plots — Perpetuity — Agreement between doneee and testator's trustees condition precedent to vesting—Donees incapable of contracting—Bequests void.*] Under a testator's will after payment of debts and funeral expenses the balance of the estate was to be divided into two equal shares, one share to be turned over to Westminster Hall, Vancouver, upon said Westminster Hall entering into an agreement with her trustees to properly care for and keep in good condition for all time her burial ground; the other share to be paid to the Guelph Presbtery of the Presbyterian church at Guelph, Ontario, upon entering into a like agreement as to the family burying ground of her father. *Held*, that in each case it is a condition precedent to the vesting of the bequest that the intended beneficiary enter into the agreement mentioned but as there is want of capacity in both donees to execute the agreements required by the will, the bequests are void and as there is no residuary clause in the will into which these bequests would fall there is an intestacy. *Held*, further, that as the sums bequeathed are intended to provide funds in perpetuity so far as required to keep up the burial plots mentioned, such gifts are not charitable and as they severally involve a perpetuity they are void. *In re* LAING ESTATE. - - - - - **449**

2.——*Codicil—Interpretation—Vested or contingent remainder.*] A testator devised the residue of his estate real and personal to trustees upon trust to pay his wife an annuity and declared that on her death annuities should be paid to his son and daughter and later by a codicil he devised to his son "after the death of my said wife" certain real property, in addition to said annuity but directed that if at his wife's death, said real property should be of greater value than $30,000 it should be sold by the trustees and out of the proceeds $30,000 should be paid to his son in cash and the balance if any should form part of the general estate. On originating summons it was held that the son's interest in the

WILL—*Continued.*

premises was a contingent interest only. *Held*, on appeal, reversing the decision of MACDONALD, J. that the said interest vested in the son at the death of the testator. THE YORKSHIRE & CANADIAN TRUST LIMITED v. MORTON *et al.* - - - - - **10**

3.——*One-third of estate left widow—Insufficient provision—Discretion of Court.* - - - - - - - - - **264**
See TESTATOR'S FAMILY MAINTENANCE ACT.

WINDING-UP — Assignment of debt of depositor to bank—Right of set-off. - - - - - - - - - - **217**
See BANKS AND BANKING.

WITNESS EXPENSES—Preponderance as to. - - - - - - **253**
See PRACTICE. 5.

WITNESS FEES—Allowance for preparation to give testimony. - - **95**
See PRACTICE. 16.

WOODMAN'S LIEN—*Contract to do work—Loading pine logs and poles—Removing poles and posts to make room—Pulling down building—Supplying car sticks for loading—Freighting gasoline—R.S.B.C. 1924, Cap. 276.*] Under the employment of the defendant Derr the plaintiff performed various services in connection with logging during the winter of 1926-7 and he duly filed a lien for his wages under the Woodman's Lien for Wages Act. In an action on the lien:—*Held*, that the lien attached for his wages in loading poles and logs at Erie which were shipped to the defendant the W. W. Powell Company and for such wages said Company was liable. *Held*, further, that as to other services performed at the instance of Derr, namely, (1) moving poles and fence posts to provide room; (2) pulling down a building for the lumber in it; (3) cutting car sticks for loading timber on cars and (4) freighting gasoline to the camps; do not come within the Act so as to give a right of lien, but the plaintiff is entitled to judgment for such services as against the defendant Derr. HAGLUND v. DERR *et al.* - - - - - - - - - **435**

WORDS AND PHRASES—"Fair and reasonable argument"—Meaning of. **130**
See TRADE-UNION.

2.——*"Hearing"—Item 214 of Appendix M—Costs—Meaning of.* - - **453**
See PRACTICE. 4.