THE BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS AND IN ADMIRALTY,

WITH

A TABLE OF THE CASES ARGUED
A TABLE OF THE CASES CITED
AND
A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

VOLUME XXXIX.

VICTORIA, B. C.
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1929.

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:

THE HON. GORDON HUNTER.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES:

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

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. GORDON HUNTER.

PUISNE JUDGES:

THE HON. AULAY MORRISON.
THE HON. DENIS MURPHY.
THE HON. FRANCIS BROOKE GREGORY.
THE HON. WILLIAM ALEXANDER MACDONALD.
THE HON. DAVID ALEXANDER McDONALD.

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

DEPUTY LOCAL JUDGE IN ADMIRALTY:

THE HON. WILLIAM ALFRED GALLIHER.

COUNTY COURT JUDGES:

HIS HON. JOHN ANDREW FORIN,	West Kootenay
HIS HON. FREDERICK McBAIN YOUNG,	Atlin
HIS HON. PETER SECORD LAMPMAN,	Victoria
HIS HON. JOHN ROBERT BROWN,	Yale
HIS HON. FREDERICK CALDER,	Cariboo
HIS HON. DAVID GRANT,	Vancouver
HIS HON. FREDERIC WILLIAM HOWAY,	Westminster
HIS HON. CHARLES HOWARD BARKER,	Nanaimo
HIS HON. JOHN DONALD SWANSON,	Yale
HIS HON. GEORGE HERBERT THOMPSON,	East Kootenay
HIS HON. HERBERT EWEN ARDEN ROBERTSON,	Cariboo
HIS HON. HUGH ST. QUINTIN CAYLEY,	Vancouver
HIS HON. HENRY DWIGHT RUGGLES,	Vancouver
HIS HON. JOHN CHARLES McINTOSH,	Nanaimo

ATTORNEY-GENERAL:

THE HON. ALEXANDER MALCOLM MANSON, K.C.

MEMORANDA.

On the 1st of August, 1928, Walter Alexander Nisbet, Barrister-at-Law, was appointed Judge of the County Court of West Kootenay in the room and stead of His Honour John Andrew Forin, resigned.

On the 1st of August, 1928, His Honour Walter Alexander Nisbet, Judge of the County Court of West Kootenay, was appointed a Local Judge of the Supreme Court of British Columbia.

On the 18th of October, 1928, Joseph Nealon Ellis, one of His Majesty's Counsel learned in the law, was appointed a Junior Judge of the County Court of Vancouver.

On the 18th of October, 1928, His Honour Joseph Nealon Ellis, a Junior Judge of the County Court of Vancouver, was appointed a Local Judge of the Supreme Court of British Columbia.

TABLE OF CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED

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"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, under the authority of the "Court Rules of Practice Act," being chapter 224 of the "Revised Statutes of British Columbia, 1924," the following item be added after item 16A of the Third Schedule of Appendix M of the Supreme Court Rules, 1925:—

"16B. Deposit to be made with the Registrar before trial or hearing is proceeded with on each subsequent day.....$5.00

"(Refund, if any, to be made by the Registrar.)"

A. M. MANSON,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., May 10th, 1928.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

THOMAS v. LAWSON AND GYLES.

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Commission—Action for—Judgment — Company—Dissolution—Evidence—Petition by one claimant for declaration that dissolution void—Dismissed—Subsequent petition by other claimant for similar declaration—Dismissed—Appeal—R.S.B.C. 1924, Cap. 38, Sec. 245 (1).

M. & D. and T. claimed that the Alberni Pacific Lumber Company (which subsequently dissolved) engaged them jointly to sell its assets and agreed to pay them jointly a commission. A sale was brought about through their efforts and M. & D. brought action for the commission. T. while not a party to the action, actively assisted in it and was examined for discovery as a party interested. Finding they could not obtain the evidence they required they filed a notice of discontinuance and the Alberni Pacific Lumber Company obtained judgment disposing of the action. The said company then dissolved and later M. & D. having found the evidence required to pursue their action, petitioned for an order under section 245 of the Companies Act declaring the dissolution of the Alberni Pacific Lumber Company void. The petition was refused and an appeal therefrom was dismissed. T. then on behalf of M. & D. and T. petitioned for an order to declare void the dissolution of the company alleging that they alone have a cause of action as joint claimants. The petition was granted.

Held, on appeal, reversing the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that the cause of action was the alleged right to obtain a

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commission and judgment in respect of that was obtained against two persons in whom with himself, the plaintiff alleges the cause of action was jointly vested. The rule that there is but one cause of action in the case of joint contractors applies and the judgment against two of the joint claimants is a bar to an action by the third.

Per MACDONALD, J.A.: The principle laid down by Lord Penzance in *Wytcherley* v. *Andrews* (1871), L.R. 2 P. & D. 327; 40 L.J., P. 57, applies here, *i.e.*, that where a person has had full notice and has had the opportunity of taking part in the suit, he will be bound by its decision.

APPEAL by defendants from the order of MCDONALD, J. of the 28th of January, 1927, on a petition by Thomas under section 245 of the British Columbia Companies Act for an order restoring the Alberni Pacific Lumber Company Limited to the register, the company having been wound up ten months previously, the purpose for so doing being to give him an opportunity to sue the company for a commission in respect to the sale of certain timber lands. The facts are that the Alberni Company, through its managing director, authorized Thomas, jointly with a partnership known as the Atlantic Pacific Lumber Company, in and during March and April, 1924, to find a purchaser or bring about a sale of the Alberni Company's assets consisting chiefly of its sawmill at Port Alberni and its timber, logging equipment and logging railway, etc., and agreed to pay to himself and said partnership jointly the usual commission on finding a purchaser. The plaintiff claims that he procured the Alberni Pacific Lumber Company (1925) Limited as a purchaser at $2,750,000 and he and said partnership are jointly entitled to a commission of $275,000 being 10 per cent. of the amount of the sale. The partnership known as the Atlantic Pacific Lumber Company brought action on the 11th of June, 1925, to recover the commission for finding a purchaser, but the said Thomas was not made a party thereto. Said partnership was unable to procure certain evidence of English witnesses as to the circumstances under which the sale was effected and this resulted in their filing a discontinuance of the action. The defendant Company then obtained an order of the Court dismissing the action under Order XXXII., r. 6. Thomas was not a party to that action and claims he gave no consent to dismissal thereof and knew nothing about the

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application for dismissal. Thomas went to England in 1926, and succeeded in procuring the necessary information and names of witnesses required to prove his case, and returning in April, 1926, he found the Alberni Pacific Lumber Company had gone into voluntary liquidation. His application to restore the said company to the register was granted.

The appeal was argued at Vancouver on the 14th and 15th of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Statement

Mayers, for appellants: It was Thomas's duty to assert any right he had by intervening when the partnership brought action. Where there are joint contractors, when judgment is signed against one the other is discharged: see *Parr* v. *Snell* (1923), 1 K.B. 1 at p. 9; *King* v. *Hoare* (1844), 13 M. & W. 494 at p. 504. If two joint contractors submit to a judgment it binds a third: see *Phillips* v. *Clagett* (1843), 11 M. & W. 84 at p. 96; *Rawstorne* v. *Gandell* (1846), 15 M. & W. 304; *Marino* v. *Sproat* (1902), 9 B.C. 335; *Nash* v. *Rochford Rural Council* (1917), 1 K.B. 384 at p. 393; *Wytcherley* v. *Andrews* (1871), L.R. 2 P. & D. 327 at pp. 328-9; *Briggs* v. *Fleutot* (1904), 10 B.C. 309 at p. 314.

Darling, for respondent: Thomas alone had no action nor had the others. All three had a joint cause of action: see Halsbury's Laws of England, Vol. 7, p. 337, sec. 691 and the cases there cited. On the question of estoppel see Halsbury's Laws of England, Vol. 13, p. 167, secs. 201 and 203; *Shannon* v. *Corporation of Point Grey* (1921), 30 B.C. 136; *Oxford (Bishop)* v. *Henly* (1909), P. 319.

Argument

Mayers, in reply, referred to *Rodriguez* v. *Speyer Brothers* (1919), A.C. 59 at p. 108.

Cur. adv. vult.

7th June, 1927.

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

MACDONALD, C.J.A.

MARTIN, J.A.: I agree in allowing this appeal. The reasons, indeed, given by the learned trial judge shew, with every respect, that the application should have been refused because in

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the circumstances which he sets out, it was the applicant who had "deprived" himself "of the opportunity of litigating his claim."

GALLIHER, J.A.: I do not think I can usefully add anything to the reasons for judgment of my brother MACDONALD, with whom I agree, after a careful consideration of the case and the authorities bearing on the subject.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal questions the right of Mr. Justice D. A. MCDONALD, to make an order restoring the Alberni Pacific Lumber Company Limited to the register and declaring void the dissolution of the company and admitting of an action being brought by Thomas with respect to a claim against the said company jointly with the Atlantic Pacific Lumber Company Limited, or Thomas A. Dingle and A. E. Mackney, as Thomas may be advised.

The section of the Companies Act (245(1), Cap. 38, R.S.B.C. 1924) under which the order was made reads as follows: [The learned judge after setting out the section continued].

The order under appeal is in the following terms: [After setting out the order the learned judge continued].

The order was made upon somewhat onerous terms, in my opinion, but they have been complied with. The legislation is the same as that existent in England being section 223(1), (2) of the Companies (Consolidation) Act, 1908, the only difference being that in England the Court may make the order within two years, with us it is only one year. It was held in *In re Spottiswoode, Dixon & Hunting, Lim.* (1912), 81 L.J., Ch. 446, that persons having unsatisfied claims against the dissolved company are persons interested entitled to appear and the petitioner in my opinion has made out his case that he jointly with others has an unsatisfied claim. In the *Spottiswoode* case Neville, J. dealt with considerations that ought to guide the Court, such as inequitable conduct of the applicant, acquiescence or laches. Upon full consideration of the facts of the alleged claim of the applicant, I cannot come to the conclusion that anything has

taken place that disentitled the learned judge making the order he did. It is significant that the company has made provision to discharge this very claimed debt, if established. It is clear that there were apparently insuperable difficulties in gathering the evidence to effectually prosecute the action and it would now appear that evidence which is thought to be sufficient has been discovered and this being the position of matters it would be highly inequitable to set aside the order. Further, the order is a discretionary order, and I am in complete agreement with Mr. Justice Neville in the *Spottiswoode* case, when he said, at p. 448:

"It seems to me that section 223 [with us 245] is a beneficial section, which prevents any such injustice as might otherwise result from section 195 [with us 233]."

It would certainly have to be an extreme case that would warrant the Court of Appeal in setting aside an order made in pursuance of a beneficial section of an Act an order which must have been made by the learned judge in the furtherance of the due administration of justice as he conceived it. It would not, in my view, be in accordance with the well-known authorities to interfere in a case of this character. No harm can ensue, the claimed right of action will have to be established and if it succeeds there are assets set aside to meet the claim, if it fails then these assets will be capable of distribution. The learned judge has made due provision against costs that will be incurred in resisting the claim—all has been done that makes it possible for the accomplishment of justice.

MCPHILLIPS, J.A.

I do not consider that I am in any way called upon to enter into the debatable arena as to whether the claim made and proposed to be litigated is certain of success, all I can say is that it is impossible for me to say that it is an unreasonable claim. Constitutionally there is the right to bring any claim that cannot be considered as vexatious or an abuse of the process of the Court. Many questions may be raised and it might even be admitted that the proposed action will be difficult of establishment, yet that does not debar the prosecution of an action, every subject of His Majesty and for that matter, all persons within the realm not being alien enemies, shall at all times be admitted to audience in the Courts. I positively decline to try

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this action now; further, it is not the province of the Court of Appeal to do so, it is only when the action has been tried and there should be an appeal to us that we can enter into the merits or demerits of the cause of action. It would be, indeed, perilous to the due administration of justice to dispose of a cause of action which does not seem unreasonable but would appear to have ear-marks of being a well-founded claim in the summary manner that counsel for the appellant asks—it is a very extreme submission and in my opinion should not be acceded to. At best the contention made is that the applicant stood by and took some part or had some notice that an action was being prosecuted by others who were jointly interested with him in the claim proposed to be litigated. As I have said, I do not propose to be led into the discussion of the merits or demerits of the action in this, to my mind, very improper way; all these questions will be debatable questions in the action. I would refer to *Jacobs* v. *Booth's Distillery* (1901), 50 W.R. 49, a case in the House of Lords. The head-note reads:

"Unless the Court is satisfied that the defendant has no defence [and the reason is equally forceful here], the plaintiff is not entitled to judgment under Order 14. The merits of the case are not to be gone into upon an application under this order [and equally not under section 245 of the Companies Act as I view it], and a defence is not to be shut out where on the disclosed facts a triable issue arises."

MCPHILLIPS, J.A.

The report of the case is short and I have ventured to quote it in full as the *ratio decidendi* is in my opinion complete, and the considerations that there operated and impelled their Lordships to disagree with the Court of Appeal are equally forceful here, disentitling this Court to at this stage adjudicate upon what is plainly a triable issue and which ought in due course go to trial:

"Appeal from order of Court of Appeal affirming that of the master and judge.

"The respondents brought an action against the appellant and another person for £3,000 odd, claimed under the following circumstances:

"To secure an advance and further sums by the respondents, the appellant had signed a memorandum of charge and promissory notes, together with the other defendant, who did not contest his liability.

"The appellant received an indemnity from this co-defendant, and said he was informed that he incurred no liability by signing, and that he had done so relying on this statement.

"On a summons under Order 14 the master ordered the amount to be paid

into Court by the defendants within seven days, with judgment if the sum was not so paid.

"This order was affirmed by the judge and by the Court of Appeal. The defendant Jacobs appealed to the House of Lords.

"Earl of Halsbury, L.C.—I am of opinion that this judgment ought to be reversed. I am surprised at the decision which has been arrived at by the tribunals before whom this question has come. I think that if this is an example of the mode in which Order 14 is administered, it would be desirable for the Legislature to consider whether that order should continue to be put in force. People do not seem to understand that the effect of Order 14 is not that upon the allegation of the one side or the other a man is not to be permitted to defend himself in a Court.

"Order 14 was intended to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. I do not propose to deal with the facts or the merits of the case, which will have to be dealt with when the case is tried, as it ought to be tried. But I am bound to say that it startles me to think that in a case of this sort an order should be made, the effect of which is that the defendant is not to be heard to make his defence. It appears to me that Order 14 is quite inappropriate to the facts of this case, so far as they are intelligible.

"Lord Macnaghten.—I agree.

"Lord James of Hereford.—The view which I think ought to be taken of Order 14 is that the tribunal to which the application is made should simply determine 'Is there a triable issue to go before a jury or Court?' It ought not to enter into the merits of the case at all, and should make the order only when it can say to the person who opposes the order, 'You have no defence; you could not by general demurrer, if it were a point of law, raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact.'

"I think there is here a plain issue to be tried.

"Lord Brampton.—I entirely agree.

"Lord Lindley.—I agree. I think the case ought to be tried.

"Order appealed from reversed. Respondent company to pay to the appellant the costs both here and below."

MCPHILLIPS, J.A.

I feel that I am well justified in using the terms I have in refusing to be propelled into the trial of an action when it is merely the determination of whether or not the learned judge below rightly made the challenged order. It will be noticed that the great Lord Chancellor—the Earl of Halsbury—in his speech said:

"I do not propose to deal with the facts or the merits of the case, which will have to be dealt with when the cause is tried, as it ought to be tried."

Unquestionably the order made was rightly made, it is founded upon remedial and beneficial legislation, and is statute law in the interest of the due administration of justice. It would be terrible indeed if a company by a speedy method of

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getting off the register could thereby defeat *bona fide* claims, and Parliament, fearful that it might be done, has passed legislation in apt words to prevent any such happening. The learned judge with all the facts and the law laid before him and with care analyzing the same, concluded that it was just to make the order under appeal. I cannot say that he was wrong, on the other hand, I consider he was absolutely right, and being firmly of that opinion, I would dismiss the appeal.

MACDONALD, J.A.: The main contention of counsel for the respondent, in supporting the order appealed against, was that the petition in question by the respondent Thomas, under section 245 of Cap. 38, R.S.B.C. 1924, was made for the first time on behalf of all parties jointly who alone had a cause of action and should therefore be considered on its merits apart from any proceedings of a similar character previously before the Courts. Counsel for appellant combatted this view, contending that by reason of prior petitions in the same matter, which were dismissed, including an action which proceeded to the point of trial and which was also dismissed, the matter is not only *res judicata* but the order is not maintainable on other grounds as well.

MACDONALD, J.A.

The petitioner Thomas (respondent) claims that the Alberni Pacific Lumber Company Limited (since dissolved) agreed to pay him and to two others carrying on business as a partnership known as Atlantic Pacific Lumber Company, a commission on the sale of its property and undertaking; that a sale was effected through their agency and he asks that the order dissolving said company should be declared void so that he jointly with the partners referred to may prosecute an action. The facts, in so far as they are material, may be elucidated by an illustration rather than by a lengthy reference to the proceedings on the record. M. & D. and T. allege that the company (since dissolved) engaged them jointly to sell its assets and agreed to pay to them jointly a commission on the sale. M. & D., on their own behalf, launched a petition to restore the company to the register and that petition was dismissed. An appeal from this order was taken to the Court of Appeal which was also dismissed. T. (the present respondent) actively assisted M. & D. in prosecuting the petition and proceedings referred to though

not a party thereto. M. & D. had previously brought action against the company claiming payment of the commission referred to. T., while not a party to the action, actively promoted it and was examined for discovery as a party interested. He was in fact the leading spirit in promoting it. M. & D. filed notice of discontinuance of this action, whereupon the company, without adding T. as a party plaintiff obtained judgment disposing of the action. T. (Thomas) now launches this petition on behalf of M. & D. and T., alleging that they alone have a cause of action as joint claimants, for an order to declare void the dissolution of the company. An order was made as asked for with certain terms imposed and from that order this appeal is taken.

The respondent Thomas submits that all previous proceedings were in effect nullities because the three individuals, who alone are entitled to receive the commission, were not parties thereto and the present petition was launched for the first time by those having a cause of action. If he is right in this contention and had not intervened in the former proceedings, I would not interfere with the order appealed from.

MACDONALD, J.A.

The respondent relies upon the principle referred to in Halsbury's Laws of England, Vol. 7, p. 337, sec. 691, where it is said:

> "Where a promise is made to several persons jointly, they are entitled collectively to performance of it. Proceedings to enforce the performance of such a promise can only be taken in the names of all the joint promisees; one of them cannot sue alone, because the promise was made to all of them jointly, and not to any of them separately."

A reference to some of the cases cited by the author in support of this principle, such as *Guidon* v. *Robson* (1809), 2 Camp. 302, and *Jell* v. *Douglas* (1821), 4 B. & Ald. 374, shews that it is a ground of defence if one of two joint promisees launch an action. It does not follow that if judgment was obtained by one of them on the cause of action, with the active assistance of the other (and the cause of action is distinguishable from the parties to it) the joint promisees could again maintain it. The Earl of Halsbury in the note referred to is speaking of proceedings to enforce performance, not of the cause of action itself. Counsel for appellant referred us to *King* v. *Hoare* (1844), 13 M. & W. 494, and *Parr* v. *Snell* (1923), 1 K.B. 1. In the

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former case it was held that a judgment against one of two joint debtors is a bar to the original cause of action.

"It would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim '*transit in rem judicatam*,'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher":

Parke, B., p. 504.

And again at p. 505:

"There is but one cause of action in each case. The party injured may sue all the joint tort feasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, and not in the other; but, for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action."

If, therefore, one only of two joint contractors is sued a pleading in abatement might be made in so far as the parties to the proceedings are concerned. It is the same cause of action, however, whether one or both are sued. This case was followed in *Parr* v. *Snell, supra,* where a final judgment signed against two of three joint contractors was held to bar action against the other. The contract was, as pointed out by Scrutton, L.J., merged in the judgment and therefore the cause of action on the contract was at an end.

MACDONALD, J.A.

It is true that in the case at Bar we have the reverse of the situation in the cases referred to. Here the three promisees are plaintiffs, not defendants, and the submission is that the cause of action vested only in the three of them jointly, and that it was never the subject of judgment. The cause of action, however, is the alleged right to obtain a commission. Judgment in respect to that cause of action was obtained against two of them; or in the words of the judgment it was adjudged that the two who sued "recover nothing against the defendant and that the defendant recover against the plaintiffs, A. E. Mackney and T. A. Dingle, the costs of the action." Whether the parties appear on the record as plaintiffs or defendants, the result is the same.

I would therefore allow the appeal on this ground alone.

I would also, if necessary, give effect to the principle laid down by Lord Penzance in *Wytcherley* v. *Andrews* (1871), 40 L.J., P. 57, referred to by the learned judge below, but not

applied by him to the facts although admitting, with some hesitation, that they came within it.

Appeal allowed, McPhillips, J.A. dissenting.

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KETCHEN v. REGEM.

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KETCHEN v. REGEM

Coal and petroleum—Lands under the sea—Price—Surface not alienated or leased—B.C. Stats. 1903-4, Cap. 37, Secs. 4 and 5.

Section 4 of the Coal Mines Act Amendment Act, 1903, provides that a purchaser of lands including coal and petroleum thereunder shall pay $10 per acre, but in the event of the land being alienated or held under lease he is entitled to a Crown grant of the coal and petroleum thereunder for $5 per acre.

The suppliants staked certain lands that were under the sea under said Act in 1908, and finally in 1918, obtained Crown grants for the coal and petroleum rights only for which they were compelled to pay $10 per acre. A petition of right for a refund of $5 per acre, of the amount paid by the suppliants was dismissed on the ground that the lands in question had not been alienated nor were they held under lease.

Held, on appeal, affirming the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that if the appellant has any right, having regard to the legislation in question, it is the right to a grant of the surface in addition to what he already has, but he has no right to recover any of the moneys paid.

APPEAL by plaintiff from the decision of MURPHY, J. of the 1st of September, 1926 (reported, 37 B.C. 479), dismissing a petition of right to recover $5 per acre that was overcharged in error by the department of lands on the sale to petitioner of the coal and petroleum rights in two lots comprising about 1,100 acres. On the 17th of November, 1908, two licences (Nos. 4834 and 4835) were issued, one to O. W. Ropuse and one to J. S. W. Pugh under the provisions of the Coal Mines Act Amendment Act, 1903, to mine for coal said coal being under the sea. The licences were renewed twice, the last expiring on the 17th of November, 1913. On the 25th of October, 1913, applications were made for leases of the ground covered by the

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licences, the ground having been surveyed as lots 28G and 29G, Wellington District. The applications were approved by order in council and leases were granted for five years from the 17th of November, 1913, and were renewed for three years from expiry date. The leases including renewals contained a clause for option and sale by the Crown to the grantee at $10 per acre if all rights are sold and $5 per acre if only coal and petroleum are sold. The approval of the minister of lands having been obtained on the 11th of October, 1918, the petitioner applied to purchase the lots and tendered payment at $5 per acre. The petitioner claims that under duress he paid $10 per acre in order to get title and he did so under protest as the lands are under the sea and his title only carries the coal and petroleum rights, the title to the surface remaining in the Crown.

Statement

The appeal was argued at Vancouver on the 9th and 10th of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: The grant is under the 1903 Act for lots 28 and 29. He buys the minerals only. The grant never included the surface. Equitable defences are available against the Crown: see *Attorney-General to the Prince of Wales* v. *Collom* (1916), 2 K.B. 193 at p. 204; *Attorney-General for Trinidad and Tobago* v. *Bourne* (1895), A.C. 83 at p. 85; *Plimmer* v. *Mayor, &c., of Wellington* (1884), 9 App. Cas. 699 at pp. 710-1; *Seguin* v. *Boyle* (1922), 91 L.J., P.C. 137. On the question of estoppel see *Powis* v. *City of Vancouver. Ramage* v. *City of Vancouver* (1916), 23 B.C. 180 at p. 186; *Kennard* v. *Harris* (1824), 2 B. & C. 801.

Argument

Maclean, K.C., for respondent: There is nothing in the pleadings as to estoppel. If there had been, evidence would have been submitted to meet it. Crown lands can only be alienated under powers conferred by statute: see *Blackwood* v. *London Chartered Bank of Australia* (1874), L.R. 5 P.C. 92 at p. 112; 43 L.J., P.C. 25; *Ketchen* v. *Regem* (1926), 37 B.C. 479.

Mayers, replied.

Cur. adv. vult.

MACDONALD, C.J.A.: If the appellant has any right, having regard to the legislation to which we were referred, it is the right to a grant of the surface which was not denied him. He has no right to recover any part of the moneys which he paid under protest.

The appeal should be dismissed.

MARTIN, J.A.: Briefly, the view I take of this case is that what really has been established is that the Crown grants issued to the suppliant (appellant) should have included the surface rights but since that has not been asked for in the petition or at Bar, I see no escape from the dismissal of the appeal.

MARTIN, J.A.

GALLIHER, J.A.: I agree in the reasons for judgment of the learned trial judge and would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the appeal should succeed. The appellant is entitled to invoke the provisions of the Coal Mines Act Amendment Act, 1903, and is in no way bound or affected in his rights by later legislation as no words were used in any later legislation giving same any retroactive effect. It is fundamental and has always been acted upon by the Crown, save in some very signal instances, that vested rights should not be interfered with. This is a good rule of morality as well as a good rule of good government. Extraordinary circumstances, such as overreaching impropriety and collusion, tantamount to fraud, could only support a departure from any such rule. It must be remembered that in the development of a new country, capital, as well as population, is needed and capital is invited for the exploitation of the great natural resources of the country and coal mining is one of the great industries of the country the Crown holding great areas of coal-bearing properties under the surface of the land as well as under the sea. The appellant relies upon a staking of coal-bearing properties under the sea, the staking taking place in 1908, and everything called for by the then governing Act was complied with in 1908, inclusive of the necessary advertising in the official Gazette. It can be said that for all practical purposes that there is no surface in the lands when under the sea,

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and the appellant does not make any contention therefor. What the appellant staked was the coal underlying the sea, and all along reliance was placed upon the coal being obtainable at $5 an acre but the Crown exacted $10 an acre founding the claim on later legislation, and now, not even content with this claim and the exaction thereof, it is asserted that by still later legislation the amount really due and payable is $15 an acre. How very disastrous to invited enterprise and the introduction of capital in good faith it would be if this contention on the part of the Crown be supportable. It is to be remembered too that it is said that in the Crown resides infallible justice. I can only assume that the Crown desires to have the judgment of the Court upon the point as to whether the later legislation was mandatory in its nature and retroactive in its effect, evidently an assumption upon which the Crown went in making the exaction it did.

MCPHILLIPS, J.A.

It has been submitted by the learned counsel for the appellant Mr. *Mayers,* in a very able argument that the later legislation is not applicable and that moreover the facts and all the surrounding circumstances have worked an equitable estoppel as against the Crown. The later demand of the Crown for $10 an acre was, indeed a surprise to the appellant as everything done and in all transactions with the Crown officers it was always on the basis of $5 an acre. It is not permissible for the Crown, save, of course, there be intractable statute law in the way, to depart from representations made by officers of the Crown upon the faith of which representations large capital investment is made (*Seguin* v. *Boyle* (1922), 91 L.J., P.C. 137 at p. 143). Here no question arises as to the right of the Crown to dispose of coal-bearing areas; that right cannot be questioned, as the statute law then existent authorized the disposition thereof, and in my opinion there is no point in the assertion made that it is only by reason of the later legislation that coal underlying the sea was capable of being disposed of. This is an absolutely untenable position. All coal-bearing lands whether under the surface of the land or sea, come within the Coal Mines Act (Cap. 137, R.S.B.C. 1897) and the Coal Mines Act Amendment Act, 1903, under which the staking was made in the present case. That legislation later specifically men-

tioned coal underlying the sea in no way weakened the right of the Crown to grant prospecting licences and to dispose of coal under the sea previous to the later legislation and the Crown had done so during a long course of years anterior to the later legislation. Further, in my opinion, the Crown had the right to grant the coal plus the surface or minus the surface—the Crown was left by Parliament with an absolute discretion in that regard. As to the question of the Crown being estopped from contending that more than $5 an acre could be exacted from the appellant, I would refer to the judgment of Mr. Justice Atkin (as he then was, now Lord Justice Atkin) in *Attorney-General to the Prince of Wales* v. *Collom* (1916), 2 K.B. 193 at p. 204, where the learned judge said:

"A further point was raised that no estoppel binds the Crown and that this equity is based upon estoppel. There is authority for the general proposition so far as estoppel by deed is concerned. I know of no authority for the proposition as applied to estoppel *in pais*. But I think that it is established that equitable defences such as I consider this to be are available against the Crown: see *Attorney-General for Trinidad and Tobago* v. *Bourne* (1895), A.C. 83; and this very principle laid down in *Ramsden* v. *Dyson* [(1866)], L.R. 1 H.L. 129 was applied against a claim of the Crown in a decision of the Judicial Committee in *Plimmer* v. *Mayor, &c., of Wellington* [(1884)], 9 App. Cas. 699."

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It will be noted that in *Attorney-General for Trinidad and Tobago* v. *Bourne, supra,* that in an action of ejectment by the Crown a defendant may set up any equitable defence which would have availed against a private plaintiff. At p. 85, Lord Watson said:

"It is not disputed that, in the year 1868, the land was within the title of the Crown, and had never been alienated. From the year 1862 until that date it had been possessed by the respondent Schwap as a squatter, or, in other words, without any title either legal or equitable. In April, 1868, the Colonial Secretary issued a letter of instructions to the warden of the district in which the land is situated, specifying the terms and conditions upon which grants of Crown land were to be made to persons willing to purchase. One of these conditions is material to the present case: 'In cases of occupation before the 1st of January, 1868, the occupant is to be allowed the option of paying at the rate of £2 per acre by instalments, but you are at liberty to accept from any petitioner any amount that may at any time be tendered by him in aid of the purchase of the land prayed for—the Crown reserving to itself the right to decline to grant the land should it be thought undesirable to do so—in which case the amounts paid will be returned to the persons from whom they were received.'

"Schwap thereupon lodged a petition stating that he was desirous of becoming the purchaser of the land, and praying that the Governor might

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be pleased to order that it should be sold. It is admitted that the upset price of the lot was fixed at $18.52, and also Schwap, who was allowed to continue in possession, on the 10th of June, 1868, paid $5.20 to the warden, and received from that official an acknowledgment bearing that the payment had been made 'on account of one acre land and a small house petitioned for at La Brea.' The effect of these transactions was to raise an equitable contract for the sale and purchase of the land at the upset price, defeasible at the instance of the Crown, at any time before the issue of a grant to the purchaser, on repayment of the sum paid to account."

In *Plimmer* v. *Mayor, &c., of Wellington* (1884), 9 App. Cas. 699, Sir Arthur Hobhouse, when delivering the judgment of their Lordships of the Privy Council, made use of language singularly applicable to the present case in its reasoning in the way of estoppel against the Crown, at pp. 712-3:

Upon the facts here it is plainly inequitable that the Crown should insist upon the retention of the moneys over and above $5 per acre and I am firm in my view that it should not be persisted in. No doubt the Crown is right in insisting upon all proper moneys being paid for parting with any of the properties of the Crown but the Crown is not expected to make any undue exactions and in granting the *fiat* in this case the Attorney-General undoubtedly desired that the opinion of the Court be given in the matter, *i.e.*, let right be done.

MCPHILLIPS, J.A.

I would refer upon the question of estoppel to what Lord Shaw said in *Seguin* v. *Boyle* (1922), 91 L.J., P.C. 137, when referring to correspondence between the solicitor for the lessee from the Crown, of placer mining claims in the Yukon and the secretary to the minister of the interior at Ottawa. At p. 143, we find this language:

"It is manifest that, in face of such correspondence, a challenge by the Crown would be in bad faith and could not succeed, and their Lordships are not surprised to find that the Government of the Province [here there is a typographical error, it should have been 'Dominion' not 'Province'] takes up no such attitude, and is in no way concerned with the challenge made by the respondent."

Upon full consideration of the case and for the foregoing reasons, I am of the opinion that the appeal should succeed.

MACDONALD, J.A.

MACDONALD, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *Stuart Henderson.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

THE IMPERIAL VETERANS IN CANADA v. EASTERN FREIGHTERS LIMITED.

Advance note—Seaman—Conditional upon sailing from British Columbia—Endorsed to plaintiff—Steamer not allowed to sail owing to improper conduct of defendant—Liability.

The defendant gave a seaman's advance note to B., a seaman, for a one-half month's wages at Vancouver payable five days after sailing of the M.S. Chris Moller from British Columbia. The plaintiff cashed the note for B. who then joined his ship before sailing to Victoria where the ship (being a rum-runner) was held by the authorities for breach of customs regulations and not allowed to leave British Columbia. The defendant was duly notified that the plaintiff held the note. In an action to recover the amount of the note:—

Held, that the defendant's conduct was the sole cause of the impossibility of performance, and having by his own conduct made it impossible for the ship to leave British Columbia, he is liable on the note.

ACTION to recover $67.50 on an advance note made by the defendant Company in favour of one Bowler, a seaman, and endorsed by him to the plaintiff. The facts are set out in the reasons for judgment. Tried by Ruggles, Co. J. at Vancouver on the 11th of May, 1927. Statement

Aspinall, for plaintiff.
Murdock, for defendant.

4th August, 1927.

RUGGLES, Co. J.: Plaintiff's action is for $67.50 on an advance note as follows:

"Eastern Freighters Limited
"Seaman's Advance Note
"Port of Vancouver, B.C., Nov. 26th, 1926.

"Five days after sailing of M.S. Chris Moller from ~~Vancouver,~~ B.C. Pay to the order of J. Bowler (providing he sails in the said ship and is duly earning his wages according to agreement) the sum of $67.50 (Sixty-seven dollars fifty cents), being half part of one month's wages for obtaining supplies to enable him to proceed to sea.

"The seaman must also write his name on the back hereof: if he cannot his mark must be attested by a witness not the discounter or the recipient payable by Eastern Freighters Ltd. [Sgd.] J. Bowler, seaman, Room 6, 410 Seymour Street. F. Gillet Master, Vancouver, B.C. P. Warrington—Witness. Judgment

[Endorsed]
"J. Bowler."

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This advance note was cashed by the plaintiff for Bowler who, at Vancouver, then joined the Chris Moller which the evidence at the trial shewed was operated by defendant as a rum-runner. A call was made at Victoria, B.C., and there the ship was held by the Government of Canada for breach of customs regulations and not allowed to leave British Columbia, and the cargo of liquor was taken off her. Plaintiff's secretary saw officials of defendant Company who verbally promised to pay the note but failed to do so. By reason of this promise plaintiff did not garnishee Bowler's wages. In violation of above promise defendant paid Bowler full wages including the amount of this note. Bowler had been ready and willing to proceed to sea. That he did not do so was owing to defendant's irregular and improper conduct.

"Impossibility of performance does not as a rule discharge the liability under a contract, but in certain cases the promisor is excused from performing his promise if it is shewn that performance is impossible without any default on his part":

Halsbury's Laws of England, Vol. 7, p. 426, sec. 876.

Judgment

In this case defendant's conduct was the sole cause of the impossibility of performance. It will be noted that in the advance note they seem to have anticipated trouble for the word Vancouver was crossed out and B.C. allowed to remain.

"The performance of a condition precedent is excused where the other party has prevented its performance, or has done something which puts it out of his power to perform his part of the contract":

Halsbury's Laws of England, Vol. 7, p. 436, sec. 892.

Pollock on Contract, 9th Ed., p. 294 says, "where the promisor disables himself by his own default from performing his promise" he is not excused.

The fact that the ship did not leave British Columbia is practically the sole defence relied on. I do not think this defence is sound for reasons above given. Had I felt obliged to dismiss this action, I should not have allowed any costs to defendant.

There will be judgment for plaintiff for $67.50 and costs.

Judgment for plaintiff.

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Negligence—Collision between automobile and motor-truck—Street crossing—Right of way—B.C. Stats. 1925, Cap. 8, Sec. 2.

At about five o'clock on the afternoon of the 30th of April, 1926, the plaintiff was driving his automobile easterly on Kingsway, Vancouver, and approaching Clark Drive which intersected Kingsway diagonally. At the same time the defendant was driving his motor-truck westerly on Kingsway intending to turn south on Clark Drive. The defendant turned into Clark Drive but did not succeed in clearing the plaintiff who struck the back of the truck as it passed in front of him. A constable who witnessed the accident stated it took place on the south track and from 32 to 35 feet east of the middle of the two streets. The plaintiff admitted the brakes of his car were defective, but that good brakes would not have prevented the accident. The plaintiff recovered judgment on the trial.

Held, on appeal, reversing the decision of CAYLEY, Co. J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that on the admitted facts the plaintiff was driving a car with defective brakes and he ran into the back of the truck when he saw it 50 feet away and could have stopped in less than that distance. The damage was brought about solely by himself and not by any negligence on the part of the defendant.

Per MARTIN, J.A.: The defendant cut the corner too fine and that negligent action was "a proximate or efficient cause of the damage" as was also the fault of the plaintiff, and both parties being at fault the liability should be apportioned equally under section 2 of the Contributory Negligence Act of 1925.

APPEAL by defendant from the decision of CAYLEY, Co. J. of the 4th of November, 1926, in an action for damages for negligence. On the 30th of April, 1926, at about 5 o'clock in the afternoon the plaintiff was driving easterly on Kingsway approaching Clark Drive. At the same time the defendant Indar Singh was driving westerly on Kingsway, on a motor-truck, intending to turn to his left into Clark Drive and proceed southerly. As the defendant turned he had nearly crossed into Clark Drive when the plaintiff, proceeding straight east on Kingsway, ran into the rear end of the truck. The plaintiff admitted that his brakes were in a defective condition, and being aware of this he claimed that in coming to crossings he always took special care to go slow enough to keep his car under control. There is no deadman at this crossing and as Clark Drive crosses

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Kingsway at an acute angle it is difficult to locate the middle of the crossing. The plaintiff claimed that when he was close to the crossing the defendant was about 35 feet away from where a silent policeman should be and he then suddenly turned and crossed in front of him taking him so by surprise that he could not stop in time to avoid him.

The appeal was argued at Vancouver on the 10th of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. M. Macdonald, for appellant: In the circumstances including his admission that his brakes were defective the plaintiff was not driving in a reasonably careful manner. If he had been he could easily have stopped his car so as to allow the defendant to pass. The defendant was ahead of him and had the right of way: see *Gerrard* v. *Adam and Evans* (1923), 32 B.C. 114.

Molson, for respondent: The plaintiff had the right of way and it was the defendant's duty to allow him to pass first. It was entirely his fault.

Cur. adv. vult.

7th June, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I am content to found my judgment, allowing the appeal, on the evidence of the plaintiff and his chief witness, Constable Thompson. The collision between the plaintiff's auto and the defendant's truck occurred at the intersection of Clark Drive with Kingsway. Clark Drive runs approximately north and south, Kingsway approximately west by north. The two streets intersect at an angle.

The defendant's driver, Mahru, an East Indian, whose competency is not questioned, was driving his truck north-westerly on Kingsway, approaching Clark Drive into which he desired to turn. The plaintiff was driving his auto south-easterly on the same street; both were on the proper side of the highway. Constable Thompson, who came on the scene officially, traced the courses of the two vehicles, by the wheel marks on the roadway to the point at which the collision occurred. This point was admittedly on the south rail of the tram-track. The constable then measured the distance by stepping it between the point of

collision, and that of the intersection of the centre lines of the two streets, and found it to be from 32 to 35 feet, thereby fixing accurately the point of collision on the plans filed in evidence. There was some loose evidence given by other witnesses for the plaintiff, who, while admitting that the collision occurred on the south rail of the tram-track, put it much further east than the point fixed by the constable. That evidence is quite unsatisfactory and unreliable, and cannot be accepted in the face of the entirely satisfactory evidence of the plaintiff's own witness, Constable Thompson. The plaintiff therefore cannot complain if I accept Thompson's evidence on this question.

There was some slight confusion in the County Court arising from the use of several plans at the trial, but nothing of importance turns on these plans except the manner in which the two streets intersect each other, and all the plans are alike as to that. The one I refer to is that marked by Constable Thompson, and filed as Exhibit 9-A. Thompson describes the turning of defendant's truck as having been made in a wide sweep, commencing 60 feet back from the curb (presumably the east curb line of Clark Drive) which proves the correctness of the white curved line shewn on Exhibit 9-A. Plaintiff's case is that the collision occurred much farther east; they submit that the truck turned too soon and before reaching Clark Drive, and at a place where the plaintiff would not expect it to cross the street. The evidence of Thompson effectually disposes of this contention.

Now the admitted facts are that plaintiff was driving a car with defective brakes; that he actually ran into the back end of the truck; that he saw it 50 feet away, and could have stopped in less than that distance. He now claims damages for the consequences of his own gross negligence.

It requires a strong contrary current of evidence to disturb a trial judge's finding of fact, but it is apparent to me, at least, that the learned judge did not appreciate the value of Thompson's evidence. He seems to have overlooked the inevitable conclusion to which it clearly points. The learned judge appears also to have assumed that Thompson meant yards, not feet, an unwarranted assumption, since he said feet in both examination-in-chief, and on cross-examination. Moreover, the

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assumption places the point of collision 60 yards east of where it was placed by any other witness and at a place where no one pretends that it could have been.

In my opinion, the defendant was not guilty of negligence; the damages suffered by the plaintiff were brought about solely by himself, and not by any negligence on the part of the defendant. There should therefore be no apportionment of the damages. The costs here and below should follow the event.

MARTIN, J.A.: I concur in the allowance of this appeal, one of the contributing causes of the collision being, in my opinion, the state of the plaintiff's brakes, which the learned judge in effect finds were defective in that they were not "in perfect working order" though sufficient for "ordinary purposes" only; but such a low degree of "sufficiency" is not sufficient to meet a case of negligence like this at least, wherein the plaintiff admits he was going at a speed of 25 miles per hour at the point of intersection with a main highway carrying a practically continuous heavy stream of traffic. The defendant, however, cut the corner too fine, as was indeed admitted by his counsel and that negligent action was, I think, in the circumstances "a proximate or efficient cause of the damage" as was also the said fault of the plaintiff (*cf. McLaughlin* v. *Long* (1927), 2 D.L.R. 186, 191), and therefore the Contributory Negligence Act of 1925, Cap. 8, applies to the situation, and as, in my opinion, both parties were at fault in the same degree the liability should be apportioned equally as section 2 of said Act directs.

MARTIN, J.A.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: It is difficult to find that the respondent's witness Thompson was mistaken in his positive evidence, placing the point of collision about 30 feet east of where the silent policeman should be if one had been placed at the intersection of Kingsway and Clark Drive. The evidence of the other witnesses called on the same side upon which the respondent relies suggesting that the point of collision was much further

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east seems so incredible that I think the learned trial judge misconceived or failed to appreciate Thompson's evidence. To justify the finding below, it is necessary to find that the appellant deliberately crossed to the other side of the street before reaching the usual turning point directly in the path of eastbound traffic. Why should we find that he did so on evidence, none of which is very satisfactory, when the evidence of the only witness on the same side (Thompson) giving details appears satisfactory and harmonizes with what would likely occur? Thompson's evidence is most explicit. In addition to pacing, to find the point of collision, he described, as shewn on a plan, the wide sweep which the appellant followed in turning the corner—quite consistent with the rest of his evidence and inconsistent with that of the other witnesses for the respondent. That being so, the respondent could readily have avoided the accident as he saw, or should have seen, appellant's truck in plenty of time and no doubt, if his brakes were not, as admitted, defective, he would have done so. I would allow the appeal.

MACDONALD, J.A.

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

Solicitors for appellant: *Macdonald & Laird.*
Solicitors for respondent: *Walsh, McKim & Housser.*

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JOHNSTON v. McMORRAN AND McMORRAN.

Negligence—Damages—Automobiles—Plaintiff without gasoline stops at curb—Defendant runs into him from behind—Ultimate negligence.

JOHNSTON v. McMORRAN

The plaintiff was driving his car northerly across Granville Street bridge at about 3.30 on the afternoon of the 13th of May, 1926. On reaching about 480 feet north of the span he found he was out of gasoline so he ran his car to the right curb and getting out walked to the nearest station for gasoline. He was away for about four minutes but before getting back the defendant, driving his car northerly across the bridge, ran into the back of the plaintiff's car and damaged it. The defendant says his vision was obstructed by a car just in front of him and the plaintiff did not have his car as close to the curb as he should have, the back of the car being 27 inches from the curb. The evidence shewed that the collision overlapped the plaintiff's car by 40 inches. The plaintiff's action for damages was dismissed.

Held, on appeal, reversing the decision of GRANT, Co. J. (MARTIN and GALLIHER, JJ.A. dissenting), that the excuse that the other cars ahead obscured his vision is untenable as the fact that these cars turned out when approaching the plaintiff's car was notice to him that there was something wrong ahead, and even if the plaintiff's car was 27 inches from the curb the collision overlapped his car by 40 inches. The sole cause of the injury was the negligence of the defendant.

APPEAL by plaintiff from the decision of GRANT, Co. J. of the 18th of October, 1926, in an action for damages for negligence and counterclaim for damages. The plaintiff was driving his car north across Granville Street bridge about 3.30 p.m. on the 13th of May, 1926. When he was about 480 feet to the north of the span and still on the bridge he found his car was out of gasoline and he went to the curb (close up) on the right (east) side. He then got out and went to the nearest station and procured a gallon of gasoline so that he would have sufficient to get to a gasoline-station. He was away about four minutes and when on the way back he saw the defendants' truck, which was coming up from behind his car and going north, run into his car and damage it. The defendants' truck was also damaged and they counterclaimed, alleging that the plaintiff's car was not left as close to the curb as it could be, and in any case it should not have been left there at all.

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The appeal was argued at Vancouver on the 11th and 14th of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Molson, for appellant: The plaintiff was as near the curb as he reasonably could be. It was entirely the defendants' fault. Their truck came up from behind and the driver was evidently not looking or he would have seen the plaintiff's car. The case of *Davies* v. *Mann* (1842), 10 M. & W. 546 still applies; see also *Suffern* v. *McGivern* (1923), 32 B.C. 542. Even if the plaintiff's car had been right against the curb the defendants' truck would have struck it so that the conflict of evidence as to how far the plaintiff's car was from the curb does not affect the case. The Act does not apply in case of ultimate negligence. The Ontario Act is the same, so that the Ontario cases apply: see *Walker* v. *Forbes* (1925), 2 D.L.R. 725; *Farber* v. *Toronto Transportation Comm'n. et al. ib.* 729; *Mondor* v. *Luchini, ib.* 746. Argument

Darling, for respondents: We submit that the Act applies: see *Rodger* v. *Flinton* (1926), 3 W.W.R. 773. The plaintiff is under a legal obligation to see that his car is properly equipped. He has no business to be caught on the street without gasoline: see *Hutchins* v. *Maunder* (1920), 37 T.L.R. 72; *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719; Barron on Canadian Law of Motor Vehicles, 1101, and on the question of ultimate negligence at p. 441.

Molson, in reply: The evidence shews the overlapping of the collision was 40 inches.

Cur. adv. vult.

7th June, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff ran out of gasoline when driving his car over the Granville Street bridge. He got his car up close to the curb and while absent obtaining a supply of gasoline, the defendants' truck driver came up behind and injured the standing car. This happened in broad daylight at a place where there was ample room to avoid the collision with the plaintiff's car. In my opinion the driver of the truck was guilty of a most flagrant act of negligence. There is a pretence that there were other cars between him and the standing car

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which he turned out to avoid and that had prevented him seeing the standing car. If that were true, his act was just as negligent. The fact that other cars turned out would in itself be notice to him that something was wrong ahead. I cannot conceive of a careful driver committing the offence he had committed in the circumstances in evidence.

There was some conflict of evidence as to the distance of the rear wheel from the curb. One witness said 6 inches; another 27 inches, but in my opinion, even if the wheel were 27 inches from the curb that fact would not help the defendants.

MACDONALD, C.J.A.

There was a question also as to the plaintiff's negligence in not having a sufficient supply of gasoline. He had an ample supply of gasoline the night before but seems to have been robbed of it during the night. I am not concerned with whether or not his want of gasoline could, in the circumstances, have been attributed to negligence. I do not think it could. I think the sole cause of the injury was the negligence attributable to the defendants.

The plaintiff should recover $157.86 and costs, and defendants' counterclaim should be dismissed with costs.

MARTIN, J.A.: As I understand the reasons given by the learned judge below he found the defendants guilty of negligence in driving too fast and the plaintiff guilty of contributory negligence in leaving his car standing too far out from the curb of the bridge's footpath, and he applied the provisions of the Contributory Negligence Act, B.C. Stats. 1925, Cap. 8, to that situation and finding them equally to blame, apportioned the

MARTIN, J.A.

damages, and costs, upon that same basis. The finding of the plaintiff's contributory negligence is attacked but I am of opinion that upon all the evidence, the inference drawn by the learned judge was not an unreasonable one in the circumstances, and since I think such negligence "contributed to causing the injurious occurrence"—to adopt the recent language of the Supreme Court in *McLaughlin* v. *Long* (1927), 2 D.L.R. 186, 191—the judgment should not be disturbed.

GALLIHER, J.A.

GALLIHER, J.A.: I do not see my way clear to interfere with the finding of the learned trial judge. He has found negligence

and contributory negligence, and in my opinion there cannot be said to be ultimate negligence here.

I agree with the interpretation placed upon the Ontario Contributory Negligence Act (which is similar to ours) by Mr. Justice Riddell in the case of *Walker* v. *Forbes* (1925), 2 D.L.R. 725.

I would dismiss the appeal.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: I do not think negligence can be attributed to the plaintiff. The rear wheels of his motor-car were probably not as near the curb as they might have been but he had no means of placing them closer except by hand. His car stopped for want of gasoline. A few extra inches from the curb would make very little difference on so wide a thoroughfare. Further, there is no finding by the learned trial judge that the accident resulted from the position of his car. The trial judge merely states that, if the plaintiff had parked his car closer to the curb, the chances are that the defendant would not have struck it. Nor do I think negligence can be attributed to him on the evidence because he suddenly ran out of gasoline. He had no reason to anticipate this dilemma; quite the contrary. He did everything which an ordinary prudent man is required to do. We must find specific acts of negligence not merely fanciful suggestions of what might have been done when viewing events after the accident. Some one apparently abstracted gasoline from the tank. That was not his fault. It might happen, while properly parked on the street. Nor does it follow because it may have been done during the night, while the car was in an unlocked garage, that negligence should be imputed to him. Many drivers lock the car itself for protection, not the garage door and the theft of gasoline from the tank while in a garage off the street in the owner's garage is an unlooked for event.

On the other hand, the learned trial judge finds "that the defendant was driving a little too fast to be safe and, had he proceeded more slowly, he might have avoided the accident."

He should have been able to turn out and avoid hitting the

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plaintiff's car as there was plenty of room to do so and as another driver ahead of him succeeded in doing. True the car driving ahead of him would obscure his vision until he was close to the plaintiff's parked car, but if he was not driving as the trial judge found, "a little too fast to be safe," that fact should make little difference. It follows that judgment should have been entered for the plaintiff for the damages sustained and the counterclaim dismissed. The appeal should be allowed.

Appeal allowed, Martin and Galliher, JJ.A. dissenting.

Solicitors for appellant: *Walsh, McKim & Housser.*
Solicitor for respondents: *Clarence Darling.*

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Accounting—Action for money received to the use of the plaintiff—Reference—Registrar's report—Confirmed—Appeal.

In 1920 the plaintiff and defendant were the owners of the three lots at the southeast corner of Robson and Hornby Streets in Vancouver, subject to a mortgage of $12,000 and interest. In order to clear the title the plaintiff gave a quit claim of his interest to the defendant, the defendant giving him a letter that he held a one-half interest in the property in trust for him. The plaintiff having left for Winnipeg and residing there the care of the property was then left in the hands of the defendant who collected the rents and paid taxes for two years when the building, being condemned by the authorities, was pulled down and a new one erected. Defendant continued to look after the property and collect the rents until May, 1924, when without consulting the plaintiff he sold the property for $125,000. In an action for moneys received by the defendant to the use of the plaintiff and for an accounting it was held by the trial judge that the defendant held a one-half interest in the property in trust for the plaintiff and he ordered a reference to the registrar to ascertain the market value of land and buildings at the date of issue of writ, the amount of commission payable on the sale, the money expended in demolition of the old building and the construction of the new one, the money expended by defendant in interest, taxes, insurance, and payment of mortgage and the money received by defendant in rents. The registrar found the market value of the land and buildings on the date of the writ at

$125,000, being $75,000 for buildings and $50,000 for land, adding that of this market value of the land $20,000 was made by the erection of the building; that the usual commission on a sale is 5 per cent. for the first $10,000 and 2½ per cent. on the balance, but on the evidence 5 per cent. was not excessive; cost of demolishing old building $4,240; amount spent in construction and maintenance of present building $88,903.38; amount spent by defendant on taxes, interest and encumbrances $45,956; payments on insurance $806.91; rents and profits collected by defendant $27,077.05. The trial judge confirmed the report finding there was $3,085.08 due the plaintiff from the defendant

Held, on appeal, varying the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that the final payment to the original owner by the defendant cannot be treated as an encumbrance nor can he charge for the examination of original title; that the defendant should be charged with the increase of rents paid by the old tenants; that the sum of $88,903.38 allowed for expenditure on the new building should be reduced to $75,000; that the value of the land should be fixed at $50,000 the estimate of increase in value owing to erection of building to be struck out; that the commission should be the usual allowance of 5 per cent. for first $10,000 and 2½ per cent. for balance; and there should be judgment for the plaintiff for the amount due under the registrar's report varied as above.

APPEAL by plaintiff and cross-appeal by defendant from the order of MCDONALD, J. of the 11th of March, 1927, confirming the report of the district registrar at Vancouver made pursuant to the order of MCDONALD, J. of the 24th of March, 1925. The action was for the recovery of one-half the value of lots 1, 2 and 3, block 61, district lot 541 (map 210) City of Vancouver, less certain moneys paid by the defendant in respect to the preservation of the property. The property in question was sold under agreement for sale by one W. G. Harvey in 1909 to Messrs. Maxwell, Le Feuvre, Passage and Tomlin for $85,000. In 1912, Passage and Tomlin assigned their interest to the National Mortgage Company Limited, the plaintiff being president and managing director of said company and the defendant being a director. In 1914, Maxwell and Le Feuvre assigned their interest to the Equitable Securities Company Limited a company that was controlled by the plaintiff. In November, 1915, when $38,000 was still due Harvey under an agreement for sale, Harvey entered into an agreement with the plaintiff whereby he agreed to assign all his rights under the agreement of 1909 to the plaintiff and on receipt of $37,500 (payable as therein mentioned) to convey the land to the plaintiff subject to the

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original agreement and to a mortgage of $12,000 to the Canadian Bank of Commerce. In September, 1919, taxes were overdue and there was still owing to Harvey $18,000. The plaintiff and defendant then conferred and each paid half of the taxes and the plaintiff obtained from Harvey an option in the defendant's name at the price of $15,000 for the lands, payable on or before 1930. In February, 1920, the defendant paid Harvey the $15,000 and received a conveyance of the land. In July, 1920, with the plaintiff's assistance they endeavoured to clear up the title and both the National Mortgage Company Limited and the Equitable Securities Company Limited quit claimed to the defendant and the property then stood in his name subject to the mortgage to the Canadian Bank of Commerce and to the plaintiff's claim. In December, 1920, the plaintiff quit claimed to the defendant, the defendant at the same time writing a letter to the plaintiff in which he acknowledged the plaintiff's quit claim was only for the purpose of clearing the title and that he was accountable to the plaintiff for a one-half interest in the property as though the quit claim had never been delivered. Shortly after this the plaintiff went to reside in Winnipeg, and in 1922 the defendant, on the demand of the municipality, demolished the buildings owing to their having become dangerous from decay. The defendant then erected new buildings and later in June, 1924, he sold the property for an expressed consideration of $125,000. This action was then brought for a declaration that the defendant was trustee for the plaintiff as to a one-half interest in the property. It was found by the trial judge that as a result of the plaintiff's and defendant's interviews between December, 1919, and February, 1920, they agreed that subject to the encumbrances upon the property the defendant should become the registered owner and should hold as trustee for the plaintiff as to a one-half interest. A reference was directed to the registrar to ascertain the market value of the land and the buildings thereon at the date of the issue of the writ, the amount of commission properly payable on a sale at such value, the moneys expended by the defendant in demolishing the old buildings, the construction of the present buildings, the moneys expended by the defendant by way of interest, taxes, insurance, and in payment of the mort-

gage, and the moneys received by the defendant by way of rents. The registrar reported that on the 29th of March, 1925, the land and buildings were worth $125,000 being $75,000 for the buildings and $50,000 for the land, and that they were of the same value on the 23rd of June, 1924, when the writ was issued; that the commission for the sale of the property should be $3,375; that the amount expended in the demolition of the old buildings was $4,240; that the amount expended in the construction and maintenance of the existing buildings was $89,903.38; that the amount expended by the defendant for taxes, principal and interest and costs of all encumbrances totalled $45,956.59; that the net total of premiums paid by the defendant for insurance was $806.91 and that the rents and profits received by the defendant amounted to $27,077.05. Both plaintiff and defendant moved to vary the report but it was confirmed by the trial judge who found after computation that there was a balance of $3,085.08 payable to the plaintiff who was entitled to the costs of the action. He further found that the defendant was not entitled to any allowance by way of remuneration under section 80 of the Trustee Act. The plaintiff appealed from the order confirming the registrar's report and the defendant cross-appealed.

Statement

The appeal and cross-appeal were argued at Vancouver on the 31st of March to the 6th of April, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, and *Bucke,* for appellant.
Cowan, K.C., for respondent.

Cur. adv. vult.

7th June, 1927.

MACDONALD, C.J.A.: The trial judge decided that the defendant held, subject to the encumbrances thereon, a half interest in the property in question, in trust for the plaintiff. There has been no appeal from this pronouncement. He thereupon directed a reference to the registrar to take the accounts between the parties, reserving further directions.

MACDONALD, C.J.A.

It becomes necessary to briefly state the earlier history of the transactions between them. One Harvey, originally owned the

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property and agreed, in 1909, to sell it to Messrs. Maxwell, Le Feuvre, Passage and Tomlin for the sum of $85,000. These purchasers failed to complete and in 1915 Harvey entered into an agreement with the plaintiff for its sale to him, subject to the rights of the previous purchasers, and to a mortgage of $12,000 and interest thereon, for the sum of $37,500 payable in instalments, of which approximately one-half was paid by the assignment of other property taken by the vendor in lieu of cash, leaving the balance still owing. The plaintiff found difficulty in meeting his payments and in 1919, appealed to the defendant to join him in the purchase, suggesting that Harvey's interest could be purchased by defendant for $15,000. This was eventually concluded and a deed was executed by Harvey to the defendant of the freehold subject to the said encumbrance and to both of the above-mentioned agreements. Though the deed was made to defendant it was agreed that he should hold a half-interest in it subject to encumbrances, in trust for the plaintiff, the trust above referred to. The plaintiff being resident in Winnipeg, the defendant collected the rents for a period of nearly two years, when without consulting the plaintiff he demolished the buildings which had been condemned by the city authorities, and erected in their stead a new building. He collected the rents of this new building until May, 1924, when, again without consulting the plaintiff, he sold the whole property for the sum of $125,000 to one Robertson.

Having declared the trust, the trial judge ordered a reference to the registrar in these words:

"There will, therefore, be a reference to the registrar to ascertain the market value of the lands and the buildings thereon on the date of issue of the writ in this action, the amount of commission properly payable on a sale at such market value; the money expended by the defendant on the demolishing of the buildings formerly on the property and the construction of the present building; the moneys expended by the defendant by way of interest, taxes, insurance and in payment of the mortgage; and the money received by the defendant by way of rents."

The defendant's contention on the reference was that it was Harvey's vendor's lien which he had purchased and that that lien was an encumbrance and should be so dealt with by the registrar. This contention was upheld by him and was adopted by the learned judge.

In my opinion it makes very little difference whether the

defendant's purchase be regarded as a purchase of Harvey's interest or one of his lien, since the plaintiff also had, by reason of the payment of half the purchase-money an equitable half-interest in the property which was preserved to him. The registrar treated the defendant's $15,000 as an advance to be repaid out of the property. That finding cannot on the evidence be sustained. The deed recites that the conveyance to the defendant was subject to plaintiff's prior contract of purchase. The unsigned memorandum, Exhibit 38, shews what was proposed by the parties should a sale of the property be effected within a year; this did not occur and therefore defendant held the half-interest in trust for the plaintiff, as the learned judge has declared. They were, after the expiration of the year, co-owners.

In connection with the purchase of Harvey's interest the registrar allowed as a disbursement a payment of $647 by defendant to his solicitor for examining the title. This item was not an encumbrance and ought to have been disallowed. It was money expended for the defendant's own satisfaction and entirely in connection with the examination of the title to the interest which he had just purchased.

The defendant has not been charged as he ought to have been with the increase of rents paid by the tenants of the old buildings. The amount I am not certain of; I make it the sum of $495; if I am wrong the sum may be corrected on the settlement of the judgment.

The defendant omitted to collect certain rents from tenants of the new building. In my opinion he is not to account for these sums. We were referred to *In re Brogden* (1888), 38 Ch. D. 546, but the two cases are quite different. The defendant here was under no obligation to collect rents at all, he was a trustee of the property simply with no duty imposed upon him to collect rents either by law or by agreement.

Two of the most important grounds of appeal relate to the demolition of the old buildings, and to the erection of the new one. The learned judge said that as the plaintiff was seeking equity he should be required to do equity, and therefore that allowance should be made for money expended on permanent improvements. He did not find the defendant guilty of fraud,

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and in such circumstances the rule governing allowances for permanent improvements is, I think, well established. There should be allowed the sum by which the property had been enhanced in value by reason of the improvements; or the sum expended by the defendant on them, which ever was the lesser. *In re Cook's Mortgage* (1896), 1 Ch. 923; *Henderson* v. *Astwood* (1894), A.C. 150; *Re Coulson's Trusts* (1907), 97 L.T. 754; *Rowley* v. *Ginnever* (1897), 66 L.J., Ch. 669.

With respect to the demolition of the old buildings, the evidence shews that they were condemned by the building inspector and ordered removed. I am therefore of opinion that the defendant in the interests of the property as well as in obedience to the law, was bound to demolish these buildings and therefore should be allowed the cost of their removal. The work was done by day labour under the superintendence of Mr. Cameron, who stated in his evidence that he paid the workmen in cash, and delivered the receipted pay-rolls to the defendant. The defendant admits that he destroyed these pay-rolls and some other documents relating to the work about two years after their receipt. Nevertheless, I think the defendant is entitled, the judge not having found fraud, to what the demolition and removal of these buildings actually cost him; I think he has made out a *prima facie* case by the evidence of Cameron, who said that he had expended $4,240 in this work. He gave some particulars of these expenditures and was not cross-examined on them by opposing counsel. This allowance should not be interfered with.

MACDONALD, C.J.A.

The registrar allowed the defendant the sum of $88,157.44 to reimburse him for the cost of the new building. I think there is error here. The order of reference is not happily worded to meet the question to be inquired into, but no objection was made to the course of the inquiry. He reported that the market value of the property when sold was the amount received for it, namely, $125,000. He allocated $75,000 to the building and $50,000 to the land, adding that "of this market value of the land $20,000 thereof was made by the erection of the building." I am at a loss to know just what he meant by this, but if he meant that the land stripped of the building was worth only $30,000, I think he was in error. It will be recalled that

it was sold in 1909 to the Maxwell syndicate for $85,000 in its then condition with the old buildings, afterwards condemned, upon it. That in 1915, it was sold to the plaintiff in similar condition for $37,500 subject to a mortgage of $12,000 and interest, and other encumbrances. Moreover, it appears that at the time of defendant's purchase of the half-interest an option to purchase was given to one Royal at $64,000, for which he paid $1,000, which was equally divided between the plaintiff and the defendant, and that the defendant refused to extend the option. The buildings were of no value; they were a detriment to the property. Royal wanted the site for a theatre. The land is opposite the Law Courts, is within a block of the Vancouver Hotel, three blocks of the Hudson's Bay Company's departmental store, in one of the most important sections of the City of Vancouver. I prefer to accept as correct the value put upon the property by the parties themselves rather than that, as I understand it, arrived at by the registrar. The price paid by the defendant for his half-interest was practically $25,000 when the encumbrances assumed are considered. Therefore I shall take the value of the land irrespective of the buildings, to have been $50,000, and when this sum is deducted from the sale price the allowance to be made for the improvements comes to $75,000. That is to say, the building has enhanced the value of the property by that sum.

MACDONALD, C.J.A.

The defendant was allowed $5,000 disbursements as a commission on the sale to Robinson, whereas the customary commission, as the learned judge finds, was $3,375; the defendant should be allowed only that amount.

There is a question whether any allowance at all should be made for this commission, the sale having been made without the plaintiff's consent, but I would not interfere with the allowance of the customary commission.

The interest, if any, allowed defendant on his purchase-money will also be disallowed.

I think the further order of reference directed by the judgment would be futile and should be set aside.

I would give judgment for the plaintiff for the amount shewn to be due him by the registrar's report as varied by my conclusions herein. The defendant's cross-appeal is dismissed.

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The plaintiff should have the costs of the action, of the motions and of this appeal and cross-appeal, except those of the motions for a further reference which should be given to neither party.

To the extent above indicated the appeal is allowed.

MARTIN, J.A.: I agree with the majority of the Court in the disposition of this appeal and cross-appeal.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal raises some very interesting questions relative to what allowances are to be made to a trustee of real estate when the Court has held that the land is impressed with a trust and the plaintiff and defendant have been held to be tenants in common thereof, notwithstanding that for years the defendant has been the registered owner in fee simple thereof.

The learned trial judge has made no finding that the defendant was not of the honest belief that he was the sole owner of the land or that he was guilty of fraud in any respect.

The evidence shews conclusively that there was acquiescence and laches upon the part of the plaintiff in asserting his claim that he was a tenant in common in the land. In truth, this is a case of the plaintiff romping in when he sees that there is something to be gained when for years he left the defendant in the position of standing by and preserving the property, improving it, enhancing its value and selling it at a profit. The defendant had to pay taxes, keep down interest and clear off encumbrances. The plaintiff is advancing strict claims of proof of outgoings when in many cases the evidence has been lost and asserting that as to the improvements there must only be allowed what may be established as the enhanced value of the improvements over and above the actual value of the land. The learned judge directed that there should be an account taken. The evidence in this case and covering the reference as well is contained in three ponderous volumes of 1192 pages. The learned trial judge, it is evident, gave the case the most careful consideration, his reasons for judgment exemplifying this

and the reference was made to the learned registrar of the Supreme Court at the City of Vancouver. The learned registrar entered upon the reference which was a most extensive inquiry and duly made his report. The report was carefully considered by the learned trial judge and was specifically and *in toto* confirmed after motion and counter-motion to verify the report and for final judgment. The learned trial judge gave considered reasons for confirmation of the report of the learned registrar, and the following is an excerpt therefrom:

"I have examined carefully the evidence taken before the registrar and have considered the argument presented by counsel on this motion and I am not satisfied that in any particular the registrar has been shewn to be wrong in his findings. That being so I am not justified in altering any of such findings."

In the result the plaintiff was held to be entitled to the sum of $3,085.08, being the total amount found by the learned registrar and approved and confirmed by the learned trial judge. The plaintiff being dissatisfied with the amount so found launched an appeal and the defendant launched a cross-appeal claiming many items disallowed by the learned registrar upon the reference. It is a matter for remark though that the defendant was willing to drop the cross-appeal if the appeal of the plaintiff were dropped. The appeal was proceeded with and as well the cross-appeal. I have come to the conclusion that both appeals should be dismissed. The offer made by the learned counsel for the defendant to drop the cross-appeal may be looked at as sufficient indication that if the appeal of the plaintiff were dismissed sufficient compensation would enure to the defendant by the costs that would follow the event. The costs of the argument of the cross-appeal were insignificant in comparison with the costs of the argument on the main appeal. I do not propose to enter into any great detail as to the evidence which in my opinion amply supports the report of the learned registrar, which was confirmed by the learned trial judge and became a judgment of the Court below. The onus was on the plaintiff to shew that the judgment was wrong; the presumption always is that the judgment is right unless that onus is discharged and it is shewn to be wrong. The present case was eminently one that the demeanour of the witnesses was important; the reasons for judgment of the learned trial judge well

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demonstrates this, and if there ever was a case for the non-disturbance of the judgment of the trial judge this case is manifestly of that character.

I do not really feel myself called upon or required to canvass specifically the allowances or disallowances made by the learned registrar, and the learned trial judge, as I will later refer to authorities that in my opinion are conclusive and do not require me to do so. In passing, however, I will refer to some of the matters called in question.

With respect to the $15,000 advanced by the defendant, that was an encumbrance and in my opinion the defendant was entitled to be allowed it *in toto*. The true situation was that the plaintiff was in dire distress, the land would have been lost to him, it was a time when it was next to impossible to obtain money to be embarked in real estate, it was a time of great real-estate depression. The plaintiff urged the defendant to salvage the property, and to pay off all encumbrances. That being done the legal estate went to the defendant alone. The defendant assumed, but wrongly, that he had become the sole owner. In that he was in error. It nevertheless follows that having paid off an encumbrance he is rightly entitled to be credited with the total amount paid out by him. Indeed, it is very doubtful if this case at all establishes the defendant in any fiduciary character; he is certainly entitled to all proper allowances in the taking of the accounts. In *Kennedy* v. *De Trafford* (1896), 1 Ch. 762; (1897), A.C. 180, it is clearly laid down that there is no fiduciary relation between tenants in common of real estate prohibiting one of them from buying or getting in for his own benefit an outstanding encumbrance or estate therein and, further, which is the present case, can one tenant by leaving his co-tenant to manage the property impose upon the latter an obligation of a fiduciary nature? See Godefroi on Trusts and Trustees, 5th Ed., pp. 151-2. The head-note in part, in *Kennedy* v. *De Trafford* (1897), A.C. 180, reads:

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"There is no fiduciary relation between tenants in common of real estate as such. Nor can one tenant in common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character."

Then there is the right to all just and proper allowances wherever there is a constructive trust, and the defendant is

entitled to all the benefits of that position. Here he has not been held to have acted other than *bona fide,* but even if it had been held that his conduct was not *bona fide* he would still be entitled to all just allowances: *Brown* v. *De Tastet* (1821), Jacob 284; *Mill* v. *Hill* (1852), 3 H.L. Cas. 828.

Another large item that is challenged is the cost of improvements upon the land put on by the defendant. It is to be noted that the builder who gave evidence of the cost was not even cross-examined. What reason can there be in disputing this item, as it is plain to demonstration that it was a necessary expenditure to preserve the land, that is, revenue had to be got, and admittedly it was expenditure which was of benefit? In Godefroi at pp. 155-6 we have this stated:

"And a constructive trustee executing permanent improvements will be entitled to recoupment with interest at four per cent., even though he may have been in possession as tenant for life. 'If you insist on a man performing his duties as trustee . . . you must treat him as a trustee throughout, and you cannot expect him to perform his duties without at the same time exonerating him from expenditure incurred which benefits' the trust property: *Per* Kekewich, J., *Rowley* v. *Ginnever* (1897), 2 Ch. [503] at p. 507; *cf. In re Jones. Farrington* v. *Forrester* (1893), 2 Ch. 461; and see *Caldecott* v. *Brown* (1842), 2 Hare 144."

The claim made upon this appeal that the defendant should not be allowed all reasonable and just allowances, and in particular the full amount for the demolition of the old buildings and erecting the new building, upon the specious plea that the property has not been enhanced to that degree, is most unconscionable. Here we have the plaintiff standing by paying no attention to the strenuous endeavours of the defendant to carry on and preserve the property, not advancing a cent but watchful that if there be any profit, he shall share, but in sharing unwilling to be honest in making full allowance for all outgoings. I am indeed surprised at the claim made on behalf of the appellant, and in this connection would quote the language of Lord Macnaghten at p. 190, in *Kennedy* v. *De Trafford, supra*:

"My Lords, . . . Mr. Farwell has argued this case with his usual ability and his usual fairness, but I must say that in the whole course of my experience I have not met with a bolder or more hopeless appeal. Certainly I never expected to find a proposition which was once thought by a great judge to be so absurd as to suggest a complete answer to a case that had in it some show and appearance of justice, put forward in these latter days as the foundation and starting-point of a serious argument in this House."

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This language can equally be applied to Mr. *Mayers* the learned counsel for the plaintiff (appellant) in this case. That which is pressed here is that in the taking of the accounts upon the basis of the relationship of tenants in common, as that is the effect of the judgment, rules shall be applied applicable only to a fiduciary relationship. This is in absolute antagonism to the decision of the House of Lords in *Kennedy* v. *De Trafford, supra.* At p. 185 of the case Lord Herschell said (and the words I quote can be equally applied here): "He tells each of them that he is preparing to sell." Here the defendant tells the plaintiff he is about to build on the land. Lord Herschell again (p. 186): "To that he has received from the present appellant no remonstrance, no answer." That is the fact here. Further on Lord Herschell said:

"My Lords, I do not think it is established here that there was a fiduciary relation . . . What are the facts? The mortgagors are co-owners."

Here by the effect of the judgment the plaintiff and defendant are co-owners.

And again further on, Lord Herschell said:

"Dodson was an owner of this property—the owner of an undivided moiety, it is true, but each owner of an undivided moiety is none the less truly an owner—and Dodson in collecting those rents and profits collected them in the right which he possessed as a co-owner of the property."

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And here the defendant was in like position, and, lastly, on p. 187, Lord Herschell said that,—

"Each co-owner would have an obligation to account to the other in respect of any rents he collected or moneys he received."

And that was not disputed before the learned registrar on the reference and the learned registrar made all just and proper allowances in respect thereof.

It is idle argument to say that the accounts must be taken on the basis of the defendant being the trustee for the plaintiff—the plaintiff is a co-owner by the effect of the judgment and upon that basis only can the accounts be worked out. It is manifest absurdity to contend otherwise. Here we have a contention made that offends against all rules of equity and extreme laches as well. The circumstances were extreme. The plaintiff stood to lose everything, he calls in the defendant, the defendant comes in, it is a case of salvage and the paying off of encumbrances, but yet we have the plaintiff saying, in all that you did you must be held to be in a fiduciary position.

I have already spoken of the condition of the real-estate market at the time. Most depressed with heavy taxation and with the risk of the absolute loss of the property, the plaintiff virtually abandons all interest in the property, goes away and does nothing. The defendant had to do the best he could and he did the best he could, and it follows that all just and proper allowances must be allowed to him upon the basis of a co-owner and a co-owner left to exercise, unaided, his best judgment. How inequitable it would be that in the taking of the accounts any moneys actually paid out in preserving or improving the property, any sums so paid out should be disallowed, yet such is the contention made in this appeal. This contention is and must be untenable. Real estate at the time in question in the City of Vancouver was of very uncertain value and holders thereof were looked upon as speculators. The defendant by the exercise of great skill and judgment was able to, in the end, make a profit by the sale of the land after the erection thereon of a suitable building, and he must be allowed all outgoings in respect thereof; the plaintiff cannot obtain the profits and leave all the losses with the defendant. I would refer to what The Lord Justice Turner said in *Clegg* v. *Edmondson* (1857), 114 R.R. 336 at p. 350 (8 De G. M. & G. 787; S.C. 26 L.J., Ch. 673; 3 Jur. (N.S.) 299):

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> "A mine which a man works is in the nature of a trade carried on by him. It requires his time, care, attention and skill to be bestowed on it, besides the possible expenditure and risk of capital, nor can any degree of science, foresight and examination afford a sure guarantee against sudden losses, disappointments and reverses. In such cases a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly, and not by empty words merely. He should shew himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing."

(See *Flynn* v. *Dalgleish* (1901), 1 I.R. 255). Godefroi on Trusts and Trustees, 5th Ed., puts the position the defendant is in in the present case and fully establishes the correctness of the report of the learned registrar and the judgment under appeal, at pp. 337-8:

> "Where a person who is in possession of property spends money in permanent improvements, if he turns out not to be sole and absolute owner, he is entitled to be recouped his expenditure on accounting for the property to the other persons interested: see *Pascoe* v. *Swan* [(1859)], 27 Beav. 508; *In re Jones. Farrington* v. *Forrester* (1893), 2 Ch. 461; *In re Cook's*

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Mortgage (1896), 1 Ch. 923; *Rowley* v. *Ginnever* (1897), 2 Ch. 503; and the fact that he was tenant for life in possession at the time of the expenditure will not displace his rights: see *Rowley* v. *Ginnever, supra.* But this is only allowed where the other persons interested are seeking equitable relief and are put on terms: *Rowley* v. *Ginnever, supra*; *Re Coulson's Trusts* [(1907)], 97 L.T. 754: and, perhaps, in a case of strict salvage: see *Re Legh's Settled Estate* (1902), 2 Ch. 274. Only the present value of the improvements, not exceeding the expenditure, will be allowed: *In re Jones, supra; In re Cook's Mortgage, supra.*"

I would also refer to Godefroi, at p. 339:

"If trustees make repairs at their own risk and without going to the Court, they may subsequently be called to account in an action; but even where infants are interested, the Court would, upon evidence that what had been done had really preserved the property, have jurisdiction to say that it was for their benefit that the property should be taken as improved, and that the trustees should not be made liable. *Conway* v. *Fenton* [(1888)], 40 Ch. D. 512 at p. 518; *Re Hawker's Settled Estates* [(1897)], 66 L.J., Ch. 341; and *cf. Re Lever, Cordwell* v. *Lever* (1897), 1 Ch. 32; and *Re Copland's Settlement* (1900), 1 Ch. 326. In *De Cordova* v. *De Cordova* ([(1879)], 4 App. Cas. 692), the tenant for life of a house being unimpeachable for waste, an inquiry was directed by the Privy Council whether any charge for money expended upon it by the executors ought to be allowed or not, having regard to the circumstances under which the expenditure was made, it being alleged that the property was preserved by it."

MCPHILLIPS, J.A.

I have gone into the law at some length to shew that the learned registrar in his report was right throughout and that the learned trial judge was right in confirming the report and the judgment following thereon, which is under appeal, but I am of the opinion, quite apart from this review of the law that the report of the learned registrar and the confirmation thereof and the judgment following, cannot be disturbed and I found my opinion upon the *ratio decidendi* in *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95. In that case Lord Buckmaster delivered the reasons of their Lordships of the Privy Council. There it was the case of an award by arbitration under the Dominion Railway Act of Canada. The award made was appealed to the Supreme Court of Ontario and the appeal was allowed. This judgment, however, was reversed by a majority of three to two in the Supreme Court of Canada (unreported) and an appeal was taken to the Privy Council. Lord Buckmaster in his reasons at p. 96 said:

"Before considering the facts and the merits of the case it is well to examine what is the real nature of the appeal covered by section 209. In their Lordships' opinion it places the awards of arbitrators under the

statute in a position similar to that of the judgment of a trial judge. From such a judgment an appeal is always open, both upon fact and law. 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."

The case was one of determining the value of land upon expropriation—$34,917 was claimed but only $3,500 allowed. Lord Buckmaster at pp. 96-7 further said:

"Now, so far as the question of fact is concerned, their Lordships see no reason whatever to justify interference with the award. The arbitrators appear to have scrutinized and examined the evidence on both sides with great care, and, in addition, they paid at least two visits to the property, and made a careful inspection for themselves. It would be in a high degree unreasonable to interfere with such a finding of fact, based on such materials; and, indeed, the Supreme Court of Ontario, whose judgment set aside the award of the arbitrators, did not attempt to do so, but rested their judgment upon the ground, which really constitutes the only foundation for the appellant's case—namely, that the arbitrators proceeded upon a wrong principle in their valuation, and that in fact the property was valued on the footing of its being a farm property rather than a private estate. Their Lordships have examined carefully the reasons given by the majority of the arbitrators, and they cannot find anything whatever in these reasons to justify this conclusion."

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The award was confirmed by the Privy Council and in my opinion the report of the learned registrar in the present case should be confirmed as it was confirmed by the learned trial judge. This appeal could only succeed if it was established that the learned registrar in his report and the learned trial judge in confirming the same, proceeded upon a wrong principle and the onus was upon the plaintiff, the appellant, to establish this. In my opinion, it was not established. The various allowances made in the accounts are all supportable by authority. The learned registrar did not, nor did the learned trial judge proceed upon any wrong principle, and that being the case the appeal necessarily fails.

I might further refer to the latest pronouncement in the House of Lords, upon the non-disturbance of the judgment of a trial judge upon questions of fact. In the *Ruddy* case, the award was viewed as a judgment of a trial judge; here, we have the report of the learned registrar confirmed by the trial judge. Here there was a prolonged taking of accounts and the witnesses were all before the learned registrar. It would have

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to be a strong case indeed that would admit of the report being disturbed, but that is not the present case. I would also refer to what Lord Sumner said in the House of Lords in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8:

"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 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.'"

Being therefore of the opinion that the report of the learned registrar was right, and the confirmation thereof by the learned trial judge was also right, the appeal in my opinion fails. Nothing was advanced to throw doubt upon the soundness of the report of the learned registrar, confirmed by the learned trial judge. In that my view is that the report of the learned registrar was right and rightly confirmed by the learned trial judge, it follows that the cross-appeal also fails.

MACDONALD, J.A.

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

Appeal allowed, McPhillips, J.A. dissenting, and cross-appeal dismissed.

Solicitor for appellant: *Horace W. Bucke.*

Solicitor for respondent: *George H. Cowan.*

IN RE WALTER EDWARD GEHM, AN INFANT. GEHM v. GATJENS.

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IN RE GEHM, AN INFANT.

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Infant—Custody—Rights of father—Fitness—Welfare of child—Discretion of Court.

The petitioner for the custody of his child was married in California in April, 1924, at the age of 19, his wife being two years younger. After living together for two months they separated. The child was born in the following November and the wife obtained a decree of divorce with custody of the child in March, 1926. The child was in the constant care of his maternal grandmother from his birth until the summer of 1926 when his mother took him to Vancouver where shortly after her arrival she was married. Shortly after her marriage she visited California with her child and soon after her arrival she died. The maternal grandmother then went to Vancouver with the child. The child was of a highly nervous temperament and was subject to fits in California from which he did not appear to suffer in Vancouver. In December, 1926, the father applied to the California Court and had the divorce decree modified providing that he should have the custody of the child. The father's petition in Vancouver was refused.

Held, on appeal, affirming the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that in the circumstances the custody in the maternal grandmother is much more to the advantage of the child than that of the father, and the discretion of the trial judge was properly exercised.

APPEAL by the applicant from the decision of MCDONALD, J. of the 24th of March, 1927 (reported, 38 B.C. 433) dismissing an application by the father for the custody of his child born in California in November, 1924. The parents of the child were married in California in April, 1924, the husband being 19 years old and the wife 17. They lived together for two months and then quarrelled and separated. In March, 1926, the wife obtained a decree of divorce with the custody of the child in California on the grounds of cruelty and gross ill-treatment, the action being undefended. The father saw the child only three times, once when he was born, once in January, 1925, and again when his wife died in 1926. Since his birth the child had been in the constant care of his maternal grandmother until the mother went to Vancouver in the summer of 1926, when she was again married and intended making her permanent domicil there. After her marriage in Vancouver she returned to Cali-

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fornia for a temporary purpose, taking the child with her. Shortly after her arrival in California she died expressing the wish that her mother should have the custody of her child. Immediately after the mother's death the maternal grandmother went to Vancouver taking the child with her, and has remained there ever since. In December, 1926, the father made an *ex parte* application to the California Court and had the decree of divorce modified providing that he should have the custody of the child. The child was delicate and of a highly nervous temperament and was subject to fainting fits in California but after he was taken to Vancouver his health was better and he was no longer subject to fits. The evidence disclosed that both the maternal grandmother and the father had sufficient means to properly provide for the maintenance of the child.

Statement

The appeal was argued at Victoria on the 7th and 8th of June, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Thomas E. Wilson, for appellant: The mother being dead the father has the primary right to the custody of the child. The fact that the child is subject to fainting fits in California is not a sufficient ground to deprive the father of its custody: see *Stevenson* v. *Florant* (1926), 96 L.J., P.C. 1 at p. 4; *Re Faulds* (1906), 12 O.L.R. 245 at pp. 253-4; *Re Mathieu* (1898), 29 Ont. 546.

Argument

Wismer, for respondent, was not called on.

MACDONALD, C.J.A.: We do not need to hear you, Mr. *Wismer.*

The appeal should be dismissed. There are certain principles which are well recognized in cases of this kind. The father is the natural guardian. And in a contest such as this, where the custody of the child has been taken out of his possession, the Court *prima facie* ought to restore it to the father. But there are certain considerations which we must pay attention to. First and foremost is the character of the father; is he a fit and proper person to have the custody, the up-bringing and education of the child; and has he got the means to perform his obligation? That is one consideration.

MACDONALD, C.J.A.

When we look to the character of the father, in this case, we see that his conduct has not been above reproach; he confessed to a crime, was convicted; and while the Court afterwards allowed him to withdraw his confession of guilt, that did not remove the moral delinquency. Again, his conduct toward the young woman whom he married at the age of seventeen, is a matter of comment. He lived with her two months, he deserted her, or at least they separated; she got a divorce from him on the ground of cruelty; there is nothing to rebut the finding of the Court that that case was made out against him. Then when the child was born, he saw it; he saw it a couple of times afterwards. He did not apparently support either the wife or the child until compelled by the decree of the Divorce Court to pay $30 a month. Then, on the death of his wife, for the first time he appears to have taken an interest in the child; he wants to get it into the possession of his mother. And I think the learned judge below was quite right in saying that it was really a contest between the grandmothers.

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Now what is the record of the maternal grandmother, on the other side? She had the custody of the child from the time of its birth. She reared him, and judging by the demonstration which took place in the Court before the learned judge, he has a great affection for her. She is in as good if not better position than the father, to provide for his future.

In these circumstances we would ask ourselves whose custody would be for the best interest of the child? Now, I have no hesitation in saying this, confirming the judgment of the trial judge, that the custody of the grandmother is much more to the advantage of the child than that of the father.

MARTIN, J.A.

MARTIN, J.A.: I agree, that in this case it would be not proper in a legal sense for us to interfere with the exercise of the discretion that the learned judge below has exercised. Because there are abundant materials before him which would justify him, from every point of view; the paramount point of view being, as all the cases shew, the welfare of the child.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I have arrived at a contrary conclusion

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in this case. I do not want it to be thought for a moment that I would condone, in any sense, the acts of the husband. But, after all, they are past acts, though regrettable acts. He is the father of this child; that is not to be forgotten. The Court must always start with the fundamental position, the rights of the parents. That is a sacred trust, and the father in particular is the proper guardian of the child. No doubt the welfare of the child must receive careful consideration.

In this particular case we have it that the domicil of the parents is the State of California, in the United States of America. Now, the last act of the judicial authority in the State of California, the place of domicil, has been an order directing that the child shall be given into the custody of the father. It is a serious step for another Court, in a foreign jurisdiction, to interfere with the sovereign authority of the Court of the State of California.

I cannot glean from the evidence here anything to shew that the welfare of the child will be in any way affected to its detriment by being given into the custody of the father, who is resident with his parents in the City of San Francisco, the father and grand parents having ample means to care for the child. They are people of good character and position, and apparently nothing at the present time to shew that the father is a person of bad character. Even if a person does commit a crime in his youth, does it mean that he ever afterward shall be deemed a criminal in the eye of the law? That is not the law of England, nor is it the law of British Columbia. Here, the surviving parent, the father, may have done things which he should not have done—I do not condone them in the slightest, as I previously have said—but today I cannot see anything which would shew that it would not be in the interest and welfare of the child that he should go to the father.

In the case of the maternal grandmother, who has wrongfully withdrawn the child into Canada against the order of the California Court, it is shewn that she has no settled or certain income —no certainty of income whatever. She is at this present moment, as far as I can see, unable to provide, really, from the point of view of the law, for this child, or to educate it. On the other hand, the father is in a position to do that, and safe-

guard it, with the care as well of his father and his mother, the grandfather occupying a good business position in the City of San Francisco, in receipt of an income of something like $20,000 a year.

Does it mean that because a father, or a mother, make a misstep in life, contravene the moral law, contravene the law of the land, become criminals even, that there should be no chance for regeneration? There can be regeneration; there can be rehabilitation; and that has come about in the present case. And with that, is it to be tolerated that the parent, the father, the mother being dead, shall have the custody of the child taken from him? We are being asked to lay down some very startling propositions of law that will have very far-reaching effect if acceded to, and operate against the best interests of children in future. I say this with every respect for the opinion of my learned brothers, who have come to a contrary conclusion.

I would have liked that this case could have been reserved for further consideration; I have not had the opportunity of considering the authorities that I would have liked to have had. We find it stated in Eversley on Domestic Relations, 4th Ed., at p. 492:

"Parents cannot enter into a legal binding agreement to deprive themselves of the custody and control of their children; and if they elect to do so, can at any moment resume their control over their children. As it has been put in the House of Lords, the father is the natural guardian, the guardianship is in the nature of a sacred trust, and the father cannot substitute another person for himself in his lifetime, in this respect the English and the Hindu law being alike (*Besant* v. *Narayaniah and others* [(1914)], 30 T.L.R. 560)."

The parent, the father, the natural guardian, comes to the Court of British Columbia and establishes that the Court of domicil has given him the custody of his child, and he asks this Court to give him the custody of the child. There is everything to shew that the welfare of the child will be well cared for, in the best of surroundings.

Further, in Eversley on Domestic Relations, p. 494, we read:

"The common law Courts could not, except in flagrant instances of unfitness, control the exercise by the father or the guardian of his legal rights, and refuse the writ. *In re Andrews* [(1873)], L.R. 8 Q.B. 153; 42 L.J., Q.B. 99. Personal cruelty towards a child, or manifest injury towards the child's prospects, were really the only grounds on which the common law Courts could deprive the father of the custody of his child. See the cases

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of *Rex* v. *Greenhill* [(1836)], 4 A. & E. 624, and *Ex parte Skinner* [(1824)], 9 Moore 278, where, though the father was of bad character, he was allowed to resume the control of his child, and *Rex* v. *De Manneville* [(1804)], 5 East, 221; *Rex* v. *Delaval* [(1763)], 3 Burr. 1436; and *Reg.* v. *Clarke* [(1857)], 7 El. & Bl. 186; S.C. 26 L.J., Q.B. 169."

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There is no evidence here that the father is of bad character now, if he really ever could be so called. He has done things in his life that he should not have done, but he evidently has now reformed his habits and is conducting himself honourably, and is attentively engaged in business pusuits, and, from all appearances, is a reputable man of business. To deprive the father of the custody of his child, and take away from him the opportunity to exercise parental affection, and keep the child so far remote from him as the City of Vancouver in the Province of British Columbia, the father residing in San Francisco, is in my opinion the deprivation of natural justice. The bestowal of the natural affection of the father for his child should never be interfered with save for the gravest reasons; it is a sacred trust, born in the heart of man—a trust to be carefully administered, especially when the child is of tender years, the present case. Is he not to be accorded that God-given right to have his child with him? I cannot agree with the proposed order of the Court. I consider the order in the Court below was wrongly made and without jurisdiction and should be set aside, and that the father should be given the custody of his child. It is plain to me that such an order only will comport with and effectuate natural justice—an order withdrawing the custody of the child from the father is against the existent order of the Court of domicil in California, and in my opinion, will be an order made without jurisdiction.

MCPHILLIPS, J.A.

I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I am clearly of the opinion that we should not interfere with the exercise of the discretion of the trial judge. I think, too, that he reached the right conclusion in the first instance.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Wilson & Drost.*

Solicitor for respondent: *Gordon S. Wismer.*

IN RE ESTATE OF DAVID McKAY, DECEASED.

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

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IN RE ESTATE OF DAVID McKAY, DECEASED

Administration—Intestate estate—Division between brothers and sisters, their children and grandchildren—B.C. Stats. 1925, Cap. 2, Sec. 4.

M. who was unmarried, died intestate. He had one sister still living and another sister who had predeceased him, left one son living. One brother was still living. A second brother who had predeceased him left three children still living and a third brother (Andrew) who had predeceased him left nine children still living and a tenth child (Edward) who had predeceased M. left four children (grandchildren of M.) still living. On a petition for directions:—

Held, that the one-fifth share of the estate to which the brother Andrew would have been entitled should be divided into ten parts and one of the ten parts should be equally divided amongst Edward's four children.

PETITION by the Official Administrator for directions as to the distribution of the estate of David McKay who died in Vancouver on the 7th of May, 1926. After the debts and costs of administration were paid there was a balance to the credit of the estate of $2,603.44. Deceased was unmarried and his father and mother both died many years ago. He had five sisters and three brothers. Three sisters predeceased him leaving no issue. One sister predeceased him leaving one son still alive. The other sister is still living. One brother James is still living. The second brother, John, died some years ago leaving two daughters and one son. The third brother, Andrew, who died in 1925, had issue as follows: (1) Edward, who died nine years ago, leaving four children all living; (2) John William, who died nine years ago leaving no issue; (3) nine other sons and daughters all living.

Statement

The question arose as to whether the one-fifth share in the estate of deceased for the children of Andrew (deceased) should be divided into nine equal parts and be given to the nine living children or whether it should be divided into ten equal parts, the tenth part to be divided equally among the four children of Edward.

Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 9th of June, 1927.

The Official Administrator in person.

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

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IN RE ESTATE OF DAVID McKAY, DECEASED

HUNTER, C.J.B.C.: The one-fifth share in the estate to which the predeceased brother Andrew would have been entitled should be divided into ten equal parts, nine of which should be distributed amongst his nine living children and the tenth part should be divided equally amongst the four children of Edward, a deceased son of Andrew's.

Order accordingly.

MCDONALD, J.

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CANADIAN STEVEDORING CO. *v.* ROBIN LINE STEAMSHIP CO.

THE SAME *v.* SEAS SHIPPING CO.

CANADIAN STEVEDORING COMPANY, LIMITED v. ROBIN LINE STEAMSHIP COMPANY INCORPORATED AND CANADIAN STEVEDORING COMPANY LIMITED v. SEAS SHIPPING COMPANY, INCORPORATED.

Shipping—Charter-party—Lumber cargo—Stevedoring—Cost of—To be borne by shipowner.

The defendants (owners) entered into a "space" charter-party with the Southern Alberta Lumber Company Limited (charterers) whereby the owners should supply and the charterers should load with lumber, one ship per month for a year. The plaintiff Company were engaged by the representative of the charterer to do the stevedoring at $1.70 per thousand feet, he representing that the charterers were the agents of the owners. Shortly after a number of boats were loaded and for which the stevedoring charges were not paid, the charterers went into liquidation. The material clauses in the charter-party were:

"13. Steamer to pay all port charges, harbour dues and other customary charges and expenses in loading and discharging cargo." "15. Cargo to be stowed under the master's supervision and direction, and the stevedore to be employed by the steamer for loading and discharging, to be nominated by the charterers or their agents, at current rates." "Addendum C. In connection with clause 15, charterers agree to load and stow cargo for One Dollar Seventy Cents ($1.70) per thousand board feet or its equivalent, and agree there will be no extra charges during customary working hours, unless detention is caused by breaking down of machinery, winches or other defects of the steamer. Charterers have the option of working overtime by paying all expenses in connection therewith, but if owners elect to have steamer worked overtime, it is understood this will be subject to charterers' approval and all expenses in this case to be for owner's account."

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THE SAME v. SEAS SHIPPING CO.

In an action to recover the stevedoring charges from the owners:—

Held, that all the terms of the charter-party are reasonably necessary to effectuate the purpose of the contracting parties. They are not inconsistent but may be properly and reasonably read together. Under its terms the charterers became the agents of the owners to engage stevedores and the owners are liable for the charges thereby incurred.

TWO actions to recover stevedoring charges for loading certain vessels of the defendant Companies with lumber. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 23rd of June, 1927.

G. B. Duncan, for plaintiff.

Pattullo, K.C., and *G. S. Clark,* for defendants.

27th June, 1927.

McDONALD, J.: These two actions were tried together as the same facts and circumstances apply to each.

In these reasons for judgment only one of the cases will be referred to.

On August 22nd, 1925, the defendants (owners) entered into a "space" charter-party with Southern Alberta Lumber Company, Limited (charterers), whereby it was agreed that the owners should supply and the charterers should load with lumber one ship per month for a period of one year. This charter-party was renewed by a similar contract for a further year.

The important clauses in question in these actions are: [already set out in head-note].

Judgment

The plaintiff, a Stevedoring Company at Vancouver, through its manager, interviewed one Sereth representing the charterers with a view to obtaining the contract for the stevedoring in connection with the shipments in question. Sereth represented that the charterers were agents for the owners and engaged the plaintiff to perform stevedoring at a rate of $1.70 per thousand feet. The plaintiff's manager stated that in a "time" charter the charterer usually pays stevedoring charges and that in a "space" charter the owner usually pays but not always. He did not ask to see the charter-party in question but accepted Sereth's statements that the charterers were agents for the owners to engage stevedores.

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In respect of several of the shipments, the plaintiff rendered accounts to, *e.g.*, "S.S. Robin Hood & Charterers and Owners." These accounts were delivered to Sereth and were duly paid by a cheque of the charterers.

The "S.S. Robin Goodfellow" was loaded between the 19th and 24th of September, 1926; the "Robin Gray" between the 7th and 13th of November, 1926, and the "Robin Adair" between the 11th and 20th of November, 1926, and these accounts were rendered in the usual way but were not paid. The loading of the "Robin Hood" began on the 24th of November, 1926, and on the 25th of November the charterers went into liquidation. Thereupon it was arranged between the plaintiff, the "custodian" of the charterers, and Mr. Greer, the agent of the owners, that the loading of this ship should proceed and that the owners would be responsible for payment of the stevedoring charges. These charges were in due course paid.

The present actions arise in respect of the stevedoring charges for the loading of the "Robin Goodfellow," the "Robin Gray" and the "Robin Adair."

Judgment

The defence is, that the plaintiff's claim is against the charterers and that no cause of action lies against the owners who have already paid to the charterers the charges in question.

In my opinion, the statement made by Sereth that the charterers were the agents for the owners is, even if admissible, of no effect; the manager of the plaintiff knowing that the relationship between the owners and the charterers could only be definitely ascertained by examining the charter-party as to the matters now involved must be taken to have knowledge of such terms. The point which falls for decision, therefore, seems to be, whether or not, under the terms of the charter-party, the charterers undertook, at their own expense, to perform or obtain performance of the stevedoring or whether the charterers became the agents of the owners to engage stevedores.

In a recent case tried in Seattle, this exact question came up for decision on exactly similar charter-parties, before Federal Judge Neterer, who gave judgment for the defendants. So far as this point is concerned, the learned judge gave the following reasons which are adopted by and relied upon by Mr.

Pattullo as his argument as counsel for the defendants in the present actions (*The Robin Goodfellow* (1927), 20 F. (2d) 924):

"The issue hinges upon the meaning of clause 15 and addenda C. If there is conflict, the addenda controls. Maclachlan's Law of Merchant Shipping, 6th Ed., 309; *Hellenic Transport S.S. Co.* v. *Archibald McNeil & Sons Co.* (1921), 273 F. 290.

"Clause 15 definitely provides for the stowing of the cargo under the master's supervision, and employment of stevedores for 'loading and discharging,' to be selected by the charterer, at current rates. The addenda changes two provisions of clause 15: (a) Definitely fixes the rate for loading at $1.70 per thousand board feet; and (b) charterers agree to load and stow the cargo. Addenda C has a further provision, that charterers may work overtime by paying all expenses, and if the ship desires to work overtime, and the charterers consent, the expense of overtime shall be paid by the ship. This provision has reference only to loading by the charterers, and appears to definitely fix the *status* of the charterers as principal, and not as the agent in ship's employment. If the charterer was to be agent for the ship, the provision was unnecessary, as the stevedores would be the ship's employees, and the ship, of course, would have to pay overtime expense in all events. The provision of clause 15 and addenda C to me is plain. It does not appear ambiguous or to be susceptible to two constructions. The $1.70 per thousand board feet cannot take the place of current rates, as it has reference only to loading, and the current rate applies to loading and discharging, and, specifically, the 'charterers agree to load and stow.'

"The conduct of the parties is in harmony with this conclusion. A number of ships were covered by these charter-parties, covering some period of time, and as in this case the charges for services were rendered to the charterers, and paid by the charterers, except in the instant case, which were not paid. Nor was any demand made upon the owners in this case until long after the service, and the lumber company, or charterer, was insolvent."

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It is common ground, and not disputed, that if the written words contained in addendum C are inconsistent with the printed words in clause 15 the written words must govern and the learned judge bases his reasons upon that well-known principle of construction. I was at first greatly impressed with the learned judge's reasons and Mr. *Pattullo's* argument based thereupon but on further consideration, I revert to the opinion which I formed on first reading the contract, which is, that the provisions in question are not inconsistent and of course, if not inconsistent, must, if possible, be read together so as to give effect to every term in the contract. To paraphrase, I would read the three clauses as if put in the words of the owners as follows:

"We, the owners will pay the stevedoring charges (13); we will employ stevedores named by you (15); and in this connection you will load and

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stow cargo by and through the stevedores so employed by us at a rate not exceeding $1.70 per thousand, unless extra costs should be incurred for some cause arising through our default although our contract provides that you are required to load only 300,000 feet per day; yet you may, if you see fit, require the stevedores to work overtime provided you pay the extra expense; we, on the other hand, may only require the stevedores to work overtime, with your consent and at our own expense."

It seems to me that in this way the intention of the parties would be carried out and that each clause would be given its intended and due effect. I am of opinion that the learned judge erred in two important particulars pointed out by Mr. *Duncan* for the plaintiff, *viz.*, that he fails to give effect to the opening words of addendum C in connection with clause 15 which shewed that the contractors had definitely in mind the terms of clause 15, not a part of the terms as argued by Mr. *Pattullo,* but all of them; and secondly, he omits consideration of the vital fact that the charterers were to provide and the ship was to receive 300,000 feet per day. It seems obvious that if the charterers, for instance, in order to fulfil a contract, wished to hasten the loading, provision must be made for the extra expense so incurred by them; and equally it was necessary to provide that if the owners should wish for their own purposes to hasten the loading they could only do so with the consent of the charterers and at their own expense. The main purpose of addendum C was to provide that the charterers, having the power to nominate the stevedores, should not be in a position by the exercise of that power to obligate the owners to pay a higher price than $1.70 per thousand unless the owners themselves were responsible for creating the necessity to pay such higher price. Looked at in this way, it seems to me that all the terms are reasonably necessary to effectuate the purposes of the contracting parties, that they are not inconsistent but may be properly and reasonably read together. I have not overlooked the fact that clause 15 provides that the stevedoring should be done at "current rates," but it seems to me quite reasonable that the owners should wish to provide, in order to avoid any dispute as to what were the actual current rates from time to time that the rate in any event (save as provided) should not exceed $1.70 per thousand. I am quite unable to conclude that the parties intended that if, for instance, the charterers were able to have

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the work done at (say) $1.50 per thousand they should pocket a profit of 20 cents per thousand.

In view of the above conclusions, it is not necessary that I should deal with the further and important question raised by Mr. *Duncan* as to whether in any event it was *ultra vires* the charterers to enter into a contract for stevedoring.

There will be judgment for the plaintiff in each case for the amount claimed.

Judgment for plaintiff.

DAVIS LOG AND RAFT PATENTS CO. *ET AL.* v. CATHELS.

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Patent—Log rafts—Combination—Novelty—Prior construction of similar raft—Evidence—Infringement—Injunction.

The plaintiffs invented a raft constructed for the purpose of facilitating the transportation of logs up and down the coast of British Columbia for which they obtained a patent. They claimed that the defendant constructed log rafts which were an infringement of the patent and sought an injunction and damages. It was admitted that the defendant's rafts were similar and if the patent was properly granted the plaintiffs were entitled to relief. The defendant claimed: (a) That the patentee was not the first inventor and (b) in any event the alleged invention was not patentable in law through lack of novelty.

Held, that the defendant did not establish by the evidence that the plaintiffs were not the first inventors. The raft when properly retained in position by wire, rope or chain forms one solid structure, its buoyancy for transportation purposes being increased by its manner of formation, making it very safe for deep-sea transportation in rough waters. It has been successful and has novelty both in construction and result and is a patentable invention.

ACTION for an injunction to restrain the defendant from constructing log rafts claimed to be an infringement of a Canadian patent of which the plaintiffs are the holders. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 13th of June, 1927.

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Darling, and *Richards,* for plaintiffs.
J. H. Lawson, and *G. S. Clark,* for defendant.

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MACDONALD, J.: Plaintiffs complain that the defendant has constructed log rafts, which are an infringement of a Canadian patent, of which they are the holders, numbered 146,188, issued on the 25th of February, 1913. They seek an injunction against the defendant, as well as damages. There is no doubt that, if the patent referred to was properly granted, there has been an infringement by the defendant, which would entitle the plaintiffs to relief. It was admitted that the log rafts, which the defendant had been constructing and which, unless restrained, he would continue to construct, were similar to those referred to in the plan and specifications attached to and forming a portion of such patent. The situation does not require the same consideration, for example, as was deemed necessary in *Short* v. *Federation Brand* (1900), 7 B.C. 197. Then, assuming, for the moment, that the patent covers an "invention," the true test, as propounded by the House of Lords in *Clark* v. *Adie* (1877), 2 App. Cas. 315, has been amply fulfilled, *viz.,* "what has been taken is the substance and essence of the invention."

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The defendant seeks to justify his actions, and various grounds are set up, by way of attack upon the plaintiffs' position and rights under the patent. Only two of these, however, require consideration, *viz.,* that the patentee was not the first inventor and that, in any event, the alleged invention is not patentable in law, through lack of novelty.

Before discussing these grounds, however, it is well to bear in mind, the weight which should be attached to a patent and the position of a party seeking to establish its invalidity. The language in a patent should be liberally construed, with a view of maintaining its validity. See *Pacific Cable Ry. Co.* v. *Butte City St. Ry. Co.* (1893), 55 Fed. 764.

In *Rubber Company* v. *Goodyear* (1869), 9 Wall. 788, the Supreme Court of the United States decided that (p. 795):

"A patent should be construed in a liberal spirit, to sustain the just claims of the inventor. This principle is not to be carried so far as to exclude what is in it, or to interpolate anything which it does not contain.

But liberality, rather than strictness, should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius."

Then was Gilbert G. Davis the first inventor of what is now commonly known as the "Davis" log raft? It may be assumed that he complied with section 10 of the Patent Act then in force, which provides—

"Every inventor shall, before a patent can be obtained, make oath, or, when entitled by law to make an affirmation instead of an oath, shall make an affirmation, that he verily believes he is the inventor of the invention for which the patent is asked, and that the several allegations in the petition contained are respectively true and correct."

Compare section 15:

"On each application for a patent, a thorough and reliable examination shall be made by competent examiners to be employed in the Patent Office for that purpose."

Viewing the strength thus obtained by Davis as patentee, the burden rests upon the defendant to shew, that he was not the first inventor. This is sought to be attained solely through the evidence of W. N. Kelly, a mechanical engineer, who stated that he had constructed a raft on the seashore of Wales, which it was contended was similar to the one covered by the patent in question. Before considering such similarity, I should determine whether, if it were established, it would affect the rights of Davis as the first inventor or discoverer of a patentable novelty in Canada. As the law stood when the patent was issued to Davis it was a prerequisite, that the invention should be "not known or used by any other person" before his invention thereof. The statute has since been amended by providing that such invention should not be known or used "by others." The patent thus requires to be supported under the legislation existing at the time of its issuance. It was held in *Smith* v. *Goldie* (1883), 9 S.C.R. 46 that a person, to be entitled to a patent in Canada, must be the first inventor in Canada or elsewhere. While this decision was virtually not followed, by Burbidge, J. in *The Queen* v. *La Force* (1894), 4 Ex. C.R. 14, still, the situation, in this respect, seems to have been fully defined and solved in the case of *The Barnet-McQueen Co.* v. *The Canadian Stewart Co.* (1910), 13 Ex. C.R. 186. It was there held that the judgment in *Smith* v. *Goldie, supra,* supported the headnote to that case. So a quotation from Fisher & Smart on

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Patents, at p. 34, may be accepted as the law affecting patents issued in Canada prior to 1923 as follows:

"There can be little doubt that there can be no limit as to place but that the invention must be new and the inventor must be the first inventor as to all the world."

Then did Kelly, so long ago as 1902, construct a raft so similar to the one covered by the patent, granted in favour of Davis, that the latter was not the first inventor of his raft? While Kelly states he was pleased and proud of the raft, he constructed for specific purposes at that time, still, I do not think it was similar, in the sense that it was not constructed in the same way nor with the same materials nor to serve the same object as the one Davis, after trial and experiment, felt was an invention entitling him to apply for a patent. Without discussing these points at length, it will suffice to refer to the construction of the raft. Kelly, it appears, thought it advisable in that particular locality, on account of the condition of the sea, to transport iron material and square timber by means of a raft. There was nothing extraordinary in this proceeding. As I take it, it is quite usual to transport goods from a ship to the shore by a lighter or barge. He simply made a raft with the load securely fastened to answer the same purpose. Then the formation of the raft was not similar to the one constructed by Davis. It was not held in the same manner by parallel boomsticks. The most important feature of dissimilarity, however, is that the load, in the shape of iron, did not assist in any way in its transportation. In other words, was not buoyant and thus form an assistance in the transportation by water. Then again the object to be served by the raft thus being loaded, and which was accomplished, was simply to convey the load between two points and it was necessary that the amount of iron should not be out of proportion to the carrying capacity of the raft on which it was placed. I do not think that Kelly "invented" anything in constructing his raft. I doubt if he thought he had done so. He simply built a raft, which served his immediate needs and, without any conception that the ideas covering its construction might be utilized in transporting large quantities of logs through portions of the sea, subject to storms and loss in rough weather. It was at most "a mere casual or

haphazard use, which would not have led to the further use of the invention, will not amount to an anticipation": see Fetherstonhaugh, p. 306, citing *Spilsbury* v. *Clough* (1842), 1 W.P.C. 259; *Harwood* v. *G.N. Ry. Co.* (1860), 29 L.J., Q.B. 193 at p. 202, *per* Blackburn, J.; *Rockliffe* v. *Priestman* (1898), 15 R.P.C. 155. He was not the first inventor of the "Davis" raft.

Then in 1912, when Davis experimented and, as a result, during the next year, obtained his patent, was the log raft so sought to be protected by patent, not really patentable in law, through lack of novelty?

Judgments of Maclean, P. in *Canadian Raybestos Co., Ltd.* v. *Brake Service Corp., Ltd.* (1926), 3 D.L.R. 497 and *Pope Alliance Corporation* v. *Spanish River Pulp & Paper Co., ib.* 902 were cited by the defendant, in support of his contention that the Davis raft was lacking in novelty and was not an "invention." While the principles, there enunciated, would of course be applicable, still the facts upon which the judgments were based are not similar to those presented in this case. The necessary quality of invention is one of fact and usually difficult of determination. A prior decision on the subject serves, merely to illustrate the manner in which a Court has treated the previous sets of circumstances and does not constitute a binding authority to determine whether in any given case there is or is not present the necessary feature of inventive genius: Fetherstonhaugh at p. 282 and cases there cited.

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As to what is a proper definition of the term "invention," it has been broadly stated to be:

"The act of devising or contriving, as a result of purpose or forethought, an original contrivance or the construction of that which has not before existed. In short, invention may be termed a step forward in an art. And if a patent does not disclose a step forward in an art and a step forward over existing knowledge there is no invention. No definition can be given which is applicable to all cases in issue. Where there is a doubt each case must be considered and judged by its own facts. Thus Fitzgibbon, L.J., in *Pirrie* v. *York Street Flax Spinning Co.* (1894), 11 R.P.C. 454, said: 'It is obviously impossible to frame any rule which will serve as a guide to shew at once whether any particular instance is one involving invention or not. The authorities are necessarily decisions on particular cases and are useful only as affording some guide to the decisions of any particular instance coming under consideration. Each case must be decided on its own merits and with reference to its own special circumstances.' See also

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Wright & Corson v. *Brake Service Ltd.* (1925), Ex. C.R. at p. 131, *per* Maclean, J.":

see Fetherstonhaugh, p. 279.

The stress of the attack upon the patent, on the ground of lack of invention, is, that the Davis raft is merely an application of already well-known contrivances, to analogous uses, without novelty in their application, and thus not forming a patentable invention. If this be established, it would invalidate the patent even if, as has occurred, there has been commercial success attendant upon the use of such rafts. See *Thermos Ltd.* v. *Isola, Ltd.* (1910), 27 R.P.C. 388. However, if old principles are applied in a new way and by new means, they may involve invention. See Fisher & Smart on Patents, p. 10 and numerous cases there cited.

Combinations, when they produce a new result are considered to be patentable inventions. Even though all the elements of a combination may be old, still the combination itself may constitute an invention: see Fisher & Smart on Patents, p. 13 and cases there cited. Such a combination, it is submitted by the plaintiffs supports their patent. That is, even admitting that the constituent parts of the Davis raft did not contain any novelty in themselves, still, that their combination, especially through the nature of the material and their use as a raft, for transporting logs, was a discovery which was patentable. Witnesses called, even by the defendant, stated that similar rafts had not been constructed upon the Pacific Coast, before Davis patented his raft in 1913. Since that time such rafts had been in extensive use in this Province and have afforded a comparatively safe means of transporting logs not only from the west coast of Vancouver Island but from the Queen Charlotte Islands across the Hecate Straits, a very hazardous stretch of water. Their adoption has thus enabled logs to be safely transported by water and materially benefited the lumber industry. It was admitted that the "Davis" rafts had solved a situation, which was proving a deterrent to the success of logging operations in some portions of the country. To shew the difficulties which were encountered on the west coast of Vancouver Island in transporting logs, a reference might be made to the evidence of William Dickinson, a witness called on behalf of the defend-

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ant. He made various efforts to transport logs with safety but failed. Neither Dickinson, Swan nor any witness called by the defendant, other than Kelly, had even heard of a raft, which bore such a resemblance to the raft constructed by Davis, that his raft could not be deemed an "invention," especially so for the purpose of deep-sea transportation of logs in rough water.

Criticism, as to the lack of inventive genius, through simplicity in the construction of the raft would of itself be of no avail. Even if simplicity were admitted, it is no evidence of want of invention—simplicity is no evidence of want of invention. Spragge, V.C. thus expressed himself in this connection, as follows, in *Yates* v. *Great Western R.W. Co.* (1877), 24 Gr. 495; 2 A.R. 226.

"The great simplicity of an invention is not a ground of objection to a patent therefor, it is rather a recommendation in favour of it."

(See also *Powell* v. *Begley* (1867), 13 Gr. 381 and *Benno Jaffe und Darmstaedter Lanolin Fabrik* v. *Richardson (John) & Co., Ltd.* (1904), 21 R.P.C. 303).

Whether the invention by Davis of his type of raft was the result of experiment or was an accidental discovery, he is entitled to a patent. See on this point, Henry, J. in *Smith* v. *Goldie, supra,* p. 60:

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"There have been some most important inventions made by mere accidental discovery, and after being discovered the great wonder has been, that what appears after discovery so palpable, had never been discovered before. Such may be said to some extent of the discovery in this case; but that is no reason why the inventor should not get the benefit of his discovery, through its protection, as provided by law."

If the "Davis" raft had only contained improvements on old rafts and no new result had been obtained then I do not think a patent would have been obtainable. The remarks of Lord Justice Cotton in *Proctor* v. *Bennis* (1887), 36 Ch. D. 740 at p. 758 are applicable to the present situation as follows:

"The opinions expressed by the judges [in *Curtis* v. *Platt* (1866), 35 L.J., Ch. 852] with reference to mere improvements in an old machine for an old purpose, cannot apply to a case like this, where there was not only novelty in the machine but novelty in the result."

As was mentioned by Ritchie, J. in *Smith* v. *Goldie, supra,* "where the patent is for the combination, the combination is itself the novelty and also the merit." I find here that Davis, viewing the difficulties to be encountered in bringing logs from

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the west coast of Vancouver Island in booms, then generally in use, conceived the idea of constructing a log raft or boom on previously well-known lines but held in position by interwoven steel cable. He then loaded the raft, as it were, with the same material, which was also buoyant in its nature. Subject to the depth of the water in the locality, where it was being constructed, such raft so loaded might be made of considerable size. It was intended to form, when properly retained in position by wire rope or chain, one solid structure. Its buoyancy, for transportation purposes, would be increased by its manner of formation. The raft when completed would, as appears by the plan attached to the patent, by its buoyancy, practically be immersed only to the same extent as a single log. It would in a sense resemble a large log floating on the water. If properly constructed and not too large, it would, as it did, prove very safe for deep-sea transportation in rough waters. It has been, as previously mentioned, successful, and, in my opinion, the Davis raft had both novelty in its construction and in its result. It was a patentable invention. The plaintiffs should be protected, in their rights, for the balance of the eighteen years covered by the patent.

Had I entertained any doubt in coming to this conclusion, I should have borne in mind that "commercial success and extended use will tip the scales when the issue is in doubt but not otherwise": Fisher & Smart on Patents, p. 18 and cases there cited.

The defendant should be restrained from further infringement of the plaintiffs' patents.

As to the claim for damages, if the parties cannot agree there should be a reference to determine the amount. Plaintiffs are entitled to their costs.

Judgment for plaintiffs.

MacGILL v. HOLMES *ET AL.*

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Negligence—Pedestrian run down by automobile—Jay-walking—Contributory negligence—Duty of driver—Decisive cause of accident.

The driver of an automobile should have his car under such control that he is able to come to a stop in the space which he sees clear ahead.

ACTION for damages for negligence. At about 9.15 p.m. on the 1st of June, 1926, the plaintiff, who was on the west side of Thurlow Street, about 20 feet north of Robson, in Vancouver, started to cross the street in a slanting direction (north-easterly) and after coming out from behind a car which was parked on the west side of the street there were no obstructions to a view up and down the street. The defendant's car, driven by one Starmer with the defendant as a passenger, came west on Robson Street and turned north into Thurlow Street. It was getting dusk at the time but the street lights at the corner and in the shop windows gave good light. The car in coming into Thurlow Street from behind the plaintiff, who was at about the middle of the street, ran her down carrying her about 20 feet. Her skull was fractured and a leg was broken. In endeavouring to avoid her the car mounted the pavement and struck a store wall. Tried by HUNTER, C.J.B.C. at Vancouver on the 27th, 28th and 29th of June, 1927. Statement

D. Donaghy, for plaintiff.
Housser, for defendant.

HUNTER, C.J.B.C.: It is becoming more and more apparent that in a city of this size there will have to be drastic regulations regarding both motor and pedestrian traffic if accidents of the kind we have been considering here for the last two or three days are not going to become very numerous. I am informed there is a by-law known as the jay-walking by-law, but for some reason or another it is not fully enforced. It seems to me if there is such a by-law it ought to be fully enforced both in the interests of the motorists and pedestrians, and if there is not one already, the sooner one is passed the better. With regard to this jay- Judgment

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walking business, it has been suggested perhaps many times that there does not seem to be any reason in the world why the liberty of the pedestrian should be interfered with, why he should not be allowed to go over the pavement at any point he wishes. The short answer to that, I think, is this, that so far as the motorist is concerned, he is confined to the roadway; he is not allowed to ramble over the sidewalk for the simple reason if he did it would cause loss of life and a great deal of damage. On the other hand it does not seem to be unreasonable that the pedestrian on his side should be confined to the sidewalks and crossings and in that way he would be in a much better position of safety and the motorist would not have to be continually on his guard as to sudden movements from the sidewalk in the middle of the block. In other words, the law ought to be that the motorist should have the right of way between the crossings and the pedestrian the right of way over the crossings. If that is done both parties will know what each may and may not do. With regard to the cases which have been referred to, particularly some decisions of my own, I may say that in cases of this type, especially concerning the question of negligence, it is very little use to refer to one case as an authority to cover another. All these cases shade into each other the same as day shades into night. What would be negligence in one set of circumstances would not necessarily be negligence in another. I think it is very little use to refer to the cases because unless they state some principle in intelligible language which the Court can follow where applicable, they are really of no use at all.

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With regard to the circumstances of this particular case, it is agreed on all hands that the defendants had come to the corner of Robson and Thurlow and that before making the turn into Thurlow Street the driver, Starmer, had reduced his speed in order to allow a car which was coming in the same direction to pass him. So it is plain enough from that his speed would be considerably reduced, and I am quite prepared to accept the testimony which set it at somewhere about ten miles an hour. Having regard to the nature of that locality, I think it is pretty safe to take it for granted, assuming Starmer was in his ordinary senses and using ordinary care, that he would not attempt to make that turn at a greater speed than ten miles an hour. At

all events, I am quite prepared to accept the evidence that that was about the speed at which he was making the turn into Thurlow Street. He was driving a high-powered car which was capable of quick acceleration, but, on the other hand, as I gather from the evidence, it had no hydraulic brakes, so that it would take some appreciable time to stop the car going at even ten miles an hour if it were necessary in a sudden emergency to do so.

It is common ground that this collision took place at the middle, or near the middle of Thurlow Street at a distance of about two car lengths from the junction of the two streets. It was not caused by the sudden emergence of Mrs. MacGill from the back of the car parked at the curb into the zone of danger which at once distinguishes it from the case of *Vance* v. *Drew* (1925), 36 B.C. 241, because the collision took place in the middle of the street, or near the middle. With regard to the question of the speed at which the car was being driven at the time of the collision, I am of opinion that no inference one way or the other can be drawn from the events which occurred immediately on the heels of the collision, that is, the crashing over the curb and going close to the wall. What one driver might do under such circumstances might not be done by another. The whole thing happened in a small fraction of time and I do not think because the car was not stopped at the curb that any inference can be drawn from that alone that the car was being driven at an undue rate of speed. It might be that in the excitement of the collision the driver did not think of putting his foot on either the foot brake or of using the emergency brake. At all events, that is a circumstance which in all probability seemed immaterial to him and he naturally in the emergency would be trying to avoid the collision as much as he could. He, however, says he could not see this woman in time. I think that is a statement which cannot be accepted. I think he ought to have seen her and could not have helped seeing her assuming that he was vigilant and had his lights in order and therefore, ought to have been able to avoid her unless he was going at too high a speed after making the turn. There was some argument based on what is called the blind spot in the human eye. As almost every person is aware, there is a small arc in the total range of vision which is obscured for an instant of

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time and which is commonly called the blind spot. This, I understand, is where the optic nerve enters the retina, but any obstruction or any invisibility caused by the so-called blind spot exists for such a small fraction of time I think it can be safely disregarded. I think he ought to have seen, so that brings me to considering this, that either, under the circumstances he was using too high a speed after making the turn, or he was not sufficiently vigilant in looking ahead. It may be that he was engrossed in conversation with the lady at his side, or that he was driving at too great a speed having regard to the conditions. It must be remembered this was about 9 o'clock at night and he was emerging from a comparatively well lit street into a darker street and his vision would be affected by that circumstance. It is well known that it takes the human eye a short period of time to accustom itself to the difference between light and darkness. However that may be, I think he was at fault because he had disregarded what I consider the fundamental requirement of all careful driving, no matter what the conditions are, and that is that a man driving a motor ought to be prepared to stop in the space which he sees clear ahead. If he is driving in fog, unless he goes at a mere crawl, he is liable to collide with something; if he is rounding a curve he ought to reduce his speed according to the degree of curvature; on the other hand, in open country, he may go 30 miles an hour with safety, so I think the true principle is that a driver is more or less negligent as the case may be unless he is prepared to stop in the space he sees clear ahead. In this case, there is no reason that I can see why this woman could not have been seen in time if he was sufficiently vigilant and driving at a speed which would enable him to stop his car within the space he could see clear ahead. The maxim *res ipsa locutur* seems to me to apply. The woman was in the middle of the highway and there appears to me to be no reason why, if he were driving as the circumstances required, he could not have seen her sufficiently soon to have stopped or swerved in time to have avoided her. I, therefore, find that the negligent driving of the defendant Starmer was the decisive cause of this accident.

Judgment

Now, with regard to the conduct of Mrs. MacGill. I think she was also negligent, but in a minor degree. The act of jump-

ing back in the agony of the collision is in her case not to be taken as negligence at all. That was an involuntary act caused by the sudden emergency. I think it would be calling things by wrong names to call that particular act in her case an act of negligence. However, I think she was negligent inasmuch as she knew but disregarded her own limitations. She knew perfectly well she was an elderly woman. She knew she no longer had the same control of herself physically that she had when she was young; that her vision was somewhat impaired. It was only ordinary prudence to have gone up to the crossing where the street was illuminated and where she would have been on safe ground. I think she was, to that extent, negligent, in attempting to cross the street the way she did, but I do not think her negligence in that respect was the decisive cause of the accident. That being the case the statute calls upon me to apportion the degree of negligence, and after giving the thing as much consideration as I can I have come to the conclusion it is about in the proportion of 80 per cent. to 20 per cent.

Judgment

With regard to the defendant Miss Holmes, the car is owned by her. She is responsible at common law. She was in the car at the time. There is nothing in the evidence to shew she had parted with her right of control over the car. They were apparently out for a pleasure ride, and under those circumstances there is nothing to negative the presumption that the car was under her direction and control. That being so, it seems to me the cases cited make it clear that she is liable as well as the defendant Starmer. With respect to the assessment of the damages, namely, allowing it at 80 per cent. and 20 per cent., taking into account the hospital expenses, I think there ought to be a total sum of $2,750 awarded to the wife and $250 to the husband, or, if the parties prefer, $3,000 to both, and one set of costs.

Judgment accordingly.

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1927

June 29.

COMPTON v. ALLEN THRASHER LUMBER COMPANY.

Male Minimum Wage Act—Lumber industry—"Incidental"—Meaning of—Cook's wages in lumber camp—Within the Act—Costs—B.C. Stats. 1925, Cap. 32—Order of the Board of Adjustment.

COMPTON v. ALLEN THRASHER LUMBER CO.

The services of a cook are incidental to the carrying on of a lumber camp and he is entitled to the wages prescribed by order of the Board of Adjustment under the provisions of the Male Minimum Wage Act.

On the plaintiff being unsuccessful on the trial the Attorney-General retained and paid counsel to argue the appeal and telegraphed the plaintiff's solicitor that the Government would undertake to pay the costs of the appeal in the event of his being unsuccessful.

Held (MCPHILLIPS, J.A. dissenting, and holding that the general rule should apply, *i.e.*, that the costs should follow the event), that the plaintiff is entitled to all costs incurred by him for which he is responsible.

APPEAL by plaintiff from the decision of ROBERTSON, Co. J. of the 13th of April, 1927, in an action to recover the difference between the wages he agreed to take as a cook in a lumber camp and the amount allowed under the Male Minimum Wage Act. The plaintiff was employed as a cook by the defendant in its lumber camp. The trial judge concluded one employed as a cook did not come within the Act and dismissed the action.

Statement

The appeal was argued at Victoria on the 29th of June, 1927, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Alexis Martin, for appellant: The plaintiff is a cook in a lumber camp. The order of the Board of Adjustment recites that "lumbering industry" includes all the operations in or incidental to the carrying on of lumber camps. My submission is that a cook's work is "incidental" to the lumber industry: see Buckley on the Companies Act, 10th Ed., p. 10; *Deuchar* v. *Gas Light and Coke Co.* (1925), A.C. 691 at p. 695; *Baroness Wenlock* v. *River Dee Company* (1885), 10 App. Cas. 354 at p. 362; *Small* v. *Smith* (1884), *ib.* 119 at p. 129; *Rainford*

Argument

v. *James Keith & Blackman Company, Limited* (1905), 2 Ch. 147 at p. 162.

Harold B. Robertson, K.C., for respondent: This was not exclusively the lumber camp cook-house. Storekeepers, trainmen and travellers had their meals there and paid for them. The men in the employ of the Company boarded themselves and it was optional for the Company's men to go there for meals. Workmen can contract themselves out of the Act: see *Toronto Corporation* v. *Russell* (1908), A.C. 493 at p. 500. When the remuneration is not cash alone it is impossible to put section 11 of the Act into effect.

Argument

Martin, replied.

MACDONALD, C.J.A.: I think the appeal must be allowed. I am not at all sure that this workman could not have claimed a larger sum than he has claimed. He was employed as a cook in a lumber camp, and he was to be paid $75 a month and board.

The order of the Minimum Wage Board fixes the minimum wage at 40 cents per hour. It is quite true that that order is not quite apt, or the circumstances apt to the order. If he must be paid in cash 40 cents an hour, and I think that is the intention of the Act, otherwise it would be impossible to carry out its provisions, then he would be entitled to 40 cents an hour for the days that he worked and the difference between that and the $75 a month for which he had contracted would still be coming to him. This Act is intended, not for the protection of the individual employee alone, but for the protection of all the employees in the industry; and therefore it is not a right to be waived by one or another of the employees; and there is no possibility either, of contracting out of it or waiving its provisions. Employers will have to amend their method of doing business. If the employer in this case had said, I will pay you $75 a month wages and I will give you your board, which we will value at $1.20 a day, then perhaps that could be regarded as a case where the difference only between $75 a month plus the $1.20 a day board and the minimum wage could be arrived at. Employers will have to take that into consideration. I am not deciding, and we are not called upon to decide how it

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would be if the employee were claiming the difference between the $75 a month and the minimum wage, in this case. He is allowing for the value of his board.

With regard to the contention that there ought to be a deduction for the number of hours per day that this employee spent playing pool, or away from his work, I cannot accede to Mr. *Robertson's* contention. The employment here was not employment by the hour, it was employment by the month, and it was an employment as conceded to begin at five o'clock in the morning and end at seven o'clock at night; that was the working day. And that working day rules this case, not the number of hours that he happened to be idle, and which it is claimed ought to be deducted from that day. I think the true construction of the Act requires me to find that the employee can neither contract out of it nor waive his rights under it, and that he is entitled to his working days, as fixed between himself and his employer, at 40 cents an hour.

MACDONALD, C.J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I would allow the appeal and give judgment for the amount claimed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed. With great respect to the learned judge in the Court below, I am of the opinion that he was in error in law in holding that a cook working in the lumber industry did not come within the ambit of the Male Minimum Wage Act. In my opinion the cook does come within the ambit of that Act, because without a cook in these logging camps and sawmills, especially in remote districts, it would be impossible to carry on these undertakings at all. And I think that the Legislature had that fully within its knowledge, and especially as we know in this country, where there are such vast areas of timber, and many of them very far removed from settlement. But whether within the settled or without the settled area, I think in the whole lumber industry, a cook who is employed in preparing meals for the workmen must be held to be working in the lumber industry. It is a necessary part of the carrying out of that industry, and certainly would come within the language of being incidental to the carrying out of that industry.

The Act is one in the nature of a declaration of policy on the part of the Legislature. It is quite within the powers of the Constitution for the Legislature to pass such an Act. We have had this Act before us, and we have had to consider it; and we also dealt with the powers and the validity of a minimum wage, that is, that 40 cents an hour in the lumber industry was a valid exercise of the powers given to the Board of Adjustment.

Now that minimum wage was promulgated, and as I have said, we passed on the matter in *Rex* v. *Robertson and Hackett Sawmills Ltd.* (1926), 38 B.C. 222 and we held that it was within the power of the Board of Adjustment to make the order it did.

This Act also proceeds to define what the civil rights of the employee may be. Firstly, we have 40 cents an hour fixed as the minimum wage. Then, secondly, we have the employee's civil right; he is entitled to that, and if he is paid less he may claim the full amount. The Legislature has made a statutory contract for him. This view that I am now expressing is quite within the *ratio decidendi* of *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1920), A.C. 184. There the Privy Council held that the Workmen's Compensation Act was a statutory contract made in favour of the workman. And in that particular case it was the officers and sailors on the Sophia; their dependants made a claim, to which the Board acting under the Workmen's Compensation Act were willing to accede, that the dependants of the officers and sailors that went down on the Sophia were entitled to compensation under the Workmen's Compensation Act, upon the view that they were employed in the Province of British Columbia, going upon a British ship, and notwithstanding it was lost within American waters, that a term of their contract of service was the statutory one contained in the Workmen's Compensation Act; that is, it was a civil right that they could claim. Now, here, the Legislature has empowered the Board of Adjustment to fix the minimum wage. That has been done. Then, having been done, the employer must guide himself in accordance with that. He is disentitled, in my opinion, to pay less than the minimum wage. In this particular case it is 40 cents an hour. The civil right is given by section 11:

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"If any employee is paid less than the minimum wage to which he is entitled under this Act, the employee shall be entitled to recover from his employer, in a civil action [which is this case], the balance between the amount paid and the amount of the minimum wage, with costs of action."

Now this is his civil right, as it was in the *Workmen's Compensation* case, the dependants of the officers and sailors had a civil right accorded to them by statute, and this plaintiff here has a civil right accorded to him by the statute. And to accentuate that, and to shew that there can be no departure from it, it is only necessary to turn to section 10, the penalty provision, which reads:

MCPHILLIPS, J.A.

"Every employer who contravenes any order of the Board [now he would contravene the order of the Board if he does not pay the minimum wage] made under this Act by the payment of wages of less amount than the minimum wage fixed by the Board shall be liable, on summary conviction, to a penalty of not less than fifty dollars nor more than five hundred dollars for each employee affected."

Now this section denotes the intention and policy of the law, and that is, that once the minimum wage is fixed, that minimum wage must be paid, and penalties may ensue if not paid; and further, a civil action at law may be brought, such as this is, and the employee, here the cook, is entitled to succeed. With great respect to the learned judge in the Court below I think the action should have succeeded, and I would allow the appeal.

MACDONALD, J.A.

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

Appeal allowed.

Robertson, on the question of costs: Mr. *Martin* was retained by the Attorney-general who paid him and my submission is there should be no order as to costs.

Argument

Martin: The solicitor for the appellant received a telegram from the Attorney-general undertaking payment of costs of appeal in the event of his being unsuccessful before the Court of Appeal, but this only applies to the costs ordered to be paid by the Court in the event of his not being successful. The appellant's solicitor prepared the appeal book and performed such other services as were required to bring the appeal before this Court. I was retained by the Attorney-general who paid my fees as counsel.

MACDONALD, C.J.A.: The order as to costs will be that the plaintiff is entitled to all costs incurred by him for which he is responsible. Any costs that were not incurred by him he is not entitled to, since he is only entitled to costs by way of indemnity.

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

MCPHILLIPS, J.A.: I think upon the accepted facts of this case, the Attorney-General intervened to see that this appeal would be heard on the ground, no doubt, that it was in the public interest. The plaintiff, the employee, really prosecuted the appeal. All that the Attorney-General undertook to do was this, that if the appeal was unsuccessful, the costs of the appeal that the plaintiff would be put to would be borne by the Crown. The appeal has succeeded, the event has happened, not the event that the Attorney-General said would impose any liability upon the Crown, but the event has happened which removes any liability from the Crown. And in my opinion the order should be as provided by statute, *i.e.*, costs follow the event.

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

Solicitor for appellant: *A. McB. Young.*
Solicitors for respondent: *Wilson & Wilson.*

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April 1.

ENNIS GOLD MINING COMPANY v. HENDERSON

ENNIS GOLD MINING COMPANY LIMITED v. HENDERSON *ET AL.*

Mining law—Hydraulic leases—Water licences—Works in connection with use of water—Appurtenancy—R.S.B.C. 1924, Cap. 271, Sec. 13.

The plaintiff obtained an option on several mining leases. The ground had previously been worked by one H. who constructed a water system for washing the gravel but after operating for a time abandoned the property leaving certain chattels used in connection with the water system on the ground. Upon the plaintiff commencing operations it purchased the chattels from H.'s estate and used them until it in turn abandoned the properties. The owners took possession and refused to give up the chattels claiming that the water licences authorizing the plaintiff to use water are together with all works constructed appurtenant to the lease and cannot be separated from the property.

Held, that the defendants have not satisfied the burden of proof which is upon them to shew that these chattels were in fact to be regarded as part of the works which are appurtenant to the leases. They are in fact parts of the mining machinery and appliances for recovering the gold, not of the water system, and are quite separate and distinct from those works and not attached in any way to them or to the soil.

APPEAL by defendants from the decision of MORRISON, J. of the 6th of December, 1926, in an action of *detinue*. Two men named Wright and Ennis had obtained an option on several mining leases of the defendants. Previous to this option having been given the same properties were worked by one Hobson who had constructed a water system including the laying of pipes and when he abandoned the property he left a quantity of hydraulic mining material on the ground. When the Ennis Gold Mining Company, through Wright and Ennis, commenced operating, they, at the defendants' suggestion, bought all the material left on the ground by Hobson, from the Hobson estate. The plaintiff Company continued to operate with the material that it had so purchased, and the option was extended from time to time by the defendants to Messrs. Ennis and Wright, and the Company, although working the properties, was never a party to the extensions. Eventually the option was abandoned and the defendants took possession of the ground and

Statement

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the chattels. On the Company bringing an action of *detinue* the defendants claimed that under section 13 of the Water Act they were entitled to retain all "works" constructed for using the water as appurtenant to the leases, which included 4 monitors, 4,000 feet of pipe, 5 steel riffles and 2 gate-valves. They further counterclaimed for interest they claimed was due under the indentures extending the options. The plaintiff recovered on the action and the counterclaim was dismissed.

Statement

The appeal was argued at Vancouver on the 1st and 2nd of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

F. A. McDiarmid, for appellants: At the time they abandoned the option on the property they owed us $3,800. We claim we have a right to hold what was on the ground particularly the water equipment and machinery consisting of monitors, steel piping and riffles. The dam, flume, pipe and monitors belonged to one Hobson, and the plaintiff bought these from Hobson. The minute they abandoned the property the whole of their water system and all the works constructed thereunder then became appurtenant to the land. The word "construction" falls under the definition of the word "works." We are entitled to the monitors, pipe, riffles and gate-valves.

Alfred Bull, for respondent: The option was given in April, 1923, to Wright and Ennis and the Company was formed in July, 1923. If there is any debt it is owing by Wright and Ennis but not by the Company. It is merely an option and no liability attaches. He says the water system became appurtenant to the soil but he cannot possibly claim any more than what is in place. The penstock is attached but we are entitled to everything from the penstock to the nozzle.

McDiarmid, replied.

Cur. adv. vult.

1st April, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Wright and Ennis, a firm, took an option on several mining leases from the defendants, other than the defendant McDiarmid. The ground leased had been pre-

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viously worked by one Hobson who had constructed a water system for washing the gravel. Hobson abandoned the ground but left on it certain chattels which admittedly he was at liberty to remove. The plaintiff Company was at no time the assignee of the opiton. It was, however, the operating Company and bought the chattels now in question from the Hobson estate at defendants' suggestion.

The option was extended from time to time by indentures but these extensions were always granted to Wright and Ennis and not to the plaintiff. Eventually the option was abandoned and the defendants took possession of the leased ground and of the said chattels and refused to give the chattels up to the plaintiff, who thereupon brought this action of *detinue*. The defendants resisted and also counterclaimed for interest, which they allege was due under one or more of the said indentures extending the option.

The defendants have abandoned all claim to the chattels in question except four items and with respect to these items they found their claim upon the Water Act, R.S.B.C. 1924, Cap. 271, relying particularly upon section 13. They argue that the water licences authorizing plaintiff to use water by means of Hobson's constructions are together with all works constructed thereafter, appurtenant to the leases and that those four items are part of such works and, therefore, cannot be separated from the property to which they are appurtenanced. It becomes necessary, therefore, to consider this submission and the question is, have defendants satisfied the burden of proof which was upon them to shew that these items were in fact to be regarded as part of the works which are appurtenant to the leases? In my opinion, they have failed to satisfy that burden. Those four items consist of (a) four monitors; (b) four thousand feet of metal pipe; (c) five chilled steel riffles for 108 feet flume; and (d) two 16-inch gate-valves. The licences granted leave to take and use water for mining purposes; the work to be constructed and the conditions upon which the taking and use and storage are under the directions of the Water Board. The four items above enumerated are not shewn to be parts of the works authorized or required nor would one expect them to be parts of such

MACDONALD, C.J.A.

works. They are I think parts of the mining machinery and appliances for recovering the gold, not of the water system and are quite separate and distinct from those works and are not attached in any way to them or to the soil. The judgment in the action should, therefore, not be disturbed.

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I think the counterclaim must fail. There was no privity of contract between the plaintiff and the defendants. Moreover on the true construction of the instruments, granting extensions, the non-payment of interest would not create a debt but merely a ground of forfeiture of the option. On the counterclaim as well, the judgment should not be interfered with.

MACDONALD, C.J.A.

MARTIN, J.A.
GALLIHER, J.A.
MCPHILLIPS, J.A.

MARTIN, GALLIHER and MCPHILLIPS, JJ.A. would dismiss the appeal.

MACDONALD, J.A.: The plaintiff (by counterclaim) on behalf of Standard Mining Company claims payment of $3,832.50 as a debt for interest on payments set out in certain option agreements. This claim is made against the Ennis Gold Mining Company Limited (defendant by counterclaim) and plaintiff in the original action. When one turns to the agreements referred to under which this claim is made, it is found that the Ennis Gold Mining Company Limited are not parties to them at all. The agreements were entered into by the plaintiff (by counterclaim) with one H. D. Wright and David Ennis. I do not find it necessary to determine whether or not interest was only made payable on condition that the option was exercised or payable at all upon the true construction of the various agreements because, in any event, no privity of contract has been established. Liability on the covenants attach only to the parties to the instrument.

MACDONALD, J.A.

The main action is brought for the return of certain chattels wrongfully detained or for their value and damages for the detention. The exact chattels were sufficiently indicated and agreed upon during the argument. The plaintiff (by original action) acquired the chattels in dispute by purchase but it is contended, that when it abandoned the leases held under the option agreements referred to, they became the property of the defend-

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ants by virtue of section 13, subsection (1) of the Water Act, Cap. 271, R.S.B.C. 1924. I do not think this section has any application to the chattels in question. They cannot be regarded on the evidence as part of the water system, certainly not as "works constructed thereunder."

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *F. A. McDiarmid.*
Solicitors for respondent: *Tupper, Bull & Tupper.*

ARBUTHNOT v. HILL.

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1927

March 15.

ARBUTHNOT v. HILL

Practice—Costs—Motion dismissed—Appeal—Dismissed on an equal division of the Court—Unusual circumstances—Equal division of the Court as to costs—No order as to costs of appeal.

A motion to compel a third party to pay the remainder of a judgment and the costs upon the ground that he was the instigator of the action and instructed a solicitor to issue the writ without authority, was dismissed. An appeal was taken and dismissed by an equal division of the Court. On motion by the third party for the costs of the appeal:—

Held, per MACDONALD, C.J.A. and MACDONALD, J.A., that the rule always followed is that when the Court is equally divided the respondent is entitled to his costs.

Per MARTIN and MCPHILLIPS, JJ.A.: That the process of the Court below was abused and an imposition of a most reprehensible kind was practised on the Court and when a party has so misconducted himself he cannot have the assistance of the Court to obtain any benefit from the proceedings. It follows that no direction as to costs should be given.

The Court being equally divided no order was made as to the costs of the appeal.

MOTION to the Court of Appeal by the respondent for the costs of the appeal from the order of MCDONALD, J. dismissing a motion by the appellant for an order compelling the respondent C. P. Hill to pay the balance of the judgment debt and the costs of the action of *Pacific Coast Coal Mines* v. *Arbuthnot* (1916), 23 B.C. 267 on the ground that he was the instigator of the action; that he was the real plaintiff and acted without authority in retaining solicitors to issue the writ and prosecute the action. The appeal was dismissed on an equal division of the Court. Statement

The motion was heard at Vancouver on the 15th of March, 1927, by MACDONALD, C.J.A., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

A. H. MacNeill, K.C., for the motion: It has always been the rule that when there is an equal division of the Court, the appeal is dismissed and the costs follow the event: see *Stanley* v. *Lalonde* (1920), 2 W.W.R. 603 at p. 605; *Newcomb* v. Argument

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Green (1923), 32 B.C. 395; *Long* v. *Hancock* (1885), 12 A.R. 137 at p. 156.

Mayers, contra: The circumstances of this case are such that the rule referred to should not be followed. The evidence at best discloses that Arbuthnot was justified in taking these proceedings. The cases referred to do not apply here.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would give costs to the respondent. That is the rule we follow when the Court is equally divided. We have followed it consistently during the seventeen years of the Court's existence. Two of my learned brothers feel strongly that the appellant should have succeeded and because of this feeling would refuse to join with the two of us who take the opposite view; the result is there can be no order. There was no event and without the concurrence of a majority nothing can be done.

MARTIN, J.A.

MARTIN, J.A.: I quite agree with what my brother has said about the Court making the order which, as he says, is the general rule of this Court. The circumstances of this case nevertheless are of such an unprecedented kind that for the first time I feel it is my duty to depart from that course in regard to costs since the establishment of this Court. My judgment being based, and as I understand, that of my brother MCPHILLIPS, upon the fact that the process of the Court below was abused, and that an imposition of a most reprehensible kind was practised on the Court, it would obviously be impossible for me to say, when a party had so misconducted itself, that he could invoke the assistance of the Court to obtain any benefit from the proceedings which I regret to say were, in my opinion, a fraud upon the Court. Therefore, not because this case is an ordinary one, but because it is an extraordinary one, I think the proper extraordinary order to make is that no direction as to costs should be given.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The Court being equally divided in opinion and being of the opinion that the appeal should be allowed, in the result the appeal stands dismissed. It remains to be decided whether the respondent should be accorded the costs of the appeal.

I would consider it a stultification of my judicial duty to give costs when I consider the reasons that I have given for my judgment. If there has been an abuse of the process of the Court; if there has been contempt of Court; if there has been a fraud perpetrated upon the Court; and if the Court was not wholly informed of all the facts how could any judge, being of the opinion I am, give costs? I may be wrong in my judgment, but certainly in conforming with my judgment I would make no order as to costs.

MACDONALD, J.A.

MACDONALD, J.A.: If there was any abuse of the process of the Court it was not by any parties to this appeal. Whether or not there was such an abuse by solicitors, I will not express an opinion. I would award the costs to the respondent.

The Court being equally divided no order was made.

IN RE CONSTITUTIONAL QUESTIONS DETERMINATION ACT AND *IN RE* SECTION 100 OF THE LEGAL PROFESSIONS ACT.

Constitutional law—Legal Professions Act, Sec. 100—Validity—Maintenance and champerty—R.S.B.C. 1924, Cap. 46, Sec. 3; Cap. 136, Sec. 100.

Section 100 of the Legal Professions Act provides that: "Notwithstanding any law or usage to the contrary, any barrister or solicitor in the Province may contract, either under seal or otherwise, with any person as to the remuneration to be paid him for services rendered or to be rendered to such person in lieu of or in addition to the costs which are allowed to said barrister or solicitor, and the contract entered into may provide that the barrister or solicitor is to receive a portion of the proceeds of the subject-matter of the action or suit in which the barrister or solicitor is or is to be employed, or a portion of the moneys or property as to which the barrister or solicitor may be retained, whether an action or suit is brought for the same or a defence entered or not, and such remuneration may also be in the way of commission

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IN RE CONSTITUTIONAL QUESTIONS DETERMINATION ACT AND IN RE SECTION 100 OF THE LEGAL PROFESSIONS ACT

or percentage on the amount recovered or defended against, or on the value of the property about which any action, suit, or transaction is concerned."

On a reference to the Court of Appeal under section 3 of the Constitutional Questions Determination Act as to the validity of this section:—

Held (MARTIN, J.A. expressing no opinion, and MCPHILLIPS, J.A. dissenting), that all that portion of the section from the word "solicitor" in the sixth line thereof to the end, is *ultra vires* of the Legislature of the Province of British Columbia; the remainder is *intra vires*.

Per MACDONALD, C.J.A.: The Constitutional Questions Determination Act should not be invoked in matters such as the one with which we are concerned. The contractual rights of solicitors with their clients is not a question of public importance and the offices of the Court ought not to be invoked as a medium for determining extra-judicial questions of a private nature. The Legislature never intended that the Act should be used other than for obtaining advice of the Court on constitutional questions of high public concern.

Statement

THE Lieutenant-Governor in Council duly approved of a report of the Executive Council that the constitutionality of section 100 of the Legal Professions Act, being chapter 136 of the Revised Statutes of British Columbia, 1924, has been questioned on the ground that it is legislation dealing with criminal law, and therefore within the exclusive jurisdiction of the Parliament of Canada. They recommend that under the powers conferred by section 3 of the Constitutional Questions Determination Act, R.S.B.C. 1924, Cap. 46, the following questions be referred to the Court of Appeal for its opinion thereon, namely:

"1. Is section 100 of the Legal Professions Act, chapter 136 of the Revised Statutes of British Columbia, 1924, *intra vires* of the Legislature of the Province of British Columbia?

"2. If the said section is *ultra vires* in any respect, in what respect, and by reason of what provisions contained therein is it *ultra vires?*"

The reference was argued at Vancouver on the 21st of March, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C., for the Attorney-General: The case of *Taylor* v. *Mackintosh* (1924), 34 B.C. 56 does not decide the matter as it is only dealt with by the Chief Justice. My submission is that: (1) Champerty is not a criminal offence in British Columbia; and (2) the section is not *ultra vires* because the Legislature does not refer to the criminal law of

champerty but merely changes conditions so that there is no occasion for the criminal law to apply. On the first point see *Thomson* v. *Wishart* (1910), 19 Man. L.R. 340. The facts in this case are precisely the same as in the Manitoba case. The English Law Ordinance, 1867, R.L.B.C. 1871, No. 70, includes the words "as far as applicable" and brings it within the above case. The cases that would appear to be against us are *Briggs* v. *Fleutot* (1904), 10 B.C. 309, and on appeal, 35 S.C.R. 327; *Meloche* v. *Deguire* (1903), 34 S.C.R. 24; and *Hopkins* v. *Smith* (1901), 1 O.L.R. 659, but with the exception of the Ontario case they are merely *dicta* and in the Ontario case it came up on a question as to the civil validity of an agreement. On the second point, even if the criminal law does apply, conditions have so changed that the Province in passing the Act is not infringing on the criminal law. On the definition of maintenance and champerty see *British Cash and Parcel Conveyors, Lim.* v. *Lamson Store Service Co.* (1908), 77 L.J., K.B. 649 at p. 658; Pollock on Contracts, 9th Ed., 404. Champerty is a species of maintenance. When we take a share in the fruits of litigation we are not infringing on public policy: see *Attorney-General of Canada* v. *Attorney-General of Ontario* (1897), 67 L.J., P.C. 17 at p. 21.

Argument

Griffin, for the Vancouver Bar Association, referred to Crankshaw's Criminal Code, 5th Ed., p. 24, sec. 11; *Dillingham* v. *Wilson* (1841), 6 U.C.Q.B. (o.s.) 85; *Lawless* v. *Chamberlain* (1889), 18 Ont. 296 at p. 309; *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186 at p. 210.

Cur. adv. vult.

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MACDONALD, C.J.A.: This is a reference to the Court under the first-mentioned Act. Section 100 of the Legal Professions Act professes to make champertous agreements legal when made between solicitor and client. We are asked to say whether or not this section is *intra vires* of the Provincial Legislature.

A similar question came before the Court in a concrete form in *Taylor* v. *Mackintosh* (1924), 34 B.C. 56, but was not finally decided owing to a division of the Court on the grounds raised in that case. The Court was composed of three members. I

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was of opinion that that part of the section authorizing a solicitor to bargain for a share in the proceeds of the litigation was *ultra vires;* my brother MARTIN decided the case on another ground, and my brother MCPHILLIPS was of opinion that the section was *intra vires.*

I have little to add to the opinion I there expressed in writing. There is, however, one ground which was strongly urged in argument here, and urged there as well, but which was not referred to in my reasons for judgment, upon which I desire to say a few words. It is the ground upon which the judgment in *Thomson* v. *Wishart* (1910), 19 Man. L.R. is founded, namely, that the law of champerty was by local conditions rendered inapplicable to that Province and that it had in fact not been introduced by legislation there. The Court said that in this respect Manitoba differed from the other Provinces, including British Columbia. My judgment, therefore, in *Taylor* v. *Mackintosh, supra,* is not in conflict with the professed grounds of the Manitoba decision, but inferentially that judgment goes further than it professes to go, and as I read it, decided that the law of champerty as a crime had long been obsolete. With this latter question I dealt fully in *Taylor* v. *Mackintosh, supra,* it being a ground which seemed to me to have been effectually disposed of against Mr. *Farris's* contention here, so far at least as this Province is concerned by the cases there referred to.

So much for the questions argued in this appeal. I cannot, however, leave this case without expressing the hope that the Constitutional Questions Determination Act will not often be invoked in matters such as the one with which we are now concerned. I do not, however, presume to criticize an Act of the Legislature. It is not for me to do so, but I may express my opinion concerning the wisdom and justice of using that Act to promote private interests. The contractual rights of solicitors with their clients is not a question of public importance and the offices of the Court ought not to be invoked as a medium for determining extra-judicial questions of a private nature. Like scores of other questions which arise in disputes between private parties, their rights may depend on the construction of statutes and on the power of the Legislature or of Parliament to pass them, but the decision of such cases when the public is not con-

cerned ought to be left to the Courts in the exercise of their judicial functions at the initiative of the parties concerned and not at the expense of the people at large. In this matter it is not the Government of the Province, but the lawyers and their clients who are concerned. I venture to think that the Legislature never intended that the Act should be used other than for obtaining the advice of the Court upon constitutional questions of high public concern.

I would answer the question as follows: That part of the section from the word "solicitor" in the sixth line thereof, to the end, is *ultra vires* of the Legislature of the Province of British Columbia; the remainder is *intra vires*.

MARTIN, J.A.: This is a reference by His Honour the Lieutenant-Governor in Council to this Court (pursuant to the 4th section of the Constitutional Questions Determination Act, Cap. 46, R.S.B.C. 1924) to obtain our opinion upon two questions submitted respecting the validity of section 100 of the British Columbia Legal Professions Act, Cap. 136, R.S.B.C. 1924.

The matter came up for "hearing and consideration" under said section 4, during the March sittings and counsel appeared on behalf of the Attorney-General of the Province to support the validity of the Provincial enactment in question, but no one appeared in support of a contrary view despite the fact that references of this nature are presumably of general public importance otherwise this Court would not be asked to consider them. Such a situation, the appearance of counsel on one side of the question only, is without precedent in this Province in references of this kind, and it is obvious that an opinion based upon a presentation of one aspect only of an important matter cannot be of that weight which the statute seeks to attain nor could it establish a safe precedent. After the conclusion of the argument we reserved our judgment upon the matter and, in view of grave differences of opinion that arose, we thought it desirable for a better elucidation of the questions to exercise the power given us by section 6 of the Act as follows:

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"The Court of Appeal or judge shall have power to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing, and such persons shall be entitled to be heard."

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We accordingly directed, on the first day of this term, that notice of the hearing should be given to the Law Society of British Columbia, as the "person interested" pre-eminently in the matter in view of the wide powers conferred upon it by the Provincial Legislature for the regulation of the legal profession and protection of the public under the said Legal Professions Act, and on the 8th of June the Attorney-General was notified in writing by the registrar of our said statutory direction that the Law Society should be "notified" as aforesaid and that "when the Law Society give their decision as to whether or not they will appear then the Court will fix the case for further argument."

Since then over three weeks have elapsed, with this Court in session, but on this final day of it no counsel appear and there is nothing before us to shew that our direction has been carried out, either by any affidavit of service of the notice in the usual way or even by any statement of counsel on behalf of the Attorney-General, who has not since appeared before us, and as the matter stands it can only be inferred that the direction of this Court has been ignored and the requirements of the statute have not been complied with. In such unusual circumstances it would not be proper for us, in my opinion, to proceed any further in the matter till the law is complied with by the representatives of the Crown, and therefore I must respectfully dissent from any opinion being expressed by this Court until due compliance has been made to its said statutory requirement and direction.

MARTIN, J.A.

GALLIHER, J.A.: After full consideration of the arguments by Mr. *Farris* and Mr. *Griffin,* and of the authorities cited, I am in accord with the reasons for judgment of my learned brother the Chief Justice, as delivered in the case of *Taylor* v. *Mackintosh* (1924), 34 B.C. 56.

GALLIHER, J.A.

In my opinion the section from the word "solicitor" in the 6th line thereof, is *ultra vires* of the Provincial Legislature.

MCPHILLIPS, J.A.: In the matter submitted by His Honour the Lieutenant-Governor in Council for hearing by this Court respecting the validity of section 100 of chapter 136, R.S.B.C. 1924, I have little to add to my judgment in *Taylor* v. *Mackin-*

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tosh (1924), 34 B.C. 56 at pp. 67-73. There a contract between a solicitor and his client was under review, but it was not authoritatively determined in that case that the impugned section of the Legal Professions Act, section 97, R.S.B.C. 1911, Cap. 136 (now section 100, R.S.B.C. 1924) was *ultra vires.* My brother the Chief Justice so held; my brother MARTIN did not find it necessary to determine the point and I held that the legislation was *intra vires,* therefore the question remained open.

To well understand the question it is well to commence with the legislation which constitutes the basis of the law of British Columbia and I here quote the statute in full:

"WHEREAS it is expedient to assimilate the Law establishing the date of the application of English Law to all parts of the Colony of British Columbia:

"Be it enacted by the Governor of British Columbia, with the advice and consent of the Legislative Council thereof, as follows:

"1. 'The Proclamation having the force of Law to declare that English Law is in force in British Columbia,' of the 19th day of November, 1858, is hereby repealed. Provided, however, that such repeal shall not affect any rights acquired, or liabilities incurred or existing before such repeal; but such rights and liabilities, civil and criminal, and all remedies and punishments thereunder shall still, notwithstanding such repeal, be capable of enforcement and imposition, as if this Ordinance had not been passed, but not further or otherwise.

"2. From and after the passing of this Ordinance, the Civil and Criminal Laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia. Provided, however, that in applying this Ordinance to that part of the Colony previous to the Union known as British Columbia, the said Civil and Criminal Laws as the same existed at the date aforesaid shall be held to be modified and altered by all past Legislation (of the said Colony of British Columbia before the Union, and of the Colony of British Columbia since the Union) affecting the said Colony of British Columbia as it existed before the Union.

"Provided, also, that in applying this Ordinance to that part of the Colony heretofore known as the Colony of Vancouver Island and its Dependencies, the said Civil and Criminal Laws as the same existed at the date aforesaid shall be held to be modified and altered by all past Legislation of the said Colony of Vancouver Island, and of the whole Colony of British Columbia since the Union, affecting the former Colony of Vancouver Island and its Dependencies.

"3. The Short Title of this Ordinance is 'The English Law Ordinance, 1867.'"

Now it is seen that the laws of England of the 19th of November, 1858, were introduced save "and so far as the same are not

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from local circumstances inapplicable." In my opinion, and as I have previously held in *Taylor* v. *Mackintosh, supra,* any law relative to maintenance or champerty was wholly inapplicable to British Columbia in 1858. This Province was, indeed, only sparsely settled and vast then as now in area and the main occupation of any considerable body of people scattered about the Province was mining and ranching, and the commercial business that was necessarily developed in consequence of this. In the main it may be well said that the Province was attracting the venturesome and roving spirits of the time, principally miners; it was a time well known historically as inaugurating the gold rush of 1858. It was not a country of settled conditions; all was speculation, little permanent settlement. It is well known that this class of people are not, save in few instances, possessed of any considerable means; it was a day of speculative endeavour and the poor miner was oftentimes called upon to obtain legal assistance and what had he to offer in payment for legal fees but some interest or fruits of the litigation when he became embroiled in law suits? It was never, I feel free to say, thought for a moment that any such inhibition as the law of maintenance and champerty stood in the way. Further, it is fitting to say that through the long years of active mining and speculation generally nothing transpired to shew that the legal profession conducted themselves other than honourably and reasonably in all their relations with their clients. It is also well to remember that the legal profession in British Columbia in 1858 numbered men of signal ability and probity, and all later history has been equally to the credit of that profession. There followed the gold rush of Cariboo, the mining in Cassiar, and later again, Atlin, and throughout all these years it was a matter of necessity to a very large extent that the legal profession should make contracts with their clients relative to some proportional interest from and out of the fruits of the litigation. In many cases were this not possible it would have resulted in deprivation of rights and loss of properties by adverse interests powerful as to means with the poor miner or prospector utterly at their mercy. This condition of things existing throughout long years and not apparently operating against the public interest we find the Legislature in 1901 crystalizing into statute

law the right to barristers and solicitors of contracting to be paid portions of the proceeds of actions. The legislation was introduced by the Government of the day and was a Public Act, although having relation to the Legal Professions Act being "An Act to Amend Chapter 24 of the Revised Statutes of British Columbia, being the 'Legal Professions Act,'" and provision was made for the review of the contract by a judge of the Supreme Court. This legislation still continues so that all proper safeguards were thrown around the making of any such contracts. We have therefore legislation now existent 26 years and it is significant that there has never been any hint or suggestion that it is legislation that has operated in any way to the prejudice of the interests of the people. In view of this I do not wonder that the Government of the Province has thought fit to submit the questions for answer, with a view no doubt of having the matter considered and reviewed and passed upon by the Court of Appeal and the opinions of judges obtained thereon. It is not well that statute law which has been existent so long and which is of the organic law of the land should be questioned without the closest scrutiny thereof admitting of the law-making authority thereafter taking such steps as they may be advised. It has been pressed that the situation is not the same in British Columbia as in Manitoba, that Province being the first to legislate along the same lines. In my opinion the analogy is complete and it is also my opinion that the judgment of the Court of Appeal of Manitoba, delivered by Perdue, J.A. in *Thomson* v. *Wishart* (1910), 19 Man. L.R. 340, is a decision which completely covers the questions here put.

MCPHILLIPS, J.A.

In my opinion section 11 of the Criminal Code of Canada, Cap. 146, R.S.C. 1906, offers no difficulty as undoubtedly in introducing the law of England as of the 19th of November, 1858, "so far as the same are not from local circumstances inapplicable" absolutely excludes any laws relative to maintenance and champerty.

Further as pointed out by Perdue, J.A. in *Thomson* v. *Wishart, supra,* the law with respect to maintenance and champerty is obsolete and it was obsolete at the time that British Columbia took the laws of England, *i.e.,* the 19th of November,

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1858. I would refer to what Perdue, J.A., at p. 347, said, upon this point:

"The result is that, although maintenance, including champerty, is still technically an offence, it is not now treated as a crime and is only invoked for the purpose of raising a defence that an agreement is illegal, as being against the policy of the law, and cannot therefore be enforced. To remove this illegality or invalidity in a contract and make it enforceable would belong to the legislative authority which has exclusive jurisdiction over property and civil rights. Being no longer regarded as a crime it does not fall within the general class of 'The Criminal Law.' The branches of it still recognized as crimes, such as conspiracy and perjury, are dealt with in the Code as specific offences."

In submitting the questions no doubt His Honour the Lieutenant-Governor in Council was advised by the Honourable the Attorney-General that the matter was one of public policy and it was in the public interest that questions be put to the Court of Appeal under the Constitutional Questions Determination Act, and if I may say so, in my opinion, the matter is one of first importance and it is eminently in the public interest that the debatable points should at an early date be finally determined, and in this connection I might say that as the majority opinion is by statute (see section 7, Cap. 46, R.S.B.C. 1924) a judgment of the Court of Appeal and an appeal shall lie therefrom, it would be well if the judgment be adverse to the validity of the legislation, that a further appeal be taken to the Privy Council as there is no appeal to the Supreme Court of Canada upon questions put to this Court under the Constitutional Questions Determination Act, that Court having so determined.

Upon the question of public policy I would refer to what Sir Montague E. Smith said in delivering the judgment of their Lordships of the Privy Council in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186 at p. 210:

"Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party;

or to be made, not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them."

Here we have by the legislation every precaution taken against it being possible to maintain an unconscionable contract —the contract is subject to review by a judge of the Supreme Court. The rule of the Privy Council which would admit of the matter being appealed to the Privy Council reads as follows:

"2. (*b*) 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 or otherwise, ought to be submitted to His Majesty in Council for decision."

I am for the foregoing reasons and the reasons given by me in *Taylor* v. *Mackintosh, supra,* of the opinion that section 100 of the Legal Professions Act, Cap. 136, R.S.B.C. 1924, is *intra vires* of the Legislature of the Province of British Columbia.

MCPHILLIPS, J.A.

As my answer to the first question is in the affirmative my answer to the second question submitted is obviated.

MACDONALD, J.A.: In *In re Legal Professions Act and Barnard, Robertson, Heisterman & Tait* (1926), 37 B.C. 161 at pp. 176-7, I held that the first part of section 100 of the Legal Professions Act, Cap. 136, R.S.B.C. 1924, *viz.*:

"Notwithstanding any law or usage to the contrary, any barrister or solicitor in the Province may contract, either under seal or otherwise, with any person as to the remuneration to be paid him for services rendered or to be rendered to such person, in lieu of or in addition to the costs which are allowed to said barrister or solicitor."

is *intra vires* of the Provincial Legislature.

In the judgment referred to I said (p. 177):

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"I would hold that in any event the first part of the section permitting a contract in respect to remuneration for services rendered having, as it has, no reference to the further provision in respect to contracting for a portion of the proceeds of the subject-matter of the litigation is *intra vires*. One part of a section may be *ultra vires* and another part *intra vires*, if each part is a separate declaration of the intention of the Legislature. *Morden* v. *South Dufferin* (1890), 6 Man. L.R. 515."

It was not, I think, seriously contended that champerty which has been described as "maintenance aggravated by an agreement to have a part of the thing in dispute" is not part of the criminal law of England. True, Perdue, J.A., now Chief

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Justice of the Manitoba Court of Appeal, expressed the view in *Thomson* v. *Wishart* (1910), 19 Man. L.R. 340 at p. 346, that champerty and maintenance are now obsolete as crimes and are only invoked in deciding the validity or otherwise of contracts tainted thereby. On the other hand, a Divisional Court in Ontario in *Hopkins* v. *Smith* (1901), 1 O.L.R. 659, regarded it as a punishable offence. I am in agreement with this view. Champerty and maintenance are still common law offences. In *Neville* v. *London "Express" Newspaper, Limited* (1919), A.C. 368 at pp. 379-80 and 382, Lord Finlay, L.C. treated maintenance and champerty as punishable offences which the common law prohibits. There are in the books so many cases where, although dealing with questions of civil liability, the criminal aspect of champerty and maintenance is referred to that they cannot be regarded as obsolete.

Has the criminal law of champerty been introduced into this Province? In *Meloche* v. *Deguire* (1903), 34 S.C.R. 24, it was held to form part of the criminal law of Quebec and also of all the Provinces of Canada, although apparently no examination was made of the ordinances and statutes purporting to introduce it into British Columbia. The Full Court of this Province also held in *Briggs* v. *Fleutot* (1904), 10 B.C. 309, in a civil action that the laws of maintenance and champerty—indictable offences—as they existed in England on the 19th of November, 1858, are in force in this Province. This decision was affirmed by the Supreme Court of Canada, 35 S.C.R. 327, and an examination of the statutes and ordinances dealing with the introduction of criminal law into this Province, together with section 11 of the Criminal Code leads me to the same conclusion (R.L.B.C. 1871, No. 70; English Law Act, Cap. 80, R.S.B.C. 1924).

A further point was raised by counsel for the appellant. Assuming that when section 100 of our Revised Statutes, Cap. 136, 1924, was originally passed, champerty was part of the criminal law of this Province it is not applicable to the situation created by this legislation. This contention, I take it, is based upon the safeguards provided by section 101 and to some extent also by section 103. Briefly section 101 provides that within a limited time upon the application of the client a judge

of the Supreme Court, if he considers that the contract to share in the fruits of the litigation, is not fair or reasonable, may modify or cancel it and order the costs to be taxed in the ordinary way. It is suggested that because champerty is directed against the promotion of mischievous litigation for the purpose of sharing in the spoils, the evil no longer exists in view of the power vested in the Courts to review such contracts. It is just as if the contract to share in the fruits of the litigation contained a clause that it would only be operative if the Courts, upon application made within three months to review it, found that it was fair and reasonable. If we had to consider a contract containing these conditions, would it be held to be champertous? While the foregoing is possibly not the form in which the argument was presented, it contains the elements of the submission made by counsel for the appellant.

Another example may be found in our Provincial Act relating to Trade-unions, R.S.B.C. 1924, Cap. 258, considered by this Court in *Schuberg* v. *Local No. 118, International Alliance Theatrical Stage Employees* (1927), 38 B.C. 130. The subject-matter of that Act is also dealt with in section 501 of the Criminal Code relating to picketting by strikers. The Provincial Act is *intra vires* because the acts thereby permitted do not come within the class of acts forbidden by the Code although lying on the borderland. In other words the conduct legalized by the Provincial Act would not constitute a crime under section 501 of the Code. It is different in the case at Bar. Section 100 of the Legal Professions Act purports to legalize an act, *viz.*, contracting "to receive a portion of the proceeds of the subject-matter of the action or suit" which is in itself a crime. The criminal ingredient is retained in the Provincial Act, none the less because by a subsequent section its evils are minimized, if not entirely eliminated by the reservation of a general supervision by the Courts. A Provincial Legislature has no authority to legislate away a criminal offence by framing conditions to make its consequences less harmful. I cannot agree that because the Provincial Legislature has minimized the danger through exercising control over such contracts, it is not legislating in respect to criminal matters beyond its competency. I say "minimizing the danger" because it is not completely elim-

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inated, inasmuch as the client has only a limited time, *viz.*, three months, to appeal to the Courts. I think the result would be the same if the Act provided that all such contracts should be passed upon by the Courts; but it is not necessary to go that far. I cannot understand upon what principle a Court by an order can alter a state of facts which in themselves constitute a crime. That is a legislative, not a judicial function. If a Provincial Legislature to make good the loss entailed enacted that one who stole from another money or goods must return their value to the true owner it would not thereby abolish the crime of theft and prevent the prosecution of the thief. It could not declare that it was lawful to steal the property of another simply because they made provision for restitution. I am far from suggesting that the cases are analogous except in principle. I can conceive of many cases where such contracts, as section 100 attempts to legalize, subject to supervision, may be beneficial. With that feature, however, we are not concerned.

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We were also referred to section 92, Nos. (13) and (14) of the British North America Act, 1867, relating to (13) property and civil rights, and (14) the administration of justice. Number 13 affords no protection for reasons, which I think, have already been indicated. Nor can it be said that No. 14 gives authority to a Provincial Legislature to abolish a criminal offence. Further such contracts arise not in the administration of justice but in the course of proceedings in litigation.

I would therefore answer the two questions submitted as follows:

(1.) No, except as to the first part of said section 100, already quoted.

(2.) The remaining part of section 100 is *ultra vires* by reason of the provisions therein contained in regard to contracting to receive any portion of the subject-matter of the action or suit or of the moneys or property involved or a commission or percentage on the amount recovered or defended against or on the value of the property in suit.

BALLANTYNE v. McCULLOCH & COMPANY AND SIMMS.

SWANSON, CO. J.

1927

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BALLANTYNE v. McCULLOCH & Co.

Execution—Deputy sheriff—Wrongful seizure by—Judgment creditor—Liability.

Under a warrant of execution a deputy sheriff seized goods in the possession of a debtor but not his property.

Held, that the judgment creditor is not responsible for the sheriff's action where no specific direction was given to seize the goods nor can the judgment creditor ratify the deputy sheriff's act and make it his own.

ACTION to recover from a judgment creditor $425 damages for wrongful seizure and detention by a deputy sheriff under a warrant of execution. The facts are set out in the reasons for judgment. Tried by SWANSON, Co. J. at Vernon on the 21st of June, 1927. Statement

Tuck, for plaintiff.

H. C. DeBeck, for defendants McCulloch & Co.

1st September, 1927.

SWANSON, Co. J.: The plaintiff's claim as set forth in the plaint is for $425 damages for wrongful seizure and detention by Deputy Sheriff Simms alleged to have been acting "under the authority of and as agent of and bailiff for the defendant" McCulloch & Co., of a piano (piano-player) the property of the plaintiff, on or about November 30th, 1925, under a certain warrant of execution dated October 31st, 1925, issued out of this Court upon a certain judgment dated October 15th, 1925, wherein A. McCulloch & Company (present defendants) were plaintiffs and A. D. Renaud was defendant to recover against the said Renaud the sum of $443.02 and costs $17, in all $460.62. It is alleged that Renaud at the time of the seizure of the piano-player by the deputy sheriff gave verbal notice to the deputy sheriff that the said piano was the property of plaintiff, but that the said notice was ignored and the piano seized. Ballantyne in his evidence states that he sold the piano-player to Renaud sometime in 1922 for a sum exceeding $500. Renaud, Judgment

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who is the proprietor of the Okanagan Hotel at Armstrong, used the piano in his hotel from the date of purchase to the present time. Renaud having paid only some $100 on the piano Ballantyne states that sometime in July or August, 1925, he took back the piano (that is, formally resumed possession of the piano) but left the same in the custody and charge of Renaud where it has always remained throughout the years intervening since its sale to Renaud in 1922. Ballantyne states that on November 10th, 1925, he negotiated a sale of this piano to one J. Bowrick of Revelstoke for the sum of $425. He states that he notified Renaud to box up and ship the piano to Bowrick at Revelstoke. He made arrangements to have a piano-box shipped to Armstrong for Renaud to use for shipment purposes, and arranged with one J. McCallum to pay the freight should Renaud not pay same. Ballantyne then left the district for Vancouver November 19th, 1925, and leaving there for California December 8th, 1925. He did not return from California until February, 1926. He received no word about this deal with Bowrick and knew nothing about the seizure of the piano during this interval of time. He states that he received two letters from Mr. *H. W. Galbraith* (solicitor for McCulloch & Company) about the 4th of February, 1926, at Palo Alto, California, when he was on his way North back from California to British Columbia. He replied by post-card. He also subsequently received a letter from Mr. *Galbraith*. The piano has ever since remained in possession of Renaud and is still in his possession. Ballantyne states that he did not see or write the sheriff, or make any effort to find out if the piano was sold. The deal with Bowrick fell through, and the plaintiff now claims that the responsibility for the failure to resell the piano to Bowrick should be laid to the door of the deputy sheriff and particularly to the door of the defendants McCulloch & Company.

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Renaud testifies to the seizure by the deputy sheriff, and that he was left in possession of the piano by the deputy sheriff as his bailiff so as to avoid expense. He states that he told the deputy sheriff that the piano belonged to plaintiff, and the rest of the furniture seized to Renaud's wife. A couple of weeks afterwards Renaud met the deputy sheriff at the hotel and later

at the station (Armstrong), and was told by him that he, the deputy sheriff, had nothing more to do with it, that is, the seizure. He states that he received no formal notice of release of the seizure from the deputy sheriff. Renaud states that the piano-box arrived the day the seizure was made, that he took the box to the hotel, but that after the piano was seized he made no further effort to box or ship the piano to Bowrick, and the piano has since remained in the possession of Renaud. At the close of the plaintiff's case the defendants' counsel Mr. *DeBeck* moved to dismiss the action as against McCulloch & Co. The action had previously been discontinued as against the deputy sheriff, as the action was not brought within the statutory time set forth in section 171 of the County Courts Act, *viz.*, three months, as against the deputy sheriff, and no notice of action was given as required by section 172 of the Act. I reserved judgment on this motion on the understanding that should I decide against Mr. *DeBeck's* motion I would at a later session hear evidence on behalf of defendants. In the view which I take of the whole matter I think the latter course will not be necessary, as I am clearly of the opinion that the action should at this stage be dismissed. A great many decisions were discussed before me by counsel, who both very ably argued the matter.

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The deputy sheriff is now out of the action. I find that the deputy sheriff was not the agent of the defendants McCulloch & Co. but acted merely in his ministerial capacity as an officer of the Court under the warrant of execution herein. He received no instructions specific or otherwise from the defendants McCulloch & Co. or from the defendants' solicitor Mr. *Galbraith*. I find that in the letters produced and evidence relating to same which passed between Mr. *Galbraith* and the other side, there is nothing whatever to amount to a ratification of the acts of the deputy sheriff in making the seizure of the piano. Indeed I think that even if there was such "ratification," so-called, it could not avail the plaintiff under the doctrine of *Wilson* v. *Tumman* (1843), 6 Man. & G. 236 (134 E.R. 879; 64 R.R. 77). Tindal, C.J. in that case said:

"That an act done, for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority

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whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. . . . In the present case the sheriff's officers, who were the original trespassers by taking the goods of the plaintiffs, were not servants or agents of the defendant Tumman, but the agents of a public officer or minister, obeying the mandate of a Court of Justice. They did not assume to act, at the time, as agents or bailiffs of the then plaintiff Tumman, but they acted as the servants of another, *viz.*, the sheriff, by virtue of the process directed to him by the Court. . . . In the present case the sheriff, or the sheriff's officers, seized under process, which is not suggested to have been void or irregular, but must be taken to be valid process. In the case in *Wilson*, the writ had been set aside as irregular; and, consequently, the arrest had been made without any authority. In that case, therefore, the sheriff had acted, not under any authority of the Court, but under the direction of the plaintiff in the original action, who, by suing out void process, was in the same situation as if he had orally desired the sheriff or his officer to make the arrest. And on the latter supposition, where a *ca. sa.* or *fi. fa.* has been set aside for irregularity, it becomes a nullity, and no doubt the sheriff acts as the servant, and by the command, of the plaintiff who sued it out, and who is consequently liable, as a principal, for the act of his agent. If the defendant Tumman had directed the sheriff to take the goods of the present plaintiffs, under a valid writ, requiring him to take the goods of another person than the defendant in the original action, such previous direction would undoubtedly have made him a trespasser on the principle that all who procure a trespass to be done are trespassers themselves, and the sheriff would be supposed not to have taken the goods merely under the authority of the writ, but as the servant of the plaintiff. But where the sheriff, acting under a valid writ of command of the Court and as the servant of the Court, seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action, ratifying and approving the taking, cannot, upon the distinction above taken, alter the character of the original taking, and make it a wrongful taking by the plaintiff in the original action."

See also *Smith* v. *Keal* (1882), 9 Q.B.D. 340; 51 L.J., Q.B. 487; *Woollen* v. *Wright* (1843), 6 Man. & G. 827; 130 R.R. 658, 662; *Cronshaw* v. *Chapman* (1882), 7 H. & N. 911; 158 E.R. 1126; *Morris* v. *Salberg* (1889), 22 Q.B.D. 614; *Hooper* v. *Lane* (1857), 6 H.L. Cas. 443; *Parsons* v. *Loyd* (1772), 3 Wils. K.B. 341 at p. 344.

In *Smith* v. *Keal, supra,* Jessel, M.R., at p. 351, said:

"It is clear that it is no part of his [the solicitor's] duty to interfere with the sheriff in the performance of his duty. It is the sheriff's duty to levy execution on the goods of the judgment debtor. If therefore the solicitor interferes, and directs the sheriff to levy on the goods of another person, he is answerable on the same principle as any one else who directs

a trespass. Though the sheriff is an officer of the law he is liable if he commits a trespass, and any one who joins in the trespass is equally liable."

These principles are set forth very clearly in Mather's Sheriff and Execution Law, 2nd Ed., pp. 66 to 70.

I therefore hold that the action fails as far as defendants McCulloch & Company are concerned and must be dismissed with costs.

Action dismissed.

REX v. McADAM.

Practice—Royal commission—Service of subpœna to attend as witness—No conduct money paid—Witness fails to attend—Writ of attachment issued by Commission—Witness arrested—Habeas corpus.

The right of a witness in a civil proceeding to prepayment of conduct money and expenses to and from where he is ordered to be in attendance is well settled, and the same principle which applies to a civil proceeding in one of His Majesty's Superior Courts of record must *a fortiori* apply to a Royal Commission in the absence of express statutory power.

MOTION for a writ of *habeas corpus*. The defendant was arrested under a writ of attachment issued by the Royal Commission for the investigation of the Customs Department of Canada for contempt in failing to appear as a witness before the Commission when called on. Heard by HUNTER, C.J.B.C. at Vancouver on the 18th of February, 1927. Statement

Stuart Henderson, for the motion.
Ellis, K.C., for the Crown.

HUNTER, C.J.B.C.: In this case a number of points of more or less gravity have been raised, as for instance, the constitutionality of the tribunal, but I do not find it necessary to give any opinion upon them. Judgment

The applicant was arrested on what purports to be a writ of attachment, the operative part of which is as follows:

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"WE COMMAND you to attach A. C. McAdam, so that you may have him before us, sitting as a Royal Commission for the investigation of the Customs Department of Canada, at the place where we will be sitting, at the time of such apprehension, to answer to us for certain trespasses and contempts brought against him in our said Commission, and have you then there this writ."

The specific contempt consisted in failing to appear as a witness when called on.

It is to be noted that there is a material difference between a power to issue a bench warrant to bring in an absenting witness for the purpose of securing his evidence and to detain him, if necessary, until he gives it and a power to issue an attachment to punish the contempt involved in wilful refusal to appear, which is a criminal offence if the *subpœna* has been legally issued and properly served together with adequate payment or tender.

I do not think that this tribunal has the latter power but, assuming that it has, the applicant was not under the legal compulsion of the *subpœna* as he had admittedly not been tendered any conduct money. The argument, that he had waived his right by being present on several occasions, is futile. He had the right of idle curiosity to be there, if he wished. The right of a witness in a civil proceeding to prepayment of conduct money and expenses to and fro has been well settled since the time of Elizabeth and there are numerous cases in the Courts which shew that the Court does not weigh the amount required to place the party under legal compulsion in too nice a scale when it is sought to use the punitory process and the same principle which applies to a civil proceeding in one of His Majesty's Superior Courts of Record must *a fortiori* apply to a Royal Commission in the absence of express statutory power.

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I may add that out of deference to the Commission, if it had been still sitting in Vancouver, I would have insisted on an application being made first to the Commission but I do not think it right that the applicant should be dragged off in custody to a remote part of the country and possibly left stranded on his securing his discharge. The application is allowed.

Motion granted.

REX v. SOMERVILLE CANNERY COMPANY LIMITED.

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REX v. SOMERVILLE CANNERY CO.

Constitutional law—British North America Act—Dominion power—Fisheries and fishing rights—Canning factory—Licensing—Ultra vires—Can. Stats. 1917, Cap. 16, Sec. 2.

The Dominion in enacting that part of the Fisheries Act, which provides for licensing and taxing canneries has exceeded its powers under the British North America Act. It is not by any reasonable implication necessary to the proper or effectual regulation of "policing" of such fisheries. It is legislation as to civil rights and as such appropriate to the Province.

APPEAL by the Crown by way of case stated from the order of H. O. Alexander, Esquire, stipendiary magistrate, dismissing a charge against the defendant Company for unlawfully operating a clam cannery for commercial purposes contrary to the provisions of The Fisheries Act, 1914, without first obtaining an annual licence therefor from the Minister of Marine and Fisheries. The facts are set out in the reasons for judgment. Argued before MACDONALD, J. in Chambers at Vancouver on the 13th of September, 1927. Statement

A. B. Macdonald, K.C., for appellant.
W. E. Williams, for respondent.

23rd September, 1927.

MACDONALD, J.: The appellant, hereafter called the "Dominion," appeals, by way of a case stated, from an order of H. O. Alexander, Esquire, stipendiary magistrate, whereby the Somerville Cannery Company Limited, hereafter called "Company," was acquitted, upon a charge, that the said Company, on the 25th of March, 1927, at the City of Prince Rupert,— Judgment

"unlawfully did operate a fish cannery, to wit, a clam cannery for commercial purposes, contrary to and in violation of the provisions of The Fisheries Act, 1914, and amending Acts, without first obtaining an annual licence therefor from the Minister of Marine and Fisheries."

Upon the trial, before the magistrate, certain facts were admitted, which may be shortly stated as follows: The Company was duly incorporated under the laws of British Columbia, with

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powers authorizing it to engage in the canning business, including the canning of fish, salmon, clams and other fish products and was the owner of a cannery at Seal Cove in the City of Prince Rupert. It canned clams for commercial purposes on the 25th of March, 1927, without having a licence from the Minister of Marine and Fisheries so to do.

Further, that the clams, so canned, were purchased by the Company, at its cannery, from diggers and were legally removed from the bed of the foreshore, between high and low-water marks in British Columbia, from land belonging to private individuals or the Crown, in the right of the Province of British Columbia.

It was also admitted that, while the Company had no licence to operate a cannery from the Dominion, it had such a licence from the Province of British Columbia, on the said 25th of March, 1927.

The magistrate held that "section 7A of The Fisheries Act" is *ultra vires* of the Parliament of Canada and, upon application of the "Dominion" he reserved the following question for the opinion of this Court: "Has the Parliament of Canada jurisdiction to enact section 7A of The Fisheries Act?" Such section is as follows:

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"No one shall operate a fish cannery for commercial purposes without first obtaining an annual licence therefor from the Minister. Where no other fee is in this Act prescribed for a cannery licence, the annual fee for each such licence shall be one dollar."

This provision, as to licensing a fish cannery, which might operate for commercial purposes, was enacted in 1917, by an amendment to The Fisheries Act, 1914, which had already provided for the issuance of fishery leases and licences for fisheries and fishing. It was a re-enactment more broadly worded of section 23A, 1 & 2 Geo. V., Cap. 9, Sec. 2.

While the annual fee for a cannery licence was thus only nominal, still, the revenue derived by the Dominion from its operation was, as far as British Columbia was concerned, supplemented by section 18 of The Fisheries Act. This section provided, in part, that no one should operate a salmon cannery, or salmon-curing establishment, in British Columbia except under a licence from the Minister of Fisheries and that the annual fee

for such a licence should be $20, and, in addition, the licensee was required to pay the Dominion four cents for each case of sockeye salmon and three cents for each case of any other species of salmon, canned in such cannery.

When you consider the large amount which is annually received by the Dominion Government for such cannery licences, the importance of the question, to be decided, becomes apparent, because a consideration of said section 7A involves a determination, also as to the validity of said section 18. If the Dominion cannot legally prevent the operation of an unlicensed cannery, then it follows that it cannot restrict the output of such cannery by what amounts to taxation.

It is contended, on behalf of the Dominion, that the legislation in question was properly enacted under item 12 of the class of subjects, enumerated in section 91 of the British North America Act, concerning which, it was declared that the exclusive legislative authority of the Parliament of Canada extended, in all matters, *viz.*, "Sea Coast and Inland Fisheries." Then, by the 5th paragraph of the "Terms of the Union" amongst the services assumed by Canada is that of protection and encouragement of fisheries, British Columbia being thus relieved from responsibility or liability in that behalf, but not debarred of any right, it might possess, to tax or licence a building used and operated in canning salmon or other sea products. Then does the exclusive legislative authority conferred upon the Dominion Parliament, with respect to "Sea Coast and Inland Fisheries," remove a cannery, owned by the Company, from the class of subjects concerning which, the Legislature of a Province may make exclusive laws, and render it amenable to the enactment, which is the subject of attack?

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It is contended by the "Company," that being the owner of the building, although used as a cannery, it is property on land within the Province and comes under the heading of "Property and Civil Rights of a Province" and exclusively subject to Provincial legislation.

It is contended, on the contrary, on behalf of the "Dominion" that the enactment giving it jurisdiction over "Sea Coast and Inland Fisheries" should receive a liberal interpretation and that it was broad enough, to enable the Dominion even to regu-

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late and licence wholesalers or retailers who might deal in fish far from the waters from which they had been obtained. I do not require to consider, however, such contention. If it were accepted, it would, to my mind, be contrary to the spirit and intention of the British North America Act. It would mean Dominion ownership of "fish," as distinguished from control and regulation of "fisheries."

The definition of a "Fishery" is afforded by section 2 of the Act, as follows:

"'Fishery' means and includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith."

A "fishery," is the right to take fish in a certain place or in particular waters—Webster's New International Dictionary—*Hart* v. *Hill* (1836), 1 Whart. 124. It has the right to employ within a particular stretch of water lawful means for the taking of fish which may be found there. *Vide Hume* v. *Rogue River Packing Co.* (1907), 51 Ore. 237; 92 Pac. 1065. The latter case refers to the incidents attached to the Rogue River, being a navigable stream, as to the common right of user and fishing and, pointedly, as concerns the present case, states that a "fishery"

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"is to be distinguished from a fishing place, which is the right to use a particular shore or beach as a basis for carrying on the business, and is always vested in the shore owner."

Lefroy, in his work on "Legislative Power in Canada," lays down two propositions, at pp. 582-3, which may be profitably used as a guide, in considering the power vested in the Dominion Parliament, in dealing with a cannery, utilized for rendering more merchantable, or fit for sale, sea products:

"53. We are not to assume, without express words or unavoidable implication, that it was the intention of the Imperial Legislature to confer upon the Dominion Parliament the power to encroach upon private and local rights of property, which by other sections of the Act have been especially confided to the protection and disposition of another Legislature.

"54. When a question arises as to whether the Dominion Parliament has power in any case over any property or civil rights in a Province, it is always necessary to form an accurate judgment upon what is the particular subject-matter in each case, for the extent of the control of Parliament over the subject-matter may possibly be limited by the nature of the object."

He had already considered the effect of the decision of the Privy Council in *Tennant* v. *Union Bank of Canada* (1894), A.C. 31 which, at p. 45, states:

"Section 91 expressly declares that, 'notwithstanding anything in this Act,' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in sect. 91, are 'Patents of Invention and Discovery,' and 'Copyrights.' It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the Provinces."

It is on the strength of such decisions that the Dominion contends that the legislation, with respect to canning fish, as distinguished from fishing, comes within its jurisdiction as part of the "fisheries" or, in the language of Lefroy, at p. 583:

"That there may be cases where, in accordance with the principle embodied in Proposition 37, [at p. 425] the Dominion Parliament may have power to interfere with Provincial property in order to the effectual exercise of the enumerated powers conferred upon it by section 91."

As to the right of the Dominion to tax and licence a "cannery," the exercise of such a power extends further than was decided in *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700. It decided in that case, at p. 716, that

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"the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of Provincial Legislatures."

And at p. 713, as to taxation, as follows:

"It is impossible to exclude as not within this power [raising money] the provision imposing a tax by way of licence as a condition of the right to fish. It is true that, by virtue of s. 92, the Provincial Legislature may impose the obligation to obtain a licence in order to raise a revenue for Provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention,"

viz., power to licence, giving the right to fish. In this connection, the Company submits that while the power of the Dominion to tax fishing, by way of licence, may be conceded, it could not be reasonably contended that such right could be extended, so as to include a power of licence or taxation after fish had been legally caught and the control and regulation of fishing had ceased.

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The question, as to the right of the Dominion, to grant a lease of a salmon fishery and raising a question as to the scope of the various classes of sections 91 and 92 of the British North America Act, was decided in *The Queen* v. *Robertson* (1882), 6 S.C.R. 52.

Ritchie, C.J., at pp. 120-1, discussed the limitations of Class No. 12 of section 91 as follows:

"I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' [Sea Coast and Inland Fisheries] contemplated by the British North America Act was not in reference to 'property and civil rights'—that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large . . . as a source of national or Provincial wealth."

Then Strong, J., at pp. 134-5, S.C. after referring to it being "A sound and well-recognized maxim of construction that in the interpretation of statutes we are to assume nothing calculated to impair private rights of ownership, unless compelled to do so by express words or necessary implication . . . and that this principle was well fixed as a canon of construction and not open to the least doubt or question"

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said, as to "Inland Fisheries," and his expressions are equally applicable to "Sea Coast Fisheries," as follows:

"We are not to assume, without express words or unavoidable implication, that it was the intention of the Imperial Legislature to confer upon Parliament the power to encroach upon private and local rights of property which by other sections of the Act have been especially confided to the protection and disposition of another Legislature. I am of opinion, therefore, that the thirteenth enumeration of section 91, by the single expression 'Inland Fisheries,' conferred upon Parliament no power of taking away exclusive rights of fishery vested in the private proprietors of non-navigable rivers, and that such exclusive rights, being in every sense of the word 'property,' can only be interfered with by the Provincial Legislatures in exercise of the powers given them by the provision of section 92 before referred to. This does not by any means leave the sub-clause referred to in section 91 without effect, for it may well be considered as authorizing Parliament to pass laws for the regulation and conservation of all fisheries, inland as well as sea coast, by enacting, for instance, that fish shall not be taken during particular seasons, in order that protection may be afforded whilst breeding, prohibiting obstructions in ascending rivers from the sea; preventing the undue destruction of fish by taking them in a particular manner or with forbidden engines, and in many other ways providing for what may be called the police of the fisheries."

This view was substantially affirmed by the Privy Council in the *Fisheries Case* (1898), A.C. 700; 67 L.J., P.C. 90. Lord Herschell, in delivering the judgment of the Board in that case said (p. 712):

"Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading 'Sea-Coast and Inland Fisheries' in s. 91. Whatever proprietary rights in relation to 'fisheries' were previously vested in private individuals or in the Provinces respectively remained untouched by that enactment."

Consideration then followed in the judgment, as to the proprietary rights being affected by proper enactment under the 91st section, such as prescribing the times of the year, during which fishing might be allowed or the instruments which might be employed for that purpose (p. 713):

"The extent, character, and scope of such legislation is left entirely to the Dominion Legislature. . . . If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by s. 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the British North America Act, been left to the Provinces and not vested in it."

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Lefroy, at p. 585, states that the Proposition 53, *supra,* has been followed and reaffirmed by the Supreme Court in *In re Provincial Fisheries* (1896), 26 S.C.R. 444 and that such decision follows *The Queen* v. *Robertson, supra.* In his opinion (p. 586),—

"The legislative authority of Parliament under section 91, No. 12, of the Act, is confined to the conservation of the fisheries, by what may be conveniently designated as police regulations."

It may thus be contended that, while the Dominion Parliament has the right to dispose of any property belonging to the Dominion, it has only, as far as fishing is concerned, the right to regulate, and incidentally licence, persons seeking to obtain the right to fish within waters under the control of the Dominion.

As already mentioned, the submission, on behalf of the Company, is that fish, legally caught, become the property of the fishermen and that, in any event, a cannery either through licensing or placing a tax upon its output is not within the jurisdiction of the Dominion Government but comes within that of the Province under the class termed "property and civil rights."

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The rights of fishing and the ownership acquired by fishermen is referred to in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1914), A.C. 153 at pp. 168 to 171.

In addition to the authorities already referred to, the Company cited what may be termed the "Grain" cases and "Insurance" cases as lending support to its position.

In *The King* v. *Eastern Terminal Elevator Co.* (1925), 3 D.L.R. 1, it was held, according to the head-note, that:

"The Dominion cannot by legislation ultimately intended to regulate external trade in a particular commodity, assume control over particular occupations and local works and undertakings in the Provinces, notwithstanding that the intended effect of the legislation could not be attained by the Provinces individually or in concert."

Anglin, C.J.C., in a dissenting judgment, at p. 8, dealing with The Canada Grain Act, Can. Stats. 1912, Cap. 27, states that, in his view

"not only is the grain trade of Canada a matter of national concern and of such dimensions as to affect the body politic of the Dominion, but the provisions of the Canada Grain Act, with some possible exceptions, deal with matters which, as envisaged by that legislation, do not 'come within the Class of Matters of a local or private Nature . . . assigned exclusively to the Legislatures of the Provinces.' (s. 91 (29), B.N.A. Act.)"

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The majority of the Supreme Court, however, held the Grain Act *ultra vires.*

Duff, J., at p. 11, says:

"The Act is an attempt to regulate, directly and through the instrumentality of Grain Commissioners, the occupations mentioned. It is also an attempt to regulate generally elevators as warehouses for grain, and the business of operating them; and it seems, *ex facie*, to come within the decision of the Judicial Committee. *Att'y-Gen'l for Canada* v. *Att'y-Gen'l of Alberta and Att'y-Gen'l of British Columbia* [(1916)], 26 D.L.R. 288, condemning the Insurance Act of 1910 (Can.), c. 32, as *ultra vires.*"

Mignault, J., at p. 21, after referring to numerous authorities, culminating in the then recent decision in *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396 states, that all arguments in support of the validity of the Grain Act had been addressed to the Court but were all finally answered by these decisions. He considered that the statute then under consideration could not be sustained on the ground that it was a regulation of trade and commerce or for the general advantage of Canada nor could it be contended that it was designed to cope with a national emergency. He then added:

"I have not overlooked the appellant's contention that the statute can be supported under s. 95 of the B.N.A. Act as being legislation concerning agriculture. It suffices to answer that the subject-matter of the Act is not agriculture but a product of agriculture considered as an article of trade. The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the ground that it is a trade in natural products."

Here, the Company contends that the purchase of salmon and clams at its cannery, though natural products of the Coast waters, should not require a licence nor should there be a tax imposed for trading and dealing with such natural products and that they should only be subject to the rights of the Province under its powers of legislating as to property and civil rights.

In *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700 various questions relating to the property rights and legislative jurisdiction of Canada and the Provinces respectively in relation to rivers, lakes, harbours, fisheries and other cognate subjects were considered by the Privy Council. Lord Herschell, at pp. 709-10, says:

"It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the Provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada."

Judgment

While other authorities were cited bearing upon the subject under consideration, I think it will suffice to simply refer in conclusion to the *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396. In that case, it was held that the *Industrial Disputes Investigations Act, 1907* (6 & 7 Edw. 7, c. 20, Can.) was not within the competence of the Parliament of Canada under the British North America Act. That it was clearly in relation to property and civil rights within the Provinces. It lends support to the argument of the Company in this respect and the first portion of the judgment of their Lordships delivered by Viscount Haldane covers the contention of the "Dominion" as to the portion of The Fisheries Act in question not being

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declared *ultra vires,* after it had been in force for a number of years as follows (pp. 400-1):

"It is always with reluctance that their Lordships come to a conclusion adverse to the constitutional validity of any Canadian statute that has been before the public for years as having been validly enacted, but the duty incumbent on the Judicial Committee, now as always, is simply to interpret the British North America Act and to decide whether the statute in question has been within the competence of the Dominion Parliament under the terms of s. 91 of that Act. In this case the Judicial Committee have come to the conclusion that it was not. To that conclusion they find themselves compelled, alike by the structure of s. 91 and by the interpretation of the terms that has now been established by a series of authorities."

It was argued, or rather drawn to my attention, that the Province though interested, beyond question, in the outcome of this contest, was not assisting nor supporting the attack upon the Dominion legislation. I do not think this is material, as taxation was sought to be imposed upon the Company and its business was affected. It thus had the right to take advantage of any legal means of defence.

Judgment

In my opinion, the "Dominion," in enacting that part of The Fisheries Act, which provides for licensing and taxing canneries, has exceeded its powers under the British North America Act. The portion of the Act in question is not "truly ancilliary" to legislation with respect to the fisheries which are within the jurisdiction of the Dominion. It is not by any reasonable implication necessary to the proper or effectual regulation or "policing" of such fisheries. It is legislation as to civil rights and as such appropriate to the Province.

The question, as to the validity of section 7A, is answered in the negative. In view of this answer, the other, less important question submitted does not require consideration.

Appeal dismissed.

GOODWIN *ET AL.* v. THE ROYAL TRUST COMPANY.

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GOODWIN v. THE ROYAL TRUST CO.

Settlement—Voluntary deed—Rectification—Evidence—Intention.

Mere alteration of intention or change of mind is not sufficient to induce the Court to interfere with or vary a voluntary trust settlement which was fully understood and deliberately executed by the grantor.

APPEAL by plaintiffs from the decision of MURPHY, J. of the 25th of May, 1927, in an action to rectify a voluntary trust deed of the 25th of May, 1926. The plaintiff had received a legacy from his mother amounting to about $60,000. He was a man who was threatened with tuberculosis and was subject to going on severe drinking bouts. Owing to his drinking he had previously dissipated large sums of money and in fear of continuing this he decided to leave one-third of his mother's legacy to his wife and one-third to his only child, a boy of nine years of age. He then entered into a voluntary trust deed whereby he assigned to The Royal Trust Company a one-third interest of the legacy with directions to pay the income to his son for life and after his son's death the *corpus* to be paid to his children and failing children to his son's wife and failing wife to whom he may will the estate and failing will to his next of kin.

Statement

The plaintiff claimed he intended to give his son $10,000 of the capital when he reached the age of 25 years and thereafter the income on the balance of the *corpus* until he attained the age of 30 years when he should receive the entire balance of the *corpus*. He claimed that he was not in proper condition at the time he signed the deed having been on a drinking bout and owing to this he did not notice the error in the deed. The solicitor who drew the deed testified that it was drawn in accordance with the instructions he received and the trial judge relying on his evidence dismissed the action concluding that after the deed had been executed the plaintiff merely changed his mind.

The appeal was argued at Victoria on the 4th of July, 1927, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Whittaker, for appellants: The amount involved is about

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$20,000. The rectification asked for is for the benefit of the son and will not affect any person at the present time. The judgment below was based on the evidence of the solicitor who drew the deed. Our submission is that his evidence is not admissible as to what took place between solicitor and client and was given without the client's consent: see *Welman* v. *Welman* (1880), 15 Ch. D. 570; *James* v. *Couchman* (1885), 29 Ch. D. 212; *Hanley* v. *Pearson* (1879), 13 Ch. D. 545; *Lackersteen* v. *Lackersteen* (1860), 30 L.J., Ch. 5 referred to in 100 L.T. Jo. 81; *Bonhote* v. *Henderson* (1895), 1 Ch. 742.

Argument

O'Halloran, for unascertained persons: The child may eventually have children who would be interested: see *Tucker* v. *Bennett* (1887), 57 L.J., Ch. 507 at p. 513. It is the plaintiffs' duty to shew that the rectification should be made: see *Jenner* v. *Jenner* (1860), 2 Giff. 232; 66 E.R. 97 at p. 102.

Maunsell, for respondent: The settlement contains a power for the infant when of age to revoke the trusts and declare new ones with the consent of the trustee, and there is further vested in him the power of appointing a new trustee.

Whittaker, replied.

Cur. adv. vult.

4th October, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: There is no doubt of the power of the Court to reform a voluntary deed, even on parol evidence. In one case, *Hanley* v. *Pearson* (1879), 13 Ch. D. 545, the voluntary deed was reformed on the affidavit of the plaintiff alone there being no conflicting evidence. In *Lackersteen* v. *Lackersteen* (1860), 30 L.J., Ch. 5, reformation was ordered on evidence of the settlor supported by that of the solicitor who drew the deed and who admitted that he had gone beyond his instructions in the particular sought to be reformed. The principles upon which such a reformation may be made are discussed at some length in *Bonhote* v. *Henderson* (1895), 1 Ch. 742. In some of the cases cited the mistake was an obvious one as in *Welman* v. *Welman* (1880), 15 Ch. D. 570, in which Malins, V.C., at p. 576 said that "No man living ever saw such a settlement." It is evident that he saw in the absurdity of the provisions of the deed, clear evidence of mistake.

Now in the case at Bar the deed is of a common and usual character. A sum of money is settled upon a boy of nine years. The settlor consulted a reputable solicitor who swears that the deed was drawn in accordance with the settlor's instructions and is positive that no mistake was made in it. The settlor was an educated and intelligent man, and while a drinking man, was sober at the time he gave the instructions and signed the deed. He had also discussed the matter with his wife who, in her turn, had discussed the settlement with the solicitor. The deed gives a life interest to his son with gifts over as set out therein. Several months afterwards the settlor concluded that the settlement was not such as he had intended. He says in his affidavit that he meant to give the boy $10,000 of the fund when he had attained the age of 25 years, and the balance of $7,000 when he had attained the age of 30 years. What is sought now is to reform the deed to provide for this although no reference was made in his instructions to either 25 years or 30 years. The learned judge below thought that in view of his solicitor's evidence, he ought not to reform the deed, and I agree with that conclusion. There were no written instructions and the verbal instructions were not proved to be such as the settlor now suggests. In fact, there is no sworn statement that they were such as are now suggested. The settlor simply relies upon his alleged intention. He read the deed over before signing it, as he puts it in his affidavit—"I scanned it through." It was such a deed as might be understood by any intelligent man. The appeal should therefore be dismissed.

MACDONALD, C.J.A.

GALLIHER, J.A.: With every disposition to do so, I find myself unable to grant the relief prayed for, and would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal brings up for consideration the terms of a voluntary settlement, the donor and the donee under the voluntary settlement (the donee being a minor of the age of nine years and the only son of the donor suing by his next friend his father) claiming that the deed should be rectified or reformed in that it is not in its terms in accordance with the intention of the donor. The deed has application to a very

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considerable sum of money passing to the donor under the last will and testament of one Ella Anderson, now deceased.

At the time of the execution of the voluntary settlement the donor was threatened with legal proceedings which might result in heavy damages being assessed against him. At the same time there is no evidence that there was any attempt made to evade any such liability as the donor had estate other than that disposed of in the voluntary settlement here called in question out of which to meet any liability should any such be imposed and at this present time the liability has been discharged and the donor is in a position to pay his debts in full, in truth has no liabilities undischarged or which he is unable to pay. The whole question resolves itself into a claim of rectification, the plaintiffs (being the father, mother and son, and the estate in question is that of the son as previously pointed out, a boy of the age of nine years) contending that the intention of the donor was not carried out, *i.e.*, the deed does not set forth the true intention of the donor. The paragraphs in the statement of claim, being paragraphs 5, 6 and 7, set forth the claim made and read as follows:

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"5. That in making the said voluntary trust settlement, it was the intention and desire of the plaintiff Alexander Henry Goodwin that William Alexander Goodwin, the plaintiff's son, should receive the income and profits of the said trust investment until he attained the age of twenty-five years, when he should receive $10,000 of the *corpus;* and that the said William Alexander Goodwin should thereafter receive the income and profits on the remainder of the *corpus* until he attained the age of thirty years, when he should receive the entire balance of the *corpus*, PROVIDED that if the said William Alexander Goodwin should die before receiving the entire *corpus* that portion thereof which he should not have received should be dealt with as in such event provided for in such voluntary trust settlement.

"6. That the said voluntary trust settlement was executed by the plaintiff Alexander Henry Goodwin under the impression that his desires and intention—as in the preceding paragraph expressed—should be carried out under the provisions of the said voluntary trust settlement; and the plaintiff Alexander Henry Goodwin would not have executed the said voluntary trust settlement if he had then clearly understood, as he now does, that the provisions of the said voluntary trust settlement prevented the enjoyment by the said William Alexander Goodwin of the *corpus* as in paragraph 5 hereof mentioned.

"7. The plaintiff Lizzie Holloway Goodwin is the wife of the plaintiff Alexander Henry Goodwin, and consents to the rectification of the said voluntary trust settlement in accordance with the claim herein."

The trial came on before Mr. Justice MURPHY, counsel

appearing for all parties to the action, and counsel also appeared to represent the unborn and unascertained persons having a possible or contingent interest in the trust fund created by the voluntary trust settlement.

The learned trial judge upon the evidence adduced before him, being the *viva voce* evidence of Mr. *Claude L. Harrison,* the solicitor who prepared the deed and saw to its execution acting for the donor; the discovery evidence of the donor and the *viva voce* evidence of his wife, being respectively the father and mother of the infant donee under the deed. The learned trial judge dismissed the action refusing rectification as prayed. The appeal calls for the consideration of a point of some nicety —whether upon the special facts and circumstances of the case relief should have been granted. The learned trial judge had the advantage of seeing and hearing the evidence given by Mr. *Harrison,* the solicitor who was retained and acted for the donor and who prepared the deed and saw to its execution, and everything done in connection therewith evidences careful thought and attention upon the part of the solicitor and he is most precise in his evidence admitting in my opinion of no question being possible that there could have been any misunderstanding as to the effect and terms of the deed or that the donor did not fully comprehend and understand the purport and true intent of the deed. Therefore having the facts so completely established there is little that remains to be said. The deed is, in its nature, a voluntary settlement. The claim is that it be rectified, the donor himself as well as the donee and any possible future rights or interests all being represented. We have here the donor moving that there should be rectification. It is to be remembered that in accordance with the law of England—and as we have it—it has been deemed to be for long years a boon according to the genius of the British people that there can be a voluntary settlement incapable of being changed or altered save in extraordinary cases such as fraud, duress or well established want of intention, due consideration, though, being given to any changed conditions, following upon the execution of any such voluntary settlement. That is, there are cases where the Court has jurisdiction in proper cases to rectify a voluntary settlement. The question now is—Is the present case one of that

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character? In my opinion the learned trial judge was right in his conclusion in refusing rectification. The relief may only be accorded and the jurisdiction exercised where bringing great care to the inquiry it is established that in the interests of justice the case is one that calls for relief. In extending relief, however, it has been the rule—and that is the present case—that where the donor or settlor invokes the assistance of the Court and the only evidence of his intention rests on his own uncorroborated statements, relief will not be granted (Godefroi on Trusts and Trustees, 5th Ed., 63). There is further internal evidence in the voluntary settlement here which rebuts any intention on the part of the donor to reserve any right to revoke all or any of the trusts declared—that is committed only to the donee—with the consent of the trustees or trustee (*Bill* v. *Cureton* (1835), 2 Myl. & K. 503; *Petre* v. *Espinasse* (1834), *ib.* 496; *Crabb* v. *Crabb* (1834), 1 Myl. & K. 511; *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447 at p. 455; and no distinction exists between a voluntary deed and one for valuable consideration: *per* Lord Romilly in *Dickinson* v. *Burrell* (1866), L.R. 1 Eq. 337 at p. 343). This is not a case where there were any written instructions and it was for the Court to decide the question on the oral evidence and that is what was done here—the evidence of the solicitor retained in the matter being taken (*Bonhote* v. *Henderson* (1895), 1 Ch. 742). There is nothing in the evidence here that I can see which would entitle the Court to reform the voluntary deed. There must be some substantial reason which has not been shewn. The donor must be held to be bound by his own act (*Henry* v. *Armstrong* (1881), 18 Ch. D. 668; *Villers* v. *Beaumont* (1862), 1 Vern. 100; *Toker* v. *Toker* (1862), 31 Beav. 629, 644; (1863) 3 De G. J. & S. 487; and Lindley, L.J., in *Allcard* v. *Skinner* (1887), 36 Ch. D. 145 at p. 183; *Taylor* v. *Johnston* (1882), 19 Ch. D. 603; *Phillips* v. *Mullings* (1871), 7 Chy. App. 244; *Dutton* v. *Thompson* (1883), 23 Ch. D. 278).

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I am unhesitatingly of the opinion that the learned trial judge was right and that the judgment should be affirmed. The donor here must be held to have fully understood the effect of the deed and it is binding upon him (*Phillips* v. *Mullings,*

supra; Dutton v. *Thompson, supra*). It is impossible for the donor to escape the binding effect of the deed upon the special facts of this case there being no power of revocation in the deed and that being the result of the decided cases the case is not one for relief (*Bill* v. *Cureton, Petre* v. *Espinasse, Crabb* v. *Crabb, Sidmouth* v. *Sidmouth, and Dickinson* v. *Burrell, supra*).

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Whittaker & McIllree.*

Solicitor for respondent: *A. S. Innes.*

Solicitor for unborn and unascertained persons: *C. H. O'Halloran.*

IN RE ESTATE OF JOHN HENRY OLDFIELD, DECEASED, AND THE SUCCESSION DUTY ACT. MINISTER OF FINANCE v. OLDFIELD AND GARDNER.

Taxes—Succession duty—Interest on duties—Date from which interest should run—Dispute as to value of properties—R.S.B.C. 1924, Cap. 244, Sec. 35.

The Succession Duty Act provides that if duties are not paid within six months of the death, interest shall be charged from the date of death, but section 35 further provides that a judge may extend the date when interest shall be chargeable where it appears to him that payment within the six months was impossible owing to some cause over which the person liable has no control. The testator died on the 15th of October, 1924, and the executors filed affidavit of value and relationship on the 17th of February, 1925. The Minister of Finance being dissatisfied with certain valuations had an inquiry and after some delay the valuations were increased and a statement of the duties as determined by him were furnished the executors on the 28th of January, 1926, and interest was claimed from the date of the testator's death. The executors refused to pay and applied for relief under said section 35 of the Succession Duty Act when it was held that interest should be payable only from the 28th of January, 1926.

Held, on appeal, affirming the decision of GREGORY, J. (MCPHILLIPS, J.A.

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dissenting), that interest is chargeable only from the date the final assessment is arrived at, as the executors although they may wish to dispute the assessment, have no longer any excuse for non-payment of the duties as the statute provides for a refund of overpayments.

IN RE ESTATE OF JOHN HENRY OLDFIELD, DECEASED.

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APPEAL by the Minister of Finance from the order of GREGORY, J. of the 4th of February, 1927, holding that interest should be charged on the duty payable on the estate of John Henry Oldfield as from the 28th of January, 1926. Oldfield died on the 15th of October, 1924. The executors filed affidavit of value and relationship on the 17th of February, 1925. The officials found fault with the valuation in regard to two matters: (1) A one-third interest in a mortgage in Uplands; and (2) certain lands in Kootenay. The executors fixed the valuation of the mortgage at $25,000 and declared that the Kootenay lands were of no value. The officials decided to arbitrate as to the Uplands mortgage, and the arbitrators fixed the valuation at $35,000. After negotiations with the executors they came to an agreement that the Kootenay properties should be valued at $7,000. Seventeen thousand dollars were then added to the original valuation and the Government's statement as to the amount of probate and succession duty ($850 probate and

Statement

$42,908.36 succession duty) was delivered on the 28th of January, 1926. Under section 20 of the Succession Duty Act (Cap. 244, R.S.B.C. 1924) no interest is charged if the duty be paid within six months after the death of the testator but if paid later interest at 6 per cent. per annum is charged as from the death of the testator until paid. Under the Government's statement they charged 6 per cent. from the death of the testator. On petition of the executors it was held by GREGORY, J. that interest should start to run from the date upon which the Government's statement of the amount due was delivered, *i.e.*, 28th January, 1926. The Minister of Finance appealed and the executors claimed that the exemption from payment of interest should be extended until the final disposition of this appeal.

The appeal was argued at Victoria on the 30th of June, 1927, before MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A.

Argument

Maclean, K.C., for appellant: It must be an impossibility of the highest nature that brings the case within section 35 of the

Act. The delay here was entirely due to undervaluation by the executors. An arbitration was necessary and finally they agreed to a sum $17,000 more than the original valuation made by the executors. They do not come within section 35 and interest should be charged from the date of the death of the testator: see *In re Estate of Edward Disney Farmer, Deceased* (1926), 36 B.C. 334.

Crease, K.C., for respondent: The executors had difficult work in this case as they had to value 40 pieces of property. We submit that section 35 applies to this case. As to what comes within the word "impossible" see *Russell* v. *Russell* (1897), A.C. 395 at p. 436; *Moss* v. *Smith* (1850), 9 C.B. 94; *Assicurazioni Generali* v. *S.S. Bessie Morris Company* (1892), 2 Q.B. 652 at p. 657. We have paid $1,594.25 of interest that we are entitled to have back.

Argument

Cur. adv. vult.

4th October, 1927.

MACDONALD, C.J.A.: The testator died on the 15th of October, 1924. Proofs of value and relationship were filed by the executors with the registrar on the 17th of February, 1925. These were forwarded to the Minister of Finance, who by section 22 (1) of the Succession Duty Act is required to determine the amount of duty payable and to forward a statement thereof to the registrar. The Minister was not satisfied with the values placed upon the deceased's assets by the executors and in accordance with the provisions of the Act, caused an inquiry to be made concerning them. After considerable delay these values were increased by upwards of $17,000, whereupon the duties were determined by the Minister and a statement thereof delivered to the registrar, who notified the respondents thereof on the 28th of January, 1926.

MACDONALD, C.J.A.

Interest on the value of the assets was claimed by the Minister from the date of deceased's death, but respondents objected to that claim and also objected to the claim for succession duties upon the value of lands situate in Manitoba, on the ground as to the latter, that succession duty was not payable in respect of foreign lands. Objection was also raised to the duties imposed in respect of certain contingent interests. Respondents therefore

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refused to pay the sums demanded by the Minister, and applied, pursuant to section 35 of the Act, to a judge of the Supreme Court, who determined that interest should be payable not from the date of the death of the deceased, but from the said 28th of January, 1926, at which date the Minister's statement was delivered to the registrar.

The Minister now appeals from that decision, and the respondents cross-appeal for a declaration that interest had not become payable even on the said 28th of January, claiming that they were prevented by circumstances beyond their control from paying the duties.

In my opinion the respondents could have paid the sum demanded on the 28th of January, notwithstanding that they disputed the correctness of it. There is a provision in the Act for refunding excess payments. It is not correct to say that payment of the duties was impossible owing to circumstances over which the respondents had no control. They had the right to appeal from the Minister's decision, but that would not entitle them to a postponement of the payments required under those rulings. Their position was analogous to that of a judgment debtor in an action, who, though disputing the correctness of the judgment, must nevertheless either pay it or apply to the Court for a stay of execution. Here, when the rights of the parties have been finally determined, adjustments may be made for refunds, just as they must be made when an appeal in an ordinary action succeeds, in whole or in part.

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The learned judge appealed from, therefore rightly exercised the powers conferred upon him by section 35 of the said Act, and the consequences of that decision can be worked out in accordance with the provisions of the Act.

The contention of the Minister that there were no circumstances in the case which rendered it impossible for the respondents to pay the duties within the six months cannot, I think, be acceded to. A reasonable construction ought to be placed upon the words of section 35. The respondents, I think, on such a construction were prevented by circumstances over which they had no control from paying until the registrar had notified them of the amount claimed by the Minister.

The appeal and cross-appeal should be dismissed.

GALLIHER, J.A.: I agree that the appeal should be dismissed. I would also dismiss the cross-appeal.

MCPHILLIPS, J.A.: This appeal has relation to a point of some nicety and is in reference to the very considerable estate of the deceased, in the neighbourhood of half a million of dollars. The learned trial judge, in the exercise of powers conferred by the Succession Duty Act (R.S.B.C. 1924, Cap. 244), section 35, decided that interest should not be chargeable except from the 28th of January, 1926, the deceased having died on the 15th of October, 1924. It was necessary, under the terms of section 35 of the Act, for the learned judge to hold that payment within the time prescribed by the Act was impossible owing to some cause over which the executors of the estate had no control. The section dealing with the imposition of interest is section 20 (1) which reads as follows:

"20. (1.) The duties imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the deceased, and if the same are paid within six months no interest shall be charged or collected thereon, but if not so paid, interest at the rate of six per centum per annum shall be charged and collected from the death of the deceased."

MCPHILLIPS, J.A.

With great respect, I cannot agree with the conclusion arrived at by the learned judge, Mr. Justice GREGORY. Section 20 (1) is imperative in its terms and the statutory provision is that the duties imposed by the Act shall be due and payable at death and that would be, in the present case, on the 15th of October, 1924, and failing their payment within six months, which is the present case, interest shall be charged and collected from the date of the death of the deceased. Now the learned judge has postponed the date—the commencement date—for the interest from the 15th of October, 1924, to the 28th of January, 1926.

It is strongly urged in the very able argument of Mr. *Crease* that the present case has all the features that entitle the exercise of the powers conferred by section 35 and that the decision of the learned judge was right in holding as he did. It must, at the outset, in my opinion, be the correct view of the statute, that it is in its nature a revenue enactment. It is precise in its terms (section 20 (1)). It is an enactment that the Minister of Finance considers in framing the Budget and the circumstances must be such as would reasonably warrant the postponement of

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the running of the interest. Now, unquestionably, a period of six months ought to admit of enough time for the executors to advise themselves of the affairs of the estate and in the making of valuations. In any case to save the running of the interest some interim calculation could be made and payment made to the Crown of an approximate amount of the duties. It is true that no special statutory provision exists for this but it is a very reasonable practice and exists in other jurisdictions. If there should be any overpayment, it would of course be a case for refund. If this be not done it opens the door to delay and postponement of revenue that the Crown is rightly entitled to and the statute must be given full effect unless of course there be facts and circumstances that admit of it being said that there was some cause over which the executors had no control. I fail to find any such cause. It is no cause to say that the valuations were not arrived at until the 28th of January, 1926. Why were they not? This was because of delays consequent upon the inaccuracies in valuations. I am not saying that the executors had not many difficulties in their way but the difficulties were not and cannot be classed as owing to some cause over which they had no control. It cannot be admitted that delay in arriving at reasonable and proper valuations is a sufficient cause. If so, the assessment might be postponed to a most unreasonable date. Here the learned judge has allowed fifteen months when it is shewn that the assessment was delayed not by any default upon the part of the Crown but default wholly on the part of the executors. In the way of illustration, the valuation of the estate was increased by no less than $17,561.94. One circumstance relied upon was that a case was pending—the Alexander case—which called in question the incidence of duties upon property held without the Province but surely that could not be deemed to be a cause that would avail the executors; otherwise lengthy litigation might unduly postpone the assessment. There must be some certainty of practice under the Act and I cannot persuade myself that the executors here made out a case for relief. In my view—of course with the greatest respect to all contrary opinion—the facts and circumstances in this case do not admit of it being said that the payment of duty and interest was impossible within six months of the date of death of the

deceased. Continued and persistent under-valuation cannot constitute an excuse. This was not impossibility beyond control nor can difficulty in financing be considered in any estate much less in the case of an estate of the value of approximately half a million dollars—the present case. I do not see here any causes over which the executors had no control. That is there is the entire absence of any such evidence. In a brief summary of the salient facts the deceased died on the 15th of October, 1924. It was not until the 17th of February, 1925, that the affidavit of value and relationship was filed as required by section 5 of the Act. When the affidavit was filed, it was thoroughly gone into. It was evident that the valuations in several instances were too low and it was not until the 27th of January, 1926, that the executors would acknowledge an under-valuation of the estate to the extent of $17,561.94. On the 28th of January, 1926, the Crown filed with the Registrar of the Supreme Court at Victoria a statement of the probate and succession duty required to be paid by the executors, but it cannot be admitted for a moment that at this date only can interest be calculated as this would be a complete frustration of the Act and put a premium upon delays caused by the persons liable to pay the duty and interest called for by the Act. The Crown exhibited at all times a willingness to meet the executors in every way and to make any refunds if there was any overpayment. There was really no excuse or impossibility at all to make the payment of duty within six months of the death. None of the excuses made are such as contemplated or within the meaning of the Act, *i.e.*, not within the plain meaning of the words "owing to some cause over which the person liable has no control" (section 35, Cap. 244, R.S.B.C. 1924). I am unable to see upon the facts here that there was or should have been any difficulty in the way of an ascertainment of the duty payable within six months of death. There were no complications whatever. The delays were under-valuations and other difficulties and delays wholly chargeable to lack of expedition upon the part of the executors. There was no risk in any overpayment as there was always the right to a refund. It is inconceivable that the Crown, if it was proved to its satisfaction that any duty paid on account of any succession was not really due from the persons paying it, or that it was

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paid by mistake, would not refund it, and to escape the interest, and prevent it running, the duties should always be paid within the six months. The language of the statute as above quoted is abundantly clear.

The interest is statutorily imposed and it is incapable of being defeated save "where it appears to the judge that payment within the time prescribed by this Act is impossible owing to some cause over which the person liable has no control" (section 34, Cap. 244, R.S.B.C. 1924). That there was no such impossibility I have already pointed out. It would seem, with great respect to the learned judge, that he came to the conclusion that there was impossibility to make payments of the duties until the final assessment was come to, *viz.*, the 28th of January, 1926, as it is from that date only that interest has been allowed to the Crown. This would be a conclusion of the most far-reaching effect and would result in absolutely defeating the statute as to the required payment of interest. There will always be more or less delay, I would suppose, in all cases and the final assessment may be long in completion but the interest is not to be defeated save where there was impossibility owing to some cause over which the person liable has no control. There cannot be as here, under-valuations and persistence in them and other delays and then the right to romp in and pay the duties minus the interest save from the date of the final assessment which has been delayed solely because of the executors' delays and default, nothing having occurred, as I read the evidence, admitting of it being said that there was any cause over which the executors had no control. Any such cause should be specifically set forth and found to be a fact and I do not find that the learned judge has made any such finding of fact; further, upon the facts, I am of the opinion that no such finding of fact in the present case could be found as there is no evidence whatever upon which to find it. The final assessment by the Crown in no way affects the question to be decided here—it is a matter of statutory book-keeping, mandatory in its nature. The interest must be paid from the date of death. Not being paid within six months of the death, save where, quite independent of the final assessment, the judge has in a proper case and upon sufficient evidence found, as a fact, that payment within the time prescribed by the Act (that is

within six months of the death, not the date when the final assessment is made) is impossible owing to some cause over which the executors had no control. I pause here to ask what was that cause found by the learned judge? I fail to find it. There has been the failure to make the finding called for by the Act and, as I have already stated, it could not be reasonably so found upon the evidence. It is in the contemplation of the Act that the duties will be paid before the final assessment is come to. It is an obligation upon the executors to bestir themselves and they must advise themselves anterior to the final settlement and pay the duties estimating them, as they best can and pay the amount to the Crown within six months of the death if they wish to save the estate from interest where especially they see ahead of them as in this case a prolonged period before the final assessment could be come to. It is unthinkable that Parliament in enacting, as it did, a revenue provision, such as section 20 (1) is should be defeated in its plain intention, as it is attempted here to be defeated, save only upon the specific finding of the cause and impossibility that supervened following the death, a cause over which the executors had no control, and again I say, what was that cause? It cannot be left in the air. We have unfortunately no reasons for judgment from the learned judge. With great respect to the learned judge, he has failed to make the necessary finding defining the cause; without that cause found and found upon sufficient evidence, the order under appeal is ineffective and of no force or effect and that is my opinion. It cannot be forgotten that Parliament is paramount in this matter and the statutory provision imposing interest must be given effect to unless there be produced an order from the judge made in the terms of the statute and for causes as set forth in the statute. The case is one of unpaid succession duty payable to the Crown, that is, a debt due to the Crown by statute and unless there be a good and valid order supporting its non-payment the debt to the Crown still subsists. In *Russell* v. *Russell* (1897), A.C. 395, Lord Hobhouse, dealing with the question of the meaning of "impossibility" said at p. 436:

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"It is said that we cannot define 'impossibility' of discharging duties. Certainly not; any definition would either be so wide as to be nugatory, or too narrow to fit the ever-varying events of human life. . . . Such rudimentary terms elude *a priori* definition; they can be illustrated, but

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not defined; they must be applied to the circumstances of each case by the judge of fact, which in this case is a jury directed by a judge, and controlled, if erring in principle, by the Court above."

Here the decision is that of a judge. In my view, the learned judge failed to find the necessary fact and upon the facts as disclosed there was no "impossibility" owing to any cause over which the executors had no control and the judge erred in principle and went wholly wrong.

For the foregoing reasons, I am clearly of the opinion that the appeal should succeed, the Crown being entitled to interest from the date of the death of the deceased, the duties not having been paid within six months of the death and that the order under appeal should be set aside.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Elliott, Maclean & Shandley.*
Solicitors for respondents: *Crease & Crease.*

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RAY v. RUBY HOU *ET AL.*

Agreement for sale—Default in payments—Further agreement—Option to purchase still in force but payments expressed in rent—Further default—Writ of possession under Landlord and Tenant Act—Appeal—R.S.B.C. 1924, Cap. 130, Secs. 19 and 22.

The plaintiff sold a property in Vancouver to the defendants under agreement for sale for $40,000. The defendants went into possession and after paying $21,000 were in default. The parties then entered into a further agreement whereby the option to purchase was still in force but the payments to be made were expressed in rent. After making further payments amounting to $2,500 the defendants were again in default and the plaintiff applied for and obtained a writ of possession under the overholding sections of the Landlord and Tenant Act.

Held, on appeal, reversing the decision of GRANT, Co. J. (MACDONALD, C.J.A. dissenting), that in a case so involved and in which if action had been brought relief against forfeiture might be considered, the section of the Landlord and Tenant Act invoked does not apply. Summary remedy should not be invoked except in cases of the ordinary relationship of Landlord and Tenant.

Banks v. *Rebbeck* (1851), 20 L.J., Q.B. 476 applied.

Statement APPEAL by defendants from the decision of GRANT, Co. J. of

the 12th of April, 1927, ordering that a writ of possession do issue to the sheriff of Vancouver to take possession of lot 39, block 29, district lot 541, group 1, New Westminster District. In 1923, the plaintiff sold the property under an option to three Chinamen, Ruby Hou, Jong Kee Hong and Chew Sing for $40,000. The purchasers after paying $21,700 on account of the purchase price, defaulted on the next payment. The parties then conferred and another agreement was drawn up and signed by the plaintiff but was not signed by the defendants. The defendants continued in possession and made payments under the new agreement to the amount of $2,500 when they were again in default. The plaintiff then applied to the County Court under the Landlord and Tenant Act for a writ of possession which was granted on the 12th of April, 1927.

Statement

The appeal was argued at Victoria on the 28th and 29th of June, 1927, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Ginn, for appellants: Of the purchase price of $40,000 they paid $21,700 before the new arrangement was made and they paid $2,500 afterwards. My submission is (1) the relationship of landlord and tenant never existed. (2) If it did, the sections of the Act that the respondent relies on do not apply. (3) There was no proper compliance with the Act. The defendants have been in possession since 1923 and under the new agreement of the 2nd of August, 1926, the defendants are still purchasers: see Williams on Landlord and Tenant, 1000; *Re Mitchell and Fraser* (1917), 40 O.L.R. 389; *McNeely* v. *Carey* (1914), 7 W.W.R. 689; *Re Snure and Davis* (1902), 4 O.L.R. 82 at p. 87; Williams on Ejectment, 2nd Ed., 27; *Fyhri* v. *Burke* (1924), 3 W.W.R. 328; *Banks* v. *Rebbeck* (1851), 20 L.J., Q.B. 476.

Argument

Brydone-Jack, for respondent: They are in default and we are entitled to the writ: see *Morton et al.* v. *Nichols* (1906), 12 B.C. 485; 2 M.M.C. 390 at p. 395; *Green* v. *Longhi* (1914), 7 W.W.R. 924; *Stewart Bros.* v. *Schrader* (1915), 8 W.W.R. 761; *Hiatt* v. *Miller* (1833), 5 Car. & P. 595.

Ginn, replied.

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MACDONALD, C.J.A.: The order appealed from was made under the provisions of the overholding sections of the Landlord and Tenant Act. The appellants took an option to purchase from the respondent the premises in question. According to the terms of the option certain payments were to be made at specified times; they were expressed to be payments of rent and the relationship between the parties were to be deemed that of landlord and tenant. The appellants made default and all things were done by the respondent which were required by said Act to be done, to entitle him to the order appealed from. The appellants' contention is that an option to purchase land and chattels cannot be regarded as a lease, nor the relationship of the parties that of landlord and tenant, and they rely amongst others upon *Re Mitchell and Fraser* (1917), 40 O.L.R. 389; and *Re Snure and Davis* (1902), 4 O.L.R. 82.

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The overholding clauses of the Ontario Act are similar to those in our own, the only difference, to which I attach little importance, is that under the former when the judge is satisfied that a case has been established for an order of possession, he "may" make the order, whereas under our Act he "shall" make it. But on substantial grounds these cases are quite distinguishable from this one, as a perusal of them will clearly shew. In the first case there was no attornment, and in the second there was no proper notice to the tenant, and if for no other reason the orders were nugatory. The powers given by our Act should no doubt be exercised with caution to avoid the danger of depriving parties of their general right to have their cases disposed of in an action of possession and not in a summary manner, but I can discover no escape from the conclusion that what was done here was within the power of the County Court. The case falls, in my opinion, clearly within the overholding sections of the Act.

The appeal should, therefore, be dismissed.

GALLIHER, J.A.: In a case so involved as this is and one in which if action had been brought and in which relief against forfeiture might have been asked and dealt with, the section of the Landlord and Tenant Act invoked, should not, I think, be taken to apply. We would have to give to the words "occupant"

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and "tenant" the widest construction. And as was said in *Fyhri* v. *Burke* (1924), 3 W.W.R. 328 by Taylor, J. at p. 330:

"The purpose of the legislation [referring to the Landlord and Tenant Act] is to afford a summary remedy to landlords against overholding tenants, not to create a new and general method to a quick and easy issue of writs of possession."

Though the facts are dissimilar I think the expression apt in the circumstances of this case.

It appears to me this summary remedy should not be invoked except in the cases of the ordinary relationship of landlord and tenant. *Banks* v. *Rebbeck* (1851), 20 L.J., Q.B. 476; *Jones* v. *Owen* (1848), 18 L.J., Q.B. 8.

The option under which the appellants, in my view, entered into occupation gave the right to purchase set out the terms on which such purchase could be made, the respective amounts to be paid on the respective dates set out and contained a clause for forfeiture of payments made to be retained by the respondent as consideration for the option and as rent notwithstanding the annulment for non-fulfilment of the terms. The option goes on to say that until default is made in payments they shall occupy the premises as tenants, the sums payable to be considered as rent. There is a further clause that the option may be exercised at any time before the final payment is due by carrying out the terms of the option. If all payments mentioned in the option had been duly made the time for making the final payment had not arrived when these proceedings were taken. Some $21,000 had been paid up to November 1st, 1926, as per statement. It would be a matter of accounting as to whether that sum would cover payments of purchase-money, interest, taxes, insurance, etc., as provided in the option up to that date. Then there might be a question under the exercise of the option clause whether the appellants, when they became in default upon an action for ejectment, could not have come in and made good their default and by so doing might have been relieved against forfeiture. When we find ourselves faced by so many of these considerations, to use the language of Meredith, C.J.C.P., in *Re Mitchell and Fraser* (1917), 40 O.L.R. 389 at p. 391,

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"The powers conferred upon County Court judges [under this summary power] . . . should not be exercised in a case which for any good reason ought not to be so tried, but should be tried in the ordinary way."

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I have endeavoured to set out some reasons why I think the present case should not have been summarily tried, and unless one gives the very widest meaning to the language of the Legislature in defining "tenant" as including an "occupant" (under whatsoever rights, or even wrongfully, he is in occupancy) which I do not think was intended, then, in my opinion this appeal should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the reasons for judgment of my brother GALLIHER and would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I agree with my brother GALLIHER.

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

Solicitor for appellants: *Roy W. Ginn.*
Solicitor for respondent: *A. C. Brydone-Jack.*

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HUGHES v. BEBAN.

Trespass—Damages—Cutting and removal of timber—Evidence—Limitation of action—R.S.B.C. 1924, Cap. 145.

The plaintiff brought action on the 31st of May, 1926, for trespass upon his lands and the removal of timber therefrom between the 1st of January, 1917, and the 31st of December, 1920. The plaintiff purchased the property in 1902 and two years later went to the Yukon where he remained for 20 years. On the evidence of four witnesses as to the removal of the timber by the defendant the jury found for the plaintiff for the amount claimed.

Held, on appeal, reversing the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that the plaintiff's claim for trespass and conversion committed before the 31st of May, 1920, was barred by the Statute of Limitations and as there is no evidence of the cutting and removal of timber after the 31st of May, 1920, upon which the jury could reasonably conclude that the plaintiff had made out a *prima facie* case, the action should be dismissed.

Statement

APPEAL by defendant from the order of MORRISON, J. of the 29th of April, 1927, and the verdict of a jury, in an

action for trespass or in the alternative for conversion of certain timber to the value of $12,372. The plaintiff is the owner of the west 40 acres of lot 4, Bright District, Vancouver Island. He claims that Beban took 505,851 feet of fir and 53,450 feet of hemlock from his property between the 1st of January, 1917, and the 31st of December, 1920. The plaintiff had purchased the property before he went to the Yukon in 1903, and his agent in Nanaimo looked after the payment of taxes until he returned in 1923. It was after his return when he first discovered that the timber was taken from his property. The defendant had a logging railway running to his mill. The railway ran through the west corner of the plaintiff's property and there was evidence that he took a quantity of timber off the plaintiff's land between 1912 and 1920. The action was commenced on the 31st of May, 1926. The defendant pleaded the Statute of Limitations, there being very slight evidence of any timber having been taken from the property after the 31st of May, 1920. Questions were put to the jury but a general verdict was given for the plaintiff for $1,118.60.

Statement

The appeal was argued at Victoria on the 27th and 28th of June, 1927, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Maclean, K.C., for appellant: There is not the slightest evidence that there was any trespass after the 31st of May, 1920. The evidence of the Carmichaels should not be given any credence as they all worked for Beban and were later discharged by him. There was a fire in 1920 and the property is mostly rock, the timber only being on a small portion of it. You must plead both fraud and laches: see Annual Practice, 1927, p. 322; *Gibbs* v. *Guild* (1881), 8 Q.B.D. 296 at p. 305. There is no plea of fraud: see *Page* v. *Page* (1915), 22 B.C. 185; *Bulli Coal Mining Company* v. *Osborne* (1899), A.C. 351 at p. 362; *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43; *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at p. 50; *Haddington Island Quarry Company, Limited* v. *Huson* (1911), A.C. 722.

Argument

J. A. Campbell, for respondent: The jury did not believe appellant's witnesses. Any equitable circumstance will take the

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case out of the statute: see *Bulli Coal Mining Company* v. *Osborne* (1899), A.C. 351 at p. 365; *Trotter* v. *Maclean* (1879), 13 Ch. D. 574 at p. 584; Banning on the Limitation of Actions, 3rd Ed., 275. On the onus of proof see *Wilby* v. *Henman* (1834), 2 Cr. & M. 658 at pp. 661-2; *Rolfe* v. *Gregory* (1865), 4 De G. J. & S. 576 at p. 579; *Ex parte Adamson. In re Collie* (1878), 8 Ch. D. 807 at p. 822. The wilful taking of timber is an equitable circumstance: see *Oelkers* v. *Ellis* (1914), 2 K.B. 139 at p. 149; *Twyford* v. *Bishopric* (1914), 7 Alta. L.R. 442 at p. 445.

Maclean, in reply, referred to Halsbury's Laws of England, Vol. 19, p. 184, sec. 391.

Cur. adv. vult.

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MACDONALD, C.J.A.: The plaintiff claims damages for trespass upon and for the value of timber removed from his land, between 1st January, 1917, and 31st December, 1920. The action was commenced on the 31st of May, 1926. His claim for trespass and conversion committed before the 31st of May, 1920, was therefore barred by the Statute of Limitations. The combined effect of the statement of claim and of the statute is to confine his right of redress to wrongs committed during the last seven months of 1920.

The plaintiff himself had no knowledge of the relevant facts, but called four witnesses to prove the defendant's wrong-doing. These witnesses were the three Carmichaels, and one Perala. W. B. Carmichael swore to a trespass and removal of timber on the 2nd of January, 1916, and said that he had seen similar acts committed by or on behalf of the defendant up to about 1919 or 1920. Gordon Carmichael gave similar evidence, and A. L. Carmichael knew of no trespass by defendant upon plaintiff's land after the beginning of 1916. The testimony of these three witnesses therefore, utterly fails to prove the wrongs complained of within the period aforesaid.

The grounds of appeal are that the learned judge misdirected the jury in charging them that if they believed the three Carmichaels the plaintiff was entitled to succeed; that they were not concerned with the Statute of Limitations, and that he had

failed to charge them that the plaintiff must have proved that the timber was taken after the 31st of May, 1920. In his charge he said:

"I would think that the whole matter turns upon the credibility of the three Carmichaels."

Again:

"I wanted to know the truth, because obviously if the Carmichaels are telling the truth, then I do not see there is any defence."

In answer to the foreman of the jury, he said:

"Have you the questions I gave you? As I said before, it seems to me it comes down to believing or disbelieving the evidence for the plaintiff. If you believe the Carmichaels, you see, when they say they were there, and the defendants took the logs off that place, then you are justified in finding whether he took all the logs off, as they claim."

Had the jury believed the three Carmichaels they could not, I think, on that evidence alone have rightly found a verdict for the plaintiff. The charge that "if the Carmichaels are telling the truth, then I do not see there is any defence" was misdirection.

Several questions were submitted to the jury who were instructed correctly, that they might answer them, or in the alternative, return a general verdict. Before the jury could properly return a general verdict they must find whether or not the wrongs complained of had been committed during the last seven months of 1920, and if they should find that only part of the timber the value of which was in question in this action, had been taken within that period, that fact would affect the measure of damages. Therefore, there was again misdirection in charging the jury that they were not concerned with the Statute of Limitations. They may well have founded their verdict, and this I think is more than likely, not upon trespass in the latter part of that year but upon the trespasses sworn to by the Carmichaels and the failure to charge them with respect to the Statute of Limitations may not only have affected the question of liability but that of the *quantum* of damages as well. It is true that had properly framed questions been answered by the jury the judge might apply the provisions of the Statute of Limitations, but that question does not arise in this case.

This conclusion would entitle the appellant at least to a new trial, but I think I ought to enquire further to see whether on the whole facts the plaintiff had made out a *prima facie* case

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and for this purpose I shall confine the enquiry to the evidence of the plaintiff's other witnesses, Perala, Dixon and Mottishaw. Perala is the only witness other than the Carmichaels who gave evidence of trespass and conversion. The other two, Dixon and Mottishaw are important only in respect of the quantity of timber taken, and the condition of the area at the time of the fire, and after the fire. Perala who resided less than a mile from the plaintiff's land, said that he had been in the habit almost daily of searching for his cows on and around the plaintiff's property during a period from some time in 1918 to the date of the trial. It is common ground that a fire swept over this land in July, 1920. Perala said that he had seen defendant's teams hauling timber from and around the plaintiff's land in 1918 and 1919. He was then asked, in chief:

"How long did you see the teams hauling from this property? Well, I couldn't really state the time, but the last time I seen hauling was between '20 and '21.

"Was this after the fire? After the fire.

"From the first to the last, how long would the time be that you saw these teams on Hughes's property? Well, the first I saw was in 1919, and the last was in 1921."

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These answers, I think, cannot be construed to mean that the witness had seen defendant's teams hauling timber from the plaintiff's property continuously from some time in 1919 to some time in 1921. The first of the above answers indicated that. Now, it is a physical impossibility for any person to commit trespass and convert timber between "'20 and '21." There is no space of time between the two years. The other answers do not amount to proof that any timber at all was taken during the year 1920, or if they do, that the timber was taken between the date of the fire in July, 1920, and the end of the year. Unless this hauling was continuous during a period of three years, and it is not stated that it was so, then no actionable wrong has been proven in this case.

This conclusion is fortified by the evidence of Dixon and Mottishaw, plaintiff's witnesses. Dixon made an estimate for the plaintiff of the timber alleged to have been taken, and his report was filed and is marked Exhibit 2. It was made from the burnt stumps, which he says were old stumps. He mentions that the area was burned over in July, 1920, "since it was

logged." He had been a forest ranger and was present at the fire. It is for the value of the timber in his estimate made from the burnt stumps that the plaintiff is suing. Mottishaw, also a forest ranger, said that there was no timber there at the time of the fire, that the area was "old slash."

On this evidence therefore, I do not think that the jury could reasonably come to the conclusion that the plaintiff had made out a *prima facie* case. The action should have been dismissed by the learned judge.

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This conclusion renders it unnecessary to consider the question of continuing trespasses.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The jury found a general verdict in an action for trespass and conversion for the plaintiff and assessed the damages at $1,118.60. The trespass was the going upon the land of the plaintiff and cutting down merchantable timber thereon.

I do not propose to in detail discuss the evidence—this is quite unnecessary when we have a general verdict and ample evidence if believed to warrant the finding of the jury. The evidence as led by the respective parties is in sharp conflict and the question of credibility was squarely up and it was the province of the jury to pass upon this evidence following the charge to the jury of the learned trial judge. The charge to the jury was complete in form and in my opinion no misdirection or non-direction has been established. The learned judge presented questions to the jury to be answered, but advised the jury that there was no compulsion upon the jury to answer the questions, counsel for the plaintiff submitting that the law did not so require. It is clear that the course of the trial was such that evidence was adduced which established beyond question that the action had been brought in time, *i.e.*, that the six years—the period of limitation—had not elapsed before the commencement of action. The jury in bringing in a general verdict must be held to have found all the essential issues in favour of the plaintiff entitling judgment to be entered for the plaintiff. The jury were in no way compelled to answer the questions or fix the date or dates of

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the trespass, and conversion—all that has to be looked at is, Did the jury act reasonably in finding as they did upon the evidence adduced and before them? In my opinion it is impossible to contend that the jury acted unreasonably in finding as they did as the evidence before them was ample in its terms to justify their finding. The jury do not give reasons and no reasons being given the case is not one which entitled the verdict being disturbed (*Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326; *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; 2 W.W.R. 1149, Anglin, J. (now Chief Justice of Canada) at p. 1167). We have recently had a binding decision in the House of Lords which establishes beyond question that in this particular case, where the demeanour of the witnesses was a matter of first importance, there being a sharp conflict of evidence, the case is not one for the disturbance of the verdict by the Court of Appeal (*S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37, Lord Sumner at pp. 47-8).

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: On the general question as to whether or not this timber was taken by the appellant apart from the time it was taken, I would not interfere with the finding of the jury. There was evidence, which if believed, justified their verdict on that point and unless we find that no reasonable view of the whole evidence justifies it that conclusion should not be disturbed. They were entitled to accept the evidence of the Carmichaels and Perala.

I find, however, that the Statute of Limitations bars the respondent's claim. True, in a case of fraud the party defrauded is not affected by lapse of time so long as without his fault he is unaware of the trespass. *Bulli Coal Mining Company* v. *Osborne* (1899), A.C. 351. But fraud was not pleaded, and, as I view it, was not an issue in the action.

It was urged that a wilful trespass amounts to fraud, or that in any event the authorities do not strictly confine the non-operation of the statute to cases purely of fraud.

"When fraud or any other equitable circumstance exists, undoubtedly the statute will not apply":

Trotter v. *Maclean* (1879), 13 Ch. D. 574 at p. 584.

While accepting the verdict of the jury, I cannot say on the whole case there are any circumstances disclosed which should lead us to free the respondent from the operation of the Act governing limitation of actions. This would require the writ to be issued six years after the last trespass, assuming that the trespass may be regarded as continuous. The claim is made for trespass only up to December 31st, 1920. No claim is made in respect to 1921. The writ was issued on May 31st, 1926, and there is no evidence of any cutting or removal of timber after May 31st in the year 1920.

I would, therefore, allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Elliott, Maclean & Shandley.*

Solicitors for respondent: *Congdon, Campbell & Meredith.*

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REX v. MORELLE.

Criminal law—Manslaughter—Conviction—Appeal—Depositions admitted on trial—Non-compliance with section 999 of Criminal Code—New trial.

The accused was convicted of manslaughter having run into and killed a pedestrian while driving his automobile easterly down a hill on 4th Avenue in Vancouver at about 8.30 on the morning of the 17th of January, 1927. One D. H. Brock gave evidence on the preliminary hearing but was too ill to appear at the trial and counsel for the Crown was allowed to read his depositions taken on the preliminary hearing. He was the only witness who gave evidence as to speed and he said accused was travelling at a high rate of speed.

Held, on appeal (MACDONALD, C.J.A. dissenting), that before admission of such depositions section 999 of the Criminal Code requires that "it must be proved that such evidence was given or such deposition was taken in the presence of the person accused and that he or his counsel or solicitor, if present, had full opportunity to cross-examine the witness." No proof of these conditions precedent was given nor of the further condition that "the evidence or deposition purports to be signed by the judge or justice before whom the same purports to be taken." The evidence was of weight and might well have turned the scale of the jury's verdict and there should be a new trial.

Rex v. *Powell* (1919), 27 B.C. 252 applied.

APPEAL by accused from his conviction by MCDONALD, J. of the 28th of April, 1927, on a charge of manslaughter. The accused is a taxi-driver and on the evening of the 16th of January, 1927, he was hired by two girls to take them for a drive. They first went to Stanley Park where they remained until late in the evening. They then went to Marine Drive and after driving for some time they approached the corner of 4th Avenue and Imperial Street where they were met by a truck which took up too much of the road and they were forced into the ditch. They remained there for about two hours when they were hauled out by a wrecking car. The accused then proceeded to drive the car to the top of a hill a short distance from where they were in the ditch, and on going down on the other side he saw a man walking in the same direction as he was going on the road (there was a sidewalk there for pedestrians). Defendant honked his horn and thought the man heard him. Just as he was coming up to him the man turned and moved towards the

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middle of the road and in front of him. He turned his car quickly to the left, the car skidded, struck the man and then went into the ditch on the opposite side where it turned over. The man on the road was killed. There were two eye-witnesses of the accident. One was a taxi-driver who was coming from the opposite direction. He could give no evidence as to the speed at which accused was going. The other witness, a student, named Brock, was ill at the time of the trial and did not appear as a witness but his evidence taken on the preliminary hearing was allowed in on the trial, he stating that the defendant was driving at a high rate of speed. Statement

The appeal was argued at Victoria on the 24th of June, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Wismer, for appellant: The student Brock who gave evidence at the preliminary hearing was ill when the trial took place and they read his evidence taken on the preliminary hearing. There is no evidence connecting David Brock with D. H. Brock and this evidence should not have been read at the trial: see *Rex* v. *Angelo* (1914), 19 B.C. 261. There is no evidence that the deposition was taken in the presence of the accused, that there was full opportunity for cross-examination or that the depositions were signed by the justice: see *Rex* v. *Powell* (1919), 27 B.C. 252. Brock's evidence is all there is as to speed. On the question of objection being taken when it was read see *Allen* v. *The King* (1911), 44 S.C.R. 331; *Rex* v. *Brooks* (1906), 11 O.L.R. 525. There is a clear distinction as to this between civil and criminal cases. The Crown must prove its case: see *Rex* v. *Smith* (1916), 12 Cr. App. R. 42; *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100; *Rex* v. *Hogue* (1917), 39 O.L.R. 427. The right to read evidence must be strictly proved: see Archbold's Criminal Pleading, Evidence & Practice, 27th Ed., 441; *Rex* v. *Boak* (1925), 36 B.C. 190 at p. 193; 44 Can. C.C. 218; *Gouin* v. *The King* (1926), S.C.R. 539. On the charge the learned judge omitted to direct the jury as to the duty of the Crown to prove the charge beyond a reasonable doubt and as to the meaning of "reasonable doubt" see *Rex* v. *Cook* (1914), 23 Can. C.C. 50; *Rex* v. *Schama* (1914), 84 L.J., K.B. 396; Argument

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Rex v. *Cohen* (1909), 2 Cr. App. R. 197 at p. 207; *Rex* v. *Stoddart, ib.* 217; *Rex* v. *Badash* (1917), 87 L.J., K.B. 732.

Ellis, K.C., for the Crown: The wrecker's chauffeur said the battery was run down and one of the wheels of his car was wabbly when he pulled it out of the ditch. My submission is there was no substantial wrong and section 1014 of the Criminal Code applies to this case: see *Rex* v. *Angelo* (1914), 19 B.C. 261; 22 Can. C.C. 304; *The Queen* v. *Stephenson* (1862), 31 L.J., M.C. 147; *Rex* v. *Miller* (1923), 32 B.C. 298 at p. 302; *Rex* v. *Baker. Rex* v. *Sowash* (1925), 37 B.C. 1; *Rex* v. *Payette* (1925), 35 B.C. 81.

Wismer, replied.

Cur. adv. vult.

4th October, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the motion. The only notice served was a notice for leave to appeal on mixed questions of law and fact. By virtue of the Criminal Appeal Rules, 1923, that notice would have served as a notice of appeal, had leave been granted. The refusal of leave therefore, disposes of the whole matter before the Court.

My learned brothers think that because we heard argument on questions of law we in effect, entertained the appeal on questions of law, but that is not my recollection of the argument, nor is it the evidence of my notes, which are explicit in treating the argument as a motion for leave to appeal on mixed questions of law and fact. This involved argument on the law applicable to the facts. If leave were granted or there had been an appeal on a question of law only, I should have had to follow our decision in *Rex* v. *Powell* (1919), 27 B.C. 252 notwithstanding that the necessity to prove the preliminaries requisite to the admission of the depositions appear to have been by both parties regarded as an unnecessary formality; both made use of them. He who relies on a mere slip should not be assisted when he has not brought himself into Court, at all events, when I am convinced that no miscarriage of justice has occurred. If that had been made to appear, I should not let a technicality stand in the way of relief.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal on several grounds from a

conviction for manslaughter in driving a motor-car, but near the close of the argument we intimated that the objection to the admission of the depositions was the only one we wished to hear counsel further upon. Section 999 of the Criminal Code provides that:

"If upon the trial of an accused person such facts are proved upon oath or affirmation that it can be reasonably inferred therefrom that any person, whose evidence was given at any former trial upon the same charge or whose deposition had been theretofore taken in the investigation of the charge against such accused person, is dead, or so ill as not to be able to travel, or is absent from Canada, or if such person refuses to be sworn or to give evidence, and if it is proved that such evidence was given or such deposition was taken in the presence of the person accused, and that he or his counsel or solicitor if present had full opportunity of cross-examining the witness, then if the evidence or deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution, without further proof thereof, unless it is proved that such evidence or deposition was not in fact signed by the judge or justice purporting to have signed the same."

The depositions objected to were those of David Brock and Dr. Lennie, the first being an eye-witness of the killing of Lawson, a pedestrian, by the appellant, while driving "at a high rate of speed" as Brock puts it, and the second described the fatal injuries sustained by the deceased when he attended him in the hospital shortly thereafter.

MARTIN, J.A.

In view of our two decisions upon said section 999—*Rex* v. *Angelo* (1914), 19 B.C. 261, and *Rex* v. *Powell* (1919), 27 B.C. 252 it is not necessary on the facts before us to do more than apply them and say that the learned trial judge had facts before him from which he "reasonably inferred" a state of circumstances which justified him in reaching the conclusion that the first witness was "so ill as not to be able to travel" and the second was "absent from Canada." But that is not enough, because the section further requires that, before admission, it must be "proved that such evidence was given or such deposition was taken in the presence of the person accused and that he or his counsel or solicitor if present had full opportunity of cross-examining the witness." No proof of these conditions precedent was given, nor of the still further condition that "the evidence or deposition purports to be signed by the judge or justice before whom the same purports to be taken." The absence of these requirements brings the case within the principle of *Rex* v.

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Powell, supra, which it much resembles, in that the original depositions are not before us nor were they properly or legally put in as evidence below.

It was submitted that as these objections were not taken below they were waived and should not be given effect to because, it was said, the appellant had sustained "no substantial wrong" under section 1014 (2) of the Code. While it is, I think, correct to say that the evidence of Dr. Lennie was of no real importance because the killing of the deceased by the appellant was otherwise abundantly established, yet the same cannot be said of Brock's evidence which was undoubtedly of weight and, might well have turned the scale of the jury's verdict against him. As to waiver of substantial objections by silence, we decided in the *Powell* case (rape) that in a matter of this importance at least (manslaughter) the mere omission to take an objection below does not deprive an appellant of the right to take it here—and *cf. Rex* v. *Sankey* (1927), [38 B.C. 361]; 2 W.W.R. 265;

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(1927), S.C.R. 436.

In the circumstances at Bar the proper order to make is to "direct a new trial" under section 1014 (3) (*b*), which gives us a wide power of discretion—*cf. Hubin* v. *The King* (1927), S.C.R. 442.

In so ordering, it has not escaped our attention that the original motion was in form one for leave to appeal only, but it was orally expanded during the hearing by a specific application for a new trial and the whole matter was argued at large by both parties without objection upon that comprehensive basis; therefore we apprehend that the proper course to adopt, in such circumstances, is formally to grant leave to appeal *nunc pro tunc* and so dispose of the case upon form as well as substance in compliance with rule 4 of the Criminal Appeal Rules respecting leave to appeal which dispenses with an additional notice of appeal if leave be granted.

GALLIHER, J.A. MCPHILLIPS, J.A. MACDONALD, J.A.

GALLIHER, MCPHILLIPS and MACDONALD, JJ.A. agreed with MARTIN, J.A.

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

Solicitor for appellant: *Gordon S. Wismer.*

Solicitor for respondent: *J. N. Ellis.*

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Trusts—Trust deed—Security for bondholders—Breach of trust—Petition for directions—Discretion—Appeal—Marginal rules 770 and 771.

On the 30th of September, 1922, the Granby Consolidated Mining, Smelting & Power Company purchased under agreement for sale, the Outsider Group of mineral claims at Maple Creek, B.C. from the American Securities Corporation Limited for $200,000 on the terms that $15,000 be paid each year to the American Savings Bank & Trust Company, Seattle, U.S.A., on behalf of the securities Company. On the 1st of April, 1923, the American Securities Corporation issued $130,000 in bonds and entered into a trust deed whereby one R. C. McDonald became trustee for the bondholders, and the Company's assets were transferred to him as security including the annual payments from the Granby Company. Shortly after this McDonald resigned and The Royal Trust Company was appointed trustee as his successor. All the bonds were held by the American Savings Bank & Trust Company and one M. Woldson in equal portion. In 1925 one Sostad brought action against Woldson for commission for bringing about the sale of the Outsider group of mineral claims to the Granby Consolidated Company and Woldson applied to have the American Savings Bank & Trust Company added as a party. The bank opposed the application but was made a party and although successful in the litigation that followed incurred an expenditure of about $3,000 in costs that the bank claimed it was entitled to charge against the payments made to it by the Granby Consolidated under the agreement for sale of the Outsider group. Woldson then as holder of more than one-quarter of the bond issue demanded of The Royal Trust Company, as trustee, to give notice to the Granby Consolidated to make all future payments under the agreement for sale of September, 1922, to The Royal Trust Company as trustee for the bondholders. On The Royal Trust Company petitioning the Supreme Court for directions in respect of this demand an order was made directing The Royal Trust Company to give the Granby Consolidated written notice to make all future payments under the said agreement for sale to The Royal Trust Company.

Held, affirming the decision of MCDONALD, J., that the appeal should be dismissed.

Per MACDONALD, C.J.A.: That the trustee had been required to take measures for the protection of the trust property and it was its duty and its right to do so. There was a breach of trust and the trustee must protect the money from diversion from the purpose for which the trust was created.

Per MARTIN, GALLIHER and MCPHILLIPS, JJ.A.: The rules confer a wide discretion in the learned judge hearing the motion which should not

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be interfered with unless in very strong and special circumstances based upon the absence of any materials to ground a discretion or error in principle. There is no reason for interfering with the order.

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APPEAL by the American Securities Corporation Limited from the order of MCDONALD, J. of the 1st of April, 1927, directing The Royal Trust Company as trustee for the bondholders of the American Securities Corporation Limited to give the Granby Consolidated Mining, Smelting & Power Company Limited notice in writing demanding payment to it of all moneys hereafter payable by the said Granby Company to the American Securities Corporation Limited pursuant to an option agreement of the 30th of September, 1922. The Granby Company obtained an option to purchase the Outsider Group of claims at Maple Bay, B.C., from the American Securities Corporation Limited on the 30th of September, 1922, for $200,000 on the terms that $15,000 be paid on the 30th of September, 1924, and $15,000 on the 30th of September of each of the following years until the full amount be paid, the payments to be made to the American Savings Bank & Trust Company, Seattle, on behalf of the Securities Company. The American Securities Corporation Limited determined to issue bonds to the amount of $130,000 and on the 1st of April, 1923, entered into a trust deed whereby Roderick Charles McDonald became trustee for the bondholders and the Company's property was transferred to him including all moneys payable by the Granby Company under the option of the 30th of September, 1922. The American Savings Bank and Trust Corporation and Martin Woldson held all the bonds of the Company between them. On the 22nd of November, 1923, Roderick Charles McDonald resigned as trustee and by indenture of the 24th of November, 1923, between the American Securities Corporation, the American Savings Bank & Trust Company (now known as the American Exchange Bank), Martin Woldson and The Royal Trust Company, The Royal Trust Company was appointed trustee as successor to R. C. McDonald. In 1925, one Sostad brought action against Martin Woldson for commission for bringing about the sale of the Outsider Group to the Granby Company and Woldson then applied to have the American Savings Bank made a party. The

bank opposed the application resulting in considerable legal expense. Eventually the bank entered an appearance and in the end was successful. A question then arose as to Woldson's liability to the bank for costs and the bank claimed that this litigation entailed an expenditure of about $3,000 which they claimed they were entitled to charge against the sums they received from the Granby Company under the original option of September, 1922. Woldson then, as holder of $50,000 of the bonds (being more than one-quarter of the whole issue) demanded of The Royal Trust Company that it should give notice in writing to the Granby Company requiring said company to make all payments under the original option of the 30th of September, 1922, to The Royal Trust Company as trustee for the bondholders. The Royal Trust Company then launched a petition in the Supreme Court for directions in respect of the Woldson demand.

Statement

The appeal was argued at Victoria on the 22nd and 23rd of June, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Griffin, for appellant: This is an application under marginal rule 765. On the 30th of September, 1922, the Granby Company obtained an option to purchase the Outsider Group of claims and under the option the payments were to be made to The American Savings Bank & Trust Company. The option is still in force and the parties to it should be allowed to run their own affairs. The trouble arose over the costs of the action of *Sostad* v. *Woldson* (1925), 36 B.C. 14. Woldson has $50,000 of the bonds and the American Savings Bank hold the balance of the issue. If there has been any default by the American Securities it has been cured and there is no ground to enforce a change: see *In re Melbourne Brewery and Distillery* (1901), 1 Ch. 453 at p. 457. Mere non-payment is not default and there is no justification to say there was default here: *In re Panama, New Zealand, and Australian Royal Mail Company* (1870), 5 Chy. App. 318 at p. 322; *Thorn* v. *City Rice Mills* (1889), 40 Ch. D. 357 at p. 359. A bondholder holding over 25 per cent. of the bonds has no absolute right to force the trustee to give this notice.

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Symes, for respondent: The only security for these bonds is the money received from the Granby Company. On the question of notice see Halsbury's Laws of England, Vol. 4, p. 372; *Bateman* v. *Hunt* (1904), 2 K.B. 530 at p. 538.

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Cur. adv. vult.

4th October, 1927.

MACDONALD, C.J.A.: The appellant assigned to The Royal Trust Company, *inter alia,* future instalments of moneys which might become payable to the appellant (the Securities Corporation) under a designated option to the Granby Consolidated Mining, Smelting & Power Company, to purchase mining property. The assignment was to secure the payment of a bond issue. A bank in Seattle was by the deed nominated to keep a record of the bonds which might be registered there and to retire them out of the moneys which should be paid into it from time to time by, I take it, though it does not appear, the payee of the said instalments, the Granby Company. Matters went on smoothly for a time until the bank at the request or instigation of the appellant, diverted some of the said moneys to a purpose not authorized by the deed, On discovering this act the respondent, Martin Woldson, a holder of more than one-fourth of the said bonds, made a demand upon the trustee that it should notify the Granby Company of the said assignment and require payment of the said instalments in future to itself. He relied upon the breach of trust and upon article 25 of the trust deed, which so far as relevant is as follows:

MACDONALD, C.J.A.

"The trustee shall not be bound to do or take any act or action in virtue of the powers conferred or obligations imposed on it hereunder, unless and until it has been required to do so by a writing signed by holders of bonds, forming at least one-fourth of the value of the then outstanding bonds, defining the action which it is required to take."

Article 26 reads, in part, as follows:

"The trustee shall not be bound to see to the doing, observance or performance by the Company of any of the obligations hereby imposed on the Company, or in any way to supervise or interfere with the conduct of the Company's business, unless and until the security hereby created has become enforceable, and the trustee has determined or been required by the bondholders, as herein provided, to enforce the same."

And again:

"And in general it is understood that prior to the trustee being required

to take active measures with respect to the mortgaged premises after being duly indemnified, or its taking active measures with respect thereto without being so requested or indemnified his sole duty is confined to certifying the bonds secured hereby to belong to the series mentioned herein."

The deed evidences a clear assignment of the moneys in question to the trustee, who is not bound to take any action unless required by the bondholders to do so, but it is not precluded from taking action on its own initiative. The first quotation from article 26, in my opinion, has no application to the case, there being no interference with the Company's business in what was proposed here. That clause has reference to the course to be pursued by the trustee when it should become desirable to enforce the trust or so-called mortgage. Unless, therefore, the last clause of article 26 quoted above rules, the appellant must fail. Now that clause provides that prior to the trustee being required to take action it must be indemnified, which was done here, and that before being requested to take action or taking it on its own initiative, its sole duty is confined to certifying the bonds. The trustee has been required to take measures for the protection of the trust property, and I think it was its duty or its right to do so. There was a breach of trust and if the trust deed is to be of any value to the bondholders the trustee must protect the money from diversion from the purpose for which the trust was created.

MACDONALD, C.J.A.

I may say in justice to the appellant and to the bank, that I am satisfied that the breach of trust was not committed *mala fides;* there appears to have been a genuine dispute as to the right of the bank to divert the moneys to the purpose for which it now appears it was wrongfully diverted. This, however, does not affect the question which was submitted to us, namely, the right of the trustee to give the notice of assignment to the Granby Company. As the learned judge below has exercised his discretion in directing the notice to be given, I do not think that this Court should interfere.

I would dismiss the appeal.

MARTIN, J.A.: After a careful consideration of this matter I see no good reason for interfering with the order made by the learned judge below under rules 770-1; they confer a wide dis-

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cretion which should not be interfered with unless in very strong and special circumstances based upon the absence of any materials to ground a discretion, or error in principle. The expression in r. 770 "as the nature of the case may require" was in effect substantially used by Lord Justice Davey in *Nutter* v. *Holland* (1894), 3 Ch. 408, and in conjunction with the further expression—"as he may think just"—in r. 771 must be given that wide application which the two rules obviously, to my mind, contemplate. The appeal, therefore, should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: Whatever my private views might be in this matter, it is one so largely in the discretion of the learned judge below, that I feel a difficulty in finding that he exercised that discretion wrongly, and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal calls in question the exercise of a discretion by the learned judge in the Court below. It could only succeed if the decision come to by the learned judge proceeded upon some wrong principle, and I am not able to agree with the very persuasive and able argument of Mr. *Griffin*, the counsel for the appellant, that that is the case. Then, being a pure matter of discretion, it is not permissible—at least not in accordance with precedent—for the Court of Appeal to impose its judgment if even of a different opinion. I would, therefore, dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A. agreed in dismissing the appeal.

Appeal dismissed.

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

REINSETH v. NICOLA PINE MILLS LIMITED AND McDOUGALL.

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REINSETH v. NICOLA PINE MILLS LTD.

Contract—Agreement to pay for all timber on certain limits—Agreement to abide by joint cruise—Cruise not carried out as contemplated—Not binding on parties.

The defendant agreed to purchase all merchantable timber whether "standing or down" on four lots belonging to the plaintiff at $7 per M. the defendant to do his own logging and take the timber off. After logging for two years the defendant decided to cease work and as some merchantable timber remained the parties agreed that two cruisers, one appointed by each party, should estimate the quantity left and that the defendant should pay the plaintiff $7 per M. for what remained. The cruisers reported but the plaintiff being dissatisfied with their finding had two of his own cruisers make an estimate and they found that more than double the amount of merchantable timber remained. On examination the joint cruisers admitted they did not cruise two of the lots as these lots had been logged by the defendant and they concluded without examination that there was no merchantable timber there. The plaintiff's own cruisers reported there were 80,000 feet of "down" timber on these two lots which was merchantable. The plaintiff's action to recover the value of the remaining timber as found by his own cruisers was dismissed.

Held, on appeal, varying the decision of MACDONALD, J. (GALLIHER and MCPHILLIPS, JJ.A. dissenting), that the joint cruise was such a partial estimate of the remaining timber that it could not be regarded as a cruise contemplated by the parties and it is not binding. The two lots omitted by them were found to contain 80,000 feet of fallen timber and the value of this timber should be added to the amount found by the joint cruise.

APPEAL by plaintiff from the decision of MACDONALD, J. of the 7th of March, 1927, in an action to recover $11,125 the purchase price of timber purchased by the defendant Nicola Pine Mills Limited from the plaintiff pursuant to agreements in writing dated respectively the 18th of January, 1923, July, 1923, 1st October, 1923, 5th September, 1924, and 7th January, 1925. Under the first agreement the plaintiff (owner of all timber on lots 331, 738, 745 and 746 near Merritt in Yale District) agreed to sell all his timber on said lots to the defendant. The quantity mentioned was 4,000,000 feet. The plaintiff was to cut the timber into sawlogs and deliver them at the Kettle

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Valley Railway at 20,000 feet per day for which he was to receive $13 per M. The plaintiff failed to supply the quantity agreed upon and in July the former agreement was varied whereby the defendant was to do the logging and pay $7 per M. for the timber. The work continued on this basis until the summer of 1925 when the defendant decided to do no more logging. In the following December the parties agreed that each should choose a cruiser to determine the quantity of merchantable pine timber that remained on the lots and for which the defendant should pay under the July agreement. The cruisers reported that 408,200 feet were left. The plaintiff claims that in fact 1,159,000 feet remained and that the cruisers did not cruise certain portions of the lots. The defendants contended it was a term of the agreement of December, 1925, that the parties should abide by the result of the cruise, the plaintiff on the other hand claiming that they were not bound by the cruisers' report. The plaintiff's action was dismissed.

The appeal was argued at Victoria on the 8th, 9th and 10th of June, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, for appellant: The question is whether the plaintiff is precluded from proving how much timber actually remained on the lands in question. The respondents contend there was an agreement to be bound by the cruisers' report and the plaintiff denies that there was any such agreement. The plaintiff says the cruisers failed to cruise two of the four lots and a subsequent cruise by the plaintiff shews there was four times as much timber than the cruisers reported. We repudiate the honesty of our cruiser.

Craig, K.C., for respondents: The plaintiff withdrew his claim for damages so that the question of fraud or bad faith on the part of the cruiser he selected is not open to him. The two men who afterwards cruised the property for the plaintiff were not cruisers and they went over the property without instruments so that their evidence as to the timber left on the property is of no value. Our submission is that the cruise made by the two men who were selected by the parties under the agreement

of December, 1925, is binding on both parties. It was made honestly and it was right.

Mayers, replied.

Cur. adv. vult.

4th October, 1927.

MACDONALD, C.J.A.: The plaintiff and defendant each selected a cruiser who went out together for the purpose of ascertaining the value of the timber remaining on certain timber limits. The agreement was that the defendants should pay the plaintiff for such timber at the rate of $7 per thousand. The cruisers were selected and sent out with instructions to ascertain the amount of merchantable timber on the said limits. All merchantable timber down to a size of eight inches at the top was to be estimated. These cruisers made an unanimous report but the plaintiff being dissatisfied with it had two of his own cruisers go over the limits and they found more than double the amount of timber estimated by the joint cruisers. The learned trial judge accepted the estimate of the former. The plaintiff appealed and the only ground upon which I would disturb the judgment is based upon the following facts, which are scarcely in dispute:

Both McDougall and Logan, the cruisers for the respective parties, admit that they did not cruise two of the lots included in the limits. Logan expressed the opinion that there was nothing there to cruise and McDougall accepted that opinion. The fact that they did not cruise these two limits is not in dispute. Under the agreement between the parties, all merchantable timber of specified sizes was to be cruised whether standing or down on the said two lots. The plaintiff's cruisers. Lillico and Frempt, found 80,000 of "down" timber which ought to have been included in the estimate. That to which I attach the most importance, in connection with this, is the undisputed fact that these two parcels had been logged by the defendants under what is known as "selective logging," *i.e.,* the logger might take what he wanted and leave what he did not want. This character of logging was described by witnesses for both parties. It was said that a tree might be felled which would make five logs and that the logger might take two or three or four of them and leave

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the rest. Whether McDougall and Logan be regarded as arbitrators or mere cruisers, in my opinion, there is no difference in the result. They were called by the defendants as witnesses in the case and there is no question of privilege involved. Their evidence is before the Court without objection and on that evidence it is manifest to me that they failed, no matter how innocently to do the very thing that the parties had agreed that they should do.

In these circumstances, the judgment founded entirely upon the evidence of McDougall and Logan cannot stand as it is. I would, however, accept McDougall's and Logan's evidence with regard to those portions of the limits which they actually cruised. I will accept Lillico and Frempt's estimate of the "down" timber on the balance of the limits. These latter cruisers say quite frankly that there was no standing timber of value on this portion of the limits. I think, therefore, the judgment must be varied and increased by the sum of $565, being $7 per thousand for the 80,000 odd feet already mentioned. The plaintiff should also have the costs of the action and the costs of this appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: Though the judgment, and oral reasons therefor at length, have been objected to on several grounds to which they were fairly open yet despite the, with all respect, unsatisfactory ground upon which the decision is based, I do not think that, taking it as a whole we should be justified in disturbing it had not the learned judge quite overlooked the fact that apart from any question of fraud or misconduct it is clearly established by uncontradicted evidence that the arbitrators, so-called, never applied their minds to a substantial portion of the timber, *viz.*, the "down timber" lying on the "selective logging" area and admittedly excluded it from their estimate of the amount due to the plaintiff. The formal judgment recites that it is "calculated on the basis of the findings of the cruisers" but no notice is taken of said facts or of the additional allowance that should be made to the plaintiff on that basis which amounts to $565. There is no doubt whatever that such "down" timber, as it was called in the evidence, should have been estimated and allowed for because that is almost the only point upon which Reinseth and Meeker agree, the latter saying to his own counsel:

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"Now, Mr. Reinseth says that these men were to cruise not only the standing timber, but all the timber there whether it was down or standing. Do you agree with that? Yes, absolutely."

The appeal, therefore, should be allowed and the judgment increased by said amount.

GALLIHER, J.A.: Upon perusal of the evidence in this case, I am of the opinion that the learned judge below came to the right conclusion.

The learned judge has dealt very fully with the matter and once I can conclude as I do that the cruise by Logan and McDougall was not merely a basis of settlement which either party could accept or reject, but in fact a cruise to determine the amount of merchantable timber for which respondents were to be accountable to the plaintiff, I am satisfied the judgment below should not be disturbed.

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MCPHILLIPS, J.A.: I am of the opinion that the judgment of the learned trial judge is right. It was peculiarly a case for the determination of the learned trial judge who had the opportunity to see and weigh the evidence of the witnesses, and it is apparent that most careful attention was given to all the essential issues in the case. I am satisfied that the case is not one which entitles this Court to interfere (*S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37, Lord Sumner at pp. 47-8).

I would dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: There is a finding by the learned trial judge that it was intended by the parties that the joint cruise should be binding upon them. We cannot disturb that finding for want of sufficient evidence to support it if in fact a cruise as contemplated was made. This joint finding by the cruisers could, of course, be set aside on the ground of fraud. Whether or not this plea was open to the appellant, I am satisfied there is no reasonable evidence to support the allegation. One should be justified in assuming when the appellant, on being asked for particulars of the fraud alleged replied, that he "abandons all claim for damages for conspiracy and fraud," that this was no longer an issue. Conciseness and particularity should be exacted in respect to this plea and if it was intended to retain

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the allegation and simply abandon the claim for damages in respect thereto particulars of the fraud should have been given as asked for.

However, apart from fraud, if in fact no cruise was made, or such a partial estimate given that it could not be regarded as the cruise contemplated by the parties it would not be binding. That does not mean that any mistake in estimating would vitiate it. If the parties selected applied their minds to the task and cruised the whole area, the fact that other cruisers might reach a different conclusion would not affect it.

The whole area, however, was not cruised as contemplated. Two lots were omitted, and the fallen timber thereon was not estimated. I think, with evidence before us from other sources, as to the amount of this fallen timber, *viz.*, 80,000 feet at $7 per M. we are justified in adding it to the amount found in the joint cruise and varying the judgment accordingly.

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

Solicitor for appellant: *A. C. Skaling.*
Solicitors for respondents: *Grimmett & Parker.*

REX v. CHENG TONG SENG.

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REX v. CHENG TONG SENG

Criminal law—Wash suitable for manufacturing spirits—Kept by accused—Conviction—Affirmed by County Court—Appeal—Jurisdiction—Jurisdiction of magistrate—Question of two offences—R.S.C. 1906, Cap. 51, Secs. 133 and 180 (f)—Criminal Code, Sec. 725.

The conviction of accused by the stipendiary magistrate at Nanaimo on the charge that "without having a licence under the Inland Revenue Act he unlawfully did conceal or keep or allow or suffer to be concealed and kept in a place or premises controlled by him, namely, a frame or wooden building on what is known as the Yick Shing Ranch, on Hornby Island, wash suitable for the manufacture of spirits contrary to section 180, subsec. (*f*) of the Excise Act," was affirmed on appeal to the County Court. On preliminary objection to the Court of Appeal that there was no appeal as this was not an indictable offence:—

Held, that the Court has jurisdiction following *Rex* v. *Evans* (1916), 23 B.C. 128.

Objection was raised by the defence that the case having been tried under the Summary Convictions Act, and it being an indictable offence the magistrate had no jurisdiction to try it under Part XV. of that Act.

Held, that there is jurisdiction under section 133 of the Excise Act.

To the further objection that the conviction was bad by reason of the fact that it was in respect of two or more offences:—

Held, that as the conviction is within the saving provisions of section 725 of the Criminal Code the objection fails.

Rex v. *McManus* (1919), 3 W.W.R. 190 applied.

APPEAL by accused from the decision of BARKER, Co. J. of the 12th of January, 1927, affirming a conviction by the stipendiary magistrate at Nanaimo on a charge that "without having a licence under the Excise Act he unlawfully did conceal or keep or allow or suffer to be concealed and kept in a place or premises controlled by him, namely, a frame or wooden building on what is known as the Yick Shing Ranch on Hornby Island, wash suitable for the manufacture of spirits contrary to section 180, subsection (*f*) of the Excise Act." On the information being laid the police raided the accused's said premises on the 24th of September, 1926. No person was in the house at the time they entered but shortly after a Chinaman employed by accused appeared and they followed him across the

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road from the house and about 250 yards away to a shack where the accused was arrested. In the shack they found eight 50-gallon barrels full of rice-wash in the course of fermentation. An analyst found the contents contained about 18 per cent. proof spirits. Afterwards in accused's house they found 31 mats of rice. Accused was convicted and fined $300 and three months' imprisonment.

Statement

The appeal was argued at Victoria on the 15th and 16th of June, 1927, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Lowe, for appellant.

Morton, for the Crown, on the preliminary objection that there was no appeal as this was not an indictable offence. Sections 132 and 133 of the Excise Act take the case out of being an indictable offence: see *The King* v. *Beamish* (1901), 5 Can. C.C. 388; *Schiffner* v. *Schiffner* (1922), 65 D.L.R. 343; Crankshaw's Criminal Code of Canada, 5th Ed., p. 906.

Lowe: Sections 132 and 133 are in Part II. of the Act and section 180 is in Part III. They are entirely distinct. Section 773 of the Criminal Code applies. Section 180 distinctly states that this is an indictable offence, the charge being under subsection (*f*): see *Wood* v. *Riley* (1867), L.R. 3 C.P. 26; *Rex* v. *Garvin* (1909), 14 B.C. 260 at p. 265. The penalty is all under section 180: see *Rex* v. *Evans* (1916), 23 B.C. 128; *The King* v. *O'Brien*: *Ex parte Roy* (1907), 38 N.B.R. 109; *Rex* v. *Bank of Montreal* (1919), 34 Can. C.C. 355.

Argument

Morton, replied.

Lowe, on the merits: The onus is on the Crown to prove *mens rea* and they have not done so. There is nothing to shew that accused knew of this still: see *Rex* v. *Cappan* (1920), 30 Man. L.R. 316; *Rex* v. *Young* (1917), 24 B.C. 482. The information contains more than one distinct offence: see *Newman* v. *Bendyshe* (1839), 10 A. & E. 11; *Ex parte Pain* (1826), 5 B. & C. 251; *Reg.* v. *Gibson* (1898), 2 Can. C.C. 302.

Morton, for respondent: They found in the shack eight barrels of the preparation which contained a large percentage of

spirits, and a large quantity of rice used for the purpose was found in accused's house.

Lowe, replied.

Cur. adv. vult.

4th October, 1927.

MACDONALD, C.J.A.: I concur in the judgment of my brother GALLIHER.

GALLIHER, J.A.: This is an appeal from BARKER, Co. J., at Nanaimo, dismissing an appeal from the conviction of Cheng Tong Seng (commonly known as Yick Shing) for an infraction of the Excise Act, R.S.C. 1906, Cap. 51, Sec. 180 (*f*).

The Crown raised a preliminary objection that there was no appeal to this Court. In this connection I need only refer to the decision in this Court in *Rex* v. *Evans* (1916), 23 B.C. 129, and would dismiss the preliminary objection.

On the merits, Mr. *Lowe,* for the appellant, in an able argument before us, raised a number of objections to the conviction.

The case was tried under the Summary Convictions Act, and Mr. *Lowe* takes objection that as this is an indictable offence the magistrate had no jurisdiction to try it under Part XV. of that Act. I think that objection is covered by section 133 of the Excise Act.

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He further objects that if the magistrate had jurisdiction he could not try without the consent of the accused, which was not asked or obtained. If, as I hold, the magistrate had jurisdiction to try under the Summary Convictions Act, this objection does not apply.

Mr. *Lowe* raised the further point that the conviction was bad by reason of the fact that it was in respect of two or more offences.

The information and conviction are in the words of section 180 of the Act—"unlawfully did conceal or keep, or allow, or suffer to be concealed, or kept," etc. In view of Code section 725, and the cases in Ontario decided upon that section, and the case of *Rex* v. *McManus* decided in Alberta, by Walsh, J.

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(1919), 3 W.W.R. 190, in which the Ontario cases are referred to, this objection, I think also fails.

I would dismiss the appeal.

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MCPHILLIPS, J.A.: I cannot say that it is not without some hesitation that I have arrived at the conclusion that the appeal cannot succeed. In view of the majority opinion of the Court for dismissal, I do not feel strong enough in my view to formally dissent.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal dismissed.

Solicitors for appellant: *Moresby, O'Reilly & Lowe.*
Solicitor for respondent: *T. P. Morton.*

KENNEDY v. McINTOSH AND BARDSIN.

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KENNEDY v. McINTOSH AND BARDSIN

Animals—Dogs—Destruction of chickens—Action for damages—Scienter—Onus—R.S.B.C. 1924, Cap. 11, Sec. 19.

Two dogs, one belonging to each of the defendants, broke into the plaintiff's chicken run and destroyed a number of chickens. An action for damages was dismissed as against one of the defendants but judgment was given against the other for one half the damages claimed. On appeal by the defendant Bardsin against whom judgment was given:—

Held, reversing the decision of HOWAY, Co. J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the appellant had discharged the onus on him under section 19 of the Animals Act of shewing the peaceful nature of the dog and his ignorance of any vicious propensity.

APPEAL by defendant Bardsin from the decision of HOWAY, Co. J. of the 5th of May, 1927, in an action to recover $655 in damages resulting from the defendants' dogs breaking into an enclosure of the plaintiff and destroying 76 white leghorn hens. The chickens were kept in a chicken-house which opened upon a run enclosed with chicken-wire netting. The dogs broke through the netting and were caught in the act of killing the chickens and were shot on the spot. One of the dogs was owned by the defendant McIntosh and the other by the defendant Bardsin. It was held by the trial judge that McIntosh had discharged the onus upon him by shewing that his dog was always peaceably behaved and had that reputation and there was no reason to suspect any vicious tendency, but that Bardsin had not discharged that onus and he was held liable for half the damages, *i.e.*, $327.50.

Statement

The appeal was argued at Victoria on the 23rd of June, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Prenter, for appellant: My submission is that the learned judge erred in law as to the application of the Act. We satisfied the onus put upon us by the Animals Act equally as well as the defendant McIntosh: see *Buckle* v. *Holmes* (1926), 95 L.J., K.B. 547. The learned judge says that Bardsin being away from home most of the day he is in the position of one who

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closes his eyes as to the action of the dog, but see *Manton* v. *Brocklebank* (1923), 92 L.J., K.B. 624 at p. 627.

Maitland, for respondent: Section 19 of the Animals Act shifts the burden to the defendant: see *Nevill v. Laing* (1892), 2 B.C. 100; see also *Rex* v. *White* (1926), 37 B.C. 43; *Clinton* v. *J. Lyons & Company, Limited* (1912), 3 K.B. 198; *Buckle* v. *Holmes* (1926), 42 T.L.R. 369. On the question of *scienter* see Halsbury's Laws of England, Vol. 1, p. 373, sec. 815; *Temple* v. *Elvery* (1926), 3 W.W.R. 652.

Cur. adv. vult.

4th October, 1927.

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MACDONALD, C.J.A.: The injury for which the respondent obtained damages was done by the appellant's dog, in company with a dog belonging to defendant McIntosh, who was dismissed from the action.

The learned County Court judge assessed the damages against the appellant at one-half the damage done. The only issues raised are in respect of the character of the dog, and the appellant's knowledge of any vicious or mischievous tendencies in him. In my opinion, the appellant has met both issues successfully. I can see no material distinction between the evidence for one defendant and that for the other. The only reason given by the learned judge for exonerating defendant McIntosh and mulcting the appellant in damages, is thus stated by him:

> "The defendant got the dog as a watch-dog, but his occupation takes him much from home and in consequence, he is in the position of one who simply closes his eyes. He has not overcome the presumption which arises from his dog's action."

Apart from the unsoundness, if I may say so, of the view that the circumstances mentioned by him amount to a closing of the eyes, one may ask—To what did he close his eyes? The harmless character of the dog was proven by several witnesses without any evidence to the contrary.

The last sentence of the above quotation shews that the learned judge had nothing to go upon but the presumption arising from the dog's action at the time of the destruction of the hens. That presumption has been amply rebutted.

One witness, in answer to a question, said that the best of pups will sometimes worry chickens, and upon that was founded

the argument that this young dog as well as all other young dogs, should not be allowed to run at large, but since young dogs have been allowed to run at large in all times it is late in the day to propound such a rule. The Animals Act stopped short of requiring that young dogs should be confined.

I would allow the appeal.

MARTIN, J.A.: This is an action to recover damages for the destruction of a large number of valuable fowls properly inclosed in a wire protected pen on the plaintiff's property which pen was broken into, as the learned judge below justifiably finds, by two dogs, one owned by defendant McIntosh and the other by defendant Bardsin, and after effecting an entrance the said dogs killed many of the fowls and, as the learned judge puts it, "were caught red-handed in the run and shot on the spot," and he awarded damages against defendant Bardsin for $327.50, being one-half the damage occasioned by both dogs, but dismissed the action against McIntosh.

The case largely turns upon section 19 of the Animals Act, Cap. 11, R.S.B.C. 1924, *viz.*:

"19. In any action brought to recover damages for injuries caused by any domestic animal or any dog, it shall not be necessary for the plaintiff, in order to entitle him to a verdict, to aver in any pleading, or to adduce any evidence that the defendant knew, or had the means of knowledge, that the animal, for the injuries caused by which the action shall be brought, was or is of a vicious or mischievous nature, or was or is accustomed to do acts causing injury; but the plaintiff, if otherwise entitled to a verdict, shall not be deprived thereof by reason of the absence of any such averment or the non-production of such evidence."

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As was said in *Nevill* v. *Laing* (1892), 2 B.C. 100 (a decision upon the essentially identical section 30 of Cap. 5, C.S.B.C. 1888) this section was originally largely taken (in 1875, Cap. 8) but in an expanded form, from the English Act of 1865, Cap. 60, being "An Act to render owners of Dogs in England and Wales liable for Injuries to Cattle and Sheep." There is, however, this important difference as regards *scienter*, that by our Act the owner is not absolved by lack of knowledge of "the vicious or mischievous nature" of his dog if he "had the means of knowledge" thereof, which provision is absent from the English statute, and is, as I view it, of the first consequence in this case, though it was not referred to below nor at this Bar.

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In the *Nevill* case it was held by Chief Justice BEGBIE, and affirmed by the Full Court, that the effect of the section in question was, upon proof of damage by the dog and its ownership, by the defendant to establish a *prima facie* case against the defendant as thus explained, p. 102:

"The only effect of that section is to shift the onus, so that, while in an action before the recent statute, if no evidence whatever were given on these points, the verdict must have gone for the defendant, now, if no evidence be given on either side, the verdict must go for the plaintiff. But that does not mean that the mere bite is to be conclusive evidence, *i.e.*, that the defendant is to be precluded from shewing the peaceful character of the dog, or his own ignorance of any vicious propensity. I think the statute means that the bite is to be *prima facie* evidence only, and that the defendant may give evidence on these points to contradict the presumption. And when evidence is adduced to the jury, they are bound, according to their oaths, to find according to what they consider its true weight to be."

The case went to the jury on that basis and they returned the following verdict in answer to questions:

"1st. That the plaintiff had been bitten by a dog;

"2nd. That the dog was, at that time, kept or harboured by the defendant;

"3rd. That the dog was accustomed to bite mankind;

"4th. That the defendant was not aware of that fact."

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Upon a motion for judgment it was pronounced in favour of the defendant on the ground that the jury's finding of defendant's ignorance of the dog's vicious propensity relieved him from liability.

It is to be noted first, that the important point about the defendant's "having the means of knowledge" was entirely overlooked; and, second, that though the learned judge said there were no decisions upon the said section, yet in fact there were then (1892) two decisions which throw much light upon it, *viz.*, *Wright* v. *Pearson* (1869), 38 L.J., Q.B. 312; L.R. 4 Q.B. 582; 20 L.T. 849, and *Cowell* v. *Mumford* (1886), 3 T.L.R. 1, and I think that if they had been cited to the learned judge and their full import grasped he would have taken a different view of the fundamental change that was effected by the section and decided the case the other way. It is to be noted in *Wright* v. *Pearson,* as better reported in the Law Journal and Law Times, the Court laid stress upon the remedial nature of the section and I am further fortified in my opinion by the later decision of Lord Russell and Mr. Justice Wright in *Gardner* v.

Hart (1896), 44 W.R. 527, wherein the "occupier of a house" (hotel) harbouring a dog which bit a horse, was held liable just as though he was the owner thereof under section 2 of the said English statute of 1865, and no one suggested that the owner would not have been liable under said section 1 of the Act; section 2 in fact is only declaratory of the common law—*M'Kone* v. *Wood* (1831), 5 Car. & P. 1; 38 R.R. 787, as pointed out by Clerk & Lindsell on Torts, 7th Ed., 445, in referring to the corresponding present Dogs Act of 1906, Cap. 32, Sec. 1.

I have, however, a great reluctance to interfere with a decision of the old Full Court except upon very strong grounds and more especially where it has stood unassailed for 35 years, and in any event it is not, in my opinion, necessary to review that decision now because the judgment in question may be supported by the said provision respecting "means of knowledge" since in this aspect at least there is evidence which justifies the learned judge below in coming to the conclusion that the defendant has not discharged the onus cast upon him by the *prima facie* case made out against him under the statute. The learned judge goes further, indeed, than is necessary in finding that "I am not satisfied that he, Bardsin, was ignorant of its vicious propensities," as to which there may be considerable doubt (as was submitted to us) upon the evidence, but he is on quite firm ground when he finds on all the facts before him that Bardsin, being a fisherman absent for weeks at a time, "is in the position of one who simply closes his eyes," *i.e.,* to circumstances which afforded him the "means of knowledge." The evidence of Marshall, on behalf of the plaintiff, of the dog having been seen and scared off by him while worrying cows two or three times, and of defendant's own witness Nelson, that young untrained dogs like this (6 months old when shot) left to roam about at will, have a "propensity to kill chickens" (other than their owner's, of course) specially support the judgment, apart from other evidence, and as to the broad inferences which may properly be drawn by magistrate or judge in cases of this description, I cite the decision of the King's Bench Division (Grove and Hawkins, JJ.) in *Lewis* v. *Jones* (1884), 49 J.P. 198, wherein an order made by magistrates awarding damages for the destruction of a

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dog for killing sheep was affirmed on an inference from facts no stronger at least than those at Bar.

In my opinion, therefore, the appeal should be dismissed. I have not deemed it necessary to discuss the two recent English decisions of *Manton* v. *Brocklebank* (1923), 2 K.B. 212, and *Buckle* v. *Holmes* (1926), 2 K.B. 125, dealing with general principles of damage done by horses and cats respectively, except to say that the latter had gone very far and become the subject of considerable criticism in England and the exact question it raises will doubtless go sooner or later to the House of Lords. I do not, with all due respect, regard it as a satisfactory

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decision, but it is of no real assistance in the disposition of this case turning upon the liability imposed by special statute upon the owners of dogs; some of the principles involved in the *Manton* and *Buckle* and other cases, were, I may say, considered by this Court in the recent important and interesting case of *Rex* v. *White* (1926), 37 B.C. 43 on the employment of dogs, bloodhounds, for the detection of criminals.

GALLIHER, J.A.: With great respect to the learned judge and the contrary views of some of my learned brothers, I have come to the conclusion that the defendant Bardsin discharged the onus cast upon him and the action should have been dismissed.

I do not think upon the evidence that it can be said that it is a case where Bardsin shut his eyes and simply left the dog at large as it were, to go his own way good or bad. It is true, at times he was absent for two or three weeks at a stretch fishing, but during these periods the dog, a puppy of six months old, was

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left in the care and custody of his sister, in fact the place was in reality the dog's home, and he was cared for more by the sister and her family than by the defendant.

The evidence for the defence shews clearly enough that the dog had no vicious propensities, and while some criticism was directed to the answers of some of these witnesses we must remember that they are from a foreign country and do not perhaps express themselves as concisely in the English language as we would do.

The natural propensities of puppies is mischievousness, not in the sense of viciousness but of playfulness. We all know of

their propensities to worry old clothes or old shoes lying around and we know or those of us who have lived in the country and seen many puppies raised, at least know that they will circle around and bark at cattle and other animals, and I owning a puppy would be surprised to learn that that was an indication of viciousness of itself, and that my puppy should be destroyed.

I do not think the cross-examination of Nelson about dogs worrying cattle or killing sheep or poultry, adds anything to enlighten us as to the nature of this puppy. It is simply generalizing and is in answer to questions put in a general way.

With regard to the incident referred to by Marshall as to the puppy, I think it is made clear that when he speaks of worrying the cattle, he means worrying not in the sense of attacking them, but of barking at them and scaring them. Take, for instance:

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"No, only scaring them. I went and scared him off, not to 'worry' [as I understand it 'bother'] the cows."

What occurred here is of course to be deplored. The plaintiff has lost a number of valuable chickens through the acts of these dogs, whichever might have been the instigator of the act, and it does seem hard if he is entitled to no remedy, but if the law is as it was admitted to be in argument, and as it would seem to be, then the defendant is not liable if upon the evidence the learned judge should have found the onus cast upon him satisfied by the defendant.

I see nothing of moment differentiating the case of McIntosh from that of Bardsin.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appellant has to meet, as in all such cases, a very formidable position, that is—the presumption is—that the judgment is right. It has to be established that the learned trial judge was wholly wrong to meet with success upon appeal. Now canvassing the evidence and considering it in all its phases I am quite unable to disagree with the conclusion of His Honour Judge HOWAY who, in my opinion, had ample evidence upon which to find for the plaintiff. Certainly the plaintiff (the respondent in the appeal) suffered a very severe loss and, in my opinion, the learned judge had ample evidence before him to admit of his reasonably finding for the plaintiff. It is a case where the demeanour and credibility of the witnesses

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was a matter of the greatest importance, and it cannot be overlooked by a Court of Appeal, and I am strongly of the opinion that it is not a case for a reversal of the judgment. The considerations that must weigh with a Court of Appeal, when asked to reverse a judgment based upon oral testimony alone and where the trial judge has had the advantage, which we have not, of seeing and observing the witnesses, have been dealt with by the House of Lords during this present year and I would refer to what Lord Sumner said in the case of *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8.

MCPHILLIPS, J.A.

I am clearly of the opinion that His Honour Judge HOWAY arrived at the correct conclusion and it is not a case which admits of any contrary conclusion, with great respect, of course, for the opinions of my brothers who have come to the conclusion that the appeal should be allowed.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I agree with the judgment of my brother GALLIHER. If the learned trial judge disbelieved the appellant's evidence he was, with deference, not justified in doing so. He would have to also disbelieve all the other testimony given on his behalf. The evidence is all one way and it would be wrong to disbelieve a group of witnesses particularly when their evidence is in accord with the probabilities, and is really not contradicted on any decisive point. If one would speculate it is more natural to believe that this six months' old animal followed the older dog whose owner was discharged from liability. Further, it does not follow that because a dog may have chased cattle on a few occasions that it has a vicious propensity to kill chickens. I think the appellant fully discharged the onus upon him of shewing the peaceful nature of the dog and his ignorance of any vicious propensity, and would allow the appeal.

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

Solicitors for appellant: *Macdonald & Prenter.*
Solicitor for respondent: *R. A. Braden.*

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IN RE KEAN *v.* BIRD

Contempt of Court—Undertaking of solicitor—Whether personal—Breach of undertaking—Jurisdiction of County Court to commit—Committal order by Supreme Court—Civil matter—Appeal—R.S.B.C. 1924, Cap. 15, Sec. 2.

An appeal to the County Court from the magistrate's decision on proceedings taken under the Deserted Wives' Maintenance Act, was dismissed on Bird's undertaking (he acting for the husband) the judge's note being as follows: "Mr. *Bird* for his client says that his client will pay the wife $20 a week in future, first payment today. Mr. Kean [the client] confirms his solicitor." *Bird* being in default after the first payment an application to the County Court judge (CAYLEY, Co. J.), for an order for committal, was dismissed on the ground of lack of jurisdiction, but in his reasons for judgment he said that if he were to certify to the Court of Appeal he would certify, that his memory confirmed his notes and that he had accepted the undertaking as the solicitor's personal undertaking and that it was only because he had regarded it as such that he had disposed of the application at that sitting. A motion was made to the Supreme Court and *Bird* was committed for contempt.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MARTIN, J.A. dissenting), that the undertaking was not the personal undertaking of the solicitor.

Per MCPHILLIPS, J.A.: Even if it could be held to amount in words to a personal undertaking it was inadvertently given and equity looks to the spirit rather than to the form of the transaction.

Held, also (MARTIN, J.A. dissenting), that an alleged contempt for breach of an undertaking to pay money is a civil matter and an appeal lies from a committal order for such contempt.

Scott v. *Scott* (1913), A.C. 417 applied.

Held, also (MARTIN, J.A. dissenting), that a County Court judge has power to hear and dispose of a motion for committal for contempt for breach of an undertaking and the Supreme Court has no jurisdiction to interfere.

Per MCPHILLIPS, J.A.: As the order for committal was for the breach of an undertaking for the payment of money, the making of said order was contrary to section 2 of the Arrest and Imprisonment for Debt Act and to section 165 of the Criminal Code.

Statement

APPEAL by defendant from the order of HUNTER, C.J.B.C. of the 19th of May, 1927, committing the defendant for contempt of Court. The facts are that Mrs. Kean instituted proceedings under the Deserted Wives' Maintenance Act before

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the magistrate in Vancouver and her application was dismissed on the ground that there was no evidence to shew that she was destitute. She appealed to the County Court (CAYLEY, Co. J.) where evidence was taken, *Bird* appearing for the husband. The learned judge took notes of the evidence which included the following note: "Mr. *Bird* for his client says that his client will pay the wife $20 a week in future, first payment today." It appeared from the evidence that Kean was engaged in a movie-picture production. He was making no money at the time but later he expected to make money when he would pay his wife $20 a week. Having no money at the time *Bird* paid him $25 from which he made his first weekly payment of $20 and he afterwards paid *Bird* back. *Bird* made no further payments and counsel for Mrs. Kean contends he undertook to make the $20 weekly payments. An application was made to the Supreme Court to commit *Bird* for contempt of Court for not carrying out his undertaking and an order was made by HUNTER, C.J.B.C. as above from which this appeal was taken.

The appeal was argued at Victoria on the 13th and 14th of June, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

A. H. MacNeill, K.C., for appellant: They say it was an undertaking that *Bird* was to pay $20 a week, and on that undertaking the appeal was dismissed. In fact all *Bird* did was to undertake to make the first weekly payment. The undertaking alleged is *dehors* the jurisdiction of the Court. There is no Court judgment that this should be paid: see Crown Office Rules (Civil) p. 310: *In re Freston* (1883), 11 Q.B.D. 545.

Mayers, for respondent: If this is semi-criminal then there is no appeal to this Court: see *Rex* v. *Carroll* (1909), 14 B.C. 116; *In re Tiderington* (1912), 17 B.C. 81. It being a criminal matter the Crown Office Rules do not apply: see *In re Marchant* (1908), 1 K.B. 998 at p. 1000; *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386.

MacNeill, as to the right of appeal, referred to *In re Killam & Beck* (1916), 23 B.C. 442; *United Mining and Finance Corporation, Limited* v. *Becher* (1910), 2 K.B. 296; (1911), 1

K.B. 840; *Rex* v. *Jones* (1911), 16 B.C. 117. The case of *In re Scaife* (1896), 5 B.C. 153 was decided before the Crown Office Rules were in force. From the earliest times contempt has been divided into two classes: see *Barlee* v. *Barlee* (1822), 1 Addams Ecc. 301. The difference between contempts of a criminal nature and contempts of a nature not criminal are dealt with in Oswald on Contempt of Court, 3rd (Can.) Ed., pp. 35-6: see also *Rex* v. *Daily Mirror. Ex parte Smith* (1927), 1 K.B. 845: In *Scott* v. *Scott* (1913), A.C. 417 it is to be noted that in the judgment of Earl Loreburn the right of appeal is put squarely on the point as to the cause or matter in which the order was made being in point of fact a criminal cause or matter. *In re Dudley* (1883), 12 Q.B.D. 44 was a case of contempt by a solicitor. It went to the Court of Appeal and the right of appeal was not questioned: see also *Seldon* v. *Wilde* (1911), 1 K.B. 701.

Mayers, in reply: That this is a criminal matter see *Ferrall's Case* (1850), 2 Den. C.C. 51; *In re Freston* (1883), 11 Q.B.D. 545 at p. 555; *In re Pollard* (1868), L.R. 2 P.C. 106 at p. 120; *In re Abraham Mallory Dillet* (1887), 12 App. Cas. 459; *Reg.* v. *Jordan* (1888), 36 W.R. 797 at p. 798; *O'Shea* v. *O'Shea & Parnell* (1890), 15 P.D. 59; *Harvey* v. *Harvey* (1884), 26 Ch. D. 644. The case of *In re Killam & Beck* (1916), 23 B.C. 442 does not apply: see also *Rex* v. *Davies* (1906), 1 K.B. 32.

Argument

MacNeill: The question is "Is there a contempt?" And as to this the cases to which he refers do not apply: what a solicitor does must be done in his capacity as a solicitor: see *Ex parte Cowie* (1835), 3 Dowl. P.C. 600; *United Mining and Finance Corporation, Limited* v. *Becher* (1910), 2 K.B. 296 at p. 306. After the appeal was dismissed he was not acting as a solicitor so what was done here was not in his capacity as a solicitor.

Mayers, on the question whether there was an undertaking, referred to *Iveson* v. *Conington* (1823), 1 L.J., K.B. (o.s.) 71; *Burrell* v. *Jones* (1819), 3 B. & Ald. 47; *Hall* v. *Ashurst* (1833), 1 Cr. & M. 714; *Schmitten* v. *Faulks* (1893), W.N. 64; *In re C. and Another* (1908), 53 Sol. Jo. 119; *Harper* v. *Williams* (1843), 12 L.J., Q.B. 227.

MacNeill, in reply, referred to *Burrell* v. *Jones* (1819), 3

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B. & Ald. 47 at pp. 50-1; *Cherry and M'Dougall* v. *The Colonial Bank of Australasia* (1869), L.R. 3 P.C. 24 at p. 31; *Elias* v. *Nightingale* (1858), 8 El. & Bl. 698; *Downman* v. *Williams* (1845), 7 Q.B. 103.

Cur. adv. vult.

IN RE KEAN v. BIRD

4th October, 1927.

MACDONALD, C.J.A.: The appeal is from an order of Chief Justice HUNTER, committing appellant for contempt of an undertaking alleged to be his, given in a civil proceeding in the County Court.

It was argued by respondent's counsel that a committal for contempt is a criminal proceeding, and therefore not appealable. The relevant facts are, that the respondent, a married woman, applied to a magistrate for an order of maintenance under the Deserted Wives' Maintenance Act, Cap. 67, R.S.B.C. 1924. Her application was denied by the magistrate and she then appealed to the County Court, pursuant to the provisions of said Act. During the hearing of the appeal, the appellant informed the Court that his client, while denying that his wife was a deserted wife, would pay her what he could, whereupon the County Court judge made this note in his Court book:

"Mr. *Bird* for his client says that his client will pay the wife $20 a week in future, first payment today. Mr. Kean [the client] confirms his counsel."

MACDONALD, C.J.A.

Thereupon the appeal was dismissed. Default having been made in the payment the respondent applied to the County Court judge for an order committing the appellant for breach of his alleged undertaking, in the words above quoted.

Much contradictory evidence was adduced upon affidavit before him, and he himself, gratuitously as I think, gave a lengthy dissertation upon his understanding of what had taken place when the alleged undertaking was entered into but he finally decided that he had no jurisdiction to entertain the motion. The respondent then applied to the Chief Justice for the committal order, which was granted. It is the order now appealed from.

In my opinion the proceedings are not of a criminal nature. *Scott* v. *Scott* (1913), A.C. 417, is an answer to that contention. The question then arises, had the Supreme Court judge power

to commit for non-compliance with an undertaking given to the County Court? The powers of superior Courts inherited from the Court of Queen's Bench, to exercise general supervision over inferior Courts, was exhaustively considered in two recent cases, *Rex* v. *Parke* (1903), 72 L.J., K.B. 839, and *Rex* v. *Davies* (1906), 1 K.B. 32 at p. 37, the latter going a step further than the former in deciding the question of jurisdiction which the first had left open. The conclusion arrived at was that the publisher of statements prejudicial to a fair trial of a person accused of an indictable offence, although in an inferior Court, was an interference with public justice. What the Court was considering in those two cases was, I think, the general jurisdiction of superior Courts over inferior Courts of criminal jurisdiction, and I infer had no reference at all to inferior Courts of civil jurisdiction such as our County Courts, when the question is disobedience to a mandatory order or the breach of an undertaking given in the Court. But be that as it may, there is another phase of the question I am now considering, which so far as I am aware has not been dealt with by any of our Canadian Courts. The County Courts Act, Sec. 145, gives power to the judge to commit for contempt in the face of the Court, but this is not the only power given. In *Martin* v. *Bannister* (1879), 4 Q.B.D. 491, followed by *Richards* v. *Cullerne* (1881), 7 Q.B.D. 623, the latter extending the principles of *Martin* v. *Bannister* to interlocutory orders, it was held that by virtue of section 89 of the Judicature Act, 1873, of which our County Courts section 22 is a counterpart, a County Court judge has power to commit for breach of his mandatory order. Now it is true that there was no such order in the County Court here, but it was decided in *Neath Canal Company* v. *Ynisarwed Resolven Colliery Co.* (1875), 10 Chy. App. 450, that where there is a breach of an undertaking upon the faith of which the Court acts instead of making an order, the undertaking is on the same footing as a mandatory order. If, therefore, I am right in thinking that the decisions in *Martin* v. *Bannister,* and *Neath Canal Co.* v. *Ynisarwed Resolven Colliery Co., supra,* are applicable to this case, then the County Court judge had jurisdiction to commit for the breach of an undertaking entered into before him and upon which he acted.

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There can be no question here that had the proceedings in the County Court been in the Supreme Court that Court would have had power to commit, and section 22 appears to enable a County Court judge to assume the powers of the Supreme Court in a case like the present.

Whatever may be said about the supervision of the superior Courts over inferior Courts, even assuming that it extends to County Courts, no one I think, would be bold enough to argue that where the County Court judge has the power of committal a superior Court would have jurisdiction, or would, if it had, intervene in the matter at all. That is made manifest in *Rex* v. *Davies, supra.* I think, therefore, that the order appealed from was wrong and must be set aside.

I ought to say further on the other principal point raised in the appeal, namely, as to whether the appellant did give a personal undertaking at all, that I am clearly of the opinion that he did not. There is much contradictory evidence, but I accept the record made by the judge himself at the time as practically conclusive of the fact and in my opinion, that entry is quite inconsistent with the notion of a personal undertaking on appellant's part, and is also quite inconsistent with the learned judge's explanation of what did take place.

The appeal should be allowed.

MARTIN, J.A.: This is an appeal from an order of the Supreme Court of this Province, *coram* HUNTER, C.J.B.C., on the 19th of May, 1927, that

"*Joseph Edward Bird* do stand committed to the common gaol at Oakalla in the Province of British Columbia for the said contempt and that he do pay to the said Jane Flavia Kean her costs of and occasioned by this application.

"AND THIS COURT DOTH FURTHER ORDER that this order for committal do lie in the District Registry of this Court at Vancouver for the period of one calendar month from this date, thereafter to be delivered out to the said Jane Flavia Kean or her solicitor."

MARTIN, J.A.

The contempt alleged in the motion to commit is that the said *Bird,* being a solicitor entitled to practise in the Courts of this Province, "has not complied with the undertaking given by him to the County Court of Vancouver on 20th September, 1926, that a certain Arthur Kean (his client) would pay to the said Jane Flavia Kean the sum of $20 per week thereafter if

no order were made in the appeal" taken to the said County Court by the said Jane Kean and being then heard by said Court. It is conceded that Arthur Kean has not made the said weekly payments (now amounting to $585) nor has the solicitor, who, however, disputes the fact that he gave such an undertaking and submits that whatever undertaking was given was on behalf of his client and without any personal liability on the part of the solicitor, except as to a sum of $20 which he did promise to advance to said Kean to pay Mrs. Kean's immediate necessities and which in fact he did advance to Kean who thereupon paid it to Mrs. Kean's solicitor.

What actually did occur before the learned County judge is, unfortunately, not as clear as it ought to be in a matter of this consequence, but he finally says in his reasons for judgment upon an application before him to commit the solicitor that his note of what happened is as follows:

"'Mr. *Bird* for his client says, that his client will pay the wife $20 a week in future, first payment today.' Those are followed by the words, 'Mr. Kean confirms his client.' 'Client' is here erroneous for 'counsel.' The next entry is: 'No costs, appeal dismissed.'"

And he goes on, *arguendo,* to say:

MARTIN, J.A.

"I have stated that I am chary about introducing myself as a witness into any proceedings before me. I am still chary, but if I were to certify to the Court of Appeal I would certify as follows in regard to these notes, that my memory confirms them. I would certify further that it was only upon Mr. *Bird's* undertaking for his client—and by that I took his words to mean that he himself was personally involved in that undertaking—that the wife should be paid $20 a week, that the idea dawned on me at all of disposing, on that sitting, of the application. I would certify that I accepted that undertaking of Mr. *Bird's* as a personal undertaking on his own behalf for his client. And although my wording might or might not have been improved upon, I think it is clear enough on the face of it what the words would ordinarily mean, and if the affidavit filed by Mr. *Bird* takes any other position (and I gather from it that he now claims that his proposition was that future payments should be dependent upon the opinion Mr. Kean had of his ability and of his financial responsibilities) I would have considered such a proposition an illusory promise. I would not have dismissed the appeal on any such illusory undertaking as that. I do not consider now that that appeal is dismissed, but that it is still in such a position as to be open to my reconsideration. There was no order taken out. If an order had been drawn out dismissing the appeal, the order would have contained the terms on which the appeal was dismissed."

And he adds that his recollection is confirmed by the note of the registrar, *viz.*:

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"Mr. *Bird* undertakes on behalf of his client Mr. Kean, to pay Mrs. Kean, the petitioner, $20 per week for her support and maintenance."

The application to commit was dismissed without costs by the learned County judge by order made on the 25th of February last on the ground of lack of jurisdiction, and thereafter a motion was made to the Supreme Court on the 19th of May for committal upon which the order appealed from was made.

In view of what I am satisfied (after a very careful perusal of all the material) is a sincere belief on the part of the solicitor in his attitude and its propriety as set out in the affidavits on his behalf it is much to be regretted that an official stenographer was not present and also, with every respect, in view of the serious nature of the matter and its uncertainty that the learned County judge did not take advantage of the opportunity when the matter again came before him to re-open the whole question, remove all doubt and uncertainty, and see that justice was done by making an appropriate order which he undoubtedly had the power to do, if as he says "I do not consider now that the appeal is dismissed but that it is still in such a position as to be open to my consideration . . . no order was taken out."

MARTIN, J.A.

But as this obviously simple and appropriate course was not taken to put an end to an unusual and unhappy situation created, I am satisfied, by a genuine misunderstanding, it is our duty to deal with it as best we may however unsatisfactory the manner in which it comes before us.

There can be no doubt, I think, that the Supreme Court had jurisdiction in the matter—*vide In re Dillet* (1887), 12 App. Cas. 459, where the Privy Council so expresses itself at p. 463, and also *Rex* v. *Davies* (1906), 1 K.B. 32 at p. 37, and there is nothing, in my opinion, in our County Courts Act (Cap. 53, R.S.B.C. 1924, Secs. 145, 222) or the English decisions upon the corresponding section 89 of the Judicature Act as explained in *Martin* v. *Bannister* (1879), 4 Q.B.D. 212, and in appeal, 491, and *Richards* v. *Cullerne* (1881), 7 Q.B.D. 623, which supports a contrary view. The first of these decisions was given in the ordinary case of the attachment of a party litigant for disobedience of an injunction which is admittedly civil in its nature; and the second was an application to commit a party litigant for disobedience of an order to produce documents

which proceeding is also of a civil nature; the decisions do not purport to have any relation to proceedings to commit a solicitor for a criminal contempt arising out of his personal undertaking: the *ratio decidendi* of both is simply that where the County Court has power to make orders of that kind it has power to enforce them as in the High Court because, as Bramwell, L.J., said in *Martin's* case (p. 492):

"The attachment is part of the remedy which consists of an injunction and consequent attachment. The remedy is, in fact, an injunction enforceable by attachment."

And Brett, L.J., said, p. 493:

"As the attachment is part of the redress, the County Court has a right not only to grant an injunction, but to enforce it by attachment."

In the *Richards* case it was merely decided that the County Court had the same power "at every stage," *i.e.,* in proceedings which were interlocutory as well as final. What analogy is there between those decisions and the point involved in the case at Bar? We were also referred to *Neath Canal Company* v. *Ynisarwed Resolven Colliery Co.* (1875), 10 Chy. App. 450, but after careful consideration of it, I am unable to see any application whatever, and it has been misconceived because it decides this and this only, *viz.,* that where in an action for trespass with a claim for an injunction the defendants had given an undertaking not to repeat the trespass and yet had done so, an injunction would be granted against them as "a matter of course." What bearing such a decision has upon this case, I, with every respect, fail to see.

MARTIN, J.A.

I am of opinion, therefore, that the learned County judge was right in his view that he had no jurisdiction over this kind of contempt because it does not come within said section 145, but even if he had, the fact that he declined, in mistake, to exercise it would not, in such case, for any reason prevent the Supreme Court from exercising the jurisdiction it undoubtedly possesses. It has, apparently, escaped attention that there has been a change in said section 22 of the County Courts Act since 1918, Cap. 19, Sec. 2 in that all jurisdictions of the County Court (which is entirely a statutory creation) were then declared "in every case to be concurrent with the jurisdiction of the Supreme Court in the like case." It flows from this that there can be no question about the jurisdiction of the latter Court if the

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former possesses it in this case under said section 22, and no good reason can be advanced for its non-exercise by the higher Court in a proper case if the lower declines, in error, to exercise it to further the administration of justice.

It is further objected, however, that this Court has no jurisdiction to entertain this appeal because it is launched in a matter which is part of the "criminal law" of Canada within section 91 (27) of the B.N.A. Act, though it is not within that class of cases wherein an appeal will lie under amended sections 1012-13 of the Criminal Code giving a right of appeal in those cases only wherein there has been "a conviction on indictment" as therein defined, which does not include committals under the special inherent summary jurisdiction now in question.

To decide this question it is necessary to determine whether or no the alleged contempt is criminal or civil in its nature, there being a long-established difference in dealing with them though the line of distinction is oftentimes, as Lord Chancellor Brougham said in *Wellesley's Case* (1831), 2 Russ. & M. 639, 667, difficult to draw upon authority and in practice owing to the lack of harmony in the English decisions, which I have examined with care, not only all those cited to us but very many others and Canadian also. In order to determine the point of criminality the facts must be before us, and I see no escape from the submission that, in the present case at least, we must take them as set out by the learned County judge, and the way the view taken of them by HUNTER, C.J.B.C. and his discretion exercised thereupon should be regarded by us in cases of this description is well stated by Lindley and Lopes, LL.J., in *Reg.* v. *Jordan* (1888), 36 W.R. 797, thus:

MARTIN, J.A.

"We have not to say here whether there was or was not a contempt in fact committed. The only jurisdiction we have in reviewing the discretion of a judge in exercising his power is limited to the question whether there were before the judge any materials from which he could reasonably infer that a contempt was committed. It is no part of the duty of this Court to decide upon the exercise of the discretion of the Court below, except as to the question whether the particular order was a valid one."

And again (798):

"It is impossible for judges not present on the occasion to realize all that took place. A vast deal depends on the manner, tone, circumstances, &c. The fact remains that the judge held that Turner did not apologize, and the judge thereupon ordered a warrant of committal to be made out. The

only question of law on this first point is, Whether there were proper materials from which the judge could draw an inference that a contempt was committed? There clearly were such materials."

And still further:

"'If the inferior Court had before them reasonable evidence from which they could draw the conclusion that the facts which gave them jurisdiction existed, and they drew that conclusion, we cannot say that we do not draw the same conclusion, and reverse their judgment. I agree that in considering a question of contempt we must see whether the inferior Court had reasonable grounds for adjudging that a contempt had been committed, but we must bear in mind that the Court is the judge whether it has been treated with contempt.' Applying the words to the present case, we have to consider whether the expressions used and uttered by one who, as a solicitor, was bound to consider himself an officer of the Court, were words capable in law of being held to amount to contempt? It is impossible to say that they were not capable of being so held. If so, the fact of there being any contempt committed is one for the judge alone to decide."

It is to be noted that the Court expressed a doubt as to its jurisdiction to hear the appeal as being criminal in its nature and the judgment declared the hearing was not to be taken as a precedent, and later on in *O'Shea* v. *O'Shea and Parnell* (1890), 15 P.D. 59, Lindley, L.J., who raised the doubt said:

"I am now satisfied we had no jurisdiction to hear it."

Now while those observations were made in a case where the contempt was an insult to the Court *ex facie* (and therefore as the authorities shew clearly criminal in its nature, *e.g., Wellesley's Case, supra* (668), and others to be cited later) yet they are a valuable guide in such cases as this where there is a conflict as to what occurred, and in such circumstances we are necessarily very largely in the hands of the committing judge so far as the facts of the matter are concerned. The decision also of the Privy Council in *Rainy* v. *The Justices of Sierra Leone* (1852-3), 8 Moore, P.C. 47, 54, supports this view of contempts *in curia, viz.*, p. 54: MARTIN, J.A.

"Now it is the opinion, not only of the members of the Committee who heard this petition, but also of the other members who usually attend here, to whom the petition has been submitted, and we have had the benefit of their judgment as well as our own, that we cannot interfere with such a subject. In this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court. It is within the competency of the Court to impose fines for contempt;* and, unless there exists a difference in the constitution of the Recorder's Court at Sierra Leone, the same power must be conceded to be inherent in that Court."

*NOTE.—A very early example in the history of this Province of a criminal contempt *ex facie* occurred in *Reg.* v. *Angelo* tried before Chief

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Of course where the undertaking is in writing, as in *In re Killam & Beck* (1916), 23 B.C. 442, or the facts admitted, its unfettered construction is for us, bearing in mind the "co-existing circumstances," p. 448.

Therefore we must for the purpose of the decision of the questions before us, accept the learned County judge's statement as being in substance that the solicitor gave his personal undertaking to the Court to pay the weekly instalments with the object of preventing the further hearing and disposition of the appeal in the ordinary course of justice and that the Court relying on that undertaking refrained from hearing the matter and giving judgment thereupon as was its duty in due course of law; in other words, that the effect of the undertaking was an interference with and an obstruction and perversion of justice in that its proper and ordinary functions were frustrated because the Court accepted, with the consent of the appellant, the undertaking of one of its officers to stay its hand or act in a manner which otherwise would have been contrary to law whereby the appellant was deprived of her constitutional right to the hearing and disposition of her appeal in accordance with the statutory right conferred upon her.

On behalf of the appellant it was submitted that at most the undertaking amounted to a promise by the solicitor to pay money personally and the neglect or refusal to do so was a contempt of a civil nature merely, the breach of the undertaking being the same in principle as the refusal or neglect to pay money under an order or judgment of the Court, and reliance was chiefly placed upon the decision of the House of Lords in *Scott* v. *Scott* (1913), A.C. 417, wherein leading English cases are considered, and in which it was decided that a punitive order for contempt for breach (by the publication of evidence) of an

Justice CAMERON, at Victoria, under special commission from Governor Douglas, on 11th August, 1859, wherein one Anderson (ex-collector of customs) was committed to jail *instanter* and later, after a short incarceration, fined £10 for interrupting the trial by calling Mr. Attorney-General Cary a liar during his opening address to the jury. In the absence of any regular law reports in those early days, I follow the example of Lord Chief Justice Alverstone in *Rex* v. *Davies* (1906), 1 K.B. 32, 46, and cite the current newspapers in the Archives Department, at Victoria, *viz.*, "Victoria Gazette," 13 Aug., 1859; "British Colonist," 12 and 19 Aug., 1859.

order of Court that a case should be heard *in camera,* was not criminal in its nature, Lord Chancellor Haldane saying, p. 440:

"Even if the order [for hearing *in camera*] had been validly made by reason of the consent of the parties, it could have provided nothing more than an instrument for enforcing an agreement come to as to the mode in which the hearing should take place. A breach of the order would, therefore, have in substance been punishable only on the same footing as a breach of an ordinary order in a civil case for an injunction; and a punitive order made with reference to the breach falls, in such cases, outside the language of s. 47 of the Judicature Act of 1873, which provides that no appeal shall lie from a judgment of the High Court in any criminal cause or matter."

Lord Loreburn said, p. 444:

"I can see nothing here except the penal enforcement of a direction for hearing *in camera* obtained at the request of Mrs. Scott, and for her protection, in a petition of nullity, and interpreted by the learned judge to be equivalent to an order for perpetual silence."

Lord Atkinson considers the question at length p. 455, *et seq.,* and after referring to the various "classes of criminal contempts" goes on to give his reasons (455) for the exclusion of the case before him from those classes:

"Still less was it [the act punished] directed or calculated to interfere with the due course of justice in any pending litigation."

But that is exactly what, the respondent submits, the act herein punished did do. MARTIN, J.A.

The broad principle is thus succinctly stated by Lord Chancellor Cottenham in *Lechmere Charlton's Case* (1836), 2 Myl. & Cr. 316 at p. 342:

"All these authorities tend to the same point; they shew that it is immaterial what measures are adopted, if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course. It is a contempt of the highest order."

The acts there punished were threats to the master and improper letters to the judge but their attempted effect was the same as here, *viz.,* "to obtain a result of legal proceedings different from that which would follow in the ordinary course"; the case at Bar is therefore much stronger because the attempt has been successful. It was long ago decided that even though "the intention of the person . . . may be innocent . . . the justice of the Court, nay the justice of the nation being concerned . . . for example's sake he must stand committed"—

per Lord Chancellor Parker in *Pool* v. *Sacheverel* (1720), 1 P. Wms. 675, a case of "a means of preventing justice" (p. 677)

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by publishing advertisements that "tend to the suborning of witnesses." And see Lord Langdale's decision to the same effect in *Littler* v. *Thomson* (1839), 2 Beav. 129, wherein he said, p. 132:

"I shall not decide this case without first reading, with careful attention, the affidavit of Mr. Glenny. Whatever might have been his belief at the time he published these articles, that belief will not protect him from the consequences, if his publication has been of such a nature as to disturb the free course of justice."

Another and early example of defeating the course of justice is to be found in *Rex* v. *Lord Preston* (1691), 1 Salk. 278 who was fined by Chief Justice Holt for a "great contempt" in "refusing to be sworn to give evidence to the grand jury"; and in *Coxe* v. *Phillips* (1736), Lee t. Hard. 237, an attorney and his clients who were the authors of a fictitious action "to deceive the Court" and obtain an improper judgment thereupon were committed for contempt because the Court "had been made an ill use of." In *Bishop* v. *Willis* (1749), 5 Beav. 83 (n) a like course was taken against a solicitor for putting counsel's name to an answer without authority; and in *Re Elsam* (1824), 3 B. & C. 597, the King's Bench committed an attorney for deceiving the Court by fictitious proceedings, saying (p. 599):

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"It is impossible to pass over a case of this kind without notice; but as it appears that the party before the Court did not intend any fraud, and that he has already incurred an expense of 40*l.* in the course of these proceedings, the object of the Court, which is to prevent the repetition of such a practice in future, will be answered by ordering him to pay a fine of 40*l.*, and to be imprisoned till that fine be paid."

In *Lawford* v. *Spicer* (1856), 2 Jur. (N.S.) 564, a solicitor was held guilty of contempt for breach of his undertaking to the Court not to attempt to discover a witness's address or in any way molest her, despite which he served *subpœna* upon her; Stuart, V.C. said:

"If the Court had known that such a proceeding as that would have been adopted, it would have taken steps to guard against it. . . . Mr. Turner appeared to have thought that what he was doing was justifiable; but when he (Sir J. Stuart) found the undertaking has been broken both in letter and in spirit, it was impossible that the Court could omit to mark its sense of the conduct of that gentleman in this matter. He would not commit him to prison, but would impose upon him the costs of this application."

The observation that the Court would have "taken other

steps" if the undertaking had not been given brings the case very close to the one at Bar.

In *Mitchell's Case* (1741), 2 Atk. 173, a barrister was committed to the Fleet for deceiving the Court in contriving the marriage of one of its wards, and in *Linwood* v. *Andrews* (1888), 58 L.T. 612, a barrister was imprisoned and fined for conspiring to "delude the Court" by false affidavits.

The principle laid down in the *Charlton Case* was affirmed by the Queen's Bench in *Skipworth's Case* (1873), L.R. 9 Q.B. 230, 233, citing the passage above quoted, wherein a barrister "who ought to have known better" (239) was found guilty of contempt and fined £500 and imprisoned for three months for having "been guilty of an attempt to change the course of justice" (235) by holding and attending "meetings with the intention of influencing and altering the course of justice and prejudicing the trial of the case" (238). In answer to the offender's statement that what was said at the meetings was true, the Court said, 234:

"But, however true the statements made might be, to prejudge the trial is none the less a contempt of Court, and one which we must check."

At pp. 232-3, the Court (*per* Blackburn, J.) gives several illustrations of "preventing the ordinary course of justice" and "attempts made to change the ordinary course and cause the judge to take a particular view of the matter" and "causing . . . . justice not to be administered in the way which is ordinarily pursued" (which is precisely what has occurred in the case at Bar) and proceeds: MARTIN, J.A.

"Most things which are done in that way may be liable to punishment by the criminal law, or they may be conspiracies punishable by the criminal law, or they may be assaults punishable by the criminal law; and generally, if there are attempts to influence the due course of justice, they would be punishable by the criminal law. But then, if we are to wait for that to be done by ordinary criminal process and an ordinary trial, there might be great mischief done, because that process is slow, and before that process could come into train the mischief would be done by the due administration of justice being hampered and thwarted. For that reason, from the earliest times the Superior Courts at Westminster, the Superior Courts of Record, the Courts of Equity and the Courts of Common Law, have always had power to deal summarily with such cases."

In the preceding similar cases in the same volume, of *Onslow's and Whalley's,* the Court said to the offenders, p. 226, *per* Cockburn, C.J.:

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"It has been attempted to be contended today on your behalf that the meetings in question were convened solely for the purpose of obtaining money in order to enable the accused to carry on his defence, with the additional purpose of removing any prejudice which the result of the former trial may have produced against him. But that, as I have said, affords no excuse, if the language used on these occasions has been such as to amount to an unwarrantable interference with the course of justice with reference to the coming trial."

And again, p. 227:

"It is clear that this Court has always held that comments made on a criminal trial or other proceedings, when pending, is an offence against the administration of justice and a contempt of the authority of this Court. It can make no difference in principle whether those comments are made in writing or in speeches at public assemblies."

It is not really open to serious dispute that obstructions of justice of the above class are criminal in their nature, the decisions of the Privy Council on counsel's contempts in *In re McDermott* (1866), L.R. 1 P.C. 260; *In re Wallace, ib.* 283; *In re Pollard* (1868), L.R. 2 P.C. 106 (applied in *In re Scaife* (1896), 5 B.C. 153); and of the Supreme Court of Canada in the leading case of *Ellis* v. *The Queen* (1893), 22 S.C.R. 7, finally settle that point, and the last (a case of scandalizing the Court and obstructing justice) also decided that such contempts are part of the general criminal law of Canada from which an appeal will not lie, and expressly declared, p. 26, that "the offence of which the appellant has been pronounced guilty is a criminal offence." The Court founded its judgment chiefly upon the decision of the Court of Appeal in *O'Shea's* case, *supra,* wherein Cotton, L.J., said (p. 63):

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"The appellant has done something to prevent the course of justice by preventing the divorce suit from being properly tried. That is clearly a contempt of Court of a criminal nature."

And Lindley, L.J., said (p. 64):

"There are obviously contempts and contempts; there is an ambiguity in the word; and an attachment may sometimes be regarded as a civil proceeding. For instance, where an order was made by the Court of Chancery in former days there was no mode of enforcing such order but by attachment. We must not, therefore, be misled by the words 'contempt' and attachment, but we must look at the substance of the thing. In the present case I have no doubt that the proceeding is a summary conviction for a criminal offence, and therefore no appeal lies."

And Lopes, L.J., expresses himself to the same effect.

It is to be noted that the expression attributed to Cotton, L.J., "to prevent the course of justice" is an error, it should be "per-

vert," as is shewn in the Law Journal report, 59 L.J., P. 50 thus:

"The application was to commit Tuohy for a contempt in doing something which has a tendency to pervert the proper course of justice by interfering with the proper trial of this divorce suit. That contempt is of a criminal nature, and is a criminal act."

And *vide Rex* v. *Davies, supra*, p. 39, that such contempts were "always punishable by indictment."

A good illustration of punishment for contempt for publishing statements "calculated to obstruct or interfere with the due course of justice" even though the offender credibly disclaimed on oath any such intention, is to be found in *Reg.* v. *Gray* (1900), 2 Q.B. 36, 39, 40; the latest English case is *Rex* v. *Daily Mirror* (1927), 1 K.B. 845, where the principle of obstruction of justice by publication was extended to photographs of accused persons, and it is again laid down (p. 848) that innocent intention is immaterial if the harmful result is brought about. In Ontario there is an important judgment of the Court of Appeal in *The Copeland-Chatterson Co., Ltd.* v. *Business Systems Co., Ltd.* (1908), 16 O.L.R. 481, which well illustrates what are contempts of a civil nature; the judgment of Meredith, J.A., concurred in by the Chief Justice and Osler, J.A., shews the foundation of the decision to be (p. 490) that the breach of the injunction complained of was civil in the nature of its consequences because it

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"was not something aimed at the dignity of the Court or calculated to prejudice or interfere with the due administration of justice, it was but the failure of the defendants to observe an injunction against them in it—to obey the order of the Court made against them in it—for the sole benefit of the plaintiffs, and at their instance."

In the creditably very few reported cases of contempt for breach of undertaking by its officers the Court has always taken a strict view of the matter for the obvious reason that the confidence it justly reposes in its officers, and without which its business could not be carried on, renders it easy for it to be misled or imposed upon, by accepting professional undertakings which, if not carried out, where possible as herein, bring scandal and disastrous consequences upon the administration of justice in general and, usually, the opposite litigant in particular, and it is to be borne in mind that these undertakings are, *ex neces-*

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sitate, on a different, and higher, plane from ordinary involuntary obligations imposed by orders, for they are purely voluntary and given merely because the officer desires the Court to shape its course of action upon them to his client's advantage: as the Court of Appeal pointed out in *Swyny* v. *Harland* (1894), 1 Q.B. 707, *per* Lopes, L.J., p. 709:

"A solicitor is not bound to give such an undertaking; it is a voluntary action on his part. He is an officer of the Court, and as such voluntarily gives the undertaking, and the Court, on the faith of his doing so, makes an order. The undertaking is given in the face of the Court, and for all practical purposes the case is the same as if it were given to the Court. If so, what are the consequences if the solicitor fails to carry it out? It is open to the other party to apply either to commit or to attach him."

In the case of *The Leonor* (1916), 3 P. Cas. 91; (1917), 3 W.W.R. 861, I held a solicitor firmly to his undertaking so as to prevent him from obtaining an undue advantage thereby, saying (p. 109) "such an attempt to play fast and loose with a Court of justice will not be permitted if I can prevent it," and citing, *e.g., In re Hilliard* (1845), 14 L.J., Q.B. 225, wherein Mr. Justice Coleridge said in making a rule absolute to enforce an attorney's undertaking to pay a sum of money:

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"It seems to me that the Court does not interfere against one of its own officers, merely with a view of enforcing in a more speedy and less expensive mode contracts in which actions might be brought, but does so with a view of securing honesty in the conduct of its officers in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers. This principle applies equally whether the undertaking be to appear, to accept declaration, or other proceeding in the course of the cause, or to pay the debt and costs. The interference is not so much between party and party to settle disputed rights, as criminally to punish misconduct or disobedience in its officers. In this view the objection relied on does not apply. I have no desire to restrain the jurisdiction of the Court as to the undertakings of its officers on any such ground as the present; they are very often most beneficially made for both parties in a cause, and there would be great injustice in allowing the attorney to get free from them, after the party has foregone the advantage, or paid the price which was the consideration of the undertaking; while on the other hand, there is no hardship on the attorney in enforcing them, for he is never compelled to enter into them; if he does, he should secure himself by an arrangement with his client, and he must be taken to know the legal consequences of his own act."

Applying all the foregoing authorities to the facts before us I am forced to the conclusion that the breach of the undertaking in the circumstances constituted a contempt of Court criminal in its nature in the broadest sense as being in its essence an

obstruction and perversion of the ordinary course of justice in that by accepting and relying on the undertaking the Court was induced to act in a manner outside the due and ordinary course of law with consequences prejudicial both to itself and its litigant; or in brief, in the very apt language of *O'Shea's* case, the solicitor "had done something to pervert the course of justice by preventing the suit from being properly tried"; the fact that the solicitor did not intend to commit the offence does not alter its nature though it would affect the weight of punishment and the exercise of executive clemency—*vide, e.g.,* the recent judgment of the Supreme Court of the United States in *Ex parte Grossman* (1925), 267 U.S. 87. If this had been a case of a deliberate attempt by the officer to deceive the Court so as to obtain an advantage by departing from its ordinary course of procedure, I do not think that it would have been necessary to give it that long and anxious consideration which I have bestowed upon it, because it could not, even upon a cursory examination of the authorities, be plausibly contended that such a wilful breach of forensic duty had not all the essential elements of an indictable offence, and the fact that the deception or misrepresentation or undertaking upon which the advantage was obtained was innocent and *bona fide* does not alter the nature of the offence. If the order appealed from is to stand, as I think it should, then this undertaking is established and the solicitor by complying with it will purge his contempt by taking the appropriate steps—Halsbury's Laws of England, Vol. 7, p. 323: it is finally to be noted that the order (properly one for committal, not attachment, *D.* v. *A. & Co.* (1900), 1 Ch. 484; *Golden Gate Co.* v. *Granite Creek Co.* (1896), 5 B.C. 145) is one for an indefinite period of imprisonment in punishment for the crime "the said contempt"—which will necessitate a formal application for discharge.

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It follows that, in my opinion, we have no jurisdiction to entertain this appeal and therefore it should be dismissed.

GALLIHER, J.A.: In this matter, upon the facts of the case, I have come to the conclusion that no personal undertaking was given by Mr. *Bird,* and would allow the appeal.

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This would dispose of the matter but as the Court deems it

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advisable that other points raised should be disposed of, I have considered them.

First, as to its being a criminal contempt, I have read the very carefully prepared and reasoned judgment of my brother MARTIN, and were I able to take the view that what was done here in giving the undertaking, was equivalent to what seems to run through most of the cases dealt with, that some perversion of justice was brought about, I would think it unanswerable, but I am unable to say so. In this view, even if a personal undertaking had been given, it would be a civil contempt only, which, of course, would render the order of HUNTER, C.J.B.C. appealable to this Court.

As to the jurisdiction of HUNTER, C.J.B.C. to make the order, I am in agreement with the conclusions of the Chief Justice.

MCPHILLIPS, J.A.: This appeal has relation to the validity or non-validity of an order made by the learned Chief Justice of British Columbia that the appellant *Joseph Edward Bird,* a Barrister-at-Law and Solicitor of the Supreme Court of British Columbia do stand committed to the common gaol at Oakalla in the Province of British Columbia for contempt.

The proceedings in which an alleged undertaking was given by the appellant, the breach of which has been held to be the contempt, being an application made by the respondent Kean the wife against her husband Arthur G. Kean, for an order for the payment of a certain sum per week to her by her husband under the provisions of the Deserted Wives' Maintenance Act (R.S.B.C. 1924) which application came before the learned deputy police magistrate for the City of Vancouver and stood dismissed. An appeal was taken from the dismissal of the application to the County Court of Vancouver and His Honour Judge Cayley dismissed the appeal. In my opinion, upon the facts the learned magistrate and the learned County Court judge arrived at the proper conclusion in respectively dismissing the application and dismissing the appeal. It is contended, however—and that is the basis of the order of the learned Chief Justice of British Columbia—that during the hearing of the appeal before His Honour Judge CAYLEY the appellant gave

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his personal undertaking that $20 per week would be paid to the respondent and that there has been default in this and hence the claimed right to the order of committal for contempt because of the breach thereof by the appellant arising by non-payment and it is submitted that the order as made by the learned Chief Justice of British Columbia is a valid order. On the other hand, the contention of the appellant is that the order was made without jurisdiction in that no personal undertaking was given by the appellant in the proceedings upon the appeal to the County Court. The situation is indeed an unique one. The contention is that the appellant is liable upon a personal undertaking to pay the respondent $20 a week and that would be during the natural life of the respondent although the learned magistrate and the learned judge both denied the right of the respondent to be paid any sum whatever under the provisions of the Deserted Wives' Maintenance Act. What is advanced as supporting the order of the learned Chief Justice of British Columbia is this—that during the hearing of the appeal the appellant gave his personal undertaking that the sum would be paid. Now, the learned County Court judge's notes of the evidence before him having reference to the hearing of the appeal read as follows:

"Respondent admits that appeal is properly brought. Mrs. Kean—wife of respondent—a, living at Point Grey, was 6 years at 1019 Haro. Have been separated from my husband for 2 years. He has been away. Both consent to reading of depositions. Mr. *Bird* states that the wife has received more money than was sufficient for her support prior to the police Court proceedings. Mr. *Bird* for his client says that his client will pay the wife $20 a week in future, first payment today. Mr. Kean confirms his solicitor. No costs, appeal dismissed."

Where there has been no official stenographer at the hearing of an appeal which was the case here the learned judge's notes constitute the evidence upon which an appeal to this Court is heard.

Other material has been laid before this Court by way of affidavits and counter-affidavits, and the oral reasons for judgment of the learned County Court judge upon an application made to him to commit the appellant for the alleged breach of his undertaking, the learned County Court judge holding that he was without jurisdiction to make any such order and the

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motion was dismissed. It would appear that this same material was before the learned Chief Justice of British Columbia. It is questionable indeed if this material is at all relevant to the question to be determined. The sole question is, was there a personal undertaking given by the appellant? If the oral reasons of the learned County Court judge are to be looked at, it would not seem to me that they advance the matter at all or tend to clear up the situation at all.

It is evident, with great respect, that the learned County Court judge *arguendo* attempts to construe his notes and the record of the registrar as amounting to the establishment of the giving by the appellant of a personal undertaking—not insisting at all that in terms any such personal undertaking was given but for fear that I may be wrongly interpreting what the learned judge said, I have set forth what the learned judge did say—in part—relative to the undertaking being in the nature of a volunteered statement for this Court, as this Court did not ask for any statement. Further, the oral reasons for judgment bear date, February 25th, 1927, and the appeal to this Court was not brought until May 23rd, 1927. His Honour Judge CAYLEY, said:

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"I have stated that I am chary about introducing myself as a witness into any proceeding before me. I am still chary, but if I were to certify to the Court of Appeal I would certify as follows in regard to these notes, that my memory confirms them. I would certify further that it was only upon Mr. *Bird's* undertaking for his client—and by that I took his words to mean that he himself was personally involved in that undertaking—that the wife should be paid $20 a week, that the idea dawned on me at all of disposing, on that sitting, of the application. I would certify that I accepted that undertaking of Mr. *Bird's* as a personal undertaking on his own behalf for his client. And although my wording might or might not have been improved upon, I think it is clear enough on the face of it what the words would ordinarily mean, and if the affidavit filed by Mr. *Bird* takes any other position (and I gather from it that he now claims that his proposition was that future payments should be dependent upon the opinion Mr. Kean had of his ability and of his financial responsibilities) I would have considered such a proposition an illusory promise. I would not have dismissed the appeal on any such illusory undertaking as that. I do not consider now that that appeal is dismissed, but that it is still in such a position as to be open to my reconsideration. There was no order taken out. If an order had been drawn out dismissing the appeal, the order would have contained the terms on which the appeal was dismissed. No such order was taken out, and until a judgment is perfected I think the authorities are that a judge may reconsider his disposition of

the case; and if that point is argued before me again (unless I am shewn that I am wrong) I would be disposed to reconsider that dismissal and to reopen that case of *Kean* v. *Kean*. So much for my notes. A judge's notes, standing alone, will always make a judge chary of basing committal orders, especially, upon them. The reasons for that are apparent, and the other Court might very well say that the judge was too certain in his opinions. They might not think it a proper thing entirely. However, my notes do not stand alone. On the same occasion that the notes were entered by me, the Registrar of the Court made an entry in his record book, and that record appears in the affidavit filed in this application. That record repeats the undertaking. It says that the undertaking was that the wife should be paid $20 a week. The exact wording of the record is clear: 'Mr. *Bird* undertakes on behalf of his client Mr. Kean, to pay Mrs. Kean, the petitioner, $20 per week for her support and maintenance.' Now, that is just what I have. That was Mr. *Bird's* undertaking, and I do not consider an undertaking of that kind to be the mere undertaking of an agent on behalf of a principal. I understand an undertaking of counsel, as Courts generally understand it, to be a guarantee to the Court that the default of the client would be made good by the counsel himself. He binds himself that his client will do a certain thing. Thus my notes are confirmed by the entry in the clerk's books. Now, the clerk's record is a totally independent record, independent of the judge's notes. Then my notes are further confirmed by the affidavit filed by Mr. *Hodgson*, who was counsel on that occasion for the wife. Mr. *Hodgson* files an affidavit which I note, shortly (though Mr. *Bird* says in his affidavit to the contrary), affirms that that was the undertaking given at the time. So that I, as a matter of fact, find that that undertaking was given by Mr. *Bird*. Now, I have to enter into the question of whether that undertaking has been carried out. One would think that these very proceedings before me are sufficient, but these proceedings before me, although they imply there was no intention of carrying out the undertaking, do not, in direct terms, say so, except in the recital of a letter in one of the affidavits filed, which is to the effect that demand was made upon Mr. *Bird* for the arrears then due the wife. This is a clear affirmation that there had been a demand and that the husband is in arrears to his wife, therefore the undertaking has been broken. I therefore find that the undertaking had been broken. Those two necessary findings will precede my discussion now as to what I ought to do with reference to an undertaking by counsel which has been broken."

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It is evident that the learned judge, with great respect, labours the point somewhat and in passing it may well be stated that it is patent that even upon the view expressed by the learned judge there is absent what is fundamentally necessary in all cases of claimed undertakings, *i.e.*, the undertaking must be clear in its terms.

The quoted record above set forth of the registrar in no way advances matters, if anything, still further weakens the case of the respondent; it reads:

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"Mr. Bird undertakes on behalf of his client Mr. Kean, to pay Mrs. Kean, the petitioner, $20 per week for her support and maintenance."

During the course of the argument in this appeal, I did not hesitate to speak in somewhat trenchant terms of the proceedings had, and taken upon such flimsy evidence to charge a member of the Bar of good standing with the breach of an undertaking to the Court, and I characterized the order made as one which in these days could not be said to be other than barbaric and that remains my opinion. This is said, though, with great respect to the learned Chief Justice of British Columbia, who no doubt was impressed with the view that he was compelled to make the order upon his reading of the decided cases. I cannot agree that the law of England or the law as we have it in British Columbia, admits of any such order being made upon the facts disclosed in this case. It would, indeed, revolt one if it were so and would shock the public conscience, and it would remain for the law-making authority to speedily legislate in the matter.

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It is a pertinent matter to remark that the learned County Court judge was in no way misled in this case, and he admits in his oral reasons above quoted, with the point raised that no personal undertaking had been given; that the appeal was still open and that he was at liberty to reconsider his disposition of the appeal, but he later dismissed the same, which was an adjudication that no order would be made requiring the husband to pay anything to his wife under the Deserted Wives' Maintenance Act, and therefore no foundation remains for the claimed personal undertaking to pay moneys that the husband stood absolved from paying. The learned judge as we have seen said:

"I would not have dismissed the appeal on any such illusory undertaking as that. I do not consider now that that appeal is dismissed, but that it is still in such a position as to be open to my reconsideration. There was no order taken out. If an order had been drawn out dismissing the appeal, the order would have contained the terms on which the appeal was dismissed. No such order was taken out, and until a judgment is perfected I think the authorities are that a judge may reconsider his disposition of the case; and if that point is argued before me again (unless I am shewn that I am wrong) I would be disposed to reconsider that dismissal and to reopen that case of *Kean* v. *Kean*."

All that can be said is that *dehors* the Court proceedings the

husband agreed, his counsel agreeing for him, which the husband there and then confirmed, that he would pay the wife $20 per week thereafter, and as a matter of fact did pay $75 thereafter.

It is contended that there is no appeal from the order of committal here, that the order is in a criminal cause or matter. In my opinion there is no point in this. *Scott* v. *Scott* (1913), A.C. 417, puts this question at rest and I would particularly refer to what Lord Loreburn said at pp. 443-4:

"I concur in holding that the Court of Appeal had jurisdiction to hear this case. The test of their jurisdiction under s. 47 of the Judicature Act is not whether criminal proceedings could (if they could) have been taken for disobedience to the order, but whether the cause or matter in which the order was made was in point of fact a criminal cause or matter."

Unquestionably the order here under appeal was not "in point of fact a criminal cause or matter."

Further the order here under appeal must be looked at as being in effect an order for the payment of money as undoubtedly, if the appellant should pay the moneys it is claimed he personally undertook to pay he would purge his contempt and would be entitled to his freedom. Then it is not to be forgotten that the failure to obey any lawful order of a Court of justice to pay money is not a criminal offence, *vide* section 165 of the Criminal Code of Canada:

"165. Disobedience of orders of Court.—Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any lawful order other than for the payment of money made by any Court of justice, or by any person or body of persons authorized by any statute to make or give such order, unless some penalty is imposed, or other mode or proceeding is expressly provided, by law."

Here the alleged personal undertaking is quite within the language of Viscount Haldane, L.C. in the *Scott* v. *Scott* case. At p. 440 we find him saying:

"Even if the order had been validly made . . . it could have provided nothing more than an instrument for enforcing an agreement come to as to the mode in which the hearing should take place. A breach of the order would, therefore, have in substance been punishable only on the same footing as a breach of an ordinary order in a civil case for an injunction; and a punitive order made with reference to the breach falls, in such cases, outside the language of s. 47 of the Judicature Act. . . ."

Then we have the graphic commentary of Lord Shaw of Dunfermline on the contention that there was no appeal in *Scott* v. *Scott* at pp. 486-7, which is exceedingly pertinent here:

"I will only add that, if the respondent's argument and the judgment

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of the majority of the Court of Appeal were right, this singular result would follow: In the year 1908 Parliament interposed to give a right of appeal in criminal cases. The Court of Appeal in the present case has held that no appeal lies from the judgment of Bargrave Deane, J., because the decision of the learned judge is in a criminal cause or matter. Grant, accordingly, that this is so; yet, nevertheless, the Criminal Appeal Act, 1907, offers no remedy to the unfortunate appellants. Under the argument against them they have been denied a civil appeal because their conduct was indictable, and under the Act of 1907 they can obtain no remedy by way of criminal appeal because they have not been convicted on indictment."

Then we have the subject dealt with in the Annual Practice, 1926, at p. 2128, under the heading "Attachment":

"Disobedience to an order of the Court does not of itself constitute a crime, but in all cases without exception appeal lies from an order for attachment in respect of such disobedience. . . . Contempt is not criminal within the section unless the act punished *per se* constitutes a crime. Therefore, if attachment issues to punish disobedience to an order of the Court in respect of an act which, even apart from the disobedience thereby constituted, amounts to an indictable offence, as, for instance, where a party is attached for breach of an injunction to restrain molestation of another party, an appeal lies even though the molestation takes the form of a criminal assault; for the contempt punished is disobedience to the order of the Court, not the crime of assault."

In my opinion by no stretch of the imagination even can it be said that there is any evidence in the present case that the appellant gave a personal undertaking—the very language relied upon makes this clear, CAYLEY, Co. J. (in his notes at the hearing):

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"Mr. *Bird* for his client says that his client will pay the wife $20 a week in future, first payment today. Mr. Kean confirms his solicitor. No costs, appeal dismissed."

The Registrar:

"Mr. *Bird* undertakes on behalf of his client Mr. Kean to pay Mrs. Kean, the petitioner, $20 per week for her support and maintenance."

Unless we give this language some distorted or other than the ordinary and natural meaning, the words imply, it is the case of the counsel stating what his client undertakes to do not the undertaking of counsel. It is astounding, to put it even mildly, to construe the language claimed to have been used by counsel into a solemn personal undertaking—that would constitute the respondent a pensioner upon the appellant for the rest of her natural life. The mere thought of so interpreting this language appals one, and to implement it by an indeterminate committal to the common gaol for this chimerical vision, an imprisonment

that may mean during the appellant's natural life, cannot be characterized other than an order of savage cruelty. Such an order could only be warranted and made by the learned Chief Justice of British Columbia because he was of the opinion that he was constrained to so order by reason of intractable law. If it is the law—and the learned Chief Justice of British Columbia must have so advised himself—then the order is right the learned Chief Justice not being concerned with the propriety of the law, his humanity not being possible of exercise. It must always be as it no doubt was here, a very regretful duty to declare the law and pronounce a judgment that would seem to be inhuman, but it is not the province of the Court to legislate, although there is much judge-made law, but to carry out the law. I do not hesitate to say that it is not the law of England, it is not in accordance with the genius of the British people; long ago the Imperial Parliament by statutory enactment declared that imprisonment for debt was at an end (The Debtors Act, 1869) and no person should after the commencement of the Act be arrested or imprisoned for making default in payment of a sum of money, with some stated exceptions which we have not in British Columbia. I will later deal with the statute law as we have it. That was the voice of the people—evidence was laid bare of the inhumanity of the law and its savagery. Unfortunately the statute law was not given that complete range of application that unquestionably was the intention of Parliament and in divers ways that which was inhibited is accomplished, and one of the ways is by process of contempt of Court which is the present case. I am not in any way indicating that the law does not admit of committal to gaol for contempt of Court *ex facie*. The Lord Chief Justice of England (Lord Hewart) in *Rex* v. *Daily Mirror* (1927), 1 K.B. 845, said (p. 847):

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> "The phrase 'contempt of Court,' as has been observed more than once, is, in relation to the kind of subject-matter with which we are now concerned, a little misleading. The mischief referred to consists, not in some attitude towards the Court itself, but in conduct tending to prejudice the position of an accused person. In other words, what is really in question is nothing attacking the *status* of the Court as a Court, but something which may profoundly affect the rights of citizens."

It is only necessary to call attention to the case of *Bourne* v. *Keane* (1919), 35 T.L.R. 560, where the then Lord Chancellor (Lord Birkenhead) in a masterly judgment in the House of

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Lords pointed out in a most graphic and illuminative way the misconception of the law of England by eminent judges throughout three centuries and more, relative to the denial to the Catholic subjects of the realm of the right to by bequest provide for the solemnization of masses for the repose of their souls, all such bequests having theretofore been held to be invalid based upon the incorrect reading of a statute passed in the reign of Edward VI., the Chantries Act, 1547.

That the learned Chief Justice of British Columbia may be in error in law, in this matter is in no way more surprising than that for centuries the most eminent judges of England went wrong, not because of any inhumanity of heart and mind, but because as they thought, of intractable law, as I believe many of them must have been deeply affected in having to frustrate the dying bequests of testators who had the conscientious conviction that masses for their souls said after death would be efficacious for them after death. The definition of the Council of Trent (Sess. xxv.) being:

"That purgatory exists, and that the souls detained therein are helped by the suffrages of the faithful, but especially by the acceptable sacrifice of the altar."

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This belief goes back to the earliest times and it is of record in the following terms:

"In those days the most valiant Judas, having made a gathering, sent twelve thousand drachms of silver to Jerusalem, for sacrifice to be offered for the sins of the dead, thinking well and religiously concerning the resurrection. (For if he had not hoped that they that were slain should rise again it would have seemed superfluous and vain to pray for the dead.) And because he considered that they who had fallen asleep with godliness had great grace laid up for them. It is, therefore, a holy and wholesome thought to pray for the dead that they may be loosed from sins." (2 Mach. xii.).

In the report of *Bourne* v. *Keane, supra,* at pp. 562-3, we have it stated:

"His Lordship [the Lord Chancellor—Lord Birkenhead] then referred to several authorities in which *West* v. *Shuttleworth* [(1835), 2 Myl. & K. 684] had been followed, and stated the conclusions to be derived from the authorities as follows:

"(1) That at common law masses for the dead were not illegal, but on the contrary that dispositions of property to be devoted to procuring masses to be said or sung were recognized both by common law and by statute.

"(2) That at the date of the passing of 1 Edw. VI., c. 14, no Act or provision having the force of an Act had made masses illegal.

"(3) That 1 Edw. VI., c. 14, did not itself make masses illegal, or provide that property might not thereafter be given for the purpose of procuring masses to be said or sung. It merely confiscated property then held for such and similar purposes, and subsequent legislation was passed to confiscate property afterwards settled to such uses. This was certainly true of 1 Eliz., c. 24, and might be true of 1 Geo. I., c. 50.

"(4) That, as a result of the Acts of Uniformity, 1549 and 1559, masses became illegal. The saying or singing of masses was a penal offence from 1581 to 1791, and no Court could enforce uses or trusts intended to be devoted to such uses.

"(5) That neither contemporaneous exposition of the statute 1 Edw. VI., c. 14, nor any doctrine closely related to it in point of date, placed upon it the construction adopted in *West* v. *Shuttleworth* (*supra*). The principle of that decision was certainly affirmed in Duke on Charitable Uses, and in Roper on Legacies, but the authorities cited on its behalf not only did not support it but in some cases contradicted it.

"(6) That the substratum of the decisions which held such uses and trusts invalid perished as a consequence of the passing of the Catholic Relief Act, 1829, and thereafter their Lordships might give free play to the principle *cessante ratione legis ceasat lex ipsa.*

"(7) That the current of decisions which held that such uses and trusts were *ipso facto* superstitious and void began with *West* v. *Shuttleworth* (*supra*), and was due to a misunderstanding of the old cases.

"If there were, in fact, an unbroken line of authorities dating back 300 years, then it would have been a matter for grave discussion whether that House, in accordance with well recognized principles, would consent to break that chain. The authorities, however, were only uniform in result. Some depended upon statutes, some on the principle that no religion other than that by law established could be recoginzed and protected by the Courts, while others depended upon a misunderstanding of the ancient decisions."

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We have seen that eminent judges of England thought that the law was intractable and it was held down through the generations from the time of Edward VI., to that of our present Gracious Sovereign George V., that bequests of the nature mentioned were invalid when finally the House of Lords in our time, as we have seen, determined that such was not the law—that the statute 1 Edw. VI., c. 14, did not so read. And further, the Catholic Relief Act, 1829, had, if the statute could be held to so read, worked a repeal of the statute law. In the present case, the learned Chief Justice of British Columbia, in my opinion, is in error in law in holding that what was done here amounted to a personal undertaking by the appellant and in making the order now under appeal for the committal of the appellant to the common gaol for an alleged breach of such undertaking. The facts of the present case do not support the

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holding that a personal undertaking was given, and the committal order was made, with great respect, by the learned Chief Justice of British Columbia, owing to a misconception of the law, and the effect of the decided cases.

It was disclosed as we have seen, before the learned County Court judge made his order dismissing the appeal to him, that the appellant denied that he had given a personal undertaking and even if in form what he did say, could be interpreted to mean that palpably there was no intention to give it, it then was the incumbent duty of the learned County Court judge to proceed and dispose of the appeal.

It would certainly be unfair, unjust and inequitable in my opinion, upon the facts of the present case to uphold the order for committal of the appellant to the common gaol because it lacks foundation in that there never was a personal undertaking given and even if it could be held to amount in words to a personal undertaking it was inadvertently given. It is not to be forgotten that equity looks to the spirit rather than the form of the transaction. Can it be reasonably thought that the appellant ever intended to give his personal undertaking in this matter? It is unthinkable that a leading counsel of wide experience ever intended to obligate himself for the rest of his natural life, which it may well be, to pay an annuity to the respondent of $20 per week. To contemplate what is here contended for and given effect to, beggars description. No doubt if the position is one of intractable law and to interfere would be the denial of that law the inhumanity of its effect would not be the concern of the Court but the responsibility of Parliament. In my opinion the learned Chief Justice of British Columbia was without "any material from which he could reasonably infer that a contempt was committed"—see Lindley and Lopes, LL.J., in *Reg.* v. *Jordan* (1888), 36 W.R. 797, and in that case an apology would have cured the contempt. Here the appellant must for his natural life pay $20 a week for the maintenance of the wife of his client. In *Rainy* v. *The Justices of Sierra Leone* (1852-3), 8 Moore, P.C. 47, a fine only was imposed. In *Landford* v. *Spicer* (1856), 2 Jur. (N.S.) 564, Sir J. Stuart, V.C., in a case where the undertaking had been broken in letter and in spirit, said:

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"It was impossible that the Court could omit to mark its sense of the conduct of that gentleman in this matter. He would not commit him to prison, but would impose upon him the costs of this application."

The case of *The Copeland-Chatterson Co. Ltd.* v. *Business Systems Co., Ltd.* (1908), 16 O.L.R. 481 well illustrates the present case, and that if there was a breach of a personal undertaking it was civil in its nature, p. 490, Meredith, J.A.,—

"it was but the failure of the defendants to observe an injunction against them in it—to obey the order of the Court made against them in it—for the sole benefit of the plaintiffs, and at their instance."

And see *Scott* v. *Scott, supra,* especially Viscount Haldane, L.C., at p. 440:

"A breach of the order would, therefore, have in substance been punishable only on the same footing as a breach of an ordinary order in a civil case for an injunction; and a punitive order made with reference to the breach falls, in such cases, outside the language of s. 47 of the Judicature Act. . . . ."

The notice of motion made for the committal of the appellant which was acceded to by the learned Chief Justice of British Columbia, was based upon the affidavit of one Albert Gerald Hodgson, sworn and filed and dated the 16th of May, 1927, and paragraphs 22, 23, 24 and 25:

"22. I did on the 9th of March, 1927, write and deliver to the said *Joseph Edward Bird* a letter in the words and figures following:

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'March 9th, 1927.

'J. E. Bird, Esq.,
'837 Hastings Street West,
'Vancouver, B. C.

'*In re Kean* v. *Kean.*

'Dear Sir;—

'In reference to the proceedings before His Honour Judge Cayley on the 25th ultimo, I beg to inform you that I have decided against the possibility of asking the learned judge to transmit these proceedings to the Supreme Court. I therefore propose on Friday next to move before His Honour Judge Cayley for the dismissal of these applications without costs, and I then propose to apply to the Supreme Court to commit you. Before doing so, however, I would ask you to comply with your undertaking and pay to Mrs. Kean the arrears from the 20th of September last. As I think you know, since Mrs. Kean received the twenty dollars which you advanced to Mr. Kean on the 20th of September last she has received absolutely nothing at all either from her husband or from you.

'Yours truly,

'A. G. Hodgson.'

"23. I did on the 5th of May, 1927, write and deliver to the said *Joseph Edward Bird* a letter in the words and figures following:

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'May 5th, 1927.

'J. E. Bird, Esq.,
'837 Hastings Street West,
'Vancouver, B. C.

'Dear Sir;—

'In re Kean v. *Kean.*

'In further reference to my letter of the 9th of March last, I beg to inform you that Mr. Kean has made no arrangement for paying the amounts due to his wife, and I am therefore applying to you for the last time asking you to comply with your undertaking and pay to Mrs. Kean the arrears which as you doubtless know now amount to $585.

'Yours truly,
'A. Gerald Hodgson.'

"24. I have received no reply to these communications.

"25. I am informed by the said Jane Flavia Kean and believe that since the 20th of September, 1926, she has received from the said Arthur D. Kean the sum of seventy-five dollars ($75) and no more and that she has received no money from the said *Joseph Edward Bird.*"

It will be seen that the demand upon the appellant was (see as above quoted in paragraph 23) "to comply with your undertaking and pay to Mrs. Kean the arrears as you doubtless know now amount to $585." It is quite evident that what was demanded was the payment of a sum of money and if paid the ground work for the application would be non-existent. Now quite apart from the law of England—although in my opinion the order here would be bad as well—it is unquestionably an order made in the very teeth of the statute law of Canada, as well as the statute law of the Province of British Columbia. The statute law of Canada as we have seen, section 165 of the Criminal Code of Canada, makes an exception and it is not a contempt where the disobedience is of an order "for the payment of money made by any Court of justice." It would be idle to contend here, that the contempt punished by the committal of the appellant to the common gaol is for other than the breach by the appellant of the alleged personal undertaking to pay the respondent $20 per week. It is recited in the order for committal,—

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"that the above named *Joseph Edward Bird*, Esq., has committed a breach of his undertaking given to the County Court of Vancouver, holden at Vancouver, on the 20th of September, 1926, that a certain Arthur D. Kean would pay to the said Jane Flavia Kean the sum of $20 per week thereafter if no order were made in the appeal,"

and the operative part of the order further on reads:

"And this Court being of opinion that the said *Joseph Edward Bird* has

by such conduct as hereinbefore appears been guilty of a contempt of the County Court at Vancouver, this Court doth order that the said *Joseph Edward Bird* do stand committed to the common gaol at Oakalla in the Province of British Columbia for the said contempt and that he do pay to the said Jane Flavia Kean her costs of and occasioned by this application."

It is patent that under the statute law of Canada it is not a contempt of Court or a criminal offence to disobey an order of a Court of justice for the payment of money and that is exactly the nature of the contempt found in the order here under appeal. However, we have no criminal proceedings here and no conviction for contempt in any criminal proceedings. If there was a conviction in any such proceedings the conviction would be invalid and would be set aside. We have here proceedings civil in their nature, *Scott* v. *Scott, supra,* and turning to the relevant law bearing upon the point it is found that there is statute law that is absolutely determinative of this appeal. I would refer to section 2 of the Arrest and Imprisonment for Debt Act, Cap. 15, R.S.B.C. 1924. Section 2 of that Act reads as follows:

"2. Process of contempt for mere non-payment of any sum of money, or for non-payment of any costs payable under any judgment, decree, or order, is abolished; and no person shall be detained, arrested, or held to bail for non-payment of money except as in this Act is, or in any other Act of the Legislative Assembly may be, provided."

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It is manifest in view of this statute law that the order under appeal here is an order which cannot be sustained. It is of the organic law of the land that no process of contempt for the mere non-payment of money is valid and no person can be detained, arrested or held to bail for non-payment of money except as in that "Act is, or in any other Act of the Legislative Assembly may be provided" (Cap. 15, R.S.B.C. 1924, Sec. 2). There are exceptions made in the English Debtors Act, 1869, but with us there are no exceptions, therefore, to sustain the order under appeal statute law must be found to support its making—decided cases if there were any supporting the order would be valueless. There is an entire absence of any statute law upon which to uphold the order under appeal. The statute law is an insuperable obstacle to the upholding of the committal order, and nothing more need really be said, but quite apart from this, I am clearly of the view that no personal undertaking was established. The order under appeal is in my opin-

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ion, with great respect to the learned Chief Justice of British Columbia, wholly unsupportable being made without jurisdiction and not based upon any materials from which it could be inferred reasonably, that a contempt was committed and should be reversed. I would therefore allow the appeal and set aside the order for committal.

MACDONALD, J.A.: If we are bound to accept the statement or deductions of the learned County Court judge as to what occurred, we must hold that Mr. *Bird* gave to the Court his undertaking to personally pay $20 a week to the respondent if his client failed to do so; also that the Court accepted that undertaking and instead of proceeding with the hearing and making whatever order the facts warranted, dismissed the appeal. The order of dismissal, however, was not taken out so that the hearing might have been resumed after the dispute as to the precise character of the undertaking arose. On the facts was there an interference with the due course of justice? It may be said that the Court was induced to dismiss the appeal by the offer of an undertaking and having secured dismissal the undertaking was disregarded and the respondent was therefore deprived of her right to an adjudication.

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If, however, we are at liberty to review the facts to ascertain if the foregoing inference could be reasonably drawn by His Honour, my conclusion would be quite different. The best evidence should be afforded by the judge's notes, and they contain this entry:

"Mr. *Bird* for his client, says that his client will pay the wife $20 a week in future, first payment today. Mr. Kean confirms his solicitor."

This language is clear. It does not remotely suggest a personal undertaking. It simply represents a suggested settlement offered and accepted in the course of the hearing. Mr. *Bird* in effect informed the Court that his client would pay $20 a week. That was accepted without the further security of a personal undertaking by him if the judge's notes correctly describe what occurred. I think the note referred to made by the judge at the time was accurate. The respondent failed to obtain an order from the magistrate; she might also fail before the County Court judge. The fact that respondent's counsel after the

alleged repudiation did not insist on reopening the case before His Honour would indicate that he felt it would be better to pursue Mr. *Bird* rather than take the chance of getting an order against his client. True the entry made by the clerk of the Court bears out the respondent's contention. But one or the other must be rejected. Both are not right and the judge's notes are of higher value. If counsel united in dictating to the clerk the precise terms of the undertaking there would of course be no difficulty. Indeed, it is strange if this personal undertaking was given that counsel for respondent did not insist that it should be taken down in writing in its exact form, possibly with Mr. *Bird's* signature added. It is going too far to ask a Court to find one of its officers guilty of reprehensible conduct on the state of facts disclosed in the material. If parties will not take the precaution to reduce to writing the exact words of an undertaking they should not expect Courts to supply the omission at the risk of doing a grave injustice. I would, therefore, find the facts to be in accordance with the judge's notes which are always looked to by a Court of Appeal in the absence of a transcript and I think, with the greatest deference, His Honour was in error when at a later stage in trying to recollect what took place he did not guide his memory by the best evidence before him. I form the opinion after reading the oral statement of His Honour that he was not at all clear in his recollection of the facts. He says:

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> "By that [referring to the alleged undertaking] I took his words to mean that he himself was personally involved in that undertaking."

That is His Honour's deduction, *arguendo*. He does not say that his notes are wrong. It falls short of a definite statement of a distinct recollection.

I have had the assistance of a perusal and extended consideration of the judgment of my brother MARTIN. I cannot, however, agree that the learned Chief Justice was bound to adopt the facts as set out by the County Court judge. I do not think *Reg.* v. *Jordan* (1888), 36 W.R. 797, so decides. I think the Chief Justice, if he had jurisdiction to hear the application, was at liberty to examine the affidavits which the parties evidently thought it necessary to file, not confining themselves to the judge's statement, and to enquire, to quote from the case

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referred to, "whether there was before the judge any material from which he could reasonably infer that a contempt was committed." This involved a determination by the learned Chief Justice of the words used by Mr. *Bird* in respect to the alleged undertaking. If he found that Mr. *Bird* merely promised to make the first payment of $20 and stated in effect that his client would make the remaining payments, no contempt would be committed. No reasons by the learned Chief Justice are in the appeal book. I would infer from the submission to us of respondent's counsel, *viz.*, that the statement of the learned County Court judge as to what took place is binding and conclusive, that this argument prevailed below. If so, with deference, I think a wrong principle was acted upon, and it is open to this Court to decide whether or not the material before the County Court judge justified the conclusion arrived at on the essential facts.

In *In re Pollard* (1868), L.R. 2 P.C. 106, their Lordships recommended to Her Majesty that a fine of $200 imposed on counsel by the Chief Justice of the Supreme Court of Hong Kong for an alleged contempt in open Court, be remitted. Six offences amounting to contempt were charged against counsel, but as stated at p. 120, "their Lordships are not satisfied that each of the six amounted to contempt of Court." In other words, their Lordships reviewed the same facts upon which the Chief Justice acted in imposing the fines, and reached a different conclusion apparently not accepting the suggestion made to us that the Court itself decides if a contempt has been committed.

On the true facts, therefore, I cannot find that what took place was an interference with the course of justice. What occurred was primarily a matter between the parties to the litigation. The judge simply noted what was said as between the parties, using his best recollection afterwards.

I am therefore of the opinion—relying chiefly on the judge's notes—that, with deference, he could not reasonably ignore them and come to a conclusion which on their ordinary construction they do not warrant. It follows that the words used by Mr. *Bird* were not in law capable of being held to amount to a contempt of Court. Cases therefore predicated on the assumption that a contempt was committed are of no assistance.

I may add, that I agree with the Chief Justice that the judge of the County Court had jurisdiction to hear and dispose of this application and also that on the facts in the case at Bar, an appeal lies to this Court.

I would allow the appeal.

Appeal allowed, Martin, J.A. dissenting.

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Solicitors for appellant: *Wood, Hogg & Bird.*
Solicitor for respondent: *A. Gerald Hodgson.*

SELDON v. ZAMBOWSKI.

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Contract—Surgical operation—Compensation for services—Necessaries—Authority of wife to pledge husband's credit—Evidence.

A wife is the agent of her husband for the purpose of engaging a surgeon and notwithstanding the fact that the wife has money of her own, her husband is liable for her necessities, including surgical operations.

APPEAL by plaintiff from the decision of CAYLEY, Co. J. of the 31st of March, 1927, in an action to recover his fees for performing a surgical operation on the defendant's wife. The wife who suffered from a serious internal complaint, was attended by a Dr. Milburn as her physician. He advised her that an operation was necessary and suggested that he should get Dr. Seldon to which she assented and she was then removed from St. Paul's Hospital in Vancouver to the General Hospital where the operation was to be performed. She said that she understood that she merely authorized Dr. Milburn to call in Dr. Seldon in consultation although she admitted she knew an operation was to be performed. Statement

The appeal was argued at Victoria on the 10th of June, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, for appellant: Dr. Seldon was called in by Mrs. Argument

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Zambowski to operate. This is clear from Dr. Milburn's evidence, he being her attending physician. As to the right of the surgeon to recover see *Garrey* v. *Stadler* (1886), 58 Am. Rep. 877. As to the husband's liability see *Hunt* v. *De Blaquiere* (1829), 5 Bing. 550 at p. 559; *Harrison* v. *Grady* (1865), 13 L.T. 369 at p. 370; *Forristall* v. *Lawson; Connelly* v. *Lawson* (1876), 34 L.T. 903; *Callot and others* v. *Nash* (1923), 39 T.L.R. 291.

Argument

J. M. Macdonald, for respondent: There is no evidence that Dr. Milburn told Mrs. Zambowski that he was getting Dr. Seldon to perform the operation. The evidence only goes as far as his telling her that he wanted to call in Dr. Seldon for consultation: see *Lindsay* v. *Freda* (1923), 2 D.L.R. 1180.

Mayers, replied.

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MACDONALD, C.J.A.: I am in some doubt about this case. It is perfectly clear that notwithstanding that the wife had money of her own, her husband is liable for her necessaries, including surgical operations. The wife therefore was the agent of the husband for the purposes of engaging a surgeon. If she authorized her attending physician Dr. Milburn, to employ Dr. Seldon to perform the operation the husband is liable, but the doubt arises from the fact that she, as she says, meant merely to authorize Dr. Milburn to call in Dr. Seldon in consultation, he, Dr. Milburn having advised her that an operation might be necessary. Dr. Seldon was called in in consultation and advised an operation. The patient was then removed from St. Paul's Hospital to the General Hospital where the operation was performed by Dr. Seldon, Dr. Milburn assisting. The learned judge came to the conclusion that she did not authorize Dr. Milburn to call in Dr. Seldon for the operation. I think this conclusion ought not to be interfered with.

MARTIN, J.A.

MARTIN, J.A.: In my opinion the learned judge has, with all respect, failed to apply his mind to this case, either upon a proper conception of the law, which is perfectly clear, or upon the facts, which are equally clear. It appears that this woman found herself so far reduced by a very serious internal complaint, that it was necessary to have an operation performed

that would render her sterile. We find her physician, Dr. Milburn, thus explaining it to her:

"Was the husband aware that the operation would have to be performed? Certainly he was, because he apparently consented.

"He knew that she would be sterile? Yes, I explained everything to Mrs. Zambowski. . . . She must have understood that because she was being removed from one hospital to another and she knew the reason so she must have understood that."

This shews the magnitude of the operation, and that it was in her mind and she was removed from St. Paul's to the General Hospital for the purpose of carrying out that operation, which was necessary to be performed for her bodily health. Then Dr. Milburn goes on:

"Now, did you say whether you mentioned Dr. Seldon's name to her? Yes, before he went in I asked her—I asked her if she could suggest anyone in particular. 'Have you anyone to suggest?' She said, 'No.' So I told her I would get Dr. Seldon [This is speaking of this operation to be performed to render her sterile].

"That is the conversation you had with her? That is the gist of the conversation.

"And when Dr. Seldon was brought in his name was not mentioned? Yes.

"At the time he was brought in? Yes.

"Was she in a condition at that time to appreciate names? Yes, certainly. There was nothing radically wrong. I do not see any reason why she should not.

"She was suffering, was she not? No, not particularly.

"And that was practically all the arrangement you made with her in regard to Dr. Seldon? As far as when she went—when she was moved, I told her the reason we were moving her, that Dr. Seldon and I were going to operate in the General Hospital and she understood that."

MARTIN, J.A.

Then Dr. Seldon was called, and we have his exact confirmation of the date he was called in, July 28th, 1925:

"I was called in consultation with Dr. Milburn, I examined the lady in St. Paul's Hospital on that date and advised an operation. After having examined her I discussed the case with Dr. Milburn in the hall; I then returned to her bedside and advised a certain line of treatment and an operation to which she consented, and I operated."

Now after that can there be any doubt that the facts are as clear as the law? Therefore I would allow the appeal.

GALLIHER, J.A.: I agree with my brother MARTIN. Mrs. Zambowski was informed that Dr. Seldon and Dr. Milburn were going to operate upon her; to my mind it does not make a bit of difference which of them operated, whoever performed the

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operation the other assisted; the one who performed would be entitled to be paid for the performance of the operation, and the other for assisting.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of a like view. When we have Dr. Seldon's sworn testimony and Dr. Milburn's and when we have the learned judge speaking in the highest terms of the reputation of Dr. Seldon, it makes it very clear to me that the learned judge was not proceeding on any denial of belief in any of the statements made. In regard to the law, with great respect, I think the learned judge was in error.

This is a very simple case of agency; where you have the agent duly authorized, as in this case, there is the responsibility upon the part of the principal to pay. And that is shortly this case.

MACDONALD, J.A.

MACDONALD, J.A.: I agree with the principles of law stated by the Chief Justice in his judgment; but on the facts I am of the opinion that this grown-up woman did understand Dr. Seldon was to operate on her, and must be taken to have agreed to it. I think, too, there is nothing in the findings of the learned judge below to preclude that view. I would allow the appeal.

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

Solicitor for appellant: *E. R. Thomson.*
Solicitors for respondent: *Macdonald & Laird.*

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TURNER v. BRITISH COLUMBIA MUTUAL BENEFIT ASSOCIATION.

Insurance, life—Application—Answers to questions—Misrepresentation as to treatment by physicians—Materiality—B.C. Stats. 1925, Cap. 20.

The plaintiff, on applying for an insurance policy answered questions in the application, stating that she had not been treated by a physician for three years; that she was not suffering from, and had not had any chronic disease, and was without any bodily defect. The policy was issued without a medical examination being required. Eleven months later she died following an operation for a tumour. In an action on the policy the defendant alleged that the above statements were false and the policy was therefore void. The evidence disclosed that a year before applying for insurance the insured had twice consulted a physician for influenza in one case and for being in a run-down condition in the other. The defendant contends that had she told of these treatments a medical examination would have been required which would have disclosed her true condition. The jury returned a general verdict for the plaintiff.

Held, on appeal, affirming the decision of GREGORY, J. (GALLIHER, J.A. dissenting), that under the Insurance Act a policy is not avoided because of misrepresentation or non-disclosures in the insured's application unless they are material, even though the policy provides that it shall become null and void if the statements or answers are found to be in any respect false or fraudulent. The question of materiality is one of fact and the verdict in the circumstances was not unreasonable. The appeal should therefore be dismissed.

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APPEAL by defendant from the decision of GREGORY, J. of the 6th of May, 1927, and the verdict of a jury in an action to recover $2,500 payable under a membership certificate in the defendant Company upon the death of his wife. The facts are that the plaintiff's wife, who was 49 years old, was insured on the 16th of February, 1926, in the defendant Company for $2,500 (the defendant being a fraternal order with head office in Vancouver). She died in Vancouver on the 15th of January, 1927. The defendant claims that under the policy the insured had to answer questions and if the answers shewed a clear bill of health then the Company would accept her statements and would not have her examined by their own doctors. The defence was that the insured had stated: (1) That she was in

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good health; and (2) that she had not been treated by a doctor for three years, whereas the evidence disclosed that she had been treated twice, first for influenza and on another occasion for being in a rundown condition, and further that her death was due to an operation on a tumour in her uterus, the disease being in the course of development for about four years. The defendant further claims that if the questions had been properly answered an examination would have disclosed the trouble from which she was suffering.

Statement

The appeal was argued at Victoria on the 20th of June, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

D. Donaghy, for appellant: My submission is first that the verdict was perverse. The application for insurance contained certain questions: (1) Whether she was in good health; and (2) whether she had been treated by a physician for three years. She answered the first question in the affirmative and the second in the negative. The evidence discloses she was treated twice, in one case for influenza and in a second case for being run down. The Company's physicians did not examine her on account of her answers. She died ten months after the insurance was taken out and her death was due to tumour of the uterus which had been developing for four years. She made misrepresentation of a material fact: see *Dawsons, Ld.* v. *Bonnin* (1922), 2 A.C. 413. An examination would have disclosed her trouble when she was insured. As to perverse finding see *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.* (1925), A.C. 344.

Craig, K.C., for respondent: On the question of representation section 76 of the British Columbia Insurance Act settles the matter: see *Salford Guardians* v. *Dewhurst* (1926), A.C. 619. The British Columbia law is the same as the Dominion law and the Ontario law on the question.

Donaghy, replied.

Cur. adv. vult.

4th October, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Counsel for the appellant argued that *Dawsons, Ld.* v. *Bonnin* (1922), 2 A.C. 413, governs the decision

of this appeal, while respondent's counsel contended that it is indistinguishable in principle from *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.* (1925), A.C. 344. I think the latter submission is the correct one. Subsections (5) and (6) of section 156 of The Ontario Insurance Act, R.S.O. 1914, Cap. 183, are in substance identical with section 83 of the Insurance Act of this Province, 1925, Cap. 20. Lord Salvesen, delivering the judgment of the Privy Council, in the last-mentioned case, referring to subsections (3), (5) and (6) of said section 156, said (p. 350):

"These provisions, read together, may be taken to lay down in unmistakable language (1.) that no policy shall be avoided by reason merely of any misrepresentation or inaccuracy in a statement made by the insured in the application form, whatever the terms of the policy might otherwise import, and (2.) that any misrepresentation which may avoid the contract must be a misrepresentation of a fact and must be material to the contract."

It is true that subsection (3) is not found in our Act, but in my opinion, that subsection is not very material to the case, it may have been inserted in the Ontario Act *ex abundanti cautela.* Subsection (5) is clear and direct and was no doubt intended to declare just what it does declare, namely, that a policy should not be nullified because of a misrepresentation in a statement contained in the application unless the statement be material to the contract. It effaced the distinction in the law as it then stood between warranties and misrepresentations and places it on a more sensible basis. Here we have the false statement in the application that the insured had not been treated by a physician during the past 3 years. Section 83 (1) declares that the policy shall not be void or voidable by reason of any misrepresentation in the application unless it be one material to the contract. The statute does not distinguish between representations which are warranties and those which are not. It is a misrepresentation in the application that section 83 (1) is concerned with, not misrepresentations or concealments outside the application.

Having come to this conclusion on the law, I shall turn to the question of fact, the materiality of the misrepresentation here in question. The special jury found that the misrepresentation was not material. Was that finding unreasonable? To set aside the verdict I must be able to say that it was so, and

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that the case should have been withdrawn from the jury and the action dismissed.

The facts are simple enough. The insured called at the office of her family physician in March, 1925, complaining of a cold, a touch of influenza; the physician gave her a prescription for it, and later in the week she came again when he gave her a tonic to brace her up from the effects of the cold. Her health was good from that time until December, 1926, when she complained of flooding and in January, 1927, she underwent an operation from which she died. The certificate of death given by the family physician shews cause of death to have been,—

"Shock following two abdominal operations inside of two days.
"(duration) about 4 years.
"Contributory: Fibroid in substance of uterus.
"(Secondary)
"(duration) 4 yrs."

It was the practice of the defendant to refrain from calling for a medical examination when the application disclosed no medical treatment during the past three years. It accepted the deceased as a member of the Association without such examination. Officers of the defendant said that had the treatments aforesaid been disclosed they would have requested her to submit to a medical examination. Several physicians gave evidence for the defence from which it may be inferred that had she been so examined something indicating her condition might have been discovered, but their evidence is, to my mind, not at all conclusive on this subject.

MACDONALD, C.J.A.

I think it was not unreasonable for the jury to take the view that the words "treated by a physician" as used in the application form, was not meant to include that for "a touch of influenza or a cold." Anglin, J., in *Ontario Metal Products Co.* v. *Mutual Life Insurance Co. of New York* (1923), S.C.R. 35, said, at pp. 46-7:

"In my opinion, Schuck might very well, as a reasonable man . . . have considered that during these years he had not had an illness, . . . which the insurance company would expect him to mention in answering question No. 17 and that he had not consulted or been prescribed for or treated by a physician within the meaning of question No. 18. Under the circumstances the hypodermic injections might well have been deemed as of no greater significance than would have been the taking of any well-known tonic bought at a pharmacy and self-administered—not 'treatments' within the purview of question No. 18."

In the same case, at p. 52, Mignault, J., said:

"I think we are entitled, inasmuch as in a case of this nature the judge discharges the duty of a jury, to look at the whole matter in a common-sense way and as a reasonable juryman would, using our knowledge of the world and of men, for it would be news to me that a man who had occasionally taken a tonic, when he felt tired or run-down from overwork, should, when examined for insurance, state this fact to the medical examiner."

I attach no importance to the evidence of the defendant's officials, who state that if they had known of these "treatments" they would have had the insured examined, by a physician. It is easy to say so after litigation has commenced, and indeed, to believe it, but the jury may well have asked themselves—Would the insurer be likely to attach importance to a treatment for a cold or a touch of influenza when answering a question such as this one? I think it would be not unreasonable to answer in the negative, as Dr. McCollough answered a similar question in the *Ontario* case.

MACDONALD, C.J.A.

I would dismiss the appeal.

MARTIN, J.A.: This is an action to recover $2,500 on a life-insurance policy issued by a mutual benefit association and the claim is defended on account of alleged breaches of the following clause in the policy, *viz.*:

"It is also understood and agreed that, if the said Statements, Answers and Declarations made and contained in the Application for Membership, upon the faith of which this said Membership Certificate has been granted and issued, should be found at any time in any respect false, fraudulent, or untrue, then and in such event this Membership Certificate shall at once become null and void of benefit or effect."

MARTIN, J.A.

Though we were informed that no fraudulent conduct is charged against the plaintiff yet the following answers by the insured to questions in the application are relied upon as establishing false or untrue statements which would cause the contract to "become null and void," *viz.*:

"Except as herein stated I am not now suffering from, nor have I had, any chronic disease, nor have I any defect in hearing, vision, mind or body? No. Name of Beneficiary, William Turner. Relationship to applicant, Husband. Address 906 Granville St.

"Have you been treated by a physician during the last three years? No. Physician consulted . . . ."

Paragraph 10 of the defence recites these answers, alleges their falsity, and further says that the deceased—

"was then and had for several years previously been suffering from a

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chronic disease and then had a defect or defects in her body, which fact was then well known to her."

The application and policy were made and issued on the 16th of February, 1926, and the insured woman died eleven months thereafter, 15th January, 1927, as the medical death certificate thus sets out:

"The cause of death was as follows:
"Shock following two abdominal operations inside of two days.
"(duration) about 4 years.
"Contributory: Fibroid in substance of uterus.
(Secondary)
"(duration) 4 yrs.

"(Signed) Thos. Verner, M.D."

The case was tried by a jury and the important question of the existence of a uterine tumour at the time of the application was strongly contested and submitted to the jury in the course of the learned judge's charge, though he told them, wrongly I think with every respect, that it was "not really the essence of the case" yet he properly added that "you are entitled to consider it," and went on to say, speaking of Dr. Verner the leading witness for the plaintiff:

"Now you have heard the strictures of counsel for the defendant upon Dr. Verner. I have nothing to say. If you believe Dr. Verner can be believed you are justified in doing so; but you are quite justified in disregarding his evidence if you do not believe that he made a truthful statement here . . . you are the judges of the facts, the judges of the credibility of the witnesses and the judges of everything except the law."

MARTIN, J.A.

The learned judge then proceeded to point out the weighty evidence of the doctors for the defence who did not agree with Dr. Verner but by their general verdict in favour of the plaintiff the jury shewed they had decided to believe Dr. Verner, who with Dr. Hall had had the valuable opportunity and advantage over other witnesses of examining the tumour when it was removed by the latter in the presence of the former, on the 11th of January, 1927.

In view of some unusual aspects of this interesting case I have carefully considered not only the evidence we were referred to but all the evidence and I am forced to the conclusion that, as the learned judge put it, the jury were "justified" in law in the view they were entitled to take of the evidence because, though it was not, doubtless, as strong as one would like yet on the other hand I find it impossible to say that their view of it was not one which reasonable men could reasonably take.

Turning then to our Insurance Act of 1925, Cap. 20, Secs. 76, 82 and 83, and after a careful consideration thereof, I am of opinion that as regards this case, their overriding effect is that misrepresentations or non-disclosures do not avoid the contract unless they are of a "material" nature, which question is one of fact (section 82) and as the Privy ouncil say in *Ontario Metal Products Co.* v. *Mutual Life Insurance Co. of New York* (1925), 1 W.W.R. 362, 368, "must always be a question of degree, and therefore be determined by the Court," which obviously means by the assistance of a jury when present, as here. Applying this test to the statement that the insured "had not been treated by a physician during the last three years," that statement is technically at least, untrue because the expression "treated" would even popularly as well as properly include the two prescriptions that Dr. Verner gave the deceased on the 27th of March and 2nd of April, 1925, when she consulted him for what he describes as a "slight touch of flu," and "a tonic to brace her up after her cold," at which latter date he thus describes her condition:

"Would you say at that time there was anything seriously wrong with her? No, I would say she was in the pink of perfection. She was not what you would call a stout robust woman, but she was thin and wiry and she was an indefatigable worker."

MARTIN, J.A.

In the Oxford Dictionary "treat" in the present sense is thus defined:

"11a. To deal with or operate upon (a disease or affection, a part of the body, or a person) in order to relieve or cure."

I pause here to note that such a condition as "cold and run-down" seems to have been very lightly regarded by the Privy Council in the *Ontario Metal* case, *supra,* p. 368. It is, however, urged that if she had truthfully answered the question her state of health would have been medically examined into and then the truth about the existence of a tumour at that time would have been ascertained and if it did exist then the application would have been refused. But on the other hand, and assuming the probability of such an examination, if the tumour did not in fact then exist the contract would undoubtedly have been made because it has not been suggested that there was any other ground upon which the application would have been refused by "reasonable insurers," and the Privy Council in the *Ontario* case, *supra,* p. 369, thus applied the test of materiality:

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"Had the facts concealed been disclosed, they would not have influenced a reasonable insurer so as to induce him to refuse the risk or alter the premium."

In the face, therefore, of the jury's finding in this case that there was no tumour in existence at the time of the application the concealment of the "treatment by a physician" in the preceding year could not, in the circumstances, have been "material to the contract" because if an examination had then been made it could only have resulted in demonstrating that there was no reasonable ground for "influencing a reasonable insurer to refuse the risk or alter the premium."

MARTIN, J.A.

I am of opinion, therefore, that the appeal must be dismissed despite the able presentation of it by Mr. *Donaghy*.

GALLIHER, J.A.: I would allow the appeal. Even if we assume the answer to the question as to being attended by a physician as not being material as found by the jury and which I do not think is warranted by the evidence, I would still hold the policy void on the ground that the accuracy of the assured's answer was made a basic condition of the contract in the policy before us. See *Dawsons, Ld.* v. *Bonnin* (1922), 2 A.C. 413, and the language of Lord Salvesen of the Privy Council in the case of *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.* (1925), 1 D.L.R. 583 at pp. 586-7.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The case is one essentially of fact and the jury has given a general verdict. No questions were submitted or asked from the jury. Therefore, the finding in its effect, is a finding in favour of the respondent upon all of the relevant issues.

The action brought was to enforce payment under a written contract in its nature a contract of life insurance payable to the respondent consequent upon the death of the wife of the respondent, a registered member of the appellant Association. The action went to trial before Mr. Justice GREGORY and a jury. The questions that were in issue may be said to be confined to the allegation that there was untruthfulness in the application for the insurance and that the alleged false representation was material and in its nature amounted to a warranty and that the contract of insurance was unenforceable. The learned judge

placed the issues in a most complete form to the jury, and in a most understandable way, so there can be no doubt that the jury fully understood the matters in issue.

At the outset it is well to remember the considerations that must weigh with the Court of Appeal when it is sought to disturb the finding of a jury especially as in the present case it was a general verdict for the plaintiff (respondent). In *Kleinwort, Sons, and Co.* v. *Dunlop Rubber Company* (1907), 23 T.L.R. 696 at p. 697, The Lord Chancellor (Lord Loreburn) said:

"To my mind nothing could be more disastrous to the course of justice than a practice of lightly overthrowing the finding of a jury on a question of fact. There must be some error of law, which the Court believes has affected the verdict, or some plain miscarriage, before it can be disturbed. I see nothing of the kind here. On the contrary, it seems to me that the jury thoroughly understood the points put to them and came to a sensible conclusion."

The insurance contract was entered into in this case without medical examination, the appellant relying upon the application and the questions and answers therein contained. The claimed false statement on the part of the applicant for the insurance, the wife of the respondent, was the answer to the following question:

"Have you been treated by a physician during the last three years? No."

The evidence disclosed that the cause of death was a fibroid tumour and the suggestion advanced on the part of the appellant is that if there had been disclosure of the fact that a physician had treated the applicant within the three years a medical examination would have been had—that is of course all indoor management and was not made known to the applicant.

In connection with the examination as to whether there was misrepresentation of a fact material to the contract it is well to bear in mind the language of the governing sections of the Insurance Act (Cap. 20, 1925, *viz.*, sections 82 and 83) which read as follows:

"82. (1.) The insured and the person whose life is insured shall each disclose to the insurer every fact within his knowledge which is material to the contract.

"(2.) Any conscious failure to disclose, or any misrepresentation of, a fact material to the contract, on the part of the insured or the person whose life is insured, shall render the contract voidable at the instance of the insurer.

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"(3.) Any misrepresentation or fraudulent concealment on the part of the insurer of a fact material to the contract shall render the contract voidable at the instance of the insured.

"83. (1.) No contract shall be rendered void or voidable by reason of any misrepresentation, or any failure to disclose on the part of the insured or the person whose life is insured, in the application for the insurance or on the medical examination or otherwise, unless the misrepresentation or failure to disclose is material to the contract.

"(2.) The question of materiality shall be one of fact."

The contract sued upon has the following provision: [already set out in the judgment of MARTIN, J.A.].

In my opinion this provision cannot avail as against the statutory provision, and in any case all the issues by the general verdict stand resolved against the appellant: see Cozens-Hardy, M.R., in *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177 at p. 179:

"Now if the jury had simply given a general verdict his Lordship thought they could not have interfered."

Dr. Verner, who had been consulted by the applicant for insurance within the three years preceding the application and the family physician of the applicant, was called as a witness for the appellant, all that the doctor says is that she had "a cold —a touch of influenza," and later she was a little "run down" and he gave her a tonic. It was nearly a year after this that the application for the insurance was made. The contract of insurance is of date the 16th of February, 1926, and we have the question put to the doctor relative in point of time to April, 1925:

MCPHILLIPS, J.A.

"Would you say at that time there was anything seriously wrong with her? No, I would say she was in the pink of perfection. She was not what you would call a stout robust woman, but she was thin and wiry and she was an indefatigable worker."

The doctor seeing the applicant again over a year thereafter, in June, 1926, noted that the applicant had entered upon the change of life—something that the appellant should have been watchful about, her age was 50, as shewn in the application—but we see that the insurance was granted without medical examination. Dr. Verner did not see the applicant again until December, 1926, and this question was put to him and answered:

"That is the first time [relative to 15th of December, 1926] she was seriously ill? That is the first time I have ever seen her ill—really seriously ill."

Now, it is impossible to say in view of Dr. Verner's evidence

that the applicant for the insurance made what might be called an untruthful statement when she said on 12th February, 1926, that—

"I am not now suffering from, nor have I had, any chronic disease, nor have I any defect in hearing, vision, mind or body? No. Name of Beneficiary, William Turner. Relationship to applicant, Husband. Address 906 Granville St.

"Have you been treated by a physician during the last three years? No. Physician consulted . . . ."

It is plain from the evidence of Dr. Verner the family physician, that she was not suffering from any chronic disease, nor was there any defect in hearing, vision, mind or body. Then as to not being "treated by a physician during the last three years," the applicant might well consider that it had relation to being "treated" for any "chronic disease"; that is the common sense way one would view it, and she had not been. Is it reasonable that an applicant for insurance should state that she had been under treatment by a physician because she had had a cold, a touch of influenza, or any little ills that occur from time to time? All such ills are of common knowledge and it is impossible for the appellant to contend that they ought to have been mentioned, nor is it reasonable that an applicant for insurance would consider, although his physician had been consulted and a prescription given, that there had been treatment at the hand of a physician. I am not saying that an ultra-conscientious applicant might not deem it proper to mention the fact that he had consulted a physician, but the question here is—Can it be said it was reasonable that it should have been mentioned? When that question has to be answered it is perhaps a question of some difficulty, but the Court of Appeal has not to answer it unless we can say that the verdict is upon all the facts unreasonable. The jury have found a general verdict—that means following the statute which governs in the matter that there was no misrepresentation or any failure to disclose in the application any fact that was material to the contract. The jury are the sole judges of the question of fact. The Court of Appeal cannot interpose its view and usurp the functions of the jury unless it is possible to say that the verdict of the jury is unreasonable and then there would follow a new trial the case not being one where only one answer is possible (*McPhee* v.

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Esquimalt and Nanaimo Rway. Co. (1913), 49 S.C.R. 43; *Skeate* v. *Slaters, Limited* (1914), 2 K.B. 429; 83 L.J., K.B. 676).

The cause of death was a fibroid tumour, the change of life had been going on for about four years, but nothing to indicate anything out of the normal apparently, according to the opinion of Dr. Verner, the medical man called by the appellant. The growth was not of very long duration, not "any more than five or six or seven months. It would be under, anyway, from my experience—under nine months."

The learned trial judge referring to Dr. Verner said:

"I do not think the doctor wants to hide anything, he is willing to tell anything."

I would refer to the following evidence of Dr. Verner:

"THE COURT: Doctor, does the fibroid condition of the uterus always follow change of life? No, but it comes on at that particular time a great deal.

"The fibroid condition sometimes comes on, but not always? Yes, not always, oh, no.

"Well, then, I cannot understand that, when you say here in December, 1926—was it in December—in March and April of 1925, you say she was then in good health? Yes.

"The pink of health, except a little touch of influenza? 'Flu, yes.

MCPHILLIPS, J.A.

"Did you at that time examine her uterus at all? There was no necessity for it. No, sir, I did not.

"I don't care about necessity, I want to know the fact, that is all? No, I did not.

"There was no need to? There was no need to.

"No complaint? No, she never did complain till—"

"All right, now? December, 1926."

The report of Dr. Ernest Hall, a surgeon of eminence, who performed the operation upon the wife of the respondent, which was put in evidence in part reads as follows:

"In your judgment how long prior to your examination was the disease contracted or begun? Probably six months.

"Was the disease acute? No.

"Recurrent? No.

"Chronic? Yes."

Then we have a question by the Court, put to Dr. Buller a witness for the appellant, that is extremely pertinent relative to this main contention of the appellant, that the fibroid tumour must have been present and known for a long time by the applicant for the insurance which displaces any possible contention adverse to the opinion of Dr. Verner and Dr. Hall:

"THE COURT: Doctor, do yon think it would be possible for a patient to have a fibroid condition of the uterus and not suffer inconvenience from it enough to justify them or induce them to go to a physician? Yes, my Lord, it is possible."

Dr. Hodgins also a medical man called by the appellant was asked the following question upon cross-examination:

"So a person may have a fibroid substance and never know it? Oh, yes."

"And may never give any trouble? It is more apt to, but it may not."

Then if it be open to the appellant to contend that there was a condition amounting to a warranty in the contract sued upon —and that question apparently went to the jury—the general verdict carries with it the holding upon the part of the jury that there were no false fraudulent or untrue statements, answers, or declarations in any respect made and contained in the application for membership upon the faith of which the membership certificate had been granted.

The appellant here travelled outside the general custom and usage in the taking of applications for life insurance. It is a matter of common knowledge, only now apparently in some small degree being departed from, to have a most complete medical examination and now having failed to take a reasonable and proper business precaution, seeks to deny its contract, MCPHILLIPS, J.A. attempting to bolster up its defence in fact maintain its defence, upon some inadvertent answers in the application. It was just such attempts to evade liability that provoked Parliament to intervene, and all contracts of insurance have in effect, and to the denial of all provisions therein to the contrary, the statutory provision set forth in section 83 of the Insurance Act. The situation in law is this: it is a question of fact and here that question was submitted to a jury—whether there was any misrepresentation or any failure to disclose on the part of the insured or the person whose life was insured in the application for the insurance or on a medical examination or otherwise, and if it be so found then even the contract shall not be rendered void or voidable unless the misrepresentation or failure to disclose was material to the contract. The general verdict from the jury is a finding of all the necessary facts to entitle the plaintiff (the respondent) in the action to recover, therefore it may be rightly assumed that the jury was of the opinion that no misrepresentation or failure to disclose occurred or even if

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of a contrary view that nevertheless the misrepresentation or failure to disclose was not material to the contract. This is the inscrutable—"A jury gives no reasons": The Lord Chancellor (Lord Loreburn) in *Lodge Holes Colliery Co., Lim.* v. *Wednesbury Corporation* (1908), 77 L.J., K.B. 847 at p. 849.

In my opinion the appeal fails and should be dismissed.

MACDONALD, J.A.: I am not satisfied with the verdict of the jury after reading the evidence, but I cannot say it was perverse. They were free to accept the evidence of Dr. Verner, and Dr. Hall, and if on their evidence the judgment can be sustained it must stand. We must assume the jury found that when the application for insurance was taken and the alleged untruthful statement made, the deceased either was not, or did not know that she was suffering from a diseased condition in the uterus. They probably concluded that this condition originated after the membership certificate was issued to her. We have therefore, a situation where a woman in general good health omitted to state that she was treated and prescribed for by a physician, once for a cold or a slight touch of influenza, and on another occasion when she was "a little bit run down," for which a tonic was given. This raises the question of materiality; also a question of fact. On that state of facts, after carefully considering the authorities, I am forced on the legal aspects of the case to the same conclusion as my brother MARTIN, whose judgment I have had the opportunity of reading.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellant: *Grant & McDougall.*
Solicitor for respondent: *W. D. Gillespie.*

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Immigration—Person of Chinese origin—Goes to China with leave to return to Canada—Returns and after inquiry, is given a certificate and allowed in—Retaken by controller and after further inquiry, held for deportation—Habeas corpus—Certiorari—Can. Stats. 1923, Cap. 38, Secs. 10, 17, 26 and 38.

A person of Chinese origin left Canada for China in 1925, with leave to return. On his return from China in 1927, he proved his identity to the controller of Chinese immigration who, after making all inquiries provided by The Chinese Immigration Act, gave him the certificate referred to in section 17 of said Act, and allowed him to enter Canada. Subsequently the controller professing to act under section 26 of said Act, retook the Chinaman, held a further inquiry, and concluding that he obtained entry into Canada by fraud, held him for deportation. An application by way of *habeas corpus* with *certiorari* in aid was dismissed.

Held, on appeal, reversing the decision of MORRISON, J. (MARTIN, J.A. dissenting), that section 26 of the Act refers only to persons who have not been before the controller at all but have come secretly into Canada, and section 17 provides that when it is sought to contest a certificate granted by the controller to a person allowed to enter Canada it shall take place before a judge of the Superior Court. When the controller has made his inquiry and come to a conclusion and given effect to it by actually landing the person who is the subject of the inquiry he has exhausted his jurisdiction. If afterwards it is discovered that a fraud has been committed the proper course is to contest his right to remain in Canada before a judge.

APPEAL by defendant from the order of MORRISON, J. of the 17th of June, 1927, directing that a writ of *habeas corpus* with *certiorari* in aid on behalf of Chin Sack be quashed. Chin Sack claims that he is 37 years old and first came to Canada in 1910, when he paid the prescribed tax and was allowed to enter. He returned to China in 1920, with leave to return to Canada, and came back in 1921. In 1925 he again went to China with leave to return to Canada. In 1927 he came back and after proving his identity the controller upon making all inquiries provided by The Chinese Immigration Act gave him the certificate referred to in section 17 and he was allowed to enter. Subsequently, purporting to proceed under section 26 of the Act, the controller retook Chin Sack, held a further inquiry and

Statement

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coming to the conclusion that Chin Sack obtained entry into Canada by fraud he held him and made an order for his deportation.

The appeal was argued at Vancouver on the 4th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

O'Halloran, for appellant: The question here is the construction and effect of section 17 of The Chinese Immigration Act. The controller purported to act under section 26 of the Act but that section only applies to persons who have not been admitted. In this case after the defendant's admission the only course was to apply to a judge under section 17. That the controller acted without jurisdiction see *In re Jeu Jang How* (1919), 27 B.C. 294 at p. 296.

Argument

Jackson, K.C., for the Crown: My submission is, first, that under section 38 of the said Act there is no jurisdiction to hear this appeal. Secondly, there is an appeal now pending before the minister of immigration and colonization that precludes this appeal. In this case *habeas corpus* and *certiorari* will not lie.

O'Halloran, replied.

Cur. adv. vult.

On the 17th of October, 1927, the judgment of the majority of the Court was delivered by

MACDONALD, C.J.A.: The appellant had been permitted by the controller to enter Canada in 1921 and was then given the certificate mentioned in section 17 of The Chinese Immigration Act, 1923, Cap. 38. In 1925 he registered out and complied with the provisions of the Act in that regard and, on his return from China in 1927 he proved his identity to the satisfaction of the controller who, after inspecting the registry and making all the inquiries provided by the Act, landed him in Canada and gave him a certificate which, after reciting the registration out and the other particulars necessary for his admission again into Canada, is as follows:

Judgment

"I have personally examined the person of Chinese origin who claims to be the person above described and whose photograph is affixed thereon, who returned to Canada on the Empress of Asia, day of May 29, 1927, and declare him to be the same person."

This was signed by the controller, handed to the appellant and he was landed and allowed to enter Canada. It is conceded that this certificate is the one mentioned in section 17 of the said Act as being *prima facie* evidence of his right to be in Canada.

The controller, however, afterwards retook him professing to act under section 26 of the said Act, held another inquiry and came to the conclusion that the appellant had obtained entry into Canada by fraud. He, therefore, held him for deportation. The fraud alleged was that another Chinaman had been permitted to enter Canada in 1910 and thereafter return to China and that the appellant impersonated him and thereby committed a fraud upon the Act. That is to say, his entry in 1921 was a fraud and because of that fraudulent entry he was enabled to register out apparently properly and to apply for a re-entry upon that registration.

The powers of the controller are defined by section 10 of the said Act. He may determine whether the applicant for admission to Canada shall be allowed to enter and remain in Canada or shall be rejected and deported. Said section 17 is as follows:

Judgment

"17. (1) The controller shall deliver to each Chinese immigrant who has been permitted to land in or enter Canada a certificate containing a description and photograph of such individual, the date of his arrival and the name of the port of his landing, and such certificate shall be *prima facie* evidence that the person presenting it has complied with the requirements of this Act; but such certificate may be contested by His Majesty or by any officer if there is any reason to doubt the validity or authenticity thereof; or of any statement therein contained; and such contestation shall be heard and determined in a summary manner by any judge of a superior Court of any Province of Canada where such certificate is produced.

"(2) The chief controller and such controllers as are by him authorized so to do shall each keep a register of all persons to whom certificates of entry have been granted."

All the provisions of the Act appear to have been complied with. True, it is alleged, that a fraud was committed but it is conceded that the different steps required by the Act to obtain admission into Canada were taken. It will be noticed that section 17 provides that when it is sought to contest the certificate granted by the controller to a person allowed to enter Canada that contestation shall take place before a judge of a superior Court. No one doubts the jurisdiction of the controller to decide the question as to whether the appellant was

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entitled to enter Canada but when he has made his inquiry and come to his conclusion and given effect to that conclusion by actually landing him, he has exhausted that jurisdiction and when it was afterwards discovered, as is alleged, that a fraud had been committed upon him, the course clearly laid down by the statute was that his right to be in Canada should be contested before a judge. Fraud does not nullify the entry; it enables a judge to set it aside. Section 26 is relied upon as authorizing what was done in this case. That section, I am satisfied, refers only to persons who have not been before the controller at all but have come secretly into Canada and to such persons as are mentioned in section 27.

Here the contention is that the controller may be both the prosecutor and the judge; that having pronounced the appellant entitled to enter Canada he could afterwards, without cancellation of the certificate, and without hearing before a judicial tribunal, ignore his certificate.

Judgment

This case is quite distinguishable from such case as the *Nat Bell Liquors* case (1922), 2 A.C. 128, and other cases of that nature. There the question was as to the jurisdiction of the Court to enter upon the inquiry not its jurisdiction to re-enter after having disposed of it. Moreover, the matter there was not controlled by such as section 17. It is not the right to enter that is now in question. It is the right to remain in Canada, a civil right which he may be deprived of on cancellation of his certificate by a judge. *Prima facie,* the appellant is rightly in Canada. That *prima facie* right arises from his admission into Canada. The certificate is merely *prima facie* evidence of that fact and, when it is desired to contest it, section 17 provides the method.

The appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: This appeal raises questions of much practical importance and wide application, in the working of The Chinese Immigration Act, 1923, Cap. 38, Can.

The appellant was ordered to be deported from Canada, as the affidavit of his solicitor sets out, by an order made on the 7th of June last by the controller of Chinese immigration at

Victoria as the result of proceedings instituted by that officer under section 26 of the said Act which also enacts that:

"Where any person is examined under this section the burden of proof of such person's right to be or remain in Canada shall rest upon him."

The suspected person, the present appellant, was duly brought before the said controller for examination and hearing on the 30th of May and 2nd and 7th of June last and the controller thus reports the result of the proceedings (in his return to the writ of *habeas corpus*) when the appellant appeared before him as a "Chinese person giving his name as Chin Sack, otherwise known as Gin Jin Way:

"I found that the said Chinese person fraudulently misrepresented himself to be one Chin Sack who had, on the 27th day of August, 1910, lawfully been admitted into Canada, and that the said Chinese person had entered and remained in Canada contrary to the provisions of the said Act, and I did, as such controller, order his deportation to the place of his birth and citizenship, and the said Chinese person is held by me for deportation accordingly."

It will thus be seen that the whole question before the controller was that of the identity of the present appellant—in other words was he the Chin Sack who was admittedly entitled to "be or remain in Canada," or was he an unidentified imposter who was fraudulently personating the real owner of a certificate (wrongly so-called as appears later) (Exhibit D) which had been validly issued to the real Chin Way under section 17 and which entitled him to remain in Canada, and which the appellant produced and "presented" and claimed to be entitled to the benefit thereof as being in fact Chin Way. The transcript of the proceedings before us shews that the investigation opened, properly, by the following statement of the controller to the suspect:

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"Chin Sack, you are now to be examined as to your right to remain in the Dominion of Canada. I understand the gentleman to your right, Mr. *O'Halloran*, has been retained as counsel for you to appear at this hearing? Yes."

Evidence on the question was then taken at considerable length and the identity of the suspect with the person described in the registration records and particulars of identification and photographs and signatures and certificates as Chin Sack, was fully gone into, the controller informing his counsel that the cause of arrest was:

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"That he is impersonating Chin Sack. . . . We claim that Chin Sack is not your client. Chin Sack arrived here on August 28th, 1910, paid his tax and was issued with [*sic*] a certificate, a C.I. 5 certificate, and outward registration was effected by whom of course we don't know, under the name of Chin Sack and secured a C.I. 9 key card 39016 that finally came into this man's hand in China and the necessary photographs were prepared in China, preceded him over here, and placed on this C.I. 35 and also on this C.I. 36, and on his arrival on the 28th of July, 1921, this man appeared as Chin Sack impersonating the Chin Sack who arrived here on the 28th August, 1910. These photographs, our contention is that these photographs were not produced in Canada. They are not Canadian productions. We claim that these photographs were produced in China."

His counsel, to meet the said "burden of proof . . . resting upon him" by said section 26, adduced evidence of identity and relied on said certificate (Exhibit D) produced and "presented" by his client and submitted that it could not be contested there but only before a judge under said section 17. At the conclusion of the proceedings the controller gave his decision against the suspect as follows:

"Chin Sack, you have satisfied me that you are a person of Chinese origin and descent. You have not, however, during your examinations proved to my satisfaction that you have ever been properly admitted into or that you are legally entitled now to remain in the Dominion of Canada. Therefore under the provisions of section 26 of The Chinese Immigration Act of 1923, it is encumbent upon me, subject to your right of appeal to the Honourable the Minister of Immigration and Colonization, to order your deportation to China, the place of your birth and citizenship. Is it your desire to appeal? Yes."

MARTIN, J.A.

The necessary notice of appeal to the minister, under section 12, was at once given and the appeal has since been heard and dismissed, as we were informed by counsel. Subsequently and upon the return to the writ of *habeas corpus* and *certiorari* coming on for hearing and consideration before Mr. Justice MORRISON on the 17th of June last that learned judge refused the application of appellant to be liberated and quashed the said writs, and this appeal is brought from his order to that effect.

The matter being of much importance, as I have said, I have given it corresponding consideration with the result that I am of opinion, with every respect to the contrary view of my learned brothers, that the learned judge below reached the proper conclusion in the matter, though no reasons were given therefor.

The subject must be approached bearing in mind the unusually stringent prohibition of section 38 of the same Act, *viz.*:

"No Court and no judge or officer thereof shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any controller relating to the *status*, condition, origin, descent, detention or deportation of any immigrant, passenger or other person upon any ground whatsoever, unless such person is a Canadian citizen, or has acquired Canadian domicil."

The present appellant not being one who "is a Canadian citizen or has acquired Canadian domicil" this Court is deprived by the clearest terms of any jurisdiction to interfere in any way, either on law or on fact, with the "decision or order of the minister or of any controller" unless it can be held that such order is one made entirely without jurisdiction, in which case it is "a thing of naught which cannot be disobeyed"; in other words a nullity, which would have to be ignored upon *habeas corpus—The Leonor* (1916), 3 P. Cas. 91; (1917), 3 W.W.R. 861. This is conceded, but it is submitted that the said certificate ousted the jurisdiction of the controller to hold the "investigation" that he admittedly did in fact hold under said section 36 into the right of the appellant to "enter or remain" in Canada. The alleged certificate was given under section 17 which provides that: [Already set out in the judgment of MACDONALD, C.J.A.].

MARTIN, J.A.

It is clear to my mind, with all due respect to other opinions, that this section does not and is not intended in any circumstances to give more than that *prima facie* evidentiary value to a certificate which it is in terms declared to have, but no more, and I am unable to apprehend why this value cannot be rebutted as in all other cases by calling evidence to answer the mere *prima facie* and not conclusive proof that the "presentation" of the certificate evidences till displaced according to the primary rules of evidence as set out in, *e.g.,* Taylor on Evidence, 11th Ed., Vol. I., pp. 75, 114; Powell on Evidence, 10th Ed., 333; and Phipson on Evidence, 6th Ed., 32. If the intention of the Legislature had been to make the certificate conclusive evidence and hence not open to attack it would have said so, as is always done in such cases which are not infrequent and many examples of which are given in Taylor, *supra,* at p. 76 *et seq.* No authority has been, nor I venture to say can be cited to support the view that *prima facie* evidence can ever be on the same plane

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as conclusive evidence and hence incapable of being even answered by the other party to the *lis*.

But it is said that the section goes on to provide a particular way in which "such certificate may be contested by His Majesty or by any officer if there is any reason to doubt the validity or authenticity thereof or of any statement therein contained," *viz.*, by a summary hearing before a superior Court judge, but while that is a very useful and expeditious proceeding in proper cases yet it has no application to this case because there is not "any reason to doubt the validity or authenticity" of the certificate in question "or of any statement therein contained"; on the contrary it is admitted by the very officer who issued it to be in all respects "valid and authentic," hence it would be not only worse than useless but impossible for him to have a "contestation" on his own proper acts before any judge, whose duty it would be to refuse to entertain the matter for lack of jurisdiction because the only complaint of the public "officer" herein is that his admittedly "valid and authentic" certificate was being put to fraudulent uses by an imposter who was personating the real grantee of the certificate and hence unlawfully "presenting" it to the controller in assertion of a sham right to remain in Canada.

MARTIN, J.A.

While such a summary application affords a valuable and speedy way of getting rid of invalid and spurious certificates, forged or otherwise, which could otherwise be "presented" as *prima facie* evidence to resist deportation proceedings, yet to give it the greatly expanded application that is claimed here simply and actually means that there is no way to prevent the misuse of *bona fide* certificates which are being diverted to *mala fide* uses, and all that a Chinese personator has to do is improperly to get possession of a valid certificate from another Chinaman to whom it has been lawfully issued and then by simply "presenting" it to the controller as his own when brought before him under said section 26 instantly oust the jurisdiction of the controller and bring all proceedings to an end, thereby frustrating the clear intention of Parliament in establishing a special tribunal to deal with cases of this sort which it is particularly well qualified to do from its special knowledge and dealings with that class of immigrant, and which it is most necessary for the

carrying out of the statute that it should have; and of all the many questions that it must inevitably consider that of identity and personation are the most difficult, for obvious reasons, in dealing with the physical characteristics and peculiarities of a foreign race. All the relevant sections of the Act negative, to my mind, any other conclusion and are inconsistent with the express declaration in said section 26 that the "burden of proof" in proceedings thereunder is specially imposed upon the suspected person, and I am unable, with all respect, to apprehend how that burden can be discharged by the mere fraudulent "presentation" of a valid certificate which was duly issued to another immigrant. The obvious dangers arising from continuous efforts to secure "admission by fraudulent misrepresentation" into Canada, and also the misuse of a "valid" as well as a "forged or fraudulent certificate, or of a certificate issued to any other person . . ." are recognized by sections 27 and 32 of the Act and severe penalties imposed therefor, and the present case shews the necessity for such provisions to safeguard the nation from gross imposition which can only be dealt with adequately by the said specially skilled tribunal that Parliament has exclusively set up for that express purpose.

MARTIN, J.A.

In coming to this conclusion I have not overlooked the submission that the controller became *functus* the moment he handed the immigrant the certificate but there is a short and complete answer to it, *viz.*, that the controller's original duty of permitting the immigrant to "enter or land in Canada" under the group of sections 10-16 is entirely distinct from his subsequent duty of deportation in a proper case, like the present, under section 26, and the distinction between the two duties and their exercise was recently declared and explained by this Court in *Rex* v. *Jungo Lee* (1926), 37 B.C. 318, and a further distinct duty and power of the controller to deport is conferred by section 27 (2): it is to my mind legally impossible to interweave these three distinct duties so as to deprive the controller of all three distinct jurisdictions because he has exercised one of them only. It is moreover to be observed that if the mere "presentation" of a certificate ousts the controller's jurisdiction to deport under section 26 it likewise ousts his additional and similar jurisdiction under 27 (2), for though it deals with a

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different subject-matter yet the certificate under section 17 applies as much to the one as to the other for "the same provisions" govern both.

It is further to be observed that it is an error to refer to the subsequent "written notices" given by out-going Chinese herein under the "registration out and re-entry" group of sections (23 to 25) as "certificates," for they are nothing of the kind and are not so styled by the statute: they are simply "notices" and nothing more, and their character is not changed by the notes of identification subsequently endorsed thereon by the controller: the only real certificate relevant to this case, is that which was issued under the "identification and registration" group of sections (17-18) and section 17 expressly declares that the certificate applicable to this case shall contain three things, "statements," only, *viz.*, (1) "a description and photograph of such individual" (*i.e.*, the entering "Chinese immigrant"), (2) "the date of his arrival," and (3) "the name of the port of his landing"; nothing beyond these three essential statements is authorized to be inserted or "contained" therein and they alone constitute the certificate which "shall be *prima facie* evidence" to the extent declared by the Act; any additional statements appended thereto by way of endorsement, notation or otherwise affecting identification or otherwise, are mere surplusage which have no evidentiary value given thereto. The sole "certificate" answering this description herein is that which was, it is admitted, issued to Chin Sack on his entry into Canada on the 28th of August, 1910, but it is not before us nor was it "presented" to the controller at the hearing. Its place, however, is substantially taken by Exhibit F issued on 26th September, 1921, and stated to be "given in exchange" for the original certificate but it is careful also to state that,—

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> "while it is not an admission that the party to whom it is issued was ever legally admitted into Canada, it may, unless cancelled upon presentation, be used when registering out under C.I. 9."

Later (on 8th April, 1924) there was a further certificate endorsed on the back of F, given under section 18, for a different purpose, that the person whose photograph appeared on the face of it had duly registered in accordance with the special objects of that section which requires "every person of Chinese

origin or descent in Canada irrespective of allegiance or citizenship" to register within twelve months at places to be designated by the Governor-General in Council, which special registration certificate has nothing to do with the question at Bar.

Exhibits D and G are merely out-going "notices" given under section 23, and not certificates at all nor do they purport to be and therefore they could not be "contested" before a judge under section 17, and it is difficult to understand how such a fundamental misapprehension of their true nature arose. The result of all this is that if the only real certificate in existence, *viz.*, said Exhibit F, were produced to such a judge he could take no action whatever in regard to it because every statement in it is admitted by all parties to be "valid and authentic" and therefore there could be no "contest" upon it for him to "hear and determine," and yet nevertheless it is sought to prevent the Crown from bringing evidence to displace its *prima facie* effect by proving that it is being wilfully used for a fraudulent purpose, which is also made a crime by said section 32.

It follows that, in my opinion, the controller adopted the proper course upon the hearing in receiving evidence to rebut the *prima facie* case that was made out by the only certificate before him, and the mere "presentation" of that certificate was neither a discharge of the burden of proof "resting" upon the suspect, nor an ouster of the controller's jurisdiction. MARTIN, J.A.

In coming to this conclusion I have of necessity been compelled to inspect the proceedings at said hearing not with the intention of "reviewing" them (which is prohibited by said section 38) but of disposing of the submission that the controller had no jurisdiction to entertain the matter, it being conceded, as already noted that if he had his decision upon any ground is not subject to our "review" or "interference."

But further, and assuming that the *prima facie* value placed upon the certificate by section 17 could not be displaced in the absence of a "contestation" provided thereby, I am also of opinion that the refusal of the controller to contest the said alleged certificate when invited by the accused's counsel to do so, and his decision, after objection, to proceed with the hearing and take evidence in rebuttal, cannot under section 38 be

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reviewed or interfered with by this Court because at most even if he wrongly in law received that evidence or wrongfully in fact acted on it nevertheless both those errors, assuming them to be such, occurred in a subject-matter over which he had jurisdiction. This indeed has already been, in principle, decided by this Court in *Re Munshi Singh* (1914), 20 B.C. 243, wherein we unanimously held that the corresponding section 23 of The Immigration Act, identical in present essentials with section 38, had that effect of barring curial appeals, the Chief Justice saying at p. 258:

"As, in my opinion, The Immigration Act is not unconstitutional, and the order in Council P.C. 897 is not *ultra vires*, and as the Board was legally seized of the subject of the inquiry, I think the Court cannot review a decision upon a question which the Board was authorized to decide. The appellant, if he have just cause of complaint, is not without redress, as an appeal to the Minister of the Interior is given by this Act."

Mr. Justice Irving at p. 263 expressed a similar view on section 23, and Mr. Justice GALLIHER at p. 278, as did Mr. Justice MCPHILLIPS at p. 281, thus:

"In my opinion, as already indicated, there has been a proper exercise of authority by the Board of Inquiry, and apart from that, it is further my opinion that the Court is absolutely without jurisdiction in the matter. Parliament has in no uncertain terms withdrawn all jurisdiction from the Courts. Parliament, in its wisdom, has given an appeal, but not to this Court, and the appellant is at liberty to prosecute an appeal should he be so advised."

MARTIN, J.A.

At p. 269, I said:

"In my opinion it stands by itself, and having regard to the subject-matter and the exceptional circumstances which often will necessarily surround cases arising out of it, I think Parliament intended that it should be taken to mean just what it says and be given full effect to, which can and ought to be done, as applied to the present case, by holding that once the Board has duly entered upon an inquiry over which it has been given jurisdiction by the statutes and its orders or regulations, there can be no interference 'upon any ground whatsoever' with its subsequent proceedings, or with the decision or order it decides to make, so long as said decision or order is one that the Board is empowered to make."

And on the similar burden of proof also present in that case, I said, pp. 269-70:

"This reversal of the usual course of a trial in effect means that he must meet what is equivalent to a *prima facie* case having been made out against him, because if he gives no evidence his application fails, and in attempting to do so he gave evidence which I need only say was of such an inadequate character, and fell so far short of what might reasonably have been expected in the circumstances, that I am not surprised it failed to convince

the Board of his veracity. This is one of the very things that the statute, I think, intends should not be reviewed, and it is for that reason that the hand of the Court is arrested and it is directed not to 'interfere with any proceedings' which the Board is engaged in. . . . ."

And at p. 271:

"This being the view I take of section 23, I therefore have no power to consider the objection of the applicant to the evidence, and I have only 'reviewed' as briefly as possible the 'proceedings' of the Board relating to the evidence before it in order to make my meaning clear. This is not one of those cases where an antecedent fact has to be found so as to confer jurisdiction to enter upon a hearing or inquiry; that is quite a distinct question."

Of course if there has been a "violation of the essentials of justice" in the conduct of the proceedings that would afford a ground for review but nothing of that sort is alleged here—*cf. In re Low Hong Hing* (1926), 37 B.C. 295, 302.

At most and at worst what the controller has done herein is that he gave the certificate not a conclusive but a *prima facie* value and admitted evidence to displace the latter, and how he could do otherwise in the face of the express declaration of the statute (section 17) that the hearing opened with the burden resting upon the suspect I fail, with all respect to apprehend. But assuming that he did err in his reception or valuation of evidence or in the effect he gave to it that is clearly a matter which does not affect his jurisdiction. This is exemplified in a striking way by the unanimous decision of the Full Court of Nova Scotia in *The Queen* v. *Stevens* (1898), 31 N.S.R. 124, wherein the Court refused to quash a conviction founded on evidence so illegal that Mr. Justice Townshend said, pp. 127-8:

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"It is a scandal on the administration of justice, as well as discreditable to the magistrate, that he should have proceeded to convict. . . . [But] however strongly such conduct on the part of the magistrate is to be, and ought to be condemned, the law has, wisely or unwisely, made the magistrate the sole judge of the evidence, and taken away from this Court the power of interfering with the exercise of his jurisdiction in that respect by way of *certiorari*."

And Meagher, J., said, p. 128, most appropriately to the case at Bar:

"The case may be decided upon the short ground that while the convicting justice erred, in acting upon the testimony of the informant, it was, at most, only a mistake in the course of the proceeding,—an erroneous ruling or conclusion, merely, which did not in any manner affect his jurisdiction to pronounce a judgment upon the matter before him."

This is a case of *certiorari* as well as of *habeas corpus* and in this respect the rule is the same—*In re Low Hong Hing, supra,* p. 302.

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Since then the matter has often come up in various aspects but in those which govern this case it is settled by the decision of the Privy Council in *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128 at pp. 151-2:

> "A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that his conviction is void, and may be disregarded as a nullity, or that the whole proceeding was *coram non judice*."

And at p. 155 it is said that in determining the question of jurisdiction "there can be no difference between civil orders and criminal convictions" except in the form of the record.

It follows from these principles that even if the controller herein made an "error, however grave" or "miscarried" (as the Privy Council said in *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417 at pp. 442-3) in taking or acting upon evidence his decision based thereupon cannot be reviewed at the instance of the suspect any more than it could have been at the instance of the Crown if the decision of the controller had been that evidence could not be adduced to rebut the *prima facie* effect of the certificate, *i.e.*, that it was in practice, conclusive in favour of the suspect.

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The result is that, in my opinion, the order of the learned judge below, refusing to review or interfere with the controller's proceedings, was properly made and hence the appeal should be dismissed. In coming to this conclusion it should be recalled that the appellant has already taken advantage of that special statutory appeal of the widest and most unfettered kind to the minister of immigration conferred by section 12 as aforesaid and has been unsuccessful, in which case it would be contrary to the established practice of this Court to grant *habeas corpus* except when there has been "a violation of the essentials of justice" or a lack of jurisdiction.

Appeal allowed, Martin, J.A. dissenting.

Solicitor for appellant: *C. H. O'Halloran.*
Solicitors for respondent: *Jackson & Baugh-Allen.*

STUART v. MOORE AND MOORE.

COURT OF APPEAL

1927

Oct. 4.

STUART v. MOORE

Negligence—Damages—Automobile swerves and overturns—Injury to passenger—Decision of judge on facts—Weight to be given to decision on appeal.

In an action for damages for negligence it is for the trial judge to decide upon the evidence whether there is any case to meet, and in order to reverse, a Court of Appeal must not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

APPEAL by plaintiff from the decision of MURPHY, J. of the 14th of December, 1926, non-suiting the plaintiff in an action for damages for negligence. On the evening of the 26th of June, 1926, the plaintiff and one Mrs. Henman were asked to go for a ride by the defendant Harry A. Moore, who was driving his wife's car, and the two women with Moore and one Arthur E. Parsons went for a drive at about 8.30 p.m. They went to Abbotsford and came back by the Yale road. The road generally is paved but at a certain point was not paved for about 150 yards. On reaching this part of the road Moore who was driving started lighting a cigarette. The plaintiff said they were going over 30 miles an hour at the time. Suddenly the car turned to the left, went across the road and on striking the curb turned over two or three times, wrecking the car. Parsons was killed and the other three were badly injured, the defendant even at present being without any memory of what has happened. The plaintiff's hospital and doctor bills since the accident are $968.70; she also claims $10,000 damages. The plaintiff was non-suited on the trial. Statement

The appeal was argued at Victoria on the 16th of June, 1927, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Arnold, for appellant: The road on which they were travelling is a paved road with the exception of 150 yards that is an ordinary gravel road and somewhat rougher. As they approached this spot they were going about 30 miles an hour. Moore took his hands off the wheel to light a cigarette with the result that the car suddenly swerved and, hitting the curb, turned over three times. There is no question that the accident was due to his gross negligence. *Res ipsa loquitur* applies: see *McClintock* v. *Winnipeg Electric Co.* (1927), 2 W.W.R. 226. Argument

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Coulter, for respondent, referred to *Byrne* v. *Boadle* (1863), 2 H. & C. 722 at p. 726; *Ferguson* v. *Canadian Pacific R.W. Co.* (1908), 12 O.W.R. 943 at p. 947; *Scott* v. *The London Dock Company* (1865), 34 L.J., Ex. 220 at p. 222.

Cur. adv. vult.

4th October, 1927.

MACDONALD, C.J.A.: The plaintiff sued for damages for injury sustained in an automobile crash. One of the men in the automobile, Parsons, was killed. The plaintiff and the defendant, H. A. Moore were severely injured but the fourth occupant of the car, Mrs. Henman, escaped with slight injuries. At a coroner's inquest on the body of Parsons the plaintiff made a sworn statement, and Mrs. Henman gave evidence. They both exonerated the defendant of any charge of negligence. There were no other eye-witnesses of the crash than these two women, the defendant H. A. Moore and the man who was instantly killed. In her said statement the plaintiff said:

"We were not going fast at the time of the accident. I have no idea what caused the accident."

Mrs. Henman said:

"Mr. Moore was a good driver, and we were not driving fast at the time of the accident."

MACDONALD, C.J.A.

The plaintiff alleges negligent driving on the part of defendant Henry A. Moore. The learned trial judge declined to believe the evidence of plaintiff and her witness at the trial so far as it conflicted with their evidence at the inquest. It was strongly pressed upon us that the evidence of the *locus in quo* was conclusive against the defendants on the doctrine of *res ipsa loquitur*. Now, the facts are that the four persons above mentioned had gone for a ride on the night in question, Parsons and Mrs. Henman being in the back seat at the time of the accident, and the plaintiff and the defendant in the front seat, the defendant driving. The evidence of persons who arrived on the scene shortly after the occurrence shews that the car had been running for a distance of about 160 feet with the wheels on one side, in or partly in the ditch on that side of the road; that the car appeared to have been brought sharply up upon and across the road, wrecking it. The condition of things indicated by those facts may have been brought about by several agencies; there was loose gravel upon the road; the driver may have been interfered with by one of the occupants, by the plaintiff herself. As

a result of his injuries the defendant has no recollection of the occurrence at all. Therefore it is apparent that the doctrine aforesaid has no application to the facts of this case. In view of this and also in view of the statement of the learned trial judge that he was satisfied that the whole facts with regard to this night drive were not disclosed by the parties concerned in it, but were kept back, I think it is clear that the judgment should not be interfered with.

The appeal is dismissed.

MACDONALD, C.J.A.

GALLIHER, J.A.: I do not feel that I should interfere with the judgment of the learned trial judge, and would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: It is impossible upon the evidence to disagree with the learned trial judge, Mr. Justice MURPHY. It cannot be successfully said that there was any case to meet. It was for the learned judge to decide upon the evidence adduced on the part of the plaintiff whether there was any case to meet. Unquestionably the onus was on the plaintiff to establish at least a *prima facie* case of negligence and one that, if the trial had been before a jury, the learned trial judge would have been disentitled to withdraw from the jury. That case has not been made out here. The learned trial judge saw and heard the witnesses and with respect to the crucial question—Was there or was there not a reasonable case indicating negligence which the defendant was called upon to meet? the learned trial judge has held that there was no such case. In truth, as pointed out by the learned trial judge, negligence is upon the evidence of the plaintiff clearly negatived. In such a case, how impossible it is—as I said at the outset—upon a rehearing, to take any different view, unless it is the fact that there is evidence that the learned trial judge overlooked evidence that would entitle this Court to say that the learned judge was wholly wrong in dismissing the action (see *Lodge Holes Colliery Co., Lim.* v. *Wednesbury Corporation* (1908), 77 L.J., K.B. 847 at p. 849; *Colonial Securities* v. *Massey* (1895), 65 L.J., Q.B. 100 at p. 101; *The "Julia"* (1860), 14 Moore, P.C. 210, 235, Lord Kingsdown:

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"We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong."

I fail to find any such evidence and I cannot disagree with the learned trial judge. I would dismiss the appeal.

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MACDONALD, J.A.: I would not interfere with the decision of the learned trial judge. I do not go so far as to say that no evidence of negligence was presented at the trial. The evidence as to speed and the inferences to be drawn from the course taken by the damaged car and possibly the incident of the defendant lighting a cigarette, thus withdrawing one hand from the wheel, might denote negligence. The trial judge, however, saw the witnesses, heard all the facts, noted the relationship of the parties and came to the conclusion that the true version of what occurred was not placed before him. He had good grounds for his opinion. At a coroner's inquest the plaintiff gave evidence exonerating the defendant, perhaps for an obvious purpose, while at the trial she testified that he was driving too fast. This volte-face made her evidence of little value and justified its rejection by the learned trial judge.

It was submitted, however, apart from this incident, that the inferences to be drawn from the accident itself and the course taken by the car conclusively shewed negligence. I think the learned trial judge, while not distinctly saying so, must be taken to have canvassed this situation. He says, the true facts were withheld and the true facts might be consistent with absence of negligence on the defendant's part. He doubtless believed that this was a joy-ride by a party of four who had, apart from the driver, been drinking to some extent at all events, and if the truth were known perhaps to a greater extent than admitted. The plaintiff was in the front seat with the driver. She may have been the author of her own injuries by grasping the wheel or by boisterous conduct. No one can tell. But the situation justified the learned trial judge in finding, as I think, substantially he did find, that in the absence of direct evidence of a credible nature he would not infer that the accident occurred through the negligence of the defendant. If, as stated, the defendant did not have anything to drink, and the others had, and the road was open and straight and easily driven, it is one of several assumptions that the accident may have been caused by the interference of the plaintiff with the driver.

I would not, therefore, say that the learned trial judge was clearly wrong, on the facts, nor do I think he erred in law.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *F. C. Aubrey.*

Solicitor for respondents: *H. S. Coulter.*

GALT v. FRANK WATERHOUSE & CO. OF CANADA LIMITED.

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1927

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GALT v. FRANK WATERHOUSE & Co. OF CANADA LTD.

Contract—Shipment of goods—Agency—Evidence of—Freight charges.

The defendants contracted with three Japanese shippers to carry certain goods from Vancouver and connect with a steamer in Seattle. Not having a steamer available at the time the defendant wrote a letter to the plaintiff Company confirming a telephone conversation as follows: "Kindly have your S.S. 'Salvor' load the following shipments of salt herring and salt salmon, to connect with the S.S. 'Shidzuoko Maru,' Pier 41, Seattle [shipments set out in detail]. Please arrange to handle this cargo as quickly as possible, as the fish is required in Seattle at the earliest possible moment. Kindly forward us freight bills covering this cargo," etc. The plaintiff carried the goods to Seattle but was too late to connect with the S.S. "Shidzuoko Maru" and the goods were brought back to Vancouver where they were shipped on another steamer. The plaintiff first attempted to collect the freight charges from the Japanese shippers who refused to pay and then brought action against the defendants and recovered judgment.

Held, on appeal, affirming the decision of McDONALD, J., that as there is absence of satisfactory evidence that the Japanese shippers authorized the defendants to act as their agents to make the contract with the plaintiff or that they adopted the contract the defendants must be held liable.

APPEAL by defendants from the decision of McDONALD, J. of the 2nd of November, 1926, in an action to recover freight charges due under a contract between the parties of the 10th of November, 1925. The facts are that the defendants had an order from three Japanese shippers in Vancouver, namely, R. Tabata, T. Matsuyama and S. Tanaka & Co. for shipments of herring and salmon to connect with the S.S. "Shidzuoko Maru" at Seattle. The defendants, not having a ship of their own ready to take the shipment, wrote the plaintiff confirming a telephone conversation instructing him to ship the fish which were on a scow at McKeen's wharf next the Balfour Guthrie Dock to Seattle to connect with said ship "Shidzuoko Maru." He was instructed to ship as soon as possible in order to connect, and to forward freight bills. The plaintiff failed to get the goods to Seattle in time and had to bring them back to

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Vancouver and have them shipped on another vessel. The bills were made out to the Japanese shippers but they refused to pay as they received no benefit from the shipment to Seattle. The plaintiff then sued the defendants on the strength of the first instructions he received from them. The defendants claim they always denied any liability for the freight charges as the plaintiff well knew. The plaintiff recovered judgment.

The appeal was argued at Victoria on the 21st and 22nd of June, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Hossie, for appellants: The freight was $889. There was no contract to which we were a party to retain the Galt Company and pay the freight. When the arrangement was made it was understood by the Galt Company that we were not to be liable. Secondly, he tried to collect the freight from the Japanese shippers before attempting to hold us responsible. Thirdly, he gave up the goods without consulting us and his lien was gone.

Beck, K.C., for respondent: The contract was made with the defendant: see *Holding* v. *Elliott* (1860), 8 W.R. 192; *Christy* v. *Row* (1808), 1 Taunt. 300; *White* v. *Parkin* (1810), 12 East 578.

Cur. adv. vult.

4th October, 1927.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I entirely agree with the learned trial judge. His reasons are given additional support by the absence of satisfactory evidence that the shippers authorized the appellants to act as their agents to make the contract with the respondent, or that they adopted the contract. The respondent saw the Japanese shipper Matsuyama, who said to him:

"I don't want to talk to you; that business is in connection with Waterhouse & Company."

He also saw Tabata, who said:

"It was Waterhouse & Company's contract."

This also is the conclusion to which the learned trial judge came.

The apparent inconsistency with this brought about by the respondent gratuitously, at the request of the appellants' endeavours to collect his freight charges from the shippers, is, I think, satisfactorily explained. The like is true with respect

to his letter to the Empire Shipping Company in an endeavour to stop the shipment of the goods to the Orient until these freight charges had been paid. The respondent was good-natured enough to endeavour to help the appellants instead of pursuing the wiser though less generous course, of minding his own affairs.

The respondent has cross-appealed, claiming that he should as well have the cost of bringing the cargo back to Vancouver. The correspondence shews that this was not claimed in the beginning; that he apparently did not construe appellants' request to bring back the cargo as creating a right to payment therefor. The claim was only put forward at the end because appellants would not pay for the carriage of the consignment to Seattle. Mr. *Beck,* in his letter notifying the appellants that suit would be brought unless the original sum demanded were paid, frankly stated so.

The appeal and the cross-appeal should be dismissed.

MACDONALD, C.J.A.

MARTIN, J.A.: After a careful perusal of the evidence I am unable to say that the learned judge below took a clearly wrong view of the sharp conflict in testimony that arises between Galt and his son on the one part and the defendants' witnesses on the other, in matters vitally affecting their credibility and the questions of fact dependent thereupon, and so we would not be justified, in my opinion, in disturbing the judgment; from which it follows that the appeal and cross-appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: I have experienced some difficulty in coming to a conclusion in this case, and have read, and reread the evidence and exhibits. There are certain phases of the case which would seem to give support to the appellants' contention, *e.g.,* the rendering of the accounts in the names of the Japanese, the delay in bringing action and the attempts in the meantime to make collection from the Japanese, and the letter of November 17th, 1925, from Galt to the Empire Shipping Company, asking it to hold the bills of lading for local freight charges, setting them out. On the other hand, there is on the defendants' part certain acts such as keeping track of the progress of the

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Salvor, directing her movements in bringing back the fish when she arrived too late, and other little incidents before the dispute arose as to freight charges hardly in keeping with absence of responsibility. The real question is—and it is not easy to decide in the face of the conflicting evidence—Was the order of dealings changed in respect of the shipment sued on herein from what pertained in all former transactions between the parties in matters of a like nature?

The question of commission came up and was discussed when they were negotiating with regard to the Salvor, and Galloway also refers to what he received as commission on former transactions, the same in each case, 5 per cent. I do not think "commission" is the proper term to use; that would imply agency and that could not have applied in the former transactions, nor do I think we can differentiate the present transaction in that respect. On the whole without going into details, I do not feel that I can say the learned trial judge was clearly in error.

As to the cross-appeal, the return charges were never claimed for until the matter came into the hands of the plaintiff's solicitor, and in saying this I cast no reflections whatsoever, but mention it as an incident only, nor is the evidence as to same satisfactory enough to cause me to interfere with the finding below.

I would dismiss both the appeal and cross-appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion this appeal cannot succeed. I am in complete agreement with the learned trial judge in the conclusion he arrived at.

It is plain that the contract was contained in the letter from the defendants (appellants) to the plaintiff (respondent) under date November 10th, 1925, which reads as follows: [already sufficiently set out in head-note].

This letter is clear and precise in its terms and unquestionably is the contract of the defendants. It is a contract as principal and it is impossible to contend otherwise. Mr. *Hossie* the learned counsel for the defendants in his very able argument, endeavoured to shew that the defendants were the agents only for the Japanese shippers and that no privity of contract existed between the defendants and the plaintiff shippers for the freight

charges. In short that upon the whole of the evidence the plaintiff failed to establish the onus of proof essential to the right of recovery. I cannot agree to the submission made on behalf of the appellants. I do not propose to discuss the evidence in detail. The case is one peculiarly fitting for its final disposition by the learned trial judge who had the advantage of seeing and hearing the witnesses, and I cannot say that it has been established in any way that the learned trial judge went wrong in law or fact. Where there is variance of testimony it is at all times difficult to take on a rehearing a different view to that found by the learned trial judge, as the question of credibility becomes a most important factor.

This case commences with the establishment of the contract by documentary evidence (and all later documentary evidence in all respects is confirmatory of the contract) as contained in the above-quoted letter, and the contract was in the end fully completed in accordance with the instructions of the defendants. It is true the freight although taken to Seattle was not delivered there, the defendants instructing that it be taken back to Vancouver, and there was some contention that it had arrived too late. No question really arises though in respect to any delay and if there was in fact any delay, it was upon the evidence waived. The freight was taken back to Vancouver upon express instructions from the defendants and there delivered in accordance with those instructions, and in passing, let me say that it is clear that there was to be no charge for returning the freight to Vancouver the plaintiff agreeing to forego any such claim and it is impossible now to press any such claim or recover therefor. The evidence dealing with this point is as follows: John Galt then being under re-direct examination, said:

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"What is the rate there? The rate is $2.25.

"From where to where? From Cowichan to Seattle.

"That is not what it says? From Cowichan to Seattle and then to Vancouver.

"That would be $4.50? Yes, but I was not going to charge them the extra rate at the time.

"Did you consider that question? I did, yes. I would not put them to that expense. I was foregoing that expense to them.

"All right, that is all."

Here we have the case tried without the intervention of a

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jury and in this connection I would refer to what Lord Loreburn, L.C. said in *Lodge Holes Colliery Company, Limited* 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."

Then we have that very recent pronouncement by Lord Sumner in the House of Lords, relative to disturbing the judgment of the trial judge in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37. At pp. 47-8 Lord Sumner quoted Lord Kingsdown in *The Julia* (1860), 14 Moore, P.C. 210 at p. 235 where he said:

> "We must in order to reverse not merely entertain doubts whether the decision below is right, but be convinced it is wrong."

I would dismiss the appeal and as well, dismiss the cross-appeal.

MACDONALD, J.A.

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

Appeal and cross-appeal dismissed.

Solicitors for appellants: *E. P. Davis & Co.*
Solicitor for respondent: *A. E. Beck.*

REX v. SANKEY.

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Oct. 5.

REX v. SANKEY

Criminal law—Conviction for murder—New trial ordered on appeal—Application for change of venue dismissed—Appeal—Jurisdiction.

The accused was convicted at Prince Rupert on a charge of murder. The Supreme Court of Canada, on appeal, set aside the conviction and ordered a new trial. An application was then made by the accused to change the venue and was dismissed. An appeal from the order was dismissed for want of jurisdiction as no appeal has been provided for by the Dominion statute nor by the law of England applicable to this Province.

APPEAL by accused from the order of MORRISON, J. of the 3rd of August, 1927, refusing an application for a change of venue under section 884 of the Criminal Code.

The accused was tried for murder at Prince Rupert, convicted, and sentenced to be hanged on the 24th of November, 1926. The Court of Appeal sustained the conviction (see 38 B.C. 361), but on appeal to the Supreme Court of Canada a new trial was ordered. The grounds for the application were that Prince Rupert being a small place and close to the scene of the alleged murder, the case has been discussed thoroughly by substantially the whole population who have formed their opinion as to the guilt or innocence of accused, and it would be impossible in the circumstances that a fair trial could be had there.

Statement

The appeal was argued at Vancouver on the 5th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

A. H. MacNeill, K.C., for appellant: In the judgment of the Supreme Court of Canada ordering a new trial (see (1927), S.C.R. 426 at p. 441) there is a suggestion as to accused applying for a change of venue that was not brought to the attention of the Court below.

Argument

Johnson, K.C., for the Crown, on preliminary objection as to jurisdiction to hear appeal: Under sections 1012 and 1013 of the Criminal Code there is only the right of appeal by a

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convicted man and by the Attorney-General. In this case there is only a true bill brought in against him by the Grand Jury. He is not convicted.

Argument

MacNeill, contra: Sections 1012 and 1013 only apply after conviction. This is an application under section 884 of the Code and under section 11 the criminal law of England as it existed on the 19th of November, 1858, unless altered, is in force here. Section 884 applies to all the Provinces but does not take away the *residuum* of power held by this Province. There was no change in the law of England so there is the right of appeal. That this is a case that justifies change of venue see *Rex* v. *Holden* (1833), 5 B. & Ad. 347; 2 N. & M. 167; *Rex* v. *Spintlum* (1913), 18 B.C. 606; *Rex* v. *Mulvihill* (1914), 19 B.C. 197.

Johnson, in reply, referred to *Rex* v. *Crane* (1921), 15 Cr. App. R. 183.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: It is conceded that the appeal is novel in this Province. The accused was convicted and upon appeal to this Court his conviction was sustained. The case then went to the Supreme Court of Canada when that Court set aside the conviction and ordered a new trial. Thereupon the accused applied to the Supreme Court of this Province for a change of venue and that application was dismissed. Now it comes to this Court by way of appeal from that order.

Judgment

It is conceded by Mr. *MacNeill* that no appeal in such a case as this is given by Dominion statute. That leaves only Mr. *MacNeill's* contention that because in 1858 the criminal law of England was introduced into the Province and because, as he suggests, there was in England prior to that time a right of appeal, as he puts it, by way of rule *nisi* returnable before the Court of Queen's Bench that that right is similar to a right of appeal and is applicable here to this case. Assuming that practice was suitable to local conditions here, what would be the procedure? A rule *nisi* could be applied for, returnable before the Court of Queen's Bench or a Court inheriting the

jurisdiction of the old Court of Queen's Bench, but there is no such practice in this Province. It is inapplicable to our conditions and has never been adopted here, at all events in the sense which it is suggested that it ought to be adopted in this case, but be this as it may there is no procedure in this Province by which the Supreme Court may make a rule returnable before this Court.

It is not necessary to refer to any other redress which the appellant may have by application to the Supreme Court *in banc*. All that we decide and all we are called upon to decide is that no appeal has been provided for by Dominion statute and no appeal is given by the law of England applicable to this Province.

Judgment

The objection to the jurisdiction to hear this appeal should therefore be sustained and the appeal quashed.

Appeal quashed.

PAINTER AND PAINTER v. McCABE.

Infant—Petition for adoption—Trial—Evidence—Presence of stenographer to report evidence in shorthand refused—Appeal—R.S.B.C. 1924, Cap. 51, Secs. 66 and 67; Cap. 6, Sec. 5 (2); Cap. 112, Sec. 93.

Upon the hearing of a petition for the adoption of a child under the provisions of the Adoption Act an application for the presence of an official stenographer to report the proceedings in shorthand was refused.

Held, on appeal, that as it is impossible to dispose of the appeal on the evidence before the Court, the case should be sent back to a judge of the Supreme Court to hear the whole matter in accordance with the practice and procedure of the Court.

APPEAL by the parent from the order of MORRISON, J. of the 21st of July, 1927, granting the petition of Alexander Henry Painter and Lily Painter for the adoption of Edward Michael McCabe, an infant. The infant was born in Victoria on the 10th of July, 1923, the son of Edward M. McCabe and Ethel McCabe. Ethel McCabe died on March 2nd, 1927, she being

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the sister of the petitioner, A. H. Painter. The petitioner and petitioner's father (maternal grandfather of the child) swore that the child's father (Edward M. McCabe) was most improvident and was in the habit of using liquor to excess and had never, from the time of his marriage, made sufficient provision for the maintenance of his wife and children, and it had been necessary for members of the said wife's family to make very substantial contributions from time to time in order that his wife and children might live. The father of the child had been convicted of doing wilful damage to property for which he was fined and the paternal grandfather (with whom the father intended to leave his children) had been on three occasions convicted of bootlegging. Counsel for the child's father was refused the attendance of a stenographer to take the evidence on the proceedings before the trial judge.

The appeal was argued at Vancouver on the 4th and 5th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

F. C. Elliott, for appellant: The affidavit of Mr. Justin Gilbert, the official stenographer at Victoria, shews that the learned judge below refused to let him take the evidence on the hearing of this petition. We submit we are entitled to the presence of a stenographer under section 67 of the Supreme Court Act. The consent of the father was dispensed with but it is submitted on the material before the Court there was no justification for making the order. Further, the order was not justified in face of section 93 of the Infants Act as the father is a Roman Catholic and the mother's parents are Protestants.

Beckwith, for respondent, referred to *Warmington* v. *Palmer* (1901), 8 B.C. 344; (1902), 32 S.C.R. 126.

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MACDONALD, C.J.A. (oral): There has been a mistrial. I attach no blame to the learned judge for that. No doubt there was a mistake of practice, but when it comes before this Court with the explanation of what took place made by Mr. *Elliott,* it is impossible to dispose of this matter on the evidence now before the Court. Therefore, it will have to go to a judge of the Supreme Court, to hear the whole matter in accordance with the practice and procedure of the Court.

MARTIN, J.A.: This being a case of wide and special public interest affecting the rights of parents in their infant children, and being the first to come before us under the "Act Respecting the Adoption of Children," I think it desirable (as I did in the kindred case of *Re Befolchi* (1919), 27 B.C. 460) to reduce to writing the reasons which induced me to agree with my learned brothers in allowing this appeal and ordering a new trial in circumstances of a most unusual kind.

The appeal is one from an order made, on 21st July, 1927, by Mr. Justice MORRISON, on a petition to the Supreme Court, under section 4 of the said Act (Cap. 6, R.S.B.C. 1924) whereby the infant son, aged four years, of the appellant, Edward McCabe of Victoria, was taken from his father's custody and control and given for adoption into that of the petitioners, Alexander Painter and Lily Painter, his wife, of Victoria, who are the brother-in-law and sister-in-law of the said father, the present appellant; the male petitioner, Alexander Painter, is the brother of the appellant's deceased wife, Ethel McCabe, who died on 2nd March of this year, leaving three children, *viz.*, the said infant son, Edward Michael, and two daughters, Evelyn aged six and a half years, and Margaret, aged two and a half years. These two infant daughters were by another order of the same learned judge taken from their father and given into the custody and control of Benjamin Sheppard and Winnifred, his wife, residents of Vancouver, the latter being the second cousin of the appellant's deceased wife. It is to be noted that by said orders the appellant's children are not merely separated and given into the care and custody of the respective petitioners (respondents) during infancy but handed over absolutely for adoption under section 7 of said Act, and their names are changed from those of their real parents to those of Painter and Sheppard, their adopted parents respectively, as in said order directed. These features of the case are important not only from the present surviving parent's point of view, but that of every parent in the land, and they distinguish orders of this absolute description, made in pursuance of recent wide powers conferred upon the Court, from orders made under the former lesser powers that it has long exercised in Chancery

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in delegation of the Crown which is the guardian of all infants *as parens patriæ*: *cf. Befolchi's* case, *supra.*

Even in the former exercise of its limited powers, however, the Court has always (because of the very delicate nature of the jurisdiction and the most acute and deep feelings that its exercise inevitably arouses in primal instincts) been careful to proceed with special caution when petitioned to sever the "strong and powerful tie" of paternity that, as Eversley on Domestic Relations, 4th Ed., p. 487 happily puts it,—

"is necessary for the cohesion of States as well as of families."

The principle adopted by the Court of Chancery for its guidance is thus stated by Lord Esher, M.R., in the leading case of *The Queen* v. *Gyngall* (1893), 2 Q.B. 232, 241:

"How is that jurisdiction to be exercised? The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child."

And he goes on to say that (p. 242):

"The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right. . . . It must act judicially in the exercise of its power."

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And the learned Master of the Rolls thus adopts the view of Lord Justice Lindley in *In re McGrath* (1893), 1 Ch. 143:

"'The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course shall be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word "welfare" must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.'"

And he adds:

"The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child. *Prima facie* it would not be for the welfare of a child to be taken away from its natural parent and given over to other people who have not that natural relation to it. Every wise man would say that, generally speaking, the best place for a child is with its parent. . . . ."

The other Lords Justices agreed with these views. Lord Justice Kay, after saying that the matter was one "of very great importance" adds (p. 251):

"A very strong case would have to be made out to deprive the parent of the custody of a child which had up to that time been in the custody of the parent."

Finally in *Smart* v. *Smart* (1892), A.C. 425 in an appeal from Ontario in a case of this nature, the Privy Council said (p. 427):

"Their Lordships approach it with a strong sense of the delicacy of the jurisdiction."

Obviously it must follow that as the power of the Court is increased and is accompanied by wider and graver consequences, there should also be a corresponding increase of caution to safeguard parents from any injustice in the exercise of the plenary powers that Parliament has recently conferred upon the Supreme Court of this Province for the furtherance of the public interest, if exercised according to law.

It is gratifying to be able to say, after a consideration of a number of decisions in this Province, that these wise rules of guidance have hitherto been observed in cases of this nature and this Court has more than once laid it down in reviewing and, almost invariably upholding, the orders made by the learned judges of the Court below, that their discretion will not be overruled if there are "proper materials" before them for its due exercise.

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A striking illustration of the caution hitherto displayed by the Court below is to be found in *Re Pilkington* (1910), 15 B.C. 456 wherein Mr. Justice MURPHY refused to interfere with the custody of an infant by its foster-father because the order of a magistrate (under the Children's Protection Act) upon which his interference was invoked, was based upon a violation of natural justice in that the foster-father had not received notice of the application to the magistrate, the learned judge properly remarking thereupon (p. 458):

"It is an elementary principle of natural justice that on any inquiry all persons whose rights may be affected by the decision should be heard."

The cases he cites in support of his view are really all based upon the historic and oft-cited declaration of the King's Bench made, over two centuries ago, in the case of the Rev. Dr. Bentley (*The King* v. *The Chancellor, &c., of Cambridge*) (1722), 1 Str. 557 at p. 567, *viz.*:

"The laws of God and man both give the party an opportunity to make his defence, if he has any."

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And the King's Bench did not hesitate to enforce this elementary principle of justice against so great a personage as the Archbishop of Canterbury by granting a *mandamus* to him because he refused to give a curate an opportunity to defend himself from charges preferred against him—*Reg.* v. *Archbishop of Canterbury* (1859), 1 El. & El. 545. The Court of Common Pleas likewise enforced it in *Re Brook and Delcomyn* (1864), 16 C.B. (N.S.) 403, in circumstances correctly set out in the head-note, *viz.*:

"Although mercantile arbitrators are not bound by the strict rules of evidence, yet they cannot be permitted to transgress that fundamental principle of justice which declares that no man shall be condemned, either civilly or criminally, without being afforded an opportunity of hearing the evidence adduced against him, and offering his defence."

In his judgment, Mr. Justice Byles said, very appropriately to this case, at p. 418:

"That which is complained of here is by no means a mere infringement of a technical rule of law: it is a violation of that universal principle of justice which prohibits any tribunal from deciding against a party without giving him an opportunity of hearing what is alleged against him."

And he cites Lord Langdale's statement that "the first principles of justice must be equally applied in every case."

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In the present case the hearing of the petition was held under sections 2, 4 and 6 of the said Adoption Act as follows:

"2. In this Act 'Court' means the Supreme Court, and the powers conferred by this Act on the Court may be exercised by a Judge thereof in Chambers or by a Local Judge of the Supreme Court."

"4. Application for leave to adopt a minor shall be made by petition to the Court, and the practice and procedure thereon shall be governed by the Rules of Court."

"6. On the hearing of the petition, if the Court is satisfied of the ability of the petitioner to bring up, maintain, and educate the minor properly, and of the propriety of the adoption, having regard to the welfare of the minor and the interest of the natural parents, if living, the Court may make an order for the adoption of the minor by the petitioner."

The appellant complains that upon the hearing the aforesaid elementary principles of justice were disregarded by the learned judge appealed from in two vital respects, in addition to other matters of complaint, as follows, *viz.*:

(1) That the learned judge refused to allow him to call and examine his own witnesses to answer the serious personal charges made against him of "unfitness" (because of "using liquor to excess" and improvidence and neglect) on which the

judge was asked to deprive him of his children; and that the appellant was also denied the right of cross-examining the witnesses who appeared against him.

(2) That the learned judge prevented the appellant from having the judge's rulings and the evidence taken and recorded according to the statute in that behalf because he, without any justification, ordered the official stenographer out of Court after he had been duly required to report the proceedings and thereby deprived the appellant of his right to have his appeal properly brought before this Court as the statute and rules direct and provide.

In support of these grounds affidavits were filed by the appellant, and by his counsel, Mr. *F. C. Elliott,* who, pursuant to our practice, made a statement from his place at the Bar as to what occurred at the hearing at which he also was counsel and hence could speak of his own knowledge. It appears that in view of the gravity of the matter and in contemplation of an appeal he had, in furtherance of his duty under the established practice of this Court (as declared, *e.g.,* in *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629 and *Dockendorf* v. *Johnston* (1924), 34 B.C. 97) taken the precaution to require the attendance of the official stenographer at Victoria, Mr. Justin Gilbert, whose duties are thus defined by the Supreme Court Act, Sec. 67:

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"67. All official stenographers, and their deputies for the time being, and all persons appointed stenographers to the Court shall be required to accurately report in shorthand evidence given on examinations for discovery, *de bene esse*, and on any trial or hearing, and all utterances made by counsel and the presiding Judge during the trial or hearing, save and except the arguments or addresses of counsel to the Judge or jury, and upon request by the presiding Judge or by any counsel appearing for any party it shall be the duty of such stenographers to report the arguments or addresses of counsel to the Judge or jury at the trial or hearing."

And section 71 declares that

"In case of an appeal, rehearing, motion for new trial, or of any proceedings in review of any matter which has been reported by an official stenographer, his deputy or deputies, regard shall be had to his or their notes, duly certified as provided by this Act, and the same, for the purposes of the appeal, rehearing, motion, or proceedings in review, shall be deemed to be an accurate record of the proceedings purported to have been reported."

The following affidavit of Mr. Gilbert shews what happened

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when he took his proper place as an officer of the Court (*Pender* v. *War Eagle*: *Ex parte Jones* (1899), 6 B.C. 427—Supreme Court Act, Sec. 66) to discharge his statutory duty as above defined:

"1. I am the Official Stenographer at the Court House, at the City of Victoria, to the Supreme Court of British Columbia.

"2. On Thursday, the 7th day of July, 1927, I was requested by Mr. *F. C. Elliott*, counsel for the above-named (parent) appellant, Edward M. McCabe, to attend on the hearing of the petition herein and report in shorthand the evidence adduced on such hearing, and in compliance with such request, took my accustomed place prior to the commencement of the hearing of said petition. At the time the hearing commenced the learned judge presiding asked me what I was doing there. I replied that I had been requested by Mr. *Elliott* to report the evidence given on the hearing of the petition, and the learned judge thereupon said, 'You have no business to be here without my permission.' Mr. *Elliott* thereupon asked the learned judge for permission to have the verbal evidence reported in shorthand by me, but such permission was refused, the learned judge saying that he did not wish to introduce the practice of having these matters reported; and I was ordered by said judge to desist from reporting the proceedings, and thereupon left the Court room."

It is due to this officer of the Court to say that he is the senior official stenographer and has, to my judicial knowledge of nearly thirty years, justly earned the highest reputation in the exceptionally able discharge of his official duties, hence no objection could be made to his presence on the ground of inefficiency.

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The hearing proceeded in the absence of the stenographer and during it the appellant's counsel assures us that he was prevented by the learned judge from calling witnesses that he had in attendance to answer the formal charges against the appellant of "unfitness" to keep his children because of wilful neglect and of improvidence in, *e.g.*, quitting his employment on the Canadian Government Ship "Estevan" and in buying a motor-car beyond his means, and also that he was prevented from cross-examining the petitioners' witnesses for the same purpose though such evidence was unquestionably of much weight and importance in deciding what judgment should be pronounced upon the said petition.

Furthermore, it must by no means be overlooked that the appellant's counsel also informs us that during the hearing he tendered evidence to prove that the father was of the Roman Catholic religion and wished to bring his children up in that faith, but the petitioners were of the Protestant religion and the

learned judge said that he would take it for granted that the father was a Roman Catholic and the petitioners Protestants but that such facts had no bearing on the case. It is to be noted that the said statements and complaints made to us by counsel were fortified by his affidavit filed and though that was not strictly necessary (*supra*) yet it was a wise precaution to take having regard to the exceptional circumstances and gravity of the matter.

On the 21st of July judgment was delivered as aforesaid against the father, and four days thereafter notice of appeal to this Court was given and, on the 13th of September, the appellants' counsel, in compliance with Appeal Rule 16, applied to the learned judge for a copy of his notes for the use of this Court but was informed by the said judge that he had not taken any notes of the evidence or of rulings made by him at the said hearing.

The appellant complains that the result of the exclusion of the Court stenographer and the omission of the learned judge to take any note of the proceedings deprives him of his undoubted right to present his appeal in proper form to this the appointed tribunal for that purpose, and that the intention of the Legislature to safeguard litigants from non-judicial acts by appointing official stenographers to report the proceedings as aforesaid has been wholly frustrated by the action of the learned judge, and that such action is of itself a miscarriage of justice which can only be remedied by a properly conducted new trial.

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I am of opinion that the adoption of any other course than to order a new trial is not open to us because it is impossible for us to do justice in the absence of all the evidence and of a complete report of the proceedings complained of, for which unprecedented state of affairs the respondents are, it is due to them to say, in no way responsible and their counsel admitted the right of the appellant to have the official stenographer present at the hearing.

This case presents certain unusual features which, as the Privy Council said, *per* Lord Watson, in *In re Abraham Mallory Dillet* (1887), 12 App. Cas. 459, 470,

"it would be neither pleasant nor profitable to criticize more minutely."

That appeal was one primarily from a conviction for perjury

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wherein the Chief Justice of British Honduras had in the trial of the appellant used language in instructing the jury which, in their Lordships' opinion (pp. 469-70) "grossly misrepresented the real issue, and was most unfair to the accused"; and also that the directions—

"were grievously unjust to the appellant, and in many instances outraged the proprieties of judicial procedure [and] a conviction obtained by such unworthy means cannot be permitted to stand."

The Supreme Court of Canada likewise in another jury case —*Bustin* v. *W. H. Thorne & Co.* (1906), 37 S.C.R. 532—was impelled to set aside a judgment of Chief Justice Tuck of New Brunswick and order a new trial because

"the charge of the trial judge . . . shewed passion and bias and was improper."

MARTIN, J.A.

In the case at Bar, I think it unnecessary to say more than that there has, in my opinion, been a gross miscarriage of justice, and that there should be a new trial to be held upon what Lord Langdale, M.R. aptly described, *supra,* as "the first principles of justice." But while I say no more than that, my clear duty to the public (for the protection of which, be it remembered, Courts of Appeal are established) constrains me to say no less. Speaking over 200 years ago, Lord Chief Justice Pratt, in *Dr. Bentley's* case, *supra,* at pp. 564-5 thus referred, in the quaint language of the time, to the necessity of protection being afforded by a right of appeal:

"It is the glory and happiness of our excellent constitution, that to prevent any injustice no man is to be concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief: for this purpose the law furnishes him with appeals."

My long judicial experience has taught me that in this Province there is today as much necessity to afford the public "relief by appeals" as there was in England in 1722.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I would allow the appeal. I think that it is in the best interests of the due administration of justice that when a case comes before the Court of Appeal having the features that this case has that the order of the Court should be that the appeal be allowed and the order set aside. It

is giving due weight to what I consider to be an absolute departure from the constitutional right of the parent to have the custody and guardianship of his children. The proceedings taken here by the parties have been carried on in a scandalous manner. I have no hesitation in saying this, and it cannot be overlooked and must be taken notice of and deprecated in the strongest terms. It is a very serious matter indeed that the law of God, carried out in the Common Law of England and the statute law from time to time of the Mother Country itself and adopted by us in 1858, that the natural right of the custody of the children and conscientious duty of the parent can never be denied or taken away except under extraordinary conditions not present here and then only with proper safeguards for the preservation of religious belief all absent here. We have an order made which disperses this young family of six, four, and two years, and takes them away from the father without any colour of right, I have no hesitation in saying, upon the evidence before us. There is express authority in the Privy Council denying any such right, the dividing of the family, the case being *Smart* v. *Smart* (1892), A.C. 425, where the mother was given the custody of the children. Who were given the custody of the children here? Practically, strangers. Not the father, not the mother—she unfortunately is dead—but an uncle is given the custody of the four-year boy and a cousin the two girls of six and two years, with absolute disregard of the fundamental provisions of the Infants Act—originally the Children's Protection Act—that the Court must advise itself of the religion of the child, and here we have Catholic children taken from a Catholic home and put in charge of Protestants. Now, the case would be just the same if it were the case of a Protestant child put in the care of Catholics. The law is equal. It is there upon the statute book of the Province so that no injustice may be done and no interference with the conscientious convictions of the people, and with all this present before me today I do not consider that it is a proper case to order a new trial. We are not compelled—the Court of Appeal is not compelled—to order a new trial even if it is asked for. In the due administration of justice it is for us to rehear the matter. We could rehear it upon further material now, but with the

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material adduced I have no hesitation in saying there was no jurisdiction in the learned judge at all to make an order because of the absence of consent of the parent to the adoption proceedings, the evidence not supporting the non-requirement of this—that is fundamental on the threshold—that is at the root of the whole matter, and not having been complied with the proceedings are an absolute nullity.

MCPHILLIPS, J.A.

In my opinion, the appeal should be allowed and as well the second appeal as it is in precisely the same position and the orders in both cases set aside.

MACDONALD, J.A.

MACDONALD, J.A. (oral): I agree in allowing the appeal and directing a rehearing.

Appeal allowed and a rehearing directed.

Solicitors for appellant: *Courtney & Elliott.*
Solicitor for respondents: *H. A. Beckwith.*

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MAIR v. DUNCAN LUMBER CO.

MAIR v. DUNCAN LUMBER COMPANY

Practice—Judgment—Final or interlocutory—Reference as to quantum of damages—Appeal—Notice of—Out of time.

When a Court decides the substantial question of liability and merely refers the assessment of damages to a referee, reserving nothing to itself, the judgment ought to be regarded as a final judgment, but where a reference is ordered to ascertain the quantity and value of timber improperly taken from lands within a certain period and the Court reserves to be disposed of by further order the costs of the reference and the question of the defendant's liability to the plaintiff with respect to the timber removed, the judgment must be regarded as an interlocutory one.

Statement

APPEAL by defendant from the decision of GREGORY, J. of the 27th of May, 1927, in an action for damages for cutting timber on the plaintiff's lands and for an injunction restraining the defendant from entering upon, and cutting and removing

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timber from the said lands. It was found by the trial judge that at the commencement of the action the defendant had no right to enter upon the lands and it was enjoined from any further entry thereon, further a reference was ordered to the registrar to enquire and report as to the quantity of timber cut and removed from the lands by the defendant within certain periods. The judgment was perfected on the 15th of July, 1927, and notice of appeal was served on the 7th of September following.

Statement

The appeal was argued at Vancouver on the 12th of October, 1927, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Davis, K.C. (*Hossie,* with him), for appellant.

J. A. MacInnes (*Burns,* with him), for the respondent, raised the preliminary objection that the judgment being interlocutory the appeal was out of time. The judgment was entered on the 15th of July and notice of appeal was not served until the 7th of September following. A reference was directed to the registrar to enquire and report. There is something further to be done: see *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386; *In re Estate of John Henry Davies* (1927), 38 B.C. 249.

Argument

Davis, contra: A reference was ordered, but the main question before the Court, namely, the construction of the agreements as to whether we had a right to continue to take all the red-cedar poles from the lands comprised in the leases, was tried out and the learned judge decided against us. The reference is merely incident to the judgment which is a final one: see Annual Practice, 1927, p. 2478; *Belcher* v. *McDonald* (1902), 9 B.C. 377; *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386; *Read* v. *Brown* (1888), 22 Q.B.D. 128; *Bozson* v. *Altrincham Urban Council* (1903), 1 K.B. 547.

MacInnes, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think this is an interlocutory appeal and that we are bound by our decision, which was unanimous, and which was carefully considered in *Boslund* v. *Abbotsford*

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Lumber, Mining & Development Co. (1925), 36 B.C. 386. The final statement in that case is:

> "In my opinion, the best rule I am able to deduce from the cases, even in England, is that when the Court decides the substantial question of liability and merely refers the assessment of damages to a referee, reserving nothing to itself, the judgment ought to be regarded as a final judgment for the purposes of appeal."

As I said a few moments ago, this has been a very difficult subject for the Courts in this country, as well as for the Courts in England, because there have been differences of opinion even in the Court of Appeal in England.

We had to decide once for all what view this Court would take, and that has been done in *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* Of course it is not applicable to all cases, but I think it is applicable to this case where there was a cause of action stated, liability found, and then a reference to the registrar, which did not amount to a quitting of the case by the trial judge, but the reserving, not only the question of the

MACDONALD, C.J.A.

butts, but the question of the poles and piles to be considered when the report of the referee was made. Those, as well as the costs, which is a matter of some importance, were reserved, and therefore I think the judgment must be regarded as an interlocutory one. The idea of drawing these distinctions with regard to interlocutory and final appeals is based upon this: that the Court, when an action below comes up for appeal, shall be in a position to deal with all that the parties complain of, and that there shall not be an appeal today on a finding of liability and an appeal tomorrow on the finding of a referee. The question is always a difficult one, but so far as possible we should follow a definite rule.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I may say that I have come to a contrary conclusion to that expressed by my brothers who have preceded me. Certainly I would not attempt to lessen the strength of *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386, in its real effect, because I am certainly bound by it. But, with great respect, I do not consider the *Boslund* case in any way concludes this case, and I see a

good deal in the judgment of my learned brother, the Chief Justice, which would support me in that view. For instance, the Chief Justice of this Court cites in that case *Bozson* v. *Altrincham Urban Council* (1903), 1 K.B. 547; 72 L.J., K.B. 271, which was referred to by Mr. *Davis,* and uses this language (p. 388):

"An order was made in Chambers declaring that the question of liability and breach only should be tried, by the Court, and that if liability were found there should be a reference to assess damages. The Court dismissed the action and the question arose as to whether or not that was a final judgment, and it was held to be such."

Now, in this particular case, I asked counsel to tell me what the real finding was and Mr. *MacInnes* was perfectly frank and told me that the finding was an unwarranted going upon the property, that is, trespass, and the costs of the action were given against the defendant. That was the cause of action and that was determined in favour of the plaintiff and in the ordinary course in the judgment we find it so providing, although in terms as to the finding which are not as clear as they might be, but I think now we are over any obstacle of this kind. Then there is this provision:

"And this Court doth further order and adjudge that the plaintiff recover against the defendant his costs of this action to be taxed."

In ordinary course, that ends a judgment in all cases, speaking to a question of practice. Now, as to form: I submit my brother, the learned Chief Justice, laid stress upon that. We ought not to have technicalities of form pressed here. And at p. 390 in the *Boslund* case we find the learned Chief Justice saying:

"But one must look at the substance rather than at the form."

This is, in substance, a judgment which disposes of the whole action, including the costs of the action.

Now, so far as this reference is concerned, it is a subsequent matter. It is not an issue. There is no issue to be determined at all. It follows the judgment and is merely saying: "A reference will be had to make a computation of the amount." Surely that computation of the amount is not one of substantiality: it is not an issue to be tried and fought out. I think that the *Boslund* case can only be held to mean where there is some issue remaining, substantial in its nature, to be fought out. I find nothing of that character here at all.

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I may say I was not a party to the *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* judgment, but I am bound equally as if I were a party to it. Certainly I would be very regretful if I do not read it correctly because it would be my bounden duty to follow it, but I would say, with great respect, that it is no obstacle in my way in arriving at the conclusion which I think I should arrive at in this case, and that is that the judgment appealed from is a final judgment, not an interlocutory judgment, and that the appeal is in time.

MACDONALD, J.A.

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

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Dec. 1.

REX v. NICHOLSON.

Criminal law—Murder—Trial—Constitution of jury—Misdirection—Manslaughter—Reasons for judgment—R.S.C. 1906, Cap. 145, Sec. 4 (5)—R.S.B.C. 1924, Cap. 123, Sec. 23—B.C. Stats. 1925, Cap. 22, Sec. 6—Criminal Code, Secs. 1013 and 1014.

REX v. NICHOLSON

Care must be taken on criminal appeals not to admit new evidence which might bring about a new trial unless it should appear that a miscarriage of justice would occur if its admission is refused.

On an application for leave to appeal on a question of fact or on mixed questions of law and fact, only one judgment may be pronounced and that judgment is to be pronounced by the presiding judge or by some one nominated by him.

A motion for leave to appeal on facts or mixed questions of law and fact will not be acceded to unless the Court is satisfied that there has been substantial wrong amounting to a miscarriage of justice by reason of remarks and rulings of a judge or other matters of fact involved on the trial.

The accused, and one Moore left a room in a hotel together, both intoxicated. On reaching the rotunda of the hotel Moore said to the night clerk "I got hit in the eye but the other fellow got worse than I did" and the clerk saw that there was blood on both of Moore's hands. Immediately after they had left the hotel a third man, who came to the hotel with them, was found dead and in a battered condition in the room they had left. On appeal from the conviction of the accused for manslaughter:—

Held (MACDONALD, C.J.A., dissenting), that there was non-direction amounting to misdirection in the charge of the learned judge to the

jury the result of which was that the strongest evidence in favour of the accused (*viz.*, the appearance of Moore after coming out of the room and his statement of his actions) was not submitted to the jury's consideration as it ought and there should be a new trial.

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1927

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APPEAL by defendant from the decision of McDONALD, J. of the 18th of May, 1927, and the verdict of a jury on a charge of murder, the accused being found guilty of manslaughter and sentenced to four years' imprisonment. At about 5 o'clock on the evening of the 5th of April, 1927, the accused, with one Moore, visited the offices of one McMartin in the Bekins Building, Vancouver. They obtained a quart of gin and drank most of it, when one Douglas came in. Shortly after Douglas went out and came back with another quart of gin. They drank nearly all of both bottles between them and at about 8 p.m. they went out and took a street-car to the Windermere Apartments on Thurlow Street where they stayed for about an hour and a half. At this time they were all in a fairly intoxicated condition and just after leaving the apartments Nicholson and Douglas quarrelled. Douglas was knocked down and his nose was bleeding, the blood going on his clothes. The police patrol then appeared and Nicholson, Moore and Douglas were taken to the police station. Shortly after they were released and they went to the Canada Hotel where they arrived about eleven o'clock. Here they were given a room in order to wash up. While in the room they obtained another bottle of gin from a bootlegger. At about one o'clock in the morning Moore came down the stairs and Nicholson was brought down in the elevator. They were both very drunk, both had blood on them, and one of Moore's hands was covered with blood. Moore told the night clerk that "I got hit in the eye but the other fellow got worse than I did." Both men then left the hotel and were taken in a taxi to Moore's rooms. After they had left the hotel the night clerk and the elevator-boy went to the room that accused and Moore had occupied and found Douglas lying on the bed, his face covered with blood, and apparently dead. A doctor was immediately sent for and on his arrival he pronounced Douglas dead.

Statement

The appeal was argued at Vancouver on the 14th and 15th

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Argument

of November, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Wismer (*J. A. Russell,* with him), for appellant, moved for leave to introduce further evidence which, with due diligence, they could not obtain on the trial. First, there was the evidence of a taxi-driver of the "Diamond Taxi," who came up to the hotel door as the accused and Moore were leaving and seeing their condition left without taking them. Secondly, Dr. Hunter should be called again to explain the contradiction between his evidence on the trial and on the hearing of the Moore trial; also there was evidence afterwards discovered of blood being on Moore's boots, and Dalton should be further examined as to Nicholson's condition when on the sidewalk outside the hotel.

Johnson, K.C., for the Crown, was not called on.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: We think that the new evidence tendered ought not to be admitted. We must take care in criminal trials not to admit evidence which might bring about a new trial unless it should appear that a miscarriage of justice would occur if we refused to receive it. Now, as far as Dalton's evidence is concerned, I do not think it of any importance at all. The homicide occurred at least several minutes before the appellant came down from the upper room. He was able to walk, up to the time that he appeared on the sidewalk at least, and whether he collapsed within a few minutes after he reached the sidewalk or was hanging on to the lamp post does not, in my opinion, affect the matter seriously in any way.

The fact that Moore's shoes shewed blood stains and that this was unknown to counsel before the trial commenced only goes to shew that no due diligence was used to obtain knowledge of this fact before the trial. The two men were indicted jointly although not tried together and if counsel did not know facts which could easily have been ascertained, upon enquiry, from the parties implicated in the transaction they cannot get the evidence in simply because they say "We were not diligent in seeking to obtain our facts before the trial."

With regard to the evidence of Dr. Hunter, we have the record before us. There is no contention that the record is

wrong except that a period is put at one place where it is suggested a dash ought to have been put. Even if this were so, it does not affect the meaning of the words used.

The motion is refused.

MARTIN, J.A.: I do not think a case has been made out for the reception of this evidence. It is somewhat near the line but is not strong enough.

GALLIHER, J.A.: I agree that the motion should be refused.

MCPHILLIPS, J.A.: If I thought these points of new evidence really were material and that they would tend to make a stronger case for the defence I would go so far as to say that the evidence should be introduced but I am not of that opinion. It seems to me that this case, after all, must be determined upon this circumstantial evidence. These variations I think will always be found in all cases. With regard to the boots, if there had been a suggestion that the blow that this man received upon his face could not have been explained except by the use of a hard instrument then it would be important but I do not see—

Wismer: That is the suggestion, my Lord.

MCPHILLIPS, J.A.: Is the medical testimony that the blow must have been struck by some hard object?

Wismer: It could not have been caused by fists.

MCPHILLIPS, J.A.: What is your position, that Moore may have kicked him in the face?

Wismer: Yes, my Lord.

MCPHILLIPS, J.A.: Because, you see, the blood may have gone on the shoes from the earlier time, when Douglas's nose was bleeding. Is the blood on the under-surface of the shoes?

Wismer: Yes, as I understand it.

MCPHILLIPS, J.A.: I only wanted some elaboration on that point, to satisfy myself. If I thought there was a fair reason to suppose that the shoes would play an important part in this matter then I would think it was evidence that ought to be adduced, and now, being of that opinion, I would say that the evidence should be introduced.

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MACDONALD, J.A.: I agree that the motion should be refused.

Motion dismissed, McPhillips, J.A. dissenting.

Wismer, on motion, for leave to appeal on mixed questions of law and fact: The learned judge refused to hear the *Moore* case first, and insisted on the *Nicholson* case going on when I was not prepared. On the question of the two cases being tried together see *Reg.* v. *Bennett; Reg.* v. *Bond* (1866), 10 Cox, C.C. 331; *Rex* v. *Martin* (1905), 9 Can. C.C. 371. Unfair atmosphere was created by the judge saying "you are doing your client more harm than good": see *Lucas* v. *Ministerial Union* (1916), 23 B.C. 257 at p. 260; *Rex* v. *Shandro* (1923), 38 Can. C.C. 337; *Rex* v. *Moke* (1917), 3 W.W.R. 575.

Johnson, was not called on.

MACDONALD, C.J.A.: We have not strictly adhered in the past to the provisions of the Criminal Code, section 1013, which requires that on an application for leave to appeal on a question of fact or on mixed questions of law and fact one judgment only is to be pronounced. I think we ought to come to a decision in the matter if there be any doubt in the minds of the members of the Court as to the construction of the said section. I entertain no doubt about the meaning of the section. It seems to me to be plain enough that only one judgment in a case of this sort may be pronounced and that judgment is to be pronounced by the presiding judge or by some one nominated by him to pronounce the judgment. On the present motion I am of opinion that leave to appeal on facts and mixed questions of fact and law ought not to be granted. In the exercise of our jurisdiction as a Court of Criminal Appeal on an application of this kind we must exercise care and sound discretion. What I mean is that expressions by a judge in the course of trial not always well considered, expressions of counsel during the trial which may be thought to have influenced the jury, and which are incident to almost every trial, are not to be seized upon to disturb the conviction unless substantial injustice can fairly be deemed to have resulted therefrom. In other words, we must be satisfied that there has been substantial wrong amounting to a miscarriage of justice by reason of remarks and rulings of a judge or

other matters of fact involved in the motion. I would refuse leave. The motion is dismissed.

Motion for leave to appeal dismissed.

Wismer, on the merits: The learned judge discharged a certain number of jurors before this trial without jurisdiction and refused a challenge to the array by accused. The trial before the hearing of this case lasted three days and the jurors who served on that case were by order of the Court relieved from further service for three years and twelve new jurors were added to the panel. This order was made without jurisdiction. This does not come within the word "expedient" in section 6 of the Jury Act Amendment Act of 1925: see *Regina* v. *Jameson* (1896), 12 T.L.R. 551 at p. 580; Halsbury's Laws of England, Vol. 18, pp. 252 and 266; *Cropper's Case* (1837), 2 M.C.C. 18. The objection is as to how the twelve additional jurors were summoned: see *Winsor* v. *The Queen* (1866), L.R. 1 Q.B. 289 at p. 310; *Rex* v. *Lewis* (1909), 78 L.J., K.B. 722. The learned judge failed to observe the imperative direction of section 4 (5) of the Canada Evidence Act: see *Rex* v. *Aho* (1904), 11 B.C. 114; *Rex* v. *Gallagher* (1922), 37 Can. C.C. 83; *Bigaouette* v. *The King* (1926), 47 Can. C.C. 271. On onus of proof the direction that any theory advanced by the defence must be reasonably more consistent with innocence than the theory advanced by the Crown as to the cause of the death, is misdirection: see *Rex* v. *Jenkins* (1908), 14 B.C. 61; *Rex* v. *Sankey* (1927), 38 B.C. 361 at p. 367; *Rex* v. *Deal* (1923), 32 B.C. 279; 39 Can. C.C. 105 at p. 107. There was not a full and fair presentation of the defence: see *Rex* v. *Powell* (1919), 27 B.C. 252; *Rex* v. *Morelle* (1927), *ante*, p. 140.

Argument

Johnson: There are but two material points: (1) As to the constitution of the jury; (2) as to misdirection, with reference to the jury: see *Rex* v. *Hayes* (1903), 11 B.C. 4 at p. 15. As to misdirection on onus of proof see *Rex* v. *Sankey* (1927), 38 B.C. 361; *Rex* v. *Meade* (1909), 1 K.B. 895 at p. 898.

Cur. adv. vult.

1st December, 1927.

MACDONALD, C.J.A.: The Court would set aside the judgment and order a new trial.

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It is agreed that each member of the Court may deliver a judgment.

I dissent from the opinion of the Court.

The majority judgment of the Court was delivered by

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MARTIN, J.A.: The Court is of opinion, without deciding other objections, that there should be a new trial because a "substantial miscarriage of justice has actually occurred," within the meaning of the language of section 1014 of the Criminal Code, in that there was non-direction amounting to misdirection in the charge of the learned trial judge to the jury, the result of which was that the strongest evidence in favour of the accused (*viz.*, the appearance of Moore after coming out of the room and his statement of his actions therein) was not submitted to the jury's consideration as it ought, in the circumstances, to have been. That of itself would be sufficient to sustain the appeal, but in addition the observations of the learned judge upon the effect of said evidence when it was being adduced by the appellant's counsel, must also have diminished its just value in the estimation of the jury to the prejudice of the appellant.

Judgment

The appeal, therefore, should be allowed, the conviction set aside and a new trial had as above directed.

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

IN RE O'CONNOR.

HUNTER, C.J.B.C.

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IN RE O'CONNOR

Extradition — Habeas corpus — Second application—Charge of procuring abortion—Evidence—Admissibility of, to identify prisoner—Jurisdiction of foreign Courts.

The common law remedy against illegal detention by inferior tribunals by making applications to different judges until the judicial power is exhausted for a writ of *habeas corpus* still exists with respect to extradition proceedings.

Cox v. *Hakes* (1890), 15 App. Cas. 506 and *United States of America* v. *Gaynor* (1905), A.C. 128 applied.

A *habeas corpus* judge must look at the evidence in order to ascertain whether the conditions of the treaty and statute have been fulfilled, as for example, whether there was evidence of an extradition crime and that the prisoner was not in reality being pursued for a political offence, so that the decision in *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128 is inapplicable, but at the same time it is not the duty of the *habeas corpus* judge to interfere with the proceedings on merely technical grounds.

It is well settled that extradition proceedings need not initiate in the foreign country.

Re Ternan and others (1864), 9 Cox, C.C. 522 applied.

Evidence, which under Canadian law, may be inadmissible at the trial on the ground that the prisoner had not been properly warned of the possible consequences of his making a statement on giving answers to a policeman's questions, is at least admissible in extradition proceedings to prove the identity of the person arrested with the person charged.

Procuring an abortion is extraditable on the demand of the State of Alabama and this Court is not concerned as to what Court in the foreign state has jurisdiction to try the prisoner.

Statement

MOTION by way of *habeas corpus* in respect of extradition proceedings on a charge of having procured an abortion in the State of Alabama, U.S.A. Heard by HUNTER, C.J.B.C. at Vancouver on the 15th of October, 1927.

Maitland, for the motion.
Orr, contra.

15th November, 1927.

Judgment

HUNTER, C.J.B.C.: This is a second application by way of *habeas corpus* in respect of extradition proceedings. With regard to the suggestion that only one application is permissible,

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I think it is untenable. The common law remedy against illegal detention by inferior tribunals by making application to different judges until the judicial power is exhausted was placed on an enduring foundation by the well-known case of *Cox* v. *Hakes* (1890), 15 App. Cas. 506, and the Lord Chancellor who delivered the leading judgment reiterated his views in the Privy Council in the case of *United States of America* v. *Gaynor* (1905), 9 Can. C.C. 205 at p. 215 so that if this common law right is to be infringed or abridged it must be done in explicit terms by statute. At first sight, as the statute uses the phrase "and that he has a right to apply for a writ of *habeas corpus*" it might seem that that meant that he had the right to make only one application but I think the true meaning of the section is that if the judge commits the fugitive he is to inform him of his rights, the accused generally speaking being a foreigner and not acquainted with our laws. I, therefore, hold that the prisoner has the right to make this application.

The first application was dealt with by my brother, Mr. Justice W. A. MACDONALD, and while I have in accordance with the law laid down by the Lord Chancellor not allowed myself to be influenced by his decision and have given the matter independent consideration, I find myself unable to differ from him as to any of his conclusions.

Judgment

With regard to the question as to how far the *habeas corpus* judge may examine into the proceedings, it is obvious that he must look at the evidence in order to ascertain whether the conditions of the treaty and statute have been fulfilled: as for example, whether there was evidence of an extradition crime and that the prisoner was not in reality being pursued for a political offence, so that the decision in *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128 is therefore inapplicable. But at the same time I do not think that it is any part of the duty of the *habeas corpus* judge to interfere with the proceedings on technical grounds or because of any erroneous rulings of the extradition judge which do not go to the root of the matter but that he should bear in mind the cardinal requisites of the treaty and the extradition Act, which are that there shall be a *bona fide* charge of an extraditable offence and that enough evidence is adduced to justify the committal for trial. In other words,

the proper function of the proceeding is to protect the prisoner against fundamental error or anything done contrary to natural justice but not to supply him with the means by way of technicalities of escaping trial by the foreign tribunal on a charge for which he would be tried in Canada if the offence had been sworn to have been committed in Canada. This view is, I think, supported by the fact that section 9 of the Extradition Act provides that the proceedings may take place before judges of the superior Courts as well as the County Courts. It is impossible to suppose that the statute intended that a judge on a *habeas corpus* application could *virtute officii* assume the function of an appellate Court and thereby review all the rulings of a judge of co-ordinate jurisdiction.

In this case the same points have been raised as on the previous application.

Some technical objections were raised to the foreign proceedings. It was well settled many years ago, however, that the proceedings need not initiate in the foreign country: *Re Ternan and others* (1864), 9 Cox, C.C. 522; so that if there is sufficient evidence produced either by the foreign depositions or otherwise to justify the committal, such objections, generally speaking, become futile.

Judgment

To deal with the other objections: One is that the alleged crime is not an extradition crime. It is sufficient to say, as to this, that the treaty makes procuring abortion an extraditable offence which of course means doing it wrongfully. I can feel no doubt that it is a criminal offence both by the law of Canada and Alabama and one Patrick O'Connor is definitely charged with having committed it by the woman in the case in a sworn deposition taken before the County judge of the County where it is alleged to have been committed.

Another point which was vigorously insisted on by Mr. *Maitland* was that there was nothing to identify the prisoner with the Patrick O'Connor charged in the woman's deposition and that the only evidence as to this was wrongly received by His Honour Judge CAYLEY, which was the evidence of the constable who made the arrest and who questioned him as to his identity and elicited from him the statement that he was Patrick O'Connor and that he knew that the charge had something to

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do with a soldier's wife. But evidence which under Canadian law may be inadmissible at the trial on the ground that the prisoner had not been properly warned of the possible consequences of his making a statement or of his giving answers to the policeman's catechism is at least admissible to prove the identity of the person arrested with the person charged. How otherwise is the constable to function? It is his duty to arrest the person wanted and therefore his duty to make sure that he is not arresting the wrong person for which he might be liable to an action. If he is to carry out his duty properly it must obviously be lawful to question the suspect as to his identity. I, therefore, think the evidence was admissible on the question of the identity of the prisoner with the person wanted. Whether any of the policeman's evidence ought to be admitted at the trial is entirely for the Alabama Courts.

Another point strongly insisted on was that it was not made clearly to appear that the State of Alabama has any jurisdiction to try the prisoner, it being suggested that as the alleged offence took place, if at all, on a military reserve he could be tried only by a Federal Court. The short answer to that is that the prisoner is sworn to have committed the offence in Alabama, that Alabama, through the President of the United States, is demanding his extradition under the treaty and that it is no concern of a Canadian Court as to what Court in Alabama has jurisdiction. That is a question for the accused to raise in the Alabama Courts, if he sees fit to do so and is one which is exclusively within their jurisdiction to determine.

Judgment

It may appear to some that there has been unusual delay in this matter and no doubt justice delayed sometimes means justice defeated. All I can say about that is that I have not been able, at the time at my disposal, to sooner give the case the consideration which I thought it required as many cases were cited which had to be examined. Speaking generally, the proceedings ought no doubt to be reasonably prompt from the arrest to the surrender, as it is only in this way that the intention of the treaty can be fully carried out which is that the law-abiding citizens on both sides of the line shall be better protected against crime.

The writ must be discharged and the prisoner remanded to the custody from which he was taken.

Motion refused.

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HARNEY v. HARNEY

Husband and wife—Petition for divorce—Remarriage of wife thinking husband was dead—Husband guilty of misconduct—Wife's conduct blameless—Discretion—Divorce granted subject to husband giving security for alimony—R.S.B.C. 1924, Cap. 70, Secs. 16 and 17—20 & 21 Vict., Cap. 85, Secs. 31 and 32.

A wife who was deserted by her husband, having reason to believe he was dead, married a second time. The first husband, turning up, petitioned for divorce. It appeared from the evidence that the petitioner had been guilty of an infraction of substantially all the matters set out in section 16 of the Divorce and Matrimonial Causes Act and that the wife was a very deeply injured woman without a stain on her character.

Held, that although there is power to refuse the petitioner a decree, the judge's discretion is left unfettered and absolute by the Legislature, and it is in the best interests of the wife, in the circumstances, to be set free. The marriage will therefore be dissolved on condition that the petitioner give security for the maintenance of the respondent in the terms of section 17 of the said statute.

PETITION for divorce by a husband and counter petition by the wife for judicial separation. The facts are set out in the reasons for judgment. Heard by HUNTER, C.J.B.C. at Vancouver on the 28th and 29th of October and 1st and 23rd of November, 1926. Statement

Wood, for the husband.
Gibson, for the wife.

8th December, 1926.

HUNTER, C.J.B.C.: This is the second proceeding for divorce brought by the husband, the first having been dismissed by my brother MORRISON on the ground of lack of domicil. After considering all the circumstances I am of opinion that the husband has since the former decision distinctly shewn an intention to make his home in the Province as among other things he says he holds a free miner's certificate and that he intends to take up the business of prospecting and mining and has been looking after real estate in which in all probability he still has the beneficial interest, although for an ulterior purpose Judgment

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he has placed it in the name of his sister who is a resident of Chicago.

The parties were married at Niagara Falls, Ontario, in 1902. Previously to this the husband had kept a store in British Columbia for two years, then moved to Fort William in Ontario where he remained for some time and acquired a considerable amount of land, part of which was purchased in his wife's name. In 1912 he went to Detroit where he established a business advertising agency which he says was mainly for the purpose of promoting the sale of the Fort William property and the business lasted until 1917. In the meantime at his suggestion his wife came to Vancouver in 1913 and bought a residence. He came on later in November, 1913, and stayed until March, 1914. They did not, however, occupy the house which she had bought, but stayed with her mother who was then keeping boarders. He then left and did not appear again in Vancouver until 1919. He corresponded with her and sent money until 1916, but there was no further correspondence with the exception of a letter written by her in the fall of 1917 and not hearing anything she had to fall back on her own resources and keep boarders, or to help her mother, both of them being in poor health. While her husband was here in 1914 she found him in bed reading a letter which she saw was in a woman's handwriting. Being confused when questioned about it her suspicion was aroused and she intercepted three letters addressed to him at the general delivery. When confronted with these letters in the box he asserted that she had no occasion to write them, but the only reasonable inference open after their perusal is that an illicit intimacy existed between the husband and the writer who was in his employ in the Detroit business. In fact, it was evidently a case of typewriter truancy. At any rate, the wife's real troubles began when this woman appeared on the scene and there were the following consequences: neglect to correspond; failure to make needed remittances; desertion; adultery; when he came here in 1919 several assaults with feet and fists for one of which he was convicted and fined; attempts to coerce his wife into giving up any claim she had to any of their property; false charges against her character, culminating in the first divorce proceeding which falsely charged her with

adultery with a man who had employed her mother as housekeeper, and whom she had gone to assist when she was ill.

Failing to come to any agreement with her about the property which she said she was willing to give up if he made proper provision for her he again abandoned her and so far as he was concerned or cared left her in poverty and the only news received by her about him afterwards was a telegram purporting to be signed by his sister in Chicago to the effect that he was found dead in Chicago destitute.

I have no doubt that this lying telegram was instigated by the husband but if he had only stayed dead it would have been much better for his wife. However, she married again within a few weeks of the receipt of the telegram, but I do not think that even Harney himself would be bold enough to suggest that she was guilty of any disrespect to his memory in doing so. At any rate, he valiantly resumes the attack and brings this second proceeding, complaining of the bigamous marriage and the question is what ought the Court to do? I have already intimated that there has been plenty of delinquency on his part. In fact, I do not remember of ever having to listen to so sordid a tale of contemptible treatment by a husband who was well able to support his wife and he has no doubt been guilty of almost every matrimonial offence in the calendar and for a long period of time.

Judgment

By section 31 of the statute of 1857 the Court is empowered in its discretion to refuse the petitioner his decree,

"if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the Court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery."

The conduct of the petitioner includes nearly all, if not all the matters specified. Now, there have been cases quoted in which the judges appear to have attempted to lay down rules for the guidance of the exercise of the judicial discretion. I may say at once that I entirely disapprove of such attempts. The Legislature in my opinion has very wisely left the discretion unfettered and absolute, evidently considering that it was

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impossible to lay down fixed rules to meet the infinite variety of cases that come before the Courts. Whether or not a decree ought to be granted depends altogether upon the view that the judge takes as to what is best to do in the particular circumstances of the case before him and he ought not to allow himself to be hampered or overwhelmed by the self-imposed rules of the dead sages of the law. With me it is the statute, the whole statute, and nothing but the statute, which confers absolute discretion and it is merely presumption for any judge to attempt in any way to fetter or qualify it, or for any one generation of judges to enunciate a rule of thumb for the next.

Lex crescit et debet crescere. Let it be granted that monogomous marriage is the *sine qua non* of all true civilization, and that its too easy dissolution ought not to be allowed. Yet it does not advance public morality or serve any other good purpose to keep the married pair yoked together by an empty legal bond after the home has become a den of dissension through the continued commission of matrimonial offences and it is clear to the Court that they would never be reconciled.

Judgment

It is no doubt within my power to refuse the petitioner a decree on nearly all, if not all the grounds specified, and the wife opposes it no doubt thinking that to grant it necessarily implies a stigma on her. As to that I am bound to say that she has come through a wretched ordeal of long duration without any stain on her character and is a very deeply injured woman. It is to the credit of the second husband who appears to be a man of upright character and herself that they separated at once on hearing of Harney's resurrection and joined in a decree of nullity.

After full consideration I am of opinion that it is in her best interests to be set free and I will dissolve the marriage on condition that the petitioner give security for the maintenance of the respondent in the terms of section 17 of the statute, the husband to signify his election within a time to be specified if counsel fail to agree; otherwise the petition will be dismissed with costs and I shall then proceed to consider what relief can be granted on the wife's counter petition for judicial separation. Details to be settled in Chambers.

Order accordingly.

REX v. STONEHOUSE AND PASQUALE.

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REX v. STONEHOUSE AND PASQUALE

Criminal law—Rape—Evidence—Complaint—Pressure—Admissibility.

A girl 17 years old lived with a Mrs. C. and on entering her house one evening with her clothes dirty and her hand bleeding, Mrs. C. asked her where she had been, to which she replied "those two boys took me to the back of the park." Being suspicious of wrong-doing Mrs. C. said "I am going to take you to the police station." On the way to the station Mrs. C. said "Now Marjory we are going to the police station and you have got to tell the truth. I want to know if them boys had anything to do with you" to which the girl replied that "one held her while the other went with her and that when he got through he held her while the other went with her." In giving her evidence on the trial Mrs. C. was asked, "if it had not been for your urging her to get these facts out you would never have got them out?" to which she replied, "No, I would never have got them out." The girl testified that both boys had had connection with her against her will, each holding her in turn. They were convicted of rape.

Held, on appeal, affirming the decision of McDONALD, J. (MACDONALD, C.J.A. and McPHILLIPS, J.A. dissenting and holding that there should be a new trial), that as Mrs. C. was cross-examined and no objection was taken to her evidence of the girl's statement to her until after the case for the prosecution had closed, when an application that by reason thereof the case should be taken from the jury was refused, and as the trial judge in his charge carefully instructed the jury to pay no attention whatever to what the girl said to Mrs. C. it cannot be said that any "substantial miscarriage of justice has actually occurred" and the appeal should be dismissed.

Held, further, that the sentence to life imprisonment should, in the circumstances, be reduced to three years.

APPEAL by defendants from their conviction by McDONALD, J. on the 23rd of May, 1927, on the verdict of a jury, on a charge of rape. The accused Stonehouse owned a coal-truck, his business being the delivery of coal to customers. On the afternoon of the 23rd of November, Stonehouse with Pasquale, drove the truck to 753 Prior Street, Vancouver, where they took a girl, Marjory Selborne, onto the truck and according to the evidence of both accused they drove to Douglas Road where both of them had connection with the girl, with her consent. They then drove to a bootlegging place on Powell Street where after they had some drinks they again got onto the truck and drove

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to Windermere Street in the vicinity of Hastings Park where each of them again had connection with the girl without her raising any objection, each of them paying her $2. The girl then suddenly broke the windshield, cutting her hand. This angered Stonehouse, who drove her out of the car and she walked home. The girl's story was that they did not have connection with her until they neared Hastings Park where one of them held her while the other had connection with her and that in this way both had connection with her against her will and that they did not pay her anything. On reaching home at about a quarter to six in the evening Mrs. Cormier, with whom she lived, saw that her hand was bleeding and that her clothes were soiled. She then told Mrs. Cormier that the two boys had taken her to Hastings Park; that she had broken the windshield of the car and that was how she cut her hand. Mrs. Cormier then told her she was going to take her down to the police station. After the girl had her supper they went to the police station and on the way, owing to Mrs. Cormier's urging, the girl for the first time told her that "they were twice with her." The accused were found guilty and sentenced to life imprisonment.

The appeal was argued at Vancouver on the 8th and 9th of November, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Killam, for appellant Stonehouse: The evidence in corroboration of the girl's story is inadmissible as her confession to Mrs. Cormier was obtained by pressure: see *Rex* v. *Jimmy Spuzzum* (1906), 12 B.C. 291; *Rex* v. *Osborne* (1905), 1 K.B. 551; *Reg.* v. *Merry* (1900), 19 Cox, C.C. 442; *Rex* v. *Bishop* (1906), 11 Can. C.C. 30; *Rex* v. *Dunning* (1908), 14 Can. C.C. 461; *Makin and Wife* v. *Attorney-General for New South Wales* (1893), 17 Cox, C.C. 704; *Allen* v. *The King* (1911), 44 S.C.R. 331; 18 Can. C.C. 1; *Sankey* v. *The King* (1927), S.C.R. 436; *Rex* v. *Baker* (1925), 37 B.C. 1; *Rex* v. *McGivney* (1914), 19 B.C. 22; *Rex* v. *Norcott* (1916), 12 Cr. App. R. 166; *Rex* v. *Lovell* (1923), 17 Cr. App. R. 163 at p. 169. Mrs. Cormier pursued her examination of the girl with a threat: see *Reg.* v. *Sonyer* (1898), 2 Can. C.C. 501; *Rex* v. *Steele* (1923), 33 B.C. 197.

Brown, K.C., for the Crown: Mrs. Cormier noted the condition of the girl when she came home and questioning her under the circumstances does not invalidate her evidence. Pressure to state the cause of visible mental disturbance is not an "inducement": see *Rex* v. *Norcott* (1916), 12 Cr. App. R. 166; Crankshaw's Criminal Code, 5th Ed., 357.

Killam, in reply, referred to *Rex* v. *Powell* (1919), 27 B.C. 252.

Frank Lyons, for Pasquale: On the question of the severity of the sentence, the evidence shews clearly that this girl was of ill-repute and in the circumstances the sentence should be reduced if the Court below is upheld: see *Rex* v. *McCathern* (1927), 2 D.L.R. 1142; *Rex* v. *Adams* (1921), 36 Can. C.C. 180; *Rex* v. *Finlay* (1924), 4 D.L.R. 829.

Argument

Cur. adv. vult.

1st December, 1927.

MACDONALD, C.J.A.: The conviction is sustained.

The Court having permitted each member to deliver a separate judgment, I desire to state my reasons for dissenting.

I would set aside the conviction and grant a new trial on the ground that illegal evidence was admitted, namely, the evidence of Mrs. Cormier, to whom the complainant told the story of the occurrence. That story was obtained, as Mrs. Cormier admitted, by her urgings. The evidence upon this is as follows:

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"What condition was she in when she came to your house? Well, her clothes was all dirty and her hands cut. . . . ."

"Did you have any conversation with her? Yes, she told me she had met with an accident, when she came to the door. . . . I asked her where she had been. She said, these two boys took her out to the park—the back of the park. So she said, 'I broke the windshield of the car.' She said, 'that was how I cut my hand.'"

The witness then described the condition of her dress, and she says that suggested something to her. The Court then asked:

"Now, you said 'I am going to take you down to the police station'? Yes.

"Well, up to that stage had she told you anything about what really happened, except that she met with an accident? Not till I was going down the street and then she told me."

She then relates the story which the complainant told at the trial. On cross-examination Mrs. Cormier said this:

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"She [the complainant] made no suggestions at all of anything improper until you were going down to the police station? No.

"Did you ask her a question going down? Yes. I told her, I says, 'Now look here, Marjory, we are going to the police station,' I says, 'and you have got to tell the truth,' I says, 'and I want to know if them boys had anything to do with you,' and she told me they had."

The last question which was asked of this witness and answered by her is as follows:

"And if it had not been for your urging her to get these facts out you would never have got them out? No, I would never have got them out."

That evidence was, in my opinion, most important as being the only evidence before the jury in support of the complainant's alleged resistance, the sole question in dispute. It is true that the learned judge later came to the conclusion that the evidence was inadmissible and warned the jury to pay no attention to it, but in my opinion the harm was done and I cannot think that that course would right the wrong which was done by the admission of the evidence or could be depended upon as freeing from the minds of the jury the impression which such evidence unquestionably would produce.

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An appeal was also taken against the severity of the sentence. The prisoners are two boys of 16 and 17 years of age respectively. The complainant is also of the age of 17 years. The evidence discloses that she was practically upon the street, and that with her consent she had had intercourse with one of the prisoners a month before the alleged crime, and also with another man the day after the alleged crime. The evidence shews her to have been thoroughly immoral. It is quite apparent to me, and in this the Court is unanimous, that the sentence passed upon the prisoners, namely, imprisonment for life, is greatly excessive. In all cases of punishment it is the duty of the Court to take into consideration the circumstances in which the crime was committed. *Rex* v. *Zimmerman* (1925), 37 B.C. 277. No rule can be laid down defining a uniform punishment for crimes of a particular sort. A wide latitude is wisely allowed by law to the trial judge in the passing of a sentence. In the circumstances of this case the Court thinks that three years' imprisonment would have been ample punishment for the offence committed, and would reduce the sentence accordingly.

MARTIN, J.A.: This is an appeal from a conviction of rape upon one Marjory Selborne, then aged 17 years, on the 23rd of November, 1926. Several grounds were relied upon in support of the main appeal, but the only one of substance is that which arises out of the original admission in evidence of the statement made by the girl to Mrs. Cormier that the two appellants had each held her in turn while the other had carnal knowledge of her.

Evidence of this unusual description "stands upon a special footing" (Taylor on Evidence, 11th Ed., Vol. I., p. 393) and is admitted merely in general support of the "credibility of her testimony" and as one of the "circumstances of fact which concur with that testimony," as is well set out in the extract from Russell on Crimes that Mr. Justice Taschereau adopts in his excellent work on the Criminal Law of Canada, 2nd Ed., p. 200, and the fact that the accuser "concealed the injury for any considerable time after she had the opportunity of complaining" is one of the circumstances that "afford a strong though not conclusive presumption that her testimony is feigned." In Archbold's Criminal Pleading, 27th Ed., p. 379, the latest authorities are thus correctly epitomized:

"The fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence by the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as negativing consent on her part."

And further:

"The mere complaint is no evidence of the facts complained of, and that its admissibility depends on proof of the facts sworn or other legalized testimony."

In *Rex* v. *Lovell* (1923), 17 Cr. App. R. 163, the reason and history of the matter are fully considered and the "clear distinction" between the classes of evidence is drawn.

It is important that this should be borne in mind otherwise the fundamental distinction between such "supporting circumstances" and confessions of the accused, which are direct evidence of the most vital kind affecting the whole responsibility for the crime charged (Roscoe's Criminal Evidence, 14th Ed., p. 37), will not be preserved or given effect to: cases of confession stand part, and so long ago as 1783 it was said by Mr.

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Baron Hotham in *Thompson's Case,* 1 Leach, C.C. 291, that "it is almost impossible to be too careful upon this subject."

Such a complaint to be admissible must be made on the first reasonable opportunity, and also upon the accused's own initiative—Archbold, *supra*, p. 380. No objection is taken herein to the former requirement, but it is submitted that the latter is wanting, which renders it necessary to consider the whole circumstances of the admission which are unusual in that not only was no objection taken to the admission of Mrs. Cormier's evidence at the time but the accused's counsel cross-examined her upon it, and it was not till after the case for the prosecution was closed that any objection was taken by the appellants' counsel who then asked that the case be taken from the jury and upon that request being properly refused he put in evidence, and at the conclusion of it the learned trial judge said:

"I think the proper way to have done, if you were objecting to the admission of the evidence, was to have taken objection before the evidence was in and not to have allowed it to go in without objection and then cross-examine upon it; but nevertheless I have to take the responsibility as to the admissibility of evidence, and I think in this case I would exercise my discretion in allowing the evidence in. I think that the case of *Rex* v. *Osborne* (1905), 1 K.B. 551, which was followed by the late Mr. Justice IRVING in our own Courts in the case of *Rex* v. *Jimmy Spuzzum* (1906), 12 B.C. 291, would justify me in admitting the evidence even if you had objected. You may go to the jury."

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Counsel thereupon addressed the jury and the learned judge in the course of his charge directed them upon this point very carefully and correctly and at considerable length in view of the unusual circumstances, from which direction the following extracts are taken for illustration:

"Now, on the question of the complaint, I have written down what I think I ought to say to you about this. I feel embarrassed by the fact that objection was not taken before the evidence went in, and now I must deal with the case as best I can; and I am going to do it in this way. I admitted that evidence under the circumstances which you have heard discussed. I must warn you, however, that if the case depended alone on the girl's evidence or upon what she said to Mrs. Cormier in answer to the last question, you ought not to convict on that evidence alone. . . . I would instruct you therefore to eliminate from your minds the evidence of what the girl said to Mrs. Cormier, and to pay no attention whatever to what she said to her, because it may well be that the girl would have made no complaint at all had Mrs. Cormier not suggested it to her. I should have greatly preferred that the objection had been taken to the evidence in the first instance, when I could have considered the question

fully at the time. The evidence was in before I had an opportunity to know that any objection could be taken or that there was any question as to the admissibility of it. Now, all I can say is to ask you, and I shall depend on you to do it, to treat the case without reference to what the girl said to Mrs. Cormier. Eliminate that from your minds and deal with the case on the rest of the evidence."

We find it impossible to believe that this strong exhortation and caution, entirely appropriate to the special occasion, failed to achieve its object in bringing the jury to the proper frame of mind in their consideration of the matter.

But it is submitted that if the evidence was wrongly admitted then there should be a new trial because the jury must have been so unfavourably affected by its admission that their minds could not, by any direction from the learned judge, be purged of the prejudice that had been wrongfully created against the accused, and that the only proper course to adopt to attain complete justice was to have discharged the jury and impanelled a new one. No apt authority, however, was advanced in support of such submission, the only case cited being *Reg.* v. *Sonyer* (1898), 2 Can. C.C. 501, which was one of confession (of a charge of wounding with intent to murder) and not of complaint, and a perusal of it shews that in the very exceptional circumstances of no less than seven alleged confessions of the accused, an Indian, made at different times being admitted in evidence against him despite objection, the Full Court of this Province thought the only proper course for the learned trial judge to have adopted was to discharge the jury and impanel a new one, as requested, instead of striking out of his notes the evidence respecting four of them (which on further consideration next day the learned judge thought had been improperly received) and directing the jury to disregard wholly those four confessions. No rule was laid down by the Court for general application, the brief judgment, based of course upon the circumstances, being only that (p. 503):

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"The judge should have discharged the jury and impanelled a fresh jury. The conviction must be quashed and a new trial had. This Court cannot now determine the questions as to the admissibility of the alleged confessions."

That the decision was right in the circumstances is beyond question, but there is no real similarity between that case and this. In no reported case has any Court yet attempted to lay

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down a general rule, even in cases of confession; on the contrary, in *Reg.* v. *Rose* (1898), 67 L.J., Q.B. 289, the Court of Crown Cases Reserved said, *per* Lord Russell of Killowen, C.J., p. 291:

"I will assume for a moment that that was evidence which shewed that the confession of the prisoner was not made voluntarily within the meaning of the authorities on the subject; and also that the chairman allowed an involuntary confession to go to the jury. Assuming this, the question is, What should the chairman have done? It is easier to say what he ought not to have done than to define what he should have done. It is clear that he ought not to have allowed the whole of the confession to go to the jury; but as to whether he ought to have struck out that part of it which was not voluntary and directed the jury to disregard it, or whether he ought not rather to have discharged the jury and impanelled a fresh one, the Court is not now called upon to determine upon the materials before it."

This clearly indicates that the appropriate course of action depends upon the circumstances, which is also to be inferred from *Reg.* v. *Garner* (1848), 2 Car. & K. 920; 1 Den. C.C. 329; wherein Mr. Justice Patteson, p. 926, thought the proper course in that case was to strike out the evidence from his notes and then direct the jury to acquit for lack of evidence, and it is to be noted that both below at the assizes and above on the Crown Case Reserved the prisoner's counsel submitted that the proper course was for the judge to strike the confession out of his notes and so not leave it to the jury.

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We have, however, found direct authority (not cited, strangely, in *Reg.* v. *Rose, supra*) to fortify our opinion, *viz.*, the decision of the Court of Crown Cases Reserved in *Reg.* v. *Whitehead* (1866), 35 L.J., M.C. 186; 10 Cox, C.C. 234; and L.R. 1 C.C. 33 (the first report being the fullest) wherein it was held in a case of the same nature as this (attempted rape) and likewise affecting the evidence of the prosecutrix which had been wrongly admitted, was properly struck out and withdrawn from the jury, that the proper course had been adopted, the Court *per* Chief Baron Pollock, saying, pp. 189-90:

"The question for us to decide is, was it competent for the judge to leave the case to the jury on the evidence of the other witnesses alone, striking out the evidence of the prosecutrix? We are all of opinion that the answer should be in the affirmative, and that it was competent for the judge to withdraw the evidence of the prosecutrix from the jury. For that I have the authority of my learned brethren to say that we are unanimous; . . . the judge did what he was perfectly competent to do. He said, 'I received

the testimony of this witness at first as competent, thinking her to be so. I now reject her as incompetent.' I desired to put the point in favour of the prisoner as strongly as possible; but I think the Chairman was quite right in striking out the evidence of the prosecutrix, resting the case merely on the testimony of the other witnesses. That course would not prevent the jury, if they had observed anything in the conduct of the prosecutrix favourable to the defence of the prisoner, from taking that into their consideration. The position of the Chairman seems to be this: 'Was I right,' he says, 'in directing the attention of the jury exclusively to what was evidence, and withdrawing from them what was not?' The whole Court think he was quite right, and that the conviction must be supported."

It follows, therefore, that the course taken by the learned trial judge herein was the right one, and as we cannot bring ourselves to say, as we must, in the language of our Criminal Code, section 1014 (2), that any "substantial miscarriage of justice has actually occurred" the appeal must be dismissed.

MARTIN, J.A.

Such being our opinion it is not necessary to pass upon the question of the admissibility of the evidence, and it is sufficient to note the leading case in this Province upon the point, *viz.*, our decision in *Rex* v. *McGivney* (1914), 19 B.C. 22 (wherein the leading authorities were considered) and later decisions of the Court of Criminal Appeal in England, *Rex* v. *Norcott* (1916), 86 L.J., K.B. 78; 12 Cr. App. R. 166; (1917), 1 K.B. 347, and *Rex* v. *Wilbourne* (1917), 12 Cr. App. R. 280, wherein *Rex* v. *Norcott* and *Rex* v. *Osborne, supra,* are considered and explained.

GALLIHER, J.A. agreed with MARTIN, J.A.

GALLIHER, J.A.

MCPHILLIPS, J.A. agreed with MACDONALD, C.J.A. in ordering a new trial.

MCPHILLIPS, J.A.

MACDONALD, J.A. agreed with MARTIN, J.A.

MACDONALD, J.A.

Conviction sustained, sentence reduced, Macdonald, C.J.A., and McPhillips, J.A. dissenting.

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WOODCOCK v. CITY OF VANCOUVER

Municipal corporation—Repair of highway—Statutory duty—Wire obstruction imbedded in street—Misfeasance—Negligence—Personal injuries—Evidence—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320.

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Section 320 of the Vancouver Incorporation Act, 1921, provides that "Every public street, road, square, lane, bridge, and highway in the city shall, save as aforesaid, be kept in repair by the city."

The plaintiff while passing along Hastings Street near the intersection of Renfrew Street in the City of Vancouver, tripped over an obstruction in the shape of some wire which was imbedded in the street, fell to the ground, and was severely injured.

Held, that the defendant must assume the burden of proving that it did all that could be reasonably done to prevent the want of repair, and accepting the evidence of the plaintiff as to the manner in which the accident occurred, the defendant has not, in the circumstances, satisfied the burden of removing the presumption that it had failed in its duty, and is therefore liable in damages.

Statement

ACTION for damages for injuries sustained owing to a defect in a street. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 6th of September, 1927.

Brydone-Jack, for plaintiff.
McCrossan, and *Lord,* for defendant.

12th December, 1927.

Judgment

MACDONALD, J.: Plaintiff alleges that, on the 15th of August, 1923, while passing along Hastings Street, near its intersection with Renfrew Street in Vancouver, she tripped over an obstruction in the shape of some wire, which was imbedded in the street, fell to the ground, and was severely injured.

She bases her right, to recover damages for such injuries, upon the want of repair of the street and consequent negligence, on the part of the City, in failing to fulfil its statutory duty, outlined in the Vancouver Incorporation Act, as follows:

"Every public street, road, square, lane, bridge, and highway in the city shall, save as aforesaid, be kept in repair by the city."

The effect of this enactment was considered in *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194. The Chief

Justice in *City of Vancouver* v. *Cummings* (1912), 46 S.C.R. 457 referring to such case, at pp. 458-9, said:

"I agree with Mr. Justice Idington. The highway was under the control of the appellant corporation subject to a statutory duty to keep it in repair. *City of Vancouver* v. *McPhalen* [(1911)], 45 S.C.R. 194. It was for the jury to say whether that highway was out of repair by reason of some positive act done by the corporation, its officers, servants and others acting under its authority and whether or not the corporation was negligent. There was evidence upon which the case could be left to the jury upon both points. Assuming, as argued here, that the hole which caused the accident might have been made without the knowledge or consent of the city in view of the duty to repair which is imposed in absolute terms by the statute, the burden of explanation was on the appellants and they have not in any way attempted to meet it. I cannot think, in any event, that any authority given by the Legislature to a gas or water company to break up the streets was intended to relieve the municipality from the obligation to maintain them in a safe condition. The right of the company to open the streets was subject to the consent of the corporation and the latter was responsible for any act of the company which might cause the streets to be out of repair."

Idington, J., at pp. 461-2, said:

"Referring to the views I and others expressed in the *McPhalen* case [(1911)], 45 S.C.R. 194, and applying the principles set forth therein, and the amendment to the statute, is it not clear that, on such a statute as amended, when the facts demonstrate an actual want of repair, causing damage, an action is *prima facie* of necessity shewn to be well founded, because the statute has not been duly observed or complied with, and hence the party in default called upon to offer some excuse?"

Judgment

Then again Idington, J. in the *Cummings* case, *supra,* agreeing with the majority of the Court and still referring to the *McPhalen* case, said, at p. 462:

"*Prima facie* the duty is imperatively obligatory and its consequences can only be got rid of by some valid excuse for a failure to discharge the duty so imposed.

"This statute is just the same as any other in that regard. The obligation is not qualified by the statute itself in any way. The same principle of law must be adhered to in applying it as in applying other statutes imposing any like duty to repair.

"Notice to, or knowledge on the part of, the authorities of a want of repair never formed part of the statute."

He then refers to the American and Ontario cases with respect to notice or knowledge of non-repair being required to be proven by the plaintiff, who may be seeking to recover, by virtue of the statute, and considered that there were no Ontario authorities cited, which would carry the doctrine of notice or knowledge as far as had been submitted by the defendant Corporation in that

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case. Further, that if any such cases might be considered to have gone the length contended for, then that they should be discarded and that it was not sufficient to escape liability for the defendant Corporation to shew, that the defect was not known by its officials.

The defendant herein with a knowledge and appreciation of this state of the law, as to the streets of the City of Vancouver, submits that it has satisfactorily assumed the burden of explanation, as to any want of repair of its streets and thus evaded all responsibility, under the absolute terms of the statute. On this point, reference is made to a portion of a judgment of Idington, J. in the *Cummings* case at p. 466 as follows:

"No one would think of saying that when the forces of nature have suddenly destroyed or put out of repair a road, or someone has maliciously or negligently wrought the same result, and an accident has taken place as a result thereof, that the municipality must be held as insurers and so, regardless of all opportunity to have repaired the road so destroyed, be cast in damages. . . .

"The municipality is bound to take every reasonable means through its overseeing officers and otherwise, to become acquainted with such possible occurrences, and if it has done so can possibly answer the presumption."

Judgment

Before considering the effect of the *Cummings* case and the evidence offered by the defendant in support of a contention that it was relieved from responsibility, it might be well to refer to some Canadian cases with reference to the liability of a municipality, under circumstances similar to those here presented.

In *Boyle et ux.* v. *Corporation of Dundas* (1875), 25 U.C.C.P. 420 the plaintiff was walking along the sidewalk in the Town of Dundas and stepping into a hole broke her leg. The hole was close to her residence and she was well aware of its existence, but she said, she was unable to see it, in consequence of it being covered with snow. The jury found for the plaintiff and upon motion for a new trial, Hagarty, C.J. referred to the statutory obligation and the civil responsibility created thereunder, similar in that respect to the City of Vancouver. He mentioned the care which should be exercised in establishing the charge of negligence and said, *inter alia,* at pp. 425-6:

"It becomes a most serious matter for the municipalities of Canadian towns and villages to ascertain the measure of their responsibility. They

are doubtless bound to keep the public streets in reasonable repair. They are not legally bound to provide sidewalks, but if they do undertake their construction, they invite persons to use them, and are doubtless bound not to allow them to become dangerous to such persons. They make them a part of the public street, and the obligation to repair must apply equally to all parts.

"I cannot understand that it follows necessarily that because there may be a hole in a plank sidewalk, like that here described, and a person accidentally trips or steps into it and is injured, that damages are recoverable. They do not become insurers of persons.

"There must be some clear dereliction of duty, some unreasonable omission to fulfil a statutable requirement. . . . Every one using a sidewalk must take on himself a certain amount of risk. To acquire a cause of action he must shew an injury resulting from the walk being left in a dangerous state of non-repair.

"I see a great difficulty in laying down any hard and fast rule.

"We all know that small breaches in the surface of sidewalks are of every-day existence in every town.

"It is unreasonable to hold that a corporation neglects its duty, merely because such a breach or hole may be found in some street.

"The question should, I think, always be as to the general performance of their duty, rather than an isolated instance of fault."

A number of cases were then cited and it concludes with the then position of the law as follows (p. 427):

"The result of all the authorities that I have seen is that the question of the state or sufficiency of repair is always for the jury."

Judgment

A new trial having been granted in this case and the jury having answered questions submitted, Hagarty, C.J. (1876), 27 U.C.C.P. 129 at p. 132, in appeal, considered that they amounted to a finding that the

"sidewalk was not in that ordinary state of repair that was reasonable to expect from a municipality of the size and population of Dundas."

The Court based its judgment, affirming the judgment for plaintiff, on the ground that the municipality had failed in its duty through the fact that the "sidewalk" was not in a reasonably sufficient state of repair. Conversely, if it had been in a reasonably sufficient state of repair there would have been no liability.

Defendant submits, however, that aside from the question of repair or non-repair there is a distinction to be drawn as to the liability of a municipality, where the obstruction on the street, terming it such in this case, and causing non-repair, was created by a third party. In this respect, I am quite satisfied that, neither the defendant nor its officials nor employees placed the

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obstruction which caused the accident upon the street, nor did they have actual knowledge of its existence.

In *Castor* v. *Corporation of Uxbridge* (1876), 39 U.C.Q.B. 113, Harrison, C.J. discusses at length and cites numerous authorities, dealing with the question of responsibility of a municipality for damage caused to travellers by obstructions, placed upon the highway by wrongdoers, of which obstructions the corporation had, or ought to have had, knowledge. After referring to the statutory obligation upon the municipality to keep its streets in repair and that such enactment

"ought to receive such fair, large, and liberal construction and interpretation, as will best ensure the attainment of the object of the Act, according to its true intent, meaning, and spirit"

states that

"the object of the Act is the safety and convenience of the public when lawfully using the highways of the municipality":

see p. 122.

Such statute does not prescribe any standard of repair

"nor does it in any manner declare what is to be deemed non-repair. It would not be practicable for the statute to do so. . . . The question whether a highway is in repair or not at the time of the occurrence of an accident is, in general, a question of fact in the determination of the question of liability."

Judgment

He then concludes:

"It is necessary to take into account the nature of the country, the character of its roads, the care usually exercised by municipalities in reference to such roads, the season of the year, the nature and extent of travel, the place of the accident, and the manner and nature of the accident."

In *Rice* v. *Town of Whitby* (1898), 25 A.R. 191 the case of *Castor* v. *Corporation of Uxbridge* was not overruled, but some of the remarks of the learned judge were disapproved of, though not in reference to the extracts, to which I have referred. The liability sought to be created, arose out of a house being moved from one part of the town to another and allowed to stand overnight, upon one of the streets without a watchman or warning light. It was held that, assuming the house was an obstruction to the highway, still, there was not sufficient notice or sufficient lapse of time to impose liability upon the corporation. This case is in line with others decided in Ontario upon the question of notice, but cannot lend support to the defendant's position in view of the *Cummings* case. The matter, however, is worthy of

mention as shewing the trend of decisions in the direction of requiring fulfilment by a municipality of its statutory obligations, as to keeping its streets in repair and only being relieved under particular circumstances.

In *McNiroy* v. *Town of Bracebridge* (1905), 10 O.L.R. 360, Boyd, C. drew a distinction between the facts there present and those existing in *Durochie* v. *Town of Cornwall* (1893), 23 Ont. 355 and based his judgment on the comparatively short time, during which the defect in the sidewalk complained of existed, and that it had not been noticed by any officer of the municipality. He referred to the fact that the matter of notice had been somewhat discussed by the Court of Appeal in *Rice* v. *Town of Whitby, supra,* and mentioned that the defect in question

"was slight in character—not conspicuous nor notorious—on a street comparatively little frequented and one over which there was periodical supervision (apparently weekly). Altogether I think there was reasonable vigilance on the part of the town in looking after the state of this particular walk, and that the defect which existed ought not to be charged against the corporation as an act of negligence."

In *Labombarde* v. *Chatham Gas Co. and City of Chatham* (1905), 10 O.L.R. 446 the facts were very similar to those here presented. It appeared that

Judgment

"the defendant company's workmen, while straightening a pole to which a guy wire was attached, cut the wire, allowing it to hang loose, and, either by those workmen, or some third party, as to which there was no evidence, it was thrown across a power wire so as to become a live wire, whereby the plaintiffs coming in contact therewith were injured."

Anglin, J. held that the gas company was liable, but that the city was in nowise responsible, even though the accident had occurred in the manner mentioned.

In *Williams* v. *Town of North Battleford* (1911), 4 Sask. L.R. 75, the statute, as to repair of streets, there considered, was similar to that in force in this Province and it was held that, in determining the liability of municipalities, to keep highways in repair, the local conditions should be considered and, having regard to these conditions, the roadway in question was in such a reasonable state of repair, that those desiring to use it, might do so, with reasonable care.

Wetmore, C.J. refers to a portion of the judgment of Patterson, J.A. in *Maxwell* v. *Township of Clarke* (1879), 4 A.R. 460 at p. 465 where he states:

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"This expression [meaning the words "keep in repair"] has been construed by the decisions of our Courts, in conformity with the construction given to similar enactments in several of the States of the neighbouring Union, to require the highway to be maintained in a condition reasonably sufficient for the locality, having regard to the ordinary amount of travel, the circumstances of the municipality, and other matters naturally entering into such an inquiry."

To the same effect, reference was made to the judgment of Armour, C.J. in *Foley* v. *Township of East Flamborough* (1898), 29 Ont. 139 at p. 141 where he states, as follows:

"The word 'repair,' as used in the Municipal Act, has been held to be a relative term; and to determine whether a particular road is or is not in repair, within the meaning of the Act, regard must be had to the locality in which the road is situated, whether in a city, town, village or township, and if in the latter, to the situation of the road therein, whether required to be used by many or by few, to how long the township has been settled, to how long the particular road has been open for travel, to the number of roads to be kept in repair by the township, to the means at its disposal for that purpose, and to the requirement of the public using that road. All these matters are to be taken into consideration, and from them is to be deduced the quality of the repair necessary to comply with the terms of the Act. And I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied."

Judgment

Then *Scott* v. *Calgary* (1926), 4 D.L.R. 1013; (1926), 3 W.W.R. 722 was cited as supporting the defendant's position but it is worthy of note that the statute in Alberta differs from our Province as only requiring the municipality to keep its highways

"in a reasonable state of repair having regard to the character of the highway and the locality in which the same is situated or through which it passes."

So that this decision does not afford the same assistance as it might otherwise, in coming to a conclusion. It refers to the *Cummings* case and states that the learned judge

"[did] not desire to be understood as deciding what might be the result if the city had permitted the obstruction to remain on the street with or without knowledge of its existence or without inspection, for an unwarranted length of time."

The case of *Jamieson* v. *City of Edmonton* (1916), 54 S.C.R. 443; (1917), 1 W.W.R. 1510 was also referred to and there the Supreme Court, following its decision in *City of Vancouver* v. *McPhalen, supra,* held the municipality liable even with the difference existing between the Provinces, upon the question of

repair, which I have already mentioned. In that case the hole in the sidewalk, which was the direct cause of the action, was only allowed to remain unrepaired for 24 hours and the city police, whose duty it was to report such conditions, had passed the place frequently.

Upon the question of liability, as against a corporation for want of repair, a short discussion of the law, in that respect, pertaining to the United States may be interesting.

In McQuillan on Municipal Corporations, Vol. 6, p. 5601 there are cases cited, supporting the proposition, that the municipality "is never an insurer against accidents nor a guarantor of the safety of travellers on its streets." The case of *Brennan* v. *City of Streator* (1912), 100 N.E. 266 is cited as so deciding

"a municipal corporation is not under the obligation to keep its streets absolutely safe for persons passing over any part of them. Its duty is only to exercise ordinary care to keep its streets and sidewalks reasonably safe for persons using them who are themselves exercising ordinary care."

Then again, in *Yeager* v. *City of Bluefield* (1895), 21 S.E. 752, it was held in effect that the liability of cities for injuries by reason of streets being out of repair was not absolute. The law was stated to be in McQuillan p. 5602, that

"a plaintiff must shew, in order to recover, not that an injury has happened, which no one would have anticipated, but that there were conditions such that the authorities, in the exercise of proper care, ought to have realized that there was danger of an injury, and to have taken precautions to prevent it."

Judgment

Negligence being the basis of the right to recover, the next question to consider would be, as to what negligence supports a liability or, to put it in other words, how careful and painstaking must a municipality be. Then the text-writer answers this query by stating, that "the degree of care should be reasonable, *i.e.*, ordinary care is required" but adds:

"The degree of care never changes, but the amount of care which must be used to constitute ordinary or reasonable care varies according to the circumstances of the particular case, unless otherwise provided by the statute."

The case of *Butler* v. *Village of Oxford* (1906), 186 N.Y. 444; 79 N.E. 712 is referred to, as deciding that a municipality must use reasonable care and prudence in detecting and remedying any defect which it might be fairly anticipated would be dangerous and liable to cause an accident. A definition of what

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constitutes reasonable care is afforded, at McQuillan, *supra,* at p. 5603 as follows:

"It is held that the ordinary care required of a municipality as to its streets means that degree of care which might reasonably be expected from an ordinarily prudent person under the circumstances surrounding the party at the time of the injury. *Norman* v. *Teel* [(1902)], 12 Okla. 69, 69 Pac. 791 and a municipal officer cannot himself establish a standard of care by his previous work. Plaintiff need not shew that the way was 'unreasonably dangerous.' *Brown* v. *Pierce* [(1907)], 78 Neb. 623, 111 N.W. 366; *Fisher* v. *Geneseo,* 154 Ill. App. 288. Little satisfaction can be obtained however, from the general definition; but whether the street was reasonably safe at the time of the injury, is to be determined by the particular circumstances of each case. *Wilson* v. *City of Wheeling* [(1882)], 19 W. Va. 323, 42 Am. Rep. 780, and the question is a practical one, not calling for expert testimony. *Warren* v. *City of Independence* [(1900)], 153 Mo. 593, 55 S.W. 227; *Gable* v. *Kansas City* [(1899)], 148 Mo. 470, 50 S.W. 84. . . .

"The duty extends to reasonable care to keep the streets reasonably safe for travel in the ordinary modes by night as well as by day. . . . So a greater amount of care may be necessary where a thing in the street was erected by the municipality itself than when erected by others."

It is, however, contended that while American and Ontario decisions may be instructive, still they have no operative effect nor assistance as a guide, in determining the law in this Province on the point in question.

Judgment

Then has the law, as to the liability of a municipality with respect to its streets being kept in repair, and, assuming similar statutory provision, changed since *Boyle et ux.* v. *Corporation of Dundas, supra,* was decided?

It is submitted by plaintiff that in view of the *Cummings* case, the *Boyle* case and other decisions of a like nature should not be followed in determining the liability of the defendant.

The effect of the *Cummings* case and also the *Jamieson* case, *supra,* was considered in *Sandlos* v. *The Township of Brant* (1921), 49 O.L.R. 142. At p. 152 Riddell, J. considered the *dictum* of Idington, J., *supra,* and referred to it, in the following terms:

"We therefore have it authoritatively stated by the head of our ultimate Court of appeal in Canada that the statement of the law by Mr. Justice Idington is that of the Supreme Court."

And then added:

"The result is that 'in all cases where the accident has arisen from the . . . apparent wearing out or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected.' The present

is such a case; and we must, I think, in loyal obedience to the Supreme Court, hold that a presumption has arisen that the duty of the defendants relative to repair has been neglected.

"The presumption is of course not *juris et de jure*, but it is rebuttable. The defendants did not meet the presumption by evidence shewing that they did all that could reasonably be done to prevent the want of repair occasioning the accident."

The sole question remaining to determine is, whether the defendant herein afforded evidence, that "it did all that could be reasonably done to prevent the want of repair," which I find existed and caused the accident. It had to assume the burden of explaining such lack of repair and has it done so by satisfactory evidence? An attempt was made towards this end through the evidence of Martin Moran, who is district superintendent for the ward or district which includes the portion of the city where the accident occurred, but his evidence, however, was very indefinite, although he had cognizance of the claim made by the plaintiff shortly after the accident. He stated that he had no knowledge of the obstruction or trap which caused the accident. The defendant, however, failed to call Mr. Cobbleday, the foreman in charge of the street at that particular locality. He would have been a material witness to shew the extent of the inspection of the streets and sidewalks at that point, especially in view of the increased pedestrian traffic at that time, on account of the Vancouver Exhibition held in the adjoining park. There was no evidence as to why this wire was negligently left on the ground nor when the work had taken place which presumably left the wire and caused the accident. I might discuss this phase of the situation at greater length but I have given the whole matter close consideration and come to the conclusion that the defendant has not, under the circumstances, accepting, as I do, the evidence of the plaintiff, as to the manner in which the accident occurred, satisfied the burden of removing the presumption, that it had failed in its duty. The statutory obligation, as defined in the *Cummings* case, was not performed and the result of such neglect has not been "got rid of by some valid excuse."

Judgment

Defendant is thus liable for damages. It remains to determine the amount of special and general damages, to which the plaintiff would be entitled. It is difficult to estimate, with any

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degree of accuracy, the loss of time, amount of expense and the extent of the pain and suffering occasioned to the plaintiff by the accident and measure them in a monetary way. I think a reasonable amount to allow as damages would be $1,000. Plaintiff is also entitled to her costs.

Judgment for plaintiff.

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Dec. 1.

REX v. LEE FOON

REX v. LEE FOON.

Criminal law—Charge of attempted murder—Verdict—"Guilty of wounding with intent to do bodily harm"—Interpretation—Common assault—Criminal Code, Sec. 264 (b).

On a charge of unlawfully wounding with intent to murder, the jury brought in a verdict "guilty of wounding with intent to do bodily harm."

Held, to be a verdict of common assault.

APPEAL by accused from a conviction at Prince Rupert by MCDONALD, J. on the 10th of November, 1926, on the verdict of a jury, on a charge of attempted murder, the accused being sentenced to four years' imprisonment. The learned judge charged the jury that they might find the accused guilty either of the charge laid or of a charge of "wounding causing actual bodily harm" or for common assault. The jury's verdict was "guilty of wounding with intent to do bodily harm."

Statement

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

Stuart Henderson, for accused: The learned judge took the verdict as one of "attempted murder" under section 264 (*b*) of the Criminal Code and sentenced accused to four years' imprisonment. My submission is that without the word "grievous" the verdict is simply one of common assault and the sentence cannot exceed one year. The evidence shews that the wound was not of a serious character.

Argument

Johnson, K.C., for the Crown: The evidence shews the

accused used an axe in attacking the injured man although the accused himself said he used a knife in self-defence. This is sufficient to justify a verdict of attempted murder and the Court can exercise its powers under section 1016 of the Criminal Code.

Henderson, in reply: "Wounding" *solus* is common assault only: see *Rex* v. *Parks* (1914), 10 Cr. App. R. 50; *Rex* v. *Sharman* (1925), 19 Cr. App. R. 43; Roscoe's Criminal Evidence, 14th Ed., 306; *Rex* v. *Letenock* (1917), 12 Cr. App. R. 221.

Argument

Cur. adv. vult.

On the 1st of December, 1927, the judgment of the Court was delivered by

MACDONALD, C.J.A.: The prisoner was indicted for that "he unlawfully did wound one Chan Bow Hung with intent thereby then and there to murder the said Chan Bow Hung." The learned judge charged the jury that they might find the accused guilty either of the charge laid or of a charge of "wounding causing actual bodily harm, or for simply common assault." The jury's verdict was as follows:

Judgment

"Guilty of wounding with intent to do bodily harm."

Mr. *Henderson,* for the appellant, argued that this verdict can be construed only as a verdict of common assault, as its language is more akin to the definition of common assault than to any other section of the Criminal Code. This is the opinion of the Court. The conviction will therefore be amended to one of common assault and the sentence reduced to one year's imprisonment.

Appeal allowed in part.

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1928

Jan. 10.

CANADA PERMANENT MORTGAGE CORPORATION v. DALGLEISH

CANADA PERMANENT MORTGAGE CORPORATION v. DALGLEISH AND CANADIAN BANK OF COMMERCE.

Writ of summons—Action by mortgagee—Order appointing receiver—Service of order on one defendant—Writ not served on either defendant and expires at end of year without renewal—Authority of receiver after expiration of writ—Marginal rule 45.

A first mortgagee brought action for taking accounts, foreclosure and possession of the mortgaged premises and on the same day an order was obtained appointing a receiver. The order was served on the defendant Dalgleish but the writ was never served on either of the defendants and not being renewed, expired at the end of the year. The receiver managed the mortgaged premises for three years making a profit for the first year but operating at a loss for the second and third years. Two years after the first writ had expired a new writ was issued at the instance of the plaintiff for the same cause of action against the same parties. On motion for liberty to enter judgment an order *nisi* was obtained and pursuant thereto accounts were taken by the registrar who refused to include the losses during the second and third years of the receiver's incumbency of the mortgaged premises. An order was then made setting aside the registrar's certificate and that the accounts be taken anew to include the losses aforesaid.

Held, on appeal, affirming the order of HUNTER, C.J.B.C. (MACDONALD, C.J.A., and GALLIHER, J.A. dissenting), that although the writ had not been served on either of the defendants nor renewed within twelve months under marginal rule 45 the authority of the receiver continued after the expiration of the twelve months and the losses in managing the mortgaged premises during the second and third years of his being in charge should be included in the accounts taken by the registrar.

APPEAL by defendants from the order of HUNTER, C.J.B.C. of the 28th of June, 1927, that the certificate of the deputy district registrar of the 10th of June, 1927, on the taking of accounts be set aside and that the accounts directed to be taken by the judgment herein of the 24th of March, 1927, be taken anew before the registrar at Vancouver. The plaintiffs held a first mortgage on 480 acres of land in Yale district owned by the defendant Dalgleish for $10,000, the defendant the Canadian Bank of Commerce holding a second mortgage on the property. The plaintiff Company issued a writ against the defendants on the 29th of February, 1924, the endorsement

Statement

thereon asking that an account be taken of moneys due on the said mortgage, for foreclosure and appointment of a receiver in respect of the mortgaged lands. On the same day an order was made appointing a receiver and served on the defendant Dalgleish on the 22nd of March, 1924, but the writ was never served on either of the defendants and was not renewed. The receiver took charge of the property and made a small profit in the first year but in both the second and third years there was a heavy loss. The plaintiff issued a new writ on the 3rd of February, 1927, against the same parties for the same relief and then obtained an order for the taking of accounts. Before the deputy registrar the plaintiff claimed it was entitled to add the loss in management of the property by the receiver during the second and third years to the mortgage debt, but this was refused and on appeal to the Chief Justice of British Columbia it was held that the deficiency for said two years should have been added to the mortgage debt. The defendants claimed that on the expiration of the first writ the receiver was no longer legally in control and any losses in management after the expiration of the writ could not be added to the first mortgage debt.

Statement

The appeal was argued at Vancouver on the 10th and 11th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Davis, K.C., for appellant Bank of Commerce: The case turns on marginal rule 45. The writ was never served and expired at the end of one year. When the writ expired the order appointing a receiver was no longer in force. He carried on during the second and third years without authority: see *Salter* v. *Salter* (1896), 65 L.J., P. 117; *Webster* v. *Myer* (1884), 14 Q.B.D. 231; *Manby* v. *Manby* (1876), 3 Ch. D. 101 at p. 103; *Richardson* v. *Daly* (1838), 4 M. & W. 384; *Graham* v. *McLean and City of Toronto* (1921), 20 O.W.N. 295. The case relied on by the other side, *In re Kerly, Son & Verden* (1901), 1 Ch. 467 is no guide here as the writ was served: see also *Coates* v. *Sandy* (1841), 2 Man. & G. 313.

Argument

Hossie, for appellant Dalgleish, adopted the argument of *Davis*.

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CANADA PERMANENT MORTGAGE CORPORATION v. DALGLEISH

Alfred Bull, for respondent: Dalgleish knew all about the first action as he worked under the receiver on his own property. That the order for a receiver is good until set aside see *Brigman* v. *McKenzie* (1897), 6 B.C. 56; *West* v. *Downman* (1879), 27 W.R. 697. As to the rule of Court although the writ ceases to be effective at the end of the year this only applies to service but for any other purpose it is efficacious and the action does not die: see Annual Practice, 1927, p. 53; *Richardson* v. *Daly* (1838), 4 M. & W. 384; *Hamp* v. *Warren* (1843), 11 M. & W. 103. The position is substantially the same as the old plea in abatement: see Kerr on Receivers, 8th Ed., 234; *Cottingham* v. *O'Reilly* (1825), 1 Hog. 49; *Newman* v. *Mills, ib.* 291; *Brennan* v. *Kenny* (1852), 2 Ir. Ch. R. 579. Even if the appointment ceased at the end of the year, the receiver is there as agent of the plaintiff, the mortgagee, *i.e.*, a mortgagee in possession: see *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Company* (1879), 4 App. Cas. 391 at p. 409.

Argument

Davis, in reply: Dalgleish and the Bank of Commerce are entirely distinct as the Bank is a second mortgagee. The fact that the receiver was appointed and passed accounts does not put the mortgagee in possession. When the year is up the action is at an end, unless the defendant agrees to its not being at an end, but there was no such agreement. What was cited on abatement is mere *dicta* and is a question of law, not of practice.

Cur. adv. vult.

10th January, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Rule 45 of the Supreme Court Rules declares that no writ of summons shall be in force for more than twelve months from the issue thereof, but that if any defendant has not been served the writ may be renewed and the renewed writ shall have the same force and effect as the original one.

In this case there were two defendants. The writ was issued but was not served on either of them. A receiver was appointed for the mortgaged premises *ex parte,* and remained for three years in possession of the mortgaged property. It was not contended and therefore it is not necessary for me to express an opinion upon it, that the writ did not support the receivership

during the first year of its existence. It was contended, however, that after the expiration of the year, there being no renewal, the receiver's authority to remain in possession as receiver, had expired, and that what he did thereafter was not binding upon the unserved defendants. No attempt has ever been made to renew the writ, but on the contrary, after three years, the plaintiff issued another writ for precisely the same cause of action, and is now proceeding for foreclosure under the second writ. *In re Kerly, Son & Verden* (1901), 1 Ch. 467, was relied upon by counsel for the receiver. The expressions there are that the writ remained in force after the expiration of the year available for some purposes. The *Kerly* case, while not in point here, since the Court held that the writ had been properly served and did not require renewal, yet throws some light upon the question we are called upon to decide. It may be at once conceded that the writ is not inoperative for all purposes at the end of the year. For example, one or more defendants in an action may have been served leaving one or more unserved, as to those who were served the proceedings under the writ remain good notwithstanding the rule, but to say that the defendants who have not been served are bound after the expiration of the year and although there never has been or never will be a renewal of the writ, is a proposition which I cannot accede to.

MACDONALD, C.J.A.

It may be that had the plaintiff gone into possession as mortgagee or had he remained in possession after the expiration of the writ, as mortgagee, the accounts might be taken on that footing. But he has not done so, on the contrary, he has insisted all through that the possession is the possession of the receiver and when he issued his new writ his prayer was for foreclosure and for a receiver. That is to say, for a receiver subsequent to the issue of the writ.

The order appealed from is a futile one. The registrar in his report shews that he proceeded on the assumption that after the expiration of the year the receiver was a trespasser. The learned judge on motion to vary or to remit it to the registrar made an order remitting it to him, to take accounts anew. No directions are contained in that order to the registrar as to the footing upon which the accounts are to be taken. The appel-

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lant therefore was justified in appealing from it. In my opinion, he ought to succeed in the appeal. I would therefore allow it with costs.

CANADA PERMANENT MORTGAGE CORPORATION v. DALGLEISH

MARTIN, J.A.: By this appeal it is sought, in effect, to have it declared that an order for a receiver made while the writ was in force though not served, automatically became of no force and effect when the writ was not renewed in accordance with rule 45, which declares that:

"No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a Judge for leave to renew the writ; and the Court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for twelve months from the date of such renewal inclusive . . . and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

MARTIN, J.A.

An Ontario decision of Middleton, J., in Chambers, in *Graham* v. *McLean and City of Toronto* (1921), 20 O.W.N. 295, was cited wherein it was said that "where the writ is allowed to lapse by reason of want of service the action automatically ends" but no authority is cited in support thereof and it is contrary to the *ratio decidendi* of a long line of decisions which are considered and, if I may say so, properly applied by the Saskatchewan Court of Appeal in the very recent case of *Morrison* v. *Bentall* (1927), 3 D.L.R. 822, a report of which has come to hand since the argument. As early as 1841 at least (under the existing section 10 of Cap. 39, 2 Wm. IV.) the Court of Exchequer decided in *Pearce* v. *Swain* (1841), 7 M. & W. 543; 151 E.R. 882; that as Lord Abinger, C.B. put it (p. 544):

"The first writ of summons is not absolutely defunct at the end of the four months, but is only so for the purpose of preventing the suspension of the Statute of Limitations."

This is in accordance with the principle laid down by the same Court in the earlier case of *Richardson* v. *Daly* (1838), 4 M. & W. 384, wherein it was declared, *per* Baron Parke (in overruling the objection that a *cognovit* could not be given after

four months because there was "then no valid writ in existence,") that:

"If a defendant chooses voluntarily to come into Court and give a *cognovit* after the writ has ceased, from lapse of time, to be in force against him, surely it is competent to him to do so, since the only object of the writ is to bring him into Court."

It is this principle (that the service within the prescribed time is only an irregularity and not a nullity) that was approved in *In re Kerly, Son & Verden* (1901), 1 Ch. 467; 70 L.J., Ch. 189, by Mr. Justice Farwell when he appropriately, in my opinion, made the following observations in deciding a cognate question under the English rule which ours follows, *viz.* (pp. 471-2):

"The respondents' first point is that there is no writ now to which he can appear. For that Order VIII., r. 1, is relied on. [His Lordship read the rule, and continued:—] In my opinion that means that the original writ of summons shall be in force for the purpose of service for twelve months and no more, not that the writ loses all its efficacy altogether for every purpose: *e.g.*, if the writ be issued and appearance be entered, and the parties arrange, or without arrangement, allow the matter to drop for eighteen months, in my opinion the writ still remains and is efficacious, and the statement of claim may go on subject, of course, to the provisions of Order LXIV., r. 13. The first point, therefore, in my opinion, is not a sound one."

MARTIN, J.A.

On appeal his decision was affirmed, and though Rigby, L.J. did not deal with the rule thinking it "has no application at all" (476), yet Stirling, L.J. (478) dealt specifically with the objection that the "writ is spent" and said:

"It provides that 'no original writ of summons shall be in force for more than twelve months from the day of the date thereof.' That, it is conceded, does not mean that the writ is not to be in force for any purpose, but only that it is not to be in force for the purpose of service."

His expression "it is conceded" is to be noted, and the submission by respondents' counsel (475) on this point was that,—

"The plaintiff can always apply to renew the writ after the expiration of the one year, which he could not do if it were dead altogether."

It is this principle that the Saskatchewan Court of Appeal properly applied in the *Morrison* case, *supra,* in which a solicitor's undertaking to appear to a writ was enforced though it was given in ignorance of the fact that the time for service had expired, because such a defect could be waived since it was an "irregularity" merely. And even under the old practice it is so laid down by text-writers of the highest repute, *e.g.*, Lush's

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Practice (1865), Vol. I., p. 369, where it is said "if the writ be served [after time] he should not treat it as a nullity but should apply to the Court to set the service aside."

Upon the principle of the rule, therefore, I am of opinion, that the appeal should be dismissed.

GALLIHER, J.A.: I agree with the Chief Justice after a full consideration of the authorities referred to in his reasons for judgment, and of the circumstances of this case.

MCPHILLIPS, J.A.: I would dismiss the appeal. The order made by the learned Chief Justice of British Columbia is a discretionary order and not in any way wrong in principle, therefore it should stand, in my opinion with great respect to all contrary opinion.

MCPHILLIPS, J.A.

An order was made in the action under date the 28th of February, 1927, appointing a receiver in the action, and in my opinion, it was right and proper that the certificate of the deputy district registrar should be set aside and that the certificate to be later made should contain the account of the receiver relative to the mortgaged premises so that the Court might have all the accounts before it when ultimately deciding the question as to the basis upon which the mortgage accounts should be allowed that being a matter for after determination. I would therefore dismiss the appeal.

MACDONALD, J.A.: Appeal from an order of the Chief Justice of British Columbia setting aside a certificate of the registrar on the taking of accounts under a mortgage.

A writ was issued by the respondent on the 29th of February, 1924, to have accounts taken of moneys due for principal, interest, etc., for foreclosure and possession of the mortgaged lands and for a receiver.

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On the same day, by order based upon a petition supported by affidavit and the writ referred to, a receiver was appointed to receive the rents and profits, manage the mortgaged premises, take all necessary steps to put the premises in condition so that the annual crops might be obtained and to secure and market the crop. It also provided for necessary advances to be made if any deficiency occurred through the proceeds being less than

outlays such deficiency to be added to the mortgage debt. The appellant Dalgleish was the mortgagor while the appellant Canadian Bank of Commerce held a second mortgage on the same property. The receiver order was served on Dalgleish on March 21st, 1924, but not on the Canadian Bank of Commerce, while the writ itself was not served on either defendant. Any illegal additions to the mortgage debt would of course affect the second mortgage.

During the first year the mortgaged property was operated at a profit but a loss ensued in the two succeeding years and the right of the respondent to add the losses to the mortgage debt is in issue in this appeal. It was submitted that no such right exists because the writ was not served within twelve months or renewed as required by marginal rule 45 and therefore lapsed at the end of that period, the receiver order falling with it. That is the contention of the appellants on this appeal.

On February 3rd, 1927, a new writ was issued asking to have accounts taken, a personal judgment against Dalgleish, foreclosure and possession followed by the usual statement of claim and in this new action, on motion for liberty to enter judgment as prayed for, an order *nisi* was obtained. It was pursuant to this order that accounts were directed to be taken by the registrar. The registrar found a sum of $6,595.94 due the respondent. It was his certificate shewing this amount due, made up without regard to the losses referred to, that was set aside by the order appealed from.

It is conceded that a receiver can only be appointed where there is a suit pending. The original writ therefore gave the receivership order validity. Did the authority of the receiver continue after the expiration of twelve months from the issue of the writ?

Referring to marginal rule 45, it is to be observed that it deals not with the validity of writs not served within twelve months but with the method of renewal. The effect of the renewal is dealt within the last four lines of the rule but I cannot find, as submitted to us, that this part of the rule is a conclusive factor in reaching a decision herein. The first part of the rule does not mean that "no original writ of summons shall be in force for more than twelve months from the day of

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the date thereof." It only means that it cannot be served afterwards without renewal. It loses its validity for one purpose, not for all purposes. Notwithstanding the use of the word "shall" in the first line of the rule, the Court or judge has power under marginal rule 967 to enlarge the time for doing any act even although the application is not made "until after the expiration of the time appointed or allowed." It is stated in the Annual Practice, 1927, p. 54, that the Court has the power to enlarge time even in the case of a writ unserved within twelve months although the practice is not to do so. If, however, the writ died at the end of twelve months for want of service an order enlarging time could not resuscitate it. It follows that it is an effective writ for some purposes. The question is, does it support the jurisdiction of the receiver to act under an order validly made in the first instance?

The cases shew that, if an unserved defendant after twelve months comes into Court and voluntarily appears, the action may proceed because as Parke, B. stated in *Richardson* v. *Daly* (1838), 4 M. & W. 383, "the only object of the writ is to bring him into Court." I do not think it is an answer to say that although the unserved defendant by his voluntary act may make the writ operative yet because the plaintiff is powerless to proceed the writ has no real efficacy. That is not a *sequitur*. Whatever efficacy the writ possesses is not determined by the action of either parties. If a defendant, after twelve months, requests service of the writ to avoid the expense of a new one, he cannot afterwards complain of irregularity or successfully say that the writ was a nullity. *Coates* v. *Sandy* (1841), 2 Man. & G. 313.

There is no question that the order of receivership was validly made in a pending suit. It is still a pending suit after the expiration of twelve months without service. The omission of the process of service does not make the writ a nullity, and if it is not a nullity neither is the order. Whether or not it could be set aside is another question. It was not set aside. In fact one of the defendants upon whom it was served identified himself to some extent at all events with the receiver in acting under it. It was held in *Brigman* v. *McKenzie* (1897), 6 B.C. 56, that even an *ultra vires* order is not a nullity but is

valid until set aside by the Court. Whether or not this view is correct an order made with jurisdiction is valid till discharged. *West* v. *Downman* (1879), 27 W.R. 697 supports this view. I agree too with Mr. *Bull's* submission that the principle is analogous to that involved in the abatement of actions yet, as pointed out by Kerr on Receivers, 8th Ed., p. 234, the abatement of an action in which a receiver has been appointed

"does not determine the appointment, or suspend the receiver's authority to proceed against the tenants. His authority continues until an order is made for his removal."

Not only may a receiver continue to act until discharged where the action has abated; he may also do so even where the action has been stayed or actually dismissed (*Pitt* v. *Bonner* (1833), 5 Sim. 577); Halsbury's Laws of England, Vol. 24, p. 416:

"For though it be said that a receiver appointed in an action must stand or fall with the action yet there must be an order discharging the receiver (*White* v. *West-meath* (*Lord*) (1828), Beat. 174)."

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Unless by the order itself, therefore, the receiver is appointed for a limited time or "until judgment or further order" his office can only be terminated by an order of the Court "even though circumstances have rendered the appointment nugatory" (Halsbury's Laws of England, Vol. 24, p. 415).

I am of opinion, therefore, that the receiver acted with authority throughout and accounts should be taken upon that basis.

The appeal should be dismissed.

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

Solicitor for appellant Bank: *Ghent Davis.*
Solicitor for appellant Dalgleish: *D. G. Marshall.*
Solicitors for respondent: *Walsh, McKim & Housser.*

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REX v. WAKABAYASHI. REX v. LORE YIP.

Constitutional law — Criminal law — Conviction under The Opium and Narcotic Drug Act, 1923—Appeal—Property and civil rights—Statute creating new crime with licensing provisions—Can. Stats. 1923, Cap. 22.

The Opium and Narcotic Drug Act, 1923, is criminal and not licensing legislation. It is, therefore, *intra vires* of the Dominion Parliament.

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Statement

APPLICATIONS by way of *habeas corpus* proceedings. Both defendants were convicted of unlawfully selling cocaine and morphine and sentenced to three years' imprisonment. They now contest the validity of their imprisonment, claiming that The Opium and Narcotic Drug Act, 1923, with amendments, is *ultra vires* of the Dominion Parliament. Heard by MACDONALD, J. in Chambers at Vancouver on the 5th of January, 1928.

Wood, and *Wismer,* for defendants.

J. A. Russell, and *Nicholson,* for the Crown.

10th January, 1928.

MACDONALD, J.: Ichizo Wakabayashi pleaded guilty to unlawfully selling cocaine and morphine, without first obtaining a licence from the minister "contrary to the provisions of section 4 (*f*) of The Opium and Narcotic Drug Act, 1923, as amended by Sec. 3 of Cap. 20 of the Statutes of Canada, 1925." He was sentenced to a term of three years' imprisonment.

Lore Yip (*alias* Londe Fong) was convicted of a similar offence, under said section of the Act and was sentenced to a like imprisonment.

Judgment

Both these persons seek, through *habeas corpus* proceedings, to test the validity of their imprisonment.

Shortly stated, the basis of their applications is, that the said Opium and Narcotic Drug Act with its amendments, creating a crime and due punishment, is *ultra vires* of the Dominion Parliament and thus cannot support punishment thereunder.

When one considers, for a moment, that the traffic covered by such Act, in narcotics and improper use of opium and drugs, constitutes one of the greatest evils of modern times, and legis-

lative efforts have been made in all civilized countries to control, and, if possible, destroy this evil, the importance of these applications becomes apparent. In fact, the matter has been considered so important from the world's standpoint, that it was dealt with by the League of Nations.

It is conceded, on behalf of the applicants, that the Dominion Parliament might, under its power, to make laws, "for the peace, order and good government of Canada" enact criminal legislation, and declare that the sale or distribution of drugs, as defined by the Act, should be a crime and subject an offender to punishment. It is, however, contended that the framework of The Opium and Narcotic Drug Act is such, that it cannot be properly construed as an Act of the Dominion Parliament, of that nature. That its terms, as to licensing, shew an infringement of Provincial rights and not criminal legislation. In this connection, the history of the legislation upon the subject is instructive. The discussion which took place in Parliament cannot be used to explain the meaning of legislation, but in the construction of a later Act, the earlier one may be utilized, to throw a light upon the Act then being considered. It sometimes furnishes a legislative interpretation of the earlier one. See Maxwell on Statutes, 6th Ed., p. 51.

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In 1908, a short Act was passed by the Dominion Parliament (7-8 Edw. VII., Cap. 50) "to prohibit the importation, manufacture and sale of opium for other than medicinal purposes." This Act simply referred to "opium" and rendered persons violating its provisions guilty of an indictable offence and liable to imprisonment. This legislation remained in force until 1917, when it was repealed by a more extensive Act (2 Geo. V., Cap. 17) with a wider scope. It was, however, prohibitive and not of a licensing nature, and so termed, though extended in its operation. This Act was amended in 1920-1921. Then in 1923, the Act at present in force (13-14 Geo. V., Cap. 22) was passed and was still designated as intended "to prohibit the improper use of opium and other drugs." It has been subsequently amended, apparently with a view of more adequately coping with the evil, sought to be destroyed and imposing more severe punishment. It is worthy of note that the title to these Acts is prohibitory in its terms and not permissive, in the sense

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of licensing persons for a particular purpose: It is now settled law that the title of the statute is an important part of the Act: Lindley, M.R. in *Fielding* v. *Morley Corporation* (1899), 1 Ch. 1 at p. 3.

"The title of an Act may be referred to for the purpose of ascertaining generally the scope of the Act":

see Lord Macnaghten in *Fenton* v. *Thorley & Co., Limited* (1903), A.C. 443 at p. 447.

The Act in question has not heretofore, been the subject of attack on the ground of invalidity. Numerous convictions have occurred and imprisonments been imposed for violation of its provisions. Notwithstanding this situation and the consequences which would result from declaring the Act *ultra vires,* I should in considering the matter, bear in mind a portion of the judgment of Viscount Haldane in *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396 at pp. 400-1, *viz.*:

"It is always with reluctance that their Lordships come to a conclusion adverse to the constitutional validity of any Canadian statute that has been before the public for years as having been validly enacted, but the duty incumbent on the Judicial Committee, now as always, is simply to interpret the British North America Act and to decide whether the statute in question has been within the competence of the Dominion Parliament under the terms of s. 91 of that Act. In this case the Judicial Committee have come to the conclusion that it was not. To that conclusion they find themselves compelled, alike by the structure of s. 91 and by the interpretation of its terms that has now been established by a series of authorities."

Still the burden is cast upon the applicants of satisfying the Court, as to the invalidity of the statute. Selwyn, L.J. in *Smith's Case* (1869), 4 Chy. App. 611 at p. 614 said:

"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."

While The Opium and Narcotic Drug Act is not ambiguous in its terms, the rules, for construing an obscure enactment, are of assistance in determining the nature and effect of such legislation. These rules, as laid down in *Heydon's Case* (1584), 3 Co. Rep. 8 are referred to in Craies on Statute Law, 3rd Ed., at p. 91 as having been firmly established and continually cited with approval and acted upon. They are as follows:

" 'That for the sure and true interpretation of all statutes in general . . . . four things are to be discerned and considered. (1) What was the common law before the making of the Act. (2) What was the mischief and defect for which the common law did not provide. (3) What remedy the Parliament hath resolved and appointed to cure the disease of the

commonwealth. (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.'"

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Fletcher Moulton, L.J. in *Macmillan & Co.* v. *Dent* (1907), 1 Ch. 107 at p. 120, said:

"In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act—not only the common law, but the law as it then stood under previous statutes—in order properly to interpret the statute in question."

It is, and must be contended by the applicants, in order to succeed, that the Act in question was not intended nor does it provide a remedy for a "mischief" and "defect" nor "cure a disease of the commonwealth" by creating a statutory crime with adequate punishment, but is an attempt to licence a traffic and then incorporate criminal provisions as ancillary to a system of licensing those who dealt in certain drugs. It is submitted that this should be the proper construction of the Act.

The applicants, in this respect, seek to obtain their main support from the result of a submission to the Privy Council, as to the validity of the Dominion Liquor Licence Act (1883, 46 Vict., Cap. 30) commonly known, as the "McCarthy Act." While the reasons for the judgment are not available, still the conclusion reached and the grounds therefor are referred to in subsequent cases. Duff, J. in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), A.C. 328 at p. 341, after referring to the fact that the preamble to such Act recited, that it is desirable to regulate the traffic in the sale of intoxicating liquors and expedient that provision should be made in regard thereto "for the better preservation of peace and order" said:

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"The statute provided for a licensing system, and prohibited, among other things, the sale of liquor by unlicensed persons, and imposed penalties by way of fine and imprisonment, including, as the penalty for a second or subsequent offence, imprisonment at hard labour in the common jail. In the course of the argument the view was advanced that the statute could be regarded as an exercise of the jurisdiction of the Dominion in relation to the criminal law; nevertheless the statute was held to be *ultra vires* as a whole."

Viscount Haldane in *Toronto Electric Commissioners* v. *Snider, supra,* at p. 411, in this connection said:

"The McCarthy Act, already referred to, which was decided to have been

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ultra vires of the Dominion Parliament, was dealt with in the end of 1885." Compare *Attorney-General of Canada* v. *Attorney-General of Alberta* (1916), 1 A.C. 596.

Russell v. *The Queen* (1882), 7 App. Cas. 829 decided that, what is commonly known as the "Scott Act" was within the competence of Dominion legislation. It was submitted as an authority in support of the Act in question, but the effect of the decision, as lending assistance is questioned and the following citation of the judgment of Viscount Haldane in *Toronto Electric Commissioners* v. *Snider, supra,* at p. 412 is pertinent:

"It appears to their Lordships that it is not now open to them to treat *Russell* v. *The Queen* (1882), 7 App. Cas. 829 as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. Unless that is so, if the subject-matter falls within any of the enumerated heads in s. 92, such legislation belongs exclusively to Provincial competency."

Then does a comparison of the McCarthy Act, so termed, with The Opium and Narcotic Drug Act, afford the assistance contended for by the applicants? Such Act was undoubtedly, intended to regulate and license the liquor traffic throughout Canada and not to prohibit such traffic. All its punitive provisions were along these lines and to render such licensing system more perfect and feasible.

Judgment

Can The Opium and Narcotic Drug Act originating, as it did, as a prohibitory Act and supplemented by further enactments be now, also considered as Dominion legislation for the purpose of licensing a traffic in the use of drugs and invading the civil rights of the Province?

I should, in coming to a determination on this point, apply the rules in *Heydon's Case* and subsequent decisions along similar lines. Portions of the judgment in *Attorney-General for Ontario* v. *Reciprocal Insurers, supra,* at pp. 342-3 are also of assistance, *viz.*:

"In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid."

"Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways."

In an earlier judgment in *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (1922), 1 A.C. 191 at pp. 198-9 it was pointed out, that the Dominion had exclusive power to create new crimes

"where the subject-matter is one which by its very nature belongs to the domain of criminal jurisprudence."

And the judgment then concluded (p. 199):

"It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application."

Judgment

Then in *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502, an Act respecting the observance of Sunday passed by the Legislature of the Province of Quebec, was considered. It was decided that, upon a proper construction of such legislation, treated as a whole, it purported to create offences against criminal law and was thus not within the legislative competence of the Provincial Legislature under the B.N.A. Act, and invalid. The Chief Justice, in his judgment, after regretting that he had to come to the conclusion that the particular section in question was not a "local, municipal or police regulation" but legislation designated to promote public order, safety and morals" then stated as follows (p. 505):

"It must be accepted as settled that 'criminal law' in the widest and fullest sense, is reserved for the exclusive legislative authority of the Dominion Parliament, subject to an exception of the legislation which is necessary for the purpose of enforcing, whether by fine, penalty or imprisonment, any of the laws validly made under the 'enumerative heads' of section 92 of the British North America Act, 1867."

He then considered that the effect of the judgment of the Privy Council in *Attorney-General for Ontario* v. *Hamilton Street*

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Railway (1903), A.C. 524 was that the phrase "criminal law" in section 91 of the B.N.A. Act was free from ambiguity and that, "construed by its plain and ordinary meaning, it would include every such law as purports to deal with public wrongs, that is to say with offences against society rather than against the private citizen." Reference might be made at length, on this point, to the judgment in *Russell* v. *The Queen* (1882), 7 App. Cas. 829 but it will suffice to cite a portion at p. 839, as follows:

"Laws of this nature [Canadian Temperance Act] designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights."

Then the validity of an Ontario Act, as to its being criminal legislation or otherwise, was considered in *Regina* v. *Wason* (1889), 17 Ont. 58; (1890), 17 A.R. 221. While all the judges agreed, that the case turned "upon the true character and nature of the legislation" they came to diametrically opposite conclusions in the Divisional Court, but in the Court of Appeal unanimously adopted the view taken by Street, J. as to the Act being valid. As to the question there requiring decision some extracts from the judgments are apposite:

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"Is it an Act constituting a new crime for the purpose of punishing that crime in the interest of public morality? Or is it an Act for the regulation of the dealings and rights of cheesemakers and their patrons, with punishments imposed for the protection of the former?":

Street, J., 17 Ont. p. 64.

"If this be an Act merely to create offences in the interest of public morality, it may be argued that it is trenching on the forbidden ground of 'Criminal Law.' If it be, as I think it is, an Act to regulate the business carried on at these cheese factories, . . . I consider it to be within the powers given by the constitution to the Provincial Legislature":

Hagarty, C.J.O., 17 A.R. p. 231.

"The regulation of their dealings between the persons supplying milk, and the persons to whom it is supplied, was not only the primary object, but the sole object of the Legislature":

Burton, J.A., 17 A.R. p. 236.

"The Act . . . is to be regarded as one, the primary object of which is not the creation of new offences generally and the prevention of dishonesty among all classes in relation to the kind of dealings mentioned therein, but the regulation of the contracts and dealings between the parties in a particular business or transaction. It is, I consider, designed more for the protection of civil rights than the promotion of public morals or the prevention of public wrongs":

Osler, J.A., 17 A.R. pp. 241-2.

The principle of this case was recognized and adopted by the Supreme Court of Nova Scotia in *The Queen* v. *Halifax Electric Tramway Co.* (1898), 30 N.S.R. 469. Graham, E.J. in referring to a Provincial Act forbidding labour on the Lord's Day, submitted the following query as affecting the validity of the Act. Is it aimed at a public wrong or is it a "shall not" in respect of civil rights? He then applied the language of the Privy Council already referred to.

The same point arose for decision in *Attorney-General for Ontario* v. *Reciprocal Insurers, supra.* See p. 337 as follows:

"The question now to be decided is whether, in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the 'true nature and character' of the enactment: *Citizens' Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96; its 'pith and substance': *Union Colliery Co.* v. *Bryden* (1899), A.C. 580; and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject-matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinized in its entirety': *Great West Saddlery Co.* v. *The King* (1921), 2 A.C. 91, 117."

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The judgment of the Privy Council, as to the invalidity of the McCarthy Act was delivered in 1885, long prior to the Dominion legislation, now the subject of attack. Lord Blackburn in *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa* (1883), 8 App. Cas. 517, 526 said that the Courts

"ought in general, in construing an Act of Parliament, to assume that the Legislature knows the existing state of the law."

This assumption appears more weighty, when one considers that the judgment, with reference to the McCarthy Act, and its invalidity, on the ground that it licensed the liquor traffic throughout Canada, must have been a much discussed matter at the time and would presumably be in the mind of the members of Parliament when the prohibitory provisions, as to sale of drugs was extended, so as to provide for licensing a class who were allowed to sell under certain conditions. It was necessary to make such provision as the drugs mentioned in the Act were beneficial if properly administered.

When I view the "mischief" sought to be remedied and the manner in which this was to be accomplished, the state of the

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law, as it existed prior to the Act of 1923 and the nature of the remedy thus applied, I have no hesitation in holding, that the Act in question is criminal and not licensing legislation. The primary object was to create a crime and afford punishment for its infraction. The licensing provisions were necessary but did not affect the validity of the legislation. It was within the competence of the Dominion Parliament and did not invade the jurisdiction allotted to the Province by the B.N.A. Act.

While such legislation constituted a new crime, it was remedial, in order, if possible, to destroy an existing evil. It was for the promotion of "public order, safety and morals" and was enacted by Parliament for the public good. While not in doubt, as to the validity of the Act, I might add that it was entitled, under section 15 of the Interpretation Act, to receive such

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"fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit."

Both applications for release are refused and there will be orders accordingly.

Applications dismissed.

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

Section 2 (5) of the Court Rules of Practice Act Amendment Act, 1925, applies to the costs of an appeal from the County Court and the taxation is under the provisions of Appendix N of the Supreme Court Rules. *Robinson* v. *Corporation of Point Grey* (1926), 38 B.C. 54 followed.

MOTION to review taxation of costs of appeal from the County Court. Heard by MARTIN, J.A. in Chambers at Victoria on the 22nd of November, 1927. Statement

J. M. Macdonald, for the motion.
Molson, contra.

8th December, 1927.

MARTIN, J.A.: This is a motion by appellant (defendant) to review the taxation of his bill of costs in this Court which was allowed at $100. The action originated in the County Court of Vancouver wherein plaintiff got judgment for $197 with costs ($100) on the higher scale under section 122 (2) of the County Courts Act, R.S.B.C. 1924, Cap. 128, pursuant to a certificate granted under County Court Order XXII., r. 28, but the judgment was reversed by this Court and thereafter the learned judge below granted a like certificate to the defendant appellant. Said section 122 (2) provides that: Judgment

"In appeals under section 116, where the plaintiff claims a sum of, or a counterclaim is set up of, one hundred dollars or over, but not exceeding two hundred and fifty dollars, or the value of the subject-matter equals or exceeds one hundred dollars, but does not exceed two hundred and fifty dollars, the costs of any appeal shall not be allowed upon taxation at a greater sum than one hundred dollars."

The amount taxable, under subsection (1) on the lower scale in interlocutory and certain specified appeals (section 117) is $50.

Section 35 of the Court of Appeal Act, R.S.B.C. 1924, Cap. 52, provides that:

"The tariffs of costs and fees in force from time to time in respect of proceedings in the Supreme Court shall apply to proceedings in the Court of Appeal."

It is submitted that this section, which was first passed in

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SHRIMPTON v. INDAR SINGH

1921, Cap. 13, Sec. 2, repeals or supplants said section 122 (2) of the County Courts Act which was passed in 1905, Cap. 14, Sec. 122, though they both appear in and were re-enacted by the Revised Statutes of 1924 as cited *supra*.

In 1925 it was declared by the Court Rules of Practice Act Amendment Act, Cap. 45, Sec. 2 (5) that:

"Notwithstanding anything contained in the Supreme Court Act or in this Act, the taxation of costs as between party and party or solicitor and client shall be governed by, and the Registrar in any taxation of costs shall allow all such costs, fees, charges, and disbursements as are prescribed in Schedules Nos. 4, 5, and 6 of Appendix M, and Appendix N of the said Supreme Court Rules, 1925, or in any tariff in amendment thereof or substitution therefor prepared and approved from time to time by Judges of the Supreme Court."

This section was held to apply to appeals from the County Courts in *Robinson* v. *Corporation of Point Grey* (1926), 38 B.C. 54; (1926), 3 W.W.R. 783, wherein the learned Chief Justice of this Court considered the same question, in principle, that is in reality raised herein, and his query—"Does Appendix N in its scope and by its language apply to the costs of an appeal?"—can only relate to the "appeal" then being considered by him which arose in an important case out of a judgment of the County Court of Vancouver, *coram* GRANT, Co. J., which we reversed on the 11th of October, 1926. That decision should be followed by the other justices of this Court in cases where its principle is applicable as it is, in my opinion here, and the conclusion thereby arrived at is, if I may say so, fortified by an important fact not mentioned in this argument but which is that the 28th item of N expressly includes in (a) County Court appeals and fixes the tariff therefor.

Judgment

With reference to the decision of my brother GALLIHER, in *Cox* v. *Begg Motor Co.* (1921), 29 B.C. 531; (1921), 2 W.W.R. 150, largely relied upon by respondent, that is not questioned by the appellant but the subsequent change in legislation above recited has altered its result and application.

It follows that this motion should be allowed with costs, and the bill is referred back for taxation under the apt provisions of Appendix N.

Motion allowed.

DAVIES v. SCHULLI AND MULLIN.

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

1927

Dec. 15.

DAVIES v. SCHULLI

Practice—Costs—Appendix N—"Winding-up proceedings"—"The amount involved"—Meaning of.

The expression "winding-up proceedings" in the caption of Appendix N of the Tariff of Costs is used in its technical sense and means proceedings taken under the Winding-up Acts.

"The amount involved" does not necessarily mean the amount claimed. In the case of a contested action it means the amount really in issue between the parties.

APPLICATION for a review of taxation. The action was for a declaration that a partnership subsisted between the plaintiff and defendants in relation to certain coal lands in the Similkameen District wherein the two defendants and the plaintiff had a one-third interest each. They joined in developing the property to a certain extent and then a sale was made by the defendants, in whose names the property stood, for $35,000. It was held on the trial by HUNTER, C.J.B.C. that the plaintiff was entitled to a one-third interest in the partnership assets. The plaintiff submitted that the costs should be taxed under Appendix M, as the action was a winding-up proceeding and consequently was expressly excepted from Appendix N and alternatively that the amount involved in the action was the total value of the partnership assets, *i.e.*, $35,000, and therefore the costs should be taxed under column 4, Appendix N. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 22nd of November, 1927. Statement

H. I. Bird, for the application.

A. M. Whiteside, contra.

15th December, 1927.

HUNTER, C.J.B.C.: As to the first point: The expression "winding-up proceedings" in the caption of Appendix N would no doubt, in its wider sense, include winding-up partnerships and estates handled by trustees whether solvent or not. But, in my opinion it is used in its technical sense and means proceedings taken under what are commonly called "the Winding-up Acts." Judgment

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As to the second point: "The amount involved" does not necessarily mean the amount claimed. In the case of a contested action it means the amount which was really in issue between the parties. Here it was a third of the partnership assets.

I, therefore, think that the application fails and must be dismissed with costs.

Application dismissed.

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

1928

Jan. 6.

IN RE CHINESE IMMIGRATION ACT AND LEE CHOW YING

IN RE CHINESE IMMIGRATION ACT AND LEE CHOW YING.

Habeas corpus—Chinese girl—Held for deportation—Claims she was born in Victoria—Application for release by habeas corpus refused—Appeal dismissed—Further writ of habeas corpus issued on new evidence—Further inquiry ordered—Can. Stats. 1923, Cap. 38, Sec. 38.

Where an inferior Court is acting within its jurisdiction the Superior Court has no power at common law to assume the function of an appellate Court and review its conclusions by means of a writ of *habeas corpus* either with or without *certiorari*, but the controller of Chinese immigration does not come within the ordinary meaning of the word "Court." Moreover section 38 of the Chinese Immigration Act enacts inferentially that anyone claiming Canadian birth has a right to apply for relief by way of *habeas corpus* from the decision of the controller.

Statement

APPLICATION by way of *habeas corpus*. The applicant claims that she was born of Chinese parents in Victoria on the 23rd of August, 1905; that she was taken to China in 1910 and returned in 1925, when she was examined and released by the controller of Chinese immigration but two days later her attendance was again required by said controller who then detained her and ordered her deportation. Subsequently she was released on bail pending further proceedings. On the return of a writ of *habeas corpus* heard by MURPHY, J. on the 17th of March, 1926, her application for release was refused and an appeal from said order was dismissed by the Court of Appeal in January, 1927. A further order for a writ of *habeas corpus* was made by HUNTER, C.J.B.C. on the 8th of

April, 1927, on further evidence being submitted as to Lee Chow Ying being one and the same person as the Lee Chow Ying who was born in Victoria on the 23rd of August, 1905. Heard by HUNTER, C.J.B.C. in Chambers at Victoria on the 20th of December, 1927.

Stuart Henderson, for the application.
Jackson, K.C., contra.

6th January, 1928.

HUNTER, C.J.B.C.: As I said during the argument I do not think it is material in a case of this character whether a writ of *certiorari* has issued or not. The cases cited by Mr. *Jackson* are no doubt the final authority for what they decide, which is that where an inferior Court is acting within its jurisdiction the superior Court has no power at common law to assume the function of an appellate Court, and review its conclusions by means of the writ of *habeas corpus,* either with or without the aid of the writ of *certiorari.* But in my opinion the principle does not apply to cases of this kind. The controller is not a Court. The ordinary meaning of the word "Court" is that in civil cases the tribunal has power to entertain and decide disputes *inter partes* and to enforce its judgments, and in criminal cases has power to mete out penalties. Moreover, the statute, by section 38, enacts inferentially that any one claiming Canadian birth or citizenship has a right to apply for relief by way of *habeas corpus* from the decision of the controller and this is the only form of relief by the Courts which the statute allows. How can this right be of any use unless the Court may examine the proceedings? I take it for granted that Parliament in granting the remedy did not intend it to be illusory or that any official who is not required to be learned in the law should have it in his power to wipe out the Canadian citizenship of any person without an effectual right of recourse to a Canadian Court.

Judgment

Now in this case it is alleged by Mr. *Henderson* that there was fundamental error on the part of the controller in finding that the applicant is not the person she claims to be. If she is she has an *ex debito* right by reason of birth to remain in the country, and it would be an irremediable injustice if she should

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be expelled especially as she is at present, as I am informed, undergoing the usual consequence of marriage.

Numerous affidavits are now submitted to shew that the controller was fundamentally wrong. Some of them are alleged to be the affidavits of leading Chinese merchants who have been for many years in the Province, and I cannot assume that these merchants have involved themselves in deliberate perjury, as it is difficult to see under the circumstances how they could say they were mistaken, and the explanation given by Mr. *Henderson* as to why this evidence was not produced before the controller or before the Courts is not unreasonable. As far as I can see the case went off in the Courts on a purely technical point, and was not considered on the merits. It appears that the girl left the country at the age of seven. When she returned she knew nothing of the English language and had lost contact with the friends of her parents and was then unable to discover some of the witnesses now available, and that as to others they shewed the characteristic Chinese indisposition to come forward when they themselves are not interested. Now I am quite aware of the dangers surrounding the reception of new evidence, but as to that, each case ought to be decided on its own merits, and is not necessarily a precedent for others. In this particular case I think there should be an inquiry pursuant to the power vested in the Court by the Statute of George III., into the truth of the fact set forth in the return, *viz.*, that the applicant was not born in Canada, and that the affidavits should be received for that purpose. I say this for two reasons: first, that I assume that the learned Crown counsel is unwilling that there should be any possibility of an irreparable injustice being done, and, second, that if the affidavits are wilfully false, then there ought to be a vigorous prosecution for perjury, for if perjury is going on in these immigration inquiries something ought to be done to check it. The deponents must be produced for cross-examination by counsel, if required, and of course he will have the right to put in affidavits in reply.

Judgment

Details to be spoken to.

Order accordingly.

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Jan. 10.

MONTREAL TRUST CO. v. CANADIAN LUMBER YARDS LTD.

MONTREAL TRUST COMPANY v. CANADIAN LUMBER YARDS LIMITED: RIIS *ET AL.*

CLAIMANTS.

Woodman's lien—Action in County Court to enforce—Action by trustee of bondholders—Receiver appointed—Order to proceed with County Court actions—Order for judgment in Supreme Court action and taking accounts—Power of County Court judge to amend liens—Can. Stats. 1923, Cap. 32, Sec. 88 (7)—R.S.B.C. 1924, Cap. 276, Sec. 8.

Section 8 of the Woodmen's Lien for Wages Act does not give a County Court judge the power in an action to enforce a lien, to amend the "statement of claim of lien" required by the Act, so as to reform the statement therein of the location of the logs.

The claimants who had performed work in respect of the logs of the Canadian Lumber Company which were lying at Port Clements and on lot 32 at Masset Inlet, filed liens in which their statements of particulars were confined to the logs at Port Clements only. They then brought actions in the County Court to enforce their claims against the Canadian Lumber Yards Limited. A subsequent action was brought in the Supreme Court by a trust company to enforce a general mortgage charge against the property of the Canadian Lumber Yards Limited and on the day after the obtaining of an order by the claimants for leave to proceed with their County Court actions an order was obtained in the Supreme Court action that the trusts in the mortgage should be carried into execution and there should be a reference. The claimants attended the reference and by the registrar's report they were given preference over the logs at Port Clements only. On motion to the Supreme Court the report was confirmed.

Held, on appeal, *per* MACDONALD, C.J.A. and GALLIHER, J.A., that the Supreme Court had jurisdiction to deal with the lien claims and had properly disposed of them. The County Court judge has no power to amend the lien statements and the appeal should be dismissed.

Per MARTIN, J.A.: Assuming the Supreme Court judge had jurisdiction under the circumstances to make the order appealed from it was not a proper exercise of his discretion, and as the County Court judge had power to amend the lien statements the appeal should be allowed as the order deprived the claimants of the right to apply for such amendment.

Per MACDONALD, J.A.: The method for the disposal of the claims of lienholders is contained in the Woodmen's Lien for Wages Act and should not be disposed of as an incidental feature in summary proceedings in another action, nor could an order by a judge of concurrent jurisdiction authorizing the action to proceed be ignored unless clearly abandoned. The appeal should therefore be allowed.

The Court being equally divided the appeal was dismissed.

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Statement

APPEAL by certain lien claimants from an order of MORRISON, J. of the 3rd of October, 1927, declaring that certain woodmen's liens for wages filed in the County Court at Prince Rupert do not cover 2,000,000 feet of logs bucked and felled on lot 32, Masset Inlet, or sawn logs in receiver's possession at the premises of the Empire Box Company Limited. In December, 1926, liens for wages were filed by the claimants in the County Court at Prince Rupert on the logs and timber of the Canadian Lumber Yards Limited situate at the sawmill of said Company at Port Clements, B.C., for work as fellers and buckers, and they brought action in the County Court to enforce their lien. It should be noted here that the Canadian Lumber Yards Limited also had approximately 2,000,000 feet of logs bucked and felled on lot 32, Masset Inlet, and sawn lumber on the premises of the Empire Box Company over which the lienholders contended their liens extended, but in their statement of lien their particulars were confined to logs and lumber "situate at the mill of the Canadian Lumber Yards Limited at Port Clements," and did not include the lumber either at Masset Inlet or at the Empire Box Company Limited. Subsequently the Montreal Trust Company brought action in the Supreme Court to enforce a general mortgage charge against the property and effects of the Canadian Lumber Yards Limited and a receiver was appointed on behalf of the Montreal Trust Company of all the property of the Canadian Lumber Yards Limited with power to sell its logs, lumber and stock-in-trade. As the order included logs on which the lienholders claimed a lien an order was later made on the lienholders' application, authorizing them to proceed with their actions in the County Court. On the following day, on motion for judgment in the receivership action, a declaration was made that the plaintiff therein (the Montreal Trust Co.) was entitled to a charge on the undertaking of the Canadian Lumber Yards Limited and a reference was directed to the registrar to take accounts. The solicitors for the lienholders did not appear on the application but noticing that it was made they wrote the solicitors of the Montreal Trust Company calling attention to their liens and advising that they proposed to speak to the judge who made the order so that it would

be taken out providing for protection of their liens. The order was so taken out and later there was a reference upon which the accounts were taken and upon which the solicitors for the lienholders appeared. The registrar by his certificate found that the lienholders had priority with respect to the logs and lumber at Port Clements but not as to timber at Masset Inlet or the premises of the Empire Box Company Limited. On motion to confirm the report the learned judge disallowed the lienholders' claim as to the logs on Masset Inlet and of the Empire Box Company Limited as they were not within the description given in the lien statements. The lienholders now claim that the learned judge had no power to deal with the liens as they were before the County Court and by section 8 of the Woodmen's Lien for Wages Act the County Court judge might amend the lien statements so as to include the logs above referred to.

Statement

The appeal was argued at Vancouver on the 21st of November, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Arnold (*Jonathan Ross,* with him), for appellants: We claim first, a woodman's lien for wages, and secondly we have a lien under section 88 (7) of The Bank Act. The order should not have been made while the County Court action was pending. Our submission is, the County Court judge has the power to amend the liens so as to include the logs on lot 32 and we should have an opportunity to apply to him for the amendment. The receiver is not entitled to intervene for the purpose of assisting bondholders as against us: see *In re King George Billiard Hall* (1925), 5 C.B.R. 465 at p. 473.

Argument

Harold B. Robertson, K.C., for respondent: The liens as filed only refer to the logs at Port Clements. When questions arise as to priority in a foreclosure action an inquiry will be directed: see Coote on Mortgages, 9th Ed., 1066; *In re Giles. Real and Personal Advance Company* v. *Michell* (1890), 43 Ch. D. 391 at pp. 398-9. As to the County Court action we submit that the County Court judge has no power to amend the liens. Section 8 of the Woodmen's Lien for Wages Act does not give any such power, so that proceeding with the County Court action would not assist them: see *Rafuse* v. *Hunter.*

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MacDonald v. *Hunter* (1906), 12 B.C. 126. If we were to be added as parties it should have been done within 30 days: see *Cooke* v. *Mocroft* (1926), 36 B.C. 393; *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592 at p. 596. The Court will not do an idle thing: see *Rex* v. *City of Victoria* (1920), 28 B.C. 315 at p. 320.

Arnold, in reply, referred to *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13 at p. 18.

Cur. adv. vult.

10th January, 1928.

MACDONALD, C.J.A.: Under the Woodmen's Lien for Wages Act, Cap. 276, R.S.B.C. 1924, the lien for wages does not attach until the statement required by the Act has been filed in the office of the Registrar of the County Court. The claimant is to state in such document the place where the logs are situate at the time of the filing of it. That statement when filed is the equivalent of a statutory charge on the logs.

Provisions are then made in the Act for enforcing the lien either in the County Court or in the Supreme Court. Section 8 gives power to the Court or judge to order particulars; to make amendments; to add or strike out the names of parties; to set aside a judgment; to permit any defence or dispute note to be filed, etc. It provides for the form of the writ or of the summons and for its service. The side-note refers to it as "Procedure," but apart from this, I think it is clearly procedure. It is the procedure to be adopted in part at least, for the enforcement of the statutory document filed as aforesaid.

MACDONALD, C.J.A.

The appellants brought an action in the County Court to enforce their liens. Thereafter application was made to the Supreme Court for the enforcement of a general mortgage charge over the defendant Company's property and effects. The Court made an order that the trusts in the mortgage should be carried into execution by the Court, and directed a reference. The appellants applied for leave to proceed with their lien action, which was granted. They attended the reference, and obtained recognition in respect of their liens upon logs situate at the mill at Port Clements. In their statement of lien aforesaid their particulars were confined to logs and lumber "situate at the mill

of the said Canadian Lumber Yards Limited at Port Clements." They contended, however, in the mortgage proceedings that they were entitled to liens upon logs situate on lot 32, distant some twelve miles from said mill, and to a preference, over a bank, under The Bank Act, for wages earned in cutting the last-mentioned logs. On motion to the Supreme Court to confirm the report the learned judge disallowed the claim in respect of said logs on lot 32, and disallowed their claim for preference, holding that the claim for preference could not be sustained because the appellants were admittedly not the employees of the defendant Company. He held that the logs on lot 32 were not within the description given in the lien statements. The complaint now is that the judge had no power to deal with the liens as they were before the County Court, and that by section 8 of the Act the County Court judge might amend the lien statements so as to reform the description of the logs to include those on lot 32. I am of opinion that section 8 gives him no such power, it merely gives him the power which he had already under the general practice to make any necessary amendment to the proceedings before him, *viz.*, the proceedings to enforce the liens.

MACDONALD, C.J.A.

I think it was a mistake to have given leave to the appellants to proceed with their lien action. That leave was calculated to lead to unnecessary expense to no purpose. They have not, in fact, proceeded. Their claims were before the Supreme Court, where the lienholders were duly represented. They were given priority in respect of the logs at the mill, but their claim to have such in respect of the logs on lot 32 was disallowed, as was also their claim for preference under The Bank Act. These two claims, I think, were properly disallowed. When the Court undertook to wind up the estate it had power to deal with the claims of all parties upon it. Therefore, if the appellants went on with their lien action they did so at their peril. However, they apparently thought they had two strings to their bow; they got part of the relief in the mortgage action, and now they claim that the Court had no jurisdiction to deal with their claims which were disallowed. I cannot agree with that contention. There can be no question, in my opinion, about the jurisdiction of the Court. The learned judge simply found that the logs on lot 32 did not fall within the lien and it was therefore

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his duty to deal with that claim, and he found also on the admitted evidence that the appellants had no preference under The Bank Act. It was therefore his duty to deal with that question. In this appeal to us the question is, Did he decide correctly? In my opinion, he did decide correctly.

I would therefore dismiss the appeal.

MARTIN, J.A.: Being in accord with my brother M. A. MACDONALD in his view that the order complained of was not, in any event, with respect, a proper exercise of discretion in the special circumstances (even assuming that the learned judge had jurisdiction to make it in the face of Mr. Justice W. A. MACDONALD's prior order giving appellants leave to continue the County Court action) I shall confine myself to the question of the power of the County Court judge to amend the liens.

This depends on sections 7 and 8 of the Woodmen's Lien for Wages Act, R.S.B.C. 1924, Cap. 276, which provide for suit in the County Court to enforce the liens filed herein and given by sections 3, 4 and 5. Said sections 7 and 8 are as follows:

"7. (1.) Any person having a lien upon or against any logs or timber may enforce the same by suit in the County Court where the statement of lien is filed, provided the sum claimed is within the jurisdiction of such Court, otherwise in the Supreme Court; and such lien claim shall cease to be a lien upon the property named in such statement unless the proceedings to enforce the same are commenced within thirty days after the filing of the statement, or after the expiry of the period of credit. In all such suits the person, firm, or corporation liable for the payment of the debt or claim shall be made the party defendant.

MARTIN, J.A.

"(2.) There shall be attached to or endorsed upon the writ of summons in such suit a copy of the lien claim filed as hereinbefore provided; and no other statement of claim or particulars shall be necessary unless ordered by the Court or judge. In case no defence or dispute note is filed, judgment may be signed and execution issued according to the practice of the Court.

"8. The Court or judge may order any particulars to be given, or any proper or necessary amendments to be made, or may add or strike out the names of parties at any time, and may set aside any judgment and permit a defence or dispute note to be entered or filed, on such terms as to the Court or judge may appear proper. The writ or summons shall be in the form, as nearly as may be, of that in use in the Court in which it is issued, and the practice thereafter shall follow as nearly as may be, that of the said Court."

The "statement of claim" or "lien claim," or "statement of claim of lien," as it is variously styled, is required by section 5 to contain the following particulars of the lien claim:

"Such statement shall set out briefly the nature of the debt, demand, or claim, the amount due to the claimant, as near as may be, over and above all legal set-offs or counterclaims, and a description of the logs or timber upon or against which the lien is claimed, and may be in the form in Schedule A or to the like effect."

The form is entitled "Statement of Claim of Lien," and provides for further particulars than are mentioned in section 5, *e.g.*, the residence of the claimant and name and residence of the owner, if known, and as to the logs and timber, that it shall state "also where situate at time of filing of statement" in addition to their "description," and it is with respect to this "statement of claim or particulars," that section 7 (2) declares "no other . . . shall be necessary unless ordered by the Court or judge." But this very fact that the judge is given the power to order a further statement and particulars in addition to the copy of the statement attached to the writ shews that they both are subject to amendment, either in whole or in part in his due discretion, otherwise the power conferred upon him would be meaningless and useless. This view is confirmed by the opening words of the next section which expressly confer the power to "order any particulars to be given or any proper or necessary amendments to be made" which language obviously includes the antecedent special subject-matter, *i.e.*, the statement of claim of lien and the particulars thereof, and has no application to the ordinary and general wide powers of amendment of plaints, etc., as to which Order I., r. 1, declares:

MARTIN, J.A.

"All proceedings authorized to be commenced in a County Court by or under the Act shall, except when otherwise provided by the Act or these Rules, be commenced by the entry of a plaint, and shall be called actions."

And section 25 of the County Courts Act provides that:

"A County Court judge may at all times amend all defects and errors in any cause or matter in his Court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the parties applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing cause or matter the real question in controversy between the parties shall be so made if duly applied for."

See also Order VII., rr. 4-7 to the same effect.

It is to my mind clear that the Legislature must have had a special object in giving such special powers of amendment in connection with a special subject-matter, and that object can be

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none other than to prevent the loss of a lien when it is sought to be asserted, often hurriedly of necessity by illiterate men the nature of whose occupation places them for the most part in the position of not being able to procure legal assistance readily, and it would be a deplorable thing if the special remedy which the Legislature aims to give them to secure the fruits of their labour is to be lost beyond recall because of a mere clerical error or omission in the attempt to comply with the many requirements of the statutory form as to name, residence, description, locality or otherwise. I feel, therefore, that this is a case where the following rule of construction laid down by section 23 (6) of the Revised Statutes, Cap. 1, should be invoked to the fullest possible extent, *viz.*:

"Every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good; and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit."

MARTIN, J.A.

As I read the said sections 7 and 8, no difficulty is experienced in coming to the conclusion that their "true intent, meaning, and spirit" support the view that the Legislature intended to and did confer a power of amendment sufficient to save the claimant's error of omission herein if the judge be of opinion that an amendment could be granted without prejudice or injustice to other persons concerned, the test being were they misled in the circumstances? *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13.

I would, therefore, allow the appeal on this ground also, because the order complained of deprives the lien claimants of the right of applying for such amendment to the learned judge of the said County Court who alone can deal with that matter.

GALLIHER, J.A.

GALLIHER, J.A.: Unless it can be said that the County Court judge has power to amend the description as to the location of the logs, which are on lot 32, and not as described in the affidavits for woodmen's lien as at Port Clements, some twelve miles distant, I can see no relief for these workmen as against such logs.

It is certainly a hardship that these men who gave their labour and time in felling and bucking these logs, should be deprived of their right to a lien because of a misdescription, not only unintentional but to a certain extent one might say, excusable.

Crawford and Moore of Port Clements had the contract for logging off lot 32. These woodmen were in their employ and worked only on lot 32, where the timber was felled from which the logs in question, as well as other logs from the same place, were worked on by the claimants and rafted to Port Clements. Unfortunately they described the logs in question as at Port Clements and not as on lot 32, which description they did not know until after their lien was filed.

I am afraid I must hold the description bad but if I thought the County Court judge had power to amend, in my judgment this would be a proper case to do so.

GALLIHER, J.A.

Section 8 of the Woodmen's Lien for Wages Act is the only one under which I think it could be suggested that he has such power. I have striven to see a way out by reason of this section, for could I conclude that such power existed, I would amend the order of Mr. Justice MORRISON as the claimants had obtained an order authorizing them to proceed notwithstanding the receivership.

While I cannot quite see the object of referring to the word "particulars" in section 8, unless the Legislature had some such idea of amendment in mind in certain cases, yet it is not definitely enough expressed to override the definite statutory requirements necessary to create the lien, and it is only upon a substantial compliance with these requirements that a lien is created. In other words, the lien which is the very root of the action has not been created.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from part of the order of Mr. Justice MORRISON declaring that certain woodmen's liens for wages filed in the County Court at Prince Rupert do not cover logs and sawn lumber referred to in part of a certificate of the registrar, later referred to.

Woodmen's liens were filed on behalf of several workmen, writs issued and dispute notes entered. The defendants were Crawford and Moore Logging operators and Canadian Lumber

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Yards Limited, sawmill owners. It was alleged that the work was performed on logs "at the said sawmill at Port Clements in the County of Prince Rupert." Subsequently in another action by order of the Supreme Court, G. F. Gyles was appointed receiver on behalf of the Montreal Trust Company of all the property of the Canadian Lumber Yards Limited, with power to sell its logs, lumber, stock-in-trade, etc. As this order included logs on which the lienholders claimed a lien an order was later made on their application authorizing them to proceed with their actions in the County Court of Prince Rupert. On the following day on motion for judgment in the receivership action a declaration was made that the plaintiff therein, the Montreal Trust Company was entitled to a charge upon the undertaking of the Canadian Lumber Yards Limited. It also directed a reference to the registrar to take accounts and to make inquiries among other things:

"(b) An inquiry of what the property comprised in or charged by the trust mortgage consists, and in whom same is vested;

"(c) An inquiry of what other encumbrances affect the property comprised in or charged by the trust mortgage or any part thereof;

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"(d) An account of what is due to said other encumbrancers respectively;

"(e) An inquiry what are the priorities of such other encumbrancers and the trust mortgage respectively."

followed by an order for sale after report by the registrar.

The solicitors for the lienholders did not appear on the above application. Noticing, however, the application made they wrote to the solicitors for the Montreal Trust Company, calling attention to their liens and advising that they proposed to speak to the learned judge who made the order to have it when taken out "go through conditionally upon our liens being fully protected." This was done and although the order or judgment was taken out as originally intended letters were exchanged on the suggestion of the Court in which the solicitors for the receiver stated that in respect to 2,000,000 feet of logs "on or near lot 32 Masset Inlet" the receiver would not include them in the properties put up for sale because they were under pledge to the Standard Bank of Canada and it was felt that there would be no equity left in them for the bondholders. The receiver did not admit, however, that the liens filed covered those logs. It was also understood that the lienholders' solicitors would have notice of the inquiry before the registrar.

Subsequently an appointment was taken out to take accounts and make the inquiries directed by the judgment referred to. On that reference the solicitors for the woodmen's lien claimants filed an affidavit and appeared before the registrar, but the material does not disclose just what attitude they assumed other than that they asserted their claims for liens and the extent of their claim. The registrar by his certificate, after finding what was due to the trustees, reported, *inter alia*:

"5. The lien claimants mentioned in paragraph 3 of the said second schedule, rank prior to the plege of the Standard Bank of Canada so far as regards the logs in water and sawn lumber at or near the Townsite of Port Clements. Counsel for the said claimants contends that their liens also extend over and include the logs on lot 32, Masset Inlet, mentioned in paragraph 3 (a) of the first schedule hereto, and the sawn lumber mentioned in paragraph 3 (b) thereof. Counsel for the twelve other claimants [not appellants] mentioned in paragraph 4 of the affidavit of *A. H. Fleishman* sworn herein the 26th of September, 1927, also contends for priority of such claims. Both of these contentions are denied by the plaintiff."

The question of the rights of the lienholders was therefore left open by the registrar and if there was any submission to an adjudication by him on the part of the solicitors for the lienholders, who are now appealing, the dispute in issue as to the validity of the liens in respect to the logs and lumber on which liens were claimed, was not determined. Application was then made to the presiding judge in chambers to confirm, not to vary, the registrar's report and notice thereof was given to the solicitors for the lienholders. On this application the order complained of was made. It purported to decide the lienholders' action by declaring that their liens were limited to certain logs and sawn lumber referred to in the certificate and did not include other logs and lumber referred to in the same certificate, *viz.*:

"(a) Approximately 2,000,000 feet of logs bucked and felled on lot 32, Masset Inlet.

"(b) Sawn lumber in receiver's possession at the premises of Empire Box Company Limited."

and further declared that said lienholders had no right, title or interest in any of the said logs and sawn lumber mentioned in paragraphs 3 (a), 3 (b) and 3 (c) of said certificate.

On that state of facts the appellants contend that the learned trial judge had no jurisdiction to dispose of the lienholders' rights, doubly so after they had obtained an order—not set aside

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—to proceed with their action in the ordinary way in the County Court of Prince Rupert. It is rather startling if a statutory right given to enforce liens to secure the wages of workmen under all the safeguards provided by the Act can be taken away and the questions involved be decided summarily in another proceeding of an entirely different character. The only substantial reason advanced for denying the right to the appellants to enforce their claim if they can under the Woodmen's Lien for Wages Act, is that in any event, they could not succeed in their action in the County Court of Prince Rupert, and therefore MORRISON, J., was right in virtually putting a stop to an abortive attempt. There is no material to shew that a full inquiry was made into this phase of the matter. The evidence of the lienholders, if and when taken, might clear up any seeming difficulties. It was said that no liens were filed against logs on lot 32 because of misdescription of the place where said logs were situate. That would be a question for the trial judge to decide after hearing the evidence bearing in mind that

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"a substantial and not a meticulous compliance with the statute is what the Court will require, the test being, were the parties concerned misled in the circumstances?"

Per MARTIN, J.A., in *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13 at p. 18.

If the logs on lot 32 were, *e.g.*, on the seashore at a point where they were stored for convenience to be later towed to the mill, or to be towed over gradually as required in the same way as logs are taken from the mill-yard into the mill it might be regarded as a proper description to say they were "at the sawmill." Under modern conditions where a mill is located on water logs in the water may be near the plant while some of them may be strung out over the water at a considerable distance from the mill; yet all might possibly be described as "at the mill." The County Court judge should hear all the evidence; ascertain the logging methods followed; the manner in which logs were stored (if they were stored) for towage to the mill, and might conclude that though twelve miles away this locality was in fact the mill's yard or area for storing logs, just as much as if in the mill yard. Further, in reference to the timber now at the premises of the Empire Box Company Limited, were the logs from which this lumber was sawn at the mill when the liens were filed? True,

Mr. Gyles in an affidavit swears (presumably on information) that this lumber was transported to Vancouver about two weeks before the liens were filed. But is that question of fact to be determined by an unanswered affidavit? Appellants' solicitors did not, as I understand it, go into details of evidence before the registrar. They had an order, not staying their action but permitting them to proceed to trial and naturally beyond protecting their interests would not submit detailed evidence. With therefore the question left open by the registrar these points were decided on an application to confirm an inconclusive report without further evidence. Perhaps on both the points I referred to, appellants' solicitors knowing all the facts may conclude that it would be futile to proceed with their action, but I am unable to do so, and the Court should clearly be of this opinion before acting upon it.

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I do not think appellants are estopped by appearing before the registrar and the learned judge who made the order appealed from. They were justified in all their attendances in the interests of the lienholders. There is no evidence that while guarding as best they could their interests, claiming too, a lien for three months under The Bank Act that they elected to abandon their action in the County Court.

I think the method for the disposal of the claims of lienholders are contained in the Act and should not be disposed of as an incidental feature of summary proceedings in another action, nor could an order by a judge of concurrent jurisdiction authorizing the action to proceed be ignored unless clearly abandoned. I would allow the appeal and vary the order to the extent claimed.

The Court being equally divided the appeal was dismissed.

Solicitors for appellants: *Fleishman & Ross.*

Solicitors for respondent: *Robertson, Douglas & Symes.*

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FRASER v. PEARCE.

Negligence—Landlord—Covenant to repair—Defective railing on porch—Gives way, injuring plaintiff—Damages—Liability.

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The plaintiff lived with her daughter whose husband was a monthly tenant of the house in which they lived. The landlord covenanted to keep the premises in repair, and on the morning of an accident, which resulted in this action, he repaired one of the supports of the back porch by raising it up and putting cement under it. In so raising the porch he loosened the nails in the railing around the floor above and shortly after he had finished his work the plaintiff walked out onto the porch and leaning against the railing it gave way precipitating her to the ground and injuring her severely for which she recovered damages.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN and MACDONALD, JJ.A. dissenting), that the landlord making the repair created a concealed danger which entrapped the plaintiff who, having the right to be there, was ignorant of the danger.

Todd v. *Flight* (1860), 9 C.B. (N.S.) 377 followed.

APPEAL by defendant from the decision of MCDONALD, J. of the 15th of June, 1927, and the verdict of a jury, in an action for damages for personal injuries sustained on the defendant's premises at 147 Third Avenue, Vancouver, on the 3rd of December, 1926. The defendant owned the premises in question and the plaintiff's daughter with her husband were tenants. The plaintiff lived there with her daughter. On the 3rd of December, 1926, shortly before the accident the landlord made some repairs to the back porch which was about seven feet high and supported by two scantlings. One of these scantlings had sunk into the ground and the landlord raised it, putting some concrete under to support it. In raising the porch the plaintiff contends that the nails in the railing around the porch above had been loosened and not long after this work was completed the plaintiff came onto the porch and leaning against the railing it gave way and she fell to the ground bruising her face and right shoulder, spraining both wrists and suffering severe nervous shock. She was 71 years of age.

Statement

The appeal was argued at Vancouver on the 5th and 6th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

D. Donaghy, for appellant: The defendant was owner of the house and the plaintiff's daughter was the tenant, the plaintiff living with her. The jury were asked two questions: "(1) Did the defendant know that the raising of the post would probably break the nails supporting the railing? No. (2) If the answer is No, ought the defendant, under the circumstances as a reasonable and prudent man, to have known that the raising of the post, as he did, would probably break such nails? Yes." There is a difference in such a case where the landlord is in control. The covenant to repair is only effective as to those who are privy to the contract. We do not owe any duty to this woman and it must be shewn we knew there was a trap: see *Cavalier* v. *Pope* (1905), 2 K.B. 757 at p. 762; (1906), A.C. 428 at p. 433; *Malone* v. *Laskey* (1907), 2 K.B. 141 at pp. 145 and 152; *Fairman* v. *Perpetual Investment Building Society* (1923), A.C. 74; *Trott* v. *Kingsbury* (1923), 4 D.L.R. 663; *Sutcliffe* v. *Clients Investment Co.* (1924), 2 K.B. 746.

Marsden, for respondent: The defendant put concrete under one of the supports. He had to raise the porch in doing this and it loosened the nails holding the railing above. He should have known this would happen and the jury so found: see *Latham* v. *R. Johnson & Nephew, Limited* (1913), 1 K.B. 398 at p. 405. There is liability to a licensee: see Halsbury's Laws of England, Vol. 21, p. 392, sec. 660; *Gallagher* v. *Humphrey* (1862), 6 L.T. 684; *Thyken* v. *Excelsior Life Assurance Co.* (1917), 34 D.L.R. 533; *Payne* v. *Rogers* (1794), 2 H. Bl. 349; *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C.P.D. 311; *Rosewell* v. *Pryor* (1703), 6 Mod. 116; *Leslie* v. *Pounds* (1812), 4 Taunt. 649; *Todd* v. *Flight* (1860), 9 C.B. (N.S.) 377; *Mills* v. *Temple-West* (1885), 1 T.L.R. 503; *Cameron* v. *Young* (1908), A.C. 176; *Victoria Corporation* v. *Patterson* (1899), A.C. 615; *British Columbia Electric Ry. Co.* v. *Crompton* (1910), 43 S.C.R. 1. Argument

Donaghy, in reply: Respondent refers to cases of nuisance only, and I have already differentiated this case from cases of nuisance: see *Cavalier* v. *Pope* (1905), 2 K.B. 757 at p. 762; (1906), A.C. 428. We cannot be liable for a trap unless we have knowledge: see *Sutcliffe* v. *Clients Investment Co.* (1924), 2 K.B. 746 at pp. 752 and 754. *Cur. adv. vult.*

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10th January, 1928.

MACDONALD, C.J.A.: The tenancy was a monthly one. The landlord had agreed to make all reasonable repairs. In pursuance of this obligation he repaired the back porch of the house. One of the corner posts of the porch had got out of place at its base and the defendant straightened this up and inserted under it a piece of cement that was lying in the yard. In doing so, as the evidence shews, the nails fastening this upright support to the floor of the porch, being rusted, were broken and the plaintiff coming upon the porch afterwards, was injured by its falling down. The plaintiff is a widow who resides with her daughter and son-in-law, the tenant.

A number of decisions were cited as to the liability of the landlord in control of them for injuries occurring on common stairways and gangways leading to the abodes or offices of tenants, and the law with regard to the obligations of an owner or occupier to his invitee or his licensee was very fully argued by counsel. These cases, in my opinion, have no application to the case at Bar. The plaintiff was not the invitee or the licensee of the defendant since he had no control over the property except the mere right to go upon it to make the repairs. This is a case of tort pure and simple. The landlord making the repair created a concealed danger which entrapped the plaintiff who, having the right to be there, was ignorant of the danger. The principle applicable to the case is well stated in *Todd* v. *Flight* (1860), 9 C.B. (N.S.) 377, where Erle, C.J., at p. 389, summarizes the cases to which he had theretofore referred, as follows:

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> "These cases are authorities for saying, that, if the wrong causing the damage arises from the non-feasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law, and that it reconciles the cases."

The appeal should be dismissed.

MARTIN, J.A.: This verdict can in my opinion only be sustained upon the ground that what the defendant did created a concealed danger, *i.e.*, a trap, which as was held by the House of Lords in *Fairman* v. *Perpetual Investment Building Society* (1923), A.C. 74, is a question for the jury, as Lord Buckmaster put it at p. 83:

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> "The degree of danger, and the extent to which it is concealed, may vary

from case to case, and its ultimate determination is a question of fact for which a jury is an appropriate tribunal."

In that case the trial judge found that the stair in question was not dangerous and that it was not a trap (84), and in *Sutcliffe* v. *Clients Investment Co.* (1924), 2 K.B. 746, the question was put to the jury (p. 748):

"Did the balcony at the time of the accident constitute a trap to the deceased? That is, was it a concealed danger? Yes."

No similar question was put herein though that point of dispute was raised and pressed by defendant's counsel, and in my opinion the two questions that were put and answered do not advance the matter far enough to support the judgment: the result is unfortunate but the obligation is clearly upon the plaintiff to obtain such findings as will in law sustain the verdict.

MARTIN, J.A.

It follows that the appeal should be allowed.

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

The plaintiff had a right to be upon the premises whether as a servant or as a member of the tenant's family. The defendant admits that he contracted with the tenant to do reasonable repairs. In effecting repairs to the porch of the house in question, he did so in such a negligent manner as to create what can, in my opinion, be termed a trap by reason of which the plaintiff met with the injury. This, as the jury have found, ought to have been known to the defendant and was not known to the plaintiff, nor did the defendant in any way advise her of it. Under such circumstances the defendant is liable. I think the question was properly left to the jury.

GALLIHER, J.A.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: A jury awarded damages to the respondent for injuries received by falling from a back porch of a house owned by the appellant but occupied by one Doherty as tenant with whom respondent resided. The appellant was obliged to keep the premises in repair. He voluntarily undertook to repair this porch, by raising one of the supporting posts, one inch from the ground and placing under it a loose piece of cement. This simple act, on his part, loosened or broke the nails holding a railing a few feet above the floor of the porch and when respond-

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ent placed her weight against it, the railing gave way resulting in a fall and the injuries complained of. The jury answered two questions as follows:

"1. Did the defendant know that the raising of the post would probably break the nails supporting the railing? No.

"2. If the answer to (1) is 'No,' ought the defendant under all the circumstances as a reasonable and prudent man to have known that the raising of the post as he did, would probably break such nails? Yes."

On these answers, judgment was entered for the respondent. It was argued that appellant, as owner, whatever might have been his liability to the tenant Doherty, with whom he had contractual relations had he been injured, was under no liability to the respondent. If this part of the porch so affected by his action constituted a nuisance, or if he created a situation knowingly hazardous in itself, there would be liability, but I cannot so regard it, either from the facts or on the answers of the jury. Further, there was no invitation to use the porch because the only possible invitor would be the tenant who had control of the demised premises and the right to say who should come and go. The tenant alone had the right to admit or exclude.

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On these facts, it is sought to make the landlord, not the tenant, liable to a third party. If the landlord is not in law answerable to the tenant, for leasing premises in a dilapidated condition (because the contract is in respect to the house, as it stands) there would of course be no liability to a stranger. It is only where the condition of the premises, or a part of them, amounts to a nuisance or where they must become a nuisance from ordinary use and occupation, without fault of the tenant, that liability to third parties arises. Here the house, when first leased, was in a proper state of repair considering the character of the premises and the rent agreed upon. The act of the landlord, this appellant, in making minor repair, viewing it, for the present, apart from the jury's findings, would place it at the highest in the category of negligence in making such repairs. There might, of course, be such a degree of negligence that a trap would be created. It is only in cases where the landlord retains control of the premises or of a limited portion, such as common halls or stairways, that liability to invitees, licensees or trespassers arises. The respondent in this case was a licensee. From the evidence it appears that the landlord was obliged to

repair and the injury resulted from failure to do the work properly, but, as there were no contractual relations between appellant and respondent—no privity—there is no liability.

Counsel for the respondent argued on the authority of *Payne* v. *Rogers* (1794), 2 H.Bl. 349, that in order to avoid circuity of action a third party might sue the landlord direct instead of first suing the tenant who in turn might claim over against the landlord. It was said there by Buller, J. (p. 350):

"I agree that the tenant as occupier is *prima facie* liable to the public, whatever private agreement there may be between him and the landlord. But if he can shew that the landlord is to repair, the landlord is liable for neglect to repair."

It is not stated that the case turns upon the maintenance of a nuisance existing possibly before the premises were rented, but it would appear to be so regarded by Erle, C.J., in *Todd* v. *Flight* (1860), 9 C.B. (N.S.) 377 at p. 388, where it is referred to.

It is also considered in *Cavalier* v. *Pope* (1905), 2 K.B. 757; (1906), A.C. 428. In that case injuries were sustained by the wife of the tenant through a defective floor. A chair on which she was standing went through it. The landlord promised to repair it but did not do so before the accident. The action brought by the wife was dismissed. I think the same result would follow so far as the wife was concerned if the landlord had in fact made the repairs but did it negligently. His only liability would be to the tenant.

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The learned trial judge, in submitting questions to the jury, would appear to have had in mind certain statements in the judgments in *Fairman* v. *Perpetual Investment Building Society* (1923), A.C. 74. There the plaintiff, who lodged with her sister in a flat (the latter's husband being tenant) while descending a common stairway giving access to a number of flats and which, therefore, was in the control of the owner, who was the defendant in the action, was injured by tripping over a depression in the stairway. The trial judge found that the defendant was not negligent, that the state of the stair was not dangerous and the depression not in the nature of a concealed danger or trap as it could be seen by the plaintiff had she looked and the action was dismissed. Observations by Lord Atkinson, however, appear to support the view that, if some dangerous

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situation existed, of which the owner had knowledge or ought to have had knowledge, not known or obvious to the plaintiff, using reasonable care on her part, the owner owed a duty to a mere licensee to inform her of it, failing which he was liable. It was evidently felt by the learned trial judge that the finding of the jury in the case at Bar brought it within this statement of the law. These principles, however, must be held as applying only to the facts of the case and the paramount fact was the common staircase in the control of the defendant carrying with it the relationship of licensor and licensee. That is not this case. The respondent was not injured on a common stairway or porch over which strangers were either invited or permitted as licensees to pass. Apart, however, from the foregoing considerations, counsel for respondent submitted that, based on tort, she was entitled to hold the judgment on the ground that there was a finding of a trap, which, on the answers of the jury, must stand. As I understood the submission, it was suggested that a licensee has a right to expect, to quote from Halsbury's Laws of England, Vol. 21, p. 393, to which we were referred,—

> "That the natural perils incident to the subject of the licence shall not be increased without warning by the negligent behaviour of the grantor, and, if they are so increased, he can recover for injuries sustained in consequence thereof."

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This again, is the negligent behaviour of the grantor and, in the case at Bar, the appellant is not the grantor.

Gallagher v. *Humphrey* (1862), 6 L.T. 684, cited in support does not assist the respondent.

The only duty owed to respondent by appellant was not to expose her to a concealed danger or perilous situation or trap. Here, as already pointed out, the alleged trap was a railing insecurely fastened by reason of strain imposed on the nails in raising a post, something which he knew nothing of but of which, as the jury found, he should have known.

In *Fairman* v. *Perpetual Investment Building Society, supra,* Lord Atkinson, at p. 86, says:

> "The plaintiff, being only a licensee, was therefore bound to take the stairs as she found them, but the landlord was on his side bound not to expose her, without warning, to a hidden peril, of the existence of which he knew, or ought to have known. He owed a duty to her not to lay a trap for her."

This passage also should be considered in the light of the facts.

The relationship of licensor and licensee existed between the plaintiff and defendant and created the duty. Not so in the case at Bar. The respondent was not there "upon business which concerns the occupier and upon his invitation express or implied"—p. 86. I do not think this statement can be taken to affect the legal situation as between a landlord and a stranger and, as I read the cases and consider what I think are the underlying principles, although text-writers do not appear to regard the point as free from doubt, I am of the opinion that it is only when the landlord knows of a hidden danger or trap and fails to give warning that liability arises and knowledge is negatived in this case. See *Norman* v. *Great Western Railway* (1915), 1 K.B. 584 at p. 591, where Buckley, L.J., after discussing obligations towards trespassers, says:

MACDONALD, J.A.

"The next is the case of a licensee. He is allowed to come on the premises and he must take them as they are, but the occupier must not expose him to a hidden peril. If the occupier knows of a danger upon the premises he must warn the licensee; he owes a duty to the licensee not to lay a trap for him."

If that is a correct statement, in respect to the duty of an occupier towards a licensee, it is at least no higher in the case of one who, as in the case at Bar, is not the occupier of or in control of, the premises.

I think the appeal should be allowed.

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

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HALL v. MORE.

Restraint of trade—Contract—Between physician and assistant—Termination of contract—Practice within certain area restricted—Reasonableness—Injunction.

HALL v. MORE

The plaintiff, a physician and surgeon, who practised in the City of Nanaimo, entered into an agreement with the defendant, a qualified practitioner, whereby the defendant was to assist him in his practice at a stated salary, the defendant to have the privilege of engaging in private practice on the arrangement of dividing the fees with the plaintiff, the contract to be in force for five years subject to termination by either party on two months' notice. The contract further provided that upon its termination the defendant would not practise in Nanaimo or within a radius of twenty miles thereof for a period of five years. The agreement having been terminated the defendant, after practising two months in Nanaimo, moved to Ladysmith (about fifteen miles from Nanaimo) and continued to practise his profession there. An action for damages and for an injunction was dismissed.

Held, on appeal, reversing the decision of GREGORY, J. in part, that the sweep of the agreement was too great, the restriction to the area outside Nanaimo not being in the interests either of the parties or the public, but the agreement being severable the restriction should be confined to the City of Nanaimo and the defendant should be enjoined from practising his profession for the agreed period within the limits of that city.

Statement

APPEAL by plaintiff from the decision of GREGORY, J. of the 3rd of May, 1927, dismissing an action for an injunction restraining the defendant from practising as a physician and surgeon for five years within a radius of twenty miles of the City of Nanaimo. In January, 1922, the plaintiff, who was a physician and surgeon, practising in Nanaimo, contracted with the defendant to assist him in his work at a salary of $250 a month with the privilege of engaging in private practice on terms of dividing the fees with the plaintiff the arrangement to continue for five years subject to termination on two months' notice by either party. There was the further stipulation that on its termination the defendant would not practise within a radius of twenty miles from Nanaimo for a period of five years. The agreement was terminated on the 19th of May, 1926. The

plaintiff complained that the defendant practised his profession in Nanaimo during November and December, 1926, and that since the 1st of February, 1927, has been practising continually in the City of Ladysmith about fifteen miles from Nanaimo. The plaintiff's action for damages and for an injunction to restrain the defendant from practising within a radius of twenty miles from Nanaimo for five years was dismissed.

The appeal was argued at Vancouver on the 3rd and 4th of November, 1927, before MACDONALD, C.J.A., MARTIN, McPHILLIPS and MACDONALD, JJ.A.

Statement

W. J. Baird, for appellant: The sole question in this case is whether the agreement was a rasonable one, both as to radius and as to time: see *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181 at p. 196; *Davis* v. *Mason* (1793), 5 Term Rep. 118; *New York Outfitting Co.* v. *Batt* (1921), 30 B.C. 155; *Mallan* v. *May* (1843), 11 M. & W. 653; *Gravely* v. *Barnard* (1874), L.R. 18 Eq. 518 at p. 521; *Mason* v. *Provident Clothing and Supply Company, Limited* (1913), A.C. 724 at p. 741; *Herbert Morris, Limited* v. *Saxelby* (1916), 1 A.C. 688 at p. 702; *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (1894), A.C. 535 at p. 565; *Attwood* v. *Lamont* (1920), 3 K.B. 571; *Palmer* v. *Mallet* (1887), 36 Ch. D. 411; *Mills* v. *Dunham* (1891), 1 Ch. 576. As to change in area owing to easy access by automobiles see *Kelly* v. *McLaughlin* (1911), 21 Man. L. R. 789; *Bowler and Blake* v. *Lovegrove* (1921), 37 T.L.R. 424; *Dewes* v. *Fitch* (1920), 2 Ch. 159; (1921), 2 A.C. 158.

Argument

Cunliffe, for respondent: There are five points to be considered: (1) Restraint against competition is bad; (2) restraint must be justified by special circumstances; (3) the onus to prove special circumstances is on the person seeking to enforce the covenant; (4) the restraint must be reasonable in the interest of both parties; (5) the plaintiff must prove reasonableness of restriction. On the question of reasonableness see Leake on Contracts, 7th Ed., 544; *Dubowski & Sons* v. *Goldstein* (1896), 1 Q.B. 478. Prior to 1922, Hall had no practice in Nanaimo: see *Putsman* v. *Taylor* (1927), 1 K.B. 637.

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Baird, in reply, referred to *Copeland-Chatterson Co.* v. *Hickok* (1906), 16 Man. L.R. 610 and Halsbury's Laws of England, Vol. 20, p. 505.

Cur. adv. vult.

10th January, 1928.

HALL v. MORE

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Both parties are physicians and surgeons. The plaintiff entered into an agreement to give professional services to miners in the employ of the Western Fuel Company at Nanaimo. He thereupon contracted with the defendant to assist him in this work at a salary of $250 a month and the privilege of engaging in private practice on terms of sharing the fees with the plaintiff. It was, however, declared that this would not subject either of the parties to the obligations of partners. Either party might terminate the agreement on two months' notice, but in the absence of such notice it was to continue for five years.

The agreement contained a stipulation that on its termination the defendant would not for a period of five years, practise his profession in the City of Nanaimo or within a radius of twenty miles therefrom.

The agreement was terminated by notice, but soon thereafter the defendant commenced the practice of his profession at Ladysmith, fifteen miles distant from Nanaimo. Plaintiff thereupon brought this action for an injunction. It was dismissed at the trial.

It appears that the plaintiff enjoyed private practice apart from that included in his contract with the miners, but the extent of this practice outside the City of Nanaimo is very vaguely defined by the evidence.

The law presumes that an agreement in restraint of trade is void but that presumption may be rebutted. To do so it must appear that the restraint is reasonable with reference to the interests of both parties and to the interest of the public. *Herbert Morris, Limited* v. *Saxelby* (1916), 1 A.C. 688; *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (1894), A.C. 535.

There are no trade or professional secrets involved. The

whole object of the agreement was to prevent professional competition for the period named and within the described areas.

In my opinion, the sweep of the agreement is too great; the restriction to the area outside Nanaimo is not in the interests of both parties, and of the public, particularly is this so having regard to the fact that it restricts the exercise of the healing art in sparsely settled areas such as the one without the limits of the City of Nanaimo.

But we may, if of opinion, as I am, that the restriction is reasonable as to one of the areas embraced in the contract, when that part is so described in the instrument itself as to be severable, give effect to the agreement in respect of that part. *Goldsoll* v. *Goldman* (1915), 1 Ch. 292 at p. 299; *Putsman* v. *Taylor* (1927), 1 K.B. 637 at p. 640; *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520; *Mason* v. *Provident Clothing and Supply Company, Limited* (1913), A.C. 724 at pp. 742 and 745.

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The restriction should therefore be confined to the City of Nanaimo, and to this extent the appeal should be allowed, and the defendant enjoined from practising his profession for the agreed period within the limits of that city. The plaintiff should have the costs of the action, except those, if any, occasioned by the larger claim. The costs of the appeal should follow the event.

MARTIN, J.A.: I agree that the appeal should be allowed with the restriction of the covenant to the area within the City of Nanaimo. In the leading case of *Mason* v. *Provident Clothing and Supply Company, Limited* (1913), A.C. 724, Lord Chancellor Haldane said in a case of this nature, p. 732:

"My Lords, such a restraint on the liberty of a man to earn his living or exercise his calling is a serious one, and the Courts have always regarded such restrictions with jealousy. They have steadily refused to allow the question of their validity to be decided by a jury. Questions of this kind have always been reserved by the Courts as being for the Court itself, and to be decided in accordance with a definite legal test."

MARTIN, J.A.

And he goes on to say, p. 733, "the test is now settled" (in the standard of public policy of the day) by the declaration of it by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (1894), A.C. 535 at p. 565, that:

" 'The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual.

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All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.' "

All the other Lords agree with this "test" and at p. 734, Lord Haldane, in concluding, says:

"It is no doubt as a general rule wise to leave adult persons to make their own agreements and take the consequences, but in the present class of case considerations of public policy come in and make it necessary for the Court to scrutinize agreements like the one before your Lordships jealously. The practice of putting into these agreements anything that is favourable to the employer is one which the Courts have to check, and the judges have to see that Lord Macnaghten's test is carefully observed."

MARTIN, J.A.

In the discharge of this duty, I am of opinion that in the circumstances before us, the test can be satisfactorily and properly applied by severing the covenant in its operation as above indicated, which we clearly have the power to do in accordance with the authorities cited by the Chief Justice, and I only note that the observations of Lord Moulton, at p. 745 of the *Mason* case, which may point to another view on severance, were not concurred in by the other members of the Court and were not adopted by the English Court of Appeal in *Goldsoll* v. *Goldman* (1915), 1 Ch. 292 nor by Mr. Justice Sargent in *S. V. Nevanas & Co.* v. *Walker and Foreman* (1914), 1 Ch. 413.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would have been disposed to have dismissed the appeal *in toto* in that upon the special facts of the case I see no ground to disagree with the decision of the learned trial judge, Mr. Justice GREGORY, the learned trial judge in my opinion being justified in holding that at the time of the entry into the agreement there was really no practice in existence to then protect; it was only what might be termed a possible or potential practice that Dr. More, the defendant, would be very instrumental in building up in conjunction with Dr. Hall, the plaintiff, and that the attempt to restrain Dr. More was unreasonable although it is true the agreement in its terms

provides against Dr. More practising in the described area. It is not to be lost sight of though that the agreement was only brought about when Dr. More had made all his arrangements to remove to the City of Nanaimo and had severed all his previous connections, that is he was then *in extremis,* so to speak when Dr. Hall presents to him this agreement containing future restraint from practice in this very considerable area. This is a consideration that has weighed greatly with me. Where an injunction is asked and the equitable powers of the Court are being invoked, rather should it be left to Dr. Hall the plaintiff to take his remedy if any, in damages for breach of contract. However, in that my brothers consider that there should be restraint to the extent of the City of Nanaimo at least, I have concluded to not formally dissent from that view. I would therefore allow the appeal in part only, that is, that an injunction be granted but confined to the City of Nanaimo alone.

MCPHILLIPS, J.A.

MACDONALD, J.A.: Appeal by the plaintiff from the judgment of Mr. Justice GREGORY, dismissing an action for an injunction restraining the defendant (respondent) from practising as a physician or surgeon for five years within a radius of twenty miles of Nanaimo, where appellant practises his profession. The respondent upon the termination of his employment with the appellant commenced practising in Ladysmith within the prohibited area. The learned trial judge held that the agreement containing the restrictive clause was executed a short time after the respondent commenced his work as assistant to the appellant. A general understanding as to terms and remuneration was arrived at before but nothing was said as to the insertion of a restrictive clause until the agreement was actually signed. At that stage the respondent would probably have to either sign or quit. However, the only bearing this feature can have is on the question of consideration. We are not concerned with the adequacy of consideration; that is only an element in considering the reasonableness of the restriction. I think, too, from the evidence and the learned trial judge's findings, we must assume that respondent in practising at present in Ladysmith "cannot possibly interfere very much with the plaintiff unless his practice grows very much more than it is at

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present." There is no evidence to shew that the respondent has been treating patients who otherwise would probably be under the care of the appellant. It is true that in these days of good roads—differing from the past—the area which a doctor might reasonably cover in his practice is greatly increased. To travel twenty miles is now a small undertaking. It may be true on the other hand that centres like Ladysmith though less than twenty miles from Nanaimo rely largely on their local practitioners seldom going outside for assistance except in serious cases to procure assistance of men with more than a local reputation. Respondent's main defence is that the restrictive covenant was not reasonably necessary for the protection of the appellant, contrary to public policy and void.

There is an abundance of legal literature on the subject and later cases suggest that some of the earlier authorities require modification. I am not at all sure after an extensive perusal of the authorities that in principle there is any departure from the statement of Parker, C.J., in *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181 at p. 197:

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"In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained."

It is scarcely a departure but rather a restatement of that principle in another form and with more detail, to say, as shewn by later cases, that in order to maintain such a covenant it must be shewn that the restraint is reasonable not only in the interests of the covenantee but in the interests of both parties; that it is not against the public interests and goes no further than reasonably necessary to protect the employer. However, if there has been any departure from earlier principles, I think it is in the direction pointed out by Younger, L.J., in *Attwood* v. *Lamont* (1920), 3 K.B. 571 at p. 582, where he says:

"In consequence it must now, I think, be recognized in all Courts that there is every difference in the matter of its validity between such a covenant as we find here embodied in a contract of service and the same covenant when found in an agreement for the sale of goodwill."

And again, at pp. 583-4:

"The principle is this: 'Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive him-

self or the State of his labour, skill, or talent, by any contract that he enters into.' "

The test appears to be (1) Is it oppressive on the covenantor? (2) Is it necessary to protect the covenantee's present or probable future practice in the locality served by him? and (3) Is it contrary to the public interest?

I have referred to the learned trial judge's findings—which I think the evidence warrants—that this restrictive covenant is not necessary for the protection of the appellant. It would be quite different if respondent was only restrained from practising in Nanaimo or within a small radius around it in direct competition with the appellant and many cases cited are distinguishable on that ground. It is not a case either where the respondent obtained trade secrets or special knowledge which might be used to the detriment of the appellant. I think, too, the onus is on the appellant to shew that the restriction is not too wide and of course "the wider the restriction the greater the onus." On the evidence that burden has not been discharged.

This covenant therefore if held valid would not materially assist the appellant, while on the other hand it would, if enforced be injurious to the respondent. It is directed to the prevention not of actual but of possible competition and against the use of the personal skill of the respondent in a neighbourhood which the appellant in his practice has not yet reached, at all events, not to any appreciable extent. The appellant may treat some patients from Ladysmith, but if so, it is not the practice of medical men to try to spirit away patients from another doctor.

MACDONALD, J.A.

The general principle laid down by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (1894), A.C. 535 at p. 565, while the facts to which they were applied are entirely different, have yet been accepted as of fairly general application. He said:

"The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if

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the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities."

The appellant in this case has failed to shew facts or circumstances to bring him within these principles. I think, however, that the agreement is severable and the restriction good so far as the City of Nanaimo is concerned. To that limited extent the appeal should be allowed.

Appeal allowed in part.

Solicitor for appellant: *T. P. Morton.*
Solicitor for respondent: *F. S. Cunliffe.*

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MOTION v. JURE

MOTION v. JURE.

Negligence—Motor-vehicles—Head-on collision—Injury to gratuitous passenger—Responsibility of driver on wrong side of road—Excessive speed of other automobile—Effective cause of accident.

The defendant was driving his car early in the morning from Alberni to Nanaimo with a view to catching the Vancouver boat, the plaintiff, who was a gratuitous passenger, sitting beside him. When about four miles from Nanaimo they ran into a thick fog the visibility being about fifteen feet. He slowed down to about fifteen miles an hour but after going about 150 yards in it he got over on the wrong side of the road where he ran into a car coming from Nanaimo at about 25 miles an hour. The plaintiff was severely injured. His action for damages was dismissed on the ground that the driver of the other car was, considering the fog, driving at an unreasonable rate of speed and his negligence was the effective cause of the accident.

Held, on appeal, affirming the decision of MCDONALD, J. (MACDONALD, C.J.A. and MARTIN, J.A. dissenting), that on all the facts disclosed in evidence the respondent acted reasonably and the learned trial judge's finding being in his favour it is impossible to say that he was clearly wrong.

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

the 19th of April, 1927, dismissing an action for damages for negligence. The defendant, who lived in Alberni, started in his car early in the morning of the 13th of August, 1926, for Nanaimo intending to catch the boat for Vancouver. He took the plaintiff with him as a gratuitous passenger. When about four miles from Nanaimo they drove into a very thick fog, the visibility being about fifteen feet, and they ran into a car coming from Nanaimo. According to the evidence, the defendant was going at about fifteen miles an hour and the car with which they collided was going at about 25 miles an hour. The evidence further disclosed that the defendant was clearly on the wrong side of the road. The plaintiff was seriously injured about the head, arms and legs. The plaintiff's action was dismissed the learned trial judge concluding that the driver of the car coming from Nanaimo was, considering the fog, proceeding at an unreasonable rate of speed and it was his negligence that was the cause of the accident.

Statement

The appeal was argued at Vancouver on the 4th and 8th of November, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Cunliffe, for appellant: The defendant says he slowed down to fifteen miles an hour when he came into the fog. The visibility did not exceed fourteen feet but he admits it would take from 20 to 30 feet for him to stop. The evidence shews clearly he was on the wrong side of the road and the other car, driven by a taxi-driver who was on his proper side, although driving fast, cannot be held responsible: see *The Virgil* (1843), 2 W. Rob. 201 at p. 205.

Argument

Housser, for respondent: Appellant has based his argument on a wrong premises. This was a purely local fog. As to his duty to a gratuitous passenger see *Armand* v. *Carr* (1926), S.C.R. 575; *Turpie* v. *Oliver* (1925), 3 W.W.R. 687.

Cunliffe, in reply, referred to *Limb and Limb* v. *Stewart* (1926), 3 W.W.R. 205; *The Counsellor* (1913), 82 L.J., P. 72 at p. 73; *Compton* v. *Allward* (1912), 22 Man. L.R. 92; *Young* v. *Degon* (1923), 2 W.W.R. 982 at p. 985.

Cur. adv. vult.

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MACDONALD, C.J.A.

10th January, 1928.

MACDONALD, C.J.A.: The defendant driving in a fog allowed his motor-car to cross to the wrong side of the road where he collided with a car coming in the opposite direction. The plaintiff, a gratuitous passenger in the defendant's car, was injured by reason of the collision. The defendant, according to his own story, was travelling at about fifteen miles per hour, while the car which did the injury was travelling at about 25 miles per hour. The range of visibility was fifteen feet. Neither driver could have avoided the collision when it became imminent. Had the defendant kept to his own side of the road the accident could not have occurred. Twenty-four feet in width of the permanent way was metalled but outside of this there was loose gravel. Defendant could plainly see the gravel and said that he was steering by it. Had he continued to do so he could not have got across the road except by want of care on his part. He was bound to exercise that reasonable care which a prudent man would exercise in his own business for the protection of his passenger. This he clearly did not do, and the judgment in his favour must be set aside and judgment entered for the plaintiff, with costs here and below.

If there be any dispute as to the amount of the damages that question may be spoken to before the formal judgment comes up for settlement.

MARTIN, J.A.

MARTIN, J.A.: I agree with my brother the Chief Justice that this appeal should be allowed, upon the uncontradicted (in essentials) evidence of the defendant and of the driver (Morgan) of the other car and Goss a passenger therein, which car beyond doubt was and continued to be on the right side of the road and was following a safe course by properly guiding itself by watching the conspicuous gravel at the side of the oiled strip which the defendant was at first also properly doing, and which was the only safe thing to do in the circumstances and in the fog, except to stop. The unexplained (satisfactorily) neglect to follow that safe line of conduct was the "real cause of the accident" (*Skidmore* v. *B.C. Electric Ry. Co.* (1922), 31 B.C. 282), for which the defendant was alone responsible in the proper legal sense. The duty of the defendant to the plaintiff

(however ungracious it may be for the plaintiff to insist upon it) has been thus recently laid down by our National Supreme Court in *Armand* v. *Carr* (1926), S.C.R. 575 at p. 581:

"To take that care which would have been 'reasonable under all the circumstances.' We regard this as the test of the responsibility of one who undertakes the carriage of another gratuitously—*Karavias* v. *Callinicos* (1917), W.N. 323; *Harris* v. *Perry & Co.* (1903), 2 K.B. 219—rather than some lower standard, which counsel for the appellant argued is implied in the decision of this Court in *Nightingale* v. *Union Colliery Co.* (1904), 35 S.C.R. 65."

MARTIN, J.A.

GALLIHER, J.A.: I think the learned trial judge arrived at the proper conclusion, and would dismiss the appeal.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: I think the appeal fails. The appellant, a gratuitous passenger in a motor-car owned and driven by the respondent, claims damages for injuries arising from a collision with another car. At the time of the accident the roadway was partially obscured by a fog. The learned trial judge found that the driver of the other car was proceeding at an unreasonable rate of speed, and expressed the view that it was his negligence (not the respondent's) that was the effective cause of the accident. That conclusion might reasonably be drawn by the trial judge from all the evidence. The appellant, to succeed, must prove negligence against the respondent. He was sitting in the same seat with him and therefore in a favourable position to detect acts of negligence if any occurred. For the few moments that they were in the fog before the collision appellant could not say whether or not the respondent maintained his position on the right hand side of the road. No doubt he tried to do so. In a fog a driver must keep on the right-hand side to avoid possible traffic not easily seen coming the other way. To do so he might have to further reduce his speed so that he could by closer observation discern the edge of the road. If the fog was so thick that the road could not be seen, he should stop at intervals to take his bearings. I would infer from the range of visibility that it was quite possible by careful driving to maintain the proper position on the road after he travelled a

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reasonable distance into the fog area. We must keep in mind, however, that this accident occurred immediately after entering the pocket of fog and a driver might excusably be confused for the moment, and as the learned trial judge stated, turn unconsciously to his left. I cannot hold that to do so—if such was the fact—was negligence on his part, or an omission to take reasonable care. The respondent at that point thought he was on his own side of the road. He may have been mistaken, the fog would at first cause temporary confusion somewhat similar to that experienced on approaching blinding headlights.

The owner and driver of the other car testified that track marks on the road shewed that respondent was on the wrong side of the highway for over 100 yards (as one testified, the other putting it at about 150 feet) before the collision. I do not think the learned trial judge accepted that evidence. It was not entirely disinterested. Both appellant and respondent testified that they were only momentarily in the fog before the collision and before entering it they were on the right side of the road. The appellant said on discovery that it happened so quickly after they had entered the bank of fog that he could not tell anything about it. If, therefore, the respondent was on the right side of the road until he reached the fog area there could be no tracks of his car on the left hand side for a distance of 150 or 300 feet. I am not overlooking, but not accepting, the attempted modification of this evidence by the appellant at the trial. The two witnesses referred to also made the improbable statement that respondent admitted to them that he was on the wrong side of the road. It is significant that these alleged marks were not called to the attention of the constable who soon afterwards examined the ground. All the constable found were the skid marks, upon which counsel for the appellant relies. To my mind, they are of little assistance. The movement of cars after a collision depending on the exact angle at which they meet affords little indication of their relative positions at the time of impact and none at all of their relative positions for some distance before the impact.

MACDONALD, J.A.

I think on all the facts disclosed in evidence the respondent acted reasonably (*Armand* v. *Carr* (1926), S.C.R. 575), and

with the learned trial judge's finding in his favour it is impossible to say that he was clearly wrong.

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

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent: *J. E. Baird.*

CANADIAN STEVEDORING COMPANY LIMITED v. ROBIN LINE STEAMSHIP COMPANY

AND

CANADIAN STEVEDORING COMPANY LIMITED v. SEAS SHIPPING COMPANY INCORPORATED.

Shipping — Charter-party — Employment of stevedores—Charterers after loading certain boats go into liquidation—Liability of owners to stevedores.

The defendants (owners) entered into a space charter-party with the Southern Alberta Lumber and Supply Company, Limited (charterers) whereby the owners should supply and the charterers should load certain ships during the following year. The plaintiff Company was engaged by a representative of the charterer in Vancouver to do the stevedoring at $1.70 per thousand feet, he representing that the charterers were the agents of the owners. After a number of boats were loaded and for which the stevedores were not paid, the charterers went into liquidation. The material clauses in the charter-party were: "13 [printed]. Steamer to pay all port charges, harbour dues and other customary charges and expenses in loading and discharging cargo." "15. [printed]. Cargo to be stowed under the master's supervision and direction, and the stevedore to be employed by the steamer for loading and discharging, to be nominated by the charterers or their agents, at current rates." "Addenda C [typewritten]. In connection with clause 15, charterers agree to load and stow the cargo for One Dollar and Seventy Cents ($1.70) per thousand board feet or its equivalent, and agree there will be no extra charges during customary working hours, unless detention is caused by breakdown of machinery, winches, or other defects of the steamer. Charterers have the option of working overtime by paying all expenses in connection therewith, but if owners elect to have steamer worked overtime, it is understood this will be

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subject to charterers' approval, and all expenses in this case to be for owners' account." In an action to recover the stevedoring charges from the owners it was held by the trial judge that under the terms of the charter-party the charterers were the agents of the owners in engaging stevedores and the owners were liable.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN and MACDONALD, JJ.A. dissenting), that the charterers did not undertake at their own expense to perform or obtain performance of the stevedoring but were the agents of the owners to engage the stevedores and the owners were liable.

Per MCPHILLIPS, J.A.: It is not possible on the evidence to fix on the stevedoring Company the special terms of the charter-party and there is nothing to displace the general rule that the owners are liable to the stevedores for all proper charges for stowage.

APPEAL by defendants from the decision of MCDONALD, J. of the 27th of June, 1927 (reported *ante*, p. 52) in two actions for stevedoring work done by the plaintiff Company for the defendants, the first for $8,090.72 and the second for $9,259.22. The first action was for loading two vessels of the Robin Line Steamship Company with lumber cargoes, namely, the steamship "Robin Goodfellow" loaded at New Westminster between the 19th and 28th of September, 1926, and the "Robin Gray" at Vancouver between the 7th and 13th of November, 1926. The second action was for loading the steamship "Robin Adair" at New Westminster between the 11th and 20th of November, 1926, at the request of the defendant the Seas Shipping Company Incorporated. Previous to the loading the defendants entered into a space charter-party with the Southern Alberta Lumber & Supply Company, Limited, under which the said Company were to load lumber on the ships above referred to. The Alberta Company as charterers then, through its agent in Vancouver, one Alexander Smith, engaged the plaintiff to do the stevedoring work. The charter-party was in writing, the main clauses for consideration being numbers 13, 15 and addenda C and were as already set out in the head-note.

Statement

The appeal was argued at Vancouver on the 1st, 2nd and 3rd of November, 1927, before MACDONALD,, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Pattullo, K.C. (*G. S. Clark,* with him), for appellants: The two actions were tried together. Our submission is that the

plaintiff Company was engaged by the Southern Alberta Lumber & Supply Company, Limited, through its agent in Vancouver, said company having chartered the vessels upon which they loaded their lumber, they being engaged in that business in Washington and in British Columbia, and no liability can be attached to the defendants: see *Blaikie* v. *Stembridge* (1859), 6 C.B. (N.S.) 894. On the interpretation of the charter-party see *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (1893), A.C. 8 at p. 21; *Glynn* v. *Margetson & Co., ib.*, 351; *Schmaling* v. *Thomlinson* (1815), 6 Taunt. 147.

G. B. Duncan, for respondent: That the owner is liable see Scrutton on Charter-parties, 12th Ed., p. 1; *Eastman* v. *Harry* (1876), 33 L.T. 800; *Harris* v. *Best, Ryley, and Co.* (1892), 7 Asp. M.C. 272 at p. 274. As to what is "incidental" see *Dundee Harbour Trustees* v. *D. & J. Nicol* (1915), A.C. 550 at p. 561; *Attorney-General* v. *Manchester Corporation* (1906), 1 Ch. 643 at p. 656; *Canada Southern R. Co.* v. *Gebhard* (1883), 109 U.S. 527. That the Alberta Company were defendants' agents in respect of stevedoring see Bowstead on Agency, 7th Ed., p. 72, art. 33; *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395; *Loring* v. *Davis* (1886), 32 Ch. D. 625 at p. 631; *Weigall and Co.* v. *Runciman and Co.* (1916), 115 L.T. 61. We are entitled to assume we are engaged by the owners of the ship and a charter is not a demise of the ship: see *Sandeman* v. *Scurr* (1866), L.R. 2 Q.B. 86; *English and Scottish Mercantile Investment Company* v. *Brunton* (1892), 2 Q.B. 700; Halsbury's Laws of England, Vol. 1, p. 202; *Le Neve* v. *Le Neve* (1748), 3 Atk. 646; *Manchester Trust* v. *Furness* (1895), 2 Q.B. 539 at p. 544. The doctrine of constructive notice has no application to purely commercial transactions: see *Rex* v. *Minister of Health. Ex parte Rush* (1922), 2 K.B. 28 at p. 32. Even if constructive notice is allowed see *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (1893), A.C. 8.

Argument

Pattullo, in reply: The cases referred to do not apply as addenda C in the charter-party changes the whole situation. On the question of *ultra vires* see Brice's Ultra Vires, 3rd Ed., pp. 750, 754-5.

Cur. adv. vult.

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MACDONALD, C.J.A.: After a careful consideration of the evidence, and particularly of the documentary evidence, I am satisfied that the learned trial judge came to the right conclusion. It was contended that there was conflict between clauses 13 and 15 of the charter-party on the one hand, and addenda C thereof on the other. The well-known rule of construction is that the Court ought to endeavour to harmonize two supposedly conflicting clauses in an agreement so as not to render either abortive. The learned judge has followed that principle, and I think he has successfully shewn that clause 15 was not cancelled, but merely modified, by addenda C.

I would therefore dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A. agreed with the reasons for judgment of MACDONALD, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I am in accord with the interpretation put upon clause 15 and addenda C by the learned judge below, and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The two appeals were heard together, being consolidated for that purpose.

It would seem to me that the learned trial judge arrived at a correct conclusion in imposing liability upon the appellants, the defendants in both actions. It is a general proposition in law that the owners of ships are liable for the stevedoring work consequent upon the loading of ships and that the charterers—especially in the case of space charterers—are the agents for the shipowners. The shipowners cannot escape from this position unless it be shewn conclusively that the stevedores entered into some different contract that will not admit of the general law imposing liability upon the owners for stowage being claimed. In these appeals the facts shew that the charterers were the Southern Alberta Lumber & Supply Company, Limited, and written charter-parties were entered into and executed. The evidence does not establish that the respondent, the plaintiff in the actions, was made aware of the contents of the charter-parties, but there is ample evidence upon which to establish the fact that the charterers were the agents of the owners of the

ships under "space" charter-parties. It was only after difficulties had arisen about payment to the respondent for the stevedoring that the terms of the charter-parties could be said to have become known to the respondent, and after the charterers had become bankrupt. In my opinion it is not possible to fix upon the respondent in any way the special terms of the charter-parties. The outstanding position is that in accordance with the well-understood law which governs in cases such as the present the owners are liable to the stevedores for all proper charges for stowage. That position has not, in my opinion, been in any way displaced and such is the judgment of the learned trial judge. Should I even be wrong in this—and that in the present case the question of liability for stowage and who shall bear that liability is to be determined upon the reading of the charter-parties—I am still of the view that the liability for the stowage charges rests upon the appellants, the owners of the ships upon which the cargo was loaded. The appellants rely upon clause 15, and addenda C as contained in the charter-party which reads as follows: [already set out in head-note].

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I cannot see that the incidence of liability is in any way shifted here from the owners to the charterers for the stevedoring and stowage charged, or to indicate in any way that the owners are not to be liable for the stowage charges to the stevedores. If so, why the particularity as to the fixing of the amount of the stowage charges if the general law of liability upon the owners was not to obtain? What the owners unquestionably desired to have settled was the rate for stowage. There is no intimation here to the stevedores that the owners would not be liable to the stevedores for the work done. It is to be noted that the stevedores were to be nominated by the charterers to the owners. This, in itself, well indicates that there was no intention upon the part of the owners to take up any other position than that they are always in—liability for all stevedoring charges. It was the usual case of the owners being the immediate employers of the stevedores and all that the charterers did in the matter was to nominate the stevedores and ensure that the work would be done for not more than $1.70 per thousand board feet, and the charterers were in all respects the agents only for

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known principals, the owners, and were in no way indebted or liable to the stevedores, the respondent herein, for the stowage charges. That is, the stevedores could not look to the charterers as debtors to them for the agreed upon stowage charges. The evidence throughout well indicates this, the accounts were rendered to the charterers, but addressed—in accordance with the custom and usage always existing and in no way displaced by the special facts of the present case—to the shipowners and charterers. Upon the whole case I cannot see how it can be successfully contended that the charterers were debtors to the stevedores for the stowage charges or that the charterers were principals in the employment of the stevedores. The charter-parties rebut this contention in the strongest way. There was no alteration whatever in the legal rights—that custom, usage and the law itself accords to the stevedores, *i.e.*, that the owners will always be held liable to the stevedores for all stowage charges—unless it be possible to displace that position by cogent evidence—and that evidence I do not find; in truth, everything points in a most conclusive manner to the establishment of the liability for the stowage charged upon the owners.

MCPHILLIPS, J.A.

It is clear upon the evidence—and nothing to displace it—that the charterers were throughout the agents of the owners.

It would seem to me that *Eastman* v. *Harry* (1876), 33 L.T. 800, is a case very much in point in this case and any differences of fact from the present case are not material. Here the appellants say, as in that case, we have paid the charterers and we are not liable, and it is to be noted that in the *Eastman* case, as here, the charterers became bankrupt. In *Harris* v. *Best, Ryley and Co.* (1892), 7 Asp. M.C. 272 at p. 274, we have Lord Esher, M.R., saying:

> "Sometimes it is stipulated that the charterer is to employ and pay a stevedore, and if he is to employ a stevedore to stow the cargo, then he is liable for the consequences of bad stowage. There is also another way in which the arrangement is made. The charterer may desire to have good stowage, but yet not to be under any obligation for the stevedore's actions; the charterer makes a contract with the shipowner or captain that the shipowner or captain shall employ a stevedore to be appointed or nominated by the charterer. In such a case the shipper nominates a good stevedore, and then leaves him to be the servant of the shipowner, just as if he had been nominated by the shipowner."

Following this quotation from the judgment of Lord Esher,

M.R., we find in Scrutton on Charter-parties, 12th Ed., this language, at p. 167:

"When it is considered that *prima facie* it is the duty of the shipowner to secure proper stowage of the cargo, it seems probable that in most cases the latter rather than the former of the results described in this passage is the right one."

It would not appear to be open to doubt upon a careful review of the cases, that the shipowner is primarily liable to the stevedore for the stowage charges, and certainly the onus rests upon the shipowner to displace this liability and that onus has not in the present case, as I view it, been displaced. Here the contention made by the appellants is unquestionably one which is against the generally accepted law acted upon for long years and that undoubtedly is that the shipowner pays the stevedores; the fact that the charterers nominate the stevedores does not alter the liability which rests upon the shipowner to pay the stowage charges. There must be interposed between the shipowner and the stevedores some contract to which the stevedores are parties, or have assented to which indicates that the charterers are to pay the stowage charges. That is not this case. The respondent here, the stevedore, was unacquainted with the terms of the charter-parties, but even if aware of the terms thereof, as I have previously pointed out, there is not established any shifting of liability from the shipowner to the charterers for the stowage charges, therefore that liability will always continue upon the shipowner unless it can be said that there is a contract binding upon the stevedores to look to other than the shipowner for the stowage charges, and that is not the present case. I do not think that anything further can be usefully said to support the view here expressed by me, and that is, that upon the particular facts of the present case, and the relevant law applicable thereto it is unquestionably a case where the liability for the stowage charges rests upon the shipowner. The learned trial judge so decided, therefore, in my opinion, the judgment of the Court below should be affirmed. I would dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The appellants entered into a "space" charter-party with the Southern Alberta Lumber & Supply Company, Limited, under which the latter agreed to load lumber on appellants' ships on terms later referred to. Afterwards the

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Southern Alberta Lumber & Supply Company, Limited, as charterers, engaged the respondent to do the stevedoring work. The respondent Company now sues, not the charterer who engaged it but the appellants who owned the steamers, alleging agency. The charter-party is the only document in writing. There was no communication oral or written between the parties to this action. The difficulty arose through the bankruptcy of the charterers before the respondent Company was paid. On similar engagements before bankruptcy the Southern Alberta Lumber & Supply Company, Limited, as charterers paid the Stevedoring Company. After bankruptcy to prevent disruption of the work a special agreement was made in respect to similar work in loading other ships under which the owners agreed to pay. It was not then suggested that the appellants were liable in any event. In so far therefore as course of conduct indicated the respondent always looked for payment to the charterers who engaged them and only now seek to hold appellants responsible because the charterer is unable to pay. It may be added that the appellants have already paid the amount sued for to the charterers.

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The respondent's manager testified that Sereth, manager of the Southern Alberta Lumber & Supply Company, Limited, told him that he (Sereth) was acting as agent for the appellants in engaging the respondent. Whether or not this is admissible evidence the appellants who had a written contract with the charterers could not be bound by statements inconsistent with its provisions nor on all the facts could it be said that the charterers were held out as appellants' agents. The respondent had knowledge of the existence of the charter-party. Parts of it were read to its manager and he was at liberty to read it all. In *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (1893), A.C. 8, where the owner of a vessel was unsuccessfully sued for goods lost at sea it did not avail the plaintiff that he had no notice of the terms of the charter-party. To quote Lord Watson, at p. 21:

"But I know of no principle or authority which requires that notice must be given when an owner parts even temporarily, with his possession and control of his ship [as the appellants did in the case at Bar] in order to prevent the servant of the charterer from pledging his credit."

That, I think, is equally applicable to an attempt on the part

of the charterer and respondent to make the owner liable for contractual obligations created between themselves. The question of agency must be determined by construing the relevant clauses of the charter-party. The principal clauses for consideration are 13, 15 and addenda C, and read as follows: [already set out in head-note].

It is of some assistance to point out that under clause 4 of the charter-party the whole space in appellants' steamers (except the engine room, etc., sufficient bunker space for the voyage and such parts as were necessary for officers and crew) was turned over for the sole use of and to be at the disposal of the charterer for cargo and without their written permission no other general cargo could be taken on board. This would indicate to some extent at all events that the charterer was responsible for loading what for the time being might be regarded as his own ship. The charterer had a limited possession and control of the ship for this purpose. This is true whether or not it is regarded as a "demise," to use a term employed in some of the cases.

Under clause 13 standing alone, the appellants would be responsible for all expenses in both loading and discharging cargoes. Loading and discharging are separate and distinct operations. The discharging would take place at distant points on the Atlantic seaboard. By clause 15, without addenda C it is clear that the cargo would be stowed (or loaded) under appellants' supervision and direction with the stevedores employed by the appellants for both loading and discharging but nominated by the respondent. In such event payment would be at current rates. That is the situation without addenda C, and would not give rise to difficulty.

Addenda C is a typewritten addition. It is conceded that if it is inconsistent with the printed words in clauses 13 and 15 the former must govern. I do not think the three clauses can be read together. It was suggested that the opening words of addenda C, *viz.*, "In connection with clause 15" shew that they are to be read together. That, however, simply means "in reference to the subject-matter of clause 15," and in reality calls attention to a different arrangement about to be set out dealing with the subject-matter contained in that clause. It should be noted that if addenda C makes a variation it is only in regard

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to "loading and stowing" and that is what we are concerned with. For discharging clause 15 remains intact and the current rate would have to be paid for that class of work. Then by this additional clause the charterers "agree to load and stow cargo for $1.70 per thousand board feet or its equivalent." That is the firm contract between appellants and the charterer. It is not, with deference, as the learned trial judge suggests, that a rate not exceeding $1.70 per thousand should be charged. The precise figure is stipulated for without any qualifications. They go on to agree that in addition to the $1.70 there shall be no extra charges during customary working hours unless the charterers are held up by a "breakdown of machinery, winches, or other defects of the steamer." This offers no difficulty. Then follows an option given to the charterers to work overtime. Overtime usually involves extra expense, extra pay, etc., and the charterers would have to meet it. In other words the stipulated $1.70 per thousand feet would be paid by the appellants without any additional charges. On the other hand, if appellants elected to have the steamer worked overtime (with the charterers' approval) all extra expense would be borne by the appellants. This clause, therefore, appears to be complete in itself and it is not necessary to refer to clauses 13 and 15 to construe it except on the one point of supervision. By addenda C in so far as loading is concerned the question of "nominating" disappears. It may be as counsel for the respondent submitted, relying on *Eastman* v. *Harry* (1876), 33 L.T. 800, that under clause 15 the charterers in nominating the stevedores, do so as agents for the appellants. That is not now material because the right of nomination was not retained. It must be conceded that clause 15 is at least altered in some respects. Under it the stevedore was to be employed by the steamer (appellants) at current rates. In addenda C there is no suggestion of current rates, a definite price is fixed and the only variation from this definite price is in reference to overtime. Clause 15 provides that the appellants must employ the stevedore nominated by the charterer. Addenda C is different. By it the charterers agree with the appellants to load and stow the cargo. Stevedoring is not mentioned. It is for the charterer to arrange for the stevedoring. So far as this contract is concerned the charterer might

take his own employees engaged in carrying on lumbering operations to do the loading, and if it cost less than $1.70 a thousand could pocket the difference.

The construction of addenda C as thus outlined does not appear to present any serious difficulty. It is a contract solely between the appellants and the charterers without any provision for the intervention of third parties. Third parties like the respondent could only be introduced by a further independent contract. If there was ambiguity or if it was capable of two interpretations, I would so construe it as to retain the effect of clause 15 (*Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395), but I do not so regard it. The charterers were in fact in the position of independent contractors not agents. An agent must act subject to the directions and control of his principal, while an independent contractor performs certain specified work the means of performance being left to his discretion, except in so far as it may be otherwise specified in the contract. Here supervision was reserved. That was necessary for the safety of the ship. An owner who engages a contractor to erect a building reserving the right to supervise it does not thereby become the employer of the contractor's workmen. In *Blaikie* v. *Stembridge* (1859), 6 C.B. (N.S.) 893, the master on behalf of the owners of the ship had control over the stevedores "with a view to the trim and safety of the ship" but that did not make the stevedores the servant of the master. The appellants not having contracted with the respondent can only be fixed with liability on a separate contract between the charterers and respondent, if the latter contract was entered into by the charterer as the agent or servant of the appellants acting within the scope of authority given by the appellants. No such authority was given. The charterers' statement to the respondent's manager, would not create it and no such authority is contained in the written document.

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We were referred to clause 22 of the charter-party and to section 4 of The Water-Carriage of Goods Act, Cap. 61, Can. Stats. 1910. True, by the Act referred to the owner cannot relieve himself from liability for loss or damage through failure to properly load and stow goods and clause 22 is in harmony with this provision of the Act. That is why supervision is retained under clause 15. If the work was not properly supervised and

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loss occurred the owner would be responsible, but that does not prevent the owner from entering into an agreement with the charterer for loading at a fixed rate the latter to engage his own stevedores.

It was submitted that as at common law in the absence of contract it is the duty of the owner to load the ship the stevedores had a right to assume that the owner would be responsible and any contract freeing him from liability would therefore have to be brought to their notice. We were referred to *Sandeman* v. *Scurr* (1866), L.R. 2 Q.B. 86, where it was held that the plaintiffs having delivered goods to the carrier not knowing that the vessel was chartered and having dealt with the master clothed with the ordinary authority to receive goods and execute bills of lading on behalf of the owners, they were entitled to look to the owners for loss through the goods not being safely carried, in other words, the owner must shew that the shipper had notice of the charter under which he claimed exemption from liability. No doubt in the case at Bar if loss occurred through defective loading the appellants would be liable. That is not this case. The respondent is suing on a contract of hiring or employment. The point is, who employed them and that being ascertained was he acting as principal or as agent for another? It is only confusing the issue to suggest that because the labour was performed in loading a steamer any different considerations arise. Further the respondent was at least put upon inquiry. He knew there was a charter-party and was at least aware of some of its terms. From the fact that until after bankruptcy the respondent looked to the charterer for payment one would infer that he was aware of the terms contained in addenda C. Respondent's action was only consistent with knowledge of the true situation.

It was argued that the doctrine of constructive notice does not apply to commercial transactions, and *Manchester Trust* v. *Furness* (1895), 2 Q.B. 539 at pp. 544 and 555 was referred to. That is true where bills of lading or commercial transactions are concerned for obvious reasons. Bills of lading are negotiable and possession is all important. It would be inequitable to extend the doctrine of constructive notice to these instruments. A charter-party of course, is not a negotiable instru-

ment, nor yet a commercial transaction in the sense employed in cases on the point. It is simply a contract between the parties thereto. The principle laid down in the *Manchester* case is not restricted to negotiable instruments. It extends to commercial transactions (*Greer* v. *Downe Supply Co.* (1927), 2 K.B. 28). It is impossible, however, to regard the employment of stevedores by the charterers without any of the special features mentioned in the *Greer* case as a purely commercial transaction of the class referred to. By the pleadings the claim is simply "for work done by the plaintiff for the defendant at the request of the defendant."

I do not think, therefore, agency has been established in this case. Had the respondent contracted with the master he would be regarded as the agent of the owner. His contract, however, is with a third party, a charterer, one who has no implied authority to bind the owner. It is wrong to assume that the charterer has a *prima facie* right to bind the owner. That is, I think, the fundamental error in the respondent's contention. It is useless also to attempt to apply the law as between shippers and owners of vessels to the facts of this case. No cases were cited nor have I been able to find any in our own Courts where such a term as we have here (addenda C) was included in the charter-party. That clause changes the whole situation. We were referred to a decision of Neterer, District Judge in the United States Federal Court on similar facts arising in the neighbouring port of Seattle and it fortifies the conclusion I have arrived at. It is *The Robin Goodfellow* (1927), 20 F. (2d) 924.

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On the question that it was beyond the power of the charterer to contract with the appellants (in view of its memorandum of association) I do not think this point is open to the respondent because no right accruing to the respondent has been invaded by the exercise of the power in question. I think too, that as the charterer was engaged in the lumber trade and had authority to "traffic in lumber" and "to carry on the business of lumbering in all its branches," and also "to carry on any other trade or business which can . . . be advantageously carried on in connection with or as auxiliary to any trade or business authorized by their memorandum of association," they had the right

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to engage in loading lumber on ships—certainly it was incidental to the general objects of the Company.

I would allow the appeal.

Appeals dismissed, Martin and Macdonald, JJ.A. dissenting.

Solicitor for appellants: *J. H. Lawson.*

Solicitors for respondent: *McPhillips & Duncan.*

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IN RE PIONEER SAVINGS & LOAN SOCIETY AND THE REGISTRAR OF COMPANIES.

Savings and Loan Associations Act—Company incorporated under former Act applies for certificate—Non-compliance with conditions in section 80 of Act—Refusal of certificate—Mandamus—B.C. Stats. 1926-27, Cap. 62, Sec. 80.

The Pioneer Savings & Loan Society incorporated under a former Act sought to obtain a certificate under the Savings and Loan Associations Act that came into force on the 7th of March, 1927. Section 80 of the Act required the Society to call a general meeting within three months from the passing of the Act for the purpose of passing a resolution to substitute a constitution and rules in accordance with the new Act for those formerly enjoyed. A meeting was called for the 26th of May, 1927, but was adjourned *sine die* to await the return of the constitution and rules submitted to the Registrar of Companies for his approval. An extension of time under subsection (4) of section 80 was then applied for but the Attorney-General refused to grant the extension unless the constitution and rules confined the Society's powers to that of an association having no guaranteed capital. The Society after correspondence finally agreed as to this and the extension was granted after the original three months had expired. The Society then called a meeting which was held on the 30th of June following when the resolution was passed but the constitution and rules as passed provided for guaranteed capital. The Registrar of Companies then refused to issue a certificate. An application for a prerogative writ of *mandamus* requiring him to issue a certificate was refused.

Held, on appeal, affirming the order of MORRISON, J. that the Society did not comply with the condition within the time mentioned in section 80 and did not get an extension within the three months and the writ of *mandamus* was rightly refused. Moreover, the appeal should be dis-

missed on the additional ground that the granting or refusal of a *mandamus* is a matter of discretion.

A statute providing that within a certain period a general meeting of an incorporated society "shall be called for the purpose of passing an extraordinary resolution" is not complied with by sending out notices of a meeting for a date within that period, which is adjourned *sine die* without passing the resolution and is not passed until a meeting is convened on a date after the expiration of the period.

APPEAL by plaintiff Society from the order of MORRISON, J. of the 27th of September, 1927, on an application for a writ of *mandamus* directed to the Registrar of Companies to issue a certificate to the Pioneer Savings & Loan Society pursuant to section 80 of the Savings and Loan Associations Act. The Pioneer Savings & Loan Society had been incorporated under the Investment and Loan Societies Act and desiring to obtain a certificate under the Savings and Loan Associations Act that came into force on the 7th of March, 1927, a meeting of the Society was called for the 26th of May, 1927, as required by section 80 of the Act in order to pass an extraordinary resolution to substitute a constitution and rules in accordance with the new Act in place of those had under the old Act. The meeting was adjourned to await the return of the constitution and rules submitted to the Registrar of Companies for his approval. A meeting was held on the 30th of June following for which notice was given at which the resolution was passed, but as the Act required that the resolution should be passed at a meeting held within three months after the passing of the Act the time had expired and correspondence passed between the solicitors of the Society and the Attorney-General with a view to obtaining an extension of time from the Attorney-General under section 80, subsection (4) of the Act. The Attorney-General refused to do this but offered to extend the time to enable the Society to file constitution and rules confining its powers to that of an association having no guaranteed capital. The Society accepted the extension on the terms offered and the extension was granted, but not until after the first three months had expired. It was contended by the Society that although the Attorney-General had power to extend the time he had no power to limit the powers conferred on the Society.

Statement

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The appeal was argued at Vancouver on the 26th and 27th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Griffin (*Sugarman,* with him), for appellant: The Attorney-General has no power to limit the Society to a particular kind of incorporation: see *Jortin* v. *The South-Eastern Railway Co.* (1855), 6 De G. M. & G. 270; *Justices of Middlesex* v. *The Queen* (1884), 9 App. Cas. 757; *Cole* v. *Green* (1843), 6 Man. & G. 872; *The King* v. *The Inhabitants of Birmingham* (1828), 8 B. & C. 29. On condition precedent see *In re Greenwood. Goodhart* v. *Woodhead* (1903), 1 Ch. 749 at p. 755. Extension of time was asked for on the 28th of May and granted: see Halsbury's Laws of England, Vol. 13, p. 620, sec. 837. That the condition is void see *Bradley* v. *Peixoto* (1797), 3 Ves. 324; *Rishton* v. *Cobb* (1839), 5 Myl. & Cr. 145 at p. 153; 41 E.R. 326; *In re Dugdale. Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176 at p. 181.

Argument

Jackson, K.C., for respondent: A writ will not issue if there is another remedy available: see *The Queen* v. *Lambourn Valley Rail. Co.* (1888), 58 L.J., Q.B. 136 at p. 137; *The Queen* v. *The Mayor of Peterborough* (1875), 44 L.J., Q.B. 85; Halsbury's Laws of England, Vol. 10, p. 77. This is in the discretion of the Attorney-General: see *Trudeau* v. *Labelle* (1907), 32 Que. S. C. 42; *Rex ex Rel. McKay* v. *Baker* (1923), 2 D.L.R. 527.

Griffin, in reply, referred to *The Queen* v. *London and North Western Railway Co.* (1894), 2 Q.B. 512 at p. 518; *The Queen* v. *Registrar of Joint Stock Companies. Ex parte Johnston* (1891), 2 Q.B. 598; *The Queen* v. *Registrar of Joint Stock Companies* (1888), 21 Q.B.D. 131; *The Queen* v. *Registrar of Friendly Societies* (1872), L.R. 7 Q.B. 741; *Regina* v. *Whitmarsh* (1850), 15 Q.B. 600; *Regina* v. *Registrar of Joint Stock Companies* (1847), 10 Q.B. 839; Lindley on Companies, 6th Ed., Vol. 1, pp. 150 and 812; *Reg.* v. *The Churchwardens of Wigan and others* (1876), 35 L.T. 381 at p. 383; *Wills* v. *Murray* (1850), 4 Ex. 843 at pp. 859, 861 and 869; Palmer's Company Law, 12th Ed., 185.

Cur. adv. vult.

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MACDONALD, C.J.A.: I have read the disingenuous correspondence of the appellant with the Attorney-General and with the Registrar of Companies, and I am satisfied that the order sought, namely, a prerogative writ of *mandamus*, directed to the latter, was rightly refused.

The appellant was incorporated under the Investment and Loan Societies Act, R.S.B.C. 1924, Cap. 237, and when the new Act covering the same field was enacted in 1927, being chapter 62 of the statutes of 1926-27, the appellant sought to obtain a certificate under that Act. It was required to comply with the conditions set out in section 80 thereof; it was required to call a general meeting of the Society within three months from the passing of the Act which was assented to on the 7th of March, 1927, for the purpose of passing an extraordinary resolution to substitute a constitution and rules in accordance with the new Act for those it already enjoyed. On filing such a resolution the Registrar was required to issue a certificate of re-registration. The meeting was called for the 26th of May, 1927, but on that date was adjourned *sine die* without passing the resolution. By a subsequent notice a meeting was convened for the 30th of June, which is said to have passed the resolution. In the meantime, however, the three months had expired and a lengthy correspondence had been carried on by the appellant with the Attorney-General and with the Registrar, looking to an extension of time. The time named in the Act had expired on the 7th of June. An extension was refused by the Attorney-General but he offered to extend the time to enable the appellant to file a constitution and rules confining its powers to that of an association having no guaranteed capital. This extension was offered provided the appellant should give a certain undertaking mentioned in the Attorney-General's letter, which so far as I can see, was never given. That was not what the appellant wanted: it wanted to come under the new Act as an association with guaranteed capital. An extension of time to permit this was absolutely refused by the Attorney-General. The appellant afterwards accepted the extension to file without guaranteed capital on the terms offered, and the extension was granted, but after the expiration of the original three months, for a period extending to the 15th of July.

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It was contended by appellant's counsel that the Attorney-General had power under said section 80, subsection (4) to extend the time generally but had no power to limit it to a particular kind of incorporation, and that having consented to extend the time, that extension must be held to be an extension of time to do anything which the appellant was entitled to do under section 80. I cannot accede to that contention. In the first place I think the true interpretation of said subsection (4) is that the time can only be extended by permission given before the expiration of the said three months. The subsection reads as follows:

> "The Minister may, upon proof to his satisfaction that an association is unable to comply with the conditions of subsection (1) [of section 80] within the time limited therefor, extend the time for such compliance for a further period not exceeding three months."

The important things to note in this connection are the words "is unable to comply" not "has been unable to comply." What may be the effect of an extension made after the 7th of June confined to a particular thing, it is not necessary to determine. The fact is that the time was not extended within the three months, and when extended was not extended to enable the appellant to obtain a certificate for an association with guaranteed capital but for another purpose authorized by the Act. Moreover, the appellant accepted the extension in the form in which it was given. The letters written by its solicitors are very significant of the appellant's methods. It was only when the meeting of the Society was held on the 30th of June that appellant boldly took the position that it had under the limited extension the right to a certificate incorporating the Society as an Association with guaranteed capital. The fact is that the appellant did not comply with the conditions within the time mentioned in section 80; that it did not get an extension of that time either within the three months or afterwards, unless the limited extension given afterwards must be construed as a general extension, and that construction, I do not think, is open to us.

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Moreover, the granting or refusal of the *mandamus* was a matter of discretion, and for that reason if for no other, the decision of the learned judge of first instance should not be

interfered with. In my opinion, he also made the proper order on the merits.

MARTIN, J.A. agreed in dismissing the appeal.

GALLIHER, J.A.: I am in agreement with the Chief Justice and would dismiss the appeal.

MCPHILLIPS, J.A.: This appeal cannot succeed. I do not propose to deal at any length with the many questions that have been raised and the objections made by the Registrar of Companies to the procedure of the appellant—all well taken, in my opinion—indicating that there has been non-compliance with the law, rules and regulations. Further the non-observance upon the part of the appellant of undertakings given—a complete breach of faith with the Attorney-General, who granted an extension of time to the appellant under section 80 of the Act conditional only upon certain steps being taken and which were not taken. No case was made out for a prerogative writ of *mandamus* and the learned judge, Mr. Justice MORRISON, was right in his refusal to grant the *mandamus*. The Registrar of Companies upon all the facts and in proper compliance with the provisions of the Savings and Loan Associations Act rightly refused to issue a certificate to the appellant. It can in no way be successfully contended that the Act, Cap. 62, B.C. Stats. 1926-27, applied to the appellants as and from the 7th of March, 1927, notwithstanding non-compliance with the requirements set out in section 80 of the Act. It is idle contention to assert and it is impossible of being given effect to that the requirements of section 80 of the Act are all conditions subsequent and it is clear that there was failure upon the part of the appellant to comply with the requirements of section 80 of the Act being conditions precedent and obligatory upon the appellant. Further, I am firmly of the view that the Registrar of Companies was right in his insistence that the appellant should have 500 fully paid up guarantee shares before it would be possible for the appellant to be entitled to a certificate as a Guarantee Association. The Registrar of Companies acted throughout in complete accord with the statutory requirements and the appellant utterly failed to comply with the Act and was

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rightly refused the certificate claimed under the Savings and Loan Associations Act. I cannot part with the subject-matter of this appeal without remarking upon the administration of the appellant's affairs. The great majority of the subscriptions and allotments of shares are palpably not within the statutory requirements in that permanent shares were admittedly upon the facts allotted to directors and officers, not for cash, but in satisfaction of alleged claims for salaries at the rate of $250 per month for three months in 1926, and at the rate of $500 per month for three months in 1927, and allotted permanent stock for the aggregate amounts less $100 only thereof paid in cash.

In passing it seems to me to be proper comment when the nature of the services are considered and the work done to say that the salaries are wholly out of all proportion and absolutely unreasonable.

It is to be observed that 288 permanent shares were allotted and it was alleged that the full cash payment of $100 in respect of each share was duly received, and in every case on or about the same day or within two days following there was repaid to each of the respective applicants the full 90 per cent. of the par value of all such shares, and the shares were allotted and issued without premium to the directors, whilst shares allotted to persons other than directors were subject to the payment of a premium.

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In the balance sheet as of the 30th of April, 1927, may be seen amongst other entries:

"Amount paid on terminating shares, $20,544.62," being a debit, with a credit "retained by agents for commission $16,122.37"; "Charges paid for salaries $6,343.50, charges for general office expenses $4,021.63."

Comment is hardly necessary, the items speak volumes but not in the nature of a true exemplification of the name of the appellant, *i.e.,* the Pioneer Savings & Loan Society. The savings seem to have in the main passed into the pockets of the commission agents. It was submitted at this Bar that all this is permissible under the statute law. If that be the case, I would think that it is high time for the law-making authority to change the statute law, and it is to be commended that the authorities are evidently now grappling with a situation that

would appear to be operating against the interests of the investing public, and amending legislation has already been passed to cope with all such matters in the future. It is patent that upon the facts here recited that no case was made out for the issuance of a prerogative writ of *mandamus;* in truth, it is more than a matter of wonderment that such an application should have been made.

The learned judge in the Court below made the proper order when he dismissed the application and the proper order in my opinion in this Court is the affirmance of the order made below and the dismissal of the appeal.

MACDONALD, J.A.: This is an appeal from the refusal of Mr. Justice MORRISON to issue a writ of *mandamus* directed to the Registrar of Companies compelling him to issue a certificate to the appellant the Pioneer Savings & Loan Society to enable it to continue in business. The points involved turn on the requirements of section 80 of the Savings and Loan Associations Act, Cap. 62, B.C. Stats. 1926-27). The appellant Society was incorporated in 1926 under an earlier Act, *viz.,* the Investment and Loan Societies Act, Cap. 237, R.S.B.C. 1924. Upon the enactment of the new Act of 1927, superseding the old the appellant could only continue in business by complying with certain conditions set out in said section 80.

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The question in issue is whether or not said conditions were complied with and if so, must the Registrar issue a certificate of compliance entitling it to carry on business under the new Act. The new Act (section 8) restricts the business operations of an association of a certain class, *viz.,* one which may not issue "guarantee shares" to a locality not exceeding two adjoining counties, all others being permitted to transact business throughout the Province. The appellant Society notwithstanding the refusal of the Minister and the Registrar to permit it, insisted on its right to issue guarantee shares and qualify under the former class, and now seeks to shew from correspondence exchanged that there was in fact no refusal, or in any event, with or without the sanction of the Minister and the Registrar, it had fully complied with section 80, and the certificate must issue.

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The material parts of section 80 of the new Act read as follows:

"80. (1.) Subject to section 81, every society or association incorporated under the 'Investment and Loan Societies Act' shall be deemed to be an association under this Act, and may carry on its business accordingly, subject to the following conditions:—

(*a.*) Within three months from the commencement of this Act, a general meeting of the society or association shall be called by the directors for the purpose of passing an extraordinary resolution to substitute a constitution and rules in accordance with this Act for the existing constitution and rules:"

"(2.) On the filing of an extraordinary resolution passed under subsection (1), the Registrar shall issue a certificate shewing that the society or association has complied with that subsection, and shall publish a notice to that effect in the Gazette for four weeks at the cost of the society or association.

"(3.) Where a society or association fails to comply with the conditions prescribed by subsection (1) the Registrar shall cancel its incorporation, upon such conditions and subject to such provisions as the Minister may think proper, and thereupon the society or association shall be dissolved.

"(4.) The Minister may, upon proof to his satisfaction that an association is unable to comply with the conditions of subsection (1) within the time limited therefor, extend the time for such compliance for a further period not exceeding three months."

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There is no doubt that the new Act authorizes an association to issue guarantee shares if certain requirements are followed (section 24 (4)), so that the appellant was not seeking to contravene the general provisions of the Act. By virtue of its incorporation under the old Act, it continued to be an association under the new legislation, and might carry on its business without interruption, subject, however, to complying with the conditions contained in section 80; in other words, it was not necessary to suspend operations until these conditions were complied with. These requirements were not therefore conditions precedent to the Society continuing its activities; it simply had to comply before becoming entitled to a certificate while failure to do so would result in cancellation of its incorporation. The conditions outlined, however, had to be carried out within three months unless an extension of time was granted under subsection (4). If these conditions were strictly complied with it would be arbitrary and unjust to refuse to issue a certificate; the Registrar could not refuse to do so as subsection (2) of section 80 is mandatory. No power is reserved in the Act to the Minister or Registrar to compel an association to

restrict its business to two counties. That is optional with the association itself, section 8 simply providing that if the association should on its own initiative not issue guarantee shares as defined by the Act, it will be so restricted in its operations.

We next turn to an examination of the record to see if the conditions imposed by section 80 were in fact complied with. The new Act was assented to on March 7th, 1927. Within three months from that date, *i.e.*, by June 7th, a general meeting of the association had to be "called" to pass an extraordinary resolution to substitute a new constitution and rules to take the place of the old in harmony with the new legislation (see section 80 (1) (*a*)). Notice was sent out on or about the 20th of April, for a meeting to be held on the 26th of May. A shareholders' meeting convened on that date, but as the new constitution and rules had not in the meantime been approved by the Registrar, the meeting on motion adjourned *sine die* pending such approval to be reconvened on giving at least fourteen days' notice. Pursuant thereto a further meeting was held on the 30th of June (*i.e.*, after the expiration of three months—an extension of time having been obtained under subsection (4) of section 80, to be later considered), where in attempted compliance with section 80 (1) (*a*) and (4), an extraordinary resolution was passed in the following words:

"At an extra-ordinary general meeting of the Pioneer Savings & Loan Society duly convened and held on the 26th day of May, 1927, and adjourned to the 30th day of June, 1927, the following extra-ordinary resolutions were duly passed.

"WHEREAS the Pioneer Savings & Loan Society is an existing Society incorporated under the Investment and Loan Society Act.

"AND WHEREAS the Savings & Loan Association Act was passed on the 7th day of March, 1927, requiring the shareholders thereof to adopt new Constitution and Rules in pursuance of the said new Act.

"AND WHEREAS it appears from the certified report of H. D. Campbell the auditor of the Pioneer Savings & Loan Society that the said society has issued five hundred fully paid up shares of permanent or guarantee shares for cash.

"AND WHEREAS it appears that the Attorney-General for the Province of British Columbia has granted an extension of time to the Pioneer Savings & Loan Society to qualify under the new Act.

"AND WHEREAS it appears that the said extension of time is given for the purpose of the Pioneer Savings & Loan Society qualifying under the new Act as a permanent association without guarantee shares.

"AND WHEREAS it appears to the shareholders of the Pioneer & Loan

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Savings Society assembled in meeting that they do not desire to qualify as a permanent association without guarantee shares.

"AND WHEREAS it appears that the Society is now able to qualify under the said Act as a permanent association with guarantee shares.

"NOW THEREFORE BE IT RESOLVED

"1. That the Pioneer Savings & Loan Society qualify under the Savings & Loan Association Act as a permanent association with guarantee shares.

"2. That the Constitution and Rules submitted to this meeting by the solicitor of this Society be and the same are hereby adopted as the Constitution and Rules of this Society in substitution and in place of the previous Constitution and Rules of the Pioneer Savings & Loan Society.

"Certified to be a true copy this 30th day of June A.D. 1927.

"R. G. Goulet,
"Secretary."

It will be noted that the fifth recital shews that the extension of time was conditional. The right to impose conditions was disputed and that point will be dealt with. It was submitted that in any event subsection (1) only required the meeting to be "called" not actually held within three months and the meeting held on June 30th was "called" within that period. If this contention is well founded and no other considerations arise then section 80 was complied with and the mandatory direction contained in subsection (2) to issue the certificate would have to be observed.

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However, it is clear that no extension of time was granted except on one specified condition, *viz.*, that the appellant Society would take steps to organize as an association having no guarantee capital thus restricting its operations to two counties. It was submitted that under subsection (4) the Minister had no authority to impose terms or clog his grant of time with inconsistent conditions. That, I think, is true, but it is also true that he was not compelled to grant an extension at all. If appellant Society acquiesced in the requirement of the Minister and acted upon it, it cannot now be heard to say that the condition was not a part of the extension. If the condition is dropped the extension drops with it, because the Minister said in effect—if not in so many words in his letter of June 2nd—"I will not grant an extension unless you restrict your operations in the way suggested." There was no extension of time to enable the appellant to qualify to carry on business throughout the Province. It is not a case of the condition being repugnant to the grant and therefore void the donee taking the grant free

from the condition; it was a term insisted upon without which no grant would ever have been made. The principles applicable to repugnant conditions in devises and bequests are not analogous to a situation where ministerial acts to carry out the objects of a statute are involved. It is also clear from the correspondence that appellant Society accepted this condition and advised the Minister that it would prepare a constitution and rules to comply with the Act as an association having no guarantee capital (letter June 8th). This was a clear submission to the Minister's demand. Subsequent correspondence shews that the Minister did not recede from this position while on the other hand the Society's solicitor by adroit correspondence in the interest of his clients sought either to change the mind of the Minister or failing that to go ahead qualifying the Association as a company possessing the full amount of guaranteed stock required by section 24, so that before the extended period expired he could say—"notwithstanding our acquiescence in your demand that we restrict our operations we have now done everything that the Act requires to permit our organization as a company with guarantee stock and you cannot refuse to issue the certificate." That is what took place; the appellant had two strings to its bow. That position, however, can only be maintained by ignoring the extension of time (it cannot be relied upon by the appellant) and by contending that because it "called" its general meeting pursuant to section 80 (1) (*a*) within the three months (then after meeting adjourning and reconvening after the three months' period) it complied with the Act and is entitled to a certificate. I cannot give that interpretation to the word "called" or say that what occurred here, *viz.*, meeting on May 26th adjourning without action *sine die* and reconvening on June 30th, met the requirements of said section. If that is so final action might be postponed indefinitely. The word "called" cannot be singled out from the context for literal interpretation. The words are "within three months . . . a general meeting . . . shall be called . . . for the purpose of passing an extraordinary resolution," etc. It does not mean that within three months a notice calling the meeting shall be sent out. The general meeting itself must be called to do certain acts within that time. It is not doing

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violence to the wording of the section to interpret the word "called" as "convened," while to give it the meaning contended for the intention of the Act would not be carried out. Even the grammatical sense of words may be modified to harmonize with an expressed intention or some declared purpose of an Act. Again, when the main purpose of a statute is clear the draftsman's unskilfulness may be remedied by substituting one word for another, *Morris* v. *Structural Steel Co.* (1917), 24 B.C. 59, followed in *Cameron* v. *Regem* (1927), 38 B.C. 191. We must construe the words of a statute so as to give a sensible meaning to them: Bowen, L.J., in *Curtis* v. *Stovin* (1889), 22 Q.B.D. 513 at p. 517. I hold, therefore, that section 80 was not complied with.

It follows from this view that it is not necessary to consider other points raised by counsel for respondent in which he sought to shew from the records that cash was not paid for shares; that the required number of guarantee shares were not issued, also that there was no consideration for the purchase of shares, unauthorized loans and invalid meetings. Even if there was strict compliance in all details of reorganization, it did not take place within the three months specified, that is before June 7th. These alleged shortcomings would, however, be a proper subject for consideration on the question of discretion.

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This appeal fails also upon other grounds. The cases shew that the granting of a prerogative writ of *mandamus* is discretionary. It is also said that it will not be granted if the appellant has other effective means of compelling the performance of the Act insisted upon. I would not care to say finally that the second ground should be acted upon in this case. There is perhaps no other effectual remedy, because a petition of right could not be launched without a *fiat,* and it is difficult to regard a remedy as effective which can only be exercised at the will of one of the parties concerned. There are cases in the books shewing that the writ will be granted for the purpose of doing justice where it is doubtful if the same result can be obtained in other ways; or if possible to obtain it would involve time and difficulty (Wright, J., in *The Queen* v. *London and North Western Railway Co.* (1894), 2 Q.B. 512 at p. 518). But the first ground should be given effect to. The Registrar and the

Minister exercised their discretion, no doubt influenced by the investigations of their own officials. They doubtless from all the facts concluded that the operations of the Association should be restricted and although it is not clear just what purpose would be served by permitting operations in a more limited field, unless supervision would thereby be more effective, still we ought to assume that the discretion was based upon sound grounds and unless it is clear that the Registrar by the Act was bound to grant the appellant's request we should not interfere with the discretion exercised. A similar discretion was exercised by the learned judge who heard the application. We must be satisfied that withholding the writ is a denial of justice. The writ may be refused if there are any special circumstances to justify it, and I cannot say on all the material that there were no special circumstances justifying refusal in this case.

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The grounds upon which that discretion may be reviewed are discussed in *Reg.* v. *The Church Wardens of Wigan and others* (1876), 35 L.T. 381 at p. 383. I see no reason why it should be interfered with in this case.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *E. R. Sugarman.*
Solicitor for respondent: *M. B. Jackson.*

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MURDOCH AND PIGION v. CONSOLIDATED MINING & SMELTING COMPANY OF CANADA, LIMITED.

Negligence—Prospectors hired by defendant—Fire started for cooking meal—Later spreads to plaintiffs' timber—Scope of employment—Damages—Liability.

Two men were employed by the defendant Company to dig trenches and prospect for phosphate on a property of the Company on Bear Creek, B.C. They were supplied with tent, tools and cooking utensils by the Company. On a morning before going to work they built a fire for preparing breakfast. It was alleged that the fire, not being properly put out, started up later and spread to adjoining timber limits of the plaintiffs and destroyed a portion of the timber. It was held in an action for damages that the fire originated as aforesaid and the plaintiffs were entitled to recover.

Held, on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting), that the fire lit for the purpose of cooking their breakfast and which escaped and caused the damage, is a necessary incident to the operations they were carrying on for the defendant, and the defendant is responsible for the loss.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 10th of June, 1927, in an action for damages for the loss of timber on property owned by the plaintiffs in the Kootenay District, through the negligence of the servants of the defendant Company, the plaintiffs claiming that two men hired by the defendant for the purpose of digging trenches and cutting trails had pitched their tent about four miles north of Fernie on a location close to the plaintiffs' timber ground and on the morning of the 8th they got up and started a fire for preparing their breakfast; that they did not properly extinguish the fire when leaving for their day's work the result being that the fire started afresh and spread burning over a large tract of the plaintiffs' timber lands, the plaintiffs claiming that they suffered damage to the amount of about $20,000. It was found by the trial judge that the defendant Company was liable in damages to be assessed.

The appeal was argued at Vancouver on the 17th and 18th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

A. H. MacNeill, K.C., for appellant: We submit, first, that the fire did not originate at the place claimed by the plaintiffs, nor did it originate through the defendant or its employees. Second, assuming the fire began as claimed, the defendant is not liable as the men were acting outside the scope of their employment. The fire was built outside the men's tent to prepare their breakfast and before they had arrived at the place where they were to work under their employment, they being engaged at the time in stripping a phosphate vein and cutting a trail for the Company. As to the scope of their employment see *Edwards* v. *Wingham Agricultural Implement Company, Limited* (1913), 3 K.B. 596 at p. 601; *Philbin* v. *Hayes* (1918), 87 L.J., K.B. 779; *Rayner* v. *Mitchell* (1877), 2 C.P.D. 357; *Sanderson* v. *Collins* (1904), 1 K.B. 628; *Cheshire* v. *Bailey* (1905), 1 K.B. 237; *Williams* v. *Jones* (1865), 11 Jur. (N.S.) 843; *Goh Choon Seng* v. *Lee Kim Soo* (1925), A.C. 550; *Gallon* v. *Ellison. Knowles* v. *Ellison* (1914), 20 B.C. 504; *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716; *Coll* v. *Toronto R. W. Co.* (1898), 25 A.R. 55. There is no evidence on which it can be found that the fire complained of was started by these men.

Argument

J. W. deB. Farris, K.C., for respondents: They claim that we failed to fasten the origin of the forest fire to the locality where these men made a fire and we failed to shew negligence that caused the fire. We submit the evidence is ample to answer these objections and was accepted by the trial judge. The fire started by these two men was a necessary incident to their work under hire by the defendant Company: see *Bugge* v. *Brown* (1919), 26 C.L.R. 110; *Port Coquitlam* v. *Wilson* (1923), S.C.R. 235 at p. 253; *Blovelt* v. *Sawyer* (1903), 73 L.J., K.B. 155; *Derby* v. *Ellison* (1912), 2 W.W.R. 99; *Morris* v. *The Mayor, &c., of Lambeth* (1905), 22 T.L.R. 22; *Ruddiman and Co.* v. *Smith and others* (1889), 60 L.T. 708; *Johnson* v. *Bell* (1922), W.C. & I. Rep. 55; *Elliot* v. *Barclay* (1926), W.C. & I. Rep. 198.

MacNeill, in reply, referred to *Black* v. *Christchurch Finance Co.* (1894), A.C. 48.

Cur. adv. vult.

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MACDONALD, C.J.A.: The trial judge after careful consideration of the case, as he states in his reasons for judgment, and with the advantage of having seen the witnesses, some of whom he might decline to credit, came to the conclusion that the plaintiffs were entitled to succeed. I cannot say he came to an erroneous conclusion.

The appellant sent these men out into the wilderness to prospect for it under conditions which made it necessary for them to cook their own food, and it supplied them with the cooking utensils. The defendant was therefore the efficient cause of the occurrence complained of and was rightly held responsible therefor.

MACDONALD, C.J.A.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A. agreed in dismissing the appeal.

GALLIHER, J.A.: During the argument the majority of the Court expressed the opinion that the fire originated at the point claimed and was allowed to escape owing to the negligence of the defendant's employees, to which I adhere.

The only other question argued was as to whether such employees were acting within the scope of their employment. Numerous cases were cited to us which I have considered, and if this were the ordinary case of a workman going to his home after the completion of his day's work, or living at home previous to going to work, it might be a very different case, but I think this case ought to be considered and decided on its own peculiar facts.

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The workmen were out in the woods in the mountains away from civilization, engaged in work for the defendant. They had a tent to sleep in and provisions and cooking utensils procured from the Company. It was the fire which they lit for the purpose of cooking their breakfast that escaped and caused the damage.

I do not see how anyone can reasonably say they should not have a fire for cooking their bacon or making their coffee. Situated as they were it was a necessary incident to the very operations they were carrying on for the defendant.

I would dismiss the appeal.

McPHILLIPS, J.A.: This appeal has relation to the responsibility for a fire which caused damage to the timber and other property of the respondents. The trial was had before Mr. Justice MORRISON, without the intervention of a jury. The evidence is somewhat voluminous, but is in no way evidence of certainty that the fire originated from the camp fire of employees of the appellant, in truth, upon a most careful analysis of the evidence, I am still more convinced in my opinion formed upon the hearing of the appeal, that it was not established by the evidence with any reasonable precision that upon the balance of the probabilities the fire had its origin from the camp fire, as claimed. There is positive evidence that the camp fire was put out before the employees left the camp the morning of the fire, and effectually put out by pouring water on the embers of the fire. There is no evidence to the contrary and nothing to indicate the ineffectiveness of this or of any carelessness in this regard. The fire that was later noticed in the neighbourhood and which eventually ran over the camp site of the employees of the appellant is shewn upon my reading of the evidence and incontestibly shewn to have been first seen by the respondents' witness Martha Hutchinson, considerably to the south of the site of the camp fire, near to the slide on the mountain side. This evidence places the fire as having its origin away to the south of the camp fire of the employees of the appellant. The other important witness for the respondents, Jules Andre, makes it definite and clear that the fire was also as Martha Hutchinson put it, away to the south of the camp fire. Andre further said: "I couldn't see very well where fire start." Andre also said: "The wind don't blow directly north." A question was put to him on cross-examination, in the following form:

"But was blowing generally in that direction [north]? Yes.
"Well, was that a very high wind? Yes."

This clearly demonstrates that the fire worked from the south to the north propelled by the high wind and the fire had its origin to the south and was driven north by the wind, and across the site of the camp fire. This is clear to absolute demonstration, as I read the evidence, therefore, it was not from the camp fire of the employees of the appellant that the fire originated, and if this be so that ends the case and the appellant is in no

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way liable. The employees of the appellant were entitled to light the fire; they had in the early morning to cook their breakfast, and the appellant could only be liable if negligence was established against them in leaving the camp fire without putting out the fire. There is, however, positive evidence that the fire was put out by pouring water on the embers of the fire and no evidence to the contrary. There is no evidence that the fire that afterwards raged over the area arose from that camp fire, it is all conjecture, in truth, this conjecture is absolutely displaced upon the evidence led for the respondents, *viz.*, the evidence of Martha Hutchinson and Jules Andre. How is it possible to build on such evidence liability upon the appellant for this fire which caused the damage sued for? In my opinion everything points to and conclusively points to the fire originating away to the south of the camp-fire site, and in its course the fire traversed the camp-fire site of the employees of the appellant. Is it just or reasonable upon this evidence to impose liability upon the appellant for the fire which caused the damage? Upon what foundation can it be placed? It may be said only upon the balance of the probabilities, and the learned judge so found. If I am right in my analysis of the evidence it cannot be said that there is any balance of probabilities as the concrete evidence establishes that the fire had its origin away to the south of the camp-fire site as first seen by Martha Hutchinson and later seen by Jules Andre, witnesses for the respondent, and fanned by a high wind was carried north and over the camp-fire site. Surely it cannot be that an action can be founded upon evidence of this nature? The mere fact that there has been a fire and it has traversed an area in which the camp-fire site is situate cannot of itself constitute evidence sufficient to impose liability for a fire the origin of which was plainly away from the camp-fire site and carried over it by the force of the wind. Further, apart from everything else, mere conjecture that the camp fire was the origin of the fire cannot be considered to be sufficient evidence when there is positive evidence of the camp fire having been put out before the employees of the appellant left the camp site that morning. The fire may have originated from many causes, not attributable to the actions of the employees of the appellant. Can it be that merely because

there was a fire in the area and the camp fire was within the area, that *ipso facto* the fire had its origin from the camp fire and that the camp fire was not out although there is positive evidence that it was put out? If so, then the appellant is constituted an insurer and made liable as such, that is, having had a camp fire within the area the employees of the appellant must be held to have negligently left the fire still burning (although there is positive evidence to the contrary) and upon that supposition—a pure supposition unsupported by evidence—there is liability. A conclusion which is fraught with grave injustice and as I say, amounts to this—that the appellant has been held liable as an insurer that having lighted a fire in the area later found to be burnt over, that in itself imposes liability as the conclusion must be that that fire was the proximate cause of the fire which brought about the damage. I cannot agree with any such conclusion, and with great respect to the learned trial judge, I am not satisfied that there was evidence upon which it could be reasonably so found. I am fully aware of the care which must be exercised in disturbing findings of fact by the trial judge, but I do not see that upon the facts of this case, I am in any way disentitled to come to a contrary conclusion to that arrived at by the learned trial judge. The appeal is in its nature a rehearing and the duty is imposed upon the appellate Court to rehear and decide the case upon the evidence in proper cases and this is in my opinion a proper case. I am satisfied that in arriving at the conclusion that there is no liability established that can be imposed upon the appellant for the damage caused by the fire, I have in no way transcended the classic judgment of Lindley, M.R. in *Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402, in which he said:

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"The case was not tried with a jury, and the appeal from the decision of the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must re-consider the materials before the judge, with such other materials, if any, as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been

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examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions, and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witness. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

Further, in arriving at my conclusion I am clear upon it that notwithstanding that the learned trial judge had the advantage of seeing and hearing the witnesses, that taking the evidence as given, no sufficient evidence was advanced at the trial—in fact there was a total absence of evidence—which would admit of the learned trial judge making the finding he did, that is, with the greatest respect to the learned trial judge, he was in error in imposing liability upon the appellant for the fire there being in my opinion no balance of probability which would admit of the imposition of liability. In arriving at the conclusion I have, I have not been unmindful of the judgment of the House of Lords in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8.

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The present case in my opinion, well warrants a contrary conclusion being arrived at to that of the learned trial judge.

I would therefore allow the appeal, being of the opinion that the action should stand dismissed.

MACDONALD, J.A.: We stated during argument that we could not interfere with the finding of the learned trial judge in respect to the origin of the fire. It is only necessary to deal with the contention that Ewan Brothers (employees of the appellant) who started the fire causing the damage were not acting within the scope of their employment because they built the fire to cook breakfast preparatory to the day's work but before actually entering upon it. In deciding this point, the nature of the work in which they were engaged, the locality and surrounding circumstances, terms of hiring and measure of control exercised over them are elements to consider.

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The facts, in so far as material, are as follows:

The appellant Company were doing preliminary work on a prospecting licence issued under the Phosphate Mining Act (Cap. 29, B.C. Stats. 1925) and the duty of these two employees was to assist in uncovering phosphate seams by digging trenches and cutting trails. Setting out fires was no part of the work itself. They were given permission to go off to work by themselves on a designated part of the land covered by the licence referred to. Their wages were $5 per day, the employees to provide their own board. The Company supplied them with all necessary tools and cooking utensils, etc., and equipped them with a tent to sleep in. They purchased their supplies from the Company's boarding house. The Company directed them where, and how they were to work but were not concerned with their method of living nor with the selection of camp sites except in so far as it had a bearing on the efficient performance of their duties. The fact that the appellant loaned a tent to them presupposed their use of it with the Company's sanction and to the best advantage. A main cook camp was situated some distance from where they were working but it was not contemplated that they should travel to a point so remote for food and shelter. If they did so, they would by the conditions of employment be using the Company's time in going to work, returning, however, on their own time. As stated, the fire that caused the damage was started before their eight hour day of labour commenced.

It is clear, I think, from the foregoing facts that the appellant Company at least expected Ewan Brothers to put up the tent near the scene of their work and as cooking meals was a necessity it could not be said that lighting fires for that purpose was in the same category as unauthorized acts by third parties. There was at all events acquiescence in, if not actual sanction, of this method of living. Further, they were working on lands covered by timber at some distance from centres of population with no established boarding houses in the vicinity. It was quite different to a situation where workmen reside in cities or in more settled parts and board in houses owned by themselves or others or even in houses owned by their employers where they provide for their own wants before and after returning from work. In the latter case, without special circumstances, there

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is no liability on the employer for acts of negligence committed outside of working hours.

We were referred to many cases under Workmen's Compensation Acts where the point was whether or not the accident considered arose "out of" and "in the course of" employment. *Edwards* v. *Wingham Agricultural Implement Company Limited* (1913), 3 K.B. 596 was referred to. There the workman was furnished with a bicycle by his employers just as here Ewan Bros. were furnished with a tent and cooking utensils. The full facts of the case may be referred to in the report. The distinction, however, is that there the plaintiff when killed by collision with a motor lorry after his day's work was on his way home for his own purposes. He might equally well have been on the way to a friend's house to spend the evening. There was no connection between that act and his general employment. In the case at Bar the lighting of the fire at the point in question was a necessary operation to enable them to carry on the work to the best advantage in their employer's interest. They were there with the knowledge of, and for the benefit of the Company. Indeed it is doubtful, though the contrary was suggested in argument, that the Company would permit any other method. Cozens-Hardy, M.R. points out, at p. 599, *supra,* that

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"the protection given by the Act to a workman does not extend to his going to and from his work, unless there are some special circumstances."

There were special circumstances in this case. While it was not perhaps physically impossible for Ewan Brothers to go elsewhere to board yet

"from a business point of view it was not reasonable or in the contemplation of either of the parties that [they] should do anything else":

Cozens-Hardy, M.R. at p. 600. It was further pointed out, at p. 601, that

"the man was under no obligation to his employer after 6 o'clock to move away from where he was working and to ride home on the bicycle."

Here Ewan Brothers were, though not by express words yet by the nature of the work and the locality, obliged to camp near it and light a fire. They could not do the work with the efficiency the Company expected and in fact arranged for without doing so. It was incidental to the employment. This distinguishing feature runs through all the cases we were referred to by counsel for the appellant. What we are concerned with is the

true scope of the employment not by a literal reading of the terms of employment but as a matter of fact and intention.

In *Philbin* v. *Hayes* (1918), 87 L.J., K.B. 779 the same principle was given effect to. Mr. *MacNeill* suggested that if we substitute the word "tent" for "hut" it is parallel with the case at Bar. I cannot agree. There a labourer while sleeping in a hut belonging to the employer, which at his option he might or might not use, was injured through a storm blowing it over. It was not during working hours that the accident happened. He was not obliged to use the hut just as here it was argued that Ewan Brothers were not obliged to use the tent although it too belonged to the employer. It was held that the accident did not arise in the course of his employment. If, however, sleeping and occupying the hut was found to be one of "the natural incidents connected with the class of work" he was engaged in, the decision would have been different. In the case at Bar it was a natural incident in this class of work that Ewan Brothers should live in a tent and build a fire for cooking purposes close to the work. This was recognized by the employer providing all necessary facilities. The situation is somewhat analogous to that of a domestic servant living in her master's house where sleeping and eating are incidental to the service. I think the manner in which Ewan Brothers lived was in fact in furtherance of a duty they owed their employer and was done to advance its interest.

The case of *Bugge* v. *Brown* (1919), 26 C.L.R. 110, while the facts differ, contains statements of the law which are applicable. Isaacs, J., at pp. 121-2, says:

> "As I understand the cases on the English Workmen's Compensation Act, including *Charles R. Davidson and Company* v. *McRobb or Officer* (1918), A.C. 304, an act of a servant in the course of the employment means an act in the course of the service either to effect directly the main purpose of the employment or to effect some purpose incident to it, and that, whether the incidental connection arises expressly or by implication."

Here it arises at least by implication.

Being therefore of opinion that in determining the scope of the servants' authority we must have regard to the nature of the work and its incidental requirements, believing also that the lighting of the fire was a necessary part of the day's work involving no interruption of the employment and that their act in

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lighting the fire was not so remote as to be beyond the sphere of their duties I must hold that the appellant is liable for the loss occasioned by the acts of its servants and that the appeal fails.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *R. C. Crowe.*
Solicitors for respondents: *Lawe & Fisher.*

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Jan. 16.

KEILL AND PURDY v. HUNTER.

Vendor and purchaser—Sale of land—Action to recover balance of purchase price—Taxes owing by vendor—Defence.

KEILL AND PURDY v. HUNTER

In an action to recover the balance of the purchase price of a property, the defence was raised that certain taxes which were due, had not been paid. Previously an action had been brought against the vendor for the amount of taxes due and judgment was obtained for $8,506.88. The plaintiffs then made a settlement whereby the minister of national revenue in consideration of the payment of $4,000 released the property in question for the unpaid balance reserving all rights and remedies against the plaintiffs for the balance. On the defence being raised that no officer of the Crown can give up property belonging to the Crown without statutory authority:—

Held, as the minister merely fixed upon the sum which was agreed upon as the value of the charge in question, and received such sum in consideration of the release, the defence fails.

Statement

ACTION to recover the balance of the purchase price of certain lands. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 11th of January, 1928.

Griffin, for plaintiffs.
Mayers, and *Tufts,* for defendant.

16th January, 1928.

Judgment

MCDONALD, J.: The plaintiffs sue for $6,743, being the balance of the purchase price of a restaurant, bakery, soda

drinks and ice-cream business sold by the plaintiff Purdy and one David, as trustee for Purdy's creditors, to the defendant by agreement dated 17th October, 1924.

The plaintiff Keill is trustee for the creditors in succession to the said David.

The amount owing is not in dispute but the defendant refuses to pay upon the sole ground that, as he contends, certain taxes are still owing to both the Dominion and Provincial Governments which taxes constitute a charge upon the assets agreed to be sold.

Some very interesting questions of law have been argued by counsel but, upon consideration, I am satisfied that the decision of the case depends entirely upon questions of fact.

So far as the Dominion taxes are concerned, the position is this: For several years prior to May, 1924, Purdy had carried on business and had become liable for sales and excise taxes in respect of which a claim was made for some $14,000. At that time, Purdy's creditors took charge of his business and an action having been brought to collect the taxes such action was still pending until 22nd February, 1927, when the claim was merged in a judgment for $8,506.88. Thereupon the plaintiffs, knowing that this claim, in so far as Purdy's assets were concerned, must be paid before Hunter could be compelled to pay the whole of his purchase-money effected a settlement (Exhibit 11) whereby the minister of National Revenue in consideration of the payment of $4,000, releasing such assets

Judgment

"from all claim and demand whatsoever in respect of the unpaid balance of excise and sales taxes owing by such R. C. Purdy reserving nevertheless to His Majesty The King His and all His rights and remedies against the said R. C. Purdy for the recovery of any unpaid balance of the said taxes."

No evidence is given as to the value of the assets out of which the minister could hope to realize the amount of the lien or charge. It may well have been that such assets were not worth as much as $4,000; so what was done was simply to agree to release the assets upon payment of $4,000 and to retain the personal claim against R. C. Purdy for the balance of $4,506.88. Counsel for the defendant relies upon authorities which go to shew that no officer of the Crown can pay out moneys belonging to the Crown or give up any valuable property belonging

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to the Crown without statutory authority but there is no evidence here that any such thing was done or that the minister did other than to fix upon a sum which was agreed upon as the value of the charge in question and to receive such sum in consideration of a release of the charge; and in my opinion this defence fails.

As to the Provincial taxes, a claim was made which is stated to have been $1,800 or $2,000. No evidence is given that this was a valid claim or that a valid assessment was made upon which a tax of such amount could properly be levied. Evidence was given that the claim for taxes was settled at $1,000 which amount was paid; whereupon the commissioner of income tax issued certificates that no taxes for the taxable periods up to and including the 1927 roll in respect of income, personal property or other basis of assessment are outstanding against R. C. Purdy Ltd. or R. C. Purdy. Here again we have no evidence that any valid claim of the Crown was released or that any official of the Government purported to abandon any valid claim of the Government and, in my opinion, the authorities cited by Mr. *Mayers* do not apply to these facts.

Judgment

Upon these findings, it becomes unnecessary to consider the interesting question raised by Mr. *Griffin* as to whether or not, in any event, the implied agreement on the part of the vendor to give quiet possession free from incumbrance was not more than a warranty which would justify the defendant in refusing to pay but only in bringing an action if and when his quiet possession was disturbed.

Upon the facts of the case I am satisfied that the plaintiffs are entitled to recover and there will be judgment for $6,743 and costs.

Judgment for plaintiffs.

MAIR v. DUNCAN LUMBER COMPANY, LIMITED. (No. 2).

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

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Jan. 25.

MAIR v. DUNCAN LUMBER CO.

Practice—Costs—Counsel fee—Attendances before registrar to settle judgment—Appendix N, Tariff Item 28.

Tariff Item 28 of Appendix N of the Supreme Court Rules applies only to the actual hearing before the Court of Appeal. Attendances before the registrar or before a judge of the Court of Appeal to settle a judgment are merely incidental thereto for which no additional counsel fee is provided.

APPLICATION by plaintiff by way of appeal from the registrar's taxation of a bill of costs. The action was for an injunction and damages, the plaintiff recovering judgment from which the defendant appealed. The appeal was quashed on the preliminary objection that the judgment being interlocutory the notice of appeal was out of time. On the settlement of the order before the registrar the appellant raised the point that the judgment of the Court should be drawn without prejudice to any further or other appeal that the appellant might desire to make. After three attendances before the registrar the matter was referred to MACDONALD, C.J.A. who sustained the respondent's contention. The respondent charged $50 for each attendance before the registrar and for the hearing before the Chief Justice in his bill of costs, contending before the registrar as taxing officer that this was permissible under item No. 28 of Appendix N of the Tariff of Costs. The registrar held that item No. 28 only applied to actual hearings before the Court of Appeal and that the attendances in question were only incidental thereto for which no provision for counsel fees were made. Heard by MACDONALD, C.J.A. in Chambers at Victoria on the 25th of January, 1928.

Statement

O'Halloran, for the application: The word "inclusive" in item 28 of Appendix N governs the three clauses in the sentence, and therefore a counsel fee should be allowed for each day of the hearing of any motion in respect to the settling of the judgment arising after the actual hearing of the appeal. In

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the alternative, in calculating the number of days in the conduct of the appeal, regard should be had not only for the actual time of argument before the Court of Appeal but also for the actual time in terms of Court days taken up upon the hearing of subsequent arguments before the registrar, adjournments thereof, and settlement thereof by the Court or a judge thereof.

H. G. Lawson, contra: The conduct of appeal *per diem* includes all subsequent motions, hearings and attendances before the registrar in respect to the settlement of the judgment.

Judgment

MACDONALD, C.J.A.: The application is dismissed with costs. The registrar has made a proper ruling; the object of Appendix N is to establish reasonable counsel fees and item No. 28 must be interpreted accordingly. This interpretation would not be upheld if the contention of the applicant were allowed as in that case each attendance before the registrar would entitle the applicant to the same *per diem* counsel fee as is allowed by the scale for the argument of the appeal itself.

Application dismissed.

THE KING v. F. R. STEWART & CO. LTD.

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Jan. 10.

THE KING v. F. R. STEWART & CO.

Municipal law—North Vancouver by-law—Truck licence required—Truck of Vancouver firm delivering goods in North Vancouver—Contravention of by-law—B.C. Stats. 1925, Cap. 35, Sec. 28.

The City of North Vancouver Trades Licence By-law recites: "From every owner of every truck plying for hire or used for the delivery of wood, coal, merchandise, or other commodity, $20 for every six months," etc. The defendants carried on the business of wholesale produce merchants in the City of Vancouver and employed travellers to canvass for orders in North Vancouver and other municipalities. From their stores in Vancouver they delivered certain merchandise to a customer in North Vancouver using one of their own trucks for the purpose. The conviction for an infraction of the by-law was affirmed in the Supreme Court.

Held, on appeal, affirming the decision of MURPHY, J., that the by-law is in exact compliance with the power given by subsection (34) of section 290 of the Municipal Act. The defendants took orders for the delivery of merchandise in the municipality and were the owners of and using in the municipality a truck for its delivery. They were therefore obliged to obtain a licence.

APPEAL by defendants from the decision of MURPHY, J. of the 1st of September, 1927, dismissing an appeal by way of case stated from a conviction by the police magistrate in North Vancouver on a charge of being the owners of a truck, did use said truck for the delivery of merchandise within the City of North Vancouver without obtaining a licence from the City of North Vancouver entitling them to do so. The facts as set out in the case stated are as follow:

Statement

"(a) F. R. Stewart & Co. Ltd. is an incorporated company carrying on the business of wholesale produce merchants in the City of Vancouver, where they maintain an office and warehouse.

"(b) Their business consists of selling merchandise to retail merchants generally throughout the Province and exporting to other Provinces and countries.

"(c) They maintain at their place of business in the City of Vancouver seven motor-trucks for use in delivery of merchandise sold by them to their retail customers in the City of Vancouver and in the various surrounding municipalities, including the City of North Vancouver.

"(d) They employ travellers to canvass for orders for merchandise throughout the Province and elsewhere, including the City of North Vancouver and all such orders are forwarded to the Company's office in Vancouver.

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"(e) They do not carry on any business in North Vancouver unless the canvassing for and taking of orders therein by the Company's travellers, or the delivery by the Company's own delivery trucks of goods purchased from it in manner above mentioned amounts to a carrying on of business in the City of North Vancouver.

"(f) No particular truck is appropriated to deliveries in the City of North Vancouver and one truck might in the same trip include goods for delivery in North Vancouver City, North Vancouver District and West Vancouver District, or some or one of such municipalities.

"(g) On the 12th day of July, 1927, they delivered to a customer in the City of North Vancouver certain merchandise purchased by such customer from them, using one of their trucks for the purpose.

"(h) They had never taken out any licence under the 'Trades Licence By-law, No. 751' of the City of North Vancouver authorizing the use of a truck for the delivery of merchandise.

"(i) 'Trades Licence By-law, No. 751' was duly proved."

The defendants appeal on the ground that there is no power under the Municipal Act enabling the municipality to require the defendants to take out a trades licence, as their travellers merely seek orders in North Vancouver and they make delivery by their own trucks to customers in North Vancouver of goods purchased in the City of Vancouver.

The appeal was argued at Vancouver on the 20th and 21st of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

R. M. Macdonald, for appellants: In order to obtain a licence, $20 must be paid for each conveyance. We merely carry goods from our stores in Vancouver. This is not carrying on a business in North Vancouver. Delivery is merely incidental to a business. *Prima facie* municipal by-laws are limited to its own people: see Dillon's Municipal Corporations, Vol. 2, p. 892, sec. 570. As to the term "carrying on" see Stroud's Judicial Dictionary, Vol. 1, p. 263; *Brown* v. *The London and North-Western Railway Company* (1863), 32 L.J., Q.B. 318 at p. 321; *Grant* v. *Anderson & Co.* (1892), 1 Q.B. 108 at p. 117. On the rules of construction see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., p. 60; *La Bourgogne* (1899), P. 1 at pp. 12-13; *Russell* v. *Cambefort* (1889), 23 Q.B.D. 526 at p. 528; *Linde Canadian Refrigerator Co.* v. *Saskatchewan Creamery Co.* (1915), 51 S.C.R. 400 at pp. 404 and 407.

D. Donaghy, for respondent: Although the goods were delivered from the City of Vancouver, this firm had its travellers

soliciting business in North Vancouver in competition with others in the same business. We submit they come within the by-law and should have a licence.

Macdonald, replied.

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Cur. adv. vult.

10th January, 1928.

MACDONALD, C.J.A.: The section of the by-law under which the licence fee mentioned in the case stated was imposed, is in exact compliance with the power given by the Municipal Act, as amended in 1925 by Cap. 35, Sec. 28, Subsec. (34).

It was submitted by appellants' counsel that the municipality had no power to demand licence fees from outsiders relying on section 294 of the Municipal Act in support thereof, but I do not construe that section as repugnant to said subsection (34), but even if it be so, the later section must prevail. The appellants took orders for the delivery of merchandise in the municipality and were the owners of and using in the municipality a truck for the delivery of it. They therefore were under obligation to obtain a licence.

MACDONALD, C.J.A.

I would dismiss the appeal.

MARTIN, J.A. agreed in dismissing the appeal.

MARTIN, J.A.

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

Section 290, subsection (34), as enacted by B.C. Stats. 1925, Cap. 35, in my view gives the City of North Vancouver power to impose a tax on every owner of a truck plying for the delivery of merchandise to be delivered within the city. It could not impose a tax upon any truck passing through the city, with merchandise to be delivered, say, in West Vancouver, as was suggested in argument.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be dismissed. The statutory provision plainly indicates the intention of the Legislature to give protection to the municipalities against outside trucks, that is, trucks not covered by municipal licence used for the delivery of merchandise within the municipality. The City of North Vancouver passed the necessary

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by-law, being No. 751, City of North Vancouver Trades Licence By-law, which in section 35 reads as follows:

"35. From every owner of every truck plying for hire or used for the delivery of wood, coal, merchandise, or other commodity, twenty dollars for every six months for each truck. Where the owner of such truck is paying to the Municipality a licence fee as a merchant, the licence fee for each truck or delivery conveyance shall be reduced to five dollars for every six months."

MCPHILLIPS, J.A.

The by-law in its terms is within the statutory power conferred by the Legislature. The appellants did not obtain the necessary licence for their truck which was being used in the City of North Vancouver for the delivery of merchandise. The conviction, in my opinion, was rightly made by the police magistrate, and the decision of Mr. Justice MURPHY upholding the conviction upon a case stated was also right and should be affirmed. It follows that in my opinion the appeal should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A. agreed in dismissing the appeal.

Appeal dismissed.

Solicitors for appellants: *Macdonald & Pepler.*
Solicitor for respondent: *A. A. Gray.*

CRONHOLM v. COLE AND COLE.

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1928

Jan. 10.

CRONHOLM v. COLE

Mining leases—Agreement for sale—Provision as to payment of rent and assessment work—Breach owing to non-payment—Forfeiture—Action for relief

The defendants, who held two placer-mining leases, upon which rents and payments in lieu of assessment work were payable on or before the 1st of January in each year, gave an option to the plaintiff to mine the lands within the leases, the plaintiff agreeing to pay the rents and payments in lieu of assessment work on or before the 1st of December in each year. The plaintiff made the first payment of $3,000 under the option but on the 3rd of December following, the defendants, finding that the rent and assessment work payments were not paid to the gold commissioner by the plaintiff, immediately made the necessary payments and treated the option as at an end. The plaintiff sent the required money to the gold commissioner a few days later but it was returned to him owing to its already having been paid. The plaintiff obtained judgment in an action for a declaration that no breach of the covenant to pay rent and assessment work dues had occurred and in the alternative for relief from forfeiture and penalties.

Held, on appeal, reversing the decision of GREGORY, J. in part (MCPHILLIPS and MACDONALD, JJ.A. dissenting), that although there was no express stipulation in the instrument that time should be deemed to be of its essence, the nature of the transaction was such that the Court would deem it to be so. There was a breach of the contract by the plaintiff and time being of the essence of the agreement the Court cannot relieve against the forfeiture of the option.

Held, further, that to keep the original payment of $3,000 made so shortly before the plaintiff's default savours too much of hard dealing and the plaintiff should be relieved from forfeiture of that sum.

Steedman v. *Drinkle* (1915), 85 L.J., P.C. 79 followed.

APPEAL by defendants from the decision of GREGORY, J. of the 13th of April, 1927, in an action for a declaration that a certain agreement entered into between the plaintiff and the defendants on the 19th of October, 1926, granting the plaintiff the exclusive right to mine two certain mining leases (Nos. 120 and 121) on Dease Creek in the Cassiar Mining Division from the date of the agreement until 1940 is in good standing and effect, or in the alternative that he is entitled to relief from forfeiture, and for an injunction restraining the defendants from operating or dealing with the said mining leases. The agreement provided that the plaintiff was to pay the defendants

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\$3,000 at once and \$1,000 in each of the three following years; also certain royalties based on a percentage of the gold recovered, and the \$3,000 were duly paid. Prior to the agreement the defendants had sold a one-quarter interest in the leases to one Dr. McCarley, who entered into a similar agreement with the plaintiff with respect to his share. The leases were issued to the defendants in 1920 for twenty years, and the yearly rentals were \$25, the owners being allowed to pay \$250 per lease in lieu of assessment work. The rentals and payment in lieu of assessment work were payable on or before the 2nd of January in each year. Under the agreement the plaintiff was to pay the rentals and the payments in lieu of assessment work on or before the 1st of December in each year to the gold commissioner at Telegraph Creek. On the 3rd of December, 1926, the defendants, finding that the plaintiff had not paid the rentals and assessment payments as provided in the agreement, immediately paid the amount required to the said gold commissioner and received a receipt therefor. Shortly after, through his solicitor, the plaintiff sent the money required for payment of rentals and assessment work to the gold commissioner but as the defendants had already paid it, it was returned. The defendants claimed that owing to the plaintiff's conduct he is not entitled to equitable relief from forfeiture.

The appeal was argued at Vancouver on the 6th, 7th and 10th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

R. M. Macdonald, for appellants: The payments in lieu of assessment and rent were to be paid by the 1st of December, 1926. The defendants enquired on the 3rd of December, and, finding no payment had been made, paid the gold commissioner to protect the property. There was evidence of bribery on the part of the plaintiff. He does not come with clean hands and is not entitled to equitable relief.

Griffin, for respondent: This is not a sale of an interest in land; it is merely a licence to work and mine minerals: see Leake on Contracts, 7th Ed., 172; MacSwinney on Mines, 5th Ed., pp. 151 and 153; *Lynch* v. *Seymour* (1888), 15 S.C.R. 341; *Wright* v. *Stavert* (1860), 29 L.J., Q.B. 161; *Wells* v.

The Mayor, Aldermen and Burgesses of Kingston-upon-Hull (1875), 44 L.J., C.P. 257. This case does not come within non-performance within a year as it is performed on one side: see Leake on Contracts, 7th Ed., 175; *Donellan* v. *Read* (1832), 1 L.J., K.B. 269; *Bracegirdle* v. *Heald* (1818), 1 B. & Ald. 722 at p. 727; *Cherry* v. *Heming and Needham* (1849), 19 L.J., Ex. 63; *Smith* v. *Neale* (1857), 2 C.B. (N.S.) 67; *Knowlman* v. *Bluett* (1873), L.R. 9 Ex. 1; *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266 at p. 276. In any case the statute does not debar a substituted contract from being proven orally: see *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598; *Leather-Cloth Co.* v. *Hieronimus* (1875), L.R. 10 Q.B. 140; *Richardson* v. *Dunn* (1841), 2 Q.B. 218; *Levey & Co.* v. *Goldberg* (1922), 1 K.B. 688; *Steeds* v. *Steeds* (1889), 22 Q.B.D. 537. As to the right to relief under the Laws Declaratory Act see *Hyman* v. *Rose* (1912), A.C. 623; *Kilmer* v. *British Columbia Orchard Lands, Limited* (1913), A.C. 319.

Argument

Macdonald, in reply: A grant to extract gold from the soil is an interest in land that brings it within the statute: see *Webber* v. *Lee* (1882), 9 Q.B.D. 315; *Laidlaw* v. *Vaughan-Rhys* (1911), 44 S.C.R. 458; *Crane* v. *Naughten* (1912), 2 I.R. 318; *Morris* v. *Baron & Co.* (1917), 87 L.J., K.B. 145 at pp. 151-2.

Cur. adv. vult.

10th January, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The defendants granted to the plaintiff the exclusive right, option and privilege to mine certain minerals in lands covered by two several placer leases held by the defendants from the Crown. By the terms of the leases certain rents and fees were made payable to the Crown on or before the 1st of January in each year, and in default the leases would lapse subject to a right of reinstatement of the lessees within 30 days thereafter.

The plaintiff covenanted to pay these moneys on or before the 1st of December in each year during the terms granted by said indenture, the first payment falling due on the 1st of December, 1926. Plaintiff made default and defendants preserved their

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leases by making the payment themselves. In no way, directly or indirectly did the defendants contribute to the plaintiff's default.

The plaintiff sues for a declaration that no breach of the covenant to pay these moneys had occurred, and in the alternative for relief from forfeiture and penalties. Three thousand dollars were paid on account of the consideration for the option before the default, but this I shall consider hereafter. The most important question is that which relates to the forfeiture of the option or privilege aforesaid. There is in the instrument no express stipulation that time shall be deemed to be of its essence, but I think the nature of the transaction is such that the Court would deem time to be of its essence. The agreement is in substance as well as in name an option. It was deposited in a bank in escrow and contains stipulations that should the plaintiff fail to observe and perform all its covenants to be performed by him the option agreement should be delivered out to the defendants in full settlement of any claim of the defendants for its breach.

MACDONALD, C.J.A.

It is clearly settled that when there is an express stipulation that time shall be of the essence, the Court will not grant specific performance or relief in the nature of specific performance in case of breach of the agreement. *Steedman* v. *Drinkle* (1915), 85 L.J., P.C. 79. The question then arises, will it do so where by the rule of equity time is deemed to be of the essence? Lord Cairns, in *Tilley* v. *Thomas* (1867), 3 Chy. App. 61 at p. 67 said:

> "A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry* [(1853)], 3 De G. M. & G. 284), there is nothing in the 'express stipulation between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds against interference mentioned by Lord Justice Turner, 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."

There being no express stipulation in this case the question

turns on the nature of the property, or on the surrounding circumstances. The properties here are mining leases of placer ground in a remote district. That the parties regarded them as of an extremely speculative character is shewn not only by the form of the agreement but by the fact that they placed it in escrow. The covenant to pay the Crown while one for the payment of money was not one for such payment to the defendants. They were to be made in circumstances in which default might entail the forfeiture of the leases without the knowledge of the defendants or when they were unable to find the money to pay the dues themselves. It is in evidence that they were much in need of money at the time. After the agreement was signed there were no communications at all between the plaintiff and the defendants, which would raise an equity in plaintiff's favour. There was nothing which amounted to a waiver of defendants' rights or to an estoppel. The plaintiff was plainly negligent in not ascertaining when and by what means his money could reach the gold commissioner at Telegraph Creek, in a remote part of the Province. He handed a draft for the amount of the fees to the solicitor who drew the agreement, with instructions to mail it to the gold commissioner, which he did, but the defendants had nothing to do with this. It was afterwards learned that there was much doubt as to whether or not the draft would reach the gold commissioner before the 1st of December. The defendants knew this but were not bound to interfere. There was another way in which the money could have been sent without any risk, namely, through the agency of the telegraph, but the plaintiff, assuming that the draft would reach there in time, left for California. The defendants ascertaining by telegraph, that default had been made, paid the money before the draft reached its destination which was some days after the first of December. While the case is a hard one I cannot see upon what legal or equitable principle the Court can interfere to save the forfeiture of the option, whatever may be said about the forfeiture of the $3,000 paid on account of it. The principle laid down in *Tilley* v. *Thomas, supra,* has not been departed from by judges in subsequent cases. Lord Haldane refers to it with approval in *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1915), 32 T.L.R. 156 at p. 157. And Lord

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Parker of Waddington in *Stickney* v. *Keeble* (1915), A.C. 386 at p. 416, said, speaking of the maxim of equity:

"This maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or of the surrounding circumstances, which would render it inequitable to treat it as a non-essential term of the contract."

However hard the case may be it seems to me that I should be running counter to the well-established principles of equity if I were to interfere in this case. Here the plaintiff was negligent in not doing what he ought to have done, in other words, he has not shewn diligence in doing all that he could have done to avoid default. It is most essential in mining transactions to hold the parties strictly to the times provided in the agreement for performance, and that is particularly so when the parties themselves have put their agreement in the form of an option, no doubt for the very purpose of avoiding litigation and delay in reselling. My conclusions are that there was a breach of contract here; that in equity time was of the essence of the agreement and that therefore the Court cannot relieve against the forfeiture of the option.

MACDONALD, C.J.A.

Turning now to the question of penalties: That is a different field. It is no longer a question of specific performance but of relief from a money penalty exacted by the defendants because of the plaintiff's default. Had default occurred at a later stage I would not have relieved the plaintiff from it. The receipt of the option moneys by them from time to time would be the only compensation they could have for tying up their property for exploitation by the plaintiff, but to keep this initial payment immediately after it was made savours too much of hard dealing. There is nothing to indicate that the defendants have suffered the loss of another bargain or have been in any way inconvenienced by the giving of the option.

An order similar to that indicated by their Lordships in *Steedman* v. *Drinkle, supra,* would, I think, meet the justice of this case. I will hear the parties as to this.

MARTIN, J.A.

MARTIN, J.A. agreed in allowing the appeal in part.

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

MCPHILLIPS, J.A.: I would dismiss the appeal. The learned judge arrived at the right conclusion, in my opinion, and the judgment should be affirmed.

MACDONALD, J.A.: I have only to consider the law applicable to the facts as found by the learned trial judge. Substantially, there is no merit to the appellants' claim. In saying so, I am not overlooking the submission that the agreement with Dr. McCarley in respect to his one-quarter interest was possibly more favourable than the one with appellants both as to time of payment of instalments and in reference to royalties. Having regard, however, to the outstanding interest of one Kyle and the evidence of McCarley that he would assist in obtaining this interest and the loose way in which agreements of this character are sometimes entered into, I cannot attach any sinister aspect to these features, particularly as the doctor's evidence was believed.

MACDONALD, J.A.

After reading all the evidence, I am of opinion that, without just cause or excuse, an attempt was made to cancel an agreement and bring about a forfeiture solely because, through remoteness of the property in question, a draft for payment of rentals could not, as the appellants knew, arrive within the exact time stipulated for in the agreement. A fair-minded man would not insist on this requirement as several weeks' delay would not jeopardize the lease. He would join with the other parties interested in overcoming this difficulty. That being my view in considering the law applicable, I would draw all possible inferences from the evidence to sustain the judgment under appeal.

We have to consider (1) whether there was in fact a breach of covenant in this respect giving the right to cancellation, having in view an alleged agreement or understanding which, it is suggested, amounted to a waiver of strict compliance with this requirement; (2) if it is necessary to go further, and forfeiture follows, whether relief against forfeiture should be granted, and, if so, should such relief be confined to the amount already paid, *viz.*, $3,000, the agreement in all other respects

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to be at an end; (3) whether specific performance of the agreement can be ordered. Specific performance was not asked for but the appellants are restrained from interfering with respondent's quiet enjoyment under the agreement. I find it only necessary to deal with the first point.

First, as to the alleged breach: I find, on the evidence, that the appellants through their agent, McCarley, assented to the payment of the rentals by means of a draft handed to Gray by the respondent to be forwarded by mail. Gray was the agent of the respondent for the purpose of making this payment. This method of payment was ratified by Mrs. Cole, one of the appellants. On the evening of the 1st of November, the respondent and Dr. McCarley explained to Mrs. Cole the payment of the $3,000, and the further fact that the draft for $500 for the payment of assessments and rentals "had been mailed that day by Mr. Gray, by registered mail," whereupon she expressed herself as thoroughly satisfied. Her assent was equivalent to assent from both appellants. How can they now be heard to deny assent to this method of payment, particularly when they knew and respondent did not, that the letter would not likely arrive by the 1st of December? Later the appellant Cole asked McCarley to wire to the gold commissioner to make sure that the draft reached its destination not thereby objecting to the method of payment agreed upon but simply as a matter of precaution or to excuse his own intervention. The fact that the appellant Cole later, on his own account, without consulting the other parties wired the money to the gold commissioner did not destroy the understanding assented to as to method of payment. It does not follow that a new contract was substituted for the original contract which, if the Statute of Frauds intervened, would require to be in writing. The original agreement called for payment by the 1st of December; the new arrangement simply provided for a different method of performance which might or might not result in the actual receipt of it by the commissioner on that date.

However, referring to the whole contract, it is not an agreement that requires writing to satisfy the Statute of Frauds. The title to the property remained in the appellants as lessees. The respondent only obtained the right or licence to work the

property and recover all metals and minerals therein on certain conditions. It did not pass an estate or interest in the lands but only a right to be exercised on the leasehold property of the appellants.

It follows that, as a different method of performance was assented to, there was in fact no breach and, therefore, no forfeiture. That being so, it is not necessary to consider the question of relief against forfeiture.

I would dismiss the appeal.

Appeal allowed in part, McPhillips and Macdonald, JJ.A. dissenting.

Solicitors for appellants: *Macdonald & Pepler.*
Solicitors for respondent: *Griffin, Montgomery & Smith.*

WALDEN AND KUSTI NIKULA v. HANEY GARAGE, LIMITED.

Bailment—Negligence—Repair of motor-car—Car left in cold room with water in radiator—Water freezes causing damage—"Work order" signed by bailor—Liability of bailee.

The plaintiffs' car broke down near the defendant's garage and leaving the car in the garage for repairs he signed a "work order" containing at the end in small type: "This company does not assume in any way any liability whatever either for cars left with us for repair, storage or other purposes, or while being driven by our employees." Upon repairs being made, the defendant moved the car to a warehouse which was not heated without removing the water from the radiator. In cold weather that followed, the water in the radiator froze damaging the radiator and the engine. The plaintiffs recovered damages.

Held, on appeal, reversing the decision of HOWAY, Co. J. (MACDONALD, C.J.A. and MCPHILLIPS, J.A. dissenting), that the special clause in the "work order" exonerated the defendant from liability irrespective of whether it was read by the plaintiff when he signed it or not.

APPEAL by defendant from the decision of HOWAY, Co. J. of the 9th of May, 1927, in an action to recover $552.70, Statement

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damages resulting from the defendant's neglect in failing to keep the plaintiffs' automobile in a heated garage or to draw the water from the radiator to prevent freezing during the cold weather. The facts are that the plaintiffs' car broke down a short distance from the defendant's premises on the 28th of December, 1926, and the plaintiff Walden left the car with the defendant for repairs. The car was repaired on the 4th of January, 1927, and then removed from the frost-proof garage to a warehouse which was not heated, the defendant not draining the water from the radiator. The temperature for the following three or four days was some degrees below freezing point. The water in the radiator became frozen and damaged the radiator and the engine. When Walden requested the defendant to repair the car he signed a paper called a "work order." This document after date, names and addresses of plaintiff Walden and defendant, proceeded: "Make following repairs"; then follow three lines for instructions. In them was written: "Go to bottom of hill, tow in car, and repair trouble in transmission." Then followed in type: "This Company does not assume in any way any liability whatever, either for cars left with us for repairs, stowage or other purposes or while being driven by our employees." The defendant swore that Walden read the document when he signed it. Walden swore that when he signed it, it was all a blank and it was found by the trial judge that Walden signed it to indicate that the work was authorized by him.

The appeal was argued at Vancouver on the 13th and 14th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

W. E. Williams, for appellant: The trial judge followed *Bate* v. *The Canadian Pacific Railway Company* (1889), 18 S.C.R. 697. We must use reasonable care and diligence but we do not come within the category of that case. It must be assumed that Walden read the document before he signed it. On the question of liability see *McGale* v. *Security Storage Co.* (1915), 7 W.W.R. 1015; *Carlisle* v. *Grand Trunk R.W. Co.* (1912), 25 O.L.R. 372; *Rutter* v. *Palmer* (1922), 2 K.B. 87. Practically the same Court that decided *Rutter* v. *Palmer, supra,* sat

in *Williams* v. *The Curzon Syndicate (Limited)* (1919), 35 T.L.R. 475 in which case *Ronan* v. *Midland Railway Co.* (1883), 14 L.R. Ir. 157 and *Joseph Travers and Sons (Limited)* v. *Cooper* (1914), 30 T.L.R. 703 were relied on, but both of these were cases of common carriers under which there is a dual liability, the Court distinguishing the common carrier cases from the garage case: see also *The Lake Erie and Detroit River Railway Company* v. *Sales* (1896), 26 S.C.R. 663 at p. 681.

Thomas E. Wilson, for respondent: The trial judge heard the witnesses and concluded there was no special contract. On the question of liability see *Maunsell* v. *Campbell Security Fireproof Storage, &c., Co.* (1921), 29 B.C. 424; *London and North Western Railway* v. *Neilson* (1922), 91 L.J., K.B. 680; *Richardson, Spence & Co. and "Lord Gough" Steamship Company* v. *Rowntree* (1894), A.C. 217 at pp. 219-20; *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178 at p. 188; *Mitchell* v. *Lancashire and Yorkshire Railway Co.* (1875), L.R. 10 Q.B. 256.

Argument

Williams, in reply, referred to *Phillips* v. *Clark* (1857), 2 C.B. (N.S.) 156; *Taubman* v. *The Pacific Steam Navigation Company* (1872), 1 Asp. M.C. 336; *Ashendon* v. *London and Brighton Railway Co.* (1880), 5 Ex. D. 190.

Cur. adv. vult.

10th January, 1928.

MACDONALD, C.J.A.: The plaintiffs' car got out of order on the highway not far from defendant's public garage, whereupon Walden obtained the services of the defendant to put it in order. He signed what is called a work order. At the end of this order, in small type, appeared the following words:

"This Company does not assume in any way any liability whatever either for cars left with us for repair, storage or other purposes, or while being driven by our employees."

MACDONALD, C.J.A.

The defendant being unable to keep the car in his workshop after it was repaired, transferred it to a storehouse of his own, and sometime thereafter, about the 18th of January, there came a heavy frost which caused the water in the radiator to freeze, causing injury to the car. The plaintiffs now sue for damage for alleged negligence on the defendant's part in not removing the water from the radiator before storing it.

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In *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178, Stephen, J., delivering the judgment of the Queen's Bench Division, at p. 188 said this:

"In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms."

In the present case, I think that had there been no special terms in the work order the finding of negligence would have been right, but the plaintiff had in mind, and reasonably so, only a contract for repair of his car. Would he reasonably expect the document to contain special terms exempting the defendant from liability for his own negligence? I cannot think that he would. This was not a formal and solemn document prepared in such a way as to challenge care in its execution. The plaintiff came into the defendant's shop and said—"Repair my car," and defendant asked him to sign an order specifying the repairs to be effected. In such circumstances I think it was the duty of the defendant if he wished to rely upon special terms to have called the plaintiff's attention to them, failing which he cannot shelter himself behind them.

MACDONALD, C.J.A.

I have read with much care the case of *Rutter* v. *Palmer* (1922), 2 K.B. 87. That was not a case of repair. The motor-car was left with the defendant for sale on commission. The question of its storage and possible injuries while demonstrating it would naturally be present to the minds of the parties. Here the judge believed the plaintiff, who said he was not made aware of the special term aforesaid.

In general, it is well to hold parties to what they have signed, but the circumstances under which they have signed are not to be overlooked.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A. agreed with the reasons of MACDONALD, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: In view of the learned judge's findings of fact there is only one matter which this Court really has to deal with. It is said that here there was a special contract and by reason of that contract defendant is exempt from liability. The learned trial judge deals with this and gives his reasons for not

giving effect to it. I agree with the learned judge that in so far as the ordinary law of bailment is applicable, the defendant would be liable, taking the facts as found.

The plaintiff Walden, when he requested the defendant to repair the car, signed what is called a work order in which is to be found the following clause: [already set out in head-note, and judgment of MACDONALD, C.J.A.]

This clause appears on the face of the work order about an inch and a-half below where the plaintiff signed and is printed in small type.

The question is, what is the effect of that clause? The learned judge holds as a fact that the plaintiff was unaware of the existence of this clause and goes on to say:

"The whole subject of special contracts is discussed in *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178, and on page 188, Stephen, J., giving the judgment of the Court, crystalizes the principle and indicates certain exceptions . . . "

and concludes that this case comes within

"this first exception, *viz.*, where the nature of the transaction is such that the person accepting the document . . . may suppose, not unreasonably, that it contains no term at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms"

and holds that it

"is not a matter of special contract, but is the ordinary case of a bailment *locatio operis faciendi.*"

GALLIHER, J.A.

The case of *Rutter* v. *Palmer* (1922), 2 K.B. 87, was one where the owner of a car deposited it with the keeper of a garage for sale on commission upon the terms of a printed document containing the clause "Customers' cars are driven by your staff at customers' sole risk," and it was there held that the defendants were by that clause exempt from liability, though the defendants' driver while shewing it to a prospective purchaser had been found guilty of negligence causing the accident and occasioning the damage sued for. See also *Marriott* v. *Yeoward Brothers* (1909), 2 K.B. 987.

The words in the contract at Bar are, I think, wide enough to take the defendant out of the ordinary liability attaching under bailment, and unless we can say as the learned judge has said, that it comes within the exception set out above in the case of *Watkins* v. *Rymill, supra,* then I think the judgment cannot be sustained.

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GALLIHER, J.A.

This is a matter upon which there might easily be different views, and I can only state what in my opinion is the correct view.

When the plaintiff had the car taken to the garage for repairs and was requested to sign the work order, he knew that it would necessarily be in the defendants' care and custody for some time. He also knew that if he failed to take it away when repaired it would continue in defendant's custody, so that when he signed the order there should reasonably have been present to his mind, not merely the authorizing of the repairs, but the consequent care and custody of the car. It is not sufficient to say that he did not know the clause was there. The document was handed to him for signature with this clause appearing on the face of it, and the incident of storage is dealt with in the terms set out.

I would allow the appeal.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I would dismiss the appeal being of the opinion that His Honour Judge HOWAY arrived at a proper conclusion upon all the facts. The only question that caused some doubt in my mind was the effect of the clause releasing the defendant from liability as unquestionably, apart from this, the case is one of bailment, and there is express evidence of negligence, *i.e.*, the placing of the motor-car in winter in a part of the garage of the defendant which was unheated, not having drained the radiator of water, the consequence being that the water froze and damage ensued to the radiator and engine. At the time the motor-car was given to the defendant for repair, a document was signed, but it is to be noted, by one of the plaintiffs only, *viz.*, by Walden, styled a work order, which contained the following language: [already set out in head-note, and judgment of MACDONALD, C.J.A.].

The learned trial judge referring to this document in his reasons for judgment said:

"There was nothing to call his attention to this exempting clause. And I hold as a matter of fact that he was unaware of its existence."

In my opinion this clause offers no difficulty whatever; its effect is not that the defendant stands absolved from express acts of negligence of its own which is the present case. To accomplish any such release there must be language positive in its nature admitting of no misunderstanding. The *ratio*

decidendi of *Ronan* v. *Midland Railway Co.* (1883), 14 L.R. Ir. 157 referred to by Lord Justice Bankes in *Williams* v. *The Curzon Syndicate (Limited)* (1919), 35 T.L.R. 475, completely covers this case. I would refer to the language of the rule under consideration in the *Curzon* case. It reads as follows:

"No claim in respect of any property alleged to have been left or lost in the club house will be entertained, and neither the club nor the proprietors shall be responsible for any article of value so left or lost in the club, but small articles of value may on application to the secretary, be deposited in the safe, but neither the club nor the proprietors shall be under any liability in respect of such deposits."

This was a case of jewellery being stolen by the porter of the club, an old and dangerous criminal, and it was held there was liability as the club had not used due care in enquiring about the night porter and here we have the want of care of the motor-car. Lord Justice Bankes in the *Curzon* case said, at p. 476:

"If it was a correct principle of construction that where it was sought to exclude liability it must be done by clear and unambiguous words, it might be asked where were the clear and unambiguous words excluding the defendants' liability."

MCPHILLIPS, J.A.

It will be noticed that in the present case, the only language that could be relied upon to cover acts of negligence might be in respect of negligence of employees in driving cars. The language is "While being driven by our employees." This language is the only language which would cover negligence and it is confined to the driving of cars only and the present case is not that. That which was done here was as in the *Ronan* case—"wilful misconduct," and Mr. Justice Harrison in that case said, as quoted by Lord Justice Bankes, at p. 476:

"'In my opinion none of these clauses cover the case of "wilful misconduct." Had such been the intention of the parties, clear and unambiguous expressions should have been used; whereas the expressions used are all, in my opinion, merely applicable to loss arising from the ordinary incidents or contingencies of carriage.'"

The language in the work order relied upon by the defendant, in my opinion, does not absolve it from liability.

I would dismiss the appeal.

MACDONALD, J.A.: We indicated during the argument that apart from the special contract the defendant was liable to the plaintiffs as bailee, for damages sustained through the freezing

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of the water in the radiator and engine of plaintiffs' car. Whether or not, the defendant is exonerated, by a special clause in a work-order sheet, remains to be considered. This sheet contains the words: [already set out in head-note, and judgment of MACDONALD, C.J.A.].

This clause appears a few lines below the signature of the plaintiff. His signature follows the words "work authorized by" as if he was simply giving authority to proceed with the repairs. I think, however, it must be regarded as an assent to all the terms in the agreement as it appeared when signed. If he did not read this condition on the face of the document he acted at his own peril. See *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178, where many cases reviewed may be usefully referred to. In that case, the plaintiff did not read the words on a receipt given to him for a wagonette left with the defendant who kept a repository for the sale of carriages. It contained the words "subject to the conditions as exhibited upon the premises." One of these conditions gave defendant the right to sell any property which remained over one month unless all expenses were previously paid. It was held that there was nothing to take the case out of the common rule that if a document in a common form is exchanged and accepted without objection it is binding whether the party bound informs himself of its contents or not. It may be said that the document in the case at Bar was not one in common use. I cannot agree. It is a usual practice to insert conditions in such documents. Stephen, J. deduces the principles applicable at pp. 188 and 189 and refers to exceptions to the ordinary rule. I do not think the plaintiffs are within any of the exceptions mentioned. The only one which might give rise to doubt is this "if without being fraudulent, the document is misleading and does actually mislead the person who has taken it." Here as stated the plaintiff's signature occurred near the top of the document after the words "work authorized by" with the exempting clause below it. Was he thereby misled in thinking that he was simply giving authority to execute repairs? There is no evidence that he was misled nor is it I think a reasonable inference. The true position is summed up by Stephen, J., at p. 190, in these words:

"The only question which can be called a question of fact is, whether

giving a man a printed paper plainly expressing the conditions on which a keeper of a repository is willing to accept a carriage for sale on commission is or is not equivalent to asking the owner of the carriage to read that paper with intent that he should read it when he has a fair opportunity of doing so. This, we think, is a question of law, to be answered in the affirmative."

The learned trial judge, in the case at Bar, finds that "there was nothing to call his attention to this exempting clause" and he adds "I hold, as a matter of fact, that he was unaware of its existence." When one seeks to escape liability for a term contained in a signed contract the onus is on him to prove that he was unaware of its existence. The only evidence on that point is, as follows:

"In the meantime a work order was presented to me for signature, and I signed this work order to cause the repairs of the car.

"THE COURT: Just one moment. We will look at it.

"*Wilson*: Is this [indicating] the carbon copy of the order you signed? Yes, I have already recognized that before.

"Yes; on the examination. That will be the first exhibit.

"As I understand it, a portion of this writing was not on when you signed? No.

"That is the detail work under 'Particulars'? Yes.

"It was only— The heading.

"THE COURT: What is that?

"*Wilson*: There was only the heading, and the part above the double line. These details were filled in by the mechanics as they did the work. I just wanted to make that clear. This order is dated December 28th. Is that your signature? It is."

This of course does not shew that the plaintiff did not see or read this special clause. The fair inference to be drawn, if any, would be that as he "already recognized it before" and signed it he was aware of its contents. However, it is not a matter of inference: it is a failure to prove that he was unaware of its existence when he signed and, with deference, the learned trial judge's finding of fact is without evidence to sustain it.

I do not hold that even if the plaintiff proved that he did not read the clause he would not be bound by it because, if accepted, without objection, he is as a rule bound by its contents whether he reads the documents or not: *Watkins* v. *Rymill, supra.* I merely point out that his position is less favourable on the facts of this case.

In determining the effect of this clause, the relationship of the parties as bailor and bailee should be kept in mind. The

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bailee is liable only for negligence differing in that respect from a common carrier who is liable for the acts of his employees whether negligent or not. The words in the clause "any liability whatever" are wide enough to include negligence on the part of the bailee or his servants. I think it is only a question of the true construction of the word used. If they are broad enough to exonerate from liability for the bailee's negligence the plaintiff cannot succeed.

In *Williams* v. *The Curzon Syndicate (Limited)* (1919), 35 T.L.R. 475 the question of the responsibility of a club for theft of jewellery by an employee which was intrusted to the manager's care was considered. A rule provided for non-liability for articles lost and the plaintiff succeeded only because the wording of the rule did not negative liability for neglect of proper care in employing a servant who it appeared had a criminal record. There is no such difficulty in this case. See also *Taubman* v. *The Pacific Steam Navigation Company* (1872), 1 Asp. M.C. 336.

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Counsel for plaintiffs submitted a further argument based upon the facts. Plaintiffs' car was left with the defendant for repairs and the document signed was he submitted primarily intended to relate, and must be taken to relate solely to the work of repairing. It was afterwards removed from the repair shop to defendant's garage for storage to await the return of the plaintiff to claim it and it was while so stored that the damage occurred.

It was submitted therefore that, as counsel put it, they "stepped outside the contract"; in other words, that a new set of circumstances arose to which the contract was not applicable. Two cases were referred to: *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 510 and *London & North Western Railway* v. *Neilson* (1922), 2 A.C. 263. I do not regard the first as of any assistance. In the latter case, where damages were claimed for the loss of luggage in transit on the terms that the defendant was relieved from liability for damages, etc. "during any portion of the transit," the agreed route of transit and delivery was departed from. As Lord Buckmaster said, at p. 268:

> "The exemption is from liability during 'the transit,' and when once the goods are diverted from that route the protection ends."

And again, at p. 269:

"If the route be abandoned, whether it was due to oversight, ignorance, accident, or design, equally the agreed transit is departed from, and the privileges the carrier enjoys by contract during that transit cease."

Although this is a case of a common carrier, I have no doubt the principle is applicable if the facts in the case at Bar are within it. It must, however, be taken as within the contemplation of the parties when the car was left for repairs, the owner to return for it, that some time would likely intervene between the completion of the work and the arrival of the owner to take it away and it is reasonable that the contract should include the respective obligations of the parties during the whole period. The facts illustrate the reasonableness of this view because the plaintiff failed to return for his car for a long period after the repairs were finished. It was necessarily incidental to the work that the car should be stored and taken care of either in the repair shop or elsewhere. The contract is broad enough to cover the whole period. Under it the Company does not assume "any liability whatever, either for cars left with us for repairs, storage or other purposes." "Storage" is included. There was therefore no departure from the contract agreed upon. I think the appeal should be allowed.

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

Solicitor for appellant: *W. E. Williams.*
Solicitors for respondents: *Wilson & Drost.*

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

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Jan. 12.

THE CANADIAN EDUCATIONAL FILMS LIMITED AND GOODART PICTURES INC. v. HORAN AND NICHOLS THEATRES LTD.

Costs—Taxation—Review.

CANADIAN EDUCATIONAL FILMS LTD. AND GOODART PICTURES INC. *v.* HORAN AND NICHOLS THEATRES LTD.

A taxing officer's ruling as to whether any particular item should be allowed or excluded ought rarely to be interfered with on appeal, if it appears he understood the governing principle.

APPLICATION to review the taxation of a bill of costs. Heard by HUNTER, C.J.B.C. in Chambers at Vancouver on the 17th of November, 1927.

A. Alexander, for the application.
Hossie, contra.

12th January, 1928.

HUNTER, C.J.B.C.: With regard to the point as to the liability of both defendants for the costs of the action, I think they are both liable, as the purpose of the action was to obtain an injunction (which was made perpetual) against both defenddants to prevent the exhibition of the piratical pictures. The best face that can be put upon the matter for the Theatre Company which was represented by the same solicitor, is that it stood by while its co-defendant Horan actively put the plaintiffs to the cost of proving their title but did not itself admit it. That does not save it from being equally responsible with Horan.

Judgment

With regard to the particular items, I cannot say that the taxing officer's rulings are wrong. Even if they are doubtful, I do not think I ought to substitute my own opinion. I think that a judge should interfere only when he is satisfied the ruling is wrong, and, speaking generally, only when some principle is involved, otherwise the interesting discussions about the allowance of this, that or the other item, which take place in the registry would be duplicated in the judge's chambers and perhaps at even more terrifying length, and more costs incurred in disputing about costs. The officer's ruling that a particular item ought to be allowed or excluded ought rarely to be interfered with if it

appears that he understood the governing principle. It cannot be too clearly understood that the original responsibility being placed on the taxing officer, it ought not to be weakened by the parties concerned getting into the habit of thinking that they may automatically transfer it to a judge. The application must be dismissed.

Application dismissed.

PEARL WONG v. RUBY HOU *ET AL.*

Partnership—Intended to continue for more than a year—Action to dissolve —Statute of Frauds.

Although it was contemplated that a partnership would exist for more than one year, the Statute of Frauds is not a bar to an action brought to dissolve the partnership and for an accounting.

ACTION to dissolve a partnership and for an accounting. Tried by MCDONALD, J. at Vancouver on the 16th of January, 1928. Statement

Bray, for plaintiff.
Ginn, for defendant.

17th January, 1928.

MCDONALD, J.: As intimated during the argument, I am satisfied the Statute of Frauds is not a bar to this action.

It is true that it was contemplated that the partnership would exist for more than a year but I do not think that the Statute of Frauds was intended to bar an action brought to dissolve a partnership and for an accounting. To so hold would be to allow the statute to be used as a cloak for fraud instead of to prevent fraud. Judgment

The real defence which was pressed in argument was that the plaintiff on the 9th of March, 1927, "abandoned all her interest in the rooming-house business which was being carried on in

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partnership, and in the assets thereof and in the moneys belonging thereto." The onus is of course upon the defendants to establish this position and upon a careful analysis and consideration of the evidence, I am of opinion that this onus has not been satisfied.

Judgment will, therefore, go dissolving the partnership and for an accounting in the usual way.

In the accounting the defendants will have credit for the sum of $1,100 paid into Court in the former action.

Judgment for plaintiff.

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HARPER
v.
MCLEAN

HARPER v. McLEAN.

Negligence—Plaintiff pedestrian injured by motor-car—Contributory negligence—Both parties negligent—B.C. Stats. 1925, Cap. 8.

The plaintiff alighted on Broadway at the intersection of Birch Street from an east bound street-car and proceeded to cross Broadway in a northwesterly direction. There was a street light at the corner but the night was dark and it was raining. On reaching the northerly rail of the street-car track she was brushed by a motor-car going westerly and the defendant's car following about 60 feet behind the first car ran into her.

Held, that the defendant was negligent in not keeping a proper look-out and the plaintiff was negligent in failing to look for approaching vehicles. The provisions of the Contributory Negligence Act apply and the damages should be divided equally between them.

Ontario and New Brunswick cases distinguished owing to the difference in the statutes.

Statement

ACTION for damages for negligence resulting from the defendant running the plaintiff down with his car while she was crossing Broadway in the City of Vancouver. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 30th of January, 1928.

J. W. deB. Farris, K.C., and *Shannon*, for plaintiff.
R. S. Lennie, and *McMaster*, for defendant.

1st February, 1928. MCDONALD, J.

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Feb. 1.

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McDONALD, J.: In this case I find the facts to be as follows: On the 15th of April, 1927, sometime after midnight, the plaintiff, Margaret Harper, alighted on Broadway from an east bound Fairview belt line street-car at the point where the street-car had stopped before crossing Birch Street. It was raining, and the night was dark. There was a street light burning near the point of alighting and from that point, the plaintiff, Margaret Harper, proceeded in a north-westerly direction across Broadway hurrying home and intending to pass through her brother-in-law's property to her own home on the next street north. Just as she crossed the northerly rail of the street-car track, a motor-car driven by one Hicks, and proceeding westerly, brushed by her, while the defendant's car, following in the same direction, about 50 or 60 feet in the rear, came into collision with her causing her serious injuries. Her husband joins in a claim for moneys expended as a result of such injuries but it has been agreed by counsel that the case shall be disposed of upon the basis that such expenses were incurred by the plaintiff, Margaret Harper, herself.

Judgment

The plaintiff, hurrying as she was, failed to look either east or west for approaching vehicles and hence did not see Hicks's car until it passed her and did not see the defendant's car until she collided with it. The defendant, on the other hand, though driving properly and at a very reasonable rate of speed, failed to see the plaintiff until she collided with the left front fender of his car, whereupon he immediately stopped and took her to the hospital. In these circumstances, it seems to me, the most typical case arises for the application of the Contributory Negligence Act.

The defendant I think, when he admits that he did not see the plaintiff until the accident, must be held not to have been keeping a proper look-out, for with his lights and with the lights from the street, even although he was not expecting any person to cross where the plaintiff was crossing yet I think he is obliged to maintain such a look-out, that at some period of time at least, before the actual collision took place, he ought to have seen the plaintiff. On the other hand, the plaintiff, blindly and heedlessly crossing the street on a dark night was negligent in

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failing to look for approaching vehicles. The negligence of each was, in my opinion, an efficient and proximate cause of the accident.

Mr. *Farris,* counsel for the plaintiff, contends that even though the plaintiff was guilty of contributory negligence nevertheless the defendant was guilty of "ultimate" negligence and must be held liable for the whole amount of the loss and he cites certain cases of which *McLaughlin* v. *Long* (1927), S.C.R. 303 was one. In this case, the appeal came up from the Courts of New Brunswick where the Contributory Negligence Act is in the same terms as those of our own Act. A careful perusal of this case, however, shews that no question of "ultimate" negligence arose at all. True the jury found on cogent evidence that the infant plaintiff was guilty of contributory negligence but the Supreme Court of Canada held that, even so, yet the effective and proximate cause of the accident was the negligent operation of the motor-truck by the defendant's servant. No question of "ultimate" negligence arose or, so far as I can understand, was discussed. Counsel also cited *Walker* v. *Forbes* (1925), 2 D.L.R. 725, a decision of Riddell, J. and, in my opinion, that case, though decided upon the Ontario Act is on all fours with the present case. There the jury found that the defendant, the driver of the car, was guilty of negligence in not keeping a proper "watch" and the plaintiff was guilty of negligence in not "watching enough where he was going." On these findings, the learned judge imputes negligence in equal proportions to plaintiff and defendant and I think that is the proper disposition to be made of this present case. I think it well to note in this connection that the Ontario statute, with which Mr. Justice Riddell was dealing, is not by any means in the same terms as our own statute and that of New Brunswick, which two latter appear to be identical. Except in the title our statute makes no reference whatever to "contributory negligence" while the Ontario statute does and I can well understand that cases may arise where, on the same facts, a different decision might be reached in the different Provinces. With the greatest respect to those learned judges who have dealt with various phases of these statutes I suggest that in our Act the Legislature intended

Judgment

to do away with all the old difficulties which have been so long the nightmare of judges and juries and which arose from the use of the words "contributory negligence" and "ultimate" negligence. As a matter of fact, the word "negligence" is not used except in the title. The simple word "fault" is used, and I suggest that the intention was that a judge or a jury in trying one of these cases should eliminate, as far as possible, the very difficult questions which formerly arose and apply the simple questions: By whose fault was the accident caused? by one of the parties alone? or by both parties and, if so, in what proportions?

So far as I am concerned, these are the questions which I am asking myself in order to reach a decision in the present case though I may say that in any event no case of "ultimate" negligence would have arisen here, even before the statute. The only negligence with which the defendant can be charged is his failure to keep a proper look-out, and that is in this case "primary" and not "ultimate" negligence.

Statement

The plaintiff has proved special damages amounting to $884 and I assess general damages at $2,000, making in all $2,884.

There will be judgment accordingly for one-half this amount, *viz.*, $1,442.

Judgment for plaintiff.

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MILLARD v. THE BEVAN LUMBER AND SHINGLE COMPANY LIMITED.

Principal and agent—Husband acting for wife—Proof of agency—Onus—No prima facie agency.

MILLARD v. THE BEVAN LUMBER AND SHINGLE CO.

A husband is not *prima facie* an agent for his wife by reason of their relationship. The onus is on the person alleging such agency to prove that he is her agent.

APPEAL by plaintiff from the decision of MCDONALD, J. of the 22nd of March, 1927, dismissing an action to recover $8,137.59, being the principal and interest owing in respect to a loan of $5,500 made by the plaintiff to the defendant on the 16th of October, 1920. The facts are set out fully in the reasons for judgment.

Statement

The appeal was argued at Vancouver on the 25th and 26th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Killam, for appellant: There is no question this was a loan when the money was advanced. The Company never held a shareholders' meeting and there were more shares allotted than there was capital before they gave her shares. She never signed any application for shares and they admit no application was received from her. They must prove she applied for shares: see *McAskill* v. *The Northwestern Trust Co.* (1926), S.C.R. 412 at p. 418; *Rogers' Case. Harrison's Case* (1868), 3 Chy. App. 633 at p. 637. The plaintiff's husband is not her agent unless it is shewn that she authorized him to act for her: see *Pole* v. *Leask* (1863), 33 L.J., Ch. 155; *Beck* v. *Duncan* (1913), 4 W.W.R. 1319; *Mackay* v. *Ferris* (1910), 14 W.L.R. 107.

Argument

W. B. Farris, K.C., for respondent: The circumstances as a whole shew that the plaintiff assented to accepting the shares and throughout the whole proceedings Dr. Millard acted for his wife and it must be assumed he acted as her agent.

Killam, replied.

Cur. adv. vult.

10th January, 1928.

MACDONALD, C.J.A.: I have had the privilege of reading the reasons for judgment of my brother GALLIHER, and therefore need not go in detail into the facts.

The following outstanding circumstances are, to my mind, strongly opposed to the defence. Hilton, who applied first to Dr. Millard for a loan to take up an overdraft at the bank, was told by him that he had no money to lend, but suggested that he come that evening to the house and see his wife, the plaintiff, who perhaps could lend him the money. He saw Mrs. Millard, who finally made the loan, so that we start with evidence of the meeting of the lender and the borrower, and as it is now admitted, although at first denied, that the money was a loan originally, at least.

Hilton's story of how shares came to be written out, first in Dr. Millard's name and afterwards in the name of the plaintiff, is, to say the least, not convincing. There is no record in the Company's books or elsewhere of an application by either the plaintiff or her husband for those shares; there was no resolution allotting them; no notice of allotment; and no memorandum of delivery.

The Company was incorporated under peculiar circumstances. It was represented to have a capital of $60,000; this was increased to $100,000. No meetings were called, no records are in existence as to how this was done, and Hilton himself is unable to give any acceptable account of it.

The other director, Gwilt, has confessed his want of knowledge of the affairs of the Company then, and for some considerable time after the loan was made. He does not even remember signing the certificates. There is a remarkable lack of writings of any kind to substantiate Hilton's story in circumstances in which one would expect records.

Hilton sold out his shares to Gwilt after the fire. He says that he offered to include plaintiff's shares in the sale and be responsible for any loss. Is it likely that, in the circumstances which then existed, the plaintiff had she been applied to would have refused her money back?

In 1925 the plaintiff was applied to by Gwilt for a further loan of $5,000. It was represented to her that it was a case of

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all or nothing; that unless the money were advanced she would lose what she had already put in. She advanced the money; she asked for security for her first advance at the same time, but was told that she was in the same position as other shareholders and the Company could not secure her. That is the way Gwilt put it; she puts it very differently.

Then there is Gwilt's story that he had a prospective purchaser for the mill. He went to see the plaintiff in her husband's absence, and tells a plausible story of what then happened, quite different to the story told by the plaintiff and her daughter, who was present. At that time plaintiff was pressing for her money and it would have been very useful to Gwilt to have her signature to a document offering to sell shares which she denied having. And lastly, there is the story of Hilton of an interview at the St. Francis Hotel, at which, notwithstanding that she was threatening suit and about to issue the writ, Hilton says she did not dispute that she was a shareholder.

I agree with my learned brother that the trial judge formed early in the case an erroneous impression of the husband's authority.

MARTIN, J.A.

MARTIN, J.A. would dismiss the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: The learned judge expressed the view during the trial of the action that Dr. Millard was the agent of the plaintiff in transacting the loan. This, with respect, does not seem to me to be the case. What took place was this: Hilton approached the doctor for a loan of $5,000. The doctor replied he had no money to lend but that if Hilton would come to the house and see the plaintiff she might agree to lend the money. Hilton did go up to the house that night and the matter was talked over, all three taking part in the conversation. Hilton left, the Millards promising to think it over and the next day or the day following, the plaintiff went down to the bank where the defendant had an overdraft at the time of $5,500, drew $3,000 out of her own savings account, made up the balance out of other moneys of her own, paid it in to the credit of the Company and wiped out the overdraft. She had no interest in the Company and the money was simply loaned as is admitted. She

took no note or other acknowledgment, thinking the record in the bank would be sufficient.

The discussion at the house in which the husband took part or even his consulting with her or advising her as to whether the loan should be made, especially as Hilton had applied to the doctor personally for the loan and been informed he had not the money, and Hilton's going to see the wife direct and obtaining the loan direct and knowing as he must that the money was hers, I can see no principle on which agency could be established. Moreover, Dr. Millard says that he did not transact Mrs. Millard's business generally—had nothing to do in her actual business. She conducts her own business and has for the last 15 or 20 years. "I conduct my side of it and she conducts her affairs, asks my advice and sometimes I ask hers." This was in fact a dealing between principal and principal, or between the plaintiff as principal on one side (with the advice of her husband, if you like) and Hilton either as principal or agent for his Company. I use the words "as principal" because something was said as to Hilton giving security on his house for the loan which, however, was not done nor asked for. But even if I were wrong in this conclusion no authority has been shewn for converting what is admitted on both sides to be a loan into a purchase of stock. It is denied by both the plaintiff and her husband that any such authority was ever given and it is admitted by Hilton that he never consulted with Mrs. Millard about it and even if it could be said that the husband was her agent for making the loan (which I hold he was not) that fact would give him no authority to change the loan once made and completed into a purchase of stock, and the wife would not be bound unless there was evidence of her confirmation of such change (if it ever took place).

A few days after the loan transaction Hilton says he met Dr. Millard and asked him whether he wished the loan treated as a personal loan or how, and that the doctor replied he would take shares in the Company. This is flatly denied by the doctor, but continuing on Hilton says that he consulted with Gwilt, a director and had these shares issued and after carrying them around in his vest pocket for some weeks he met the doctor and handed

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him the shares and the doctor informed him that they should be made out to the wife, that he took them back and had that certificate cancelled and a new one issued in the name of the wife, this being carried around in his vest pocket for some weeks, and on meeting the doctor handed it to him. This again is flatly contradicted by the doctor, and Mrs. Millard swears she never heard of these transactions.

Now, let us examine how these shares are claimed to have been issued by Hilton, and I am only referring to them to continue the narrative.

Hilton swears: 1. No signed application for shares; 2, no allotment of shares other than they were simply issued; 3, no notice of allotment to either the doctor or Mrs. Millard; 4, no meeting held to allot; 5, no meeting of the Company ever held either annual or other meetings of shareholders. In other words, Hilton simply made an issue of shares to Dr. Millard, cancelled that certificate and issued a new one to the plaintiff, making the book entries. Of course, the irregularity of this is glaring, but as I said, I am only dealing with this by way of narrative.

GALLIHER, J.A.

Now, whatever may be said up to the time the shares (according to Hilton's story) were first handed to the doctor and the doctor said they should be in Mrs. Millard's name, one would expect an endorsement on the back of the certificate transferring them to Mrs. Millard, and then the usual transfer entered in the books and one would have expected that Hilton knowing it was Mrs. Millard with whom he made the loan-contract, she should have been advised of this change from loan to shares but he makes no mention of this to her at any time.

Just because the doctor is her husband does not give him authority to change her investments from loans to purchase of shares and the defence here being that such change was made the onus is on the defendant to prove that authority either directly or by inference and while the effect of their relationships would not call for as strict proof from which inference might be drawn, as in the case of strangers, it must still be such proof as from which reasonable inference can be drawn. In considering this there is one circumstance which is not without some weight.

The plaintiff let matters run on for a period of almost six years without receiving anything by way of payment, either for interest or principal, and we have to look at the reasons given for what on its face would call for explanation. That circumstance would of course be a factor and unless reasonably explained would have to be considered with other factors in the case.

Such a thing would be unbusinesslike, but we start out with just as unbusinesslike a proceeding at the very inception. I refer to there being no note or acknowledgment taken at the time the loan was made, and I have already referred to the plaintiff's explanation of that which is capable of understanding.

Now, as to matters being allowed to run along as they were, Mrs. Millard's explanation is: In cross-examination, plaintiff admitted:

"And for 6 years you allowed this loan to remain without having one jot of a pen, demand note, security or anything else. . . . ? Well, we tried to get it paid.

"You never tried to get the security that was promised you. You never got a note, you never had any acknowledgment in writing for that whole six years, did you? No, I had nothing in writing."

It might be noted here that between the 16th of October, 1920, date of loan, and the issuing of the shares to Dr. Millard, 28th January, 1921, a period of over three months, the same state of affairs existed.

It might be said that during this period, if it was understood that the plaintiff was to take shares there would be no necessity for taking any acknowledgment, but three months is rather a long time in which to withhold issuing these shares in the simple and irregular manner in which they were issued. And in fact, as I will refer to later, it would appear that no suggestion was made as to shares at all until Dr. Millard asked Hilton for payment, three months later, and it seems more probable that this was the first time reference was made to Dr. Millard becoming a director and taking shares, than as stated by Hilton, a few days after the loan was made.

One can understand why people so unbusinesslike as not to require anything but the bank record evidencing their loan might allow a debt of this kind to run on without payment and without enforcing their claim until it was necessary to do so to prevent the operation of the Statute of Limitations, depending

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on the relationship between the parties both in a friendly way and in regard to other transactions between them.

The mill burnt down in 1922 (but was rebuilt) and it would appear that the plaintiff did not ask about her money until after that took place. She says she met Hilton on the street and asked him what about her money and he did not give her much satisfaction.

Dr. Millard says about three months after the loan he met Hilton and asked him about the loan. Hilton said he did not think they could pay it but he would talk with Gwilt. Then a few days after he again met Hilton who suggested the taking of shares and becoming a director. This Hilton denied. Hilton admits suggesting that he become a director and the doctor refused.

Dr. Millard's explanation of why payment was not pressed for is:

"In 1922 why did not you insist on the payment of this account, after the fire . . ? I did speak about it then.

"*Farris*: Yes, then why did not you insist upon being paid at that time? Well, they told—Mrs. Millard told me too—if Mrs. Millard insisted upon having payment of the note they could not rebuild the mill.

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"You could have got the money at that time? Yes.

"You did not ask for any note, did not ask for payment on account of interest at that time? Yes, we asked everything just as soon as it was over—

"Yes, the interest was then overdue? Oh, yes.

"Considerably overdue? Yes.

"It was a matter of something like $440 a year interest, did not you have any—did not you require the interest? Mrs. Millard did not really require it, it would have been acceptable enough, she did not absolutely require it, but still at the same time—you do not take into consideration the fact that Mr. Gwilt and Mrs. Millard had been doing business in the thousands up to as high as $25,000 just previous to that, and we had found Mr. Gwilt very honourable, as far as we knew carried out his agreements and his obligations, and we did not think it was—I am sure Mrs. Millard did not—did not think it was necessary to have anything down in black and white and tying a man right up to the last knot.

"The business that you had had with Mr. Gwilt was the buying of timber? Oh, yes.

"He bought certain timber from you? Yes.

"And he paid for it according to the written contract? No, he has not paid for it all yet.

"He has not paid for all yet, but it was in the form of a written contract? Yes, I did not know Mr. Gwilt then, none of us knew him then.

"But you never had any business with Mr. Gwilt or Mr. Hilton without

taking any acknowledgment from him before? Mrs. Millard was at one time—Mr. Gwilt owed her $2,700.

"What was that for—under the agreement to purchase timber? Yes.

"Yes? He owed her that much and he came through and paid it without any trouble at all, and we had no—nothing to complain about.

"Now, what I am trying to find out is, at this time that you found about the insurance, that the buck was being passed back and forth between Gwilt and Hilton as to the carrying of this insurance, I want to know at that time why you did not insist that that loan should be put in proper shape by saying I have got to get some security or some evidence of the amount of payment? When we went down to get the money for the loan right after the fire and were satisfied they would pay it out of the insurance, they said that was going to break them, they could not put up the mill, all the money practically was tied up in the mill. Hilton said all the money he had was tied up and to use that money it would not give them a chance to get clear at all. Of course being easy and soft we let it go.

"I see, that is your explanation? Yes.

"And you were easy and soft for six years? Yes, pretty easy.

"All but two days? Well, we gave them just as long as we possibly could, yes.

"Now, during that time you say that you made—how many demands upon Mr. Gwilt or Mr. Hilton for payment of this money? Oh, I could not say definitely, but I would say about a couple of dozen, I should think.

"And do you say that in that whole time there was never any discussion between you at all in reference to the shares, either with Mr. Hilton or Mr. Gwilt? Never any mention about shares.

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"Never even heard about the question of shares until this action came in Court? No.

"THE COURT: You do not quite mean that because you say once early in the game he suggested you taking shares and making you a director? Yes, but that was not in connection with—

"You say subsequent to that day, when he made that suggestion, you never heard it mentioned again until after your action was started? No, there was nothing.

"Well, that it what you say? Yes, that is what I say, your Lordship."

These business relations are confirmed by Gwilt:

"I suppose you have seen Dr. Millard though, many times, have you? Oh yes.

"From 1920 to 1925? The nature of our relations was such that we were bound to meet. We had bought timber from them and were operating another mill and had to meet in the ordinary course of business.

"*Killam*: And during any of that time did you ever mention the fact of either the doctor or Mrs. Millard taking shares in the Bevan Shingle & Lumber Company? Not to my knowledge, no."

I can quite conceive of easy-going good-natured people transacting other business with the same parties agreeably and of a profitable nature, not being desirous of embarrassing the Company and sensible of the loss that had been occasioned by the fire,

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and the necessity of using the insurance money to rebuild, not wishing to press their claim unduly, not being in immediate need of the money, so I do not think that undue weight should be given to this circumstance.

Now, dealing with the issue and delivery of the shares as they appear in the Company's books. Hilton says a few days after the loan was completed, he met Dr. Millard, asked him how the loan was to be considered, and the doctor told him he would take shares. Dr. Millard denies this and says the first time shares were mentioned was three months afterwards, when he went to ask for payment, of which particulars have already been given. Hilton describes how shares were issued to Dr. Millard, then that certificate cancelled and a certificate made out to the plaintiff at the doctor's suggestion and handed to him.

Millard denies all this. Then Hilton says years later when coming on the boat from Nanaimo, Dr. Millard brought up the matter, saying he was going to take action to recover—that the shares were only collateral as he (Hilton) knew, and asking him to back him up in this. Dr. Millard says there was no such conversation and that he never knew of shares being issued until after action brought.

There is further evidence from Hilton that at the time he sold his shares to Gwilt in 1922, he offered to take on Mrs. Millard's shares at par and stand any loss himself. Hilton says that came about in this way:

"*Farris*: Now, I wanted to know, Major Hilton, the next time that you had any discussion with Doctor or Mrs. Millard in reference to either this loan or these shares? Shortly after the fire in 19—in July, 1922, Mrs. Millard met me on the street and—oh, said something tantamount to 'How do we stand in regard to the money we have got in the Company, Major?' I said, 'I will'—I was rather surprised—I said 'I will have a chat with the doctor.'

"THE COURT: What is it? I said I would have a chat with the doctor.

"*Farris*: Yes, did you have a chat with the doctor? A few days afterward I met the doctor, I had a chat with him in his office, I told him what Mrs. Millard had said. 'Now,' I said 'I feel—feeling that I was more or less responsible to the doctor investing their money in the Company, and explaining that I was selling my shares to Mr. Gwilt, I offered to take up theirs and sell them with mine to Mr. Gwilt, and assume any loss myself.'

"Yes, what did the doctor say to that? 'I still have faith in that Company and I am going to retain the shares.'

"THE COURT: 'I still have faith in that Company and I am going to'—What? 'Retain my shares.'"

And he further relates a conversation with Dr. and Mrs. Millard in the St. Francis Hotel, Vancouver, in September, 1926, in these words:

"I told this to the doctor and Mrs. Millard at the hotel. The doctor said he would like to take shares in the company. I explained to him that I thought it would be all right, but I would have to take it up with my co-director. I took it up with Mr. Gwilt—the only one then in town, who approved of it, and shares were issued. The doctor said the shares were issued in the wrong name, they should be for Mrs. Millard. Now, the share certificate was issued. Subsequently the mill was burned down. Feeling that there was some moral responsibility to me for the doctor investing his money in the Company I offered to take over his shares at par value and assume the loss as well—with my own interest to Mr. Gwilt. The doctor said, 'No, I still have confidence in that Company, I am going to retain the shares.'

"THE COURT: Now, when you said that to them in the hotel what did they say? They said that is quite right.

"Who said? I think Mrs. Millard."

While admitting meeting Hilton as alleged, both Dr. and Mrs. Millard deny that any such conversation took place. Dr. Millard's evidence is:

"*Killam*: Just give details. Did he come and offer at the time he came to sell out to Mr. Gwilt to take up Mrs. Millard's shares? No, he had sold out to Gwilt about 10 days or possibly two weeks before I knew anything about it. I knew nothing about it at all.

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"Well, when you did find out about it, did he make any offer to you about taking any shares? No, it was too late then, he had got his money then.

"Well, did you know anything about any shares? No.

"He says you told him then—in these words—'I still have faith in the Company and will retain the shares'? I said nothing of the kind.

"Nothing like it? No.

"He says also that he repeated all the matter to you in the St. Francis Hotel when Mrs. Millard was present. And you have heard what he said in reference to that? Yes.

"Was that true? That was not correct.

"That was not correct? No.

"Did Mrs. Millard say, 'That is quite right'? No.

"To any such story? No, she did not say that at all.

"Well, did he give any such story for her to say that to? No, his time was mostly occupied it seemed to me with trying to square himself with Mrs. Millard on account of the misunderstanding that he and Gwilt had had when he got out of the business."

And Mrs. Millard's evidence:

"*Killam*: Mr. Hilton says he told you that he had asked Dr. Millard whether he wanted to take shares or how to treat the loan to him in the first place, away back in 1920, in the fall, and Dr. Millard had come and told him that he wanted shares; but later on he offered to take up the

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shares and sell them—that is, to Gwilt, and Dr. Millard said, 'I still have faith in the Company and will retain the shares.' And he reviewed the whole situation in that way. Did he do that as he says? No.

"Did you say to him when he had said all that, 'That is quite right'? No.

"You did not say any such thing? No.

"Was the conversation there as you have given it here today as you remember? Yes.

"And not as he has said? No, not as he has said.

"You specifically deny him stating he said those things to you on that occasion? Yes.

"Or on any other occasion? Or on any other occasion, I do."

Now, as to Gwilt's evidence regarding shares. He had bought Hilton's shares after the fire in 1922—prior to that he had owned one share and obtained some more in January, 1921, but took no part in the management of the concern though going up occasionally. He was not asked either in chief or cross-examined as to whether Hilton had consulted him as to issuing shares to the Millards, nor did he offer any evidence to that effect although this was sworn to by Hilton, and if one is to judge by what he said: "I told the doctor I had nothing whatever to do with raising the money and knew nothing about it."

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And further, in replying to Dr. Millard's statement to him in September, 1926, that the money had been got by Hilton as a loan and the Company was liable for it, Gwilt said:

"I do not know anything about it—it was not on our books—I said it was not shewing as a loan. It was shewn as shares."

So though Gwilt signed the certificate as president, it would appear that he did so merely because Hilton handed it to him to sign. If he had looked into the matter at all he would have found that there was no signed application for shares, that there had been no allotment, and no notice of allotment, and he would know that no meeting had been held and as I say, he gives no testimony to corroborate Hilton's statement that he took the matter up with Gwilt, and consulted him as to the issuing of shares for the money loaned.

Two other instances are given in support of the fact that the plaintiff knew her loan had been converted into shares. In 1925 she made a further loan to the Company of $5,000 which was secured by mortgage. This loan came about by reason of a letter written by Gwilt to Dr. Millard, dated 12th February, 1925. That letter furnishes information that would naturally

be given to a person you were looking to borrow from but there are two portions of the letter which defendants saw shew it was written to a shareholder. One is:

"And I am making the suggestion that the only way out of the difficulty will be to raise some money by way of first mortgage and pay them off."

And:

"I would like to know if you would be agreeable to this way of raising the required money?"

No doubt Gwilt was writing to Millard as a shareholder, as he thought, in view of the records in his own office. So there is nothing really significant in that letter.

No answer seems to have been received to this letter, but in April, 1925, Mrs. Millard made a loan of $5,000 to the Company secured by mortgage. At the time the mortgage was taken, Gwilt retails the conversation with Mrs. Millard:

"Mrs. Millard said that they would like to get security for the money they already had in the Company and I said, 'You have your shares like the rest of us.'

"What did she say to that? She said, well, they wanted to get this security and I said, there is no chance in the world so far as I can see for getting security for shares. The Company could not give security on its own shares.

"And did the matter drop there? I did not hear any more about it and the loan went through for the mortgage.

And further:

"Now you had some conversation at the home of Mrs. Millard here in Vancouver? Yes.

"What was that in reference to? I had what I thought was a very good opportunity to interest a man named Bell of the Long-Bell Lumber Company, of Longview, Washington, and I tried to get them to agree to sell their shares for so much money so that I could go to this man with a clear good deal.

"And was Dr. Millard home that night? No, he was not at home, but Mrs. Millard—I simply wrote out a paper addressed to the directors of the Bevan Lumber & Shingle Co. Ltd., offering to sell their shares and she said she would not sign it. She would call up the doctor at Courtenay.

"THE COURT: At what price? It was figured the value she would place on it would be $8,200.

"*Farris*: Yes. And she called up the doctor at Courtenay and Mrs. Millard talked to him and the telephone was then given to me, and I spoke to the doctor and he said he wouldn't agree to any paper being signed unless it was returnable in some few days as it might affect his case which he thought he had against the Company.

"So nothing was signed? No.

"And the deal never went through? No, the deal never went through and I missed the boat, I was late.

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"That is all you saw of either of the Millards in reference to this, was it, before they issued the writ? Yes, that is all. Well, I saw Dr. Millard, I think, it was three times and I advised him if this writ was issued very likely it would affect the creditors and we would be forced to make an assignment and Dr. Millard said he had no wish to embarrass the Company at all."

This latter took place in September, 1926, shortly before writ issued. Mrs. Millard's version of that is:

"Mr. Gwilt came in and he said 'Mrs. Millard,' he says, 'I think I have some good news for you.' And I said 'That is good.' He says, 'I think I am going to be able to sell the mill.' And I said, 'That is good news.' And he said, 'I have come to see you,' he said, 'if I had something definite,' he said, 'to shew a prospective buyer,' he said, 'I have from the other creditors,' and he said, 'I would like to have something from you to shew this man that is going to buy the mill.' And he said, 'If you get me a piece of paper,' he said, 'I will write it out.' So we got the paper and he sat down and he said, 'You have $5,500 in the Bevan Lumber and Shingle Company.' 'Now,' he said, 'at eight per cent.'—and this is about six years—no, he said, 'Christine, get a paper, you are going to High School—'

"Your daughter was Christine? My daughter was there. He said, 'You are going to High School,' he said, 'How much should that be?' And she said 'that would be $8,200.' 'Yes,' he said, 'that would be right.' So, Mr. Gwilt sat down and he wrote out $5,500 at eight per cent. would come to $8,200. 'Now,' he said, 'Let me see, fifty-five shares,' 'now,' he said, 'you would—in selling out, Mrs. Millard, you would have to sell to the Company, or if not to the Company to someone else.' 'But,' I said 'Mr. Gwilt, I do not know anything about shares.' And he wrote the paper and I took it up and read it, and I said I would not sign the paper."

That version is corroborated by the daughter of the plaintiff.

It is on these two incidents, the one in 1925 and the other in 1926, and also the incident in the St. Francis Hotel with Hilton in September, 1926, that defendant seeks to bring home to the plaintiff knowledge that shares had been issued in her name and although no direct authority had been shewn to enable her husband to make the change from a loan to shares defendant says her conduct shews that she acquiesced in what had been done and confirmed any act done by her husband.

It is admitted that in 1925 when the second loan was negotiated, she asked for her first loan to be included in the security, and Gwilt says he informed her that could not be done, that she had her shares like the rest of them, that she answered—"we want to get this security," and he again said the Company could not give security on its shares and the matter was dropped, and the loan went through. This was the first time in over four

years, either Gwilt or Hilton had ever mentioned to her that she had shares, and unless her husband told her she would not know and both deny this. It is suggested that the natural thing for her to have said then would be—"What shares? I know of no shares I have in the Company," and perhaps it would, and we must consider the fact that she did not.

Then comes the second incident, when Gwilt who thought he had a chance of selling the mill came to her and wanted her to sign a paper which would be an acknowledgment of her being a shareholder, and there she does say, she knew nothing about shares, and her daughter confirms that—Gwilt says she refused to sign it but neither affirms nor denies that she gave the reason she has stated.

I must confess I cannot see the reason why Gwilt should require any such signed paper to shew prospective purchasers. The books would shew them who the shareholders were and it was no interest to them what she valued her shares at, they would pay the price agreed on if a sale went through and on that price would be determined the value of her shares.

It might be that the Company wanted some acknowledgment under her own hand that she was a shareholder because at that time suit was being threatened. And such a document would be of importance to the company in defending an action brought for money loaned but the document was not signed and we do not find any effort made by Gwilt to get in touch with the suggested purchasers afterwards. He says he missed the night boat to Seattle, but I think I can take judicial notice of what is common knowledge that there is both a boat and a train to Seattle every morning. This incident is not without its significance to me.

The other incident with Hilton at the St. Francis Hotel, I have already dealt with.

I cannot but entertain some doubt by reason of the manner in which these shares were issued.

I will now turn to the reasons for judgment of the learned trial judge. I quite appreciate the fact that where the case is decided upon conflicting testimony one should not lightly interfere with the findings of the judge below. The reasons have

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been so often given that I need not repeat them here and they are cogent reasons. The learned judge says:

"The issue is simple and the parties appear to be respectable people."

And at the end:

"I can only say that, after the most careful consideration of the evidence and of all the circumstances, I feel confirmed in the impression that I formed at the trial, that the evidence offered by the defendant is to be preferred to that offered by the plaintiff."

I cannot, of course, say what was present in the learned judge's mind, but it would not appear to me that the demeanour of witnesses was one factor. That is usually expressed more definitely when the learned judge does consider it a factor. This is in no sense a criticism of the learned judge's reasons, and I only mention it as indicating to me to some extent at all events, that demeanour did not enter into his conclusions.

On the other hand there is this: and it may very largely have influenced the learned judge in his conclusions. The learned judge says, addressing Dr. Millard:

"THE COURT: Oh, well do not tell us that any longer. You are agent for your wife throughout this whole transaction and you know it and she knows it."

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This being the view the learned judge took, I can quite see why he might prefer the evidence of the defendant to that of the plaintiff's witnesses.

It is to be noted that this expression of the learned trial judge was made during the examination of the plaintiff's first witness Dr. Millard, and before any testimony had been given by Hilton as to how the transaction came about in the first place.

Hilton's evidence is practically the same as Dr. Millard's, except in cross-examination he denies that Dr. Millard told him he had no money himself but that perhaps Mrs. Millard might lend the money. Hilton left the house, the Millards saying they would consider it and let him know. Now, what took place afterwards? So far as the evidence goes it shews that all the money was loaned by Mrs. Millard. She went to the bank next morning, drew out from her savings account $3,000, made up the balance, $2,500, out of her own moneys, paid it into the bank, and retired the overdraft. Under these circumstances, I have no hesitation in saying that in my view Dr. Millard's evidence should be accepted as to how the transaction came about

and it is on that basis I have accepted it in coming to the conclusions I have with regard to agency.

My view being that he never was the agent of the plaintiff from the beginning and if I am in error there, then certainly not for the purpose of converting money loaned into share stock, and the only thing defendants can rely on in that respect is confirmation by plaintiff's course of conduct, which in my opinion has not been sufficiently established to meet the onus.

I would allow the appeal and order judgment for the plaintiff.

MCPHILLIPS, J.A.: I have had the benefit and advantage of reading the reasons for judgment of my brother GALLIHER. My learned brother has at length canvassed the evidence and made pertinent excerpts therefrom having a very decisive effect on the issue that was to be determined at the trial. I am in complete agreement with the conclusions of fact of my learned brother—they are the only reasonable conclusions of fact that can be come to. The loan is admitted, the *onus probandi* was on the defendant, the respondent in the appeal, to establish repayment of the loan or the acceptance by the plaintiff, the appellant in the appeal, of the shares it was contended the plaintiff agreed to accept as consideration for the money advanced. This onus in my opinion, was not discharged by the defendant. The attempt was made to shew that there had been acceptance of the shares and that the husband of the plaintiff was her agent, and as such accepted the shares. There is no evidence to establish the agency and no proved communication of any kind to the plaintiff that she was a shareholder in the Company, at the time of the alleged changed transaction, *i.e.*, the acceptance of shares in consideration of the loan made. It is significant that the plaintiff at once—when after the absence of five years or more she was apprised of the contention made that she had become a shareholder and held shares as consideration for the loan—repudiated the contention made that she was a shareholder in the Company. In any case there was no valid issue of the shares, and it is clear that it was a plan worked out by someone in the Company to forestall, as it was hoped, the plaintiff in making any claim for the money loaned which if followed up by a suit would embarrass the Company. It was

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a scheme to fend off any possible financial complications and held in reserve. I cannot but come to the conclusion that there has been conduct in the nature of a breach of faith attempted here, and being of that opinion, I cannot accept the view of the learned trial judge. It is not a view, with great respect to the learned trial judge, that comports in my opinion with the evidence adduced at the trial. It is not reasonably the conclusion that one is compelled to draw from all the surrounding facts and circumstances, and it is a highly inequitable conclusion.

The appeal is in its nature a rehearing, and in coming to the conclusion I have, I am convinced that I am quite within the *ratio decidendi* of the leading case of *Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402, where Lindley, M.R. (afterwards Lord Lindley), that master of the law, said at p. 402:

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"The case was not tried with a jury, and the appeal from the decision of the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must re-consider the materials before the judge, with such other materials, if any, as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions, and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witness. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

It is without hesitation that I have arrived at the conclusion that the case is a proper one for the reversal of the judgment of the Court below. The appeal, in my opinion, should be allowed.

MACDONALD, J.A.

MACDONALD, J.A.: The plaintiff a married woman sued for the amount of an alleged loan—$5,500—made to defendant Company or its manager personally in 1920 with interest at 8

per cent. or $8,137.59 in all. The defendant admitted the money was obtained as a loan but that shortly afterwards, on the request of the plaintiff's husband, it was used to purchase 55 one hundred dollar shares of the capital stock of the Company. The $5,500 originally advanced belonged to the plaintiff but the matter of obtaining it was taken up first with the husband and later with both the plaintiff and her husband, the latter being the chief spokesman. The learned trial judge preferred to accept the evidence offered on behalf of the defendant in preference to that offered by the plaintiff and dismissed the action. In so far, therefore, as questions of fact are concerned that finding must stand. The case must therefore be viewed on the basis that although it was originally a loan it was by mutual agreement turned into the purchase of shares as aforesaid. Counsel for plaintiff (appellant) argued that no valid shares were in fact issued or received for want of compliance with the requirements of the Companies Act in several respects not necessary to detail. Such an inquiry however is not relevant to any issue in this appeal. The action was not framed on the basis of failure of consideration for want of validity of the stock issued nor to compel the issue of valid shares nor for damages for breach of an agreement to issue shares. It is simply an action to recover money loaned. The only ground upon which we can be asked to reverse the finding of the trial judge is this. It was, as stated, originally a loan of the plaintiff's money to the defendant or its manager. It is alleged that if the plaintiff's husband agreed to convert it into the purchase of shares that could not bind the plaintiff. The plaintiff, it was urged, made no application for shares nor did she ever receive them and no act of the husband could bind her or change the character of the original transaction from a straight loan to a purchase of shares. Having regard to the learned trial judge's acceptance of the evidence offered by the defendant, we must hold that 55 shares were in fact delivered to the husband and later on the Company being told by him that they should have been issued to the plaintiff the original certificate was cancelled and 55 new shares were issued in the plaintiff's name and delivered to the husband. If this did not bind the plaintiff, then the original character of the transaction was not altered and the plaintiff should have

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obtained judgment. This necessitates a consideration of the evidence to determine the question of agency. Again, in ascertaining the facts to decide the question of agency, we must accept the evidence offered by the defendant. Hilton, the manager of the Company in 1920, told the plaintiff's husband that he needed $5,000. The husband invited him to come to his house to discuss it. Hilton explained in the presence of them both, although primarily directing the conversation to the husband, that he had taken over the whole interest in the Beaven Lumber Company and required a further sum of $5,000 to complete payment. The plaintiff's husband said to him "We will think the matter over." The next day or shortly thereafter $5,500 was placed in the bank either to the credit of Hilton or the defendant Company, that being the amount of an overdraft. Shortly afterwards Hilton met the plaintiff's husband, thanked him for the money and asked him how he wished to have it treated. The husband replied "I would like to take shares in the Company." Hilton replied that he would have to consult his co-directors. After doing so and securing their approval the Company issued a share certificate for 55 shares in the name of the husband and handed it to him. The husband said "there is something wrong here—this should be made out in the name of Mrs. Millard, it was her money not mine," whereupon a fresh certificate was made out for her and handed to the husband, the other being cancelled. Sometime later when Hilton was about to dispose of his own shares he made an offer to the plaintiff's husband to include his wife's shares in the sale but the husband replied "I still have faith in the Company and am going to retain the shares." Again some years later (September, 1926) when difficulties arose Hilton at a conference with both repeated to them what he understood to be the original transaction practically as set out above and the plaintiff said "that is quite right." On that state of facts, I think agency on the part of the husband is established. While the relationship of husband and wife does not imply agency except in respect to certain matters yet it has a bearing on the point of view from which the evidence should be considered. From all that took place and the uniform course of conduct of the husband with, as the evidence shews, the sanction of the plaintiff, agency is established.

He acted by her will and with her consent. That is the only fair inference from all the evidence. That intention may be manifested simply by permitting the husband to assume a position where he must be regarded as representing the person who has placed him in that position. True if the plaintiff first made a loan or expressly or impliedly authorized the husband to make a loan of her money and he afterwards converted it into a purchase of stock without her sanction she would not be bound. But the fact that at a later date when the whole facts are recited to her she replies "that is quite right" coupled with her conduct in permitting the husband in her presence to speak on her behalf knowing all the time that it was her money that was to be advanced and the further fact that in all conversations up to the time of trial she did not repudiate his authority it is proper to infer that at the very least she held him out as her agent and is estopped from denying his authority. The plaintiff by her conduct stood by while the husband discussed the question of the loan; she acquiesced in the statement by the husband "we will consider it"; she permitted Hilton to believe that the husband had her authority and even if no agency in fact existed she should not be heard to deny it. The husband in his evidence constantly uses the phrase "we made the loan," etc. The plaintiff also uses the plural saying "we were pressing for payment." Although this evidence was not necessarily believed it is proof as against her that they acted jointly in the matter.

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Since writing the foregoing I have had the advantage of reading the reasons for judgment of my brother GALLIHER. I cannot, with deference, believe, however, that the fact that the learned trial judge erroneously or otherwise, expressed an opinion in the course of the trial on the question of agency, had any bearing, or should by this Court be regarded as having any bearing, on his findings of fact. Nor does it indicate that had he not expressed that opinion his view as to what evidence should be believed or "preferred" might be altered.

I would dismiss the appeal.

Appeal allowed, Martin and Macdonald, JJ.A. dissenting.

Solicitors for appellant: *Killam & Beck.*
Solicitors for respondent: *Farris, Farris, Stultz & Sloan.*

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SCUILLI v. PLANTA AND A. E. PLANTA LIMITED.

Judgment—Damages in certain sum recovered with costs—Order for taking accounts—Execution—Order for stay subject to furnishing bond—Appeal—Marginal rule 595.

SCUILLI v. PLANTA

In an action in which there were two distinct issues, one being a claim for damages and the other for the taking of accounts between the parties, the plaintiff recovered $1,500 damages with costs and a reference was ordered for the taking of accounts. On the issue of execution the defendants applied for and obtained a stay subject to furnishing a bond for $1,500 as security for payment of the amount due the plaintiff after the accounts were taken.

Held, on appeal, varying the order of MCDONALD, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting, dismissing the appeal), that as the defendants filed an account on the trial shewing that the balance they claimed in their favour as against the plaintiff was $604, the stay should be removed except as to this sum.

APPEAL by plaintiff from an order of MCDONALD, J. of the 2nd of December, 1927. The plaintiff had recovered judgment against the defendants for $1,500 damages and costs, for the sale by the defendants of certain chattels of the plaintiff under a chattel mortgage fraudulently obtained and the judgment included an order that an account be taken by the registrar at Nanaimo of all transactions that had formerly taken place between the plaintiff and defendants. The defendants then obtained an order staying execution providing the defendants do furnish a bond conditional for the payment of $1,500 as security for the payment of the amount found due from the defendants to the plaintiff upon the taking of accounts. The plaintiff appealed from this order.

Statement

The appeal was argued at Victoria on the 12th and 13th of January, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

D. S. Tait, for appellant: We are entitled to issue *fi. fa.* under marginal rule 595. That there is an order for an accounting is not sufficient ground for a stay: see *Rawson* v. *Samuel* (1841), 10 L.J., Ch. 214 at pp. 215-6; *Maw* v. *Ulyatt* (1861),

Argument

31 L.J., Ch. 33. They cannot have a stay by reason of something that is going to happen in the future: see Halsbury's Laws of England, Vol. 25, p. 492, sec. 868; *Stumore* v. *Campbell & Co.* (1892), 1 Q.B. 314; *Middleton* v. *Pollock. Ex parte Nugee* (1875), L.R. 20 Eq. 29 at p. 37; *Bennett* v. *White* (1910), 2 K.B. 643; *In re Milan Tramways Company. Ex parte Theys* (1884), 25 Ch. D. 587. He must satisfy the Court that there is a preponderance of equity requiring a stay: see *Greer* v. *Young* (1883), 24 Ch. D. 545 at p. 549. There is nothing here that would be a set-off to our claim.

Argument

Craig, K.C., for respondents: We looked after the plaintiff's financial affairs for a long time and there is an unascertained amount owing by the plaintiff to us. Forcing payment of this judgment would be an injustice. The judge below has exercised his discretion and he should not be interfered with: see *Wells* v. *Knott* (1910), 15 W.L.R. 285; *Meynall* v. *Morris* (1911), 104 L.T. 667; *Sheppards and Co.* v. *Wilkinson and Jarvis* (1889), 6 T.L.R. 13; *Williams* v. *North's Navigation Collieries (1889), Limited* (1904), 2 K.B. 44; Yearly Practice, 1928, p. 330.

Tait, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would allow the appeal in part. I think the stay should apply to the extent of the $604, and as to the balance the stay should be removed, for this reason, that at the time of the trial of this action there were two separate and distinct issues before the judge, one was a claim for damages by the plaintiff against the defendants, the other was the accounts between the parties. The learned judge gave judgment for the damages, $1,500, and referred the accounts to the referee. At the trial the defendants filed an account shewing what they then claimed to be the state of the accounts between themselves and the plaintiff; all that they were then claiming was $604, that is the balance that they were claiming in their favour, but the plaintiff denied that there was a balance in their favour.

In that account of $604 there was a $2,000 credit; that is, the defendants had credited the plaintiff with $2,000. That came about in this way: one Casilio and the plaintiff had entered into an arrangement by which the plaintiff was to convey

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certain lands to Casilio, and Casilio was to advance $2,000 to pay off the encumbrances on those properties and give a life lease back. Casilio paid the $2,000 to Planta for that purpose. Planta instead of paying off the encumbrances on the land that was going to Casilio, used it to pay some other debt of Scuilli's than the one that the money was entrusted to him for. Scuilli has got the benefit of that and was credited with it in the account.

Now that of course eliminates everything except what was before the learned judge at the trial. If he had decided both issues at that time and had found in the defendant's favour he would have set that $604 off against the $1,500 and given judgment for the balance; and that would be the last of the matter; the plaintiff would have got the balance of approximately $900. What is now suggested is that defendants will claim on the reference what was not claimed in the account put in on the trial. It was then conceded to the plaintiff, and the authorities cited to us shew that judgment will not be stayed in those circumstances.

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The stay will therefore be removed, except in respect of $604.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from an order staying the proceedings in an action which is still pending, which state of affairs has no relation to that wherein the application is to stay proceedings on a concluded judgment pending an appeal to this Court—I state this difference by way of precaution. It is a matter, therefore, particularly within the jurisdiction and discretion of the learned judge of the Court which still has control of an unfinished action, and such being the case the situation is governed by one rule which has been referred to, and one rule which has not been referred to. The rule referred to is 595 (*b*):

"The Court or a judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit."

The other rule is additionally and particularly appropriate to the present circumstances, *viz.*:

"605. No proceeding by *audita querela* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or judge may give such relief and upon such terms as may be just."

That has particular application here because since judgment was obtained in this action a judgment was obtained on the same day by Casilio against the defendant. Some months later, when the learned judge had full cognizance—he had indeed, particular cognizance because he tried both actions—he made the order to stay complained of. Now in those circumstances this Court must be very careful to apply the rule of non-interference with judicial discretion, which is that in general the discretion of a judge will not be interfered with where there are proper materials before him for its due exercise and where he has not erred in principle; and there is a third element to be considered, which is herein specially invoked by the last concluding words of said rule 605, *i.e.*, "upon such terms as may be just." This has been very recently, only last month, strikingly illustrated by the judgment of the English Court of Appeal, consisting of Lord Hanworth, Master of the Rolls, Lord Justice Atkin and Lord Justice Lawrence, in *Maxwell* v. *Keun* (1927), 44 T.L.R. 100; [(1928), 1 K.B. 645], wherein they said that even though there was a discretion which ought not to be ordinarily interfered with, yet if the order made would lead to an injustice the Court then would feel bound to interfere; and they did so, in a very striking manner, because they set aside the order of the Lord Chief Justice, by which he had refused to postpone a trial, upon the ground that if his order had been permitted to stand there would have been a "denial of justice"; Lord Justice Atkin saying the reason he did so was because there would have been "a very substantial injustice" done if the case had gone on for trial immediately as the order of the Lord Chief Justice directed, and therefore in such case the Court "would not hesitate to reverse it."

MARTIN, J.A.

Now what we have to consider here is—What is the balance of justice in this matter? In my opinion the case has not been advanced beyond peradventure and I find myself unable to say (despite the very precise and careful argument of Mr. *Tait*) as we would have to say before interfering, that there has been a "clear denial of justice" or a "very substantial injustice" done by the order that was made by the learned judge below, and therefore the appeal should be dismissed.

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GALLIHER, J.A.

GALLIHER, J.A.: I would have preferred that Mr. *Craig* had been here this morning. It is true it probably was his duty to be here, but as the Court had only intimated that judgment would be handed down this morning he may reasonably have not thought it necessary. However, I am not affected by that particularly, as the statement made by Mr. *Tait* does not, so far as I followed his argument yesterday, differ materially from the submissions that were made to us yesterday. I find myself under the circumstances of this case in agreement with the Chief Justice. I think the order should be varied so as to leave only subject to execution the $604, the account before the learned judge when he gave the order.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. The action is still pending, and one of the questions to be tried, one of the matters to be inquired into, is the state of accounts between the parties. I cannot approve of a judgment being given in the form in which this is attempted to be worked out. There should be but one judgment; here apparently we have got two judgments in one order; one is for an amount of money, and the other is for taking the accounts. The plaintiff himself asked that the accounts be taken; he also asked for damages which have been allowed. But the overriding situation is that the accounts are to be taken. Now how idle it is to have a direction that the accounts be taken when to begin with there is the isolated sum of $1,500 that the defendants must pay *instanter*. I must say it is a unique case. I may say also in passing that I do not approve, nor do I think the Court should approve of solicitors taking an assignment of the judgment when matters are still pending. It throws the solicitors into the position of not being dispassionate instructors of counsel; it makes them parties litigant. And as we see it in this case, it has a tendency to put the legal profession in a position they ought not to be in the eyes of the public. In the judgment there is provision made that accounts may be had and taken; the order is so directed; and in due time these accounts will be taken. Further, I think it is not in the best interests of justice that we should, in the *interim,* have these matters determined when there is still the right of appeal.

It also to my mind is not true forensic procedure to have counsel here animadverting upon the defendants' position, and that certain things have been found in the nature of a breach of trust or not in conformity with instructions given. There is the right of appeal and it will come to this Court, and it will be a matter of embarrassment to this Court, if, later on, we have to take a different view. All these points punctuate this, that when the learned judge made the order under appeal, he was still seized of the action, and he made the order properly in my opinion, because it is not yet known what the state of the accounts will be. Why should this $1,500 be looked at in any other way than say the lending of money, or anything of that kind, which would be the matter of credit in the account? The plaintiff can say, as to $1,500 the learned trial judge has allowed that to me and therefore it is to be credited.

But there may be, on the taking of the accounts, a large balance in favour of the defendants. Still, in the *interim* of time this money is required to be paid. I must say I know of no precedent for proceedings of this character, none whatever, and I must deprecate them, and I deprecate them in the strongest terms, that we should be embarrassed by having to pass on matters which may later be the subject of appeal.

MCPHILLIPS, J.A.

I am in thorough accord with the principles that are so well enunciated in the case my brother MARTIN referred to. I have no hesitation in saying that this is a denial of justice, from the point of view I look at it, if the order under appeal be reversed either in whole or in part—in the language of Lord Justice Atkin "substantial injustice would be done in my opinion." Why should $1,500 be paid now when the $1,500 may be payable by the plaintiff to the defendants a little later on? I know of no precedent whereby you can have two judgments in one action.

I therefore, as I said at the outset, would dismiss the appeal, because I consider that the order made by the learned judge in the Court below is a proper exercise of the discretion that resided in him. Unless I could find he was proceeding upon some wrong principle, even if I felt that I would have made a different order if I was acting in first instance, as a member of the Court

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of Appeal, I am not entitled to take that stand. The order is reasonable; that costs be paid, but conditional upon an undertaking to return, it is a well understood rule in England as well as with us. If solicitors want costs with the risk that there may be an appeal, then there must be an undertaking to return the money if the judgment be reversed; and the learned judge was quite right in so ordering. When I consider that the $1,500 has been paid into Court, is lying in Court, there is no risk whatever to the parties. The learned judge having the responsibility resting upon him has made an order that I consider was rightly made, quite within his powers, and in the exercise of a right principle in view of all the facts and circumstances.

MACDONALD, J.A.

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

Appeal allowed in part, Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellant: *Leighton & Bainbridge.*
Solicitor for respondents: *F. S. Cunliffe.*

REX v. LIM GIM.

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REX v. LIM GIM

Criminal law—Sale of opium—Conviction—Petition for leniency—Read by judge before sentence—Appeal to increase sentence.

The accused was found guilty on two separate charges for unlawful sale of opium and having opium in his possession. Before sentence the trial judge read a petition for leniency which was presented to him and in giving sentence stated that it would be heavier if it were not for the fact that the accused's friends had presented him with a petition asking for leniency, the sentence being four years' imprisonment and a fine of $500 for each offence, the imprisonment to run concurrently. On appeal by the Crown for increase of sentence:—

Held, that there was error in receiving the petition, the proper practice in the presentation of evidence in mitigation of sentence being the hearing of evidence after verdict either *viva voce* or by affidavit and in the circumstances the sentence should be increased to seven years, and a fine of $1,000 in each case, the imprisonment to run concurrently.

APPEAL by the Crown from the sentence imposed on the accused by MACDONALD, J. on the 21st of October, 1927, upon his conviction on two charges, for the unlawful sale of drugs, and having drugs in his possession. The sentences imposed were four years in the penitentiary to run concurrently and a fine of $500 in each case. The learned trial judge stated he would have imposed a heavier sentence if it were not for the fact that he was presented with a wonderfully worded petition asking for leniency. The accused was the manager of a large general mercantile house in Vancouver and owned a large share of the business. He was a man of high standing as far as his business dealings were concerned.

Statement

The appeal was argued at Victoria on the 20th of January, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Wismer (*Wood*, with him), for the Crown: This appeal for increase of sentence is taken under section 1013 (2) of the Criminal Code. The learned judge should not have been influenced by a petition. There is a proper way of receiving evidence of character: see Roscoe's Criminal Evidence, 14th

Argument

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Ed., 311; Archbold's Criminal Pleading, Evidence & Practice, 27th Ed., 232. Considering the extensive dealing in narcotics by this man, it is submitted that the sentence should be as heavy as the law allows:

J. A. Russell, for accused: On reduction of sentence see *Rex* v. *Adams* (1921), 3 W.W.R. 854. This is his first and only offence. The evidence shews that he is of high character as far as his business dealing is concerned and he has a large mercantile business. The learned judge took these matters into consideration and his sentence should not be disturbed.

Cur. adv. vult.

On the 23rd of January, 1928, the judgment of the Court was delivered by

Judgment

MACDONALD, C.J.A.: This is an appeal by the Crown against the inadequacy of two sentences for like offences, running concurrently.

The federal agent's evidence of the sale and delivery of the opium, if believed, is conclusive proof of the justice of the prisoner's conviction for having in his possession and of selling narcotic drugs. This evidence is amply corroborated by that of the police officers under whose instructions the witness acted. It was proved that the prisoner, who was the manager of a large general mercantile house with a yearly turnover of upwards of $900,000, and who is one of the largest owners therein, carried on an extensive trade in narcotic drugs. Here are some of his own statements as to its extent: Lachenauer (the agent aforesaid) giving evidence said:

"Well, during the conversation I had with Lim Gim when I was practically trying to establish my confidence with him, he said, 'You have been to 232 Pender Street?' I said 'Yes.' He said, 'You tried to buy 200 cans up there and you seen the price he made you?' 'Yes.' 'Well,' he said, 'that shews you I am the biggest dealer here, you could not buy 200 cans from six of these Chinamen, you could not get 200 cans.'"

That these were not his first offences is shewn by the evidence of his corrupting an employee of the Canadian National Railway Company in other like transactions, and in his conversations with Lachenauer from which it may be gathered that he was an experienced hand at the business.

He was sentenced to four years' imprisonment, and fined $500 in addition for each offence, to run concurrently.

The sentence of the Court is that the sentences be increased to the maximum permitted by law, *viz.*, seven years in each case, and in addition a fine of $1,000 in each case, the sentences of imprisonment to run concurrently, the prisoner to pay the costs of each proceeding here and below.

While the discretion of the trial judge is not lightly to be interfered with, yet the statute has imposed on the Court the duty to review that discretion. In this appeal it was stoutly contended by counsel for the Crown that the learned judge had proceeded on evidence which was not legal evidence, or was not in accordance with past practice. He was handed a petition asking for leniency signed by a number of business men of Vancouver, which appears to have influenced him in imposing sentence. He said:

"The sentence which I am going to impose upon you would be heavier if it were not for the fact that your friends have got very busy and presented to me a wonderfully worded petition asking for leniency."

Judgment

The petition is well described as wonderfully worded, but we think the learned judge was in error in receiving it. The proper practice in the presentation of evidence in mitigation of sentences is set forth in Archbold's Criminal Pleading, Evidence & Practice, 27th Ed., pp. 232-3, where it is said (p. 232):

"As an aid to determining the appropriate punishment the Court will, after verdict, hear evidence for the Crown or the defendant, either *viva voce* or by affidavit."

The following cases, among others, are referred to: *Rex* v. *Bunts* (1788), 2 Term Rep. 683; *Reg.* v. *Dingnam* (1837), 7 A. & E. 593; *Rex* v. *Lloyd* (1883), 2 L.J., K.B. 214, and *Rex* v. *Stratton* (1914), 10 Cr. App. R. 35.

While we have felt impelled to disapprove of this novel innovation at its inception, we are yet of the opinion that apart from the influence of the petition on the learned trial judge's discretion, we ought, in the other circumstances of this case, to increase the sentences to the limit of our powers.

Appeal allowed.

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MADDISON v. DONALD H. BAIN LIMITED.

Practice—Pleading—Defence—Irrelevant matter—Struck out—Discretion—Marginal rule 223—Appeal.

MADDISON v. DONALD H. BAIN LTD.

M. brought action for damages against B. for failure to supply a certain quantity of walnuts at a certain price as provided in a written agreement. At the time the agreement was entered into M. was manager of the wholesale grocery department of the Hudson's Bay Company, the company dealing in walnuts. B. raised an alternative defence that M. committed a breach of his duty to his employer by entering into such a contract as the one sued on as the company dealt in the commodity in question, that B. knew M. was manager of the wholesale grocery department of the company and as such was not at liberty to purchase on his own account the goods in question and B. refused to assist M. in committing a breach of duty to his employer. On M.'s application the plea was struck out.

Held, on appeal, affirming the order of MORRISON, J. (GALLIHER and MACDONALD, JJ.A. dissenting), that the allegations are not relevant to the issue, the learned judge had properly exercised his discretion and the appeal should be dismissed.

APPEAL by defendant from the order of MORRISON, J. of the 6th of October, 1927, striking out paragraph 10 of the statement of defence. The defendant had agreed in writing to deliver to the plaintiff on the 2nd of September, 1926, 1,000 cases of walnuts of 55 pounds each at 24 cents per pound, and the plaintiff brought action for non-delivery claiming 10 cents per pound being the difference between the purchase price of 24 cents per pound and 34 cents the market price, *i.e.* $5,500. Paragraph 10 of the statement of defence recited:

Statement

"That the plaintiff committed a breach of his duty to his employer, The Hudson's Bay Company, by entering into any such contract as the one sued on, his said duty being to refrain from dealing personally in any kind of goods which he was required to purchase for his said employer. The said The Hudson's Bay Company, at all times material in this action, has dealt in the commodity in question. The defendant and the said Mason were at all time material in this action, well aware that the plaintiff was the manager of the wholesale grocery department of The Hudson's Bay Company at the City of Vancouver, British Columbia, and that as such, he was not at liberty to purchase on his own account the goods in question. The defendant refused to assist the plaintiff in committing a breach of duty to his said employer."

The appeal was argued at Victoria on the 23rd of Janu-

ary, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

St. John, for appellant: The plaintiff at the time the alleged contract was made was manager of the grocery department, dealing in walnuts. It was a breach of duty, his entering into this contract. We should be allowed to raise this defence on the trial: see *Tomkinson* v. *The South-Eastern Railway Company (No. 2)* (1887), 57 L.T. 358 at p. 360; *Mayor, &c., of City of London* v. *Horner* (1914), 111 L.T. 512; Story's Equity Jurisprudence, 13th Ed., Vol. 1, p. 265. It is a good defence: see *Jackson* v. *Duchaire* (1790), 3 Term Rep. 551; *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549.

O'Halloran, for respondent: The cases referred to are where fraud is alleged: see The Annual Practice, 1928, p. 332. The plea is embarrassing and scandalous and attacks his honesty: see *Sharpley* v. *Louth and East Coast Railway Co.* (1876), 2 Ch. D. 663 at pp. 683-5. The discretion of the trial judge should not be interfered with: see *Tobin* v. *Commercial Investment Co.* (1916), 22 B.C. 481 at pp. 489 and 493; *Golding* v. *The Wharton Railway and River Salt Works Company* (1876), 34 L.T. 474.

Argument

St. John, in reply, referred to *Sproule* v. *Isman* (1915), 8 W.W.R. 1133 and *Ormes* v. *Beadel* (1860), 30 L.J., Ch. 1 at p. 4; Yearly Practice, 1928, p. 309; *Centre Star* v. *Rossland Miners Union* (1903), 9 B.C. 531 at p. 534. In any case an amendment should be allowed.

MACDONALD, C.J.A.: I think the appeal should be dismissed, but that leave should be given to amend as the appellant may be advised. I do not see much substance in this appeal. Paragraph 5 of the statement of defence says that Mason, who was the agent of the defendant, sold the goods in question contrary to his express instructions, and that the plaintiff knew that; that is one defence. Paragraph 7 says that the plaintiff and Mason fraudulently conspired together to do this wrong. Now there is the charge of conspiracy, implicating them both, so that any lesser implication would not affect the case very much. Then there is paragraph 10, which alleges that the plaintiff failed in

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his duty to his employer. The peculiarity of the paragraph is that the defendant says he knew, at the time, that the contract was contrary to the plaintiff's duty.

In the circumstances, and in view of the judgment striking out the paragraph, we ought not to reverse it. I would dismiss the appeal. Leave is given the appellant to amend upon payment of costs of the amendment.

MARTIN, J.A.: This is an appeal from an order made under rule 223, striking out paragraph 10 of the defence which sets up in the "further alternative" as a breach of duty under the contract that "the defendant refused to assist the plaintiff . . . ." It is not usual for a Court of Appeal to set aside orders in the exercise of a discretion. The first case of this nature is *Golding* v. *The Wharton Railway and River Salt Works Company* (1876), 34 L.T. 474; 1 Q.B.D. 374, wherein the Court of Appeal unanimously declared that it would not do so unless they could say that the case was so "extreme" and the circumstances so special that a "serious injustice" would result if the order complained of was sustained, and *cf. Knowles* v. *Roberts* (1888), 38 Ch. D. 263, where it was held (p. 268) that "material injury" and "very great prejudice" had been occasioned by the order and therefore it was set aside.

MARTIN, J.A.

This view of non-interference with judicial discretion has been constantly followed and in a very striking way in a case reported no later than the 9th of December last, *Maxwell* v. *Keun* (1927), 44 T.L.R. p. 100; [(1928), 1 K.B. 645], in the English Court of Appeal and they said that they would not do so unless there was what Lord Justice Atkin declared had been occasioned by the order of the Lord Chief Justice, *viz.*, "a very substantial injustice." In such cases, *i.e.*, where there had been "a denial of justice" the Court of Appeal "would not hesitate" to set aside an order of discretion and they did set it aside for that reason.

In *Mayor, &c., of City of London* v. *Horner* (1914), 111 L.T. 512, Lord Justice Pickford thus defines "embarrassing" allegations, p. 514:

"The learned judge in the Court below has struck out these allegations as embarrassing under the well-known rule to that effect. Of course there are many reasons for which allegations may be embarrassing. For the purposes of the present case I take 'embarrassing' to mean that the allega-

tions are so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues. In order that allegations should be struck out from a defence upon that ground, it seems to me that their irrelevancy must be quite clear and, so to speak, apparent at the first glance. It is not enough that on considerable argument it may appear that they do not afford a defence."

In the case at Bar I am unable to say that anything in the nature of a "very substantial injustice" is present. While it is conceded that if you have a real cause of action the mere fact that you relevantly make what would otherwise be scandalous allegations is not a ground for setting the pleading aside (see the language employed by Lord Chancellor Selborne and Lord Justice Brett in *Millington* v. *Loring* (1880), 6 Q.B.D. 190 at p. 196) yet this is not a case of that class.

The present test is—Are these allegations relevant to the issue? In my opinion clearly they are not. The crucial statement is set up in such an indefinite and obscure way that it is impossible to found anything on it, and I think from that point of view also the learned judge was right in striking out this paragraph.

MARTIN, J.A.

Again, if anything at all was intended to be set up it should have been alleged clearly and definitely, that is to say, there should here have been a repudiation of the contract, but what is alleged is entirely inconsistent with any position of that nature.

For these reasons I think the discretion exercised by the learned judge was a proper one and that the appeal should be dismissed.

GALLIHER, J.A.: I take a somewhat different view to my learned brothers, and would restore the paragraph in question. I recognize the reasonableness of a great deal that has been said, but it seems to me, reading that paragraph, in fact looking through the whole statement of defence in the matter, it strikes me that that paragraph is so, as it were, interwoven that the trial would be the proper place to decide all that is claimed there, rather than at this initial stage, before anything is brought forward.

GALLIHER, J.A.

Shortly, without going into the matter, that would be my reason for allowing the appeal.

COURT OF APPEAL

1928

Jan. 23.

MADDISON v. DONALD H. BAIN LTD.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. The case is a most peculiar one; the parties say this, that they entered into this contract fully knowing and believing that the plaintiff had no right to enter into it, and now seek to avoid the contract on that ground. I know of no case like this in the books, and I think it is fair to assume that liability to perform a contract cannot be evaded on any such ground.

In passing it may be said that the contract is not illegal or against public policy. Take the case of a voidable contract; the agent exceeds his duty or authority, the principal might say this, "True, my agent made the contract, he acted contrary to his duty, or he exceeded his authority, nevertheless I will adopt the contract." That can be done. The contract in such a case is voidable only. How can it be said that the present case is a voidable contract when the parties at the very outset admit that one of them had no authority to enter into it but nevertheless in all solemnity entered into the contract? How can you afterwards be allowed to say that in such a case it is a voidable contract? It is a most extraordinary case; and the order of the learned judge was in my opinion rightly made.

MACDONALD, J.A.

MACDONALD, J.A.: I would allow the appeal. When a defence is raised which is at least debatable and involves a question of law which can be better disposed of when all the evidence is adduced, it should not be struck out. Looking at the whole pleadings, where somewhat similar allegations are made to that contained in the paragraph objected to, it should not be held that this particular plea is scandalous or misleading, even although it may afterwards transpire to be bad in law. I think the learned judge proceeded on a wrong principle in presumably holding on a Chamber application that this clause did not raise a good defence in law. That conclusion should not have been reached at that stage.

Appeal dismissed, Galliher and Macdonald, JJ.A. dissenting.

Solicitors for appellant: *St. John, Dixon & Turner.*
Solicitor for respondent: *Knox Walkem.*

HIGGINS v. MACDONALD, ROBERTSON AND THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY.

MURPHY, J.

1928

Jan. 24.

HIGGINS v. MACDONALD

Sheriff — Writ of capias ad respondendum — Arrest by deputy sheriff— Prisoner escapes—Negligence—Liability—Bond covering acts of sheriff and deputy—Liability of bonding company—Costs—R.S.B.C. 1924, Cap. 231, Sec. 13.

The deputy sheriff of Vancouver was given a writ of *ca. re.* for the arrest of B. who was a resident of Seattle but was on a visit to Vancouver. He found B. in the rotunda of the Vancouver Hotel and told him he had a writ of *capias* for him. B. said he wanted to change his clothes and they went up in the elevator together to his room where he proceeded to take off his clothes. After some of his clothes were off he asked the deputy if he could go into the next room to consult his brother. With the consent of the deupty he went into the next room leaving the door open between. After a few minutes, B. not returning, the deputy looked into the next room and found that B. had gone. B. succeeded in escaping from the Province. In an action against the sheriff and his deputy for damages for allowing the escape, and against the Guarantee Company on a bond given for the due fulfilment of their duties:—

Held, that as the sheriff is paid a salary and has no interest in fees other than to collect them, and does not select, appoint or pay his deputy, whose authority to act is by virtue of his appointment by the Executive, there is no personal liability to be attached to the sheriff.

Held, further, that although there was no evidence of the deputy touching B., from what occurred, B. knew he was under detention and acquiesced in the situation, constituting an arrest in law. The deputy did not display reasonable care after he had secured B. and he was guilty of negligence.

Held, further, that under section 13 of the Sheriffs Act, the plaintiff is entitled to maintain this action against the bonding Company. The bond covers the acts of the deputy as well as the sheriff and the plaintiff is entitled to judgment as against the Company.

ACTION against the sheriff of Vancouver, his deputy and the Guarantee Company on a bond, given by the Company for the fulfilment of their duties as officials. The plaintiff having a claim against one Frederick Burckhardt of Seattle and hearing that Burckhardt was in Vancouver, obtained a writ of *capias ad respondendum* and delivered it to the sheriff of Vancouver for execution. The writ was handed to the deputy sheriff who found Burckhardt in the rotunda of the Vancouver Hotel telling

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him he had a writ of *capias* for him. Burckhardt told him he wanted to change his clothes so they went to his room and when he was partly undressed he asked the deputy sheriff if he could go into the next room (there being a door between) to talk the matter over with his brother. The deputy sheriff allowed him to go into the next room, the door between being left open. In the course of a few minutes Burckhardt not coming back the deputy sheriff looked into the room and found that Burckhardt had gone. Burckhardt succeeded in getting out of the Province. Tried by MURPHY, J. at Vancouver on the 10th of January, 1928.

Dorrell, for plaintiff.

J. W. deB. Farris, K.C., for defendants Sheriff and Deputy.

Ellis, K.C., for the Guarantee Company.

24th January, 1928.

Judgment

MURPHY, J.: Plaintiff, having a claim against one Frederick Burckhardt, resident in Seattle, on hearing that Burckhardt was temporarily in the Province, issued a writ and obtained an order for a *ca. re.* under which that writ was duly issued. Plaintiff, accompanied by his solicitor, then went to the office of defendant Macdonald, who is sheriff for the County of Vancouver, to have the writ executed. Macdonald informed plaintiff that such matters were looked after by Macdonald's deputy, the defendant Robertson. Macdonald then took plaintiff and his solicitor to an outer office, introduced them to Robertson and left. He had no further direct personal connection with the *capias* proceedings. Plaintiff delivered the writ of *capias* to Robertson and I find, as a fact, at the same time warned him to be careful as Burckhardt was "slippery." Robertson in the course of the afternoon found Burckhardt in the rotunda of the Vancouver Hotel and informed him that he had a writ of *capias* for him. Burckhardt was in golfing clothes as he had just come in from the links. Robertson and Burckhardt went by elevator to Burckhardt's room. Here Burckhardt proceeded to undress placing his watch and scarf pin on a bureau and removing most of his clothes. Burckhardt asked Robertson how he could arrange the matter stating that some money was owing Higgins but not the amount claimed and that the matter was really the affair of his brother who he informed Robertson

was in the hotel with him. When almost completely undressed Burckhardt asked Robertson if Robertson had any objection to his going into the next room to talk the matter over with his brother. The door leading to this room was then open. Robertson said no and Burckhardt went through the open door into the adjoining room. The door remained open. After an interval of some minutes, as Burckhardt did not return, Robertson went to investigate only to find Burckhardt had decamped. Robertson had heard no talk in the next room after Burckhardt entered it though, as stated, the communicating door was open. Burckhardt successfully escaped from the Province and this action is brought against the sheriff and his deputy for allowing such escape and against the third defendant, the Guarantee Company on a bond given by it for the due fulfilment of their duties by these officials.

It is contended: first, that there was no arrest. I hold there was. The return by Robertson to the writ of *capias* states there was. True there is no evidence that Robertson touched Burckhardt but the only construction I think that can reasonably be put upon what occurred between Robertson and Burckhardt is that Burckhardt knew he was under detention and acquiesced in the situation. If this view is correct it is not controverted that such knowledge and acquiescence would constitute an arrest in law. Then it is argued there is no evidence the right Burckhardt was arrested. I think there is. What was said between Robertson and Burckhardt shews, I think, that Robertson had the right man. This evidence is supplemented by what occurred between Robertson and defendant's brother, Charles Burckhardt, when, shortly after the escape, the latter was interviewed by Robertson.

Judgment

Next it is said there was no negligence on Robertson's part. I hold there was. Even if he had not been warned to be careful my view would be that he did not display reasonable care in acting as he did when he had secured Burckhardt. The question, in my opinion, is placed beyond controversy when what plaintiff said to Robertson, when delivering him the writ, is kept in mind. I, therefore, hold Robertson liable for damages. I do not think plaintiff can succeed against Macdonald. His is not

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the ordinary sheriff's position. He is paid a salary and has no interest in sheriff's fees other than to see they are collected and paid into the Consolidated Revenue Fund. What is vital here is that he does not select nor appoint the deputy sheriff, does not pay him and cannot dismiss him. He is appointed, paid and dismissed, if necessary, by the Provincial Government. The deputy does not derive his authority to act as such from the sheriff but by virtue of his appointment by the Executive and by the operation of subsection (9) of section 23 of the Interpretation Act. Under such a state of facts, no personal liability attaches to Macdonald. *Rex* v. *Rutherford* (1917), 3 W.W.R. 916. The case of *Ross* v. *Fiset* (1926), 2 W.W.R. 422 does not impugn this conclusion. In fact it confirms it. What this case does is to question the opinion that the sheriff's office, under the circumstances aforesaid, is so much a part of the civil service in Alberta as to preclude the sheriff from appointing any one to act as his bailiff. The contention that section 13 requires plaintiff to join the sheriff as a party when, as here, seeking to recover on an indemnity bond and therefore in any event the sheriff should get no costs will be dealt with later.

Judgment

I think that plaintiff's action against the bonding Company must succeed. The bond covers the acts and rights of Robertson as well as those of Macdonald but it is given to the King in right of the Province. Plaintiff relies on section 13 of the Sheriffs Act to enable him to maintain his action. It is contended, on the other hand, that section 13 is inferentially repealed and that sections 51 to 58 constitute a code which governs the office of sheriff in Victoria and Vancouver and in consequence that there is no privity between plaintiff and the bonding Company. I can see nothing in the Act requiring such an interpretation. Where it is intended to repeal sections not applicable when a sheriff becomes a salaried officer this is done expressly by section 51. On the question of code, section 54 shews that both sheriff and deputy sheriff must be bonded. Why should section 13 not apply since it has for many years been on the statute books to simplify procedure on sheriff's bonds? But, it is said, section 13 names only the sheriff not his deputy. But subsection (9) of section 23 of the Interpretation Act provides that words

directing or empowering any public officer to do any act or thing *or otherwise applying to him by his name of office* shall include his lawful deputy. There is no question I take it but what the sheriff is a public officer. Section 13 refers to him by his name of office. I therefore hold the bonding Company liable.

If the views I have heretofore expressed as to the defendant Macdonald's position in relation to his deputy are correct then I think he is entitled to his costs. Section 13 requires him to be added but only I think when he is being sued for a personal neglect or default. If the neglect or default is that of the deputy then the deputy not the sheriff should be added as party. The object seems clear. The matter of default or neglect would first have to be determined in an action on the bond and that enquiry would be much facilitated by having the person charged with the default or neglect a party to the proceedings, but to add the sheriff when he is not personally liable and had nothing to do with the neglect or default would be mere futility.

As to the amount of damages to be recovered against Robertson and the bonding Company, I think they must be the amount of the claim as stated in the writ of *capias*. The measure of damages is the value to the plaintiff of having defendant under arrest. Halsbury's Laws of England, Vol. 25, p. 820. Higgins has since recovered judgment for his full claim. On the evidence, I am of opinion that if Frederick Burckhardt had been retained in custody security covering the claim would have been forthcoming. It is argued that I can go into the matter of whether or not Burckhardt could secure his release by shewing irregularities in the proceedings.

Judgment

The order for *capias* was made by MACDONALD, J. Subsequent to the escape defendant Burckhardt moved to set this order aside which application was refused. So far as the record shews neither of these orders was appealed. I do not think I, as a judge of co-ordinate jurisdiction, can reopen anything leading to the original order for *capias*. *Damer* v. *Busby* (1871), 5 Pr. 356. But although the order must I consider be given its full effect by me the same authority shews that if the defendant had been taken into custody under it he could

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have applied to any judge not to set aside the order but for release from custody. Any matter occurring after the making of the order could be relied upon as shewn by the same case. The only point of that character raised in the case at Bar is that the sheriff accepted a cheque instead of cash in payment of fees and maintenance money. *Kinder* v. *Macmillan* (1919), 2 W.W.R. 248 shews that if under an arrangement with the sheriff nothing is paid defendant under *capias* must be released. But here a cheque was given which the sheriff accepted as good. Apparently the object of stipulating that maintenance money must be paid in advance is to secure the jail authorities against loss for the keep of a prisoner under *capias*. When the sheriff accepts a cheque in lieu of cash for maintenance, he, in my opinion, obligates himself personally to the jail authorities to pay over the amount so received whether the cheque proves to be good or not. If so, the object is as fully attained as if cash instead of a cheque was given the sheriff.

Judgment against defendant Robertson and defendant The Dominion Gresham Guarantee & Casualty Co. for the amount set out in the writ of *capias* and costs.

Judgment for plaintiff.

MURPHY, J. (In Chambers)

1928

Jan. 26.

IN RE GALT BROS. AND BURNABY ARBITRATION

IN RE GALT BROS. AND BURNABY ARBITRATION.

Arbitration — Costs—Taxation — Witness fees — Jurisdiction to award— R.S.B.C. 1924, Cap. 211, Sec. 24.

On the taxation of the costs of an arbitration, the registrar disallowed items for attendance of witnesses called by the successful party to give opinion evidence, and for preparation to give the evidence required of them.

Held, affirming the registrar, that under section 24 of the Public Works Act, the arbitrators are solely vested with authority to grant or withhold witness fees in the case of any particular witness, at any rate to the extent of deciding whether such fees should be included in the bill for taxation or not, and what amount of preparation was reasonably necessary.

APPEAL from the registrar on the taxation of a bill of costs of an arbitration. Argued before MURPHY, J. in Chambers at Vancouver on the 25th of January, 1928.

G. A. Grant, for Minister of Public Works.
D. Donaghy, for Galt Bros.

26th January, 1928.

MURPHY, J.: Appeal from the registrar on taxation of costs. Numerous witnesses were called by the successful party to give opinion evidence. The bill as brought in contained items for attendance of these witnesses and for preparation on their part to give the evidence required of them. The registrar has disallowed all such items on the ground that the arbitrators have not dealt with the matter and in consequence he is without jurisdiction. I think the registrar is right. Remuneration of witnesses is dealt with specifically under section 24 of the Public Works Act. Section 28 deals separately with the question of costs in general. Said section 24 commands the arbitrators to allow at their discretion a sum according to the scale of witness fees in the Supreme Court. The award is entirely silent on the matter of witness fees. It does award costs to Galt Bros. but this I take it only covers costs as dealt with by section 28 of the Act. I hold that under section 24 the arbitrators are solely vested with authority to grant or withhold witness fees in the case of any particular witness at any rate to the extent of deciding whether such fees should be included in the bill for taxation or not, and what amount of preparation was reasonably necessary. The reason seems obvious. The registrar is in no position to decide whether one piece of opinion evidence could be reasonably considered as necessary or not, or if it was, what amount of preparation was reasonably entailed on the part of witnesses who gave such evidence. Only the arbitrators who heard the case and made the award would be in a proper position to decide these points. The appeal is dismissed with costs.

Judgment

Appeal dismissed.

MCDONALD, J.

1928

Feb. 14.

ERICKSON AND ERICKSON v. CAMPBELL'S LIMITED AND CENTRAL MOTOR TRANSFER COMPANY.

ERICKSON v. CAMPBELL'S LTD. AND CENTRAL MOTOR TRANSFER CO.

Damages—Negligence—Collision between motor-trucks—Plaintiffs riding on one of the trucks—Injury—Evidence.

On the 23rd of May, 1927, about midday, when the weather was clear, the plaintiffs were riding on a motor-truck of the defendant the Central Motor Transfer Company, going south on Granville Street, Vancouver, when the truck collided with a truck of the defendant Campbell's Limited, which was proceeding easterly on 49th Avenue. The plaintiffs' evidence in an action for damages for injuries sustained, was that the car in which they were riding was going at fifteen miles per hour and the other at about ten miles per hour. He saw the other car coming on 49th Avenue some little time before the collision but neither car sounded its horn and both continued on until about ten feet apart when the driver in his car called "look out" and turned suddenly to the left but too late to avoid the collision. The defendants submitted no evidence.

Held, that on the evidence it is impossible to say that either of the defendants was guilty of negligence and the action should be dismissed.

Statement

ACTION for damages for negligence. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 9th of February, 1928.

Wismer, for plaintiffs.

P. J. McIntyre, for defendant Campbell's Limited.

J. M. Macdonald, for defendant Central Motor Transfer Co.

14th February, 1928.

Judgment

MCDONALD, J.: On the 23rd of May last, in the middle of the day, which was bright and clear, the plaintiffs were riding on a motor-truck owned by the defendant, Central Motor Transfer Company, going south on Granville Street when the truck in which they were riding collided with another truck belonging to the defendant, Campbell's Limited, which was proceeding easterly on 49th Avenue. The evidence of the male plaintiff is, that the driver of the truck in which he was riding did not sound his horn and that he heard no horn sounded by the driver of

the other truck though he saw the other truck on 49th Avenue some little time before the collision occurred, and that the former truck was going about fifteen miles an hour and the latter at about ten miles an hour. When the trucks were about ten feet apart the driver of the Central Motor Transfer Company's truck called "look out" and turned sharply to the left but it was too late then to avoid the collision.

At the conclusion of the plaintiffs' case, counsel for both defendants moved that the action be dismissed upon the ground that no evidence of negligence had been offered.

Upon hearing a careful and instructive argument from each of the counsel engaged, I concluded that if I were trying the case with a jury I would feel obliged to leave to the jury the question of whether or not either defendant or both was or were guilty of negligence. Thereupon counsel for the defendants decided to offer no evidence and I now consider the case as if I were sitting as a jury and, after careful consideration, I have decided that the action must be dismissed.

Judgment

I am quite unable to say upon this evidence that both defendants were guilty of negligence and how can I say that one of them was guilty? If I say that the truck on 49th Avenue was negligently driven I must state what that negligence was and I am unable to do so and I find myself in exactly the same position when I deal with the truck which was travelling on Granville Street.

Action dismissed.

GREGORY, J.

1928

Feb. 23.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF F. ELWORTHY, DECEASED. ELWORTHY v. HALE.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF F. ELWORTHY, DECEASED

Testator's Family Maintenance Act—Daughter of testator—Right to relief —R.S.B.C. 1924, Cap. 256.

A testator's wife predeceased him by two years. After her death, his only daughter kept house for him for a short time, but owing to his bad conduct towards her, she left him and earned her own living getting $150 a month. Testator then advertised for a housekeeper and he entered into an agreement with Miss Hale whereby she and her niece would live with him and care for him until his death in return for which he would leave her all his property. Shortly after her entering his employ he made a will leaving her all his estate, the net value of which at the time of his death was about $2,400.

A petition on behalf of the daughter for relief under the Testator's Family Maintenance Act was, in the circumstances, refused.

Allardice v. *Allardice* (1911), A.C. 730 applied.

Statement

PETITION by Harold Elworthy, on behalf of his sister Emily Barrington Elworthy, for relief under the Testator's Family Maintenance Act. The facts are set out in the reasons for judgment. Heard by GREGORY, J. at Victoria on the 17th and 20th of February, 1928.

Maclean, K.C., for the petitioner.
Moresby, for the executrix.

23rd February, 1928.

Judgment

GREGORY, J.: This is a petition, under the above named Act, by Harold Elworthy on behalf of his sister, Emily Barrington Elworthy, who is 33 years of age.

The facts are shortly as follow: The deceased died on the 17th of June, 1927, leaving him surviving three sons, aged respectively, 36, 35 and 26 years, and one daughter, Emily B., aged 32 years. The sons are all able to provide for themselves and make no claim upon the estate. The daughter is employed in the City of New York, and is in receipt of a salary of $150 a month. Her living expenses are about $125 a month, and this was the condition of affairs at the time of the death of Elworthy.

Mrs. Elworthy died on the 5th of May, 1925, and for a very short time thereafter the daughter lived with her father, and kept house for him, but by reason of his unnatural conduct towards her was in decency compelled to leave the home and seek employment. This she obtained and she has supported herself continuously ever since.

The net value of the estate of the deceased is about $2,400, probably less. During the mother's lifetime she kept boarders and lodgers and the daughter assisted in the domestic work. It was undoubtedly their industry which enabled the father to leave any estate at all.

On September 28th, 1925, the deceased advertised for a housekeeper, the daughter having previously left the home. Miss Hale answered the advertisement and she says that it was then agreed that she and her niece should go and live with the deceased, and care for him until his death in return for which he would leave all his property to her. On the following day she entered the house with her niece and they continued to live there until the death of the deceased.

Miss Hale boarded the deceased and received $50 a month therefor. She paid the grocery and meat bills, etc., and Elworthy paid for the light, fuel, taxes, telephone, etc. There were other apartments in the house which were rented to outsiders by Miss Hale, but the rentals were given by her to the deceased.

Judgment

Miss Hale's evidence as to the making of the agreement or contract between her and Elworthy was not entirely satisfactory, but on the 15th of October, he made his will leaving everything to Miss Hale "as she has promised to protect me to the best of her ability during my life and as a reward for her expected faithfulness."

In his will Elworthy made serious reflections upon his children. I think it only right to say that there is no evidence before me to justify these strictures in the slightest degree; but on the other hand, there is ample evidence to justify his daughter in leaving his house—no self-respecting woman could have done otherwise, if her father was not mentally unbalanced.

While I have the greatest sympathy with Miss Elworthy and

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IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF F. ELWORTHY, DECEASED

feel that she has been treated very badly by her father, I cannot give her any portion of her father's estate unless she comes within the provisions of the statute. To give her the whole estate, which would only produce an income of about $100 a year, as has been suggested, would be to ignore the just claims of Miss Hale, who without other remuneration cared for her father for one year and nine months, and it might well have been longer. The statute gives me no right to redraw the will and dispose of the estate as I might think right and just. Had Miss Elworthy, in spite of her father's conduct, remained at home and cared for him, and had he then left his estate to another, I would have had no hesitation in righting such a wrong, for she would then have been dependent upon him and could not be expected to start the battle of life at her age, empty handed. But as a matter of fact, she was at her father's death, and for nearly two years before, living away from home and supporting herself, quite as well, if not better, than her father could do for her. She had no legal claim upon him of any kind. In case of illness she might have some difficulty and her present position is probably none too easy. If the father had left a considerable estate some aid might be granted as stated by Stout, C.J., in *Allardice* v. *Allardice* (1911), 29 N.Z.L.R. 869.

Judgment

Whatever my view may be of the morality of the testator's conduct, I can only grant relief when "in the circumstances of the case I am of opinion that adequate provision has not been made for the proper maintenance and support," etc. The smallness of the estate, the fact that the man was in advanced years, needed to be cared for and there was no one to care for him, except a stranger, that the daughter was able to, and actually was, and now is maintaining herself in a station quite as good as that occupied by her father, are all circumstances that I cannot ignore, any more than I can the care and attention given to him by Miss Hale.

It has not been suggested that she has been guilty of any fraud and it has not been proved that she has been guilty of any impropriety. Counsel for the petitioner referred me to *In re Livingston, Deceased* (1922), 31 B.C. 468, but I see nothing in that case resembling this one. That was a case of deceased

failing to provide for his widow, who was in poor health and who had married him late in life and who had been a good and faithful companion to him in his declining years.

The principle to be applied in cases under the Act is settled by *Allardice* v. *Allardice, supra,* and each case must be governed by its own circumstances. In none of the cases in our own Courts to which reference has been made did the circumstances resemble those before me and it may be pointed out that in *In re Mary Ann McAdam* (1925), 35 B.C. 547 there was a very considerable estate left; *Re Schmalz* (1927), 38 B.C. 264, the application was by the widow who was then in actual need of assistance; *Brighten* v. *Smith* (1926), 37 B.C. 518, the application was by the widow, 43 years of age, who had been left $10 and the household furniture valued at $250. Her whole assets did not come to more than $950 and I assume that she had no employment or means of providing for herself. The estate was worth $6,000.

Judgment

A son or daughter in good health and in the prime of life is, I think, in a very different position from that of a widow of middle age or older, whose opportunities of obtaining employment are greatly inferior. In the present case it is only suggested that Miss Elworthy may need assistance in case she loses her present position or falls ill, but there is no evidence before me that either one of those contingencies is presently expected to happen.

The prayer of the petitioner must be dismissed.

Petition dismissed.

MURPHY, J. (In Chambers)

1928

Jan. 28.

IN RE ORR AND DISTRICT OF NORTH VANCOUVER

IN RE ORR AND DISTRICT OF NORTH VANCOUVER.

Arbitration — Claim for compensation — Costs—Taxation—Appendix N—Matter, meaning of—R.S.B.C. 1924, Cap. 179, Sec. 349; Cap. 51, Sec. 2.

The costs provided for in section 349 of the Municipal Act mean party and party costs and Appendix N governs the taxation.

APPLICATION by way of appeal from the registrar's taxation of costs of an arbitration under section 349 of the Municipal Act. Section 349(1) reads as follows:

"The Council of any municipality, in all cases where claims for compensation or damages are made against it which, under the provisions of this or any other Act, are declared to be subject to arbitration in the event of the parties not being able to agree, may offer in writing to any person making such claim such amount as it considers proper compensation for the damage sustained or lands taken, together with interest at the rate of six per centum per annum; and in the event of the non-acceptance by the claimant of the amount so offered and of the arbitration being proceeded with, if an award is obtained for an amount not greater than the amount so offered, the costs of the arbitration and award shall be payable by the claimant to the municipality and set off against any amount awarded against it. But in case the arbitration shall award a greater sum than the amount offered as aforesaid, or in case no offer in writing shall have been made and compensation shall be awarded to the claimant, the costs of such arbitration, including the costs of the claimant, shall be borne by the municipality. All such costs shall be taxed by the Registrar or District Registrar of the Supreme Court for the judicial district in which the said lands lie."

Statement

Heard by MURPHY, J. in Chambers at Vancouver on the 24th of January, 1928.

Harper, for the application.

G. A. Grant, contra.

27th January, 1928.

MURPHY, J.: The costs provided for in section 349 of the Municipal Act mean I think party and party costs. *Re B.C. Railway Act and C.N.R. Arbitrations* (1914), 6 W.W.R. 467; *Ripstein* v. *Winnipeg* (1919), 3 W.W.R. 730, cases construing somewhat analogous statutes, so hold.

Judgment

Order LXV., r. 8 of the Supreme Court Rules directs that Appendix N shall apply to party and party taxations in all

causes and matters commenced after September 1st, 1925. By section 2 of the Supreme Court Act "matter" includes every proceeding in the Court not in a cause. I hold this taxation to be a "matter" as so defined. Said section 349 of the Municipal Act directs the proper District Registrar of the Supreme Court to tax such costs. That statute therefore directs the taxation to be done by an officer of the Supreme Court in his capacity as such officer. See Interpretation Act Amendment Act, 1926. In so doing he is acting in a *quasi*-judicial capacity and his decisions are open to review by appeal just as are orders made by a judge. I therefore hold that Appendix N is to govern the taxation in question.

Order accordingly.

REID v. VANCOUVER TUG BOAT CO. LTD.

Discovery — Affidavit on production — Documents—Claim of privilege— Insufficiency of evidence in support.

Where there is nothing on the face of documents indicating that they are privileged and there is no affidavit from any person who has examined them shewing proper grounds for refusing production, their production will be ordered.

APPLICATION for an order for the production of certain documents. Heard by MURPHY, J. in Chambers at Vancouver on the 25th of January, 1928. Statement

C. L. McAlpine, for plaintiff.
Darling, for defendant.

27th January, 1928.

MURPHY, J.: The affidavit filed herein setting forth the grounds against production is made merely on knowledge, information and belief. There is nowhere a statement that any person who has examined these documents has positively stated or can positively state that the proper grounds for refusing pro- Judgment

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duction exist. Nothing on the face of the documents, as listed, indicates they would be privileged. I therefore direct their production. *Diamond Match Co.* v. *Hawkesbury Lumber Co.* (1901), 1 O.L.R. 577; *Henderson* v. *Mercantile Trust Co.* (1922), 52 O.L.R. 198. Costs to plaintiff in any event.

Application granted.

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HARPER v. McLEAN. (No. 2).

Costs—Action for damages—Contributory negligence—Both parties equally at fault—B.C. Stats 1925, Cap. 8, Sec. 4.

Where in an action for damages for negligence it is found that the fault lies equally upon both parties, under section 4 of the Contributory Negligence Act, the plaintiff's costs and defendant's costs should be added together and each party held liable for one-half the total. *Ansel* v. *Buscombe* (1927), 3 W.W.R. 137 followed.

Statement

MOTION to settle the judgment as to the disposition of the costs of the action. Heard by McDONALD, J. at Vancouver on the 30th of January, 1928.

J. W. deB. Farris, K.C., and *Shannon*, for plaintiff.
R. S. Lennie, and *McMaster*, for defendant.

20th February, 1928.

Judgment

McDONALD, J.: On the motion to settle the judgment herein, counsel have submitted arguments as to the disposition which ought to be made of the costs. I have learned that my brother W. A. MACDONALD has already decided in *Ansel* v. *Buscombe* (1927), 3 W.W.R. 137, that under section 4 of the Contributory Negligence Act the proper practice is, on a holding that the fault lies equally upon both parties, to add the plaintiff's costs to the defendant's costs and hold each party liable for one-half the total. In my view this is the correct interpretation of the section and judgment will go accordingly.

Order accordingly.

THE BRITISH COLUMBIA MILLS, TIMBER AND TRADING COMPANY v. MAYOR AND COUNCIL OF VANCOUVER AND ATTORNEY-GENERAL OF BRITISH COLUMBIA.

GREGORY, J.

1926

April 12.

BRITISH COLUMBIA MILLS, &C., CO. v. MAYOR, &C., OF VANCOUVER

Taxation—Assessment—Made on wrong basis—Power to interfere—Injustice—Inherent jurisdiction to prevent—Marginal rule 285—R.S.B.C. 1924, Cap. 135—B.C. Stats. 1921, Cap. 55, Secs. 39 and 56(3).

The plaintiff Company having a leasehold interest in its Hastings Mill site was assessed by the city assessor as though it was owner of the fee. The Company appealed to the Court of Revision which was composed of the members of the City Council. Pending decision by the Court of Revision the Company brought action in the Supreme Court for a declaration that it is entitled to have the value of its leasehold interest ascertained as liable for taxation and for an injunction restraining the defendants from confirming the assessment. The City charter providing for an appeal from the Court of Revision to a judge of the Supreme Court limits the jurisdiction to the question of whether the assessment is equal and rateable with the assessment of other similar property and excludes the right to correct any error of the assessor or Court of Revision. The trial judge finding that the Court of Revision had determined to confirm the assessment which was made upon a wrong basis,

Held, that there is inherent jurisdiction in the Court to prevent such an injustice and by marginal rule 285 the Court has power to declare that the interest in question be valued as a leasehold interest.

Held, further, that under the Laws Declaratory Act an injunction should be granted restraining the defendants from confirming the assessment until the plaintiff be given an opportunity of shewing the value of the leasehold and that such value should not be fixed on any other basis than that it is a leasehold interest.

ACTION for a declaration under the authority of the Supreme Court Rules, Order XXV., r. 5, that the plaintiff is entitled to have the value of its leasehold interest in its Hastings Mill site ascertained as liable for taxation, and for an injunction restraining the defendants from confirming the assessment made until the plaintiff is given an opportunity of presenting evidence as to the value of its leasehold interest and from fixing the value of the plaintiff's interest upon any other basis than that it is a leasehold interest. Tried by GREGORY, J. at Victoria on the 7th of April, 1926.

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Davis, K.C., and *Hossie*, for plaintiff.
Reid, K.C., and *J. B. Williams*, for defendant.
Sloan, for the Attorney-General of British Columbia.

12th April, 1926.

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GREGORY, J.: On the evidence before me, I have not the slightest hesitation in finding that the plaintiff's leasehold interest in its Hastings Mill site has been assessed by the city assessor as though it was owner of the fee instead of being a mere lessee. This no doubt was done in the belief that the decision of the Privy Council in *City of Montreal* v. *Attorney-General for Canada* (1923), A.C. 136, permitted it, but the fact was overlooked that that decision was based upon article 362a of the City of Montreal charter and there is no similar provision in the charter of the City of Vancouver. I also unhesitatingly find that the Court of Revision, to which the plaintiff appealed, being composed of the members of the City Council, determined to confirm the assessment on that basis. The only question before me is, therefore, has this Court jurisdiction to interfere and prevent a palpable injustice from being committed, simply because the City charter has provided the manner in which assessments are to be made, an appeal to the Court of Revision and for an appeal from the Court of Revision to a judge of the Supreme Court? If the final appeal to a judge of the Supreme Court was a full and untrammelled appeal his jurisdiction might be exclusive but that is not the case. On the hearing of such an appeal, the judge hearing the same is limited in his power by the provision of section 56 of the City charter, being Cap. 55, B.C. Stats. 1921, and subsection (3) of that section provides that such appeal shall be limited to the question whether the assessment in respect of which the appeal is taken is or is not equal and rateable with the assessment of other similar property in the city having equal advantage of situation. On the hearing of such an appeal, he would be entirely powerless to correct the error of the assessor and Court of Revision in assessing upon a wrong principle and I think it is wrong to say that this is merely a question of *quantum;* true it is in a sense but while men and Courts may differ in their result, even when endeavouring to apply the same principles, they are bound to

Judgment

do so when they apply different principles. So while the ultimate question here is, what is the correct amount of the assessment, the real and preliminary question is, what is the correct principle to apply in fixing the amount of such assessment?

That the plaintiff's interest in the lands in question should be assessed as a leasehold interest and not as a freehold is not I think now seriously disputed by anyone and I cannot understand why there should be the slightest hesitation on the part of the City to do the only fair and honest thing, *viz.*, correct the palpable error of the assessor. I can only conclude that the zeal of the gentlemen concerned for the welfare, or rather coffers of their wonderful and beloved city, has blinded their sense of justice.

Many cases were cited to me during the argument, but, as the defendants have urged that it is important that a prompt decision be rendered, and the trial list occupies my time completely, I am unable to review those cases. Speaking generally of the defendants' case they do not seem to me to be applicable—they are cases where the Court refused to interfere with a properly constituted body which presumably would have done its duty, or which had actually completed its work. While I find here as a fact that the Court of Revision not having yet rendered a decision had made up its mind before hearing any evidence, to do wrong, *viz.*, to assess on the wrong principle, and that thereafter there will be no opportunity of putting matters right. Surely there is inherent jurisdiction in the Court to prevent any such injustice. The Laws Declaratory Act provides that the Court may grant an injunction whenever it appears to be just and convenient. In the absence of explicit and plain law preventing it, I should think that it was always just and convenient for this Court to prevent by injunction the deliberate commission of a known wrong or injury.

Judgment

In the present case, it is this advance knowledge of what the Court of Revision intends to do regardless of the evidence to be produced before it and that the judge appealed to will be powerless to put matters right, that gives this Court jurisdiction to interfere at this stage, for in the absence of this knowledge it would have to be presumed that that Court would properly

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discharge its duty and make its assessment on the proper basis.

I am asked by the plaintiff to make a declaration under the authority of Supreme Court Rules Order XXV., r. 5, that the plaintiff is entitled to have the value of its leasehold interest ascertained in the manner set out in *Re City of Toronto and McPhedran* (1923), 54 O.L.R. 87.

While I would probably adopt the principle there set out, there are other ways of ascertaining the value of the plaintiff's interest, for example, by ascertaining what it could be sold for in the open market and section 39 of the City charter will, I must assume, be followed by the Board and it provides that the plaintiff's rateable interest shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor. I have no jurisdiction to attempt to tie the hands of the Board and direct it to ascertain the value of the plaintiff's interest in any particular manner. There will be a declaration but it is limited to this that in ascertaining the value, the plaintiff's interest must be treated honestly as a leasehold interest, due regard being paid to the unexpired term and to any covenant or stipulation in the lease with regard to a right of renewal or otherwise which enhances or diminishes that value.

Judgment

Defendants' counsel strongly pressed upon me the case of *Canadian Land Co.* v. *Municipality of Dysart* (1885), 12 A.R. 80 where the plaintiff alleged fraud on the part of the Court of Revision and yet failed. But that case only held that the facts relied on did not amount to fraud and that there was a statutable appeal to the County Court, "[who] would be the natural corrective of any . . . . alleged [irregularities]," etc., see p. 84, but, in the present case, the appeal is so circumscribed that the judge appealed to would be unable to correct the irregularity about to be committed, if it can be correctly described as an irregularity.

The cases referred to by plaintiff's counsel and by counsel on behalf of the Attorney-General, who has intervened, appear to me to furnish ample authority for the injunction and declaration which I am making but for the reasons already stated, I am unable to refer to them in detail.

In addition to the declaration, there will be an injunction

restraining the defendants from confirming the assessment until the plaintiff be given an opportunity of presenting evidence as to the value of its leasehold interest and from fixing the value of plaintiff's interest upon any other basis than that it is a leasehold interest or estate. The exact form of the declaration and injunction may be spoken to again by counsel if they cannot agree upon the form which will give the plaintiff the protection this judgment is intended to secure to it.

Judgment for plaintiff.

HARNAM SINGH v. KAPOOR SINGH *ET AL.*

Practice—Discovery—Documents—Production of—Partnership—Transfer of interest—Action by transferee for accounting—Order for production of documents—Appeal—R.S.B.C. 1924, Cap. 191, Sec. 34.

Five hindus entered into a partnership as lumber manufacturers, there being a clause in the agreement that no partner could sell his share without the written consent of his partners. The plaintiff purchased an interest from one of the partners and later brought action for an injunction restraining the defendants from disposing of the partnership assets and for an accounting. On examination for discovery the defendants refused to produce the financial records of the partnership business contending that the plaintiff must first prove his right to an accounting before he has access to them. The plaintiff then applied for, and obtained an order for the production of all documents pertaining to the partnership business.

Held, on appeal, varying the order of GREGORY, J. (MARTIN and MCPHILLIPS, JJ.A., dissenting), that it is premature to order the production of the financial records until the plaintiff has established his partnership as it is conceded that there are no entries in the financial records bearing on this point. The order should be modified in such a way as not to preclude the plaintiff in attempting to establish his partnership and confined to documents other than the financial books.

APPEAL by defendants from the order of GREGORY, J., of the 4th of June, 1927, ordering the defendant Kapoor Singh to attend for examination for discovery and produce on the examination certain documents set out in a list submitted by the

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plaintiff. In October, 1916, the defendants Kapoor Singh and Mayo Singh with Doman Singh, Sheam Singh and Jawalla Singh entered into a partnership as manufacturers of lumber under the name of Mayo Lumber Company and under the partnership agreement no partner was to sell his share without the consent in writing of the other partners. On October 2nd, 1917, Sheam Singh sold to one Indar Singh a two-sevenths' interest in his share in the partnership (a one-twenty-third interest of the whole business) and in July, 1920, Indar Singh sold said interest to the plaintiff. In 1924 the defendants Mayo Singh and Kapoor Singh incorporated the Mayo Lumber Company Limited and without the knowledge or consent of the plaintiff, they purporting to be sole owners of the partnership, sold all the assets of the Mayo Lumber Company to the Mayo Lumber Company Limited. The action is for a declaration that the plaintiff is the owner of a one-twenty-third interest in the business, and to a one-twenty-third interest in the profits since October 2nd, 1917, a declaration that the transfer to the Mayo Lumber Company Limited is void, for an injunction restraining the Mayo Lumber Company Limited or Mayo Singh, or Kapoor Singh from disposing of the assets of the partnership, and for an order that the business be sold and the proceeds be divided according to the respective interests. The defendants stated their willingness to produce all documents except the financial records of the two companies, claiming that the plaintiff must first prove his right to an accounting before he has access to the financial records, the defendants claiming that the transfer of an interest in the partnership to the plaintiff was never assented to by the other members of the partnership as required under the original partnership agreement.

Statement

The appeal was argued at Vancouver on the 24th of October, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Sloan, for appellants: A one-twenty-third interest in the partnership was transferred to the plaintiff but there is nothing to shew that the transfer was consented to by the other partners as required under the partnership agreement. It must be shewn that he is a partner before he can have access to the

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financial records: see *Great West Colliery Company* v. *Tucker* (1874), 43 L.J., Ch. 518 at p. 520; *Leitch* v. *Abbott* (1886), 31 Ch. D. 374 at p. 377; *Williams* v. *Bird* (1890), 34 Sol. Jo. 347. Further, he is precluded by section 34 of the Partnership Act. This is a matter to be dealt with under marginal rule 362.

F. C. Elliott, for respondent, referred to C.E.D., Vol. 3, p. 212; *Vanderlip* v. *McKay* (1906), 3 W.L.R. 232; *Graham* v. *Temperance Life Assurance Co.* (1895), 16 Pr. 536 at p. 539; *Grain Claims Bureau Ltd.* v. *Canadian Surety Co.* (1927), 2 W.W.R. 407 at p. 413; *Parnell* v. *Walter* (1890), 24 Q.B.D. 441; *Heidner & Co.* v. *The "Hanna Nielsen"* (1926), 37 B.C. 207 at p. 209.

Argument

Sloan, replied.

MACDONALD, C.J.A.: I think the appeal should be allowed. I do not think the material before us, which is that which was before the learned judge, is sufficient to sustain the order. There are certain facts that bear on this material most important to the decision. In the first place, the agreement of the 2nd of October, 1917, sets out that by articles of partnership, five men, naming them, entered into a co-partnership to carry on the lumber business, and that these men were all parties of the first part to the agreement of the 2nd of October. These five men, therefore, constitute the partnership called the Mayo Lumber Company. There is an assignment by one of the parties of the first part to the plaintiff in this action of part of his interest in the partnership, and it is said that two of the five men approved of that sale; but it is not said that the others ever consented to the admission of this new man into the partnership. It is a well-settled rule that a written agreement is not to be varied, added to or subtracted from by parol evidence, but the parties may, nevertheless, put an end to an agreement and enter into another. The plaintiff now comes forward and says "I am a partner, I want an accounting." He had to prove his partnership which I think he has, by the material before the Court, failed to do. The rule gives the judge power to postpone discovery until a prior question has been decided, namely, whether the plaintiff is a partner in this business at all. I think

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it is premature to make an order for production of these accounts. There are certain things which, perhaps, if they have been asked for, ought to have been produced, such as the minute-book of the partnership. That minute-book might furnish some evidence that the plaintiff had been treated as a partner, or that that partnership had been put an end to and something different been substituted therefor. But there is no suggestion that any such minutes are to be found. This man himself was present at some of the meetings; he must have known whether such minutes were taken, and would know whether he had voted as a member or not. He does not come forward to say that at a meeting of the company at which he was present he acted as a partner, was accepted as a partner, or that there were any minutes made.

Then there is the section of the statute which prohibits members of a partnership from selling or disposing of their shares in the partnership. That has not been met by Mr. *Elliott* in his argument. So that, looking at the case as a whole, and remembering also that Mr. *Sloan* has offered to produce the minute-book, if there be such, and all other books except what he calls the financial books, I think our only course is to allow the appeal.

MACDONALD, C.J.A.

I think we ought to define the documents which are to be produced, and not leave it in the way in which it has been left by counsel, that is, taking the statement of Mr. *Sloan,* who said he was willing to produce everything except the financial books.

Now, on page 20 of the appeal book there are nine different kinds of documents which Mr. *Elliott* asked for. There is only one of these objected to by Mr. *Sloan,* that is, number 8. Those are the financial books, journal, ledger, cash-book, and so on. The documents mentioned at page 20 with the exception of those, ought to be produced. The documents referred to at page 21 are the financial books of the partnership, and they ought not to be produced. Mr. *Sloan* at page 22 refers to books and documents which he is willing to produce and these should be produced down to number 4—from "stock record" down to there. I think that is all that ought to be produced. As Mr. *Sloan* has offered to produce these, we ought to hear counsel on the question of the costs of this appeal.

[Argument by counsel as to costs then took place.]

Yes, I think the costs should be allowed.

The appellant has succeeded, and while we have made an order against him that he is to produce the books, he had offered to produce these books before. The order below is varied in the respect that I have just mentioned, and the appellants are to have the costs of the appeal.

MARTIN, J.A.: In my opinion, this appeal substantially turns on the question as to whether or no the learned judge below has rightly exercised his discretion under rule 362 in deciding that it is not desirable, as the rule says, that production of certain documents should be postponed till after the determination of any issue which he has power to order to be tried. I do not propose to endeavour to state here all the facts which were before the learned judge, because they were both long and complicated, but I am satisfied that enough has been shewn to satisfy us, with all due respect to other opinions, that there were materials before him for the proper exercise of his discretion, and therefore, according to our established rule, we should not interfere with it. I said at one time during the course of the argument that even express articles of partnership may be abandoned by the consent of all the partners, and also by conduct, and that is precisely what Mr. *Elliott's* chief point, as I understand it, in this case is and which he proposes to establish. He may not be successful, but at least he wishes to have the opportunity of trying out that issue in the ordinary way with the assistance of discovery beforehand. All I can say is this, that I feel that I am not justified in disturbing the exercise of the discretion of the learned judge below. At the same time it is admitted that the order is too wide, and therefore Mr. *Sloan's* submission to that extent should be given effect to and the order curtailed to appropriate length.

MARTIN, J.A.

GALLIHER, J.A.: I agree that the order cannot stand in its present form with regard to the production of these documents. If there is real necessity in view of what Mr. *Sloan* has said, that he is willing to produce these books, in which one would expect to find any entries that would enable Mr. *Elliott's* client to prove that he had in reality a partnership or an interest in

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this partnership—that, of course, might be even in the face of the written articles of the partnership that we have here, and which set out who the partners are—my impression would be that the order should be modified, and modified in such a way that it would not preclude Mr. *Elliott* from trying to establish a partnership. That direction should be confined to books other than the financial books of the company. Now, I think that can be done, and that, I understand, is agreed to by Mr. *Sloan*. It may not be necessary to make an order in view of Mr. *Sloan's* attitude. However, possibly it would be better to put it in the form of an order, so that there could be no misunderstanding as to what might take place afterwards, when it comes up again before the registrar, or whoever conducts the examination.

I would allow the costs to the appellant.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. It may be said that the order seems somewhat wide in terms, but counsel has stated here that he stated before the learned judge the extent of the discovery evidence that was intended to be sought, and I do not think that with that being stated, mere form should affect the judgment of this Court. In my opinion the learned trial judge did not err in principle in making the order.

With all deference and all respect to contrary opinion, I consider this matter very simple, absolutely simple to a degree, when you consider our jurisprudence of the present day; yet this point that is pressed before us and the technical objections that are raised here today, it seems to me are in reversal of what has existed ever since the Judicature Act came into force. It cannot be said here that an action is brought to establish a partnership interest without any colour of right; surely not. We have ample evidence here indicating that there is more than a mere colour of right. Discovery is something wherein we in Canada have taken a step somewhat further than that of the mother country, but in principle it was more or less always in English jurisprudence. Today in England they do what we used to do in effect, bring in a bill of discovery; we have got away from that method and we have a very wide range of discovery. It would be idle to carry out the true application of the principles of justice if a person be able to come in here and

say in a partnership matter that his books did not contain this or that. That is an idle proposition, because discovery is the method that will be utilized and the instrument that will be utilized to find out the truth. Here an attempt is being made flatly to absolutely deny the right of discovery. It is all very well to say financial books. Again with deference to counsel, I do not know what financial books mean at all. I know that in the keeping of books you have a journal, you have a cash-book, you have a ledger, you have in some complicated systems of book-keeping many other books, but the books are supposed to be details of the business, the course of the business and it may be that even in a cheque-book or the stub of the cheque-book, there might be written such as this: "$100, being John Brown's proportion of the profits in the business of Jones & Company." That might be put there, and you might find that all through the cheque-books. Here we have gentlemen who are not of this country, and their ways may be very different with regard to the keeping of their books, and it may not be so clear as to how they indicate who are the partners, what the interests are and so on. They may keep them in very different books for aught I know, the question is, shall there be discovery? Therefore, as I have said, it is a simple matter, I see no difficulty about it, and it is in the interests of justice. It is discovery that is reasonable and proper, and the learned judge, not having committed any error in principle, should be supported. Even if this Court arrived at a different conclusion, being discretionary, and it not appearing that the learned judge erred in principle, the line of decision is that the Court of Appeal will not interpose its view as to the exercise of the discretion, I certainly would affirm the judgment. Being of that opinion, I would dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: In my opinion the plaintiff is only entitled to discovery and disclosure of such documents as may bear on the question of partnership or no partnership. I understood Mr. *Elliott* to concede that there is no evidence to shew that any entries may be found among the financial records of the company bearing on this point, while on the other hand there is an affidavit filed that has not been displaced. I think we must allow the appeal. This does not mean, however, that

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the discovery referred to in the letter of defendants' solicitors of November 10th, 1926, should not be given.

I would allow the costs of the appeal.

Order of Gregory, J. varied, Martin and McPhillips, JJ.A. dissenting.

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitors for respondent: *Courtney & Elliott.*

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REX v. BURGESS AND MCKENZIE

REX v. BURGESS AND McKENZIE.

Criminal law—Murder—Premeditated attack with intent to rob—Subsequent operation followed by death—Duty of Crown to call surgeon who performed operation—Manslaughter—No direction in charge as to—Criminal Code, Sec. 1014(2).

The two accused made a premeditated attack with weapons, the precise nature of which was not established, on two men with intent to rob them on a flat car as they were stealing a ride on a freight-train of the Canadian Pacific Railway going from Vancouver to the Prairies. One of the men attacked was rendered unconscious and subsequent examination disclosing that his skull was fractured, he was operated on in the Vancouver General Hospital, about 26 hours after the attack to relieve the pressure on the brain, but he died immediately after the operation. Both accused were found guilty of murder.

Held, on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that as to the trial judge having failed to direct the jury upon the question of manslaughter, it is his duty to confine the issue to the real question and not allow the jury to be perplexed or diverted by irrelevant directions and in the light of all the facts given in evidence this objection to the charge cannot be sustained.

Held, further, that it was not incumbent upon the Crown to call as a witness the surgeon who performed the operation.

Statement

APPEAL by accused from a conviction for the murder of one Otto Bosch at the New Westminster Fall Assizes, made on the 10th of November, 1927, by MACDONALD, J. and a jury. The facts are that on the evening of the 22nd of July, Otto Bosch and Rhebergen, both Hollanders, and recent arrivals in Canada,

went to the Canadian Pacific Railway right of way in Vancouver with a view to getting a free ride on a freight-train to the Prairies where they expected to get work. When looking for a train they met Burgess and McKenzie and the four of them got on a train together. The train proceeded east and after they had left Mission City, Burgess and McKenzie suddenly attacked the other two men. Burgess hit Bosch with some instrument on the head and rendered him unconscious and McKenzie hit Rhebergen, Burgess and McKenzie demanding money from them. Rhebergen gave McKenzie $3 keeping only 65 cents that he had in another pocket. Burgess and McKenzie then demanded that Rhebergen jump off the train and they attempted to throw him off. He resisted and prayed that they should not throw him off owing to the danger and owing to the condition of Bosch. Then McKenzie said they could stay on if he promised not to say anything as to what had occurred. On Rhebergen promising not to say anything McKenzie gave him back $1 and helped him to look after Bosch who was in a semiconscious condition and apparently paralyzed on one side. On reaching Ruby Creek, Burgess and McKenzie were arrested and Bosch was taken to the Vancouver General Hospital where he was operated on, about 26 hours after he was attacked, to relieve the pressure on the brain caused by the fractured skull. He died at the close of the operation.

Statement

The appeal was argued at Victoria on the 16th to the 19th of January, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Henderson, K.C., for appellant Burgess: Burgess hit Bosch on the back of the head but there was no evidence of a deadly weapon being used. Under the circumstances the judge was bound to charge the jury as to manslaughter: see *Rex* v. *Eberts* (1912), 20 Can. C.C. 262 at p. 273; *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555; 8 Can. C.C. 423; *Gilbert* v. *The King* (*No. 2*) (1907), 12 Can. C.C. 127; *Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77; *Rex* v. *Scholey*, *ib.* 183. There must be a finding that he meant to inflict grievous bodily harm: see *Rex* v. *Jagat Singh* (1915), 21 B.C. 545; *Rex* v. *Spellman* (1921), 69 D.L.R. 649.

Argument

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Stuart Henderson, for appellant McKenzie: As to the dangerousness of the injury, the question is the time of its dangerousness. It may have been at or after the operation. An operation is an assault unless there is consent: see Taylor's Principles and Practice of Medical Jurisprudence, 7th Ed., Vol. I., pp. 101 and 105. This case does not come within "robbery." This is a case of "assault with intent to rob": see *Rex* v. *Gross* (1913), 23 Cox, C.C. 455. The doctor who performed the operation should have been called and submitted to cross-examination.

Johnson, K.C., for the Crown: Assuming the immediate cause of death was the operation, they are nevertheless guilty of murder: see 1 Hale, P.C. 428; *Reg.* v. *Flynn* (1867), 16 W.R. 319; *Reg.* v. *Davis and Wagstaffe* (1883), 15 Cox, C.C. 174; *Rex* v. *Martin* (1832), 5 Car. & P. 128; *Reg.* v. *Pym* (1846), 1 Cox, C.C. 339; *Reg.* v. *McIntyre* (1847), 2 Cox, C.C. 379; *Rex* v. *Edmunds* (1909), 25 T.L.R. 658; 2 Cr. App. R. 257. As to not charging on manslaughter, there is no evidence of provocation. There was a simultaneous assault without warning, an unlawful common purpose accompanied by violence resulting in death. Intent is unnecessary where there is an unlawful common purpose. The intent is clear from McKenzie saying they thought the other two had $50 each and from their attempt to throw them off the train. There is no evidence leading to manslaughter. As to the charge see *Reg.* v. *Davis and Wagstaffe* (1883), 15 Cox, C.C. 174; *Rex* v. *King* (1909), 2 Cr. App. R. 306; *Rex* v. *Scholey* (1909), 3 Cr. App. R. 183; *Rex* v. *Naylor* (1910), 5 Cr. App. R. 19 at p. 21; *Rex* v. *Jagat Singh* (1915), 21 B.C. 545; *Rex* v. *Hopper* (1915), 11 Cr. App. R. 136; *Rex* v. *Gorges, ib.* 259; *Rex* v. *Ball* (1924), 18 Cr. App. R. 149; *Rex* v. *Beard* (1920), 14 Cr. App. R. 159.

Argument

Henderson, K.C., in reply: It was his duty to produce the evidence so that the facts could be fully disclosed. The doctor performing the operation should be examined. We are left entirely in the dark: see *Reg.* v. *Pym* (1846), 1 Cox, C.C. 339; 1 Hale, P.C. 427. Even without provocation there might be manslaughter and not murder: see *Reg.* v. *McIntyre* (1847), 2 Cox, C.C. 379.

Stuart Henderson, in reply, referred to *Rex* v. *Parks* (1914), 10 Cr. App. R. 50.

Cur. adv. vult.

On the 23rd of January, 1928, the majority judgment of the Court was delivered by

MARTIN, J.A.: This is an appeal from the joint conviction, at the November Vancouver Assizes, of both appellants for the murder of one Otto Bosch on the 23rd of July last.

A number of questions were argued at length but they all are founded upon or arise out of the submission that the learned trial judge failed to direct the jury upon the question of manslaughter, which in his opinion was excluded from the case in the circumstances thereof.

It must be conceded that where that is the fact it is the duty of the trial judge to confine the issue to the real question and not allow the jury to be perplexed or diverted therefrom by irrelevant directions or otherwise: *Eberts* v. *The King* (1912), 47 S.C.R. 1; *Rex* v. *Jagat Singh* (1915), 21 B.C. 545; *Rex* v. *Foy* (1909), 2 Cr. App. R. 121; *Rex* v. *Scholey* (1909), 3 Cr. App. R. 183; *Rex* v. *Robinson* (1922), 16 Cr. App. R. 140, and *Rex* v. *Thorpe* (1925), 133 L.T. 95; the only decision to the contrary is *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555 which has not met with approval and since our decision in *Rex* v. *Jagat Singh, supra,* has not been relied upon in this Province. It likewise must be conceded that if the defence of manslaughter does become apparent in the course of the trial, even though not advanced by the defence, it would be

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"the duty of the judge to put to the jury such questions as appear to him properly to arise on the evidence. In other words, in a case such as *Rex* v. *Hopper* [(1915), 2 K.B. 431; 113 L.T. 381], he should put the alternative defence of manslaughter, if there is evidence on which the jury can reasonably reduce the crime from murder to manslaughter. In that case the Court was clearly of opinion that there was sufficient evidence to justify the jury in finding a verdict of manslaughter, if they accepted a certain view of the facts and circumstances. But can it be said that that is the case here? In our opinion it cannot truly be said. . . . There being here no evidence which would have justified the jury in finding a verdict of manslaughter, there was no duty on the part of the judge to leave to the jury that defence, and the appeal must be dismissed:

Rex v. *Thorpe, supra,* p. 96.

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To determine this question in the case at Bar it is our duty to "read the charge of the trial judge as a whole and in the light of all the facts given in evidence" (*Eberts* v. *The King, supra,* 22) and after having done so the objection to the charge cannot, in our opinion be sustained, and the appellants have not in any way sustained any "substantial wrong or miscarriage of justice" under section 1014(2) so as to entitle them to a new trial.

The principal ground advanced to sustain the objection was that Dr. Thompson a consulting surgeon of the hospital who, with two assistant surgeons, had performed an operation upon the deceased at the Vancouver General Hospital about 30 hours after he had sustained very serious injuries to his skull, had not been called by the Crown (nor by the accused) to testify to the particulars of the operation, at the conclusion of which the patient died, and section 258 is invoked to support the submission, as follows:

"258. Every one who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results, kills that person although the immediate cause of death be treatment proper or improper applied in good faith."

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In our opinion that section does not apply to this case, because there is no evidence from which it might be inferred that the injury (which at all times was of a "dangerous nature" from any point of view) was in any way increased or its consequences accelerated by the "treatment" that was given to the deceased with the obvious effect of relieving the pressure on the brain caused by the fractured skull, and resulting hemorrhage. What the injury was there is no doubt about, because it was clearly manifested by the official *post mortem* examination held the following morning (Saturday, 25th July) by Dr. Hunter, physician to the Coroner of the County (an official of very long and wide experience), who described the fracture as a cutting tear on the top of the head starting on the fore-part thereof and directed backwards slightly to the right of the middle line of the skull (which was of average thickness) and

"the skull had been cracked in many directions—not unlike an egg that you had struck on the top of it where small pieces had been broken inwards, and from this top break there were cracks which extended down to the right side, down the right ear, towards the undersurface of the skull. Also one crack extended down from the injured area in front of the right ear,

and on the left side there had been a crack extending down in front of the left ear, to the under surface of the skull. Further examination shewed that on the left side of the skull, an artery had been torn by the rough edges of the cracked bone; and in this area there had been a great deal of bleeding. This bleeding had pressed the brain away from the skull, or, in our language, it had compressed or constricted or hampered the functioning of the brain. On removing the brain from its cavity—from its skull cavity —I found that on the right side of the brain there was evidence of some tearing of its substance and there was also evidence of tearing of the substance of a part of the brain, underneath the skull—what we call the cerebellum. Those were the more important findings."

And he went on to say:

"The injuries described suggest the hitting of the skull by some object that was hard, that was not of a wide nature, but more of a narrow nature; and that the blow must have been severe, because, in addition to the breaking, right underneath the place, impact, it had spread down, as I have described it.

"Were you able to form any opinion as to how many blows were necessary to inflict those injuries? I think that one severe blow would produce those injuries."

"Could those wounds have been produced by the fist of a human being? No, sir; not in my opinion.

"What was the cause of the man's death, in your opinion? Compression of the brain and hemorrhage inside the skull as the result of a broken skull.

"Apart from the evidence in the skull itself shewing portions of the broken bone removed, and apart from the question of the bandaging, the sewing up, sutures, and the work of shaving the head and that, preparing for the operation, was there any evidence in that head that the death was either caused or accelerated by anything else other than the hemorrhage due to the fracture? Not in my opinion.

"That is in your opinion? Yes.

"Although I put that rather involved, I want you to say to the jury what was the cause of death you have described. Was there any other cause of death other than what you have described, namely, that bleeding from the wounds caused in the fractured skull? Not—no other cause that I could find out."

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Now whatever might be the duty of the Crown in other circumstances (and it is always to bring forward what is favourable as well as unfavourable to the accused) it is apparent that in these there was no obligation upon it to call any more evidence of the result of the operation after establishing such a strong *prima facie* case of the actual cause of death, and it is to be observed that the defence at the trial neither called the operating surgeon nor made any application to the Crown to call him though his name did not appear on the back of the indictment,

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nor even before us was such an application made (doubtless because of lack of grounds therefor) as it was (and granted) in *Rex* v. *Ward* (1922), 17 Cr. App. R. 65, also a case of a fractured skull a contributing cause to which, before the assault upon the deceased, was established by medical and other evidence adduced by the accused before the Court of Criminal Appeal. The position taken by the appellants at this Bar was, in short and in effect, that the onus is cast upon the Crown in all cases of operations of this nature to call the operating surgeon to describe it in detail, though no reason is apparent for inferring that the "treatment" was the "immediate cause of death"; for this submission, however, no apt authority was cited in support.

The argument was advanced that if such evidence had been given something might have been disclosed to support the submission that the death of the deceased had been caused by his head being forced back against the ends of the poles during the sudden and savage assault made (on the railway flat car at high speed) upon him by Burgess in concert with McKenzie's simultaneous assault upon Rhebergen for the common purpose (successful in part) of robbing both of them. This, however, is, we think, not a reasonable view to take of the whole occurrence before, at, and after the admittedly unprovoked assault which is only consistent with the deliberate and reckless intention to inflict, if necessary, grievous wounds by some effective weapon or weapons the precise nature of which has not been established though doubtless they were clubs or pieces of metal of some description which were thrown away from the car when the criminal object of their use had been effectively attained.

Judgment

Our conclusion, after a full consideration of the whole case in all its aspects, is that no ground has been established for disturbing the verdict of the jury and therefore the appeal should be dismissed.

MCPHILLIPS, J.A.: This is an appeal upon several grounds. I think it must be conceded that there was evidence laid before the jury that the deceased man Otto Bosch, was struck upon the head by Burgess. Burgess and McKenzie have both been convicted of murder, both being engaged in a common design to commit robbery from the person. Interesting questions have

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been argued as to whether upon the developed facts the learned judge should have directed the jury upon manslaughter, which he did not do. Further he expressly withdrew from the jury any right upon their part to return any such verdict. In that I am of the opinion that a new trial should be had. I refrain from referring to the facts save in so far as it may be necessary to elucidate the point of law which I consider entitles a new trial being directed.

Four young men were together stealing a ride upon a freight-train of the Canadian Pacific Railway proceeding east from Vancouver—two Canadian youths, Burgess and McKenzie, between seventeen and eighteen years of age, and two Hollanders (Otto Bosch now deceased and Rhebergen), considerably older. There is no evidence shewing that any weapon was used by Burgess in striking the deceased man but it would seem that some hard object was used or his head was forced into violent contact with the wooden poles being carried on the car as freight —whether through the action of the deceased in endeavouring to avoid the assault upon him by Burgess or the act of Burgess alone. The assault and robbery was a little while before the train arrived at Ruby Creek. The prisoners (Burgess and McKenzie) did not make any attempt to escape which they might very well have done, there being nothing to prevent them doing so, but stood about when the deceased man was taken from the train; in fact assisting in this. The train crew came upon the scene and in the end the prisoners were taken into custody. A Dr. McCaffrey who was travelling west and lived at Agassiz, a town to the west, was brought to the deceased man, and without making anything but a very superficial examination, noting that there was evidence of paralysis, said it was a hospital case and advised that he be taken to a hospital in Vancouver; this was done, the deceased man being placed on a stretcher in the baggage-car of a train which had come up going west. The deceased man was taken off the train at Vancouver and was taken to the Vancouver General Hospital, and placed in what is called the Observation Ward. The deceased man had spoken to his fellow countryman to some extent, but there cannot be said to be any evidence definitely determining whether he was able to speak when on the way to

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the hospital. No evidence at all is given as to any medical or surgical examination of the deceased man when received into the hospital, or at any time thereafter. There is no evidence that the deceased man was able to talk or did talk or give his consent to the operation, which was performed some 26 hours after his reception into the hospital. Further, there is no evidence whatever given by doctors or surgeons giving it as their opinion that an operation was necessary, or that the injuries to the head of Bosch were of a dangerous character. All we have is some evidence from a Dr. Seymour who was present for a short time during the operation, arriving there some time after the operation had been entered upon, but no evidence from him as to the physical or mental condition of the deceased man—he had made no examination and was busying himself about providing blood for transfusion purposes. After being on the operation table, being operated upon by surgeons for a space of an hour or more, the statement was made by one of the surgeons to Dr. Seymour that death had ensued. None of the surgeons performing the operation was called as a witness by the Crown.

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At this Bar the learned counsel for the Crown stated that he was not of the opinion that the Crown was under any duty to call these surgeons or shew that there had been a medical and surgical opinion that the operation was necessary, remarking, also, that in his opinion there was no obligation upon the Crown to shew the actual condition of the wound upon the deceased man's head prior to the operation, and further remarking that the Crown did not consider that there was any duty to call and submit the surgeons to the cross-examination of counsel for the defence. It is pressed by the Crown that the autopsy made in the Vancouver General Hospital morgue is sufficient evidence as to the nature of the wound received upon the head and skull of the deceased man. This is only at best, evidence after the event and Dr. Hunter had to admit that pieces of bone from the skull quite apart from any bone affected by the blow had been removed by the surgeons. Of course, the condition of the man's head and skull was greatly changed by the operation—that cannot be other than an admitted fact. This is not at all like the case of an autopsy where there has been instant death

and no disturbance of the body after death. Here there was an operation extending over a long time, rendering it next to impossible to, with accuracy, say what was the condition before the operation was had. In my opinion it was the bounden duty of the Crown to complete the chain of events from the time the deceased man was received into the hospital to the time when he was placed on the operation table, his condition physical and mental at the time when he arrived at the hospital following an examination had by a surgeon or surgeons who would precisely state the nature of the wound, whether dangerous or not and what was observed during the time he was in the Observation Ward, and whether he could speak or give his consent to the operation, and what his condition was when an operation was decided upon, and that there was the opinion of a surgeon or surgeons that the operation was necessary. There is absolute silence covering all this time. In my opinion, the absence of all this necessary evidence establishes a case of the denial of natural justice. The accused were entitled to have this evidence advanced by the Crown. Further, in my opinion, the onus was unquestionably upon the Crown to give in evidence this very necessary evidence. The evidence was available—it was not given. Upon what ground can it be said to have been properly withheld? I know of none. Surely the fact that the witnesses would have to run the gauntlet of cross-examination at the hands of counsel for the defence can be no answer. According to the genius of the British people, cross-examination is a method of arriving at the truth and it is a cardinal right that accused persons and litigants have in our Courts of justice. It is a wholesome rule and the authorities support it that the Crown should call all relevant evidence and the best evidence, whether for or against the accused. It is idle argument in my opinion—and I say this with great respect to all contrary opinion—to say the defence could have called this evidence. The evidence was in the possession of the Crown, and the Crown was under the bounden duty to call the evidence to establish its case and without it no case is established which will warrant the upholding of the conviction of murder which was the verdict of the jury. The onus always remains upon the Crown to establish the crime charged and that onus extends throughout the whole trial and

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the Crown can never be absolved from this well-known obligation. In truth we have here an uncompleted case, evidence available and uncalled.

The case of *Reg.* v. *Pym* (1846), 1 Cox, C.C. 339 (Erle, J.) supports the view I have here expressed of the requirement to give evidence of the necessity for the operation. We have Erle, J., at p. 341, saying:

"After the examination of the first medical witness, who stated his opinion that the operation was the only chance of saving the life of the deceased. . . ."

Further on Erle, J. said:

"In the *bona fide* opinion of competent medical men, was [there it was a gun-shot wound and a pulsating tumour arising therefrom] dangerous to life, and that they considered a certain operation necessary, which was skilfully performed, and was the immediate and proximate cause of death."

Here there was failure to adduce any such evidence and the Crown insists at this Bar that it was under no requirement to do so. We have Erle, J., at p. 343, saying:

"I have already ruled that a person who gives a wound is responsible for the consequences to the party wounded which ensue from the treatment *bona fide* adopted by competent medical men who were called in to attend him."

Here there is no evidence that the treatment was *bona fide* or that it was treatment at the hands of competent medical men; there is an entire absence of this essential, and necessary evidence. Why was it not given? The non-production of this necessary evidence was a denial of justice to the condemned men. Other cases that may be usefully referred to are the following: *Reg.* v. *McIntyre* (1847), 2 Cox, C.C. 379, Coleridge, J.; *Reg.* v. *Davis and Wagstaffe* (1883), 15 Cox, C.C. 174.

Section 258 of the Criminal Code of Canada is really an enactment in conformity with the decided cases and particularly those above cited. It reads:

"258. Everyone who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results, kills that person, although the immediate cause of death be treatment proper or improper applied in good faith."

the words "good faith" carrying with them the meaning and the law as laid down in *Reg.* v. *Pym, Reg.* v. *McIntyre* and *Reg.* v. *Davis and Wagstaffe, supra.* Here, as pointed out, there is nothing in evidence to establish "good faith," that the operation was performed by competent surgeons which operation

they in good faith considered necessary, nor even evidence that the wound was dangerous. Surely it was incumbent upon the Crown to establish all these points of evidence. It might be that some previously existent condition previous to the injuries charged against Burgess or some new cause of death, had supervened (*Reg.* v. *Markuss* (1864), 4 F. & F. 356).

There were many points argued involving misdirection and non-direction and the failure of the learned judge to charge the jury as to what constitutes manslaughter and the right in the jury to bring in such a verdict, upon the facts of the case, but on the contrary all such considerations were wholly withdrawn from the jury and that there was error in law in this. I do not propose to in detail canvass the many exceptions taken to the learned trial judge's charge to the jury. It may well be that many of them are without merit. I would not say that they all lack merit, but I will refer to one plain misdirection which may have prejudiced the condemned men, and that is the following:

"Now, did Bosch die from the effects of a blow administered by Burgess? You may have been affected by able arguments submitted by both counsel for the accused, that Bosch was not brought to his death through a blow thus administered; but that it might have occurred, and for aught you know did occur, through the operation performed by Doctor Thompson and other assistants. But it is my duty to inform you that even if the operation could bear such a conclusion—of which you are the judges as to whether there is any evidence or not—that would not relieve a person who has, without excuse or justification, inflicted a blow, fracturing the skull of another and necessitating, through his condition, an operation to relieve the injured man."

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It will be noticed that the learned judge said "and necessitating through his condition an operation to relieve the injured man." This statement, with great respect to the learned judge, is not covered by the evidence. There is an entire absence of evidence that there was any condition existent that necessitated an operation. That was a most serious statement that went to the jury, and was not supportable upon the evidence. This alone was in its nature such error that it may rightly be said that there was a miscarriage of justice as the jury would consider taking all the charge together and the law which was explained to them that the case was one where the operation was a necessary one and that it followed that when death ensued on the operation table that but one verdict was returnable, namely, that

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of murder, although the facts were that there was no evidence that the wounds inflicted were dangerous or that competent surgeons in good faith considered an operation was necessary, or that the operation was properly and carefully performed. This was a misdirection that amounted to a denial of justice.

Upon the whole case I have no doubt that a miscarriage of justice took place in that the Crown failed to complete its case, essential evidence was wanting and it was evidence that was available to the Crown, and not called. If that evidence is favourable to the appellants they will be entitled to the benefit of it, if favourable to the Crown it will complete a case which today stands incomplete and in the result there has been prejudice to the appellants.

The principles of law which govern are well defined in two cases in the Supreme Court of Canada, both going from this Province, *viz.*, *Allen* v. *The King* (1911), 44 S.C.R. 331, and the very late case of *Sankey* v. *The King* (1927), S.C.R. 436. In the *Allen* case Sir Charles Fitzpatrick, C.J. said at p. 341: ". . . may have influenced the verdict of the jury and caused the accused substantial wrong. . . ."

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The cases last above cited indicate the prejudice that may be occasioned by happenings at the trial, such as the introduction of illegal evidence. The *ratio decidendi* to be deduced therefrom well entitles in my opinion, it being determined in this case that error occurred at the trial in that the jury were erroneously charged that there was evidence before them—which admittedly there was not—to apply language used by the Chief Justice of Canada in the *Sankey* case at p. 440:

> "It may well have been the deciding factor which led the jury to the conclusion that . . . . the murder in question was sufficiently established."

In my opinion, the conviction should be quashed and a new trial ordered.

Appeal dismissed, McPhillips, J.A. dissenting.

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MORRISON, J.

1928

Feb. 20.

McSORLEY v. MURPHY

Contract—Sale of a hotel—Lease for year with option to purchase—Purchase price fixed with certain amount down "balance to be arranged"—Construction.

The defendant entered into possession of the King Edward Hotel at Revelstoke under a lease for one year. The lease contained the following clause: "And the said lessors hereby give to the said lessee the first option to purchase the said lands, premises, furniture and equipment for a period of one year from the date hereof, at a price of $45,000 with a cash payment of $15,000 and the balance to be arranged." After many interviews as to terms of payment, the plaintiff stated the defendant should pay $15,000 and the balance should be placed in escrow pending delivery of the title deeds. The defendant declined to accede to this and on the day before the expiration of the year tendered the plaintiff a certified cheque for $15,000 and stated he intended to complete the purchase. The plaintiff refused to accept the cheque and then brought action for possession, the appointment of a receiver and for an accounting. The defendant counterclaimed for damages.

Held, that "balance to be arranged" means that it was to be arranged impliedly upon a reasonable and fair basis and the attitude of the plaintiff was not reasonable and fair. The defendant was in lawful possession at the date of the issue of the writ and he is entitled to judgment on the counterclaim.

ACTION to recover possession of the King Edward Hotel in Revelstoke from the lessee, for the appointment of a receiver, and for an accounting. The facts are set out in the reasons for judgment. Tried by MORRISON, J. at Vancouver on the 11th of January, 1928. Statement

Mayers, and *Harper*, for plaintiff.
Hansford, for King Edward Hotel.
J. W. deB. Farris, K.C., for defendant.

20th February, 1928.

MORRISON, J.: The plaintiff, McSorley, a hotel-keeper, may for the purposes of narrative be treated as the owner of the King Edward Hotel in Revelstoke.

The defendant is also a hotel-keeper, who for some years previously, and at times material to the issues herein, managed under lease from the Canadian Pacific Railway Company Judgment

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another hotel in Revelstoke, known as the Revelstoke Hotel. In September, 1926, the plaintiff and defendant, at the instigation of the plaintiff, began negotiations for the purchase of the King Edward Hotel, the plaintiff desiring that the defendant take possession on the 15th of September, 1926. This the defendant could not do owing to his arrangement with the C.P.R. Terms were mentioned and also that the plaintiff was ready to give an option to the defendant to purchase, for one year: that, if the hotel were not sold under this option, there would be no trouble in getting a renewal for a year. The defendant in consequence of these overtures terminated his occupation of the Revelstoke Hotel and went into possession of the King Edward Hotel for a year under the lease produced and dated, 30th October, 1926. During his occupancy the hotel was put on a paying basis. There were several interviews between them when the question of terms was discussed. Within a period of some five months before the expiration of the year, the plaintiff asked the defendant to release him from the option contained in the lease, which is in the following words:

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"And the said lessors hereby give to the said lessee the first option to purchase the said lands, premises, furniture and equipment for a period of one year from the date hereof, at a price of $45,000 with a cash payment of $15,000, and balance to be arranged."

But this the defendant refused to do. The plaintiff and defendant apparently met more or less frequently and on one occasion the plaintiff stated that he desired to receive practically the full payment in cash. Following that intimation, the defendant proposed if the purchase price, as stated in the lease, were reduced by $5,000 he would pay the $40,000 in cash. The plaintiff refused, and reiterated his proposal that the defendant should pay $15,000 in cash, and that the balance be placed in escrow pending delivery of the title deeds. The defendant in turn declined to accede to this proposition.

On Saturday, the 29th of October, 1927, the defendant tendered the plaintiff a certified cheque for $15,000, as first payment on his option in the terms of the lease, and stated that he intended to complete the purchase of the premises. The plaintiff refused to accept this cheque and pressed his demand as previously made. On the 31st, a Monday, the defendant

sought to find the plaintiff in order to pay him in full, but the plaintiff had left Revelstoke for Vancouver, and, in due course, the writ herein was issued claiming possession and for the appointment of a receiver and an accounting. The receiver was appointed and the defendant gave up possession. Parenthetically, I may say that the defendant was, on the 31st, ready and willing to pay the full amount as previously demanded by the plaintiff.

The purchase price was fixed at $45,000. Any difficulty which the incidents of the transaction present arises from the words "balance to be arranged," which appear in the lease. To my mind, it cannot be that the price of $45,000 having been fixed, and $15,000 to be paid in cash, it was intended the balance should also be in cash, as demanded by the plaintiff. The character of the transaction and the knowledge which it is reasonable to find that the plaintiff had of the defendant's financial capacity, repel such a submission. So that the true meaning of that clause as to the arrangement for the balance would, in my opinion, come within the cases cited in the judgment of MARTIN, J.A., in *Townley* v. *City of Vancouver* (1924), 34 B.C. 201 at pp. 211-12.

Judgment

The balance was to be arranged impliedly upon a reasonable and fair basis. The attitude taken by the plaintiff was, in my opinion, not reasonable or fair. I find there was no waste or neglect on the defendant's part. For aught it appears the plaintiff could have performed his part of the contract, but he would not do so. Therefore, as to the measure of damages, the rule in *Jaques* v. *Millar* (1877), 6 Ch. D. 153 applies, *viz.*, such damages as may reasonably be supposed to have been in the contemplation of the parties as likely to arise from a partial breach of the contract.

The question which remains to be determined arises on the counterclaim as to damages and the measure to be applied in ascertaining the amount. I find that the defendant was in lawful possession at the date of the issue of the writ herein, and the appointment of the receiver. There will be judgment for him accordingly. The exact terms of the judgment to be spoken to.

Judgment for defendant.

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LARBONNE *v.* SHORE

LARBONNE *ET AL.* v. SHORE.

Principal and surety—Bond not signed by principal—Default by principal—Liability of sureties—Release.

Petronilla Quagliotti and A. E. Shore became sureties on a bond to the registrar of the Court at Victoria in the penal sum of $20,000, the condition of the bond being that if L. J. Quagliotti, the principal, do duly account for all moneys he shall receive on account of the estates of the Larbonne infants, the bond to be void. The bond was signed by the two sureties but not by the principal.

Held, on appeal, affirming the decision of MORRISON, J. that the sureties are not liable on the bond.

APPEAL by plaintiffs from the order of MORRISON, J. of the 11th of November, 1927, as to the liability of A. E. Shore on a bond of indemnity for the costs incurred in proceedings for the taking of accounts of Lorenzo J. Quagliotti as guardian of the persons and estates of Julien Larbonne, Charles Larbonne, Leon Larbonne, Germaine Larbonne and Gabrielle Raugh, children of Joseph Larbonne who died in 1908. Upon the death of Joseph Larbonne, L. J. Quagliotti was appointed guardian of the persons and estates of his children and the United States Fidelity Company became surety for the due performance of his duties as guardian. In 1911 at the instance of the Fidelity Company accounts were passed and the company was released as surety. On the 7th of February, 1912, a bond was entered into by L. J. Quagliotti, Petronilla Quagliotti, and Albert E. Shore in the penal sum of $20,000 to the registrar of the Court at Victoria, the condition of the bond being that if L. J. Quagliotti shall duly account for the money he shall receive on account of the estates of the said infants and pay the balance certified to be due the bond shall be void. This bond was only signed by Petronilla Quagliotti and Albert E. Shore. The youngest of the children came of age on the 12th of September, 1924. In 1925, an originating summons was taken out for an accounting and by the registrar's certificate of the 27th of October, 1926, the balance due from Quagliotti on the 30th of June, 1926, was $1,461.17, exclusive of costs, and the costs of the proceedings

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were taxed at $1,240.35. The defendant Shore paid the plaintiffs' solicitor $1,461.17, being the amount of the balance due the estates but refused to pay the costs. The plaintiffs then applied for an order to be allowed to put in suit in the name of the registrar the said bond and upon the hearing the parties by consent argued the question of the liability of A. E. Shore in respect to the sum of $1,240.35 for costs. Upon it being held that he was not liable for the costs the plaintiffs appealed.

Statement

The appeal was argued at Victoria on the 31st of January, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Beckwith, for appellants: This only applies to the question as to Shore's liability for the costs. The bond was for $20,000 and there is a breach. He is liable for all sums for which the guardian would have been properly accountable and is therefore liable for the costs: see Halsbury's Laws of England, Vol. 24, p. 420, sec. 820; Kerr on Receivers, 8th Ed., 349; *In re Graham. Graham* v. *Noakes* (1895), 1 Ch. 66 at p. 69; *Dawson* v. *Raynes* (1826), 2 Russ. 466 at pp. 470-1; *Maunsell* v. *Egan* (1845), 8 Ir. Eq. R. 372; (1846), 9 Ir. Eq. R. 283 at p. 284. The surety cannot come into a Court of Equity and say they are doing equity by causing an expense of $1,241 of costs when there is default: see *Kenney* v. *Employers' Liability Assurance Corporation* (1901), 1 I.R. 301; *In re Lockey* (1845), 1 Ph. 509; *In re Nugent's Estate* (1897), 1 I.R. 464; *Greville* v. *Gunn* (1854), 4 Ir. R.C.L. 201; Halsbury's Laws of England, Vol. 3, p. 80, sec. 160. On the question of the bond not being signed by Quagliotti see *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755 at p. 764.

Argument

O'Halloran, for respondent: Having taken the principal amount they are now debarred from any further claim: see *Deisler* v. *United States Fidelity & Guaranty Co.* (1917), 24 B.C. 278. In the case of *Greville* v. *Gunn* (1854), 4 Ir. R.C.L. 201 at p. 202, it is not a bond to an officer of the Court and the terms shew it was an indemnity bond: see *In re Graham. Graham* v. *Noakes* (1894), 64 L.J., Ch. 98. The bond was not executed by Quagliotti and the surety is discharged: see *Bonser* v. *Cox* (1841), 4 Beav. 379; *Cooper* v. *Evans* (1867),

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36 L.J., Ch. 431; Halsbury's Laws of England, Vol. 13, p. 354, sec. 492. This is not an indemnity bond as the costs are not included in it: see Halsbury's Laws of England, Vol. 3, p. 81, sec. 162.

Beckwith, in reply: The surety by paying what he did admits his liability under the bond and is estopped from contesting liability.

Cur. adv. vult.

6th March, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree with my brother GALLIHER.

MARTIN, J.A.

MARTIN, J.A.: This bond is, in my opinion, one of indemnity to insure the due performance of the receiver's duty to duly account as set out in the condition as follows:

"Now the condition of the above written obligation is such that if the above bounden Lorenzo Joseph Quagliotti, do and shall duly account for all and every the sum and sums of money which he shall receive on account of the estate of the said infants, Julien Larbonne, Charles Larbonne, Leon Larbonne, Germaine Larbonne and Gabrielle Larbonne and the income thereof from the 3rd day of January, 1911, being the date when said accounts were last passed, at such periods as the Court shall appoint and do and shall pay the balance which shall from time to time be certified to be due from him as the said Court shall hereafter direct."

It is in essentials not distinguishable in principle from simliar bonds in, *e.g., In re Lockey* (1845), 1 Ph. 509; *Maunsell* v. *Egan* (1846), 9 Ir. Eq. R. 283; *Greville* v. *Gunn* (1854), 4 Ir. R.C.L. 201; *In re Nugent's Estate* (1897), 1 I.R. 464, and *In re Graham. Graham* v. *Noakes* (1895), 1 Ch. 66, 70, in which last the following statement in Kerr on Receivers, 3rd Ed., 217, is accepted as "a correct general statement of the principle on which the Court proceeds":

" 'The surety is answerable to the extent of the amount of the recognizance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal, and of the appointment of a new receiver in his place.' "

This statement covers the circumstances of the case at Bar, in my opinion, and so that question should be decided in the appellants' favour, *viz.*, that the surety is liable for the costs of the proceedings to compel the receiver to do his duty, which costs have been ordered to be paid by the defaulting receiver.

As to the other objections raised by the surety (respondent)

that which also requires special mention is the submission that the surety has been discharged because one of the proposed signatories, *i.e.*, the receiver himself, Lorenzo Quagliotti, did not sign the bond but only his wife Petronilla and Shore (respondent) though the bond recites that both of them "are jointly and severally held and firmly bound . . ." Why the receiver did not sign is not explained and the uncontradicted evidence upon the matter is that of the surety who says in his affidavit, paragraphs 3 and 13:

"3. I entered into the said bond as surety at the request of the said Lorenzo Joseph Quagliotti that I be one of his sureties to guarantee that he would duly account for all and every sum of money he should receive on account of the estates of the infants in the said bond mentioned and the income therefrom from the 3rd day of January, 1911."

"13. In so far as the said costs are concerned and the said bond may relate thereto, I executed the said bond upon the express understanding in the bond itself contained, that the said Lorenzo Joseph Quagliotti would also execute the bond."

It is submitted that these facts bring the case within the principle of Lord Langdale's (M.R.) decision, affirmed by Lord Chancellor Cottenham, in *Bonser* v. *Cox* (1841), 4 Beav. 379; 49 E.R. 385, which has been approved by the Privy Council in *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755 at pp. 764-5, thus: MARTIN, J.A.

"On the same principle it has been held that when the creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each. In *Bonser* v. *Cox* [(1841)], 4 Beav. 379, where the defendant agreed to become a surety for Richard Cox in a joint and several bond to be executed by Richard Cox and himself, and the execution of the bond by Richard Cox was not obtained, Lord Langdale observes, 'The surety has a right to say, "The arrangement was that Richard Cox, as well as myself, should be held bound by bond to the creditor, that arrangement never was carried into effect,"' and the decision would obviously have been the same if Richard Cox had executed the bond and had been afterwards released."

In the *Bonser* case Richard Cox was the debtor who applied to his partners for further advances which were granted upon his brother John becoming surety for him, it being agreed that a counter-bond would be taken from Richard Cox and Davies to indemnify him for becoming security. The report goes on to say:

"A joint and several bond, intended to be executed by Richard Cox and

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John Cox, was prepared, and was carried by a clerk to John Cox for his execution, and who accordingly executed it. The same clerk afterwards went to the house of Richard Cox, to obtain his execution, but he, being from home, did not then execute it, and the bond having been mislaid, was never, in fact, executed by Richard Cox."

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Such being the circumstances of the decision of the *Bonser* case, wherein Lord Langdale said (pp. 382-3):

"I do not think that it is material to enquire in what way the surety contemplated benefit or protection to himself, by stipulating that a particular remedy should be held by the creditor against the principal debtor. A man may reasonably say, I will be surety to you for payment of such a sum, provided you have it secured by the bond of the principal debtor, but I will not be surety upon any other terms."

MARTIN, J.A.

As to the omission of execution by a contemplated co-surety, the law is settled in the same way as is said in Rowlatt on Principal and Surety, 2nd Ed., 278 by *Hansard* v. *Lethbridge* (1892), 8 T.L.R. 346 and applied in *The National Provincial Bank of England* v. *Brackenbury* (1906), 22 T.L.R. 797, and the instructive decision of the Irish Queen's Bench Division in *Fitzgerald* v. *M'Cowan* (1898), 2 I.R. 1, on the subject generally merits perusal.

GALLIHER, J.A.: In the view I take of this case it only becomes necessary to deal with one point. Was the surety released by the failure to have the bond signed by Quagliotti? I think the case of *Bonser* v. *Cox* (1841), 4 Beav. 379; 49 E.R. 385, covers the case at Bar. This case was referred to in *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755 at p. 764, and the principle was in no way dissented from.

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In the *Bonser* case, *supra,* the Master of the Rolls thus states it:

"I think that it cannot, upon any principles on which this Court acts, be doubted, that the surety has an interest, and a most material interest, in the rights and remedies which the creditor has against the principal debtor; he is not to be held bound where the situation of circumstances, in respect to the rights and the remedies which the creditor has against the principal debtor, are different from that which was contemplated by himself and all other parties. I do not think that it is material to enquire in what way the surety contemplated benefit or protection to himself, by stipulating that a particular remedy should be held by the creditor against the principal debtor. A man may reasonably say, I will be surety to you for payment of such a sum, provided you have it secured by the bond of the principal debtor, but I will not be surety upon any other terms. The surety in this case has a right to say, 'The arrangement was, that Mr.

Richard Cox as well as myself should be held bound by bond to the creditor: that arrangement never was carried into effect.' The circumstance of Mr. Richard Cox being held by bond to the surety, does not appear to be material in this case.

"I think that this exception cannot be sustained; that the Master is right, because the surety had not that which he contemplated, and that which was a material portion of the contract stipulated for by him at the time when he entered into this obligation. In the contract, as existing between the principal debtor and the creditor, there is a departure from that which the surety stipulated for, and in a matter in which, I conceive, the surety had a most material interest."

MARTIN, J.A.

We have in this case the surety pledging his oath that he entered into the bond on the distinct understanding that it was to be executed by Quagliotti as well and would not otherwise have done so.

I would dismiss the appeal.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I would dismiss the appeal. Several insuperable difficulties exist that render it impossible to give effect to the appeal. At the threshold the bond was not executed by Lorenzo Joseph Quagliotti and it never became a complete instrument legally capable of being enforced. Then it is clear that if the bond could be said to be enforceable it was confined to the accounting for any sum of money received on account of the estate and all such moneys were accounted for by the surety and the registrar's certificate so shews and there was no appeal from this report; therefore it is not permissible to reagitate the matter. In any case the bond was not in its nature an indemnity bond and moneys received being accounted for the liability for costs is not maintainable as against the surety. The authorities cited, and relied upon by the learned counsel for the appellant, in his very able argument, are not applicable to the special facts of this case. I do not find it necessary to elaborate further my reasons for judgment in affirming the conclusion arrived at by Mr. Justice MORRISON in determining, as I think rightly, that the surety, even if the bond could be looked at as complete, is under no further liability. That which is claimed, being costs occasioned in respect to the proceedings instituted for an account under the bond as against Lorenzo Joseph Quagliotti—the guardian of the infants—that is not a liability falling upon the surety.

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MACDONALD, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *H. A. Beckwith.*
Solicitor for respondent: *C. H. O'Halloran.*

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INLAY HARDWOOD FLOOR CO. v. DIERSSEN

INLAY HARDWOOD FLOOR COMPANY LIMITED *ET AL.* v. DIERSSEN.

Practice — Costs — Set-off — Separate actions — Solicitor's lien — Judicial discretion.

The defendant was given the costs of this action against the three plaintiffs. One of the plaintiffs had recovered judgment against the defendant in a former action (to which the other two plaintiffs herein were not parties) for a larger sum which was not paid. The said plaintiffs' motion for the right to set off defendant's costs herein against the former judgment was granted.

Held, on appeal, affirming the decision of MCDONALD, J., that a set-off should not be refused owing to a solicitor's lien if as between the parties themselves it is fair and just, and if no fraud has been practised upon the solicitor.

APPEAL by defendant from an order of MCDONALD, J. of the 22nd of December, 1927, allowing a set off of costs. The defendant Dierssen at one time owned the majority of the shares in the Inlay Hardwood Floor Company Limited when Ross and Conway carried on the business of the B.C. Hardwood Floor Company Limited in competition with Dierssen. Later the B.C. Hardwood Floor Co. arranged with Dierssen to supply the Inlay Hardwood Floor Co. with certain material required in carrying on its business. During this time Ross and Conway gradually acquired shares of the Inlay Hardwood Floor Co. and eventually obtaining a majority of the shares they ousted Dierssen from the management of the company and in the name of the company brought action against Dierssen to recover $3,000 owing by Dierssen to the Inlay Hardwood Floor Co. and

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recovered judgment for the full amount with costs. Dierssen then started a business of his own in hardwoods and Ross and Conway brought action in the name of the Inlay Hardwood Floor Company Limited and themselves for an injunction to restrain Dierssen from carrying on the hardwood business. This action was dismissed and the costs were taxed at $777. The order provided that these costs should be set off against the amount owing on the former judgment obtained by the Inlay Hardwood Floor Co.

Statement

The appeal was argued at Victoria on the 7th of February, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant: On the question of jurisdiction see Daniell's Chancery Practice, 8th Ed., Vol. I., p. 1008; *Douthwaite* v. *Spensley* (1853), 18 Beav. 74; *Craven* v. *Ingham* (1888), 58 L.T. 486. On the question of discretion dealing with set-off see *Royal Bank of Canada* v. *Skeans* (1917), 24 B.C. 193; *Blakey* v. *Latham* (1889), 41 Ch. D. 518; *Knight* v. *Knight* (1925), Ch. 835 at p. 840.

Craig, K.C., for respondents: The defendant has a judgment for his costs against the three plaintiffs, the plaintiff Company only having a judgment against him, but the judge may, in his discretion, grant a set-off. This should not be interfered with as no question of wrong principle is involved. A solicitor's lien should not interfere with a set-off if no fraud has been imposed on him: see *Puddephatt* v. *Leith* (*No. 2*) (1916), 2 Ch. 168; *Re Beer, Brewer, and Bowman* (1915), 113 L.T. 990; *Reid* v. *Cupper* (1915), 2 K.B. 147; *Barsi* v. *Farcas* (1924), 2 D.L.R. 660; *Young* v. *Mead* (1917), 2 I.R. 258. A solicitor's lien is a right to protection against his own client: see *Re Fort Frances Pulp & Paper Co.* v. *Telegram Printing Co.* (1927), 4 D.L.R. 77; *M'Cormack* v. *Ross* (1894), 2 I.R. 545 at p. 555.

Farris, replied.

Cur. adv. vult.

6th March, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Two minor questions were raised in this appeal, which I think are not tenable.

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The substantial question is the claim to set off the costs of this action, awarded to the defendant, amounting to about $700, against a judgment for a much larger sum, namely, $3,000, recovered against him by one of the three plaintiffs, two of these men not being parties to the previous action. Now, the costs aforesaid were recoverable against all or any of the three plaintiffs. One of them says—"I will discharge the obligation by allowing that sum to be set off against my judgment." The right of set-off of amounts recovered in different actions is not disputed. That question was decided, following English authorities, by this Court in *Royal Bank of Canada* v. *Skeans* (1917), 24 B.C. 193. In that case there was no question of a solicitor's lien involved, as is the case here. The appellant argues that to set off the said costs against the former judgment would defeat the lien of his solicitor. The appellant makes much of the circumstance that but for the set-off he would have the right to collect against the other two plaintiffs. The later cases relating to solicitors' liens are well explained by Younger, J., in *Puddephatt* v. *Leith* (*No. 2*) (1916), 2 Ch. 168. This case was followed by *Young* v. *Mead* (1917), 2 I.R. 258.

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The opposing parties are not concerned with rights as between a solicitor and his client, subject, of course, to this, that they may not collude to deprive a solicitor of the right to have his costs out of the proceeds of the litigation. As between parties costs belong to the party who is to recover them not to his solicitor, and if his opponent have a just counterclaim the Court ought to allow it to be set off unless there be some equity in favour of the solicitor superior to that shewn in this case.

The appeal should be dismissed.

MARTIN, J.A.: Whatever may be said about the rights of a solicitor in a set-off of costs before the recent decision of the Court of Appeal in *Knight* v. *Knight* (1925), 95 L.J., Ch. 33 (wherein the principal cases are noted) since then the matter beyond any "doubt at all" comes down to the exercise of a judicial discretion in all the circumstances as to whether or no the solicitor's right or lien (as it is inappropriately also styled) shall be "defeated" as Atkin, L.J., puts it, by ordering a set-off even where the actions are several: to the cases therein cited I

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add only *M'Cormack* v. *Ross* (1894), 2 I.R. 545 and *Young* v. *Mead* (1917), 2 I.R. 258; *Barsi* v. *Farcas* (1924), 2 D.L.R. 660, and *Re Fort Frances Pulp & Paper Co.* v. *Telegram Printing Co.* (1927), 4 D.L.R. 77.

In exercising the discretion the test is well expressed by Younger, J., in *Puddephatt* v. *Leith* (*No. 2*) (1916), 85 L.J., Ch. 543 at p. 550, thus:

> "*Prima facie* a set-off should not, owing to such a lien, be refused, if as between the parties themselves it would be fair and just, and if no fraud or imposition has been practised upon the solicitor by collusion between them."

There is, in my opinion, no good reason for saying that the learned judge below has not exercised his discretion to this end upon the adequate materials before him, and so, as I am also of opinion that his jurisdiction was, in the circumstances, clear, the appeal should be dismissed.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion, the learned judge in the Court below arrived at the proper conclusion in denying the claimed lien of the appellant's solicitors for costs. The authorities fail to support a lien under the special circumstances of this case.

MCPHILLIPS, J.A.

Appeal dismissed.

Solicitors for appellant: *Bourne & DesBrisay.*
Solicitors for respondents: *Ladner & Canetlon.*

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IN RE LEGAL PROFESSIONS ACT.

NOBLE & ST. JOHN v. BROMILEY.

IN RE LEGAL PROFESSIONS ACT. NOBLE & ST. JOHN v. BROMILEY.

Practice—Costs—Solicitor and client taxation—Discretion of taxing officer—Quantum—Special circumstances—Telephone attendances—Fee on settlement of action—Appendix M, Schedule 4, items 199, 200 and 201—Appendix N, item 8.

On appeal from the taxation of a solicitor and client bill of costs in an action that was settled on the day that the trial was to have taken place, two items disallowed by the taxing officer were allowed, *i.e.*, counsel fee for settling and revising reply, and fee for brief for junior counsel (MARTIN, J.A. dissenting as to the first item).

The allowance of telephone messages as ordinary letters and not as attendances by the taxing officer was sustained.

Where it was contended an inadequate amount was allowed on certain items:—

Held, that the Court would not interfere with the officer's discretion when the question is only one of *quantum*.

Fee for settlement of the action charged at $200, was taxed at $50. On objection that the fee was inadequate:—

Held, that although it appeared to be inadequate, the officer's discretion should not be interfered with as no question of wrong principle is involved.

Per MARTIN, J.A.: It is not for the taxing officer in a case of this kind to fix the proper "allowance" under tariff item 83 for "compromising suits" but for the judge whose *fiat* therefor should have been obtained in the usual way.

APPEAL by plaintiffs from the order of MORRISON, J. of the 23rd of November, 1927, dismissing an application to review the taxation of a solicitor and client's bill of costs. The costs were in respect to an action brought by the defendant for $25,000 damages resulting from a collision between two automobiles. Both the owners and drivers of the automobiles were defendants. The plaintiff had four specialists as witnesses to give evidence as to brain affection, resulting from the accident. The case was set down for trial and the parties then arranged a settlement at $11,000. The bill of costs delivered was $1,567, and on taxation was reduced to $949.

Statement

The appeal was argued at Victoria on the 13th of January, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

St. John, for appellants: The taxing officer only allowed $1 for attendance by telephone on client. This comes under Schedule 4, of Appendix M, items Nos. 199 and 200, the minimum charge being $1.50. This is an error in principle as the minimum cannot be reduced: see *Price* v. *Clinton* (1906), 2 Ch. 487; *Re The Winding-up Act and The Bank of Vancouver* (1917), 3 W.W.R. 461; The Annual Practice, 1928, p. 1419. An attendance at the telephone should be regarded in the same manner as any other attendance. The next matter is "fee on settlement." He only allowed $50, and in so doing he acted on a wrong principle in not taking into consideration various matters leading up to settlement: see *Milton* v. *Surrey* (1904), 10 B.C. 325; *In re Solicitors* (1913), 4 W.W.R. 311 at p. 314; *In re Cowan* (1900), 7 B.C. 353; The Annual Practice, 1928, p. 1430; *Hill* v. *Peel* (1870), L.R. 5 C.P. 172; *In re Lindsay's Estate. Lindsay* v. *Ayrton* (1915), W.N. 246. On the question of *quantum* and special circumstances see *Smith* v. *Buller* (1875), L.R. 19 Eq. 473; *Corrigan* v. *City of Toronto* (1923), 54 O.L.R. 56; *Flexlume Sign Co. Limited* v. *Globe Securities Co.* (1918), 44 O.L.R. 277 at p. 282; *Great Western Railway* v. *Carpalla United China Clay Company, Limited (No. 2)* (1909), 2 Ch. 471 at p. 477. As to fee on "revising and settling reply" see *Tisdall* v. *Richardson* (1887), 20 L.R. Ir. 199. This is a case where a junior counsel is necessary and a brief for him should be allowed.

Argument

Creagh, for respondent: These are all matters that are in the discretion of the taxing officer and this Court should not interfere: see *In the Estate of Ogilvie. Ogilvie* v. *Massey* (1910), P. 243.

St. John, replied.

Cur. adv. vult.

6th March, 1928.

MACDONALD, C.J.A.: I have had the advantage of reading the reasons of my brother GALLIHER, and entirely concur therein.

MACDONALD, C.J.A.

MARTIN, J.A.: This is an appeal from the refusal of MORRISON, J. to order a review of the taxation of the appellants'

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bill of costs, the learned judge regarding the items objected to as being "entirely in the discretion" of the taxing master in the circumstances, there being, in the opinion of the judge, no question of mistaken principle or irregularity in the proceedings before the taxing master.

That the Court will not as a general rule interfere with the exercise of discretion "where [the master] has not acted upon any wrong principle" is so well established as to need little, if any, authority and the rule was recently applied in a striking way by the Court of Appeal in *The Lord Strathcona* (1926), W.N. 270, wherein the leading cases are cited, and in *Societe Anonyme Pecheries Ostendaises* v. *Merchants Marine Insurance Company, Limited* (1928), 44 T.L.R. 270, and so if all the items before us "merely went to *quantum*" the appeal should be dismissed; but it may be that an error in *quantum* is so gross as to indicate an error in principle and to come within Lord Justice Vaughan Williams's language in *The Denaby and Cadeby Main Collieries (Limited)* v. *The Yorkshire Miners' Association* (1907), 23 T.L.R. 635 at p. 637:

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"It would not be true to say that the rule was quite absolute to the effect that the Court would never under any circumstances review the decision of the taxing master in such a case; but the Court would certainly never review it unless it came to the conclusion that the taxing master had made some mistake which interfered with the possibility of his having applied the right rule. The present case was not one of *quantum*. It was not necessary in this case to lay down any hard and fast rule as to when the Court ought or ought not to interfere with the discretion of the taxing master. But in his opinion they could go to this extent—that where the Court was satisfied, not only that the taxing master had exercised his discretion, but also that the matter was so before him that he had the opportunity of exercising that discretion, then the exercise of that discretion would only be reviewed in exceptional cases."

And in *Slingsby* v. *Attorney-General* (1918), P. 236, Swinfen Eady, L.J., said, p. 239:

"The decision of the taxing master is not absolutely final even on a question of *quantum*. For instance, a large sum might be allowed, but from the very fact of the amount the Court might see that the master, in arriving at so large a sum, must have acted on a wrong principle or have taken something into consideration which he ought not to have done. It doubtless requires an exceptional case to call for the interference of the Court, but exceptional cases do occasionally arise."

Applying the foregoing observations to the present case I feel justified in reviewing one item only, *viz.*, No. 159, which dis-

allows the brief for junior counsel though it is conceded that it was a case for such counsel and it is impossible, in my opinion, on the admitted facts to say that his brief was "prematurely" prepared within the true meaning of Reg. (49) of rule 1002, and hence the taxing officer must have "misdirected himself" on the point, as Lord Justice Atkin said in the *Societe Anonyme* case, *supra*.

As to the disallowance of any counsel fee for "settling and revising reply" that depends on items 223 and 224, which should properly, in such a case as this, be read and applied together, and where, as here, a fee of $10 for "counsel fee advising on statement of defence" has already been allowed, under item 223, it would be within the proper discretion of the taxing master not to allow at all, under item 224, another counsel fee for advising further, in effect, on the reply to that defence; such an allowance is clearly a matter of discretion depending on the nature of the reply which should not be interfered with—*Tisdall* v. *Richardson* (1887), 20 L.R. Ir. 199. This view, based upon said joint reading and application, does not conflict with the change in discretion occasioned by the omission of General Regulation No. (15) of former rule 1002 from the new Rules of 1925.

MARTIN, J.A.

As to the main item of complaint, No. 200, fee on settlement of action, charged at $200, and allowed at $50, that is "merely *quantum*" and this is not an "exceptional case" outside the general rule. Moreover it seems to have been overlooked that it is not for the taxing master in a case of this kind to fix the proper "allowance" under tariff item 83 for "compromising suits" but for the judge whose *fiat* therefor should have been obtained in the usual way—*Bryce* v. *Canadian Pacific Ry. Co.* (1907), 14 B.C. 155.

The master was justified, in my opinion, in treating telephone conversations as ordinary letters.

GALLIHER, J.A.: This is an appeal from the order of MORRISON, J., affirming the certificate of the registrar as to taxation of the plaintiff's bill of costs.

GALLIHER, J.A.

Of the items as taxed and objected to by Mr. *St. John* before us, the taxing officer has treated all telephone messages under

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the heading of letters, and not as claimed for under the heading of attendances in the tariff. I would not interfere with this. As to items in which it is claimed an inadequate amount is allowed, the taxing officer has exercised his discretion and we should not interfere in this, leaving aside for the moment item 200, fee on settlement, which I will deal with last. The balance of the items (which were disallowed *in toto*) are item 74, counsel fee settling and revising reply. I think a fee of $5 should have been allowed on this, under item 223 of Schedule M. Item 123, Interview with counsel as to settlement: I would not interfere with this. Item 159: the case was settled on the morning of the trial. It was a case justifying second counsel and brief for second counsel was necessary, and this item should have been allowed. This brings us finally to consideration of item 200 (fee on settlement). The action was brought for injuries by reason of a motor accident, Mr. *St. John* acting for the plaintiff, the present respondent, who claimed $25,000 damages. The action was settled (all parties agreeing) for $11,000. The fee claimed on settlement was $200—this was taxed down to $50. There is no item in the tariff dealing with counsel fee on settlement of an action, item 201, Schedule M, merely saying—"In case of settlement . . . of any action . . . all work done and money paid in connection therewith to be allowed." It was not objected or appealed against that the registrar had no power to tax any fee, it was simply objected by Mr. *St. John* that the fee was inadequate. Assuming that the taxing officer had authority to allow this fee, even if we considered it inadequate, which it would appear to be in this case, we would not, I think, be justified in interfering with his discretion, it not being a question of a wrong principle. To the extent mentioned, the appeal should be allowed.

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with the proposed judgment—that the appeal be allowed in part.

MACDONALD, J.A.

MACDONALD, J.A.: I agree with the reasons for judgment of my brother GALLIHER.

Appeal allowed in part.

Solicitors for appellants: *St. John, Dixon & Turner.*
Solicitor for respondent: *A. R. Creagh.*

RATTENBURY v. LAND SETTLEMENT BOARD.

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Constitutional law—Provincial powers—Incorporation—Servants of Crown —Liability to be sued—Taxation—Penalty for not paying—Validity of Act—B.C. Stats. 1917, Cap. 34; 1918, Cap. 42; 1919, Cap. 41; 1920, Cap. 41—R.S.B.C. 1924, Cap. 128.

The Land Settlement and Development Act is *intra vires* of the Legislature of the Province of British Columbia.

The Land Settlement Board created by the Legislature under the Land Settlement and Development Act is a department of State in its real constitution and cannot be sued in an action for tort in its official capacity.

Mackenzie-Kennedy v. *Air Council* (1927), 2 K.B. 517 followed.

APPEAL by defendant from an order of MORRISON, J. of the 10th of November, 1927. In 1907 and 1908, the plaintiff became the registered owner of about 40,000 acres of land in the Coast District and Omineca District of British Columbia and along the line of the Grand Trunk Pacific Railway. He carried on a colonization business in respect thereto and sold certain portions thereof under agreements for sale. Under section 53 of the Land Settlement and Development Act the defendant claimed against the plaintiff penalty taxes and works and performance of obligations in respect of said lands; the Provincial collector of taxes certified to the amounts of penalty tax alleged to be payable and caused to be offered for sale and purported to have sold at tax sale or by entries against the registered title of the plaintiff caused said lands to revert to the Crown. The plaintiff claims that the Land Settlement and Development Act is and at all times was *ultra vires* the Provincial Legislature; that in the alternative sections 46 to 55 both inclusive of said Act are *ultra vires* and that the Acts of the Provincial Legislature, 1918, chapter 42; 1919, chapter 41; 1920, chapter 41 and 1925, chapter 23 are *ultra vires,* and that he is entitled to damages, an injunction, and an accounting. On the application of the plaintiff it was ordered on the 6th of September, 1927, that the following points of law raised in the pleadings be set down for hearing and disposed of before the

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trial of the action: (1) Whether the defendant is liable to be sued in respect of any of the matters complained of in this action; (2) whether the plaintiff's claim discloses any cause of action; (3) whether the Land Settlement and Development Act and in particular the provisions thereof referred to in paragraph 7 of the plaintiff's statement of claim are *ultra vires* the Legislature of the Province of British Columbia. Upon the application being heard it was held that questions (1) and (2) should be answered in the affirmative, and question (3) was left to be determined by the trial judge.

The appeal was argued at Victoria on the 25th and 26th of January, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Johnson, K.C., for appellant: On the question of the right to sue, the Board is a Crown servant only by statute, a pure creature of statute: see *Graham* v. *Public Works Commissioners* (1901), 2 K.B. 781 at p. 791; *Roper* v. *Public Works Commissioners* (1915), 1 K.B. 45; *Raleigh* v. *Goschen* (1898), 1 Ch. 73 at p. 75; *China Mutual Steam Navigation Company* v. *MacLay* (1918), 1 K.B. 33; *Rowland* v. *The Air Council* (1923), 67 Sol. Jo. 385; *Bainbridge* v. *The Postmaster-General* (1906), 1 K.B. 178 at p. 180. If there is a right to bring action against the Board this is one in tort and no one can sue the Crown for a tort: see *Feather* v. *The Queen* (1865), 6 B. & S. 257.

Maclean, K.C., for respondent: Rattenbury acquired these lands in 1908. He developed a colonization scheme and sold some of the lands. Then in 1917 the Land Settlement Board made an offer to buy him out at $6 per acre at the same time asking him to cease his own operations which he did but the offer was never confirmed by the Lieutenant-Governor in Council. In 1924 they notified Rattenbury to sell at the price they said and if he did not he must make improvements to the amount of $2.20 per acre or be subject to a penalty tax. Our submission is, that the sections of the Act (46 to 55) giving such power are *ultra vires* as this is indirect taxation. It is a punishment for not doing something. In the case of *City of Halifax* v. *Fairbanks* (1927), 4 D.L.R. 945, the defendant shifted the burden of the tax from

himself to others but here it is shifted by the Act itself and is therefore an indirect tax. A *fiat* is not required in seeking a declaration against the Crown: see *Dyson* v. *Attorney-General* (1912), 1 Ch. 158; *Wigg* v. *Attorney-General for the Irish Free State* (1927), A.C. 674; *China Mutual Steam Navigation Company* v. *MacLay* (1918), 1 K.B. 33; *Eastern Trust Company* v. *McKenzie, Mann & Co., Limited* (1915), A.C. 750; *Sinclair* v. *Land Settlement Board* (1925), 35 B.C. 434; *Nelson* v. *Pacific Great Eastern Ry. Co.* (1919), 27 B.C. 420. That we may sue in tort see *Nickell* v. *City of Windsor* (1926), 59 O.L.R. 618 at p. 624; *The Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93; *Bainbridge* v. *The Postmaster-General* (1906), 1 K.B. 178 at p. 190; *Boynton* v. *Ancholme Drainage and Navigation Commissioners* (1921), 2 K.B. 213 at p. 229; *Gilbert* v. *Corporation of Trinity House* (1886), 17 Q.B.D. 795; *In re Wood's Estate. Ex parte Her Majesty's Commissioners of Works and Buildings* (1886), 31 Ch. D. 607.

Argument

Johnson, in reply: As to the validity of the Act see *Fairbanks* v. *City of Halifax* (1926), 1 D.L.R. 1106 at p. 1108; *McColl* v. *Canadian Pacific Ry. Co.* (1923), A.C. 126; *Attorney-General of Quebec* v. *Reed* (1884), 54 L.J., P.C. 12; *Attorney-General of British Columbia* v. *Canadian Pacific Ry. Co.* (1926), 37 B.C. 481 at p. 490; *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493 at p. 506. This is a tax on land and is not indirect: see *Lynch* v. *The Canada North-West Land Co.* (1891), 19 S.C.R. 204.

Cur. adv. vult.

6th March, 1928.

MACDONALD, C.J.A.: The following questions were submitted to MORRISON, J., of which the first and second were answered by him in the affirmative, and the third referred to the trial judge.

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The defendant appeals from the answers to the first and second questions, and the plaintiff appeals from the learned judge's disposition of the third question.

The defendant is a Board constituted by Act of the Legislature now to be found in the Revised Statutes of British Columbia, 1924, Cap. 128. The point was taken by defendant's

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counsel that the Board is a department of the Government, and may not be sued; that the plaintiff can only proceed by petition of right. There is nothing in the statute creating the Board which gives it a right to sue or be sued, and there is very much in the Act to indicate that it has inferentially no power to sue or be sued. That question should be answered in the negative. This would dispose of the whole appeal but since I have come to a firm conclusion on the other questions, I shall state it.

The second question asks, Does the plaintiff's claim disclose a cause of action? The answer to this question depends upon the answer to the third, which is as follows:

"Whether the Land Settlement and Development Act and in particular the provisions thereof referred to in paragraph 7 of the plaintiff's statement of claim, are *ultra vires* of the Legislature of the Province of British Columbia?"

When I say that the answer to the second question depends upon the answer to the third, I mean this: if the legislation is *intra vires,* then there is no cause of action, since no complaint has been made that the Board failed to follow the directions of the Act in what it did. The Act is *intra vires.* The submission of counsel for the plaintiff that the Act is *ultra vires* is founded on the assumption that the tax is not a direct one. It was contended that the question here is precisely the same in principle as that decided by the Judicial Committee in *Attorney-General of Manitoba* v. *Attorney-General of Canada* (1925), A.C. 561. I do not think so. In *City of Halifax* v. *Fairbanks* (1927), 4 D.L.R. 945; (1928), 1 A.C. 117, it was said that the Court in considering the character of a new tax should look at what was regarded as direct taxation and what as indirect taxation at the time of Confederation, and assign the new tax to the class to which it more closely approximates.

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The land tax has always been regarded before and after Confederation, as a direct tax. The tax here is a land tax, it is imposed upon the owner and upon the land, and while encumbrancers are also affected by it, that is a common incidence of a land tax. It was argued that this was really not a land tax, but a penalty tax, whatever that may mean. Assuming that it was imposed as a penalty for non-compliance with the demands of the Board, it is a matter of civil rights and clearly within the

competence of the local Legislature. Penalties are frequently imposed for non-payment of taxes, or non-compliance with other demands. I see no difference in principle between this one and one imposing a penalty for the non-payment of land taxes when due.

The appeal should, therefore, be allowed.

MARTIN, J.A.: In my opinion the first of the three points of law set down for preliminary hearing and disposition before trial should, with all respect, have been answered in the negative because the Land Settlement Board is, as the Act creating it shews, to my satisfaction, a department of State in its real constitution, and hence not liable to this action, within the principles laid down and considered, *e.g.*, by this Court in *Callow* v. *Hick* (1923), 32 B.C. 71 and by the English Court of Appeal in *Mackenzie-Kennedy* v. *Air Council* (1927), 96 L.J., K.B. 1145. This view disposes of the matter and renders it unnecessary to consider the other questions, and so the appeal should be allowed and the action dismissed.

MARTIN, J.A.

GALLIHER, J.A.: I have very carefully read and considered the provisions of the Statutes of British Columbia, 1917, creating the Land Settlement Board, and the amendments in 1918 and 1919, and also the provisions of the Interpretation Act, referred to by counsel.

Notwithstanding the able argument of Mr. *Maclean*, a close scrutiny of the Act convinces me that the Land Settlement Board can be considered only as the servants or agents of the Crown, and no action lies against them in their official capacity, nor should we give effect to granting a declaratory judgment.

GALLIHER, J.A.

It is not necessary to do more than state that clause after clause of the Act points to what the *status* of the Board is, and as I read it it seems overwhelmingly in favour of the construction I have placed upon it.

This is an action in tort and defendants are sued in their official capacity. It was said by Bankes, L.J., in *Mackenzie-Kennedy* v. *Air Council* (1927), 2 K.B. 517 at p. 523:

"In the absence of distinct statutory authority enabling an action for tort to be brought against the Air Council, I am of opinion, both on principle and upon authority, that no such action is maintainable. The Air

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Council are not a corporation, and even if they were to be treated as one the respondent's position would not be improved."

citing *Roper* v. *Public Works Commissioners* (1915), 1 K.B. 45, *Bainbridge* v. *The Postmaster General* (1906), 1 K.B. 178, and Atkin, L.J., at p. 532:

"This present action is directed against the members of the Air Council in their official or, as I prefer to say, representative capacity as servants of the Crown, and therefore will not lie. . . . The Crown may and does employ as its servant or servants, an individual, a joint committee or board of individuals, or a corporation. None can be made liable in a representative capacity for tort."

It was pointed out that in the case at Bar that while the Act declaring the Board to be a body corporate and politic contains no provision empowering them to sue or be sued, yet they have this power by virtue of the general Interpretation Act, R.S.B.C. 1924, Cap. 1, Sec. 23, Subsec. (13), which reads:

"Words making any association or number of persons a corporation or body politic and corporate shall vest in such corporation:—

"(*a.*) power to sue and be sued. . . ."

GALLIHER, J.A.

But see application of Interpretation Act, section 2(1):

"This Act, and each provision thereof, shall extend and apply to . . . all statutes of the Legislature, except in so far as any provision thereof is inconsistent with the intention and object of any Act, or the interpretation which the provision would give to any word, expression, or clause is inconsistent with the context."

In this regard see section 12 of the Act of incorporation:

"All moneys in the hands of the Board or payable to the Board by any person whomsoever, including all moneys owing to the Board under this Act by any mortgagor, borrower, lessee, or purchaser, whether the same are accrued due or not, and all property whatsoever held by the Board or to which the Board is entitled, are hereby declared to be the property of the Crown in right of the Province, represented by and acting through the Board, and all moneys so payable or owing to the Board shall be recoverable accordingly as from debtors to the Crown."

Also see section 34, of the Act.

This would dispose of the case if I am right, but I would also agree with the Chief Justice that the Act is *intra vires* and that the Board acted within the powers given them.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same opinion as my brother MARTIN.

Whilst it is quite unnecessary to give any considered opinion upon the question of the *intra vires* or *ultra vires* nature of the

challenged legislation, I am clear upon it that nothing was advanced at this Bar which could be said to successfully impugn the validity of the statute law called in question. Taxation upon property—here it is real estate—is a well understood form of direct taxation within the constitutional power of the Provincial Legislature and penalties for non-payment are also well understood and have had long existence. Then we have had the judgment of their Lordships of the Privy Council in *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462, upholding the Provincial Legislature in its disposition of property, *i.e.*, real estate as against the title of the registered owners thereof, the Provincial Legislature is paramount in the matter.

I would allow the appeal.

MACDONALD, J.A.: The first question submitted is whether or not suit can be maintained against the Land Settlement Board, hereinafter called "The Board," inasmuch as it is a branch of the department of agriculture and the acts complained of were performed by the said Board, it is alleged, as agents of the Crown. The Board has no independent powers. It is an administrative branch of the department of agriculture in respect to land settlement. It may establish a settlement only "with the approval of the Lieutenant-Governor in Council" (section 45A, as enacted by section 10, Cap. 42, B.C. Stats. 1918). The Act creating the Board provides that,

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> "There shall be in the Department of Agriculture . . . a Board to be called the 'Land Settlement Board,' . . . who shall be appointed by and receive such remuneration as may be determined by the Lieutenant-Governor in Council, and such Board shall be a body politic and corporate": B.C. Stats. 1918, Cap. 42, Sec. 3.

It carries on its work with such funds as the minister of finance may advance from time to time out of Consolidated Revenue, as directed by the Lieutenant-Governor in Council. Moneys collected by the Board are paid to the minister of finance (B.C. Stats. 1917, Cap. 34, Sec. 10). All moneys in the hands of the Board or payable to the Board under the Act and all property held by the Board or to which it is entitled are declared to be the property of the Crown in right of the Province "represented by and acting through the Board," and "all moneys so payable or owing to the Board shall be recoverable

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accordingly as from debtors to the Crown" (section 12). "Property" is defined by section 2 as including "real and personal estate," etc. The Board are required also by section 13 to pay all moneys collected into Consolidated Revenue, nor can any "moneys collected or received by the Board . . . be expended or paid out without first passing into the Provincial Treasury" (section 13). By section 42 for all its general activities it must have the sanction of the Lieutenant-Governor in Council. It follows that any judgment secured against the Board would be fruitless. Further, there is no provision in the Act that the Board may sue or be sued. On that state of facts is the plaintiff's claim wholly against the Crown or its agents in the right of the Province, against whom action can only be taken by Petition of Right? It was suggested that the right to sue or be sued arises from the fact that the Board is "a body politic and corporate." As Bowen, L.J., pointed out, in *Baroness Wenlock* v. *River Dee Company* (1883), 36 Ch. D. 675 at p. 685, this is not a corporation at common law, simply a statutory corporation:

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> "What you have to do is to find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature."

One must, therefore, examine the statute to ascertain its powers and, as stated, no power is given to sue or to be sued. It is, therefore, prohibited from exercising powers which it would have if a corporation at common law.

If it could be gathered from the provisions of the Act, or from other relevant sources, that the Crown (even though the Board is its agent) yet expressly or by implication gave it the power to contract as principals, other considerations might apply and a declaratory judgment obtained. Phillimore, J., in *Graham* v. *Public Works Commissioners* (1901), 2 K.B. 781 at p. 790.

In Robertson's Civil Proceedings by and against the Crown, p. 81, the author suggests that this decision "is open to the gravest doubts." I do not think the Board can be liable as agent of the Crown unless from the nature of the contract or undertaking with the plaintiff, it can be found that it rendered itself liable personally or in its corporate capacity.

We were referred to section 23, subsection (13) of the Interpretation Act (Cap. 1, R.S.B.C. 1924). This must be read, however, in conjunction with section 22 of the same Act. It is inconsistent with the intention and object of the Act.

This action for a declaration, injunction and damages, is in respect to, not a question of wrongful acts by the Board, *qua* Board or an act of negligence, trespass or tort (except in so far as clouding of title is alleged); it is in respect of the very acts for which the Board was created. They are all the acts of the Lieutenant-Governor in Council acting through the Board, the latter in no way intervening as a principal. I conclude, therefore, that it would be contrary to the general provisions of the Act to hold that the Board may be sued. No action will lie against it for doing that which the Legislature authorized.

In so far as the action is based on tort, see Bankes, L.J., in *Mackenzie-Kennedy* v. *Air Council* (1927), 2 K.B. 517 at p. 521 where because the acts were done by virtue of their statutory position as members of the Air Council no action for tort could be brought against such a statutory body. That, of course, was a department of the Crown, while here the Board is the agent of such a department.

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It was also submitted that parts of the Land Settlement and Development Act (R.S.B.C. 1924, Cap. 128, Secs. 46 to 56) are *ultra vires*. It was argued that the Provincial Legislature has no authority to impose the tax outlined in section 53, subsection (2) because the notice in said section referred to imposes a tax

"upon the land described therein and upon the owner thereof, and all persons claiming any estate or interest therein or any charge or encumbrance thereon, the liabilities, charges, taxes, and duties of which such owner is thereby notified, and shall be binding . . . upon all persons having any estate or interest in the land described in the notice in every respect in accordance with its terms," etc.

A mortgagee, for example, it was urged, might be forced to pay the tax and if so would be paying a tax another should pay, *viz.*, the owner. It is, therefore, indirect taxation. The suggestion was that such a mortgagee, for example, if compelled to pay could indemnify himself at the expense of the owner. I think the question is concluded by the judgment of the Judicial Committee in *City of Halifax* v. *Fairbanks* (1927), 4 D.L.R. 945.

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It is there pointed out that the framers of the Act of Union no doubt had in mind that certain taxes were universally recognized as direct. "Thus, taxes on property or income were everywhere treated as direct taxes"—p. 949. As that judgment points out, the question of "ultimate incidence" is only important where a new form of taxation is considered not decisively contemplated by the framers of the Act of Union. The imposition of taxes on land was so universally recognized as within the competency of Provincial Legislatures, that it cannot be otherwise regarded because in its incidence any one on whom it is imposed may by action or otherwise, shift the burden to other shoulders.

"It may be true to say of a particular tax on property . . . that the taxpayer would very probably seek to pass it on to others; but it may none the less be a tax on property and remain within the category of direct taxes":

(1927), 4 D.L.R. at p. 950.

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I cannot regard the tax in question herein as "any new or unfamiliar tax." True, it is a novel method expressive of an attempt to cure a situation brought about by excessive land speculation, which was thought to retard agricultural development. It is, however, in its essence taxation on land and it has been too long definitely recognized as a direct tax in the contemplation of Parliament to be otherwise regarded today on account of its incidence in any particular instance.

I find, therefore, that the action cannot be maintained against the Board, and that the sections of the Act complained of are *intra vires* of the Provincial Legislature.

Appeal allowed.

Solicitor for appellant: *J. W. Dixie.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

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EXECUTORS OF ESTATE OF ISAAC UNTERMYER, DECEASED v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

EXECUTORS OF THE ESTATE OF ISAAC UNTERMYER, DECEASED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA.

Succession duty—Testator domiciled in New York—Stock in British Columbia mine—"Fair market value"—Application of—Situs—Mobilia rule—R.S.B.C. 1924, Cap. 244, Secs. 3 and 30.

A testator, who died domiciled in New York City, held 318,800 shares (par value of $1 each) in the Premier Gold Mining Company Limited, the mine and head office of the company being in British Columbia. By order in council pursuant to section 30 of the Succession Duty Act a commissioner was appointed to enquire into and report what property of deceased is subject to duty under the Act and what is the value thereof. Section 3 of the Act provides that "in determining the net value of property . . . , the fair market value shall be taken as at the date of the death of the deceased . . . ." The evidence disclosed that on the day of the testator's death the selling price of the stock on the exchange was $2.20 and that the quotations for a year before and a year after his death averaged this sum with the price slightly increasing after his death and dividends of 32 per cent. per annum were paid on the par value of the stock during this period. The evidence further disclosed that if the whole 318,800 shares were placed on the market *en bloc* on the date of death it would so depress the market that an average of only about $1.20 could be obtained and that if the stock had to be sold at once the best means of obtaining the highest price would be by selling to underwriters in which case $1.50 per share might be obtained. The commissioner reported that "fair market value" means "such sum as could be obtained by sale of the property under conditions where you have a willing but not anxious seller and where you have all possible potential purchasers acting under normal circumstances brought into consideration" and found that the sum of $2 per share or a total value of $637,600 would represent the fair market value of the stock.

Held, on appeal, affirming the report of A. D. Macfarlane, Esquire, the commissioner (MCPHILLIPS, J.A. dissenting, and holding that the value should be increased to $2.20 per share), that neither a sale of the shares *en bloc* on the date of the testator's death nor a sale to underwriters at the best price obtainable is a sound test of "fair market value." The commissioner took into consideration all the evidence surrounding the stock including the market quotations on the date of death; the quotations for a year prior and subsequent to death; the number of sales that took place on the markets and the dividends paid. His finding the "fair market value" of the stock at the date of the testator's death at $2 per share should not be disturbed.

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Held, further, that although the testator died domiciled in New York City, the company being registered in British Columbia, and its property and head office being in British Columbia, the *situs* of the shares is in this Province.

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APPEAL by the executors of the estate of Isaac Untermyer, deceased, and cross-appeal by the Attorney-General from the report of A. D. Macfarlane, Esquire, a commissioner appointed to enquire into and report what property of the said deceased is subject to duty under the Succession Duty Act and the value thereof, dated the 23rd of December, 1927. Untermyer died on the 31st of August, 1926, his domicil at the time of his death being New York City. He was the owner of 318,800 shares in the Premier Gold Mining Company Limited, the mine being near Stewart, B.C., with head office in British Columbia. This stock for some time before and after Untermyer's death was paying 32 per cent. on its par value of $1 per share. The stock was quoted on the market at the time of his death at $2.20 per share. Between the 31st of August, 1925, and the 31st of August, 1927, the market value of the stock ranged between $1.87 and $2.60. Section 3 of the Succession Duty Act provides that in determining the net value of property "the fair market value shall be taken as at the date of the death of the deceased." The executors' valuation of the shares was placed at $1.19 per share based on what was alleged to be the book value of the shares on the 1st of September, 1926, as taken from a statement of assets and liabilities of the company. The department having charge of the collection of succession duties contended that the value of the shares should be arrived at by taking the stock market quotations for the shares at the date of death, *i.e.*, $2.20. Evidence was submitted on the part of the executors to shew that if a block of 320,000 shares was put on the market at once the market would be so depressed that an actual sale would not net more than $1.25 per share. It was further submitted that the highest price could be obtained on an immediate sale by selling *en bloc* to underwriters and that by this method in the neighbourhood of $1.50 per share might be obtained. It was contended by the Attorney-General that "fair market value" should be interpreted as meaning the price at

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which the stock was sold on the Exchange at the time of the death of the deceased when it was quoted at $2.20 per share. The commissioner concluded that "fair market value" means such sum as could be obtained by sale of the property under conditions where you have a willing but not anxious seller and where you have all possible potential purchasers acting under normal circumstances brought into consideration and he found that $2 per share or a total value of $637,600 would represent the fair market value of the shares in question.

The appeal was argued at Victoria on the 9th to the 15th of February, 1928, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: Section 3 of the Act provides that in determining the value of property the fair market value shall be taken at the time of death. My submission is that "fair market value" is what the shares would bring on the market if placed on the market and sold. Seven brokers were called as witnesses and they all agreed that the market for Premier stock is a limited market and if they attempted to realize on 318,800 shares on the 1st of September, 1926, they would not net more than $1.25 per share. There must be a hypothetical sale and the question is what the stock would bring on such a sale. In England there is a special provision that no reduction is to be made on the assumption that the whole of the shares are to be placed on the market at the same time but there is no such provision here: see Dymond on The Death Duties, 5th Ed., p. 98. "Value" means value in exchange: see *In re Charleson Assessment* (1915), 21 B.C. 281. Supply and demand is the basis: see *Ellesmere (Earl)* v. *Inland Revenue Commissioners* (1918), 88 L.J., K.B. 337; *Attorney-General* v. *Jameson* (1905), 2 I.R. 218; Quigg's Succession Duties in Canada, 173; *Lord Advocate* v. *Marr's Trustees* (1906), 44 S.L.R. 647; *Galletly's Trustees* v. *Lord Advocate* (1880), 8 R. 74; *Re Marshall* (1909), 20 O.L.R. 116; *Pearce* v. *Calgary* (1915), 9 W.W.R. 668; *Grierson* v. *Edmonton* (1917), 2 W.W.R. 1138 at p. 1142; *Re Nairn Estate* (1918), 2 W.W.R. 278. The *Charleson* case (1915), 21 B.C. 281 does not apply as the question of "willing but not anxious seller" does not arise

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here. Four matters must be considered: (1) The capital stock is 5,000,000 shares, par value, $1 each; (2) no practical market other than the stock market; (3) the market quotation of $2.20 per share is based on a limited quantity of shares on a comparatively limited market; (4) the available markets could not absorb 320,000 shares at the time of death at the price of $2.20 per share, and the best possible price to be obtained would be by underwriting the stock to a syndicate by which means according to the evidence $1.50 per share might be obtained. One broker says these shares might be sold at $2.20 in three months but the Act says they must be put on the market at once. We submit that shares are so intangible in their nature as not to have a *situs* within section 3, and we do not need the aid of probate to dispose of them: see *Brassard* v. *Smith* (1924), 94 L.J., P.C. 81; *Smith* v. *Levesque* (1923), S.C.R. 578 at p. 585. The *situs* of the shares is where the deceased person dies: see *In re Clark* (1903), 73 L.J., Ch. 188. The only *situs* shares can have is the *situs* of the owner. *"Mobilia sequuntur personam"* applies: see *Smith* v. *The Provincial Treasurer for the Province of Nova Scotia and the Province of Quebec* (1919), 58 S.C.R. 570 at pp. 579 and 586; *In re Estate of Robert Alexander, Deceased* (1926), 38 B.C. 28; *Forbes* v. *Steven. Mackenzie* v. *Forbes* (1870), L.R. 10 Eq. 178 at p. 188; *Wallace* v. *The Attorney-General* (1865), 35 L.J., Ch. 124 at p. 126. The case of *Rex* v. *Lovitt* (1911), 81 L.J., P.C. 140 can be distinguished from this case: see also *Prescott* v. *Crosby* (1922), 32 Man. L.R. 108; *Winans* v. *Att.-Gen.* (1909), 79 L.J., K.B. 156 at p. 168; *In re Succession Duty Act and Inverarity, Deceased* (1924), 33 B.C. 318. We rely on *Cotton* v. *Rex* (1914), A.C. 176 and submit that *Burland* v. *The King. Alleyn* v. *Barthe* (1922), 1 A.C. 215 can be distinguished. Section 10 of the Act is *ultra vires* as in fixing the rate of tax it takes into consideration the value of deceased's property outside the Province: see *Frick* v. *Pennsylvania* (1925), 268 U.S. 473; *The Minister of Finance of British Columbia* v. *The Royal Trust Co.* (1920), 61 S.C.R. 127; *In re Succession Duty Act and Estate of Joseph Hecht, Deceased* (1923), 33 B.C. 154. Our Act does not say "actually situate," it is "situate": see *Smith* v. *Levesque, supra.*

Hall, K.C., for the Crown: The words "fair market value" should be construed as to applying to a sale over a reasonable period: see *Attorney-General* v. *Jameson* (1905), 2 I.R. 218 at p. 228; Dymond on The Death Duties, 5th Ed., p. 430; *Ellesmere (Earl)* v. *Inland Revenue Commissioners* (1918), 2 K.B. 735; *Re Marshall* (1909), 20 O.L.R. 116. All the witnesses say $2.20 is a fair price and that in twelve months they could dispose of these shares without affecting the market: see *Re The Estate of W. H. Clark* (1916), 10 W.W.R. 509. If $2.20 is fair for a small number of shares it should apply equally to a large block. *In re Estate of Sir William Van Horne, Deceased* (1919), 27 B.C. 269; (1922), 1 A.C. 87 is in our favour on the question of *situs*: see also *Re Renfrew* (1898), 29 Ont. 565. The Act within its terms clearly applies to these shares as they are within the Province: see *Rex* v. *Lovitt* (1911), 81 L.J., P.C. 140; *Blackwood* v. *The Queen* (1882), 8 App. Cas. 82 at p. 93. The case of *In re Succession Duty Act and Estate of Joseph Hecht, Deceased* (1923), 33 B.C. 154 is the same as this one.

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Farris, in reply: Section 28(2) of the Act only applies when the testator dies domiciled in British Columbia. The testator here was domiciled in New York at the time of his death.

Cur. adv. vult.

6th March, 1928.

MACDONALD, C.J.A.: It is common ground that the shares in question, for purposes of succession duty, are to be appraised at their fair market value at the date of the testator's death. It may be conceded that to place so large a block of shares, in a mining company, namely, 318,800 shares, on the market at once would depress the market. But the executors, according to my interpretation of the Succession Duty Act, are not bound to offer these shares in one block, or at all. If they wish to sell them they should sell them as a prudent man would do, not at forced sale. They have not thought fit to sell, they are still holding them notwithstanding that there has been a very active market for them since the death of the testator.

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The commissioner who heard the evidence and the arguments

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of counsel, fixed the value of these shares at the date of the testator's death, at $2 each, par being $1 each. He had before him an undisputed list, shewing the market quotations for a period of one year before the testator's death, and for one year after his death. This list shews the consistency of the prices offered for shares in this company during those two years. They averaged more than the price put upon them by the Commissioner. On the day of the testator's death, they were selling on the Exchange at from $2.24 to $2.27 per share, and have since, and are now selling at a still higher price. There was evidence to shew that had the shares been put upon the market they might have been sold, if judicially handled, within from three months to a year without disturbing the market materially. During the year following the testator's death, the total number of shares of the company traded in on the Exchange amounted to upwards of one million; there was therefore an active demand and, as the said list shews, constant trading and consistent prices. The ingenuous submission was made by appellant's counsel that the proper way to ascertain the fair market value of the shares at the time of the testator's death was by an assumed sale *en bloc* to underwriters. A number of brokers were called to give their opinion as to what underwriters might fairly be expected to pay for the shares. I do not adopt that mode of valuation.

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Several other grounds were raised by the notice of appeal, but they have been so fully considered, and dealt with, against appellant's submission, in authoritative decisions, that it would be a work of supererogation to restate what has already been so well said by higher Courts upon those questions.

The Attorney-General's cross-appeal, claiming that the valuation of the shares should be increased from $2 as found, to $2.20, should also be dismissed.

GALLIHER, J.A.: In this matter we have had the benefit of a very able and exhaustive argument from Mr. *Farris*.

GALLIHER, J.A.

First as to the fair market value of the shares at the date of death. Mr. *Farris* has called a number of brokers who have given evidence that in their opinion the best way to determine that would be as of a supposed sale carried out by way of underwriting the shares by some wealthy syndicate who would put up

the price for the shares and take them over the price to be commensurate with the sum advanced, the risk of decrease in value on the market, and the probable time in which they could be disposed of to advantage to the syndicate, and the weight of opinion is that such price should be ranging from $1 to $1.50 per share, and the time for disposal from three months to one year. With all respect for the opinion of these brokers, who are much more skilled in that line than I am, I do not think that is the right principle upon which to determine market value. I think their very suggestion defeats itself. The very fact that they would have to advance large sums of money, take into consideration risks and possible delays, is to my mind equivalent to putting these shares under the hammer, a process which in my view is not applicable to determining fair market value. It is also quite apparent that to throw all these shares on the market (which is somewhat limited) at once would be to so affect their selling value as to render that expedient useless to determine fair market value. There is no necessity in my opinion, to adopt either expedient, but we have to make some determination in the matter and must do so as best we can.

GALLIHER, J.A.

In my view the suggestion of the Chief Justice during the argument, is the most reasonable one to adopt. He has dealt with that in his reasons for judgment and I need not repeat them here.

As to the points of law argued, we are pretty familiar with them in this Court, but I have again examined the authorities referred to and am in agreement with the views of the Chief Justice. In the result the appeal should be dismissed.

McPHILLIPS, J.A.: This appeal raises for consideration a point of some nicety, yet upon careful analysis it would seem to me that there is really no difficulty in the matter. It is true that the block of shares is very large, *viz.*, 318,800, but the value thereof as found upon which the succession duty was imposed is only $2.20 per share, the par value being $1 per share. No doubt, though, this is a very considerable block of shares to come into the market, but they need not necessarily go upon the market, that is a matter to be determined by the executors or the beneficiaries. What is to be arrived at it is true is the "fair

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market value." That, though, is not a new or at all an impossible problem. The evidence advanced amply establishes this, and the undisputed evidence is that at the time of the testator's death the Mining Exchange quotation of selling value was $2.24 to $2.27 per share and a more or less steady advance has taken place ever since, and the executors have not desired to sell the shares and do not now so intend, as I understand. It is pressed though at this Bar that the market value can only be fairly ascertained by finding out what the shares would fetch if they were put upon the market *en bloc* and that the valuation as found is excessive.

The learned counsel for the appellants, Mr. *Farris,* in his very able argument presented the view that at the most the fair market price could not be said to be reasonably in excess of $1.50 per share having in view the effect of placing such a large block of shares upon the market. Whilst Mr. *Farris* was engaged in his argument I took occasion to propound this question: "Suppose it was only a relatively small number of shares that would go upon the market, say, 100 to 200 shares, what would you say the fair market value might be said to be?" Mr. *Farris* very frankly said in reply "that there would likely be no depreciation in the Mining Exchange quotation" but the submission was strongly made that the fair market value could only for succession duty purposes be arrived at having in view the precipitation of the whole body of shares upon the market at the one time. This proposition, with great deference, cannot, in my view, be deemed to be at all a tenable or reasonable view of the matter. To give weight to this would be to give the advantage to those who are in the state of the "embarrassment of riches," as against the holder of but 100 or 200 shares who would have to pay duty upon the shares at the Mining Exchange quotation, *i.e.,* the selling price, say $2.25 per share, and the holders of this block of 318,800 shares would be paying duty at a hypothetical value of say $1.50 per share it being assumed that to that amount at least the market value of the shares would be depressed the shares going *en bloc* upon the market. That cannot be the true method of arriving at the fair market value; it can only be arrived at upon the existent facts, not a problematical happening. In my

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opinion the assessment as originally made was the correct one, *viz.*, $2.20 per share, and I would dismiss the appeal and allow the cross-appeal.

It was argued, but with deference, I consider, that it could not have been at all hopefully argued, that in any case the *situs* of the shares was not or could not be deemed to be in British Columbia, and that therefore it was not a case for the imposition of succession duty. It would seem to me that there is no merit in any such contention, the facts are insuperable against any such view, the mining property is in British Columbia, the share issue is made by a company registered in British Columbia and no valid transfer of shares can effectively be made save upon due registration and transfer in conformity with the Companies Act of British Columbia and due compliance therewith in the office of the registrar of companies at the City of Victoria. It follows that probate is necessary in British Columbia to entitle the executors to complete the due administration of the estate and it also follows therefrom that succession duty is legally payable in the Province of British Columbia (*Brassard* v. *Smith* (1924), 94 L.J., P.C. 81).

MCPHILLIPS, J.A.

MACDONALD, J.A.: Mr. A. D. Macfarlane, barrister, Victoria, appointed a commissioner under section 30 of chapter 244, R.S.B.C. 1924, the Succession Duty Act, enquired as to the value for duty purposes of 318,800 shares of stock in the Premier Gold Mining Company Limited. The executors' valuation was $1.19 per share as of date of death. The commissioner found $2 to be the fair market value. From this finding the executors appeal urging that a value of not more than $1.50 should be placed upon them. The Attorney-General cross-appeals to increase the amount to $2.20 per share.

MACDONALD, J.A.

The deceased was domiciled in New York, and died there, leaving by will an estate of about one and a half millions to his widow, and children, also domiciled in New York. The mining property is in British Columbia—par value of the stock $1 and market quotation at death $2.20.

Two points which require consideration were raised: (1) The valuation; (2) that, in any event, the Succession Duty Act

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did not apply to this estate. The governing section is 3 of chapter 244, R.S.B.C. 1924, providing that,—

"In determining the net value of property or the value of a beneficial interest in property, the fair market value shall be taken as at the date of the death of the deceased."

We have to ascertain the "fair market value" as of the date of death, *viz.*, 31st August, 1926. The appellant submitted that because in a limited market it was not possible to sell so many shares in one block—at all events without depressing it—the market quotation of $2.20 was not a fair criterion. The available market on the date of death would not absorb 318,800 shares and the market quotation of $2.20 could, it was submitted, only be obtanied for a limited quantity of share transactions. The Court, therefore, it was urged, must assume a theoretical sale; in other words, ascertain the best disposition that could be made of the whole block on the day of death. It was also said that the commissioner disregarded the evidence on the point.

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It was conceded that an attempt to dispose of all these shares on the day of death for the market price would fail. There need not, however, be a sale as of the date of death. They simply have to value as of that date. It is enough to surmise a hypothetical sale and in doing so the commissioner may draw deductions from all the evidence not simply accepting as the true test the suggested underwriting scheme by a syndicate, as suggested by the appellant. The question of fair market value at date of death is one of fact. The test, however, is not the amount the shares would bring, if offered for sale on that date without regard to the special conditions making such a sale impossible or, at all events, difficult. If, as the cases shew, the property is so situated or of such a character that it presents greater attractions for one possible purchaser than for another; or if there are considerations, such as large dividends which would dispose the holders to retain it these elements should be considered. The executors have not sold it in whole or in part. It is doubtless regarded as a desirable investment. Ordinarily, the test is the price the property can be disposed of to the best advantage. But, if that is not possible, except by an underwriting scheme that has not the ear-marks of a sale, other

methods may be resorted to. It may not, for example, be possible to sell shares in a private company at all events, except under restrictions but that does not prevent a valuation being placed upon them. A value is ascertained by the best means of knowledge obtainable.

As to the meaning of "fair market value" I do not think a separate meaning should be assigned to each word. It is not "market value." If so, it might mean the amount an estate would bring in the open market in exchange for other commodities. The word "fair" disqualifies that phrase.

Mr. Justice Duff in *Pearce* v. *Calgary* (1916), 9 W.W.R. 668 at p. 674, in discussing the phrase "fair actual value" said:

> "I do not think it necessary to attempt an exact definition of the phrase . . . as used in the statute before us. The words must be construed in accordance with the common understanding of them."

We are told that "value" does not mean "worth"; it means what an article will bring in the open market in other commodities on a given day. But quite conceivably on the day of death or for a limited period, from, *e.g.,* temporary panic, through false reports, there would be such a general desire to sell that the supply would be over-abundant. The normal equation between "supply" and "demand" would be temporarily dislocated, and a valuable stock would either be unsaleable or realize very little. Yet the normal value would be there throughout. On the other hand, if there was a temporary advance of an unwarranted character the assessor would be obliged to consider it and make a proper allowance. The market quotation therefore is not the only element but it is an important element particularly if quotations are maintained at a fairly even level, over a considerable period of time. Here, it was not possible to sell the whole block on the day of death, without a sacrifice, which, in view of the whole history of the property, would not represent its fair value. If shares in a private company, which by the articles may not be sold except to members of the company at a fixed valuation, less than the market value, may yet be valued for duty purposes at their true worth, it would seem that the shares in question herein must not be given a depreciated value because they too cannot be sold except possibly in small blocks. We have therefore, a situation which

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prevents a free sale in the ordinary way. It might take a year or more to dispose of all of it and thus realize its full value: That is not because the value is not there. It is because of conditions that have nothing to do with value, *viz.*, the limited market. This block represents such a large portion of the whole capital stock of the company that the market could not absorb it. It is an embarrassment of riches. It is not therefore a question of what 318,800 shares would command in the market on a given date. It is their "fair market value" on that date. No doubt the commissioner could make allowances for this novel situation. He did so as his valuation is $2, which is less than the market quotation shews. If the deceased held only 500 shares there would be no question as to their fair market value. Why should a larger amount be regarded as intrinsically less valuable? I think the commissioner was justified in considering the nature of the property, dividends paid and the market quotations for some time before and after death and, after doing so "valuing" the 318,800 shares at the "fair market value" which the shares would undoubtedly bring if, for example, distributed among 1,000 small shareholders rather than one large holder, as here. We should give the words of the Act such a reasonable workable construction—if the words employed will bear it—as will not lead to anomalies or in fact injustice. A small owner would have his shares valued much higher than a large owner, if appellant's argument prevailed.

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The case of *Attorney-General* v. *Jameson* (1905), 2 I.R. 218, is instructive although the facts and the governing statutes differ. There, on account of restrictive conditions, a sale in the open market was not permitted; so here, sale in one block is not feasible. As Lord Ashbourne stated at p. 226: "A feat of imagination should be performed." The question is, what would a purchaser of sufficient means ordinarily pay for the right to stand in the testator's shoes, had he lived, to secure all the profits (the dividends there were 20 per cent.) and be subject to whatever uncertainties the future might have in store. To quote Fitz Gibbon, L.J., at p. 230:

> "The price was what the shares were worth to Harry Jameson at his death—in other words, it was what a man of means would be willing to pay for the transmigration into himself of the property which passed from H. Jameson when he died."

I think too the language of the late Mr. Justice Idington in *Pearce* v. *Calgary, supra,* referrred to by counsel for appellant, is pertinent but supports the respondent's view. He says (pp. 672-3):

"In the course of liquidation which always follows and has to be faced by those concerned in disposing of such properties under such circumstances, there are generally some prudent persons possessed of means or credit who will attempt to measure the forces at work making for a present shrinkage in values for a time and again likely to arise making for an increase of value. Such men are few in number and of these only a very small percentage perhaps are able to make a rational estimate of these reversible currents, and a still smaller percentage willing to venture the chances of their investment on the strength of their best judgment. They know that the shrewdest and most far-seeing may be mistaken. I take it that the 'fair actual value' meant by the statute quoted above is, when no present market is in sight and no such ordinary means available of determining thereby the value, what some such man would be likely to pay or agree to pay in way of investment for such lands."

All these factors are of course variable and uncertain and the supporting evidence largely conjectural. Still, the commissioner may draw an inference from all the facts and make a definite finding. He had sufficient evidence disclosing the true situation to enable him to say that an offer would probably be received for the amount arrived at from some men "able to make a rational estimate of these reversible currents." The intent of the statute cannot be defeated by exceptional situations in exceptional circumstances. Nor was he obliged to accept as evidence of "fair market value" the estimate of brokers who did not underwrite but gave speculative evidence of what it might bring in an underwriting scheme, *viz.,* not more than $1.50 a share leaving a large margin for distribution expenses and profits if present values are maintained. The commissioner therefore, used his best judgment in drawing an inference from all the evidence and, if he honestly applied his mind to the task, as I am sure he did, without serious misdirection, I think the conclusion reached should not be disturbed.

Counsel for appellant submitted further that, in any event, these shares were not liable to succession duty on the ground that they are not property situate within the Province within the meaning of the Act—shares it was suggested—intangible property—have no *situs* within the purview of section 37 of the

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Act. The property is in British Columbia; also the head office and place of share registration. The decedent owner was domiciled in New York. I think, without discussing the cases that, in this case, the *situs* is the place where the shares can be transferred.

In *Brassard* v. *Smith* (1925), 94 L.J., P.C. 81, the Judicial Committee held that the true test was the question—Where could the shares be effectively dealt with? True, in addition to the fact that the shares of a bank, with head office in Quebec, were registerable in Nova Scotia, and could only be dealt with there, the deceased was domiciled in Nova Scotia. But the *ratio decidendi* was not the *mobilia* rule.

I would dismiss the appeal and cross-appeal.

Appeal and cross-appeal dismissed; McPhillips, J.A. would allow cross-appeal.

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitor for respondent: *H. C. Hall.*

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Practice—Service out of jurisdiction—Foreclosure order by consent—Contemporaneous agreement to collect rents—Action to recover moneys under agreement—Res judicata.

The plaintiff claims that in September, 1922, he consented to a foreclosure order in an action brought by the defendant and others against the plaintiff and others in respect of certain properties in Yale District by reason of a verbal arrangement between Ryder and himself, that he be allowed to collect the rents and profits of the Brookmere Hotel (one of the properties included in the foreclosure action) until such time as the properties referred to in the order had been sold. Under this agreement he collected $150 per month rent from the lessees of the hotel until the 1st of June, 1924, when Ryder instructed the lessees not to pay any further rentals to him. He then brought action for a declaration as to his rights under the agreement and obtained an order for service *ex juris* as Ryder lived in England. This order, the writ of summons and service thereof were on the defendant's application, set aside. The plaintiff then brought this action to recover $5,100, being the rent he was entitled to from July, 1924, to May, 1927, under the said agreement and obtained an order for service *ex juris*. The defendant's application to set aside the order and service of the writ was dismissed.

Held, on appeal, affirming the decision of GREGORY, J., that the affidavit in support of the application disclosed a *prima facie* case shewing a probable cause of action, the necessary conditions required by the rules being present, and the order was properly made; further, the setting aside of the first writ does not prevent a new action claiming other relief although arising out of the same state of facts.

APPEAL by defendant from the order of GREGORY, J. of the 12th of November, 1927, dismissing an application to set aside the service of a writ, and the order for service out of the jurisdiction. In 1922 the defendant and others brought an action for foreclosure in respect of a hotel in the Yale District known as the Brookmere Hotel, the plaintiff Jones being one of the defendants in that action. Jones consented to an order for foreclosure on the verbal arrangement that he should have the rents and profits from the hotel until such time as the property could be sold from which sum $50,000 was to be paid to the plaintiffs in that action. In accordance with the agreement

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Statement

Jones collected $150 per month rent from the hotel until the 1st of June, 1924, but no sale being made of the property Ryder stopped the tenants from paying any further rent to Jones. Jones then brought action for a declaration in respect to his consenting to the foreclosure order on the arrangement that he was to collect the rents until a sale was made, and an order was made for service of the writ out of the jurisdiction as Ryder lived in England. On the application of the defendant the service of the writ and order for service out of the jurisdiction were set aside. Jones then brought this action for $5,100, being the rent payable by the tenants of the hotel since the 1st of June, 1924, and obtained an order for service of the writ out of the jurisdiction. An application to set aside the service of the writ and the order was dismissed.

The appeal was argued at Victoria on the 27th and 28th of January, 1928, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. A. Clark (*Bass,* with him), for appellant: The matters in this action are *res judicata* as they were included in a former action which was disposed of: see *In re South American and Mexican Company. Ex parte Bank of England* (1895), 1 Ch. 37 at p. 50. The oral agreement alleged is contradictory in effect: see *New London Credit Syndicate* v. *Neale* (1898), 2 Q.B. 487. If there was a contemporaneous agreement it was a fraud on Jones's co-defendants. A consent order cannot be set aside: see *Attorney-General* v. *Tomline* (1877), 7 Ch. D. 388 at p. 389. Only in case of fraud or common mistake see *Davis* v. *Davis* (1880), 13 Ch. D. 861 at p. 862; *Holt* v. *Jesse* (1876), 3 Ch. D. 177 at p. 183; *Ainsworth* v. *Wilding* (1896), 1 Ch. 673; *Parker* v. *Schuller* (1901), 17 T.L.R. 299; *The Hagen* (1908), P. 189 at p. 201; *Strauss and Co.* v. *Goldschmid* (1892), 8 T.L.R. 512; *In re Eager. Eager* v. *Johnstone* (1882), 22 Ch. D. 86.

Clearihue, for respondent: This is an entirely different action from the first one, so that *res judicata* does not apply. We are entitled to the order in this case: see *National Mortgage and Agency Company of New Zealand, Limited* v. *Gosselin* (1922),

38 T.L.R. 832; *Hoerter* v. *Hanover Caoutchouc, Gutta Percha, and Telegraph Works* (1893), 10 T.L.R. 103 at p. 104. All we require is to shew a *prima facie* case to try: see *Badische Anilin und Soda Fabrik* v. *Chemische Fabrik Vormals Sandoz* (1903), 88 L.T. 490; *Hardingham* v. *Rowan* (1880), 24 Sol. Jo. 309.

Clark, replied.

Cur. adv. vult.

6th March, 1928.

MACDONALD, C.J.A.: The first order was set aside on the ground that the action was for a declaratory judgment only. This is shewn by the reasons of GREGORY, J.

In this appeal to us it was contended that the application was *res judicata.* Without deciding that had the first writ or the service thereof been set aside on the merits the doctrine would be applicable, it is enough to say that it was not set aside on the merits but because service *ex juris* was considered by the learned judge to be inapplicable to a writ asking for a declaratory judgment. It is not necessary to pass upon the correctness of this view.

The second order, the one now attacked, was founded on a claim which appears to be *bona fide* made, for money. That is a matter to be disposed of on the trial. The second writ is therefore not for the same cause of action but raises a concrete question of debt, and therefore if there could be *res judicata* there is not such on the facts here. I am therefore free to decide this appeal on its merits.

MACDONALD, C.J.A.

Does the judgment of the 22nd of December, 1922, stand in the way? The plaintiff alleges a contemporaneous verbal agreement with the defendant, that until the $50,000 mentioned in the judgment should be paid, he, the plaintiff, should receive the rents and profits of the hotel property. There is no objection to such an agreement unless for the want of written evidence and a suggested fraud upon the other defendants mentioned in the judgment. These objections may be overcome at the trial. Proof may be offered to meet both these objections. We are not to try the merits.

I would therefore not disturb the order appealed from.

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GALLIHER, J.A.: I am in agreement in the reasons for judgment of my brother M. A. MACDONALD.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same opinion as my brother the Chief Justice. The order under appeal is to a very large extent one of discretion—no doubt though of judicial discretion —and notwithstanding the very able and persuasive argument of Mr. *Clark,* counsel for the appellant, I cannot come to the conclusion that the order was one that could not constitutionally be made within the purview of the Rule of Court. Further, I see no obstacle upon the ground of *res judicata;* there would not appear to be anything tried or determined that would admit of this contention being successfully made. However, as to this I do not wish to be thought to in any way conclude the matter—as it will be always open as the action proceeds—the real point now is that there is an apparent triable issue which should not be prevented. The order therefore, in my opinion, was rightly made and the appeal should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from the order of GREGORY, J., refusing to set aside the service of a writ and order for service *ex juris.* The writ claims the sum of $5,100 under an alleged agreement whereby the plaintiff was to receive the rents and profits from certain hotel premises for a certain period, or in the alternative for an accounting and a declaration that the defendant received certain rents and profits from said hotel as the plaintiff's agent. The plaintiff herein some years before was a party defendant with others in a foreclosure action where the same property was concerned, and by a judgment therein obtained it became vested in the plaintiffs in that action, one of whom is now the defendant in this action. The plaintiff herein made a claim for relief in a previous writ based upon the claim that he consented to the foreclosure judgment in consideration of an undertaking given by the present defendant, Ryder, that he (said plaintiff) should receive the rents and profits from the hotel until a certain event. He alleged that pursuant to said agreement he collected the rents for a certain time and continued to do so until prevented by the present defendant acting under the foreclosure judgment referred to. Thereupon the plaintiff

issued the writ referred to for a declaration setting up the oral agreement which was the alleged consideration for his consent to judgment. The defendant being out of the jurisdiction, an order was obtained for service of this writ *ex juris*. Upon application, however, this order and writ were set aside. Notice of appeal was given from said order but was abandoned.

Thereupon the plaintiff issued a second writ (the one in question) against the defendant Ryder in respect to the same incident but making no reference to the foreclosure judgment, this time claiming judgment for a specific amount, *viz.*, $5,100 and other relief alleging that amount to be due under the agreement to permit him to receive the rents and profits. An order was obtained giving leave to issue and to serve *ex juris*, but on that application no disclosure was made of the previous application to the judge in Chambers. A further application was then made to GREGORY, J. to set aside the order allowing service of the second writ and the writ itself. This application was dismissed on the ground that there was a substantial difference between this and the previous action. From that order this appeal is brought on the following grounds: (1) That the relief sought is in contradiction to the terms of the foreclosure judgment vesting the property in the present defendant; (2) that the questions raised in the action are *res judicata;* (3) that the relief claimed against the defendant in the present action though framed differently is similar to that claimed in the first; (4) that no disclosure was made of the previous application when the last order for service *ex juris* was obtained; (5) that in the original foreclosure action in which the present plaintiff was a defendant he had co-defendants and the plaintiff alone cannot maintain this action; (6) that the foreclosure order is conclusive of the issue herein unless it is varied at the instance of all parties to it or set aside by a competent Court.

MACDONALD, J.A.

There is no doubt that the foreclosure judgment effectively precludes this plaintiff from prosecuting any claim settled and determined by that judgment. The question here, however, is whether when said judgment was entered there was a collateral oral agreement between, not all of the parties thereto but two of them, that notwithstanding the property was vested in three plaintiffs of whom the present defendant was one, the latter for

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a consideration agreed that for a certain period the present plaintiff should receive the profits and if so, can an action be based upon that agreement independently of the foreclosure judgment? If the present action can be brought on this oral agreement I do not think it is an answer to say that other parties are interested in these rentals. That would only mean that the present defendant might have to account to his original co-plaintiffs for their share of any amount the present plaintiff might recover. Again, if it was sought to contest the identical issues decided in the foreclosure action such a course would not be permitted because that judgment ended the litigation between the parties on the points in issue therein. The point raised in the present action was not, however, adjudicated upon. The present plaintiff is not disputing that judgment; he does not refer to it in the second writ, and there is no estoppel. If the foreclosure judgment specifically provided that in addition to vesting (even although that implies receipt of profits) the rents and profits should be received by the plaintiffs therein there would be an estoppel. There is nothing,

MACDONALD, J.A.

however, to prevent an owner of property agreeing with another for valuable consideration to permit the latter to receive the profits from that property. Whether such an agreement depending on circumstances, time of performance, etc., requires to be in writing, is another matter which may be decided at the trial, not on this application. These are not matters that we are bound to finally decide at this stage. The learned judge in Chambers was not obliged to try the action before giving leave to issue and serve the writ. He had simply to be satisfied that a *prima facie* case was made out shewing a probable cause of action and that the necessary conditions required by the rules were present. It will be open to the defendant at the trial to shew that the plaintiff is estopped from maintaining the action and to raise the question of *res judicata* or any other defence, which may be tenable. In a case briefly referred to in (1880), 24 Sol. Jo. 309 (*Hardingham* v. *Rowan*) Jessell, M.R. considered that

"the affidavit filed on behalf of the plaintiff was sufficient. All he had to see on a motion of this sort was whether the plaintiff made out a *prima facie* case of something to try—some case, in fact, on which a verdict might

result for the plaintiff. There were difficulties, no doubt, in the way of the plaintiff's case, but they might be got over at the trial and it was not for him to try the action now."

Is the dismissal of the first writ a bar to the present action? I think not. If the plaintiff misconceived his remedy and discontinued the action he could issue the second writ, claiming the proper relief. I do not think any different considerations arise where the action was not discontinued but the writ set aside. There was no adjudication on the first writ. The material does not shew why it was set aside—probably it was regarded as an attempt to assert a claim settled by the foreclosure judgment. That does not prevent a new action claiming other relief even though arising out of the same state of facts if the second writ discloses a probable cause of action.

MACDONALD, J.A.

On the question of want of disclosure, I agree that the first writ and the proceedings in respect thereto should have been disclosed. However, there is no suggestion of a wilful withholding of facts and I think the material is sufficient to shew that the learned judge in Chambers was not misled. I do not think a different order would have been made had there been full disclosure of the first writ and of the proceedings thereunder.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Lennie & Clark.*

Solicitors for respondent: *Clearihue & Straith.*

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W. T. MCARTHUR & CO. v. MUTUAL LIFE OF CANADA INSURANCE CO.

W. T. McARTHUR & COMPANY LIMITED v. MUTUAL LIFE OF CANADA INSURANCE COMPANY.

Mechanic's lien—Affidavit of claim—Amendment—Mechanics' Lien Act—Application of section 20 to subsequent amendment of section 19—R.S.B.C. 1924, Cap. 156, Secs. 19 and 20—B.C. Stats. 1926-7, Cap. 41, Sec. 2.

Section 19 of the Mechanics' Lien Act Amendment Act, 1927, provides that the affidavit of claim may be made by the person claiming the lien or by his agent having a personal knowledge of the facts stated in the affidavit, and the affidavit made by the agent shall state that he has such knowledge. The plaintiff obtained an order consolidating two mechanics' lien actions with leave to amend the agent's affidavits of claim.

Held, on appeal, reversing the decision of GRANT, Co. J. (MCPHILLIPS, J.A. dissenting), that as the agent who made the amended affidavit states that he has "except where stated to be on information and belief, a personal knowledge of the matter hereinafter deposed to" and the affidavit shews that in several essential particulars he is speaking from information and not from personal knowledge, although the judge may have had power to allow the amendment the attempt to make it comply with the Act has not cured the objection to the lien claims.

APPEAL by defendant from the order of GRANT, Co. J. of the 12th of December, 1927, consolidating two mechanics' lien actions and directing that the plaintiff be at liberty to amend the affidavits filed in support of the liens as may be advised. The liens were in respect to the installation of two furnaces with connections on adjoining properties owned by the defendant Fagen, and both installations were under the same contract. Both affidavits were made in the form of Schedule B of the Mechanics' Lien Act, R.S.B.C. 1924, without applying the 1927 amendment of section 19 of the Act.

Statement

The appeal was argued at Victoria on the 26th and 27th of January, 1928, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. A. Clark, for appellant: The affidavits are defective. The deponent does not say for whom he is working as accountant nor does he say he has personal knowledge of the facts deposed to.

Argument

He says there is power to grant amendment under section 20 of the Act. In these cases it would be creating new affidavits and they are out of time. Where the statute is imperative an amendment cannot be made; secondly, even if allowed, the amendments are not sufficient. There is express injunction that there shall be personal knowledge, and he admits he did not see the properties on which the furnaces were installed: see *Fitzgerald and Powell* v. *Apperley* (1926), 2 W.W.R. 689 at p. 693; *Columbia Bithulithic Co.* v. *Vancouver Lumber Co.* (1915), 21 B.C. 138 at p. 145; *Braden* v. *Brown* (1917), 24 B.C. 374. It cannot be amended because it is not an affidavit: see *In re J. L. Young Manufacturing Company, Limited. Young* v. *J. L. Young Manufacturing Company, Limited* (1900), 2 Ch. 753 at p. 754; Phipson on Evidence, 3rd Ed., 190; *Spargo* v. *Brown* (1829), 9 B. & C. 935; 109 E.R. 348; *Bruce* v. *National Trust Co.* (1913), 11 D.L.R. 842; *Canada Sand Lime and Brick Co.* v. *Poole* (1907), 10 O.W.R. 1041.

Brown, K.C., for respondents: Section 20 still applies to section 19, and the judge has jurisdiction to make the amendment. Non-compliance in the affidavit does not invalidate the lien unless prejudice is shewn: see *Crown Lumber Co., Ltd.* v. *Hickle and O'Connor* (1925), 1 W.W.R. 279; *Hutchinson* v. *Berridge* (1922), 2 W.W.R. 710; *Barrington* v. *Martin* (1908), 16 O.L.R. 635; *Robock* v. *Peters* (1900), 13 Man. L.R. 124 at p. 141; *Imperial Lumber Yards, Ltd.* v. *Saxton* (1921), 3 W.W.R. 524; *Limoges* v. *Scratch* (1910), 44 S.C.R. 86; *Scratch* v. *Anderson* (1917), 1 W.W.R. 1340 at p. 1342; *Rendall, MacKay, Michie, Ltd.* v. *Warren & Dyett* (1915), 8 W.W.R. 113; *Nobbs* v. *C.P.R.* (1913), 6 W.W.R. 759; *Ontario Lime Association* v. *Grimwood* (1910), 22 O.L.R. 17 at p. 20; *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13 at p. 18; *Nelson* v. *Person* (1927), 2 W.W.R. 161; *Craig* v. *Cromwell* (1900), 27 A.R. 585; *Polson* v. *Thomson and Watt* (1916), 10 W.W.R. 865 at p. 870; *Manitoba Bridge & Iron Works* v. *Gillespie* (1914), 29 W.L.R. 394; *Coughlan* v. *National Construction Co. McLean* v. *Loo Gee Wing* (1909), 14 B.C. 339. Argument

Clark, in reply, referred to Halsbury's Laws of England,

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Vol. 13, p. 421; Phipson on Evidence, 5th Ed., 207; *Reg.* v. *Saunders* (1899), 1 Q.B. 490; even with the allowance of the amendment the affidavit is not a sufficient compliance as to personal knowledge: see *Republic of Peru* v. *Peruvian Guano Company* (1887), 36 Ch. D. 489 at p. 496; *Re O'Connor* v. *Lemieux* (1927), 3 D.L.R. 831; *Winter* v. *Gault Brothers, Limited* (1913), 18 B.C. 487; (1914), 49 S.C.R. 541; *Averill* v. *Caswell & Co. Ltd.* (1915), 23 D.L.R. 112.

Cur. adv. vult.

6th March, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The County Court judge had, I think, power to allow an amendment but the amendment does not satisfy the requirements of the Mechanics' Lien Act, and has therefore not cured the objection to the lien claim. The amendment made in 1927 to section 19 of the Mechanics' Lien Act, provides that the lien affidavit may be "made by the person [here the company] claiming the lien or by his agent having a personal knowledge of the facts in the affidavit, and the affidavit of the agent shall state that he has such knowledge." The agent who made the amended affidavit had not such personal knowledge; he states that he is the plaintiffs' accountant, and is authorized to make the affidavit and that he has "except where stated to be on information and belief, a personal knowledge of the matter hereinafter deposed to." The affidavit shews that in several essential particulars he was speaking from information and not from personal knowledge. Therefore, although the judge may have had power to allow the affidavit to be amended so as to comply with the Act, the attempt to make it comply with the Act proved abortive.

It has been suggested that the amendment above referred to must be regarded as a part of section 19 of the principal Act, and therefore subject to the powers granted the judge by section 20 of the Act, namely, powers to amend. I may concede this, though I am not deciding it. Now, the principal Act requires certain facts to be stated in the affidavit. If the person making it has strictly complied with the Act, there is nothing to amend, neither is there anything to amend if he has substantially com-

plied with the provisions of the Act. It is only where he has failed to substantially comply with the provisions of section 19 that the amendment is needed. Therefore it makes no difference whether the amendment of the statute above referred to is to be regarded as subject to the provisions of section 20 or not. The language of that amendment is perfectly clear. Nothing is better settled in the law than the meaning of "personal knowledge" and nothing could be more clearly stated than that which has been stated in the amendment that the agent making the affidavit "shall speak from personal knowledge." It emphasizes this by saying that he must state in the affidavit that he makes it from personal knowledge. Now, unless the affidavit is to be regarded as one that may be entirely dispensed with it is plain that the plaintiffs must fail.

MACDONALD, C.J.A.

The appeal should be allowed.

GALLIHER, J.A.: I have striven to see my way clear to upholding the judgment herein, as the amendment to section 19 by the Act of 1926-27 has created a situation in this case, and in cases of a like nature respecting trading firms that could scarcely have been contemplated. However, the amendment was deliberate and the words used are in no way ambiguous, and must be given effect to. The affidavit as amended does not now meet the requirements. The agent has not deposed from personal knowledge, nor does he so state; in fact, he states part of his knowledge is from information and belief. Though the amendment of section 19 in a case of this kind would call for more than one affidavit by more than one agent, something I hardly think could have been considered, yet, there are the specific words and I see no escape from them.

GALLIHER, J.A.

The appeal must, I think, be allowed.

MCPHILLIPS, J.A.: I am completely in accord with the conclusion arrived at by His Honour Judge GRANT in this case. The judgment, in my opinion, is right and no case has been made for its disturbance with great respect to all contrary opinion. I am in complete agreement with the reasons for judgment of Mr. Justice Riddell in *Barrington* v. *Martin* (1908), 16 O.L.R. 635, whose judgment the learned judge below fol-

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lowed. It is rightly said by Mr. Justice Riddell at pp. 640-1 that:

"It is easy to say, and it is true, that more attention should be paid by intending lienors to the form of their claims; but the Court is now able to do substantial justice, and the fear as to 'the state of the record' is a thing of the past. It would be intolerable if persons honestly entitled to receive money should be deprived of all chance of asserting their rights by reason of some petty—or even some grave—slip in practice; and especially so in the administration of an Act which is so clearly intended to enable the poor man to procure his wages and the supplier of materials to receive pay for his materials in a cheap, simple, and expeditious manner."

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A. concurred with MACDONALD, C.J.A. in allowing the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Lennie & Clark.*

Solicitors for respondents: *Ellis & Brown.*

REX v. CHEW DEB.

GREGORY, J.

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REX
v.
CHEW DEB

Criminal law—Infraction of Excise Act—Act and section named in information and conviction—Act so named repealed—New Act in force—Habeas corpus—Conviction quashed—R.S.C. 1906, Cap. 51, Sec. 180 (e); 1927, Cap. 60, Sec. 176 (e).

The Inland Revenue Act, R.S.C. 1906, was repealed and substituted by the Excise Act, R.S.C. 1927, Cap. 60. The accused was convicted of an offence that "on February 24th, 1928, the defendant without having a licence under the Excise Act then in force did have in possession a still, etc., contrary to section 180 (*e*) of the Excise Act being chapter 51, R.S.C. 1906, and amendments thereto," the offence being so described in both information and conviction.

Held, that notwithstanding the fact that section 176 (*e*) of the new Act recites a similar offence, the conviction under the earlier statute for the offence should be quashed.

Statement

APPLICATION for a writ of *habeas corpus*. The facts are set out in the reasons for judgment. Heard by GREGORY, J. in Chambers at Victoria on the 14th of March, 1928.

Jackson, K.C., for the prisoner.
C. G. White, for the Crown.

15th March, 1928.

Judgment

GREGORY, J.: Return of writ of *habeas corpus;* application to quash a conviction by a magistrate for infraction of the Excise Act.

Both the information and conviction in describing the offence set out that on the 24th of February, 1928, the defendant without having a licence under the Excise Act then in force, did have in possession a still, etc., "contrary to section 180 (*e*) of the Excise Act being chapter 51, Revised Statutes of Canada, 1906, and amendments thereto."

It is admitted by the Crown that at the time of the commission of the offence the Excise Act referred to had been repealed by a new Excise Act, Cap. 60, R.S.C. 1927, brought into force by Proclamation. Under the new Act there is an offence similar to that described in the old Act, but it is not set out in section 180 (*e*) which is quite different.

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It was urged on behalf of the Crown that as the title to both Acts is the same, as the offence complained of is described and exists under both acts, that the accused is not taken by surprise, and the citation of the statute, chapter and section can be disregarded as surplusage, and *Rex* v. *Gan* (1925), 36 B.C. 125, and *Rex* v. *Jungo Lee* (1926), 37 B.C. 318, were referred to as supporting this contention.

These cases are, I think, very different from that before me. In those cases the statute, chapter and section were not set out and the accused was left to find out for himself what statute had been broken, while here, he is expressly told that his acts are contrary to the named statute and section. I do not think he can be reasonably expected to look outside of that statute. Had the information and conviction simply said "contrary to the statute in such case made," etc., as is frequently done, he would have had no complaint.

Judgment

The case of *Michell* v. *Brown* (1858), 1 El. & El. 267, seems to support this contention. That was a case where, like here, the acts complained of were offences under both the repealed and the new Act. Lord Campbell, C.J., in giving the judgment of the Court said, at p. 274:

"If it had not been that both the prosecutor and the magistrate profess to proceed upon the earlier statute, the conviction might be supported on the later statute."

And at p. 275:

"In this case, we think that the Legislature, in passing [it] intended that a prosecutor should not be permitted afterwards to proceed for this offence under statute 19 Geo. 2, c. 22."

The conviction will be quashed but without costs.

Conviction quashed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

AMERICAN SECURITIES CORPORATION LIMITED v. WOLDSON (p. 145).—Affirmed by Supreme Court of Canada, 25th April, 1928. See (1928), S.C.R. 432; (1928), 3 D.L.R. 687.

CANADIAN STEVEDORING COMPANY LIMITED v. ROBIN LINE STEAMSHIP COMPANY. THE SAME v. SEAS SHIPPING COMPANY INCORPORATED (p. 359).—Reversed by Supreme Court of Canada, 2nd May, 1928. See (1928), S.C.R. 423; (1928), 3 D.L.R. 856.

CRONHOLM v. COLE AND COLE (p. 405).—Affirmed by Supreme Court of Canada, 26th April, 1928. See (1928), 3 D.L.R. 321.

Cases reported in 38 B.C. and since the issue of that volume appealed to the Supreme Court of Canada or to the Exchequer Court of Canada:

BULGER v. THE HOME INSURANCE COMPANY (p. 270).—Reversed by Supreme Court of Canada, 13th October, 1927. See (1928), S.C.R. 436.

DAGSLAND v. THE CATALA (p. 440).—Reversed by the Exchequer Court of Canada, 23rd January, 1928. See (1928), Ex. C.R. 83; (1928), 3 D.L.R. 334.

GOSSE-MILLERD LIMITED v. DEVINE *et al.* (p. 499).—New trial ordered, 16th December, 1927. See (1928), S.C.R. 101; (1928), 2 D.L.R. 869.

JONES v. PACIFIC STAGES LIMITED (p. 520).—Reversed by Supreme Court of Canada, 6th October, 1927. See (1928), S.C.R. 92; (1928), 2 D.L.R. 897.

KNOX AND LEWIS v. HALL AND IRWIN AND TORONTO GENERAL TRUSTS CORPORATION (p. 348).—Reversed by Supreme Court of Canada, 31st October, 1927. See (1928), S.C.R. 87; (1928), 1 D.L.R. 193.

MANNING AND MANNING v. NICKERSON (p. 535).—Affirmed by Supreme Court of Canada, 10th October, 1927. See (1928), S.C.R. 91; (1928), 3 D.L.R. 494.

MINISTER OF CUSTOMS AND EXCISE v. BRADSHAW (p. 558).—Affirmed by Supreme Court of Canada, 12th October, 1927. See (1928), S.C.R. 54; (1928), 2 D.L.R. 352.

QUEEN INSURANCE COMPANY OF AMERICA AND RITHET CONSOLIDATED LIMITED v. BRITISH TRADERS INSURANCE COMPANY LIMITED (p. 161).—Affirmed by Supreme Court of Canada, 4th May, 1927. See (1928), S.C.R. 9; (1928), 2 D.L.R. 399.

Case reported in 37 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

MCFARLAND v. LONDON & LANCASHIRE GUARANTEE & ACCIDENT COMPANY OF CANADA (p. 373).—Affirmed by Supreme Court of Canada, 20th April, 1927. See (1928), S.C.R. 57.

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carriage of justice by reason of remarks and rulings of a judge or other matters of fact involved on the trial. The accused, and one Moore left a room in a hotel together, both intoxicated. On reaching the rotunda of the hotel Moore said to the night clerk "I got hit in the eye but the other fellow got worse than I did" and the clerk saw that there was blood on both of Moore's hands. Immediately after they had left the hotel a third man, who came to the hotel with them, was found dead and in a battered condition in the room they had left. On appeal from the conviction of the accused for manslaughter:—*Held* (MACDONALD, C.J.A. dissenting), that there was non-direction amounting to misdirection in the charge of the learned judge to the jury the result of which was that the strongest evidence in favour of the accused (*viz.*, the appearance of Moore after coming out of the room and his statement of his actions) was not submitted to the jury's consideration as it ought and there should be a new trial. REX v. NICHOLSON. - - - - - **264**

8.——*Rape — Evidence — Complaint — Pressure—Admissibility.*] A girl 17 years old lived with a Mrs. C. and on entering her house one evening with her clothes dirty and her hand bleeding, Mrs. C. asked her where she had been, to which she replied "those two boys took me to the back of the park." Being suspicious of wrong-doing Mrs. C. said "I am going to take you to the police station." On the way to the station Mrs. C. said "Now Marjory we are going to the police station and you have got to tell the truth. I want to know if them boys had anything to do with you" to which the girl replied that "one held her while the other went with her and that when he got through he held her while the other went with her." In giving her evidence on the trial Mrs. C. was asked, "if it had not been for your urging her to get these facts out you would never have got them out?" to which she replied, "No, I would never have got them out." The girl testified that both boys had had connection with her against her will, each holding her in turn. They were convicted of rape. *Held*, on appeal, affirming the decision of MCDONALD, J. (MACDONALD, C.J.A. and MCPHILLIPS, J.A. dissenting and holding that there should be a new trial), that as Mrs. C. was cross-examined and no objection was taken to her evidence of the girl's statement to her until after the case for the prosecution had closed, when an

application that by reason thereof the case should be taken from the jury was refused, and as the trial judge in his charge carefully instructed the jury to pay no attention whatever to what the girl said to Mrs. C. it cannot be said that any "substantial miscarriage of justice has actually occurred" and the appeal should be dismissed. *Held*, further, that the sentence to life imprisonment should, in the circumstances, be reduced to three years. REX v. STONEHOUSE AND PASQUALE. - - - - - **279**

9.——*Sale of opium—Conviction—Petition for leniency—Read by judge before sentence—Appeal to increase sentence.*] The accused was found guilty on two separate charges for unlawful sale of opium and having opium in his possession. Before sentence the trial judge read a petition for leniency which was presented to him and in giving sentence stated that it would be heavier if it were not for the fact that the accused's friends had presented him with a petition asking for leniency, the sentence being four years' imprisonment and a fine of $500 for each offence, the imprisonment to run concurrently. On appeal by the Crown for increase of sentence:—*Held*, that there was error in receiving the petition, the proper practice in the presentation of evidence in mitigation of sentence being the hearing of evidence after verdict either *viva voce* or by affidavit and in the circumstances the sentence should be increased to seven years, and a fine of $1,000 in each case, the imprisonment to run concurrently. REX v. LIM GIM. - - - - - - - - **457**

10.——*Wash suitable for manufacturing spirits — Kept by accused — Conviction—Affirmed by County Court—Appeal—Jurisdiction—Jurisdiction of magistrate—Question of two offences—R.S.C. 1906, Cap. 51, Secs. 133 and 180 (f)—Criminal Code, Sec. 725.*] The conviction of accused by the stipendiary magistrate at Nanaimo on the charge that "without having a licence under the Excise Act he unlawfully did conceal or keep or allow or suffer to be concealed and kept in a place or premises controlled by him, namely, a frame or wooden building on what is known as the Yick Shing Ranch, on Hornby Island, wash suitable for the manufacture of spirits contrary to section 180, subsec. (*f*) of the Excise Act," was affirmed on appeal to the County Court. On preliminary objection to the Court of Appeal that there was no appeal as this was not an

MINING LEASES — *Agreement for sale—Provision as to payment of rent and assessment work—Breach owing to non-payment—Forfeiture—Action for relief.*] The defendants, who held two placer-mining leases, upon which rents and payments in lieu of assessment work were payable on or before the 1st of January in each year, gave an option to the plaintiff to mine the lands within the leases, the plaintiff agreeing to pay the rents and payments in lieu of assessment work on or before the 1st of December in each year. The plaintiff made the first payment of $3,000 under the option but on the 3rd of December following, the defendants, finding that the rent and assessment work payments were not paid to the gold commissioner by the plaintiff, immediately made the necessary payments and treated the option as at an end. The plaintiff sent the required money to the gold commissioner a few days later but it was returned to him owing to its already having been paid. The plaintiff obtained judgment in an action for a declaration that no breach of the covenant to pay rent and assessment work dues had occurred and in the alternative for relief from forfeiture and penalties. *Held*, on appeal, reversing the decision of GREGORY, J. in part (MCPHILLIPS and MACDONALD, JJ.A. dissenting), that although there was no express stipulation in the instrument that time should be deemed to be of its essence, the nature of the transaction was such that the Court would deem it to be so. There was a breach of the contract by the plaintiff and time being of the essence of the agreement the Court cannot relieve against the forfeiture of the option. *Held*, further, that to keep the original payment of $3,000 made so shortly before the plaintiff's default savours too much of hard dealing and the plaintiff should be relieved from forfeiture of that sum. *Steedman* v. *Drinkle* (1915), 85 L.J., P.C. 79 followed. CRONHOLM v. COLE AND COLE. - - - - - **405**

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MUNICIPAL CORPORATION—*Repair of highway—Statutory duty—Wire obstruction imbedded in street — Misfeasance — Negligence — Personal injuries — Evidence—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320.*] Section 320 of the Vancouver Incorporation Act, 1921, provides that "Every public street, road, square, lane, bridge, and highway in the city shall, save as aforesaid, be kept in repair by the city." The plaintiff while passing along Hastings Street near the intersection of Renfrew Street in the City of Vancouver, tripped over an obstruction in the shape of some wire which was imbedded in the street, fell to the ground, and was severely injured. *Held*, that the defendant must assume the burden of proving that it did all that could be reasonably done to prevent the want of repair, and accepting the evidence of the plaintiff as to the manner in which the accident occurred, the defendant has not, in the circumstances, satisfied the burden of removing the presumption that it had failed in its duty, and is therefore liable in damages. WOODCOCK v. CITY OF VANCOUVER. - - - **288**

MUNICIPAL LAW—*North Vancouver by-law—Truck licence required—Truck of Vancouver firm delivering goods in North Vancouver—Contravention of by-law—B.C. Stats. 1925, Cap. 35, Sec. 28.*] The City of North Vancouver Trades Licence By-law recites: "From every owner of every truck plying for hire or used for the delivery of wood, coal, merchandise, or other commodity, $20 for every six months," etc. The defendants carried on the business of wholesale produce merchants in the City of Vancouver and employed travellers to canvass for orders in North Vancouver and other municipalities. From their stores in Vancouver they delivered certain merchandise to a customer in North Vancouver using one of their own trucks for the purpose. The conviction for an infraction of the

2.——*Testator domiciled in New York—Stock in British Columbia mine—"Fair market value"—Application of—Situs—Mobilia rule—R.S.B.C. 1924, Cap. 244, Secs. 3 and 30.*] A testator, who died domiciled in New York City, held 318,800 shares (par value of $1 each) in the Premier Gold Mining Company Limited, the mine and head office of the company being in British Columbia. By order in council pursuant to section 30 of the Succession Duty Act a commission was appointed to enquire into and report what property of deceased is subject to duty under the Act and what is the value thereof. Section 3 of the Act provides that "in determining the net value of property . . . , the fair market value shall be taken as at the date of the death of the deceased . . . ." The evidence disclosed that on the day of the testator's death the selling price of the stock on the exchange was $2.20 and that the quotations for a year before and a year after his death averaged this sum with the price slightly increasing after his death and dividends of 32 per cent. per annum were paid on the par value of the stock during this period. The evidence further disclosed that if the whole 318,800 shares were placed on the market *en bloc* on the date of death it would so depress the market that an average of only about $1.20 could be obtained and that if the stock had to be sold at once the best means of obtaining the highest price would be by selling to underwriters in which case $1.50 per share might be obtained. The commissioner reported that "fair market value" means "such sum as could be obtained by sale of the property under conditions where you have a willing but not anxious seller and where you have all possible potential purchasers acting under normal circumstances brought into consideration" and found that the sum of $2 per share or a total value of $637,600 would represent the fair market value of the stock. *Held*, on appeal, affirming the report of A. D. Macfarlane, Esquire, the commissioner (MCPHILLIPS, J.A. dissenting, and holding that the value should be increased to $2.20 per share), that neither a sale of the shares *en bloc* on the date of the testator's death nor a sale to underwriters at the best price obtainable are sound tests of "fair market value." The commissioner took into consideration all the evidence surrounding the stock including the market quotations on the date of death; the quotations for a year prior and subsequent to death; the number of sales that took place on the markets and the dividends paid. His finding the "fair market value" of the stock at the date of the testator's death at $2 per share should not be disturbed. *Held*, further, that although the testator died domiciled in New York City, the company being registered in British Columbia, and its property and head office being in British Columbia, the *situs* of the shares is in this Province. EXECUTORS OF THE ESTATE OF ISAAC UNTERMYER, DECEASED V. THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA. **533**

TAXATION—*Assessment—Made on wrong basis—Power to interfere—Injustice—Inherent jurisdiction to prevent—Marginal rule 285—R.S.B.C. 1924, Cap. 135—B.C. Stats. 1921, Cap. 55, Secs. 39 and 56 (3).*] The plaintiff Company having a leasehold interest in its Hastings Mill site was assessed by the city assessor as though it was owner of the fee. The Company appealed to the Court of Revision which was composed of the members of the City Council. Pending decision by the Court of Revision the Company brought action in the Supreme Court for a declaration that it is entitled to have the value of its leasehold interest ascertained as liable for taxation and for an injunction restraining the defendants from confirming the assessment. The City charter providing for an appeal from the Court of Revision to a judge of the Supreme Court limits the jurisdiction to the question of whether the assessment is equal and rateable with the

WRIT OF SUMMONS—*Action by mortgagee—Order appointing receiver—Service of order on one defendant—Writ not served on either defendant and expires at end of year without renewal—Authority of receiver after expiration of writ—Marginal rule 45.*] A first mortgagee brought action for taking accounts, foreclosure and possession of the mortgaged premises and on the same day an order was obtained appointing a receiver.

WRIT OF SUMMONS—*Continued.*

The order was served on the defendant Dalgleish but the writ was never served on either of the defendants and not being renewed, expired at the end of the year. The receiver managed the mortgaged premises for three years making a profit for the first year but operating at a loss for the second and third years. Two years after the first writ had expired a new writ was issued at the instance of the plaintiff for the same cause of action against the same parties. On motion for liberty to enter judgment an order *nisi* was obtained and pursuant thereto accounts were taken by the registrar who refused to include the losses during the second and third years of the receiver's incumbency of the mortgaged premises. An order was then made setting aside the registrar's certificate and that the accounts be taken anew to include the losses aforesaid. *Held*, on appeal, affirming the order of HUNTER, C.J.B.C. (MACDONALD, C.J.A. and GALLIHER, J.A. dissenting), that although the writ had not been served on either of the defendants nor renewed within twelve months under marginal rule 45 the authority of the receiver continued after the expiration of the twelve months and the losses in managing the mortgaged premises during the second and third years of his being in charge should be included in the accounts taken by the registrar. CANADA PERMANENT MORTGAGE CORPORATION v. DALGLEISH AND CANADIAN BANK OF COMMERCE. - **300**