THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

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

WITH

A TABLE OF THE CASES ARGUED
A TABLE OF THE CASES CITED

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

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JUDGES

OF THE

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

During the period of this Volume.

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JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES:

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

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MEMORANDA.

On the 15th of March, 1929, the Honourable Gordon Hunter, Chief Justice of British Columbia, died at the City of Victoria.

On the 9th of April, 1929, the Honourable Aulay MacAulay Morrison, a Puisne Justice of the Supreme Court of British Columbia, was appointed Chief Justice of the said Court.

On the 9th of April, 1929, Alexander Ingram Fisher, one of His Majesty's Counsel learned in the law, was appointed a Puisne Justice of the Supreme Court of British Columbia.

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Wheeler v. Morris	(1915)	84 L.J., K.B. 1435	211
v. United States	(1895)	159 U.S. 523	479
White v. Neaylon	(1886)	11 App. Cas. 171	385
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Wilkinson, *In re*	(1922)	1 K.B. 584	105
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Williams v. Cartwright	(1895)	1 Q.B. 142	186
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Williamson v. Hine	(1891)	1 Ch. 390	500
Willis v. Wells	(1892)	2 Q.B. 225	62
Wilson v. Church	(1879)	13 Ch. D. 1	240
v. City of Port Coquitlam	(1922); (1923)	30 B.C. 449; S.C.R. 235	211
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Sons & Co. v. Balcarres Brook Steamship Company	(1893)	1 Q.B. 422	243
Winn v. Snider	(1899)	26 A.R. 384	381
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Wray (a Solicitor), *In re*	(1887)	36 Ch. D. 138	226
Wright v. Monarch Benefit Building Society	(1877)	46 L.J., Ch. 649	61
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Case		Reference	PAGE
Yeates v. Barrett	(1927)	3 W.W.R. 286	294
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Case		Reference	PAGE
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COURT RULES OF PRACTICE ACT.

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that under authority of the "Court Rules of Practice Act," being chapter 224 of the "Revised Statutes of British Columbia, 1924," and all other powers thereunto enabling, Rule 1 of Order 72 of the "Supreme Court Rules, 1925," be repealed, and the following substituted in lieu thereof:—

"Where by section 51 of the 'Supreme Court Act' or by these rules any application ought to be made to or any jurisdiction exercised by the Judge by whom a cause or matter has been tried or partly tried, or heard or partly heard, if such Judge shall die, or shall have died, or shall cease or shall have ceased to be a Judge of the Court during or after such trial or hearing as aforesaid, or if the Judge shall become a Judge of the Court of Appeal, or if for any other reason it shall be impossible or inconvenient that such Judge should act in the matter, the Senior or next Senior Judge of the Court to which the cause or matter belongs may either by a special order in any cause or matter, or by a general order applicable to any class of causes or matters, nominate any Judge to whom such application may be made and by whom such jurisdiction may be exercised."

R. H. POOLEY,
Attorney-General.

Attorney-General's Department,
April 4th, 1929.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

THE BUONAPARTE RANCH LIMITED v. SCHNEIDER.

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1928

March 6.

THE BUONAPARTE RANCH LTD. v. SCHNEIDER

Water and watercourses—Conditional licence—Point of diversion changed by comptroller in final licence—Interference with another final licence—Powers of board of investigation to amend—R.S.B.C. 1924, Cap. 271—B.C. Stats. 1925, Cap. 61, Sec. 54.

In 1912, A applied for a water licence for irrigation purposes, the point of diversion being on one of a chain of lakes which was connected with a creek above known as Phil Creek by an artificial ditch constructed by others some years before and from which a certain amount of water continued to flow into the chain of lakes. He obtained a conditional licence in 1917. In the meantime B obtained a conditional licence for irrigation purposes with point of diversion on Phil Creek at a point below the aforesaid artificial ditch. In 1924, the comptroller of water rights issued a final water licence to A changing the point of diversion to Phil Creek to the point where the artificial ditch carries water into the chain of lakes. At the instance of B the Board of Investigation under the Water Act amended A's final water licence by changing the point of diversion back to where it was in the conditional licence.

Held, on appeal, affirming the Board of Investigation (MARTIN, J.A. dissenting), that although the comptroller has power to change the point

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of diversion it is inconsistent with the Water Act to change it to a point in a different body of water and the Board of Investigation properly amended A's final water licence by changing the point of diversion to its original position.

Statement

APPEAL by defendant from the decision of the Board of Investigation under the Water Act of the 13th of July, 1927. In 1912, one Philip Parke applied for and obtained a conditional water licence to divert water at a point on Phil Creek for use on his ranch close to where Phil Creek flows into Hat Creek, and in 1924, he obtained final licence No. 4577. In 1917, the defendant Schneider applied for and obtained a conditional water licence to divert water from a chain of small lakes north of Phil Creek these lakes being supplied with water from Phil Creek by an artificial ditch which had been constructed some years previously and which had its point of diversion some distance above Parke's point of diversion. In May, 1924, the comptroller of water rights issued final water licence No. 4245 to Schneider but changed the point of diversion to Phil Creek at the point where the old artificial ditch diverted water to the chain of lakes above referred to. On the application of Philip Parke (who later transferred all his rights to The Buonaparte Ranch Limited) the Board of Investigation amended Schneider's final licence by changing the point of diversion to the point as described in the conditional licence.

The appeal was argued at Victoria on the 6th and 7th of February, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Maclean, K.C., for appellant: The final licence was issued to us in 1924, when the point of diversion was changed, the comptroller having power to do this. We then constructed our works and there was no objection until 1926, when this application was made to amend the licence. We submit that all grounds of objection should have been taken before the final licence was granted and there is no jurisdiction to amend now. The Board took a view of the *locus in quo* and improperly based certain conclusions on this: see *London General Omnibus Company, Limited* v. *Lavell* (1901), 1 Ch. 135 at p. 139; *George* v. *Humphrey Brothers* (1912), 17 B.C. 541 at p. 542.

Pitts, for respondent: The Board have jurisdiction to amend under section 54 of the 1925 amendment to the Water Act. The comptroller's action in changing the point of diversion was irregular and inconsistent as it took the water away from my client to which he was entitled under his licence.

Maclean, replied.

Cur. adv. vult.

6th March, 1928.

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

I think the matter disposed of by the Water Board was within its jurisdiction. The change made by the water comptroller was, I think, contrary to the scheme of the Act. The comptroller, Mr. Young, adjudicated upon applications by the appellant and by one Parke, for the right to divert water from what was alleged to be two branches of the same creek. Parke, whose successor the respondent is, was allowed his point of diversion at its present location, and a conditional licence was issued to him. Appellant in his application asked for a point of diversion at the point at which it has now been replaced. He received a conditional licence. That was the situation from 1912 until 1924, when appellant received his final licence with a new point placed above Parke's point of diversion, thereby interfering with his water supply. After a hearing, at which appellant failed to attend, the Board changed the point of diversion back to that fixed by the conditional licence. It was contended that it had no authority to do this, as not being within the powers granted by section 54 of the Water Act Amendment Act, 1925, Cap. 61, which reads:

MACDONALD, C.J.A.

"The Board may at any time amend any licence which in its opinion is incomplete, imperfect, irregular, or inconsistent with the provisions of this Act."

I think the change made by the water comptroller was irregular and inconsistent with the provisions of this Act. It was proved before the Board that appellant's point of diversion as fixed by his conditional licence was not on Phil Creek at all. It was on a chain of lakes or swamps which originally had no connection whatever with Phil Creek. About 40 years ago a small artificial channel was opened from Phil Creek, and water flowed through this channel and formed the chain of lakes or swamps.

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Now, while the comptroller is given power to change a point of diversion, I think it is inconsistent with the Water Act to change it to a point in a different body of water. This the comptroller did when he attached it to Phil Creek, which had no natural connection with the chain of lakes.

MARTIN, J.A.: This is an appeal under section 337 of the Water Act, R.S.B.C. 1924, Cap. 271, which gives a restricted appeal to this Court from four classes of orders of the Board of Investigation established by that Act, the other appeals from that body being to the minister of lands, section 338, and in the disposition of this appeal we have the same ample powers as in the case of an appeal from a "final judgment of a judge of the Supreme Court"—section 337 (1).

The appeal arises out of an order of the Board dated 13th July, 1927, whereby an amendment is ordered to a final water licence issued on 16th May, 1924, by the comptroller of water rights to appellant (Schneider) which changes the point of diversion fixed by him in said final licence and restores it to the point fixed by him in the conditional licence of 7th March, 1917, but which he later in the said final licence changed pursuant to the powers conferred upon him by section 80 of the Act then in force, as follows:

MARTIN, J.A.

"Any licensee may obtain permission from the comptroller to change the point of diversion of the water used by him, or the position of his works, on giving such notices and complying with such terms as the comptroller may require or impose, and subject to the requirements hereinbefore imposed respecting the taking and using of lands."

There is nothing before us to suggest that in making the change pursuant to this section the comptroller did not comply with the statute, or that he in any way exceeded his powers or acted irregularly in the exercise of them.

Wide powers of the first importance are conferred by the statute upon the comptroller and, *e.g.*, he alone has the power to adjudicate upon applications for and issue conditional and final licences and exclusively perform other weighty duties (sections 11, 13, 30 *et seq.* to 76, 281, 289, 291, 299). The said licences issued by him may be reviewed by the Board only in the circumstances set out in section 309 as amended by Cap. 61 of 1925, Sec. 54, as follows:

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"309. (1.) The Board may at any time amend any licence which in its opinion is incomplete, imperfect, irregular, or inconsistent with the provisions of this Act, or in respect of which it appears to the Board that the terms of the licence respecting the duty of water for the land to which the licence is appurtenant and the irrigible area of land are based upon wrong estimates of the said duty of water or area."

"(2.) [Provides for notice to licensee and hearing of objections]."

On the 10th of August, 1926, the respondent (the successor to Philip Parke who obtained a final licence on 12th February, 1925) formally applied in writing to the Board to amend the appellant's (Schneider) final licence

"on the grounds that it is irregular and inconsistent with the Act, in that his point of diversion as shewn on the plan attached to his conditional licence and his application for a licence, is not on Phil Creek, and no notices have ever been posted by him on Phil Creek as required by the Act.

"No application under section 80 of the Water Act has been made by the said John Henry Schneider to change the said point of diversion to Phil Creek, and that the said Final Licence No. 4245 is irregular in that it purports to give the said John Henry Schneider a point of diversion on Phil Creek."

MARTIN, J.A.

As already stated no evidence whatever was given of any irregularity in procedure and the statement in the Board's reasons that the said licence is "irregular" is unquestionably erroneous and therefore the only possible ground upon which the Board had jurisdiction to interfere with the licence was that it was "inconsistent with the provisions of the Act," but I confess myself unable to apprehend how the regular exercise by the comptroller of a special power to change the point of diversion clearly conferred upon him by section 80 as the nominated official for that very purpose, "upon such terms as the comptroller may require or impose" can be said to be "inconsistent" with the Act which deliberately confers that identical and often very necessary power upon him; some official must inevitably be empowered to do so when need be in order to insure the consistent working of the Act. I am therefore, in the first place, of opinion that the Board had no jurisdiction to make the order that it did make (by a quorum of two out of its three, at present members) amending the said final licence to change the point of diversion to one "on the north easterly shore of the above mentioned lake or swamp" as in the said order set out.

In the second place, I am also of opinion that the said order cannot, on the facts, be supported because it is to me obvious

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that its members, with all respect, clearly misunderstood the situation and dealt with the matter, as the evidence before them and us shews, upon the assumption that the case against the present appellant was concluded by the fact that it was established that prior to 1887 no water came from a then un-named creek (later confusedly called, in whole or in part, Phil or Parke Creek) into one small lake (now one of a chain of three lakes) said water being partly diverted in that year from said un-named creek into said lake by a short ditch, about 100 yards long, cut by Alexander McDonald. In the course of time this diverted water considerably increased as the evidence shews, and also increased the number of small lakes from one to three with an original outlet from the lowest by a natural short tributary creek (as the Board itself finds) into a large creek (Hat) to the eastward. But the all-important point is that at the time both Schneider and Parke made their applications for conditional licences in July, 1912, there was in existence and operation a considerable water system consisting of a creek and chain of three lakes with an inlet from what later was called Parke or Phil Creek and an outlet in said small tributary natural creek, and it was in regard to this entire *de facto* water system as a unit in two branches that both applications were made (as shewn by Parke's application with sketch map as well as by Schneider's) and regularly adjudicated upon by the comptroller first by the issuance of conditional licences, and later by final ones, Schneider's preceding Parke's by nearly a year. It is to my mind, clear, that the comptroller properly dealt with the whole system as it existed when it came before him for consideration under the said two applications which alone affected it, being the first to be made thereupon and none later, and in the determination of the question it was of no importance, legally or practically, how the system was originally created, *i.e.*, whether entirely natural or partly artificial. Watercourses often change their channels and their nature and complexion so frequently and unexpectedly from various causes that it is the state of affairs upon the ground at the time of adjudication that must govern the consideration of conflicting claims. If, for example, McDonald's short ditch had only been partly cut and

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abandoned, but the creek in a freshet by the forces of nature had forced its way over the remaining distance (or made an entirely new channel apart from the said ditch) and discharged itself into the detached lake and from that time on made and scoured a new deep channel through a self-created chain of lakes, which completely deprived the old bed of water, could it be said that nevertheless that former but now dried up channel was still to be regarded as the original creek? At most what happened here was that Parke-Phil Creek became in fact by the cutting of the ditch a two-branched water system and on that actual and practical basis it was properly regarded for the purposes of the Act by the comptroller.

MARTIN, J.A.

I am therefore of opinion that the said amending order of the Board cannot be supported being, with respect, based upon a misunderstanding and misapplication of legal principles (as their written reasons shew) and founded upon evidence not material to the real question; the appeal, consequently, should be allowed.

GALLIHER, J.A.: In my view the Board were within their powers in amending the final licence issued by the comptroller, and as I do not regard the watercourse partly natural, and partly artificial as a branch of Phil Creek, I would not interfere with the finding of the Board.

GALLIHER, J.A.

I think the appeal should be dismissed.

MCPHILLIPS, J.A.: In my opinion the Board of Investigation arrived at the right conclusion, and the appellant fails in his adverse contention. I would dismiss the appeal.

MCPHILLIPS, J.A.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *W. B. Bredin.*
Solicitor for respondent: *C. H. Pitts.*

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CORPORATION OF DISTRICT OF PENTICTON *v.* SUTHERLAND

THE CORPORATION OF THE DISTRICT OF PENTICTON v. SUTHERLAND.

Water and watercourses—Water record—Irrigation—Water appurtenant to certain lands—Contract fixing prices for supply—Water system sold to municipality—Municipality to assume obligations under contracts for supply—Order of Water Board raising prices under Water Act Amendment Act, 1925—Validity—B.C. Stats. 1909, Cap. 48; 1925, Cap. 61, Sec. 55.

The Southern Okanagan Land Company acquired a water record for 2,000 inches of water from Penticton Creek and a certain tract of land to which the water record was made appurtenant for domestic and irrigation purposes. The company sold a portion of the lands to the defendant agreeing to supply him with a certain amount of water per acre during the irrigation season at certain stated prices. Subsequently the company sold its entire irrigation system to the plaintiff Municipality who acquired it pursuant to the provisions of the Water Act of 1909, and assumed all obligations of the company as to its water contracts. In 1926 the Municipality increased the water rates to a sum above what was agreed to in the original contracts between the defendant and the Southern Okanagan Land Company claiming the right to do so under an order of the water board passed pursuant to section 55 of the Water Act Amendment Act, 1925. The Municipality recovered judgment for the taxes and water tolls of 1926.

Held, on appeal, affirming the decision of BROWN, Co. J., that the defendant was legally made liable for the increased tolls for 1926.

Statement

APPEAL by defendant from the decision of BROWN, Co. J. of the 20th of August, 1927, in an action to recover municipal taxes and irrigation tolls for 1926, in respect of about 22 acres of orchard lands owned by him on the north side of Penticton Creek in the Municipality of Penticton. The land in question is included in a block of land formerly owned by one Thomas Ellis who in 1892 obtained water record No. 322, as appurtenant to said block of land for irrigation purposes. Ellis sold both the land and the water record to the Southern Okanagan Land Company and the land company then put in a water system. On the 1st of April, 1910, the land company sold the defendant ten acres of land and agreed to supply a certain amount of water per acre at certain prices. Subsequently the defendant bought adjoining lands, the vendor having previously entered into a

like agreement with the company for the supply of water. On the 1st of October, 1910, the Municipality of Penticton purchased the water system including water record No. 322 from the company, the Municipality agreeing to assume all obligations of the company as to the supply of water. Later the Municipality obtained a conditional licence to divert water on Penticton Creek at a point one-half a mile above the point of diversion under water record No. 322 for power and for the purpose of supplying the Municipality with water for domestic purposes. In 1926 the Municipality increased the fees for water above the amount agreed to in the original agreements. This was done under an order of the water board passed pursuant to section 55 of Cap. 61 of the Act of 1925. The appellant complains he has not received sufficient water since 1924, the result being that the crops were poor and many of the trees have died. Further, the agreements as to price of water originally made were disregarded. The plaintiff succeeded for the amount claimed on the trial.

Statement

The appeal was argued at Victoria on the 2nd, 3rd and 6th of February, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Sutherland, in person: The water record of 1892 is still appurtenant to my lands, and I still have the water privileges I acquired when I purchased these lands: see *Dalton* v. *West Shore and Northern Land Co.* (1920), 28 B.C. 384. No licence was issued to anyone. They could not issue a licence except under Part V. of the Act of 1909, Cap. 48. The conditional licence which was issued is not a licence at all. I did not get the quantity of water they agreed to give me, the result being loss of crop and loss of trees dying through lack of water.

Argument

Harold B. Robertson, K.C., for respondent: The action is for the taxes and water tolls for 1926. We submit that under the Act of 1925, Cap. 61, Sec. 55, the Board had power to alter the agreement between the company and the defendant. The Ellis record of 1892 was cancelled under the new Act in 1911 and a new licence was issued to the Municipality. It is proved that the requisite notices of the change were sent to Sutherland. We say (1) it was not an absolute covenant to supply but a

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Argument

covenant to supply all available water; (2) we are not liable unless there is wilful neglect in the supply of water; (3) if there is default in supplying water we are entitled to two days' notice. In any event he must shew that the failure to supply water caused the loss: see *Yukon Gold Co.* v. *Canadian Klondyke Power Co.* (1919), 27 B.C. 81. Assuming there is proof of damages it is not shewn whether it is on his own property or his brother's and there is no assignment from his brother to himself. As to his claim for a return of moneys paid see *Slater* v. *Mayor, &c., of Burnley* (1888), 59 L.T. 636 at p. 638; *Maskell* v. *Horner* (1915), 3 K.B. 106 at pp. 117-18.

Sutherland, replied.

Cur. adv. vult.

6th March, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: A company known as the South Okanagan Land Company acquired the Ellis water record No. 322, and a tract of land to which the same was appurtenant. The record gave the right to the holder to divert 2,000 inches of water from Penticton Creek for agricultural and domestic purposes, which would include purposes of irrigation. The land company sold ten acres of the above mentioned land to the appellant and agreed to supply him with water for irrigation for periods of twelve hours on two days per week during the irrigation season of each year for which the appellant was to pay fees to be fixed from time to time by the company, but in no case to exceed $5 per acre for parcels containing more than five acres.

Thereafter the land company sold its undertaking to the respondent who acquired it pursuant to the provisions of the Water Act, 1909. I will assume that this was legally done and that the rights of the land company in the water and in the undertaking were duly vested in the respondent. Under section 293 of said Act the respondent was made liable for the obligations of the land company.

The appellant was not a party to this transaction; he had an interest in the water record since it was appurtenant, *inter alia,* to his land. What the respondent acquired from the land company was an interest in the water, not the ownership of the

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whole. Had this state of matters remained as it was on the completion of the respondent's purchase, the appellant, I think, would be entitled to succeed on one ground at least, of his appeal. The maximum fee which the respondent was entitled to charge for irrigation in respect of appellant's ten acres would be $50 per annum. In 1926 respondent increased the fees to a sum above that figure. It did this notwithstanding the agreement aforesaid, under and by virtue of an order of the Water Board passed pursuant to chapter 61 of the Acts of 1925, section 55, and by virtue of the interpretation clause of the Water Act. It has not been shewn that this was not regularly obtained. In the absence of proof to the contrary, it must be assumed that it was, and that being so, the appellant was legally made liable for the increased water tolls of 1926.

There is another branch of the appeal which is not affected by the water legislation. The appellant claims damages for non-delivery of water that he was entitled to under the agreement with the land company. That agreement, article 11, provides that the company's covenant to convey and supply water to the appellant shall not be deemed to be broken by reason of delivery of a less quantity than the appellant was entitled to unless two clear days' notice in writing to the company should be given, from time to time, of said shortage. That notice was not given, and therefore appellant has not put himself in the position to claim a breach in that respect.

MACDONALD, C.J.A.

The appellant, who appeared in person, took other exceptions to the judgment appealed from, but I am forced to the conclusion that they are not tenable.

Mr. Sutherland included in his appeal a claim for relief in respect of land agreed to be conveyed to him by his brother. This is on the same footing as his own ten acres and is disposed of by the findings above.

The appeal must be dismissed.

MARTIN, J.A.

MARTIN, J.A.: No good cause has, in my opinion, been shewn for disturbing the judgment herein and therefore this appeal should be dismissed.

GALLIHER, J.A.

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

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CORPORATION OF DISTRICT OF PENTICTON *v.* SUTHERLAND

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I would dismiss the action and allow the counterclaim. The respondent in this appeal is a municipal corporation and became entitled to water records and the distribution of water for irrigation purposes, transferees from companies with such rights under the Water Act and the respondent was under compulsion to carry out the terms of contract for the supply of water with landowners of whom the appellant is one. The error that is patent is this, that the Municipality proceeded to supply the water and imposed rates in disregard of provisions of the Water Act and in the same manner as in respect of the supply of domestic water under the provisions of the Municipal Act. The water in question was water appurtenant to the land of the appellant and could not be dealt with in this manner. The appellant along with all other landowners had a proprietary interest in the water and there was a statutory obligation on the respondent to supply the water and in error and contrary to the statutory rights of the appellant water was diverted to other areas and to other users contrary to the statute and the contractual obligations that were imposed upon the Municipality (see MURPHY, J. in *Dalton* v. *West Shore and Northern Land Co.* (1920), 28 B.C. 384 at p. 386). In that my learned brothers have all come to a different conclusion to that at which I have arrived, and the case is not one that can proceed further unless by special leave, I will not, in any great detail or specially, draw attention to questions of fact, but deal with them generally. With regard to the Board of Investigation's order affecting the rights of the appellant, I would apply the *ratio decidendi* as contained in my judgment in *Kenworthy* v. *Bishop* (1925), 36 B.C. 38, especially at p. 45. The appellant was not served with the requisite notice; it was not the case of a hearing had by the Board of Investigation, all parties being heard. In my opinion, there was complete frustration upon the part of the respondent of the contract that it was under an obligation to carry out, there being a wilful withholding of water from the appellant in direct breach of the obligation upon the respondent to supply water to which the appellant was entitled and the supply of water to other areas which water the appellant was plainly entitled to. In this connection, I would refer to the decision of this Court in *Yukon Gold Co.* v. *Cana-*

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dian Klondyke Power Co. (1919), 27 B.C. 81. The analogy with the present case is complete the only difference being that here it is water, there it was power. The present case is one of flagrant departure from the obligations that were by contract and by statute imposed upon the respondent and the destruction of all possibility of effectively growing and bringing to maturity in a commercial way, and suitable for the market, fruit which the appellant would have been able to do if the proper supply of water had been given. The defence set up by the respondent and the contention put forward upon this appeal in support of the challenged judgment is one wholly devoid of merit. It shocks one to see the plain disregard of contractual obligation presented in this case and the non-observance of statutory law upon the part of the respondent with the result that fruit-growers —of whom the appellant is one—are exploited out of proper returns in the carrying on of their orchards resulting in the destruction of orchards that took long years to bring into the condition of commercial production.

MCPHILLIPS, J.A.

I cannot leave the consideration of this case without adverting to statutory provisions that have been added to the Municipal Act and the Water Act, curative in their nature, and which amount in effect to prevention of reasonable exception being taken to defaults on the part of the municipal authority in complying with the general provisions of both the above-mentioned Acts and which in their effect render it difficult, if not impossible, for the Court to decree just relief to the users of water who reasonably were of the belief that there had been no disturbance in their vested right to water and unimpaired in flow in the carrying on of the industry of orchardists; in truth it comes to this that that which is brought about is an enforced denial of justice in many cases. This case in its result affords an instance of this which is greatly to be deplored.

MACDONALD, J.A.

MACDONALD, J.A. would dismiss the appeal and cross-appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *W. A. Woodward.*
Solicitor for respondent: *H. H. Boyle.*

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1928

March 6.

In re Estate of D. H. Wilson, Deceased.

Wilson v. Minister of Finance

IN RE ESTATE OF D. H. WILSON, Deceased. WILSON v. MINISTER OF FINANCE.

Succession duty—Contingent estate—Bond for payment within two years of death approved—Interest—Date from which it is chargeable—R.S.B.C. 1924, Cap. 244, Secs. 17, 19 and 20.

Section 20 of the Succession Duty Act provides that duty is payable at the death of the deceased "unless otherwise herein provided for." By section 17 duty on contingent estates may be paid "within such time, not exceeding two years from the death of the deceased, as may be fixed by the Lieutenant-Governor in Council."

A testator whose estate included a contingent interest, died on the 10th of December, 1926, and his executrix, electing to pay the duty on the contingency within two years, filed a bond as security for payment of the duty on the 10th of December, 1928, which was duly approved by order in council. The minister asserted the right to add interest at 6 per cent. on the duty payable from the date of testator's death until the date of payment. On petition of the executrix it was held that the Crown was entitled to interest as claimed.

Held, on appeal, reversing the decision of Murphy, J. (McPhillips, J.A. dissenting), that the duty was made payable with the approval of the Lieutenant-Governor in Council two years after the death of the testator under section 17 which is within the exception "unless otherwise provided for" in section 20, and no interest is chargeable except from the date fixed for payment.

Statement

APPEAL by the executrix of the estate of D. H. Wilson, deceased, from the order of Murphy, J. of the 30th of September, 1927, on a petition by the executrix, the widow of deceased, for a determination of the amount of succession duty payable on the 10th of December, 1928, in respect of said estate. The testator died on the 10th of December, 1926, and letters probate were duly granted to the executrix. The succession duty to which the estate was liable was determined at $20,452.36 of which sum $10,411.21 is in respect to the interest of the widow in the estate of a life tenant and the annuity to one Thomas Wilson as a beneficiary, the balance of $10,041.15 being in respect to the interest of three daughters who are entitled to a contingent remainder in the whole estate. The said sum of $10,411.21 was duly paid on the 1st of June, 1927, and pursu-

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ant to the provisions of section 17 of the said Act the Lieutenant-Governor in Council approved of a bond by the United States Fidelity & Guarantee Company, the widow, and the three daughters in the penal sum of $37,293.61 for payment on the 10th of December, 1928, of the amount of succession duty payable in respect to the interest of the said contingent remainderman the bond being duly executed and delivered to the minister of finance. The said minister asserts the right to add interest at the rate of 6 per cent. per annum upon the said sum of $10,041.15 from the 10th of December, 1926, until paid and the petitioner disputes the right to charge interest until after the 10th of December, 1928. It was held by the trial judge that the Crown is entitled to interest as claimed.

Statement

The appeal was argued at Victoria on the 10th of January, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, for appellant: Section 20 of the Act is the only section that deals with interest, and interest is payable on all duties that become payable at death. This is a case where it is not payable at death and is otherwise provided for. The wife has a life interest in the whole estate and the remainder is to the three daughters. The question is as to the duty on the contingent interest to the daughters. Section 17 provides three alternatives: (a) The executor may pay any time within two years; (b) she may with the consent of the minister pay after the expiration of the two years; and (c) it may be paid when the estate comes into possession. We submit that section 19 does not apply to this case and is confined to duties that are payable on the date of the testator's death.

Darling, for respondent: The whole Act should be considered. Section 20 deals with the time when interest is payable and applies to all duties. On the construction of the statute see Halsbury's Laws of England, Vol. 27, p. 181, sec. 348.

Bull, in reply, referred to Maxwell on the Interpretation of Statutes, 3rd Ed., p. 168.

Cur. adv. vult.

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MACDONALD, C.J.A.: Section 20 of the Succession Duty Act, Cap. 244, R.S.B.C. 1924, makes the duty payable at the death of the deceased, "unless otherwise herein provided for." By section 17, duty on contingent estates, as these are, may be paid "within such time not exceeding two years from the death of the deceased, as may be fixed by the Lieutenant-Governor in Council." In my opinion, the true construction of these provisions is that no interest on the duty is chargeable except from the date so fixed.

I would allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: This appeal turns on the meaning to be attributed to the language used in sections 17, 19 and 20 of the statute, and after a careful consideration of them it is my opinion that the appellant is not liable to pay the interest demanded from her, and so the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: The property here subject to succession duty included future or contingent estate and the executors having elected to pay the succession duty on this estate within the period of two years from the death of the deceased, the duty on such contingent estate was calculated on the value of such estate as of the date of the death of the deceased under section 32 of the Succession Duty Act, R.S.B.C. 1924, Cap. 244.

The executors proceeded under subsection (1) of section 17 and there was no commutation as under section 19. A bond as provided for in section 23, subsection (2) was approved by order in council and duly filed for payment of such duty on 10th December, 1928, being within two years from the death of the deceased.

The learned trial judge, from whose order this appeal is taken (MURPHY, J.), has allowed interest at the rate of 6 per cent. as provided in section 20, from the 10th of December, 1926, until paid.

Mr. *Bull* on behalf of the executors disputes this right of the finance minister to charge interest until after the time fixed for payment, December 10th, 1928.

Section 20 is the only one that deals with the payment of interest on succession duty. Section 20 (1) is as follows:

"The duties imposed by this Act, unless otherwise 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 6 per centum per annum shall be charged and collected from the death of the deceased."

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The estate in question comes within the exception "unless otherwise provided for" in section 20 and is dealt with in sections 17 and 19.

Two courses might have been pursued, one for commutation as of a present payment under section 19, and one for payment within two years which latter was here adopted. Under section 17 the time for payment is not immediate payment but is fixed at two years. The way I view sections 17 and 19 is this: Under section 19 after commutation the amount agreed upon became due and payable at once, the present worth would be determined and being a contingent estate, the amount payable would be less than would have been the case where the estate came into possession and enjoyment on the death of the testator. I do not regard section 17 as being merely a section authorizing the Lieutenant-Governor in Council to extend the time for payment of an amount commuted under section 19. It may apply for that purpose, which I do not decide, but it seems to me it has a wider scope which the petitioner here availed herself of. The effect of section 17 seems to me to be this: The petitioner as in this case, goes to the department and says, as to succession duty affecting the contingent interest of the children, "I wish to pay that within two years. While their interest might not come in for several years, I am willing to pay within two years without commutation, the sum that would be computed as of this date." The department agree to this and a bond is put up to secure payment of the amount on that date. If not paid on that date, by the consent of the minister, an extension may be obtained but in such event certain consequences flow therefrom, which are dealt with in the section. It seems to me that this is a course open to the petitioner independent of section 19, and within the exception in section 20. A time is thus fixed for payment of duty on a contingent interest to the same effect that the statute in section 20 fixes the time of payment on property coming into enjoyment at time of death. In this latter case if paid immediately, or within six months after death, no interest

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is charged. Under section 17 the time fixed for payment is two years after death, and no interest should be charged if paid on or before the time fixed.

I would allow the appeal.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I would affirm the judgment of Mr. Justice MURPHY. I cannot take the view that the case is one coming under the words "unless otherwise provided for" as contained in section 20 of the Succession Duty Act (Cap. 244, R.S.B.C. 1924) and that section 17 in admitting payment of duty on contingent estates within two years from the death of the deceased brings such a case within those words. The interest, in my opinion, has been properly allowed and no case has been made out which admits of it being disallowed. Section 20 is the controlling section and imperatively imposes interest in all cases unless it can be established that the case is one of statutory exemption and I see nothing of that kind here.

I had occasion to deal with this subject recently in *In re Estate of John Henry Oldfield, Deceased* (1927), 39 B.C. 119. That case deals with the one case where the interest may be remitted or postponed in running. The present case is wholly outside the statute and there can be no exemption of payment of the interest in my opinion.

MACDONALD, J.A.

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

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Tupper, Bull & Tupper.*
Solicitor for respondent: *Clarence Darling.*

IN RE ESTATE OF GEORGE KEYES, DECEASED. KEYES *ET AL.* v. GRANT *ET AL.*

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Will—Construction—Devise to wife—"This is my wish (her being free to use her own judgment)," meaning of—Precatory trust—Wife predeceased husband.

A testator devised and bequeathed to his wife "all my personal property moneys securities everything that I now possess or may possess at the time of my decease and this is my wish (her being free to use her own judgment) for her Sadie Keyes to will at her death to," etc. Then follow certain legacies. Husband and wife made their wills on the same date in precisely the same words, each bequeathing to the other all their property as above. The wife predeceased her husband. On originating summons by the executor it was held that there was in the will "a direction amounting to an obligation" as distinguished from a mere expression of the testator's wishes thus creating a trust in favour of the beneficiaries.

Held, on appeal, reversing the decision of MORRISON, J., that in view of the words "her being free to use her own judgment" the direction to carry out the testator's wishes cannot be construed as imperative. The will should be interpreted to mean that the testator gave his property to his wife absolutely and the doctrine of precatory trusts does not apply.

Statement

APPEAL by the next of kin of George Keyes, deceased, from the decision of MORRISON, J. of the 27th of October, 1927, on an originating summons issued on the application of Gordon Grant, sole executor of the estate of Sadie Keyes, deceased, and George Keyes, deceased. George Keyes and Sadie Keyes were husband and wife and on the 3rd of July, 1926, they both made wills in precisely the same terms, the husband bequeathing all his estate to his wife and the wife bequeathing all her estate to her husband. Sadie Keyes died on the 30th of March, 1927, and George Keyes died on the 13th of May, 1927. The will of George Keyes devised and bequeathed all his property to trustees in trust, firstly to pay debts, testamentary and funeral expenses and secondly, as follows:

"I give, devise and bequeath unto Sadie Keyes my lawful wife all my personal property moneys securities everything that I now possess or may possess at the time of my decease and this is my wish (her being free to use her own judgment) for her Sadie Keyes to will at her death to," etc.

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Then follows a detailed list of proposed legacies. The question raised was whether the words "this is my wish" used in the will created a precatory trust and it was held by the trial judge that there was in the will "a direction amounting to an obligation" as distinguished from a mere expression of the testator's wishes thus creating a trust in favour of the parties to whom the testator intended the property should be distributed.

The appeal was argued at Victoria on the 11th of January, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Argument

Savage, for appellant: The will gave all the property to the executors upon certain trusts: (1) To pay debts, etc.; (2) bequeaths all his property to his wife, "and this is my wish (her being free to use her own judgment) for her to will at her death to," etc. Then certain bequests are set out. His wife predeceased him and we submit there is a lapse: see Theobald on Wills, 8th Ed., p. 874. There is an intestacy except as to the debts: see *Elliot* v. *Davenport* (1705), 1 P. Wms. 83. As to the word "wish" see *Re Atkinson; Atkinson* v. *Atkinson* (1911), 103 L.T. 860 at pp. 861-2; *Re Walton* (1911), 16 W.L.R. 679; *Comiskey* v. *Bowring-Hanbury* (1905), A.C. 84 at p. 88; *Briggs* v. *Penny* (1851), 3 Mac. & G. 546 at p. 554; *In re Adams and the Kensington Vestry* (1884), 27 Ch. D. 394 at p. 406; *Mussoorie Bank* v. *Raynor* (1882), 7 App. Cas. 321 at p. 331. *Bank of Montreal* v. *Bower* (1889), 18 Ont. 226 at p. 231; *Re Walker* (1924), 56 O.L.R. 517; *Re McClennan* (1925), 58 O.L.R. 24; *Morrin* v. *Morrin* (1886), 19 L.R. Ir. 37.

Carmichael, for respondent beneficiaries: We would have more difficulty if there were only one will to consider. The two wills shew a common intention and the intention of the testator is not questioned. This is clearly a case where the Court should lean more to testacy than to intestacy.

Colgan, for respondent St. Anthony's Catholic Church: That the obvious intention of the testator should be acceded to see *Kirby-Smith* v. *Parnell* (1903), 72 L.J., Ch. 468 at p. 470. That there is a precatory trust see *Johnson* v. *Farney* (1913), 14 D.L.R. 134.

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Kerr, for the executor.

Savage, replied.

Cur. adv. vult.

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MACDONALD, C.J.A.: In my opinion it is quite clear that this appeal must be allowed.

MACDONALD, C.J.A.

The deceased, George Keyes, devised and bequeathed all his property to trustees in trust, firstly, to pay debts, testamentary and funeral expenses, and secondly, as follows:

"I give, devise and bequeath unto Sadie Keyes my lawful wife all my personal property moneys securities everything that I now possess or may possess at the time of my decease and this is my wish (her being free to use her own judgment) for her Sadie Keyes to will at her death," etc.

in favour of several objects.

Sadie Keyes predeceased her husband by a few weeks. MORRISON, J. held that a precatory trust had been created by the second clause of the will. The next of kin of the testator contest this and claim the estate.

Precatory trusts are not now so lightly inferred from words expressing a testator's wish as they once were, but even in the former state of opinion, it would be difficult to construe the words in question here as an imperative direction to carry out the testator's wishes in the way expressed, particularly in view of the words "her being free to use her own judgment." The appeal should therefore be allowed, but the costs of all parties should be paid out of the estate.

MARTIN, J.A.: This appeal concerns a precatory trust and more than a century ago it was said in the House of Lords, by Lord Redesale, that "all cases of this description were to be considered with very considerable strictness"—*Meredith* v. *Heneage* (1824), 1 Sim. 542, 565—and though this wise injunction was subsequently lost sight of and a laxity introduced for a considerable period yet it was happily restored at latest in 1911 by the decision of the Court of Appeal in the leading case of *Re Atkinson; Atkinson* v. *Atkinson* (1911), 103 L.T. 860, which states definitely that the "current has turned." That case I have applied as far as possible to the present (though Lord Chancellor Cottenham truly said in *Wood* v. *Cox* (1837),

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2 Myl. & Cr. 684, that "in cases of this kind little assistance is to be derived from former decisions") with the result that the trust set up has not, in my opinion, been established in accordance with the modern view of the subject nor indeed, as the two older cases above cited and others shew, would it have been established thereunder, because the strong expression "being free to use her own judgment" is tantamount to an unfettered exercise of disposition; in short, looking at the will as a whole the "wish" here relied upon is not more than what Cozens-Hardy, M.R. styles "a mere super-added expression of a desire or wish that he will do something in favour of a particular object."

The appeal therefore should be allowed.

GALLIHER, J.A.: The point for decision is whether the clause in the will,

"I give, devise and bequeath unto Sadie Keyes my lawful wife all my personal property moneys securities everything that I now possess at the time of my decease and this is my wish (her [she] being free to use her own judgment) for her Sadie Keyes to will at her death," etc.

(then follows a number of proposed legacies) is to be interpreted as a "direction amounting to an obligation," as the learned judge below finds, or as a bequest to Sadie Keyes expressing a wish that she will deal with the property in her will in accordance with that wish.

GALLIHER, J.A.

A direction amounting to an obligation cannot, I think, under the authorities be held to have been given the words "her [she] being free to use her own judgment," being opposed to imposing an obligation and being in conformity with a wish and where such is the case, we should give effect to that which is in conformity rather than what is opposed.

On the same day on which the will of George Keyes was executed, Sadie Keyes executed a will in favour of George Keyes, in precisely the same words, and expressing the same wish. Sadie Keyes died on 30th March, 1927, and George Keyes on May 13th, 1927, and both wills were by order, dated 1st June, 1927, directed to be probated, and letters probate were granted of George Keyes's will on 27th June, 1927, and of Sadie's will on 28th June, 1927.

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It occurred to me during the argument that the wish being mutual as evidenced by the respective wills executed on the same day, and the wish of each and the intention of each being carried out in so far as it could then be, that might have some effect in determining the matter but on consideration I think we must construe the respective wills as if no other will had been made and in doing so, we should give effect to Mr. *Savage's* contention, and allow the appeal.

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

MACDONALD, J.A.: Three questions were submitted for the opinion of the Court, *viz.*:

"1. Did the whole of the estate, real and personal, of the said Sadie Keyes, deceased, upon her death pass to the said George Keyes, as her sole heir?

"2. If the answer to question 1 is in the negative, who are the heirs of the said Sadie Keyes, and what interest do they take respectively in her estate?"

"3. Who are the next of kin and the heirs of said George Keyes, deceased, and what interest do they take in his estate?"

MACDONALD, J.A.

The first question presents no difficulty. The answer is in the affirmative, as declared in the order appealed from. The only question to determine is the interpretation of the clause in the will in which the deceased testator George Keyes, after devising and bequeathing to his wife, Sadie Keyes—"all my personal property moneys securities everything that I now possess and may possess at the time of my decease," adds—"and this is my wish (her being free to use her own judgment) for her Sadie Keyes to will at her death to St. Anthony's Catholic Church, Marpole, B.C. $1,000 of which $300 to go for masses to be said for the repose of our souls, $1,000 for to erect a tomb-stone, $500 for the upkeep of our graves, $1,500 to Lena Ugland of Kenyon, Minn., sister of Mrs. S. Keyes," etc., followed by a number of similar bequests.

His wife, Sadie Keyes, who predeceased him by several months, by her will after devising and bequeathing to executors in trust, for her husband, all her property, added provisions in identical terms to those contained in her husband's will. She

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expressed a similar wish ("he being free to use his own judgment"). Both wills were executed on the same day. As the wife predeceased the husband, there was a lapse of the devise and bequest to her. Is a trust imposed on the husband's executor to carry out this "wish" or desire; if not, and there is an intestacy to this extent, the next of kin take, otherwise the executor must carry out the wishes of the deceased as provided for in the will. It will be observed that the wife of the deceased, had she lived, might exercise her own judgment—a personal act. Can that judgment be exercised by her executor?

First, consider the estate the wife would take had she survived her husband. The testator intended to leave the property under the entire control of his wife. He then adds a wish that (only if she thought fit) she by her will would dispose of it in a certain manner, as already indicated. It is perhaps more than a recommendation, but not more than a "confident expectation." I add the word "confident" because we may look at both wills and when we find in the will of Sadie Keyes a similar wish, addressed to her husband, it discloses a mutual understanding. As, however, the testator did not in apt terms cut down the interest given to the wife, "it will not now be held without more that a trust has been thereby created." *Bank of Montreal* v. *Bower* (1889), 18 Ont. 226 at p. 231.

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There is, therefore, no trust enforceable by the beneficiaries mentioned. The cases shew that the doctrine of precatory trusts is not given as wide an application as formerly, *Re Atkinson; Atkinson* v. *Atkinson* (1911), 103 L.T. 860. To create it the words used by the testator must be in the nature of a direction. Here it is not only a mere wish—quite different from a direction—but further, it is subject to the judgment of the devisee. Her option or discretion is not excluded. When, therefore, she may interpose her own will to defeat the "wish" or desire it cannot be held that a trust is created. *Mussoorie Bank* v. *Raynor* (1882), 7 App. Cas. 321 at pp. 330-1.

Counsel for respondent admitted that he would have difficulty in establishing a precatory trust if there was only one will. I cannot agree, that reading the wills together assists the respondent; rather the contrary, as in each case it is carefully restricted

to a desire subject to being defeated at the will of the devisee.

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Savage & Keith.*
Solicitor for executor: *P. McD. Kerr.*
Solicitors for respondent beneficiaries: *Ladner & Cantelon.*
Solicitor for St. Anthony's Catholic Church: *H. W. Colgan.*

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Real property—Sales of portions of quarter-section—Overlapping of surveys—First survey under vendor's instructions—Error made in locating corner post—Effect on subsequent sale of adjoining portion of quarter-section.

G. owned a quarter-section of land with the exception of a railway right of way running across its southern end. G. sold a strip to C. in 1910, described as 184 feet wide and running from the north boundary line to the right of way with its side lines parallel to the western boundary of the quarter-section, the north-west corner of the strip being 460 feet from the north-west corner of the quarter-section. G. instructed his own surveyor to survey the strip and shewed him the post at the north-west corner of the quarter-section and the spot where the western boundary line reached the right of way, but in pointing out the latter he erred by placing it 33 feet east of the true position, so that in surveying C's strip the surveyor put the two south corner posts thereof 33 feet east of where they should have been according to the description. C. entered into possession of the strip as surveyed, subdivided it into lots and in 1914 sold a portion of the two lots at the south end of the strip to the plaintiff. In 1911, G. sold M. a strip 163 feet wide, and running from north to south described as adjoining the C. strip on its eastern side. M. had his strip surveyed and in running his side boundary lines parallel to the western boundary of the quarter-section it overlapped C's strip at the southern end by 33 feet. In 1924, M. sold his strip to the defendant who trespassed on the plaintiff's lots after the plaintiff had built a house and made other improvements. The plaintiff's action for damages for trespass and an injunction was dismissed.

Held, on appeal, reversing the decision of MORRISON, J. (MACDONALD, C.J.A.

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dissenting), that as the strip sold to C. was surveyed under the vendor's directions and C. entered into possession of the strip as surveyed making improvements thereon, he is entitled, notwithstanding the error in the survey, to the strip so surveyed as against the vendor or any person to whom the vendor subsequently transfers adjoining portions of the quarter-section.

Statement

APPEAL by plaintiff from the decision of MORRISON, J. of the 11th of November, 1927, in an action for trespass. One Goard owned all that portion of the north-east quarter-section of section 8, township No. 1, New Westminster District, that lies north of the right of way of the Victoria Terminal Railway and Ferry Company. In 1910, Goard sold to one Creelman a strip of this land (called lot 6) 184 feet wide and running from the north boundary of the quarter-section to the railway right of way, the north-west corner post of the strip being 460 feet east of the north-west corner of said quarter-section and by the description the side boundary lines of the strip were to be parallel with the westerly boundary line of the quarter-section. When this sale took place Goard employed a surveyor to locate the position of lot 6 by corner posts. He shewed the surveyor the true north-west corner post of the quarter-section but in shewing him where the westerly boundary line of the quarter-section reached the northerly boundary of the railway right of way he erred by shewing him a point 33 feet east of the true point and measuring from the spot shewn him the surveyor placed the south-east and south-west posts of lot 6, thirty-three feet too far easterly. Creelman then subdivided the strip into 34 sub-lots, number 1 of which adjoined the railway right of way and in 1914 he sold the plaintiff the easterly 47½ feet of sub-lots 1 and 2. In 1911, Goard sold one Milliken a strip of the quarter-section (called lot 5) 165 feet wide running from the northerly boundary of the quarter-section to the railway right of way and adjoining the eastern boundary line of the Creelman strip. The Milliken strip was surveyed with its easterly and westerly boundaries parallel to the westerly boundary of the quarter-section and thus encroached 33 feet on the southerly end of the Creelman strip. In 1924 Milliken sold lot 5 to the defendant. Shortly after purchasing the plaintiff made improvements on his lots by building a house costing

$1,000, erecting outhouses and cultivating a garden. The defendant encroached on the plaintiff's lots by erecting a wire fence across the easterly portion thereof. The plaintiff's action for trespass and for an injunction restraining the defendant from entering on his lands and building fences thereon was dismissed.

Statement

The appeal was argued at Victoria on the 30th and 31st of January, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Reid, K.C., for appellant: The first surveyor of the quarter-section was one Wilkie who put up the corner posts but when the railway ran through the southern posts disappeared. Draper's survey was four years after Wilkie's and Goard shewed Draper the north-west post and he shewed him where the south-west post ought to be. Then Draper measured from there to locate the positions of the south-east and south-west posts of the Creelman strip adjoining the north boundary of the railway right of way. Goard, the vendor, shewed the surveyor what Creelman was buying: see *Davison* v. *Kinsman* (1853), 2 N.S.R. 1. What Goard sold Milliken later is the strip east of what he sold Creelman and Milliken's successor in title is confined to the strip sold Milliken who bought subject to Creelman's rights: see *Johnston* v. *Clarke* (1884), 1 B.C. (Pt. II.), pp. 56 and 81.

Argument

A. S. Johnston, for respondent: It is common ground that there was a mistake in Draper's survey. The post for the south-west corner of the quarter-section was removed and he should have taken proper steps to find the true spot by running a line straight south from the north-west corner post, but he did not take the trouble to do this. The side boundary lines of the Creelman strip are not parallel with the westerly boundary line of the quarter-section and the description of the strip provides that they should be. The result is that the southern end of the Creelman strip as surveyed by Draper is 33 feet too far east and encroaches on the Milliken strip to that extent. We are entitled to the ground in dispute under the correct survey: see *Lee Mong Kow* v. *Registrar-General of Titles* (1923), 32 B.C. 148; *Seippel Lumber Co.* v. *Herchmer* (1914), 19 B.C. 436.

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Argument

On the cross-appeal we are entitled to substantial damages: see *World P. & P. Co.* v. *Vancouver P. & P. Co.* (1907), 13 B.C. 220. As to the survey see *Davis* v. *Waddell* (1857), 6 U.C.C.P. 442; *Dyell* v. *Millage* (1877), 27 U.C.C.P. 347.

Reid, in reply: On the question of costs see *Harnett* v. *Vise* (1880), 5 Ex. D. 307; *Rice* v. *Burckhardt* (1925), 36 B.C. 180; *Huxley* v. *West London Extension Railway Co.* (1889), 14 App. Cas. 26.

Cur. adv. vult.

6th March, 1928.

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

One Goard, was the owner of a parcel of land, and in 1910 sold part of it to one Creelman. Goard employed a surveyor, Draper, to survey the part sold to Creelman. The description in the deed of the land sold is as follows:

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"Commencing at a point on the north boundary of the said quarter-section four hundred and sixty feet six inches east of the north-west corner of the said quarter-section thence southerly parallel to the west boundary of the said quarter-section to a point on the north boundary of the right of way of the Victoria Terminal Railway and Ferry Company four hundred and sixty feet ten inches easterly (measured along the line of said right of way) from the westerly boundary of the said quarter-section thence easterly along the north boundary of the said right of way one hundred and eighty four feet thence northerly parallel to the west boundary of the said quarter-section, to the north boundary of the said quarter-section, thence westerly along the north boundary of the said quarter-section one hundred and eighty three feet nine inches to the point of beginning."

The surveyor who was accompanied by Goard, made a mistake in the position of the south-west corner post of the quarter-section. Goard told him where he thought the line would strike the railroad right of way, but this was wrong; it was 33 feet farther east than the true point. The lines running north and south were therefore not parallel to the westerly boundary of said quarter-section. The deed to Creelman contained the correct description, the description I have just quoted. Shortly thereafter Goard sold to one Milliken a portion of land lying east of Creelman's. This description was also tied on to the north-west corner post of the quarter-section, and as in Creelman's deed, the north and south lines were to be parallel with the westerly boundary of said quarter-section. A conflict there-

fore has arisen between the appellant, who claims title through Creelman, and the respondent, who claims title through Milliken. Though there is no conflict between the two deeds, yet because of the said mistake appellant claims the said 33 feet of overlap. The respondent secured the services of a Provincial land surveyor, Mr. Wilkie, who ran the lines according to the records which he found in the Land Registry office. His survey again was checked up by another surveyor, who reaffirmed it. The appellant had no survey made. The learned judge accepted the evidence of Wilkie and the other surveyor, and gave judgment for the respondent.

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It was argued that the owner of land may go upon it, plant a stake at any place, draw a line to another point and plant a stake there, and so on until he has planted four corner stakes, irrespective altogether of surveys and if he convey the property so staked and subsequently convey the balance to another, the title of the former cannot be attacked. I have no desire to question that proposition, providing the property so staked is described in the deed in accordance with such staking. That was not what happened here. It was intended that the survey of each parcel should conform to the lines of the quarter-section, and it was by misadventure that Creelman's parcel was not surveyed to conform. What the parties intended should be conveyed is precisely what has been conveyed.

The strip of land which appellant now claims was never conveyed to him; it is outside the description in Creelman's conveyance, and within that in Milliken's.

The appeal should therefore be dismissed.

MARTIN, J.A.

MARTIN, J.A.: It is agreed that the Land Registry Act does not apply to the question in dispute herein, hence it is to be decided upon principles that govern cases of the kind apart from special statutory provisions. Such being the situation I view the matter (upon the uncontradicted evidence, in this respect) as being simply and shortly one where an owner of a considerable piece of land being requested to sell a part of it goes with the prospective purchaser, or his agent, upon the ground and then and there points out and defines by his surveyor then present for that express purpose the exact boundaries of the lot he is

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selling to the purchaser and which the purchaser is buying from him, and after the surveyor had then and there located that lot the description of it, supposed to define and represent the actual location, is inserted in the deed and the purchaser takes his deed and also possession thereunder and remains by himself and successors in quiet enjoyment of the lot for 16 years in the course of which valuable improvements have been made thereupon in building and otherwise. That in such circumstances even the vendor would be estopped from disputing the purchaser's right to possession or title is in my opinion, clear from the decision of our National Supreme Court in *Grasett* v. *Carter* (1884), 10 S.C.R. 105, wherein Ritchie, C.J. says, pp. 110-11:

> "I think it is clear law, well established at any rate in the Lower Provinces where I came from, and I believe it must be established everywhere, that where there may be a doubt as to the exact true dividing line of two lots, and the parties meet together and then and there determine and agree on a line as being the dividing line of the two lots, and, upon the strength of that agreement and determination, and fixing of a conventional boundary, one of the parties builds to that line, the other party is estopped from denying that that is the true dividing line between the two properties."

And see also *Davison* v. *Kinsman* (1853), 2 N.S.R. 1.

MARTIN, J.A.

The case at Bar is indeed even stronger because no question of estoppel is really raised herein, since the original vendor does not dispute the purchaser's rights in any respect, but if he did attempt to do so he would be estopped undoubtedly. The case of a vendor who deliberately carves out of his property a defined area thereof and puts the purchaser in possession of it is also much stronger than the settlement of a disputed boundary between opposing owners because as regards the vendor's locatee, who gets precisely what he stipulates for, there is no dispute between the two contracting parties and therefore nothing to compromise or settle. The fact that in the attempt to define upon paper the definition of the location upon the ground an error in description may have crept in cannot alter the matter in principle, though it might render the vendor liable for the results of his subsequent sales to other parties if his actionable negligence could be established.

In the present case the evidence of the care taken by the purchaser (Creelman) to have an exact location upon the

ground is very marked and he thus describes how he insisted upon it:

"I bought the piece I have now from Mr. Goard after I had a little trouble with him about getting located. There were no stakes in the first place, you see, and I did not want to sign up the deed until I knew exactly where I was.

"Yes? And I insisted upon it being surveyed. Mr. Goard, who I bought the property from employed Mr. Draper to survey this block. Mr. Draper put the stakes in. I said, 'That is all right.' That is the land, sir, that I bought between the stakes, that Mr. Draper put in for Mr. Goard.

"THE COURT: Just a minute, did you see them put in? I don't hear very quick.

"*Reid*: Did you see the stakes put in or did you see them after they were put in? Well, whether I saw Mr. Draper put the stakes in or not I cannot say, but I have seen them 101 times since. Yes, they are there yet.

"Where were the stakes located? The eastern?

"Yes, the ones towards Blaine? That is the south-eastern?

"Yes? It is just over the brow of the top of the bank of the ravine, just a little above, just over the brow.

"And then the western one? Is on the flat.

"Is on the flat? Yes."

MARTIN, J.A.

And Draper gives at length and with great particularity an account of the proceedings upon the ground and the steps he took to verify and test, satisfactorily as he thought, the post pointed out to him by the vendor (Goard) as the south-west corner post on the railway line, which evidence space forbids reciting except the conclusion:

"So you were satisfied from that? I was satisfied from that, but I did that in order to test to see that Mr. Goard was right in his idea that that was the post in order to back Mr. Goard's opinion.

"You did not take his opinion for granted? No, I did not take his opinion for granted, but I used something to check it.

"Which of these pieces was surveyed first? Well, Mr. Creelman's was, 6.

"That is the Creelman property? Yes.

"And afterwards I believe you subdivided it for Mr. Creelman? Yes, Creelman's was the first that was located first. That is 6 was located first. I cannot say that it was all surveyed first.

"Then where did you locate No. 5, that is the Milliken piece? Immediately east of No. 6.

"Where did that bring it? It brought it into the ravine, pretty near across the ravine.

"And then 4? Well, that was done too at the same time.

"And under whose directions are these done? Mr. Goard's.

"This survey was, I suppose, before the descriptions were drawn? Well, they were before these last descriptions. There have been descriptions drawn before that.

"But the description that was in the deeds was drawn after the survey was made? Yes.

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"And the stakes were there to be seen? Yes.

"You not only made the subdivisions but then you again made the subdivision of two lots for Mr. Creelman of which a portion was sold to McDonald? Yes.

"Have the stakes at the south side, the end of that piece 6 been there all the time? Yes, they are there yet."

MARTIN, J.A.

In these circumstances I am unable to apprehend how the defendant, standing in the shoes of a subsequent grantee from the same vendor (on adjoining lot 5 to the east) can have any claim upon the plaintiff's location to lot 6, even though there may be an error in the description of lot 6 in plaintiff's deed caused by the vendor's mistake (assuming it to be so) in fixing the south-west corner post in a wrong position, though it is to be borne in mind that according to the vendor's unquestioned directions given on the ground the description is a correct one. In this view of the matter the appeal should be allowed and an injunction granted to restrain further trespass and unless the parties can agree upon the damages sustained that matter should go back to the trial judge for assessment thereof.

GALLIHER, J.A.

GALLIHER, J.A.: If this case is to be decided on the surveys alone I do not feel that I could say the learned judge below was wrong, but Mr. *Reid,* for appellant says, Goard owned both the properties sold to Creelman and Milliken. He sold to Creelman first, and at the time of making the sale took Draper, a land surveyor, on the property for the purpose of having a survey made of the portion he proposed to sell to Creelman shewn on plan, Exhibit 5, lot 6, and a survey was made at about the same time of lot number 5 on said plan.

When Goard took Draper down he pointed out a place which was to be the south-east corner of lot 6, and Draper put a stake there; the lot for Creelman was to be 184 feet wide. Draper then went west that distance, and put in a post which was to be the south-west corner of lot 6. In surveying he went to the north boundary and at a distance of 460.6 planted a post, this to be the north-west corner post of 6, as fixed from the north-west corner post of the quarter-section. Starting from thence south, he connected up with the post he had already planted as the south-west corner of lot 6, then went easterly along the right of way 184 feet to the post he had planted as the south-east

corner post of lot 6, thence north to the northern boundary to a point where he planted a post as the north-east corner of 6, and thence to the place of commencement.

Mr. *Reid* says this was the property as laid out on the ground according to Goard's instructions, which was accepted by Creelman, and what Creelman bought was the land between those four posts connected up and that Goard being the owner of all the land included in 5 and 6, could, and did sell the same to Creelman through whom the plaintiff claims, and any portion he afterwards sold to Milliken through whom the defendant claims, could only be what lay outside of that, and therefore that should be binding and should not be affected by any inaccuracies in the actual survey, *e.g.,* description as to lines being parallel. Creelman makes no complaint as to this, in fact says that the land between the posts is what he bought. Had the western boundary line of lot 6 not been described as parallel to the western boundary of the quarter-section, I think the case would be less difficult.

GALLIHER, J.A.

Draper the surveyor acting for Goard took instructions from Goard which, according to the evidence, was definite and that was—on the ground before survey made he caused Draper to plant a post which was to be the south-east corner of 6, and from there the land to be given Creelman was to start as the east boundary, and was to extend westward 184 feet, that being the width of the property to be conveyed and there another post was planted.

Now, whatever may be said as to the northern posts, the south posts, particularly the south-east corner post, were fixed according to Goard's express wish in the matter. It is true Draper checked up the proposed south-west corner post of 6 by going back to what was presumed to be the south-west corner post of the section, and according to his checking he found the proposed south-west corner post of 6 he had planted to be in the proper place, but I will assume his checking was wrong, and that acting on it as correct the line afterwards drawn from a point fixed as the north-west corner post of 6 to the south-west corner post of 6 as planted was described by him as "parallel" to the western boundary line of the section, when as a matter of fact

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he was wrong in so describing it, and as so described, it would throw out the eastern boundary line of 6.

Now, whatever else is uncertain, this is certain, that Goard's own acts and words on the ground fixed the eastern extremity from which Creelman's land was to start and to extend 184 feet west—the same width on the north—whether the connecting lines from north to south to give the respective widths ran parallel to the western boundary line of the section or not, that was the land intended to be given by Goard on the ground as staked, and even a mistake by the surveyor which caused a misdescription in the deed describing the line as parallel should not alter a fixed and definite eastern boundary so fixed on the ground by the vendor himself, the then owner of both pieces of land afterwards conveyed to Creelman and Milliken. It was the then established conventional south-eastern boundary post and has never been disputed by Creelman.

GALLIHER, J.A.

We have then to weigh on the one hand "the description of the line as parallel" brought about in the way I have stated, and which found its way into the deed, and on the other hand, Goard's explicit fixing of the south-east corner post of 6 declaring that from there the land to be allotted to Creelman should start and its width should be 184 feet. In other words, are we bound to take the description in the deed and accept a line truly parallel with the western boundary of the section which will have the effect of displacing the eastern boundary line of 6 definitely decided on by the vendor and staked on the ground, and that after the plaintiff has in good faith improved and built upon the land and which would deprive him of the ground upon which his house and garden are?

While I am aware that the law may not be disregarded by reason that it may impose a hardship, I still think that in the circumstances of this case we should be governed by the work on the ground rather than the description in the deed.

My brother MARTIN has referred to some cases which I think give some support to the course I am adopting.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I wholly concur in the reasons for judgment of my brother MARTIN. I would merely say that the case

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is one which signally demonstrates that that which must control is what was intended to be conveyed upon the ground and to those facts the law must adapt itself. That is, the definition as to boundaries must be based upon the actual facts, *i.e.*, the declared and proved position of the posts fixed in the ground.

Therefore in my opinion the judgment should be in the terms proposed by my brother MARTIN—that the appeal be allowed and an injunction granted to restrain further trespass and unless the parties can agree upon the damages the case should go back to the trial judge for assessment.

MACDONALD, J.A.

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

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

Solicitors for appellant: *Reid, Wallbridge & Gibson.*
Solicitor for respondent: *A. S. Johnston.*

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Principal and agent—Sale of house—Introduction of purchaser—Sale not effected—Subsequent sale through other agents to same parties but terms varied—Efficient cause of sale—Right to commission.

The defendant listed a property for sale with the plaintiff and with another firm of brokers at $3,500. The plaintiff introduced Z. to the defendant as a purchaser who offered to pay $3,000 for the property. The defendant would not accept less than $3,500 and Z. with the plaintiff went away without coming to terms. Six days later the other firm of brokers brought Z. to the defendant and after negotiations a sale was made to Z. for $3,350. The plaintiff's action for a commission claiming that he was the effective cause of the sale was dismissed.

Held, on appeal, affirming the decision of CAYLEY, Co. J., that there was no evidence of collusion to deprive the plaintiff of his commission and when on Z.'s first visit to the house with the plaintiff they failed to come to terms the defendant was justified in concluding that the transaction as between the plaintiff and the defendant was completely ended.

Statement

APPEAL by plaintiff from the decision of CAYLEY, Co. J. of the 21st of February, 1928, in an action for commission for

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bringing about the sale of a property owned by the defendant on 6th Avenue East in the City of Vancouver. The defendant listed the property for sale with the plaintiff, a real-estate agent, and with another firm of brokers named Johnson & Sharpe. The property was listed at $3,500. On the 4th of January, 1928, the plaintiff brought a man named Zilinski and his wife to see the house. While they were looking it over the defendant came in and during a conversation that ensued, the defendant told them his price was $3,500 with $1,000 down. The Zilinskies said that was too much, that they could only pay $3,000. This was refused, and they left the house with the plaintiff. On the 10th of January, a man from Messrs. Johnson & Sharpe brought the same people to the house and after negotiations the house was sold to them for $3,350, Messrs. Johnson & Sharpe obtaining a commission on the sale. The plaintiff's action for a commission claiming that his efforts were the effective cause of the sale was dismissed.

Statement

The appeal was argued at Vancouver on the 20th and 21st of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

W. J. Baird, for appellant: This was a general listing and although a mere introduction is not sufficient it was his efforts that eventually brought about a sale to these people: see *Green* v. *Bartlett* (1863), 32 L.J., C.P. 261; *Burton* v. *Hughes* (1885), 1 T.L.R. 207; *Toulmin* v. *Millar* (1887), 58 L.T. 96; *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614; *Osler* v. *Moore* (1901), 8 B.C. 115; *Prentice* v. *Merrick* (1917), 24 B.C. 432; *Turner, Meakin & Co.* v. *Field* (1923), 33 B.C. 56; *Carr* v. *La Dreche* (1927), 38 B.C. 97.

Argument

G. Roy Long, for respondent: By arrangement between the plaintiff and defendant the price was $3,500 and the parties introduced would not buy at that price. He was not an exclusive agent and he had nothing to do with the sale that was made: see *Travis* v. *Coates* (1912), 27 O.L.R. 63; *Wilkinson* v. *Martin* (1837), 8 Car. & P. 1; *Robins* v. *Hees* (1911), 19 O.W.R. 277.

Baird, replied.

MACDONALD, C.J.A.: This is a very common type of case, and the chief thing is to distinguish it from other cases already decided on similar points of law and fact. In the first place, I am clearly of the opinion that the employment here was a general employment, and therefore we can dismiss any case which turns upon a special contract from our minds.

There is another question that was discussed to some extent during the argument, and that was the question of collusion. Now, it is not necessary in all cases for a plaintiff to shew that there was collusion between the defendant or the seller and another agent, or that the defendant collusively carried on negotiations with the buyer himself behind the back of his agent; but if in the present case there had been collusion between the defendant and the other agent looking to deprive the plaintiff of his commission, then I think the plaintiff would have been entitled to succeed. The Court will not countenance attempts on the part of buyers and sellers by underhand methods, behind the door, to rob a commission agent of his due for the work he has done; but in this case there is no suggestion of collusion at all, therefore, the case must rest upon other principles. The only other principle that seems to be applicable to the case is: Was the sale which was subsequently made brought about by the plaintiff's introduction? In other words, was he the effective cause of the sale?

MACDONALD, C.J.A.

Secondly, was the defendant entitled, having regard to the conduct of the parties on the 4th of January when they came to the house, when they got in touch with the defendant, to believe that that transaction was ended when Zilinski and his wife left his house?

On both these points I have come to a firm conclusion. One has only to recollect the evidence—the undisputed evidence, in fact, of what took place at the house on the 4th of January. The Zilinskies were looking for a $3,000 house; the plaintiff knew that. The plaintiff knew that the defendant's firm price, or asking price, was $3,500. When they had looked through the house, they got in touch with the defendant, who lived next door, and these facts were disclosed: that the Zilinskies would only pay $3,000, and the defendant wanted $3,500; thereupon

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Zilinski said to his wife, "Come on, we can't pay any such price as that for the property." And they went away, under circumstances which, to my mind, shew that the transaction was completely ended, and the defendant was entitled to believe that that was so.

Now, the learned judge apparently came to the same conclusion. The inference he drew from the facts was that when they went away, leaving the defendant somewhat dissatisfied that they had been brought there at all, that was an end of the transaction. This itself would be a sufficient answer to this action; but I would go a step further. I do not think, taking the undisputed evidence against the evidence of the plaintiff himself and the evidence of his client, that he was the effective cause of the sale. When he discovered that there was nothing to be said as between the parties, there was no attempt to get them together or to get them to approach each other in price. He went away, said nothing about coming back, or that he would make any further efforts to bring about a sale, took his customers to see other houses, which his counsel very frankly admitted he would have sold to them if they would buy.

MACDONALD, C.J.A.

It has been suggested by one of my learned brothers that the fact that the plaintiff had not brought them back and had done nothing for five days would amount to abandonment of any claim of this kind on the plaintiff's part. That may be true, but I would go a step further and say, apart altogether from that, there was an end of the transaction on the 4th of January; therefore, I think that the conclusion which the learned judge has come to, and he has come to it on uncontradicted evidence, has drawn his own conclusions and his own inferences from that evidence, should not be interfered with.

The appeal is dismissed.

MARTIN, J.A.: This is a case of two agents who had the general listing of the same property, endeavouring independently of one another to earn a commission by obtaining a purchaser for the owner. In such case it is obvious that the situation is one which requires precision on the part of the agents and also on the part of the owner, because if he deals with different

MARTIN, J.A.

agents after a prospective purchaser is introduced by one of them, the position is one which is very likely to create difficulty; and it not only calls for a clear definition of the situation by the owner, but also calls for the same definition by the agents, because the agent should be just as alert in such circumstances to prevent the owner from being misled as to the true position as he should be in preventing him from being misled as to his; therefore in determining what has actually been accomplished in such circumstances it is necessary for the jury or a judge in each case to consider it and see which of the introductions was the one that brought about the sale. It is not correct to say, of course, that the mere fact of the first introduction puts the first agent in a position of obtaining a commission. All the cases are certainly clear that that is not the position; but on the other hand they are, as I regard them, fairly clear that the agent who can shew that he made a prior introduction has placed himself in a position certainly of advantage over the other one—a very decided advantage, which, however, may be displaced, if, as developed in the present case, it can be shewn that the negotiations with the first introducer were definitely brought to an end, so that the owner would be justified in concluding that he could, with safety, deal with another agent. That, really, is the crux of this case, just as it was the crux of the case in, *e.g.*, *Wilkinson* v. *Martin* (1837), 8 Car. & P. 1. Second, *Antrobus* v. *Wickens* (1865), 4 F. & F. 291; *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139, and *Barnett* v. *Brown and Co.* (1890), 6 T.L.R. 463.

MARTIN, J.A.

The result of all these cases is this, that the question as to whether or no the transaction with the first introducer was finally off is a question which must be left to the jury, and that if there is any evidence at all on that point an error would occur if that question was prevented from being considered by the jury. I will take the latest of these cases as perhaps the most succinct, *i.e.*, *Barnett* v. *Brown and Co.*, wherein the learned judge said:

"The question to be decided was, whose introduction had brought about the purchase. . . . The first introduction . . . resulted in nothing; the second . . . resulted in a sale and entitled the defendants to the commission."

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So therefore, the fact must be determined as to whether the first negotiations were broken off, which is always a matter in the circumstances of the case. In the present circumstances the learned judge apparently, as I regard it, has taken the view upon the uncontradicted evidence (and if he has not it is open to us to take the view) that the owner was justified in assuming from what had occurred that the first introducer had definitely failed in obtaining a purchaser, and if so, then he was justified in dealing with the second agent.

In determining that question the various conditions and circumstances of each case have to be considered; and the question of the circumstances in this case, and the time that elapsed before the appearance on the scene of the second agent, are most material. That is to say, in this case if the first introducer had come, we will say, in the morning, and had gone away, and the second introducer had come in the afternoon with the same would-be purchasers, that would raise a very strong inference that the sale was due to the first introducer; but if, on the other hand, instead of a few hours elapsing five weeks had elapsed before the second introducer came on the scene, that would be a very strong inference to draw that as a matter of fact the first negotiations were definitely off.

MARTIN, J.A.

Here the first negotiations took place upon the 4th of January, and the defendant is very definite in saying that the transaction was not closed till the 10th when the first $100 deposit was paid, and that would mean that from Wednesday of the 4th till Tuesday of the 10th the matter was open. The plaintiff admits that he left the owner upon the premises without giving him the slightest intimation that he would resume the negotiations, which was a very unbusinesslike thing for him to do, and the defendant says that he thought that he was finished with him. Now, for example, suppose the plaintiff in leaving there had said to the defendant in terms, "I am going, I can do nothing more in this matter," there is no doubt that he would be definitely concluded from his claim. Well, if his conduct was such that it was open to the defendant to reasonably draw the inference that he had decided to do nothing more in the matter, the result, in law, would be the same; so it comes to this, did the

defendant act reasonably in all the circumstances in assuming from what passed between them that he could safely deal with a second purchaser? That, really is the crux of the matter; and one of the principal elements of that would be, as I have said, the length of time that had elapsed. In some circumstances that time would be long—fairly long we will say in negotiations on timber limits, where you have to inspect property out in the country, or a mine and that sort of thing, but when you are looking at property within the town, immediately accessible, with purchasers who we all know are apt to be fugacious in their ways, and unless they are brought promptly to time you will probably lose your sale, would it be reasonable to expect that he could, with safety to himself, wait any longer before hearing from the first introducer?

MARTIN, J.A.

I had some slight doubt about the matter when it was first put before us, but the more I consider it, I feel that on the uncontradicted evidence we would not be justified in saying that the defendant has acted in a way that was not reasonable, and therefore in such circumstances he was justified in dealing with the second agent, and consequently the first has not established his case for a commission.

GALLIHER, J.A.: I agree with what has been already said. I do not think there is any principle in this case to distinguish it from the decision in the *Prentice* case and also in the *Turner, Meakin & Co.* case; therefore I would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This case is very close to the line without a doubt, but it is pleasing to see that it has been well considered by counsel, and, I might say, quite well argued. It is always a matter of difficulty on the part of a Court of Appeal to arrive at a conclusion when the facts are close, differing from that of the Court below. Now, that is this case. The learned judge who heard the case in the Court below has decided against the plaintiff's claim or cause of action. It is sometimes forgotten, though, that an agent, after all, in effecting a sale of property, must do a little more than introduce the parties. That may, as the matter resolves itself, be sufficient, but the agent has to do this, he has to find a person ready, able and willing to buy

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at a price that the owner has agreed to take. Special circumstances, of course, may arise, such as a sale even for less by the owner and behind the back of the agent will render the owner liable to the agent for the commission. When the agent obtains the purchaser his duty is not ended. He should obtain a contract, an enforceable contract from the proposed purchaser. He must have a contract, something that would entitle the owner to enforce.

Very often the facts work out that that may not be necessary, that is, suppose it is that the owner deals with the person directly and the sale is effectuated, then such a question would not arise; but if you wish to recover against the owner, if the owner refuses after the agent has found a purchaser who will pay his price, and the owner refuses to accept him, he has not completed his contract unless he has done all these things that I have mentioned. He has not produced the purchaser who has bound himself to buy or who is ready to execute the necessary contract.

MCPHILLIPS, J.A.

Now, in this particular case, on the cross-examination of the plaintiff, this is the evidence which was given: "What efforts did you make to get these people" (the plaintiff is being cross-examined)—"What efforts did you make to get these people, the Zilinskies, to sign up, or did you make any effort at all? I didn't try to get them to sign anything. Did you get any offer from them? No, I didn't get any offer on this property from them. So you were not able to adduce" (there must have been a different word used) "from them, any offer from them on the premises? No, I didn't get any offer." Now, apparently that was the way it was left, although the evidence does shew that $3,000 was the price that these people were willing to pay. They were willing to go up to $3,000, but not more. Then they go away; there is no evidence to shew that the plaintiff kept in touch with them and was still urging or doing anything in the way of bringing about this sale; as far as the evidence goes the plaintiff let it go at that, nothing more being done. Five days elapsed, when these same people are taken to the scene by another agent.

When you come to consider the circumstances of the real-estate

market in Vancouver today, it is a quiet market and the opportunity to sell is not very great, and when persons are looking about for houses, I would consider that the circumstances require expedition. The owner, if he wants to get his property sold, must have an agent who proceeds with expedition, and to lose this one person might be to lose the possibility of a sale for a considerable time—six months or a year, perhaps, before any person would come along who might be a likely purchaser. Now, to leave even five days elapse without anything being done it seems to me was too long under the circumstances—the slowness of the market, the keen desire on the part of this owner to sell his property, to constitute what might be said to be an abandonment on the part of the agent to make further efforts.

If there was an abandonment of further efforts, why should the plaintiff succeed in obtaining a commission, or why is not the other agent entitled to receive the commission? It would seem to me that it was a very reasonable thing under the circumstances for the learned judge to arrive at the conclusion which he did.

MCPHILLIPS, J.A.

Now, the learned judge arrived on the facts at the conclusion that the owner would not be able to sell through the efforts of the plaintiff. In his judgment the learned judge uses these words: "If the sale had rested on the plaintiff he never would have sold." Now, that was the finding of the learned trial judge; and how can it be said in the face of that, if the evidence is an indication of it, and I think the evidence is, how could it be said—the learned judge having said, "If the sale had rested on the plaintiff, he never would have sold"—that the plaintiff was the effective cause of the sale?

Unless there was conduct that would amount to a sale behind the back of the plaintiff—anything in the nature of fraud or deception, which is not present in this case, then it is not possible to contend that the plaintiff did that which in law entitles him to a commission. As I said at the outset, when we consider all the cases, it looks to be a case close to the line. Possibly it is, but certainly on a case close to the line I would not feel disposed to hold that the learned judge went wholly wrong; and unless I am of that opinion I should not reverse that judgment. I therefore think the appeal should fail.

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MACDONALD, J.A.: On the particular facts of this case, as we must take them to be found by the learned trial judge, I am of opinion that we cannot interfere with the view that the plaintiff did not bring about a sale. His efforts failed to effect a sale at $3,000 and his work was not a contributing factor in the ultimate sale.

Appeal dismissed.

Solicitor for appellant: *W. J. Baird.*
Solicitor for respondent: *G. Roy Long.*

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1928

April 20.

CHUHEI FUKUKAWA v. AMERICAN TIMBER HOLDING CO.

CHUHEI FUKUKAWA AND THE QUEEN CHARLOTTE TIMBER HOLDING COMPANY LIMITED v. AMERICAN TIMBER HOLDING COMPANY. AMERICAN TIMBER HOLDING COMPANY v. CHUHEI FUKUKAWA.

Contract—Sale of timber—Based on cruiser's report of quantity—Subsequent discovery of one-third deficiency—Misrepresentation—Rescission.

The plaintiff, Fukukawa, entered into two agreements with the defendant Company for the purchase of 42 timber licences, relying on the estimate of quantity made up by a firm of timber cruisers employed by the defendant and submitted to him by the defendant's agent. Although the agreements did not so specify, it was found that the purchase price had been arrived at on a basis of $1.50 per M. board measure as the sum named in the agreements was actually the number of M. feet stated in the estimates multiplied by this sum, and the agreements contained provision for the reduction in timber taken by the Imperial Munitions Board and loss by fire during the currency of the contract, estimated on a $1.50 basis. It was afterwards established by a cruise made for the purchaser that there was a shortage of approximately one-third as between the actual quantity of timber and said estimates.

Held, that even assuming there was no fraud, where there is a deficiency of approximately one-third in the quantity of timber from the original estimate the plaintiffs are entitled to rescission.

Statement

CONSOLIDATED ACTIONS, one brought by Chuhei Fukukawa and The Queen Charlotte Timber Holding Company

Limited against the American Timber Holding Company for rescission, and the other brought by the American Timber Holding Company against Chuhei Fukukawa for specific performance of two agreements dated the 21st of March, 1920, for purchase and sale of a total of 42 Queen Charlotte Island timber licences. The facts are set out in the reasons for judgment. Tried by HUNTER, C.J.B.C. at Vancouver on the 6th of March, 1928.

Mayers, and *G. S. Clark*, for plaintiffs.
Burns, and *Walkem,* for defendant.

20th April, 1928.

HUNTER, C.J.B.C.: The plaintiff Fukukawa, and The Queen Charlotte Timber Holding Company Limited (in which Fukukawa is the chief shareholder) which subsequently acquired his interest, are the plaintiffs in the consolidated actions and at the time of the making of these agreements Fukukawa was resident in Tokio while the defendant Company had its general office in Milwaukee, Wisconsin. The agreements were negotiated in Japan during January and February, 1920, between Fukukawa and one Ikeda who was acting as sub-agent for M. C. Lawler, the British Columbia resident agent of the defendant Company. It was admitted at the trial that for purpose of these negotiations Ikeda was the defendant's agent as he had taken a commission on the sale from the defendants. The total purchase price amounted to $1,583,195.50. The agreements provided for this amount to be paid by instalments over a term of five years with interest at 6 per cent. Owing to financial difficulties arising chiefly from the earthquake in Japan the time for the payment of some of the instalments was extended from time to time by subsequent agreements. At the time of the negotiations in Japan, Ikeda exhibited to the plaintiff blue prints and estimates of the amount of timber said to exist on the land covered by the licences made up by the firm of Brayton & Lawbaugh who were engaged in the timber-cruising business. According to Fukukawa, Ikeda assured him that these estimates were correct. They were admittedly given Ikeda by Lawler for

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the purpose of promoting a sale and Ikeda testified that Lawler told him they were correct and Lawler did not appear as a witness to contradict Ikeda's statement. The estimates stated that there was a total quantity of 1,050,533,000 feet of timber. Up to the time of the plaintiffs' action Fukukawa had paid in respect of principal sums and interest the sum of $1,110,164.92 to which should be added the cost of exchange amounting to $57,043.82 making a total sum of $1,167,208.74 and the plaintiffs' action is for rescission and repayment on the ground that Fukukawa was induced to enter into the agreements by a material misrepresentation, *viz.*, that the quantity of timber existed as set forth in the Brayton & Lawbaugh estimates, whereas shortly before he brought the action he discovered by means of the cruise hereinafter referred to that there was a shortage to the extent of 34.6 per cent.

Judgment

In the fall of 1925 the plaintiffs had entered into a contract with another company for a sale of a portion of the timber covered by the Brayton & Lawbaugh estimates and it was reported to Fukukawa that after the intending purchasers cruised the timber they found such a shortage that they refused to proceed further in the matter and that a similar discovery was made with respect to several other licences. Whereupon Ikeda, who, after the agreements had been executed, had become, and then was, the agent resident in British Columbia to look after Fukukawa's interests, wrote West, the secretary of the defendant Company, on the 6th of March, 1926, requesting that the time for payments then falling due should be extended until the matter was cleared up. The defendant refused to recognize any responsibility in connection with the alleged shortage and insisted upon the contract being carried out and hence the litigation.

Part of the argument turned on the question as to whether the agreements were for a lump sum without any reference to a rate per M. feet or whether the basis of the contract was an agreement to pay for a stated quantity of timber at the rate of $1.50 per M. The agreements themselves provided for the payment of a named sum payable in certain instalments without specifying that the amount had been arrived at on the basis of

$1.50 per M. As to this question, I think there can be no doubt that the agreements were arrived at on the basis that the vendor was selling and the purchaser was buying the timber at the rate of $1.50 per M. and that this is demonstrated by the fact that at the time of the negotiations the Brayton & Lawbaugh estimates were the only statements as to the quantities of timber that were before the plaintiff; that the sums named in the agreements were actually, with the exception of 50 cents, which is no doubt a clerical error, the number of M. feet stated in the estimates multiplied by this factor; that a reduction for any timber that would be found to have been removed from the lands by the Imperial Munitions Board was fixed at the rate of $1.50 per M.; that it was provided that any loss by fire during the currency of the contract should be equally divided and be computed at a rate not to exceed $1.50 per M. and that a reduction at this rate was made for an error in the addition of the total estimates discovered by Fukukawa's agent, Tsukioka, in the same year that the agreements were entered into. That the quantities shewn by the Brayton & Lawbaugh estimates to be paid for at the rate of $1.50 per M. forms the core of the contract is also borne out by the correspondence which shews that that at any rate was the intention of the defendant. Before the agreements were entered into, *viz.,* December 23rd, 1919, Lawler writes West, the defendant's secretary, that "my opinion is that the Japs mean business and are going to buy this timber at the price I made of $1.50 per M. feet on your estimate." On January 19th, 1920, Lawler wires Starnes, the vice-president at Milwaukee "Ikeda has requested his man to see me and get detailed estimates on each licence based upon a price of $1.50 per M. feet, board measure, and on quantity of timber as shewn by Brayton & Lawbaugh estimates. I have written Mr. West to send same" and, on January 21st, 1920, West writes Ikeda to the effect that the price was $1.50 per M. board measure and on a quantity of timber as shewn by Brayton & Lawbaugh's estimates and that this was in accordance with resolutions passed by the Company. In his examination for discovery Lawler was asked "Was that the substance of your negotiations with Ikeda that the timber was for sale at $1.50 per

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M. on Brayton & Lawbaugh's cruise—that is right?" To which he answered: "Yes, I believe that is right." In fact it is difficult to see how otherwise Fukukawa could know how much the timber would cost him as he had no knowledge either personally or through his agents as to the quantity and had nothing to go on as to the quantity except the Brayton & Lawbaugh estimates and while he had had some information about the situation of the timber, the character of the district and its availability to water transportation I accept his evidence that he entered into the agreements relying upon these estimates upon the question of quantity. It was argued very strongly for the defence that these estimates were really statements of opinion and not statements of fact and that the purchaser entered into the transaction at his peril if he did not choose to investigate for himself the question of the amount of timber. I think I must reject that contention. If a man offers to sell me his orchard which I have not seen and tells me that he estimates that there are 600 trees and that the price is $5 per tree and I agree to pay him the $3,000 and then find that there are only 400 trees, I do not think that he can say "that was only my opinion, you should have looked for yourself." The reason why I agreed to buy is that I relied on his statement that I would get 600 trees which will cost me $5 per tree. He has no right to force me to pay at a greater rate than $5 per tree for I did not agree to pay any more and whether the remedy would be rescission or compensation would depend on the circumstances. It may well be that where, from the nature of the subject-matter it can be seen that the parties were contracting on the basis of substantial accuracy and not absolute accuracy and that, if the Brayton & Lawbaugh estimates varied by a small percentage from the actual facts as found by a reliable cruise, the plaintiff would have no right to rescind as it has not been claimed that the defendant's representatives were guilty of fraud in putting forward these estimates. At the same time, it is somewhat peculiar that no person who was concerned in that cruise was produced as a witness in support of its accuracy which raises a suspicion that it was what is commonly known as a vendor's cruise with the right to the payment of a commission to the cruisers in the event of a sale

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but I will assume that there was no fraud in connection with the matter and that the defendant was ignorant that these estimates were wrong by a large percentage and that the case has to be decided on the footing of innocent misrepresentation. That there was a deficiency to the extent of approximately one-third I think was satisfactorily established by the witnesses who took part in the Lacey Company's cruise made at the instance of the plaintiffs. Those in charge of this cruise were quite emphatic upon the question that they never turned in a cruise to suit the source of the request and stated positively, as far as they were concerned, that no matter who ordered the cruise the return would be in exact accordance with the facts as far as they could discover them. Notwithstanding a searching cross-examination of their methods of cruising and their methods of computation, their cruise stood the test with possibly an insignificant exception. The very minute criticism to which it was subjected by Mr. *Burns* in his argument proves too much for if applied to either the Brayton & Lawbaugh cruise or the Wolfe cruise, made at his clients' instance, it would at once demolish both of them and if the hyper-accuracy which he suggests were to be insisted on by the Court it would practically be impossible for any cruise to be made which would comply with such a standard with the result that the Court would be powerless to do justice but I think that if the Court is satisfied that the methods adopted are such as to insure substantial accuracy in the results that that is enough. On the other hand, the so-called cruise made by Wolfe and put forward by the defendants in support of Brayton & Lawbaugh's estimates was riddled in cross-examination both as to the mode of identification of the licences in question with the parcels cruised, the methods of cruising and the methods of computing the volume content of the timber. The evidence at the trial in short establishes that the Brayton & Lawbaugh estimates were grossly wrong to the extent of at least one-third in volume content. Now the case being one of an executory contract into which one of the parties has been induced to enter by the representation that the timber amounted to that stated in the Brayton & Lawbaugh estimates and it being established that that amount was too great by approximately one-

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third, the question is whether that is a material misrepresentation which entitled the plaintiff to rescind. I think it is. Had the difference been a small percentage it might have been argued that the case was one for the abatement of the purchase-money rather than for rescission but I think that the Court has no right to fasten a new bargain on the plaintiff which differs to so great an extent from the one into which he entered. It would moreover be practically impossible to accurately assess the deficiency in money value as for one reason it must be obvious that it might be a nice question of judgment as to whether any particular area which has been found to contain very much less timber than that which was called for by the contract would still have sufficient timber available to be logged off at a profit and, on the other hand, it might not be just to the defendant to affirmatively say, as against it, that there was only the exact amount of timber as shewn by Lacey & Company's cruise as that cruise was made at the request of the plaintiffs and not by order of the Court and I find from the evidence that there might be a variation of at least upwards of 5 per cent. between two equally reliable cruises of a large area of timber largely owing to difference of opinion as to the get-at-ability of a given portion of it. But that being the only evidence of reliable cruising which has been adduced, I am bound to hold that the discrepancy is so great that the plaintiffs ought not to be forced to complete, there being no difficulty about *restitutio in integrum*.

It was much pressed that because Fukukawa retained Ikeda to look after his interests in British Columbia, after he had agreed to buy but before the agreements were formally drawn up, this amounted in some way or other to a bribe of the defendant's agents and that, therefore, he is not *rectus in curia*. I cannot comprehend the argument. There was no secrecy about it as Ikeda, acting as the plaintiffs' agent on numerous occasions, negotiated with the defendant for extensions of time without any protest by the defendant or it even occurring to it that he was still their agent. If I engage a land agent to find me a buyer for my house there is no law that I know of to prevent the buyer from afterwards engaging the agent to collect the rent. Why should not Fukukawa, who trusted Ikeda, appoint him to look after his interests in British Columbia?

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With regard to the defence of waiver based on the extensions of time, I think it fails. Waiver postulates knowledge and I accept the account given by Fukukawa of the interview with West supported as it is by Hattori's evidence and his statement that he had no actual knowledge of the shortage until the attempted sale to the Powell River Company and it is therefore not open to the defendant to object that its representations on a material question of fact were given full faith and credit by the plaintiffs.

Judgment

Then there is the contention that because an error had been found in December, 1920, in the additions of the Brayton & Lawbaugh estimates that that put the plaintiff on his enquiry. It is, in my opinion, wholly untenable. That had nothing to do with the question of the accuracy of the cruise itself. It was an error in the compilations and moreover the plaintiff had received an assurance from the secretary that any further errors discovered would be corrected on the same basis. Then there is the contention that because it was reported to him that the Whalen Pulp Company stated they found a shortage in respect of some of the timber which they had cruised and were proposing to buy he was put on enquiry. It was of course natural enough for him to consider that this was merely depreciatory information coming from an intending buyer as he had no actual cruise put before him but, as he was not intending to sell, there was no reason why he should investigate especially in view of the assurance already referred to. The contention therefore amounts to nothing more than that he owed a duty to the defendant to test, at his own expense, the assertions of a possible buyer instead of relying, as he had a right to do, on the defendant's representations. And generally on the question as to Fukukawa being put on enquiry, it seems to me that the acts of the defendant were such as not only not to arouse suspicion but to encourage him to go on with his payments by confirming him in his reliance on the estimates which were the basis of the contract and in the belief that he had made a good bargain. Else what was the point in West writing on March 26th, 1923, that

"we are getting good offers for several tracts of our timber anywhere from $3 to $4 per M."

And again on October 29th, 1923:

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"We just sold a small tract of British Columbia timber at $3.50 per M. I can see plainly now that you will make a nice profit on your investment."

And again on June 9th, 1924:

"We have sold nearly a million dollars worth of timber to loggers at from $3 to $4 board measure per M."?

although any suggestion made by Fukukawa during his financial difficulties that the contract should be reconstituted on the basis of the payments already made was always peremptorily rejected. Again, on July 26th, 1924, West writes the plaintiff encouraging him to let a long time cutting contract so as the better to enable him to make his payments. Of course if he had done that he would have got deeper into the mire and there would have been no escape by way of rescission.

The result is that if the parties cannot agree upon the quantity of timber that ought to be paid for at the contract rate and to carry out the contract on that basis, the plaintiffs will be entitled to judgment affirming the rescission and to repayment of the amount claimed and any payments necessarily made to keep the licences in good standing plus legal interest from the date of the service of the writ but the details of the judgment will be reserved to be dealt with on the settlement of the minutes.

I would like to say in conclusion that I am greatly indebted to the learned counsel for the written arguments which have reduced the labour of the Court to a minimum.

REX v. HARRISON.

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1928

March 14.

REX v. HARRISON

Criminal law—Identification of suspect by photographs—Examination of witnesses as to.

The police may use photographs of a person whom they suspect of a crime for the purpose of identification but evidence of what was said when shewing photographs for such purpose will not be allowed.

APPEAL by accused from his conviction by H. C. Shaw, Esquire, police magistrate, at Vancouver, on the 23rd of February, 1928, for knowing a cheque to be forged, did deal with it as genuine. On Saturday the 21st of January, 1928, the accused entered the store of Messrs. Arnold & Quigley on Granville Street, Vancouver, and after purchasing certain wearing apparel he presented a cheque in payment. After deducting the price of the goods purchased, the balance of the amount of the cheque was paid to him in cash. The cheque was deposited to the credit of Messrs. Arnold & Quigley in the bank and a few days later, on discovering that the cheque was forged, a detective entered Messrs. Arnold & Quigley's store and shewed six photographs of different persons (one of them being that of the accused), to the two clerks who had attended the accused when he purchased goods, and they both identified the photograph of the accused as that of the person who had cashed the cheque. On the trial, at the instance of counsel for the Crown, the two clerks gave evidence as to the photographs being shewn to them by the detective, and identifying that of the prisoner, and they were then cross-examined by counsel for the accused on the subject. Subsequently the detective was asked by counsel for the Crown what was said when he shewed the photographs to the two clerks in the store.

Statement

The appeal was argued at Vancouver on the 6th of March, 1928, before MACDONALD, C.J.A., MARTIN and McPHILLIPS, J.J.A.

Maitland, for appellant: The detective went into the store with six photographs, one of which was of the accused and he

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shewed them to the clerks before the arrest. Then after the arrest he brought the accused into the store for identification by the clerks. At the trial he was allowed to give evidence as to what happened in the store when he shewed the photographs. This was highly improper: see *Allen* v. *The King* (1911), 44 S.C.R. 331; *Rex* v. *Bagley* (1926), 37 B.C. 353.

W. M. McKay, for the Crown, referred to *Hills* v. *Hills and Easton* (1915), 31 T.L.R. 541; *Rex* v. *Kingsland* (1919), 14 Cr. App. R. 8; *Rex* v. *Dwyer*. *Rex* v. *Ferguson* (1924), 18 Cr. App. R. 145.

Maitland, replied.

Cur. adv. vult.

On the 14th of March, 1928, the judgment of the Court was delivered by

Judgment

MACDONALD, C.J.A.: The appeal hinges upon what took place on a view of photographs shewn for purposes of identification of a suspect.

Counsel for the prosecution introduced the subject by asking Crown witness Hunter this question: "Were any photographs shewn you?" This question was objected to by prisoner's counsel and answered in the affirmative on a ruling of the judge that it was a proper question. Up to this point no wrong was done. It was quite proper that Crown counsel should prove this in order that prisoner's counsel might, if he thought fit, take advantage of the information to cross-examine in an attempt to shew that the display of the photographs was not fairly conducted. *Rex* v. *Fannon* (1922), 22 S.R.N.S.W. 427. The Court there said:

"An injustice might be done to the accused if the fact of photographs having been shewn to witnesses was not disclosed."

Mr. *Maitland*, for the prisoner, did cross-examine and brought out the statement:

"You say you picked the picture out? Yes.

"And you said that is the man or that looks like the man, which? I said that is the man."

Subsequently detective Alcox, who had shewn the photographs, was asked by Crown counsel what was said on that occasion and the witness answered:

"One said that is the man, the other (Clark) sure there is no doubt in the world."

This ought not to have been done but no objection was taken and in the circumstances, having in mind that prisoner's counsel opened the door, no miscarriage of justice occurred.

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Other grounds of appeal were argued, but, in my opinion, they are not substantial ones. The appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Maitland & Maitland.*
Solicitor for respondent: *W. M. McKay.*

MOTORCAR LOAN COMPANY LIMITED v. BONSER.

COURT OF APPEAL

1928

March 14.

MOTORCAR LOAN CO. v. BONSER

Sale of goods—Automobile repossessed by vendor—Repairs—Auction sale advertised with notice to purchaser—Sale abortive—Action against purchaser for balance of purchase price and cost of repairs, etc.—Private sale by vendor without notice—R.S.B.C. 1924, Cap. 44, Sec. 10 (3).

The defendant being in default in payments due under a conditional sale agreement for a motor-car, the plaintiff caused the car to be repossessed under the terms of the agreement and after making repairs, advertised the car for sale by auction, notice of which was given the defendant. The sale proved abortive and after commencing action against the defendant for the balance of the purchase price and cost of repairs and other expenses in connection with taking the car over, he sold the car by private sale without notice to the defendant. The action was dismissed.

Held, on appeal, affirming the decision of GRANT, Co. J. (MCPHILLIPS, J.A. dissenting), that the words "the intended sale" in subsection (3) of section 10 of the Conditional Sales Act import that there was a sale in view and notice of the private sale must be given the defendant to enable him to defend his interest, he being liable for the balance in case of deficiency.

Statement

APPEAL by plaintiff from the decision of GRANT, Co. J. of the 10th of February, 1928, in an action to recover the balance of the purchase price of a motor-car under a conditional sale agreement made between the defendant and Bray Motors

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Limited on the 19th of July, 1926, the purchase price being $664.30 payable in instalments over twelve months. The agreement was immediately assigned by Bray Motors Limited to the plaintiff Company. The defendant being in default the car was repossessed by the plaintiff in August, 1927, and certain repairs were made. The car was then advertised for sale at auction of which notice was given the defendant under section 10 of the Conditional Sales Act. No bids were forthcoming from any person but the vendor whose bid was accepted. He then brought action for the balance due under the original agreement with costs of repairs and other expenses incurred after repossessing the car, *i.e.*, $494.85. Shortly after without further notice to the defendant he sold the car for $275 by private sale. The action was dismissed.

The appeal was argued at Vancouver on the 14th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Argument

Wood, for appellant: Proper notices of the sale by auction were given and there being no bids the plaintiff bid it in itself. It then sued for the balance and after action sold for $275. That it is entitled to sue for the balance see *The Sun Life Assurance Company of Canada* v. *Elliott* (1900), 31 S.C.R. 91 at p. 96; *Chan* v. *C. C. Motor Sales Ltd.* (1926), 36 B.C. 488; (1926), S.C.R. 485. The cost of necessary repairs can be added to the debt: see Barron's Canadian Law of Conditional Sales, 3rd Ed., p. 95; *The John Abell Mfg. Co.* v. *McGuire* (1901), 13 Man. L.R. 454; *Toth* v. *Hilkevics* (1918), 1 W.W.R. 905. Costs of sale are contemplated by the parties: see Barron's Canadian Law of Conditional Sales, 3rd Ed., p. 407; *McHugh* v. *Union Bank of Canada* (1913), A.C. 299; *Gerrard* v. *Gaar Scott Co.* (1909), 13 W.L.R. 442; *North-West Thresher Co.* v. *Bates* (1910), *ib.* 657; *Mawhinney* v. *Porteus* (1907), 17 Man. L.R. 184; *Gray-Campbell Ltd.* v. *Jamieson and Batterley* (1923), 3 W.W.R. 1146; *Manitoba Lumber Company* v. *Emerson* (1913), 18 B.C. 96 and on appeal (1914), 6 W.W.R. 1450; *Robert Bell Engine & Thresher Co.* v. *Farguharson* (1918), 1 W.W.R. 924; *Stubley* v. *Aultman-Taylor Machinery Co.* (1923), 2 W.W.R. 897. The notice given for

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the sale by auction was a sufficient compliance with the Act: see *The Ash Temple Co.* v. *Wessels* (1926), 36 B.C. 424.

J. A. MacInnes, for respondent: We submit that the judgment below is supported by *The Ash Temple Co.* v. *Wessels* (1926), 36 B.C. 424. Subsection (3) of section 10 of the Act requires that notice be given of an intended sale and this applies as well to the private sale as to the sale by auction that proved abortive. No notice of the private sale was given and the action was properly dismissed.

Wood, replied.

MACDONALD, C.J.A.: By subsection (3) of section 10 of the Act, it is enacted that:

"If the price of the goods exceeds $30 [in this case it does] and the seller intends to look to the buyer for any deficiency on a resale, the goods shall not be resold until after notice in writing of the intended sale has been given to the buyer."

MACDONALD, C.J.A.

Now, what took place here was an attempt to sell by auction, after notice given, I presume, in proper form for sale by auction. The auction was held and no bids from any person other than the vendor, the plaintiff in this action, were received. The property was therefore bid in by the plaintiff who was afterwards advised that that was not legal, so that the sale has now to be treated as an abortive sale. Plaintiff afterwards did resell the property by private sale without giving notice of the intended sale. Now, the words "the intended sale" import to my mind that there was a definite sale in view, and that notice to the defendant should be given of that so as to enable him to defend his interest, he being liable for the deficiency. In other words, a sale could not take place behind his back. In the absence of notice, it seems to me that the sale behind his back, which this was, was not a sale which entitled the plaintiff to sue for the deficiency.

I found my judgment entirely upon that provision in the Conditional Sales Act.

MARTIN, J.A.

MARTIN, J.A.: This question is a most substantial one and it is that to which my brother has just referred, *viz.,* the effect of the statutory obligation requiring "notice in writing" of prospective sales, whether public or private, to be given, within

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the meaning of the expression "the intended sale" in subsection (3) of section 10 of the Conditional Sales Act, R.S.B.C. 1924, Cap. 44. I must confess that I feel somewhat embarrassed by the language of the section, and that there is much to be said on both sides, because that expression "the intended sale," is not in all respects harmonious in practical business application with the object sought to be accomplished by the language used in the subsequent subsection (*d*). Nevertheless, I cannot fail to see that there is very much to be said in favour of the majority view taken by my learned brothers, in which, I understand, three of them are quite firm, and therefore I do not think I should be justified in delaying their judgment, and hence, although with some doubt, I shall not dissent therefrom.

GALLIHER, J.A.

GALLIHER, J.A.: I take the same view as the Chief Justice, and I think that when it comes to a question where action is brought for a deficiency, then that section was passed so that the purchaser whose car is to be sold should have notice and be in a position to protect himself with regard to seeing that a proper amount was obtained at the sale.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would allow the appeal. With deference to what my brothers who have preceded me have said, I think that the situation is very clear. Without any doubt at all, Courts must not disassociate themselves from conditions of trade and commerce, and must, to some extent at any rate, be acquainted with them. The present Chief Justice of Canada in *In re Price Bros. and Company and the Board of Commerce of Canada* (1920), 60 S.C.R. 265 at p. 279 said that a judge should not fail to remember that he is entitled to at least know as much as the man on the street. Now, everyone knows what a public sale is—an auction sale, and what a private sale is; they are very different in character. The auction sale calls upon everybody by public advertisement to attend at a certain time and place and the sale, with respect to chattels or whatever it may be, takes place. A private sale is a very different transaction. It is in private, the public are not called in; and everyone also knows that when you make a private sale

of goods it is done privately. Very often people do not wish it to be known that they are purchasers, as far as that goes. But let us take the case in question, and I think judges cannot disabuse their minds of that which is commonly, currently known on the street. The car is taken over under the powers contained in the conditional sale agreement, and it is reconditioned. They have power to do it under this contract; then a private sale takes place. Everyone also knows that very skilled salesmen are used for the purpose of selling cars all throughout this continent of America; and as I said a little while ago, even judges should not shrink from knowing what takes place. There are what are colloquially known as high-powered salesmen, and one of them gets a probable purchaser before him and he so influences that person with the beauties and capacities of the car to such an extent that he gets him up to a point where he bids and buys. Now, is it feasible to carry out the contention advanced by counsel for the respondent that no sale can take place until notice goes out that a particular sale is about to be made? This would be destructive of all chance of making sales.

MCPHILLIPS, J.A.

The Legislature also knows something of what is going on in the world as much as the man in the street, surely. We must read the language in accordance with the way ordinary people would read it, and to indicate that I am not saying something that I have not the very highest authority for, I would refer to the case of *The Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited* (1915), A.C. 599 at p. 617, where Lord Shaw said:

"The law must adapt itself to the conditions of modern society and trade."

Now, is there any difficulty here in adapting the law, and yet at the same time carrying out the intention—the expressed intention of the Legislature? The expressed intention of the Legislature that my brother, the Chief Justice, relies upon is, with great respect, not as modern practice construes it, in my opinion:

"If the price of the goods exceeds $30 and the seller intends to look to the buyer for any deficiency on a resale, the goods shall not be resold until after notice in writing of the intended sale has been given to the buyer."

"The intended sale!" Now, what the Legislature intended,

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and what the common and ordinary meaning of the words is, is that there is the intention to sell, not the intention that they will, on a certain day at a certain place and to a certain person sell. The intention is to sell under the provisions and conditions of the conditional sale agreement—no doubt about that; then we have in subsection (4) the statement that unless the amount as stated in the notice is paid the goods will be sold either at private sale, or advertised for sale at public auction. In this particular case the sale was a private sale, and the intention was indicated by a notice that it was intended to bring this property to a sale, and the method adopted was private sale as against public auction.

MCPHILLIPS, J.A.

It is unnecessary to go into the particulars of this case as to what was done, that is all over and done with. I cannot refrain from saying that this is a very clear case, and is a case within the language of the statute, and to subvert the practices of modern trade and what people do in circumstances of this kind, and what they are entitled to do, is indeed a very serious thing; and I consider that in mercantile contracts, as I said at the outset, we must not disabuse our minds from that which takes place every day, and that which reasonably takes place, and what was done in this case was in conformity with the law in my opinion, and being in conformity with the law, the sale must be upheld. I would therefore allow the appeal.

MACDONALD, J.A.

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

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Wood, Hogg & Bird.*
Solicitors for respondent: *MacInnes & Arnold.*

FURNESS v. GUARANTY SAVINGS AND LOAN ASSOCIATION.

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Savings and loan associations—Arbitration clause—References of disputes between the association and its members—Right of action when question of membership in dispute—B.C. Stats. 1926-27, Cap. 62, Sec. 20.

To bring a dispute within section 20 of the Savings and Loan Associations Act it must be one which arises between the association and a party who is a member of the association. When the question at issue is whether the party is or is not a member of the association it is a matter for the Court and does not come within the section.

Statement

APPEAL by defendant from an order of GRANT, Co. J. of the 2nd of February, 1928, refusing an application to stay proceedings in this action in order that the matter in dispute might be decided by arbitration under section 20 of the Savings and Loan Associations Act. The plaintiff claims he is a shareholder in the defendant Association and as there is a dispute between him and the Association it should be submitted to arbitration under said section. The Association denies that he is a shareholder and that therefore the matter in dispute does not come within the statute and must be decided by action in the Courts.

The appeal was argued at Vancouver on the 16th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Walkem, for appellant: The action was for the recovery of $70 paid the defendant's agent, the plaintiff claiming it was paid through fraudulent misrepresentation. Section 20 of the Savings and Loan Associations Act ousts the jurisdiction of the Courts: see *Reeves* v. *White* (1852), 21 L.J., Q.B. 169; *Wright* v. *Monarch Benefit Building Society* (1877), 46 L.J., Ch. 649; *Crossfield* v. *Manchester Ship Canal Co.* (1904), 73 L.J., Ch. 345; *Armitage* v. *Walker* (1855), 2 K. & J. 211; 69 E.R. 756; *Russell* v. *Pellegrini* (1856), 6 El. & Bl. 1020; *Barnes* v. *Youngs* (1898), 67 L.J., Ch. 263. The plaintiff says he thought he was paying money in as a deposit upon which he could draw cheques but we can shew he afterwards dealt with

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Argument

the shares which precludes him from charging fraud: see *Ex parte Briggs* (1866), L.R. 1 Eq. 483. The sale of shares comes under the word "affairs."

P. J. McIntyre, for respondent: This is a case of *non est factum*. The minds of the parties never met: see Halsbury's Laws of England, Vol. 20, p. 739, sec. 1749. The plaintiff was never a member and is not subject to the rules of the Association: see Halsbury's Laws of England, Vol. 3, p. 387, sec. 822; *Prentice* v. *London* (1875), L.R. 10 C.P. 679; *Willis* v. *Wells* (1892), 2 Q.B. 225; *Palliser* v. *Dale* (1897), 1 Q.B. 257 at p. 263; *Pethick Brothers* v. *Metropolitan Water Board* (1911), Hudson on Building Contracts, 4th Ed., Vol. II., p. 456. The only question here is whether he is a member or not. As to *bona fides* of allegation see *Monro* v. *Bognor Urban Council* (1915), 84 L.J., K.B. 1091 at p. 1094; *Smith* v. *Martin* (1925), 1 K.B. 745.

Walkem, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A. (oral): The appeal, I think, should be dismissed. There is a very neat point involved, that is to say, whether the arbitration clause in the Savings and Loan Associations Act covers anything except disputes between the company and its members or between members. The authorities are perfectly clear on this, that when the dispute is membership or no membership, the matter is one for the Court, and not for arbitration. In this case that is the situation that Mr. *McIntyre* puts forward. He says this man denies membership. Although the pleading is not very artistic, allegations are there made which, if proved, shew that he was not a member. On the other hand, if he fails to prove these allegations, the defendant will succeed, and that, clearly, under the authorities, must be decided by the Court, and not by arbitration.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal by special leave of County Judge GRANT from his order refusing an application to stay the proceedings in this action so that the matter in dispute might be decided by arbitration under the following section of the Savings and Loan Associations Act, Cap. 62, of the statutes, 1926-27:

"20. Every dispute arising out of the affairs of an association between the association or an officer thereof and a shareholder thereof, or any person aggrieved who has for not more than six months ceased to be a shareholder, or any person claiming through such shareholder or person aggrieved, or claiming under the rules shall be decided by arbitration (which shall be under the Arbitration Act unless the rules prescribe some other method); and the decision so made shall be binding on all parties and may be enforced on application to a County Court, and unless the rules otherwise provide there shall be no appeal from such decision."

The appellant Association submits that the evidence before the County judge established the fact that the respondent is one of its shareholders and that as there is undoubtedly a dispute between him and the company the learned judge was not justified in refusing the application because the statute did not give him a discretion in the matter. To this the respondent (plaintiff) denies he is a shareholder and submits that when such a contest arises it is not a dispute of the nature dealt with by the statute but an ordinary issue of fact which must be decided in the action in the ordinary way before the County Court has any jurisdiction to stay the proceedings preliminary to resort to arbitration as the statute directs.

MARTIN, J.A.

Under the decisions on the corresponding English Friendly Societies Acts of 1875 and 1895 it is "plain" as Bankes, J. said in *Taylor* v. *National Amalgamated Approved Society* (1914), 2 K.B. 352 at p. 359, that—

"a statute providing that disputes between a society and a member shall be decided by arbitration does not remit to arbitration the question whether a person is or is not a member."

And Ridley, J. said, p. 356:

"The cases which have been cited shew that under the Friendly Societies Acts it has been held that in order to oust the jurisdiction of the Courts the dispute must be between a member and the trustees of the society, but that if the membership of the claimant is denied, the matter is not one to be decided solely under the rules of the society but can be entertained by the Courts."

That is precisely the question here and so unless there is any essential difference between the English statutes and ours I see no reason for not putting the same construction upon ours, and after an examination of the English statutes (which are conveniently set out in *Palliser* v. *Dale* (1897), 1 Q.B. 257) I do not find any such difference.

In *Prentice* v. *London* (1875), L.R. 10 C.P. 679, Lindley, J. said at p. 688:

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> "The object of the provision in question was the easy settlement of internal disputes between the trustees and officers of the society and its members. That assumes the parties both to be members of the body. If the matter in controversy is whether the party is a member or not, that clearly is not a matter of internal arrangement."

That there is in fact such a "controversy" herein is beyond question, and even though it does not fully appear upon the face of the plaint owing to the special form of the action (to recover money paid on an alleged fraudulent and sham transaction in the Association's shares) yet it is distinctly, and admittedly *bona fide,* raised in the affidavits filed on the defendant's application to enforce arbitration, and that is sufficient to prevent the ordinary jurisdiction of the Court from being ousted and so, in my opinion the learned judge appealed from took the proper view of his powers under the section before us.

MARTIN, J.A.

This principle as invoked in the determination of questions under this compulsory statutory arbitration section is also to be found in voluntary partnership, building, and other contracts, as applied in, *e.g., Piercy* v. *Young* (1879), 14 Ch. D. 200; *Nobel Brothers Petroleum Production Company* v. *Stewart and Co.* (1890), 6 T.L.R. 378; *De Ricci* v. *De Ricci* (1891), P. 379, 391; *Pethick Brothers* v. *Metropolitan Water Board* (1911), Hudson on Building Contracts, 4th Ed., Vol. II., p. 456; *May* v. *Mills* (1914), 30 T.L.R. 287; *Monro* v. *Bognor Urban Council* (1915), 3 K.B. 167, and *Smith* v. *Martin* (1925), 1 K.B. 745, all of which throw light on the question raised herein.

It follows that the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A. (oral): I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): In my opinion the appeal must be dismissed, and in so doing I think the real point is the one point that the authorities shew will always be open to the Court, and that is whether a man is a shareholder or not a shareholder. I do not think that jurisdiction resides in arbitrators to determine that question.

I do not part from this case without saying that in my opinion counsel are entitled to commendation for the very able manner in which it was presented on both sides.

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MACDONALD, J.A. (oral): I agree.

Appeal dismissed.

Solicitor for appellant: *Knox Walkem.*
Solicitor for respondent: *T. F. Hurley.*

JONES v. GIBBONS.

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Practice—Action for damages against a minor—Guardian ad litem—Order appointing—Affidavit in support—Form of—R.S.B.C. 1924, Cap. 1, Sec. 29; Cap. 53, Sec. 177; Cap. 101, Sec. 25—B.C. Stats. 1926-27, Cap. 44, Sec. 12—County Court Rules, Order II., r. 51.

Where in an action against a minor for damages for negligence, the affidavit in support of an application for the appointment of a guardian *ad litem* is not in the form set out in the Appendix to the County Court Rules but contains substantially all the essentials therein prescribed, effect should be given to the rule that "where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them."

Statement

APPEAL by defendant, Thomas Gibbons, from the order of GRANT, Co. J. of the 4th of February, 1928. The action was for damages resulting from a collision between the plaintiff's car and a car owned by the defendant Thomas Gibbons and driven by his son the defendant Allen S. Gibbons, who is a minor, and resides with his parents. The action was brought on the 8th of December, 1927, in the County Court, plaint and summons were served on both defendants on the 10th of December, and a dispute note was filed for the defendant Thomas Gibbons. No dispute note being filed for the defendant Allen S. Gibbons, the plaintiff applied for and obtained an order on the 30th of January, 1928, appointing the official guardian, the guardian *ad litem* for the defendant Allen S. Gibbons. This order was never entered and on the 4th of February an order was obtained appointing the father guardian *ad litem* with leave to file a dispute note on behalf of Allen S. Gibbons. In support

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of the application the same affidavit was used as on the first application which recited that the action was commenced on the 8th of December, 1927, that an advice note was received from the sheriff that both defendants were served with plaint and summons, that a dispute note was filed by the father on the 21st of December and that it appeared from a search in the registry office that no dispute note was filed by the son. The defendant, Thomas Gibbons, appealed from the order of the 4th of February, on the grounds: (1) That the order appointing the official guardian as guardian *ad litem* had not been vacated; (2) that the notice of motion was bad in that it was made returnable before His Honour Judge GRANT *persona designata;* and (3) that the order was made without proper material.

Statement

The appeal was argued at Vancouver on the 15th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Soskin, for appellant: The claim is made against the father under section 12 of the 1926-27 amendment to the Motor-vehicle Act. The first order appointing the official guardian the guardian *ad litem* for the boy although not entered was still in force when the second order was made. In the next place the affidavit in support of the application was not made according to the form in the Appendix as provided by Order II., r. 51 of the County Court Rules and does not contain the necessary material. When the father is appointed guardian there may be some conflict.

Argument

C. R. J. Young, for respondent: The father was served with the plaint and summons and that is all that is required under section 25 of the Equal Guardianship of Infants Act. Although the affidavit in support of the order is not in the exact form of that provided in the Appendix to the Rules it contains all the necessary material and the provision in section 177 of the County Courts Act should apply.

Soskin, replied.

MACDONALD, C.J.A.: I would dismiss the application. The action is possibly somewhat confused by the failure to realize the effect of the Equal Guardianship of Infants Act, but sub-

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stantially everything was done which was required to be done to obtain the order which is now the subject of appeal, and we should not interfere.

MARTIN, J.A.: I am of the same opinion. The rule I was looking for is found in the Interpretation Act, chapter 1, section 29:

"Where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead shall not vitiate them."

And then the County Courts Act, section 177, says,

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

MARTIN, J.A.

Substantially all the essentials are in this affidavit.

As to the notice, it is impossible for us to countenance the submission when the statute requires notice to be given to a person, and that person in all solemnity through his solicitor accepts service, that he can expect to turn round and repudiate the notice when by his previous action he has prevented the service of it being made on the proper person as he now contends.

GALLIHER, J.A.: With respect, it is not necessary to consider the merits in this matter. I agree that the Interpretation Act would have a bearing if it were merely a slight deviation from the form prescribed, but in this case the provisions of the rule have not been complied with and I would allow the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of like opinion to that expressed by my learned brother GALLIHER. It seems to me this is a provision to prevent injustice, and it is a condition precedent to the order being made that the affidavit provided by the rules should be made. I can understand that it is a very necessary thing to have under oath that there is no adverse interest. We cannot be unmindful that at times a father becomes a widower, has a son, marries again, and there are step-children, and sometimes there arises partiality and the son's rightful inheritance may be affected. There are many things which arise and it seems to me there is safety in requiring compliance with the rule. I quite admit that technical and unimportant things may be got over, but this seems to me a matter of substance. I do not see any other way of disposing

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of the matter when it is shewn the proceedings do not conform with the rule, that is, to hold that the order was not properly made and was made without jurisdiction.

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

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

Solicitors for appellant: *Soskin & Levin.*
Solicitor for respondent: *Dugald Donaghy.*

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REX v. CHIN SACK

REX v. CHIN SACK. (No. 2).

Immigration—The Chinese Immigration Act, 1923, Sec. 17—Application under—"Any judge of the Supreme Court"—"Persona designata"—Right of appeal—Can. Stats. 1923, Cap. 38, Sec. 17.

The words "any judge of the Supreme Court" in section 17 of The Chinese Immigration Act, 1923, should be construed as "*persona designata*" and there is no appeal from an order made under said section.

APPEAL by the Crown from the order of GREGORY, J. of the 6th of December, 1927, dismissing an application of the controller of Chinese immigration contesting the validity of a certificate issued under the authority of section 17 of The Chinese Immigration Act to one Chin Sack (Gin Jin Way) on the 26th of September, 1921, and the right of the said Chin Sack thereto. Chin Sack entered Canada in 1910, and upon payment of the head tax was furnished with a certificate. He went to China in 1920 and on his return was furnished with the certificate in question in lieu of the certificate issued in 1910. In 1925 he again went to China and returned in 1927 when the question of his identity as the original Chin Sack who entered Canada in 1910 was raised by the immigration authorities.

Statement

The appeal was argued at Vancouver on the 20th of March,

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1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Jackson, K.C., for appellant.

O'Halloran, for respondent, took the preliminary objection that under section 17 of The Chinese Immigration Act, unless provision is specifically made for an appeal, there is no appeal. The matter is heard in a summary way and there is no appeal. The learned judge is *persona designata* under a proper construction of section 17: see *The Canadian Pacific Railway Company* v. *The Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606 at p. 618; *St. Hilaire* v. *Lambert* (1909), 42 S.C.R. 264; *Canadian Northern Ontario Rway. Co.* v. *Smith* (1914), 50 S.C.R. 476 at p. 479; *Chandler* v. *City of Vancouver* (1919), 26 B.C. 465 at p. 472; *In re Vancouver Incorporation Act* (1902), 9 B.C. 373 at p. 376. The jurisdiction under section 17 conferred on a judge has nothing to do with him *qua* judge so there is no appeal unless expressly given by statute.

Argument

Jackson, contra: There is the express statutory right of appeal provided for by the Supreme Court Act: see *Royal Trust Co.* v. *Liquidator of Austin Hotel Co.* (1918), 26 B.C. 353; *Doyle* v. *Dufferin* (1892), 8 Man. L.R. 294. On the question of *persona designata* see 5 C.B. Rev. 174; *Calgary and Edmonton Rway. Co.* v. *Saskatchewan Land and Homestead Co.* (1919), 59 S.C.R. 567.

MACDONALD, C.J.A. (oral): The majority of the Court is of opinion that the preliminary objection is well taken, and that we have no authority to hear an appeal from the learned judge.

Jackson: May I suggest there should be no costs?

MACDONALD, C.J.A.: You may be taken by surprise, but you see you had plenty of time to prepare your argument. You would not suggest that if objection had been taken, for instance by Mr. *O'Halloran,* that that would have settled the matter. The objection is one which may be taken without notice, and the Court has had itself to take it. It is a question of jurisdiction. I see no reason why the Crown, when it fails in an appeal, should not pay the costs like any other appellant. The appeal is dismissed with costs.

MACDONALD, C.J.A.

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MARTIN, J.A.: This is an appeal from an order made in Chambers by GREGORY, J. on 6th December, 1927, under section 17 of The Chinese Immigration Act, 1923 (now Cap. 95, Sec. 17, R.S.C. 1927), whereby he declared that a certain certificate delivered by the controller to a Chinese immigrant (as considered in our previous judgment reported in [(1927), 39 B.C. 223]; (1928), 1 W.W.R. 618) was "valid and authentic" and dismissed an application by the Crown to "contest" the same under said section as follows:

"17. 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."

MARTIN, J.A.

It is objected *in limine,* that no Court has any jurisdiction to entertain an appeal from such a hearing and determination "in a summary manner by any judge of a superior Court of any Province" because such judge is a *persona designata* by the statute to adjudicate solely and finally upon the matter.

This question of *persona designata* is almost invariably a difficult one and has often given rise to divergence of opinion, or confused expression of the principles really involved therein. It has arisen frequently in the Courts of this Province and our reported cases are many but the leading ones are, *In re Vancouver Incorporation Act* (1902), 9 B.C. 373; *Chandler* v. *City of Vancouver* (1919), 26 B.C. 465; *In re Succession Duty Act and Estate of Edward H. Grunder, Deceased* (1923), 33 B.C. 181, reported on appeal to the Supreme Court as *Blackman* v. *The King* (1924), S.C.R. 406, and *Caudwell* v. *George* (1925), 35 B.C. 134, and in the *Chandler* case particularly the matter was considered at length upon the leading decisions up to that time.

In determining the question the "whole Act" must be considered as Idington, J. said in *Blackman's* case, pp. 411, 413, to arrive at the intention of the Legislature in each particular

case and often that intention is obscure, of which the *Blackman* case is a good illustration, for in it the opinion of the two dissenting justices of this Court (my brother McPHILLIPS and myself) that the "judge" therein was *"persona designata"* was, in effect, upheld by the majority of the Supreme Court, *viz.*, Idington, Duff and Malouin, JJ. at pp. 411, 413, 415 and 419. The necessity of this broad consideration was early pointed out by Patterson, J., who wrote the leading judgment in *The Canadian Pacific Railway Company* v. *The Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606 at pp. 618-9, which is the leading case in the Supreme Court of Canada, and he said, after a recital of some of the pertinent clauses of the Consolidated Railway Act of 1879 (to which many more might be added) assigning various special duties to "a judge of the Superior Court of Quebec," that:

> "All these functions may be exercised by any judge of any of the Courts embraced by the definition of the expression 'superior Courts.' They are functions which from their nature and object must be intended to be exercised in a summary manner and not liable to the delay incident to the appeals from Court to Court. From these considerations, as well as from the language of the statute, it is plain that the judge acts as *persona designata* and does not represent the Court to which he is attached."

MARTIN, J.A.

These observations on a National statute are, in like circumstances, a safe guide in considering the intention of our National Parliament in enacting the statute now before us, and the more so because the principle they embody has been affirmed on several occasions by the same tribunal, *e.g.*, in *St. Hilaire* v. *Lambert* (1909), 42 S.C.R. 264; *Canadian Northern Ontario Rway. Co.* v. *Smith* (1914), 50 S.C.R. 476 and *Calgary and Edmonton Rway. Co.* v. *Saskatchewan Land and Homestead Co.* (1919), 59 S.C.R. 567, the second and third being also cases on the Federal Railway Act. On the other hand, in *e.g.*, *The City of Halifax* v. *Reeves* (1894), 23 S.C.R. 340; *North British Canadian Investment Co.* v. *Trustees of St. John School District No. 16, N.W.T.* (1904), 35 S.C.R. 467; and *Turgeon* v. *St. Charles* (1913), 48 S.C.R. 473, the same Court was of opinion that on the statutes in point the appeals were not from *personæ designatæ*, and the *Halifax* case makes it clear that if an application is authorized to a "Supreme Court or a judge thereof" the matter is in the Court and an appeal lies in the

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ordinary way, as is conceded; and that is also, in reality, the ground for the otherwise apparently inconsistent decision of the same Court in the *North British* case, which is, owing to the incompleteness of the report, obscure, but if all the sections of the Federal Land Titles Act (Cap. 28, 1894, Can.) are referred to it will be seen that section 97 must be read with the three preceding sections empowering " the Court or a judge" to confirm the procedure in sheriffs' sales which is declared to "be the same" as in section 97 and is the "procedure" that must also be resorted to in confirmation of tax sales.

In view of these binding decisions of our Supreme Court it is not now necessary or desirable to review the decisions of the English or other Canadian Courts, all of which I have considered and most of them are reviewed with the history of the matter in a valuable article on *"Persona Designata"* by Mr. *D. M. Gordon,* of the Bar of this Province, in the Canadian Bar Review for March, 1927, which will repay perusal as it is the only article in which I have found this important subject adequately treated. In it the suggestion was made that the whole conception of *persona designata* could be abolished with advantage and the Legislature of this Province did in its next session pass the following (Cap. 1 of 1926-27) amendment to the Interpretation Act, on which the appellant relies, *viz.*:

"30A. Notwithstanding the provisions of section 2, where by any Act of the Legislature heretofore or hereafter passed judicial or *quasi*-judicial powers are given to a judge or an officer of any Court of record, whether individually or as a member of a class, those powers shall be deemed for all purposes to be given to the judge or the officer to be exercised by him in his capacity as judge or officer of the Court, as if the Court itself had jurisdiction in respect thereof and not as a *persona designata,* unless the Act contains express provision to the contrary."

This amendment, however, is specifically restricted to "any Act of the Legislature," *i.e.,* of British Columbia, and hence whatever may be its effect it has no application to the Act of the National Parliament now before us.

It is to be observed, *en passant,* that in Ontario by the "Act respecting the Enforcement of Judges' Orders in Matters not in Court," R.S.O. 1897, Cap. 76, the principle of *persona designata,* as declared by the Courts of that Province, is expressly recognized and appeals in such cases prohibited unless

specially conferred, and means also are provided to overcome some at least of the many difficulties that are encountered in resorting to such extraordinary tribunals which are entirely outside the Court, and because the consequences of their orders "would probably in many cases be irremediable, great care should, I think, be taken in the exercise" of them, as Meredith, C.J. said in *Re King* (1899), 18 Pr. 365.

Our modern conception of the matter was first exactly and best expressed by the Irish Court of King's Bench in Trinity Term, 1847, wherein the Court said, in the leading case of *Tennant* v. *Borough of Belfast,* 11 Ir. L.R. 290 at p. 291:

> "We are asked, by the application made in this case, to review certain things done by the Master, no appeal being given to this Court by the Act of Parliament referred to; and thus constructively we are called on to perform a duty which has been imposed on the officer. That duty is thrown on him, not as the officer of the Court, but under the specific directions of that Act of Parliament. The Court have no jurisdiction, there being neither matter nor cause in Court."

The first use of the exact expression, that I have found, was made by counsel, Mr. Temple, in his argument in *Ross* v. *The York, Newcastle and Berwick Railway Company* (1849), 18 L.J., Q.B. 199, so it is of respectable antiquity, nearly 80 years.

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To ascertain the intention of Parliament in the case at Bar I have considered the whole Act in the light of the foregoing authorities, but in none of its 40 sections is the matter touched upon save in 17 and then only in a brief and bare way and hence very different, in that enlightening respect, from other statutes that have been considered in certain of the cases cited, *supra, e.g., Canadian Northern Ontario Rway. Co.* v. *Smith,* at p. 479, wherein the Chief Justice of Canada said:

> "The Act conferring jurisdiction upon him provides all necessary materials for the full and complete exercise of such jurisdiction in a very special manner, wholly independent of, and distinct from, and at variance with, the jurisdiction and procedure of the Court to which he belongs (sections 194, 195, 196, 197 *et seq.* Railway Act)."

Nothing is said in the statute before us about any appeal from the judge under that section, 17, though by section 12 a general appeal is given to the minister of immigration from the controller, with certain exceptions, but on the other hand the prohibition in section 37 that "no Court and no judge or officer thereof" shall review or interfere with the orders of the minister

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or controller therein specified does not refer to orders of a judge however made. The situation is therefore particularly unsatisfactory and to me, at least, the intention of Parliament doubtful, but after a very careful, in view of its important consequences, consideration of the section I find that my doubt is not sufficient to warrant my dissent from the firm opinion of a majority of my learned brothers that "any judge of a superior Court" should, in the present circumstances and having regard to the *ratio decidendi* of binding decisions of this Court, be construed as *"persona designata,"* but in so doing I wish to note that I have not attached great importance to the expression "determined in a summary way" because that language is equivocal and may well relate to celerity and absence of form in procedure and not to finality of adjudication: if that were intended the usual declaration that the summary decision was to be "final and conclusive" would be expected—*cf., Van Laun & Co.* v. *Baring Brothers & Co.* (1903), 2 K.B. 277, and rule 120A.

It follows that the appeal should be dismissed but speaking in the public interest in a matter of this wide racial consequence, I venture to express the wish that this clear-cut case may, if possible, and apart from other inadequate remedies elsewhere, be brought before our National Supreme Court because that tribunal, as one of final resort, would be at liberty to take a different view of the question arising upon this particular short and simple section, which is unlike other elaborate and self-enlightening enactments (*cf.,* the *Chandler* case, at p. 468, *per* MACDONALD, C.J.A.), than I feel this Court is able now to do in view of its own decisions.

GALLIHER, MCPHILLIPS, MACDONALD, JJ.A.

GALLIHER, MCPHILLIPS and MACDONALD, JJ.A. agreed with the Chief Justice.

Appeal dismissed.

Solicitor for appellant: *M. B. Jackson.*
Solicitor for respondent: *C. H. O'Halloran.*

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Malicious prosecution—Reasonable and probable cause—Malice—Prosecution to establish civil rights.

The plaintiff, who was in the defendant's employ as a salesman of sawdust burners, brought about the sale of three burners for which he claimed he was entitled to $60 commission. One Bunting, to whom one of the burners was sold, asked the defendant if it would be all right to give the plaintiff a cheque in part payment, to which the defendant replied that it would. Bunting made a cheque out for $100 to the plaintiff's order and gave it to him. The plaintiff cashed the cheque and going to the defendant's office, tendered $40 of the amount which was refused. Later in the day the defendant telephoned the plaintiff that if the $100 was not paid to him before ten o'clock on the following morning he would have him arrested. On the following morning the money not having been paid the defendant preferred a criminal charge against the plaintiff of having fraudulently converted to his own use and thereby stolen the sum of $100. The charge was dismissed. In an action for malicious prosecution:—

Held, that as a rule private wrongs, when of a civil nature, should be pursued through civil proceedings, and when the defendant threatened the plaintiff over the telephone it was with the idea that if he did not pay the money over he would resort to the police Court to redress the wrong done him; in doing so he rendered himself liable for damages.

Statement

ACTION for damages for malicious prosecution. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 22nd of March, 1928.

D. W. F. McDonald, for plaintiff.
J. L. Lawrence, for defendant.

Judgment

MACDONALD, J.: The plaintiff complains that the defendant, in November, 1927, maliciously and without reasonable and probable cause preferred a criminal charge against him, of having fraudulently converted to his own use and thereby stolen the sum of $100.

The facts, shortly put, are these: That the plaintiff was in the employ of the defendant as a salesman of sawdust burners, and had been the means of bringing about the sale or installation of three such sawdust burners. The plaintiff claimed to be entitled

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to commission in connection with these sales, amounting to $60. One of the sales was made to Mr. Bunting, who upon being satisfied with his purchase paid the sum of $100. This payment was made in the shape of a cheque payable to the plaintiff, who in due course cashed the same and became possessed of the $100 in cash. The plaintiff then went to the office of the defendant and tendered to William E. Hoag, then in charge of the office, the sum of $40, claiming to be entitled to retain $60 of the $100 he had received from Bunting. Hoag, however, declined to accept the $40, and contended that he was entitled and would only receive the entire amount, namely, the $100 in the possession of the plaintiff. Later on in the day, the defendant being advised of the situation and knowing that the contention had been made by the plaintiff that he was entitled to retain $60 out of the $100, telephoned to the plaintiff asking that the whole amount should be paid to him. He threatened, and I so find, at the time, that unless the amount was paid by ten o'clock on the following morning, being Saturday, he would have the plaintiff arrested.

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As to the position assumed by the plaintiff at that time with respect to the $60, and the threats made by the defendant, I read portions of the examination for discovery of the defendant as follows:

"Now, I will go further and ask you this: You knew at the time that you laid this information against Mr. Jones, as you put it, Jones was labouring under a misapprehension that he was entitled to a commission? That is the only thing I know of.

"You knew at the time that Jones was claiming a commission, he thought he was entitled to this $60 commission? I presume so.

"You knew that before you went to the police Court? It seems to me that that is what all the row is about, isn't it?

"If Jones would have brought you in the $100 on Saturday morning you would still have had him arrested? No certainly not. If the man was going to admit he was in the wrong and play the game, that was all right. I am not vindictive."

In referring to the fact that Hoag had informed him as to the situation and as to the tender, the defendant then makes the following answer:

"You were vexed at him because he was retaining that $60 for his commission. You did not think he should retain it for his commission, did you? I presume that is it."

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There may be some other portions of the examination for discovery bearing upon this point, but suffice it for me to say I am quite satisfied that the defendant was contending that the plaintiff had improperly received and was not entitled to retain the $60 claimed by him as commission. He was then proposing, according to the statements to which I have referred, and to which he more or less admitted in giving his own evidence in Court, that his intention was to proceed in the police Court to deal with the matter should the payment not be made as he demanded.

The situation that brought about the payment to the plaintiff was quite open and aboveboard on the part of all concerned. The plaintiff was apparently desirous of getting some portion of his commission and had gone to the house of Bunting, and in some conversation in the basement of that house Bunting was about to make out a cheque in payment on account, of $100, and according to the evidence given by the defendant on discovery, the following then occurred. In answer to question 131 the defendant says:

"Mr. Bunting and Mr. Jones and myself were in the basement and Mr. Bunting said, 'Will it be all right to give Mr. Jones' (who had from time to time approached Mr. Bunting on the matter of the cheque) 'would it be all right to give him a cheque for part payment on the burner?' and I said certainly, thinking that he would make the cheque out as it should have been done, to The Economy Sawdust Burners instead of to Mr. Harry Jones, as it was made out."

Now Mr. Bunting is quite candid that after he had been given this authority he thought it was quite proper to make the cheque to the party to whom it was to be given, namely, Jones, because of the statement made by the defendant, which I have just read, contained a query on the part of Bunting as to whether it would be all right to give Jones a cheque. There is no evidence before me as to what The Economy Sawdust Burners consists of. It seems to be a name, but it may be a partnership name adopted by the defendant, although he states there was no partnership.

To resume, then, the situation. Upon the plaintiff failing to make the payment, the defendant went to the police office, and after discussion the information was then laid charging the

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plaintiff in the terms to which I have alluded. Suggestion is made that at that time some of the facts were stated to the policeman, but any advice that may have been given or received when the magistrate took the information was on statements made through a third party, namely, not through the defendant. And I am not satisfied that even to the policeman the defendant gave all the evidence and shewed all the facts surrounding the transaction, otherwise I doubt very much if even a policeman with his scanty knowledge of the law would have brought the matter to the further consideration of the justice of peace.

The whole matter, then, resolves itself into a question as to whether the defendant acted maliciously and without reasonable or probable cause. The magistrate did not take very long after the case came on for hearing in disposing of it by dismissing the summons and releasing the plaintiff from any further liability as far as criminal proceedings were concerned. The plaintiff is still not satisfied with the result and asked for further vindication of his character by finding the defendant liable for damages and costs.

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The burden rests upon the plaintiff in an action of this kind of shewing that the defendant acted maliciously and without reasonable and probable cause. It has been stated that Courts of law do not lay down a law or finding as to what will constitute reasonable and probable cause, and the judge must consider what he will do in each case. Then, again, it has been held that in order to justify a defendant, there must be a reasonable cause such as would operate on the mind of a discreet man, and there must also be a probable cause such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge, otherwise there is no probable cause. Now here I cannot see what reasonable and probable cause there might be that would operate on the mind of a discreet person, to summon a man who has been in his employ to answer a charge of theft in the police Court because such party was contending that, under the terms of his hiring, he was entitled to retain moneys in his hands which, I find, had legally come into his possession. It seems to me that the defendant was acting unreasonably and without probable cause.

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It has been suggested, but not sworn to, that he was acting in good faith. Well, he had not the temerity to say in Court that the plaintiff had been guilty of theft. In fact, he endeavoured to evade that rather opprobious term to be applied to the actions of the plaintiff, but there can be no disguising the fact that the charge was one, although termed conversion, of theft. And the result would have been, had the charge been proven, of a penalty attaching to the crime of theft.

It has been held, in *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247, that upon a Court being satisfied that there is want of reasonable and probable cause, that malice may be assumed; it does not require to be proven by the plaintiff. In the case of *Ibbotson* v. *Berkley* (1918), 26 B.C. 156 I declined to go that length in giving judgment, although I had such a distinguished authority as Mr. Stephens to support that conclusion as being one to be derived from the *Abrath* case. I preferred then, and I prefer now, to deal with the question of malice as being one required to be proved by the plaintiff in an action of this kind. Now, malice has not to be taken simply in the ordinary acceptation of bad feeling, evil mind, desire to do harm, but it can be assumed from the actions of a defendant, as in this case, if through a prosecution of this nature he is endeavouring to obtain an object which ought to be sought in another manner. To point that more particularly, if a person having a civil remedy seeks through a criminal proceeding to enforce his rights, then he is acting, to my mind, maliciously. Here there is no question whatever that the defendant sought in criminal proceedings to obtain payment of $100, which he contended was illegally being held by the plaintiff. He did not reduce his claim to $80, but he wanted the whole $100 to be paid into his hands so that he might go through the somewhat farcical operation of paying back $20 to the party to whom he owed the money. But to return. It has been held that where a party has an indirect ulterior motive in criminal proceedings, then malice, in the sense of being applicable to an action of malicious prosecution, applies. I do not think any good purpose will be served by my discussing the matter further. I can hardly accept the view taken by the defendant, that he was not

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aware in going to the police Court that he was starting, what might result in criminal proceedings. I accept his statement made the night before, when he threatened the plaintiff, that it was with the idea that if the plaintiff did not pay the money over to him he would not seek his advice from his solicitor, but would refer to the police Court to redress, what he thought was a wrong being done to him.

I remark, in closing, that persons having a claim of a civil nature should be very loath to press that claim by criminal proceedings. They should be perfectly satisfied that in the pursuit of such a claim they were acting, not with a view of satisfying their own personal ends, but bringing to justice someone who had committed a wrong from the public standpoint. It may be, and often it has happened, that a private wrong involves something in which the public is interested, but as a rule private wrongs, when they are of a civil nature, should be and only can be pursued through civil proceedings. The result is one which is quite plain from what I have said, that the defendant has rendered himself liable for damages by his action. The extent of those damages it is for me to determine.

The plaintiff succeeds to the extent of having his character further vindicated by his success in this action. I do not think he has been damaged to any appreciable extent. I fancy his vocation is such that, having been dismissed from the charge in the police Court, and being vindicated in this Court, he will be able to withstand any criticism which may arise or any question which will be presented for his consideration. He has already paid the sum of $50 for his defence in the police Court. I think a further sum of $100, namely, in all, $150, should be sufficient. There will be judgment for the plaintiff for $150 and costs on the Supreme Court scale.

Judgment for plaintiff.

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THE GEORGIA CONSTRUCTION COMPANY LIMITED *ET AL.* v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

Contract—Construction—Engineer to be judge of work and material—"Extra haul"—Meaning of—Method of work—Engineer's powers.

The plaintiffs entered into a contract to make a cut and fill on a certain portion of the defendant Company's railway line. The contract provided that the engineer be the sole judge of work and material in respect of both quantity and quality, his decisions on all questions in dispute with regard thereto to be final. A further clause was as follows: "Extra haul 12. The contract prices for the several classes of excavation shall be taken to include the cost of depositing material in embankments, crib work and all other expenses connected therewith, except extra haul which will only be paid for where it exceeds 500 feet, at so much per yard per additional 100 feet." The plaintiffs located and distributed their plant and equipment in such a way that it would be obvious to the engineer that he intended to remove the soil from the north end of the embankment and it was not until the excavating work had commenced that a divergence of opinion arose between the plaintiffs and the engineer as to the meaning of the word "extra haul" the engineer then contending there would have been a shorter haul if the work had been commenced from the south end of the embankment. Upon completion of the contract the plaintiffs brought action for the cost of the "extra haul" work under clause 12 of the contract.

Held, that the difference of view as to the method of work should have been raised when the plaintiffs commenced to locate their plant, and the construction of a term of the contract, namely, the meaning of the words "extra haul" did not come within the duties of the engineer. It was for the contractor to determine the method of work he would adopt. The method adopted was within the contract and the cut and fill were finished in a workmanlike manner and they are entitled to the price of the "extra haul" claimed.

[Reversed by Court of Appeal.]

Statement

ACTION to recover the price of overhaul under a contract with the defendant Company for the making of a cut and fill at a point in the defendant's line of railroad known as Mile 13.7, North Lillooet, B.C. The facts are set out fully in the reasons for judgment. Tried by MORRISON, J. at Vancouver on the 7th of March, 1928.

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J. W. deB. Farris, K.C., and *Sloan*, for plaintiffs.
Mayers, and *Locke*, for defendant.

21st March, 1928.

MORRISON, J.: The plaintiffs are seeking to recover the price of over-haul work from the defendants, a Railway Company incorporated pursuant to the Pacific Great Eastern Railway Incorporation Act, B.C. Stats. 1912, notwithstanding that the engineer has withheld his final certificate. The plaintiffs' tender was accepted for the making of a cut and fill at a point on the defendant's line of railroad known as Mile 13.7, North Lillooet, B.C. On the 20th of May, 1926, a contract containing the measure of the rights of the parties thereto was entered into between the parties, the dispute over the wording of clause 12 of which has given rise in the main to this action. The contract contained clauses usually to be found in agreements for works of this kind between contractors and railway companies; for example, clause 8:

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"The engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard thereto shall be final, and no work under this contract shall be deemed to have been performed, nor materials nor other things provided, so as to entitle the contractor to payment therefor, until the engineer is satisfied therewith, and has issued to the contractor his certificate in writing in respect thereof."

Clause 10:

" . . . In case of dispute as to what work, labour, tools, plant, materials, equipment and things are included in the works contracted for, or in the said schedule, or any item thereof, the decision of the engineer shall be final and conclusive."

Clause 28: The written certificate of the engineer certifying to the final completion of the said works to his satisfaction, shall be a condition precedent to the right of the contractor to receive the remaining amount due. Then there is the "over-haul" clause, clause 12, which provides as follows:

"Extra haul. 12. The contract prices for the several classes of excavation shall be taken to include the cost of depositing the material in embankments, crib work, and all other expenses connected therewith except extra haul, which will only be paid for where it exceeds five hundred (500) feet, at so much per yard per additional one hundred feet. No allowance or compensation whatever shall be due or paid to the contractor for any temporary roads, bridges or trestles he may make to facilitate his work."

The words "extra haul" as used in the contract and "over-haul" are synonymous.

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I am relieved to find, having regard to the conclusion to which I have come in this case, that it shall not be necessary for me to attempt to define "over-haul" or to determine whether the embankment in question should be "trapped" "shovelled" or "hydraulicked."

The plaintiffs, for the purpose of tendering for the work, made preliminary investigations of the "ground" and, upon acceptance of their tender, they proceeded, in due course, to assemble and put in place their equipment, and to commence the work. From the way they located and distributed their plant and equipment, it must have been obvious to the defendant's engineer and agents on the work that the plaintiffs intended to remove the soil of the embankment, through which the "cut" was to go, from the north end instead of the south end, or by what, at the trial, was referred to as the circuitous or long haul. In all fairness to the contractor, it was then, in my opinion, that any differences of views, as to which method should be followed and for which the contract may not have clearly provided, ought to have been considered definitely and, if possible, a new and understandable arrangement come to as between practical men desirous of carrying out the true intent of the contract, if such intent had not been manifested by explicit terms and unambiguous language. It was not until after breaking ground and the work was commenced that there began to be disclosed the divergence of opinions between the plaintiffs and the engineer as to the meaning of "over-haul."

The parties to a contract for the performance of work of this kind are at perfect liberty to agree that the decision of one or other of them or of a third person, as to the sufficiency of the performance of its terms shall be conclusive. It is not the province of a Court to alter the terms of a contract, although it may be a harsh and unreasonable one. Upon looking into the contract the matters, which were agreed to be left to the sole decision of the defendant engineer, are clearly set out. But, in my opinion, the decision, as to the meaning of the contract, was not one of them. *Kinlen* v. *Ennis Urban District Council* (1916), 2 I.R. 299 at p. 312.

"For to construe is nothing more than to arrive at the meaning of the parties to an agreement, and this must be the aim and

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end of all Courts which are called upon to enforce any rights created by and growing out of contract."

The Court, in construing a contract, may not read into it any submitted construction; its duty is to read out of it the true intention of the parties which it expresses in unambiguous language. If the language is ambiguous or intractable, then it has, as to the particular clause to be construed, no meaning; and if the work, which one of the parties requires to be done, is allowed to be performed by the other, then on the compendious principle that a servant is worthy of his hire, they ought to pay for the work performed by him in the manner in which he did it and of which work they have the full benefit. Again, it seems to me that this may be read out of it, namely, that the conditions which made it necessary to arrange for or to consider the contingency of "over-haul" should likewise have brought to the Railway Company's attention the necessity for a special clause involving the use of a highly technical term which, or the meaning of which, should not have been left in doubt—a term, the effect of which, if it carries the meaning attached to it by the plaintiffs, would, to the knowledge of the engineer, necessarily increase the cost of the work.

The defendant had the carriage of the drafting of the contract. The contractors, if they desired to secure the contract, were obliged to accede to its terms, and in respect of certain matters, to put themselves in the hands of the defendant's engineer. It is clear, from the evidence, that, as to the meaning of "over-haul" the plaintiffs and defendant were not *ad idem*. One was thinking in terms of attacking the work from the north end, the other from the south end of the embankment through which the cut was to be made. They were as divergent as that on this question of the method of working out the "over-haul." The engineer, however, had his mind closed against the contractor's overtures. He would be entitled doubtless to take that stand had the contract been clear on the point. Other methods of doing the work were considered by the contractor, such as by "trapping" by hydraulicking and steam shovelling from the south end. It was for the contractor to determine which, if any, of these methods they would adopt. I do not deem it necessary to encumber this judgment with extracts from the

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evidence or by inserting the correspondence which took place between the parties. The cut was made and the fill was finished in workmanlike manner. Had the dispute, as to over-haul not occurred, there was nothing, broadly speaking, to prevent the issuing of the final certificate.

At the trial, there appeared two conflicting schools of opinion, as to the meaning of the word "over-haul," a conflict between the scientific description and the individual practical interpretation which tended to a confusion of thought. The theoretic view, as to how the contractor should have done the work, or as to how the respective witnesses themselves, some of whom had tendered for this piece of work, would have done it, is met by the fact that the contractor actually did it in one of the ways deposed to, for which he has the support of a number of experienced engineers. The contract was left, as to this phase of the case, in a state of ambiguity. The exhaustive learned expert evidence has, to my mind, increased the ambiguity instead of removing it. It was pressed upon me, on behalf of the defendant, that the word "over-haul" by custom bore a restricted meaning in the profession. That "over-haul" is a custom, bearing the meaning attached to it by the engineer. I find that there is no such custom. The word "custom," as meant to be applied here, has run the gamut of the Courts and has been frequently adjudicated upon. The authorities, as to what constitutes custom, are numerous and clear. It must be notorious, certain and reasonable—Halsbury's Laws of England, Vol. 10, p. 249 *et seq.* The tendency of the Courts in cases of contracts, which contain ambiguous or faulty expressions rendering the meaning doubtful, is to give them that interpretation which is most consonant to equity.

The defendant Company could readily have inserted a properly worded "over-haul" clause. On this branch of the case alone they must bear the consequences and be ordered to pay for the "over-haul" work done as claimed.

There is another ground upon which the plaintiffs seek to get away from the position created by the absence of a final certificate, namely, that the engineer had deferred to the decision of the board of directors of the Railway Company in a matter left to him solely by the contract:

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"Where it is agreed by the parties that quantity, price or quality is to be left to the decision of a third person his judgment or estimate is binding in the absence of fraud or mistake. Otherwise when it is founded on wrong views of the contract or where he cannot freely exercise his judgment."

After the work had progressed for some time, during which progress certificates were issued in which no provision was made for over-haul, and, upon the contractor directing the engineer's attention to the omission, the engineer did refer the matter of the contractor's contention, as to the meaning of "over-haul" to the board, and reiterated his own views. The board, whose views coincided with the engineer's, appears to me to have dealt with the matter on the footing that it was within their power to determine. From the resolutions passed by them and the correspondence which ensued it would appear that they had appropriated the functions of the engineer. They passed a resolution on the 20th of July in these words:

" . . . that with regard to the question of over-haul, the engineer at Mile 13.7 be instructed that the Board cannot consider any other than the shortest haul or the nearest way."

And to that they steadfastly adhered. The next day the general manager wrote the engineer as follows:

"With reference to the question of over-haul I am instructed to advise you that the Board of Directors cannot consider any other than the shortest haul or the nearest way."

The contractor was not aware of this resolution or the correspondence until later.

It was some period after this that the engineer's progress certificates allowed for "over-haul," but on the short haul basis. To this the contractor objected, and the plaintiffs' manager, Nixon, had several interviews with the board and sought in vain to have them and the engineer recede from the position taken by them. However, they were as dead to the contractor's appeal as were the Scotch divines to Cromwell's on an historic occasion when he implored them—"I beseech you . . . to think it possible you may be mistaken." Both the engineer and the directors, in dealing with question of over-haul, had reached their strain-limit. I am constrained to think that the Courts are not powerless to step in and grant them relief from the pressure. What the plaintiffs agreed to was to submit to the engineer's decision and not to that which some other forum chose to decide. *Scott* v. *The Corporation of Liverpool* (1858), 28 L.J., Ch. 230. The Courts look with penetrating eye upon

the relations created between engineer and contractor where the engineer is made the sole determinator in his own work. And they proceed on the assumption that he must necessarily be a somewhat biassed person who must have some preconceived idea on the matter in dispute. Owing to the delicate position in which he is placed by the concurrence of the parties the Courts of Law must be particular to see that his judicial attitude is maintained. *Hickman & Co.* v. *Roberts* (1911), 82 L.J., K.B. 683; *Bristol Corporation* v. *John Aird & Co.* (1913), *ib.* 687; *Eaglesham* v. *McMaster* (1920), 89 L.J., K.B. 805 at p. 810.

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The defendants allege that if the plaintiffs' tender, which was for $127,980, had added to it the $78,445.86 now claimed as "over-haul" minus $9,576.40, the amount which the engineer has allowed, the real sum of the plaintiffs' tender should have been not $127,980, but $196,849.40 in which event their tender would not have been the lowest and consequently would have been rejected. Were the issues herein restricted to that plea, I would be called upon to speculate. It would have been necessary to have gone into the *bona fides* of the other tenders, and to have determined in the face of conflicting evidence whether or not the work could have been done within the time limit in the contract, by the short haul method at the price agreed upon. This plea is another way of saying that the plaintiffs created an over-haul and are not entitled to succeed. I cannot, on the evidence, take that view.

There will be judgment for the price of "over-haul" as claimed for the amount which I understand counsel agreed will be settled between the parties without prejudice should the plaintiffs succeed.

The counterclaim did not necessitate any additional evidence, and, in the view of the fact the plaintiffs have withdrawn some of the items in their statement of claim, I was at first inclined to treat it as being withdrawn. But, on further consideration, although the engineer has conceded that the work was finished to his satisfaction—other than this question of over-haul—yet the plaintiffs have exceeded the time limit and the defendant to that extent succeeds on the counterclaim. The *quantum* in both claim and counterclaim to be spoken to if necessary.

MURPHY, J.

1928

March 27.

GRADY v. DEVITT

GRADY AND GRADY v. DEVITT.

Malicious prosecution—Swearing out and executing a search warrant—Reasonable and probable cause—Malice—Damages—R.S.B.C. 1924, Cap. 146, Sec. 73.

In April, 1926, an informant who was known to the police complained to the chief of police of the Municipality of Burnaby that Grady was illicitly dealing in liquor. An investigation was had but all reports were in Grady's favour. In June following, the same informant arranged with the desk sergeant of police that on having information as to illicit dealing in liquor he would telephone the information under an assumed name. On the 31st of July, 1926, said informant telephoned the desk sergeant under an assumed name (the sergeant knowing who he was) that a load of liquor was leaving for Grady's place and "better hurry up if you want to get it." The sergeant advised the chief who, without further investigation, swore an information for a warrant to search Grady's premises. The premises were immediately searched but no liquor was found. In an action for malicious prosecution against the chief of police:—

Held, that the most charitable view that could be taken of his action was that by the information given he was instructed to investigate but instead of making a proper investigation he immediately applied for a search warrant, and this view, with the absence of reasonable and probable cause would support a finding of malice.

The Government Liquor Act has not changed the law in reference to malicious prosecution.

Manning v. *Nickerson* (1927), 38 B.C. 535 followed.

Statement

ACTION for damages for malicious prosecution and for maliciously and without reasonable and probable cause swearing out and executing a warrant to search the plaintiff's house. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 22nd of March, 1928.

R. L. Maitland, for plaintiffs.
David Whiteside, K.C., for defendant.

27th March, 1928.

Judgment

MURPHY, J.: Plaintiff Grady is a labourer living in Burnaby. Defendant is the chief of police of that municipality. About April, 1926, a person, known to the chief as a respectable citizen, and subsequently vouched for as such to the chief by the Reeve

of Burnaby, complained to the chief that plaintiff Grady was illicitly dealing in liquor. Informant wanted to be appointed a special officer to enforce the liquor law, apparently with an intention of devoting special attention to Grady. The chief declined to appoint him. He did, however, cause Grady to be investigated by his officers and received three separate reports on him. These reports were all favourable to Grady. Grady went to the chief and complained about being made the object of investigation. Grady subsequently went to his solicitor and laid the matter before him. The solicitor thereupon wrote (Exhibit 2) to the chief. The chief on May 28th, 1926, wrote (Exhibit 1) in which he states he believes Grady to be a respectable citizen. Sometime in June, 1926, Devitt's informant wrote the Burnaby police commissioners asking that body to appoint him a special officer. He also saw the reeve and apparently complained that Devitt had not acted on informant's information against Grady for the reeve 'phoned Devitt asking why action had not been taken. Devitt replied by telling the reeve of the favourable reports he had on Grady. Devitt attended before the reeve and successfully resisted informant's application to be appointed a special officer. Informant was present and it was finally arranged that a reward of $50 be offered for information leading to the conviction of anyone guilty of breaking the liquor law. Informant then asked Devitt how informant should proceed in case he desired to give such information. Devitt took informant to the police desk sergeant and it was there arranged that informant should telephone such information under an assumed name. Informant stated he did not wish to use his own name over the telephone. On July 31st, 1926, the desk sergeant received what purported to be a long distance 'phone message from Vancouver that a load of liquor was leaving for Grady's place and "better hurry up if you want to get it." The name used by the sender was the name agreed upon by the informant and Devitt, as the one informant would use but the sender added a Vancouver street address and this had not been agreed upon. The desk sergeant conveyed this information to Devitt who was engaged in the Burnaby police Court which was in session. Devitt directed the desk sergeant to check up the

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GRADY v. DEVITT

name and address given by the sender. This the desk sergeant did by searching the city and telephone directories. He could find no such name and address in either and so reported to Devitt. Devitt swore an information to obtain a search warrant of Grady's premises before magistrate Johnson who was presiding in the police Court. The information is not produced but the search warrant based on it is (Exhibit 7). It states:

"Whereas it appears on the oath of W. J. Devitt, chief constable of Burnaby that there is reason to suspect that certain liquor not being sealed with the official seal prescribed under the Government Liquor Act, is concealed in the house of T. J. Grady," etc.

Little time elapsed between the receipt of the 'phone call and the obtaining of the search warrant. From Devitt's discovery evidence it seems doubtful that the checking up in the directories was completed before the officer had left to execute the search warrant. No liquor was found on Grady's premises. The warrant was executed in a careful, unobtrusive manner. Some liquid was found which Grady told the constable was raspberry vinegar to which yeast had been added. Grady invited the constable to taste this. The constable did so but apparently concluded that possession of it did not occasion suspicion that the liquor law had been broken for he took none of it away for analysis. At the trial, however, Devitt referred to this as "home brew." Grady again saw his solicitor and on August 27th, 1926, the latter wrote Devitt for an explanation. No reply was sent. The solicitor wrote Devitt again on December 16th, 1926, with no result. On January 24th, 1927, the solicitor wrote Devitt once more and for the first time threatened suit. To this, a reply, dated January 25th, 1927, was sent giving the names of Devitt's solicitors who the letter stated were instructed in the matter. This action was then brought. In my opinion, the plaintiff has proven the absence of reasonable and probable cause. Granting that Devitt did have the checking up in the directories done before he swore the information leading to the search warrant, which seems doubtful, on his own evidence, all that he could reasonably conclude therefrom was that the 'phone message was sent by the informant who had previously seen him. He knew this informant was a resident of Burnaby. He knew from the reports of his officers that Grady was unpopular with

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his neighbours. He knew that three investigations made, as a result of information given by this informant, had not only failed to find anything suspicious against Grady but resulted in reports that convinced him, Devitt, that Grady was a respectable citizen. He knew that this informant was so eager to be made a special officer that he had gone over Devitt's head to the police commissioners. He knew that the informant was so anxious to conceal his identity that he arranged to use a fictitious name over the 'phone. He knew that the informant was throughout a volunteer against Grady and should, in my opinion, have regarded him as an eager volunteer. All this should have made him proceed with caution. The information on which he acted was not that liquor was concealed in Grady's house but that a load of it was being taken there. The recital in the warrant therefore taken literally is not true. The 'phone message purported to come from Vancouver, distant three or four miles from Burnaby. In view of the necessity for caution it would seem the proper course was to detail plain clothes men to watch Grady's house. Even if it is considered a reasonable inference on his part that the 'phone message did in reality come from Burnaby—a view I do not take since the source of supply would much more probably be Vancouver—and that therefore he could reasonably believe the liquor had been actually delivered and was in Grady's house when the information was sworn, in view of all the above recited facts I think he should have caused enquiries to be made in the neighbourhood about the arrival of any conveyance at Grady's house before proceeding to the drastic step of utilizing search-warrant procedure. The time was forenoon. There were neighbours in the vicinity. Further, since his information was that Grady had had a trap door constructed in his attic for the purpose of concealing liquor and, since he swears he believed Grady intended to sell the liquor, even if such enquiries failed, in view of the antecedent facts, I consider he should have had Grady's premises watched for a time for customers. It would have been different had he believed that Grady's house was a depot for passing on liquor in quantity to others. But his information was all the other way. I, there-

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fore, hold that plaintiff has shewn an absence of reasonable and probable cause.

On the question of malice, the most charitable view, in my opinion, that can be taken of Devitt's action is the one which the Supreme Court of Canada stated in *Nickerson* v. *Manning* (as yet unreported* but a copy of which decision was kindly furnished me by defendant's counsel) was one that the jury in that case could reasonably take, *i.e.*, that Devitt by the information he was given was instructed to investigate and instead of making a proper investigation he immediately took the step of applying for a search warrant. If it be replied that his informant requested speedy action that to my mind only confirms the view that what was being requested was not search-warrant action but the taking of immediate steps to watch for the load of liquor so that Grady would be caught in the act of accepting delivery. The same decision states that such a view coupled with the finding already made of absence of reasonable and probable cause will support a finding of malice. In the case at Bar however there are other facts proven which I think support a finding of malice, in the sense that Devitt acted without any real belief in the guilt of Grady. He was personally convinced that Grady was a respectable citizen. Informant, however, had been to the police commissioners complaining of Devitt's inaction and whilst informant failed to get himself appointed a special officer he did convince that body or, at any rate the reeve that the Burnaby police force was so inefficient in the matter of liquor law enforcement that a reward of $50 to informers had to be offered. I think Devitt, when the 'phone message of July 31st, 1926, was reported to him, felt he must take spectacular action as proof of his zeal and that this was his actuating motive in obtaining the search warrant. There are in addition some *ex post facto* indications of feeling on Devitt's part against Grady. The suggestion at the trial by Devitt that Grady had "home brew" in his house was not justified by the facts for I think what Devitt intended to convey was that this "home brew" was of such alcoholic strength as to constitute an infraction of the Liquor Act. His neglect to reply to the cour-

* Since reported (1928), S.C.R. 91.

teous letters of Grady's solicitor is also a fact of some significance. Such indications may and should be considered on the question of malice if I understand aright the judgment of MACDONALD, J.A. in *Manning* v. *Nickerson* (1927), 37 B.C. 535 and as I read the report MARTIN, J.A. concurs with MACDONALD, J.A. in this view. I, therefore, hold that plaintiff Grady is entitled to succeed. Evidence was indeed adduced that Devitt had laid the matter before Magistrate Johnson who, after investigation, issued the search warrant. The evidence, as to what was laid before the magistrate, is in the most general terms. The matter was dealt with apparently whilst the magistrate was holding a session of the police Court. Devitt's evidence is that the whole affair of getting the search warrant was a hurried one. I do not believe that had all the facts, as herein set out, been laid before the magistrate he would have signed the warrant. *Manning* v. *Nickerson, supra,* shews that the Liquor Act has not changed the law in reference to malicious prosecution.

Judgment

Grady's wife is also a plaintiff. Her case is that she is and has been since the search in a serious condition of health and that the search brought this about or at any rate is largely responsible for it. I thought that some question might arise as to her right to sue since she is not mentioned in the search-warrant proceedings. The matter was not raised at the trial and counsel for plaintiffs calls my attention to the fact that in the *Manning* v. *Nickerson* case the wife was a co-plaintiff and no comment was made on this feature either in the judgments of the Court of Appeal or of the Supreme Court of Canada. I am not affirmatively convinced that the fit the wife had in October, 1926, was caused by the search or that her present condition is mainly attributable to it but I believe it was a factor in intensifying her nervous condition and did contribute to damaging her health.

As to damages, the judgment of MARTIN, J. A. in *Manning* v. *Nickerson, supra,* shews these are to be measured with care when, as here, the search was conducted in a very considerate and unobtrusive manner. On the other hand, I have here the factor of injury to the wife's health and consequent expense to

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the husband. On the whole I think justice will be done if I give judgment for the plaintiffs for $500 and costs. Judgment accordingly with costs to plaintiffs.

Judgment for plaintiffs.

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1928

March 29.

CANADA PERMANENT MORTGAGE CORPORATION v. DALGLEISH

CANADA PERMANENT MORTGAGE CORPORATION v. DALGLEISH AND CANADIAN BANK OF COMMERCE.

Costs—Appeal—Foreclosure suit—Untenable defence—Puisne encumbrancer —Right to payment forthwith.

An appeal by the mortgagor and second mortgagee from an order setting aside the registrar's certificate and directing that a new account be taken, having been dismissed, it was held that the usual rule should be followed and the first mortgagee was entitled to the costs of the appeal forthwith after taxation thereof.

Statement

MOTION to vary the form of the judgment of the Court of Appeal herein delivered the 10th of January, 1928, the registrar following the direction that the respondent's costs of the appeal be taxed and added to the mortgage debt and allowed in its accounts.

The motion was argued at Vancouver on the 12th of March, 1928, before MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Molson, for the motion: Our submission is that we are entitled to the costs forthwith after taxation: see *Guardian Assurance Co.* v. *Lord Avonmore* (1873), I.R. 7 Eq. 496; *Essen* v. *Cook* (1914), 20 B.C. 213; *Tildesley* v. *Lodge* (1857), 3 Jur. (N.S.) 1000; *Cotterell* v. *Stratton* (1872), 42 L.J., Ch. 417; *Herrick* v. *Attwood* (1859), 33 L.T. Jo. 232; Eng. & Emp. Digest, Vol. 35, p. 697.

Hossie, contra: The right of the mortgagee is to add all costs to his mortgage debt: see Halsbury's Laws of England, Vol. 21, pp. 156, 231 and 295; *Addison* v. *Cox* (1872), 8 Chy. App. 76

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at p. 83; *O'Meagher* v. *Daly* (1917), 1 I.R. 341 and on appeal at p. 493. This is foreclosure only and there is a distinction between foreclosure and a sale: see *Sharples* v. *Adams* (1863), 32 Beav. 213; *Cotterell* v. *Stratton* (1872), 8 Chy. App. 295.

Molson, replied.

Cur. adv. vult.

On the 29th of March, 1928, the judgment of the Court was delivered by

MARTIN, J.A.: This is a motion to vary the form of the judgment we pronounced herein (on the 10th of January last) as settled by the registrar. The appeal was brought on identical grounds by the defendants, Dalgleish being the mortgagor to the plaintiff of the lands in question and the Bank of Commerce being alleged in the statement of claim 5, to be "a puisne mortgagee of the lands above set forth." An order *nisi* for foreclosure and account and immediate delivery of possession was made against both defendants on the 24th of March, 1927, and the registrar made his certificate on the 10th of June thereafter but on plaintiff's motion it was set aside and a new account directed to be taken by order of Chief Justice HUNTER on the 28th of June, 1927, and an appeal as aforesaid was taken to us by both defendants but was dismissed.

Judgment

In settling the form of our judgment the registrar approved the direction therein that the "respondent's costs of the appeal be taxed and added to the mortgage debt and allowed in its accounts." The respondent submits that the usual rule of this Court that costs of an unsuccessful appeal should be payable forthwith should not be departed from. It is conceded by the unsuccessful appellants that the costs should follow the event, as in general directed by section 28 of the Court of Appeal Act, but it is submitted that a direction as to when and how they should be paid following the event is within the discretion of the Court, and doubtless that is the practice and appropriate directions will be given to meet special cases, *e.g.*, in setting off costs. It is further submitted that in foreclosure cases it is the practice to add the mortgagee's costs of a successful appeal to

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CANADA PERMANENT MORTGAGE CORPORATION *v.* DALGLEISH

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the security to be paid, in case of redemption, by the mortgagor.

Many cases *pro* and *con.* were cited on the point, and after an examination of all of them, and many more, we have not found one precisely on all fours with this because here the mortgagee is not the appellant, as was the case in the decisions the appellant's counsel relies upon but the respondent, and it seems difficult to apprehend why in such case the successful respondent should not have, if he so desires, immediate payment of costs which have been thrown away by the insistence of the mortgagor upon an untenable position. Doubtless it follows from the cases that if the respondent in such case should ask that his costs be added to his security, instead of being paid forthwith, that request would be granted, but that is far from saying that if he asks for our usual order, for immediate payment, it should be denied him. The nearest case to this and almost, if not quite, identical in principle, is *Herrick* v. *Attwood* (1859), 33 L.T. Jo. 232 wherein certain of the defendant's subsequent encumbrancers who, like the respondent Bank herein, had appealed to the Lord Chancellor from the Master of the Rolls were ordered personally to pay the respondent mortgagee's costs forthwith.

Upon a careful consideration of the whole matter, we think this is not a case where the usual order for the payment of costs should be departed from, it being in accordance with the conditions of this Province, and therefore the direction in the judgment will be for their payment forthwith to the respondent, including the costs of this successful motion.

Motion granted.

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1928

March 30.

DANSEY v. ORCUTT

DANSEY v. ORCUTT.

Malicious prosecution—Civil process—Evidence of intention to leave Province—Proof of absence of reasonable and probable cause—Damages—Appeal—R.S.B.C. 1924, Cap. 15, Secs. 3 and 7.

An applicant for an order for a writ of *capias* is required to prove first, that he has a cause of action and secondly, that the debtor is about to leave the Province, and when he believes he has a *bona fide* claim (even although it may later be decided not to be well founded) and has correct information that the debtor is about to leave the Province, an action for malicious prosecution will not lie.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 15th of November, 1927, in an action for damages for malicious prosecution. The facts are that Orcutt had brought action against Dansey and one Tyner for the balance of the purchase price of a shell-crushing machine, and being advised by the manager of a bank, where he did business, that Dansey was about to leave for England he obtained an order for the issue of a writ of *capias* against Dansey from RUGGLES, Co. J. The writ was issued and Dansey was held under arrest for four hours when an order was obtained from RUGGLES, Co. J. for his discharge. Orcutt's action against Dansey and Tyner for the balance of the purchase price on the machine was dismissed and the defendants succeeded on their counterclaim for the recovery of the sums paid on account of the purchase price of the shell-crushing machine. Dansey recovered $250 in his action for malicious prosecution.

The appeal was argued at Vancouver on the 29th and 30th of March, 1928, before MACDONALD, C.J.A., MARTIN, and MACDONALD, JJ.A.

Argument

D. J. McAlpine, for appellant: They must prove absence of reasonable and probable cause of action and that there was absence of reasonable and probable cause that he was leaving the Province: see *Trevanian* v. *Penhollow* (1655), Style 452; 82 E.R. 855. Dansey did in fact go to England one week after

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the *capias*: see *Melia* v. *Neate and Others* (1863), 3 F. & F. 757 at p. 771; *Larchin* v. *Willan* (1838), 4 M. & W. 351; *Kimpton* v. *McKay* (1895), 4 B.C. 196; *Robertson* v. *Beers* (1899), 7 B.C. 76 at p. 78; *Daniels* v. *Fielding* (1846), 16 M. & W. 200; *Bank of British North America* v. *Strong* (1876), 1 App. Cas. 307 at p. 315. On the question of misdirection see Taylor on Evidence, 11th Ed., Vol. II., p. 1131. As to the release, the writ of *capias* has never been set aside: see Halsbury's Laws of England, Vol. 19, p. 692; *Lees* v. *Patterson* (1878), 7 Ch. D. 866; *Turner* v. *Ambler* (1847), 10 Q.B. 252; *Goslin* v. *Wilcock* (1766), 2 Wils. K.B. 302; *Baxter* v. *Gordon Ironsides & Fares Co.* (1907), 9 O.W.R. 194 at p. 196.

Argument

Marsden, for respondent: Orcutt knew the machine was a failure, that he was not entitled to the balance of the purchase price, and his action was dismissed. There was evidence of lack of reasonable and probable cause: see *Daniels* v. *Fielding* (1846), 153 E.R. 1159 at p. 1162; *Atkinson* v. *Blake* (1842), 6 Jur. 1113. There was no evidence to shew that Dansey was leaving for the purpose of defrauding Orcutt: see *Shaw* v. *McKenzie* (1881), 6 S.C.R. 181 at pp. 190-1; *Fitchet* v. *Walton* (1910), 22 O.L.R. 40.

MACDONALD, C.J.A.: The appeal should be allowed. There is not very much to be said in this case; it seems clear that the proceedings taken by way of *capias* were justified and were in accordance with the provisions of our own statute which is different from similar statutes in other Provinces. Fortunately the defendant got the correct information that plaintiff was about to quit the Province. The plaintiff admits that he had taken his ticket. It is deemed that he had a cause of action. A cause of action means a *bona fide* claim and I have not the slightest doubt that Orcutt had what he considered a *bona fide* claim. It is not necessary that that claim shall be found ultimately to be well founded, if it be in fact a genuine claim for money.

MACDONALD, C.J.A.

There are only two things that the applicant is required to prove: first, his cause of action, which has been shewn; and, secondly, that the debtor was about to quit British Columbia.

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In these circumstances there is no doubt in my mind that the appeal should be allowed, and the action dismissed.

The appeal is allowed.

MARTIN, J.A.: I am also of opinion that the verdict cannot stand because the plaintiff has complied with the statutory requirements of section 3 of the Arrest and Imprisonment for Debt Act, Cap. 15, R.S.B.C. 1924. The form of action very properly follows the precedent given in Bullen & Leake, page 436 and the leading case on the subject (which is illuminating as shewing the changes in the law) *Daniels* v. *Fielding* (1846), 16 M. & W. 200. The cases which have been cited by the learned counsel for the respondent are based upon statutes which are essentially different from that which is before us and therefore the principles therein enunciated and observations made by the learned judges, which doubtless are very appropriate to those statutes, have no application to that before us.

MARTIN, J.A.

Really the most substantial question before us is the meaning of the words, "about to quit the Province" in section 3. All I think that is necessary to say is that I agree with my brother that it is clear that whatever may be the construction of what took place in these circumstances it is clear from the facts before us that the debtor was about to quit the Province within the meaning of the statute. Therefore, such being the case, I am of opinion that good cause has been shewn for disturbing the verdict, and I only add that the case of *Atkinson* v. *Blake* (1842), 6 Jur. 1113, based upon a like statute, and instructive so far as it goes, only refers to the subsequent application under section 7 for the discharge of the debtor from custody and in the exercise of the discretion therein provided for very different elements enter from those which come before a judge under section 3.

MACDONALD, J.A.

MACDONALD, J.A.: In my view there is no reasonable evidence to support the answers of the jury to the questions put to them.

The only question which might give rise to doubt is whether or not the defendant was moved by indirect motives in making

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an application for a *ca. re.* It is difficult, however, to speak of indirect motives when one with a cause of action simply exercises a right given by the statute. There is no evidence from which such an inference could reasonably be drawn.

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Buell, Lawrance & Johannson.*
Solicitor for respondent: *P. S. Marsden.*

MARTIN, LO. J.A.

1928

April 4.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE "PACIFIC FOAM"

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE "PACIFIC FOAM."

Admiralty — Navigation — Tug with scow in tow collides with bridge—Damages—Negligence.

The defendant steam-tug with an empty scow on a short tow-line and bridle, in attempting to go through the south passage of the Government bridge across the North Arm of the Fraser River at Marpole on a slightly ebbing tide collided with the bridge. In an action for damages, resulting therefrom, alleging that it was occasioned by improperly choosing the south channel of the bridge at its swing span:—

Held, that the reasonable use of the south channel by the tug with a scow in tow depends upon the circumstances in each particular case and that upon the whole case there is no sound ground for holding that the master of the tug navigated her in a way which was not proper and seamanlike in the circumstances and the action is dismissed.

Statement

ACTION for damages to the Government bridge across the North Arm of the Fraser River between Marpole and Sea Island, the defendant steam tug "Pacific Foam" colliding with the bridge in attempting to go through the south channel with an empty scow in tow on a slightly ebbing tide. The facts are set out in the reasons for judgment. Tried by MARTIN, Lo.J.A. at Vancouver on the 16th of February, 1928.

Gurd, for the Attorney-General.
F. G. T. Lucas, for defendant.

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1928

April 4.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE "PACIFIC FOAM"

4th April, 1928.

MARTIN, Lo. J.A.: This is an action to recover damages for substantial injuries done on 10th December, 1925, to the British Columbia Government's bridge (duly erected by permission of the National Government) across the North Arm of the Fraser River from the mainland at Marpole to Sea Island by the defendant steam tug—length 56′ 6″, beam 15′ 10″ and 10 horse-power, Harrison, master. It is alleged that said damage to the bridge was occasioned by the negligent navigation of the said tug, with an empty scow in tow, in that in the circumstances of tide and weather it improperly chose to go through the south channel of the bridge at its swing span (158 feet over all, including both channels of about 60 feet and the central pivot pier) instead of the north; and also that "the master should not have attempted to navigate the said channel with the said scow on a tow-line."

Judgment

A great deal of evidence was given on these two heads of alleged negligence and the case was very thoroughly gone into and I am pleased to say that the task of elucidation of the difficult and important matter has been rendered easier by the excellent plans and models which were furnished for the assistance of the Court. After a full consideration of the issues, which are of fact alone, I have reached the conclusion that the circumstances of navigation were not out of the ordinary and that it cannot, in general, be said that it was negligence *per se* for a tug to go through the south channel with a scow in tow on a slightly ebbing tide, nor, in particular, that a tug of this description, *i.e.*, size, structure, power and equipment, was not justified in attempting said passage with a scow of this kind on a short tow-line and bridle, as was the case here.

The evidence of all the most reliable witnesses on both sides is really not at variance on the main point established, which is that the reasonable use of this south channel by a tug with a scow in tow or alongside depends upon the circumstances of each particular case, and no arbitrary rule can be laid down. Upon the whole case, therefore, there is, in my opinion, no sound ground for holding that the master of the tug navigated her in

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a way which was not proper and seamanlike in the circumstances, and so the action is dismissed.

The law governing the matter, which is not in dispute, is to be found in the cases collected in *Kennedy* v. *The "Surrey"* (1905), 11 B.C. 499; *The Queen* v. *Moss* (1896), 26 S.C.R. 322; *Evans, Coleman & Evans, Ltd.* v. *The S.S. Roman Prince* (1924), Ex. C.R. 93; and *The Mostyn* (1927), 44 T.L.R. 179.

Action dismissed.

MURPHY, J. (In Chambers)

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IN RE LAND REGISTRY ACT AND MARJORY CLAZY, DECEASED

IN RE LAND REGISTRY ACT AND MARJORY CLAZY, DECEASED.

Executors and administrators—Holograph will—Probate in Scotland—Resealing—Land in British Columbia—Registration in name of executrix—R.S.B.C. 1924, Cap. 5, Sec. 106; Cap. 127; Cap. 203, Sec. 4; Cap. 274.

Marjory Clazy, who died in Scotland, left all her estate heritable and movable by a holograph will to her sister and appointed her executrix. The will was probated in Scotland and pursuant to section 4 of the Probates Recognition Act was resealed under the seal of the Supreme Court in British Columbia. An application by the executrix to have certain lands in British Columbia registered in her name was granted.

Statement

APPLICATION by the executrix under the will of Marjory Clazy, deceased, to have certain British Columbia lands registered in her name under the provisions of the Land Registry Act. Marjory Clazy domiciled in Scotland, died in November, 1924, having made a holograph will effective under Scottish law leaving all her estate heritable and movable to her sister Robina Clazy. The will was probated in Scotland in June, 1925, and was on the 28th of February, 1928, resealed under the seal of the Supreme Court of British Columbia. Heard by MURPHY, J. in Chambers at Victoria on the 10th of April, 1928.

A. N. Robertson, for the application.

Crane, District Registrar of Titles, *contra*.

MURPHY, J. (In Chambers)

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IN RE LAND REGISTRY ACT AND MARJORY CLAZY, DECEASED

11th April, 1928.

MURPHY, J.: Marjory Clazy, domiciled in Scotland, died there on November 13th, 1924, having made a holograph will effective under Scottish law, leaving all her estate heritable and movable to her sister Robina Clazy. This will was probated in the proper Scottish Court on June 23rd, 1925, and pursuant to section 4 of the Probates Recognition Act, R.S.B.C. 1924, Cap. 203, was resealed under the seal of our Supreme Court on February 28th, 1928.

Decedent was seized in fee of certain lands in British Columbia.

Admittedly there is an intestacy as to these lands, as the holograph will was not executed in accordance with the provisions of the Wills Act, R.S.B.C. 1924, Cap. 274. Executrix has applied under the provisions of the Land Registry Act to have the British Columbia lands registered in her name claiming same to be vested in her as personal representative of decedent under section 106 of the Administration Act, R.S.B.C. 1924, Cap. 104. The Registrar has refused to so register her because the Scotch probate does not state that administration of all the estate which by law devolves to and vests in the personal representative of said deceased has been granted to applicant. Said section 106 clearly vests such real estate as is here in question in the personal representative of deceased. The Probates Recognition Act, section 4, provides that after resealing of a foreign probate, such as the one in question, such probate "thereupon shall be of like force and effect and have the same operation in this Province as if granted by the Court of Probate of this Province."

Judgment

The Scotch probate after reciting the fact of death, of the execution of the holograph will and of the filing of personal estate inventory, situate in England and Scotland, states:

"Therefore I in His Majesty's name and authority ratify approve and confirm the nomination of executrix contained in the aforesaid holograph will."

It then proceeds to commit the administration of the "said personal estate," meaning the personal estate set out in the inventory, to the executrix named.

Probate is necessary as the authenticated evidence of the

MURPHY, J. (In Chambers) — 1928 April 11.

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executor's title but is not at all the foundation of such title. The executor derives all his interest from the will itself and the property of the deceased vests in him from the moment of the testator's death. *Woolley* v. *Clark* (1822), 5 B. & Ald. 744. The Scotch probate as a result of the resealing under the Probates Recognition Act evidences the will and the fact that the applicant herein is the executrix thereof. The will itself shews that she is so appointed executrix without qualification. Under the case cited therefore all decedent's personal property vested in her at the moment of death.

Judgment

Section 106 of the Administration Act in effect makes real estate personal property for devolution purposes. The necessary proof that applicant is executrix of decedent results from section 4 of the Administration Act. I would hold that on the facts of this case the executrix is entitled to have the British Columbia lands registered in her name.

Application granted.

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FIELD v. INTERNATIONAL TIMBER CO.

FIELD v. INTERNATIONAL TIMBER COMPANY.

Male Minimum Wage Act—Logging camp—Cook's helper—"Domestic servant"—Meaning of—B.C. Stats. 1925, Cap. 32, Sec. 13.

By an order of the Board appointed pursuant to the Male Minimum Wage Act the expression "lumber industry" includes, *inter alia*, all operations in or incidental to the carrying on of logging camps, and section 13 of said Act provides that "This Act shall apply to all occupations other than those of . . . domestic servants." An action by a cook's helper in a mining camp to recover the minimum wage provided for by said Board was dismissed.

Held, on appeal, that a cook's helper at a logging camp is not a "domestic servant" within the meaning of said section 13 and is entitled to the benefits of the Act.

[Reversed by Supreme Court of Canada.]

Statement

APPEAL by plaintiff from the decision of CAYLEY, Co.J. of the 15th of December, 1927, in an action to recover the balance

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of wages due him under the Male Minimum Wage Act as a cook's helper at the defendant Company's logging camp. The plaintiff had been engaged under written contract by the defendant Company at $3.20 per diem.

The appeal was argued at Vancouver on the 28th and 29th of March, 1928, before MACDONALD, C.J.A., GALLIHER and MACDONALD, JJ.A.

Argument

Alexis Martin, for appellant: This man was a "cook's helper" but he is in substantially the same position as a cook with relation to the Act. In *Compton* v. *Allen Thrasher Lumber Co.* (1927), 39 B.C. 70, it was held that a cook in a lumber camp comes within the Act and that decision should be followed: see also 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* v. *James Keith & Blackman Company, Limited* (1905), 2 Ch. 147 at p. 162.

Pattullo, K.C., for respondent: It has been held that a cook is not entitled to a lien for wages: see *Anderson* v. *Godsal* (1900), 7 B.C. 404 at p. 408; *Bradshaw* v. *Saucerman* (1912-13), 18 B.C. 41; 4 D.L.R. 476. Certain occupations are excluded by section 13 of the Act: see *The King* v. *Wright & Baltzer* (1928), 1 D.L.R. 701. The question is whether he is a domestic servant: see *Pearce* v. *Lansdowne* (1893), 69 L.T. 316 at p. 317; *In re Unemployment Insurance Act, 1920. In re Dr. David and Others. In re H. E. Bryant* (1922), 1 K.B. 172; *In re Unemployment Insurance Act, 1920. In re North and Ingram, ib.* 188; *In re Wilkinson, ib.* 584; *In re Unemployment Insurance Act, 1920. Ex parte Woollands, Ltd.* (1921), W.N. 247; *In re Unemployment Insurance Act, 1920. In re Selfridge & Co., Ltd.* (1922), W.N. 241. The plaintiff worked in shifts before and after meals and there were intervals during each day in which it was understood between the parties that he was free from work, and the onus is on the other side. The case of *Compton* v. *Allen Thrasher Lumber Co.* (1927), 39 B.C. 70, should not be followed as the question of a domestic

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Argument

servant being exempt from the Act was not argued on that appeal: see *Rex* v. *Gartshore* (1919), 27 B.C. 175 at p. 179; *Gentile* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 307 at p. 309; *Stuart* v. *Bank of Montreal* (1909), 41 S.C.R. 516 at pp. 535 and 541.

Martin, in reply: "Domestic service" does not apply to an industry such as a lumber camp. It applies to "service in a home": see *Rex* v. *Robertson and Hackett Sawmills Ltd.* (1926), 38 B.C. 222 at p. 230.

Cur. adv. vult.

12th April, 1928.

MACDONALD, C.J.A.: The appellant was employed by the respondent as cook's helper at its logging camp. By order of the Board appointed pursuant to the Male Minimum Wage Act, Cap. 32, B.C. Stats. 1925, the expression "lumber industry" includes (*inter alia*), all operations in or incidental to the carrying on of logging camps. The appellant was engaged under written contract at $3.20 per diem; his duties actually began at 6 o'clock in the morning and ended at 7 o'clock in the evening; there was a period of idleness, although he remained on call, between breakfast and dinner and again between dinner and supper. No stipulations regarding those periods were made by the contract.

MACDONALD, C.J.A.

The respondent makes alternative submissions, the one that appellant was a domestic servant, excepted from the said Act by section 13 thereof, the other that there was a tacit understanding or agreement that the actual hours worked should constitute a day. There is, in my opinion, no warrant for this latter contention. It may be competent to employers and employees to make agreements excepting certain hours out of the day thus reducing the hours to be paid for below those which otherwise would be included between the time of beginning work in the morning and that of quitting in the evening. But in the absence of such an agreement all hours must be included, as the Court held in *Compton* v. *Allen Thrasher Lumber Co.* (not yet reported*). The respondent argued that such an agreement

* Since reported (1927), 39 B.C. 70.

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tacitly existed here, but it has failed to prove it, while on the other hand, the appellant makes it quite clear that there was no such agreement, and that he was always at the call of the respondent.

The substantial question therefore is, Was the appellant within the Board's order? or was he excepted therefrom by section 13 as being a domestic servant? Section 13 enacts that

"This Act shall apply to all occupations other than those of . . . domestic servant."

In *Compton* v. *Allen Thrasher Lumber Co., supra,* the Court held that a cook in a logging camp was within the benefits of the Board's order and that the order was within the Board's powers. The question as to whether he was a domestic servant or not, was, it is conceded, not raised in that case, it was therefore suggested by counsel for the respondent that the Court should give leave to argue it in this appeal. In those circumstances we gave leave.

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The *status* of the employee is one to be determined on the facts of the particular case, *Pearce* v. *Lansdowne* (1903), 69 L.T. 316. It is therefore necessary to consider the case from the standpoint of the Board's order and also from that of the appellant's duties and his personal relationship to his employer. The Board is by the Act denied the power to fix a minimum wage for domestic servants; as such they are outside the statute. The powers of the Board enable it to fix a minimum wage for employees in occupations other than those referred to in section 13. The appellant's occupation was that of cook's helper in a logging camp. He may theretofore have been a domestic servant, or a farmer or a fruit-picker, but when he took employment with the respondent he came within the order provided always that his service was incidental to the carrying on of a logging camp.

It is common knowledge, of which I think we may take judicial notice, that logging operations in this Province are carried on almost exclusively in the wilderness, and that a logger must of necessity make provision for the board and lodging of his men. One of his first cares is to build a cook house and employ cooks and helpers to provide his employees with board and lodging.

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The learned judge was of the opinion that the appellant is to be classed as a domestic servant, it therefore becomes necessary to see whether that finding is supportable, having regard to what would have been his *status* apart from the Board's order and what was his *status* under it, the latter is, of course, the real question, but a brief reference to some of the cases cited relating to the former may be of assistance to a solution of it. We were referred to several decisions of the English Courts under the Employer's Liability Act and under the Unemployment Insurance Act, 1920, which have some bearing upon the question. In *In re Selfridge & Co., Ltd.* (1922), W.N. 241, Roche, J. held that a woman regularly employed in cleaning a mercantile house though engaged in domestic work was not in contemplation of the statute in domestic service because she was employed in a business carried on for purposes of gain, and therefore within that exception in the English Act. This, and other decisions of the same learned judge, is entitled to great respect, but the two statutes are different, and have objects which may well differentiate their interpretations. Domestic service implies in this country at least, a domestic establishment, not a business one.

In *Pearce* v. *Lansdowne, supra,* at p. 319, this description of domestic servants is approved:

"'Those persons whose main duty is to do actual bodily work of servants for the personal comfort, convenience, or luxury of the master, his family and his guests, and who for this purpose become part of the master's residential or *quasi*-residential establishment.'"

I think the appellant was not a domestic servant.

But I am, however, more concerned with the construction of the Board's order than with the common law definition of domestic servant, or with that applied under other statutes. I think there is much significance in the language used in the Board's order. The words not only include persons "engaged in the lumber industry" but also those engaged in operations "in or incidental to the carrying on of logging camps." I would therefore allow the appeal.

GALLIHER, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: Two points require consideration. First it was suggested that if the Male Minimum Wage Act (Cap. 32,

B.C. Stats. 1925) applies the plaintiff is not entitled to payment at the specified rate for thirteen hours each day because a cook's helper works every day in three shifts, *viz.*, from 6 a.m. to 10 a.m.; from 11 a.m. to 2 p.m. and from 4 p.m. to 7 or 7.30 p.m., the *interim* between being rest periods. It is true that ordinarily the cook enjoys comparative freedom when not preparing or serving meals and doing the work incidental thereto but the evidence does not shew that these so-called rest periods were fixed and unalterable. The cook or his helper were "on call" throughout the whole period and in reality on duty all day. The plaintiff is therefore entitled to payment for the whole working day without deduction for the periods when he may or may not be actively engaged. If this view creates a hardship—and that is quite conceivable—the Courts cannot provide a remedy.

The other point raised was under section 13 of the Act. It reads as follows:

"This Act shall apply to all occupations other than those of farm-labourers, fruit-pickers, fruit-packers, fruit and vegetable canners, and domestic servants."

MACDONALD, J.A.

It was urged that the plaintiff—a cook's helper—was a domestic servant and therefore not within the Act. Decisions under the English Unemployment Insurance Act, 1920, were referred to. The frame of that Act differs from our Male Minimum Wage Act. The subject is approached from different angles. The English Act treats with and affects the individual—

"All persons of the age of sixteen and upwards who are engaged in any of the employments specified in Part I. of the First Schedule to this Act," etc.:

section 1.

Our Act deals primarily with "employees in the various occupations to which the Act applies." The lumbering industry as an occupation has a variety of employees in different lines of work, some of whom in a literal sense have little or nothing to do with the actual work of logging and lumbering. Each however, contributes to the success of the business. That is true of cooks and cooks' helpers. Their work is incidental to the business itself and contributes to its successful operation. An employee in charge of a donkey-engine in a lumber camp may

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in a restricted sense be regarded as an engineer. But he is engaged in the lumbering industry within the purview of the Act. So too, the cook's helper. Whether or not a person is a domestic servant may vary with the facts of each particular case. If employed in the private dwelling-house of the manager living at or near the works he would form part of his family household and be properly classed as a domestic servant. It is different when, as here, he is attached to the industry. The general boarding-house appertains to the business carried on. It is an essential part of it, not merely ancillary to the main operation. The cook goes into the logging camp to assist in the general work in a certain capacity. It is to my mind foreign to the generally accepted meaning of the word "domestic servant" to apply it to the plaintiff. The word "domestic servant" connotes "work as servants for the personal comfort, convenience or luxury of the master, his family and his guests and who for this purpose becomes part of the master's residential or *quasi*-residential establishment"—*e.g.*, as in a club. None of those elements is present in the case at Bar.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *Alexis Martin.*
Solicitors for respondent: *Pattullo & Tobin.*

QUINN v. CORPORATION OF THE CITY OF SALMON ARM.

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QUINN v. CITY OF SALMON ARM

Municipal law—Assessment—Court of revision—Appeal to County Court judge—Appeal to Court of Appeal—Point of law not raised in Court below—Condition precedent to appeal—R.S.B.C. 1924, Cap. 179, Sec. 228 (7).

On appeal from the decision of a County Court judge on appeal from the Court of Revision in respect of the assessment of certain lots in Salmon Arm, the preliminary objection was taken that as no point of law had been raised in the Court below there was no appeal within section 228 (7) of the Municipal Act.

Held, that a point of law must be clearly brought out for adjudication in the Court below otherwise there is no jurisdiction to hear the appeal and it should be quashed.

Grand Trunk Pacific Development Co. v. *City of Prince Rupert* (1923), 32 B.C. 463 followed.

Statement

APPEAL by plaintiff from the decision of SWANSON, Co.J. of the 1st of March, 1928, on appeal from the Court of Revision in respect to the assessment of lots 7, 8 and 9 (map 304) City of Salmon Arm and improvements thereon. The following grounds were raised in the notice of appeal to the judge below:

"1. That there was no assessment of the appellant's lands and improvements for the year 1928, in that:

"(a) The assessor did not set out the value of the appellant's lands as required by subsection (*c*) of subsection (1) of section 216 of the Municipal Act, R.S.B.C. 1924, Cap. 179.

"(b) The assessor failed to set out the value of all improvements on the appellant's lands as required by subsection (*c*) of subsection (1) of section 216 of the said Municipal Act.

"(c) The assessor did not set out the true value of the appellant's land and improvements in accordance with section 220 of the said Municipal Act.

"(d) The assessor failed to assess the appellant's land at its actual value, as required by subsection (1) of section 212 and section 220 of the said Municipal Act.

"(e) The assessor did not assess the appellant's lands."

"(g) There was no assessment of the appellant's lands or improvements by an assessor of the Municipality.

"2. In the alternative, the assessor did not assess the appellant's lands in accordance with section 2 of the Municipal Act.

"3. In the alternative, if it is found that there was an assessment of the

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QUINN v. CITY OF SALMON ARM

appellant's lands, the said assessment was invalid and illegal, and the appellant repeats subsections (a) to (g) of paragraph 1 hereof.

"4. In the alternative, the Court of Revision failed to adjudicate upon the appellant's lands and improvements so that the same should be fair and equitable and fairly represent the actual value of each parcel and the actual value of the lands and improvements.

"5. In the alternative, the said Court of Revision failed to adjudicate upon the actual value of each parcel of the appellant's lands.

"6. In the alternative, the Court of Revision failed to adjudicate upon the actual value of the appellant's improvements.

"7. In the alternative, the appellant's lands and improvements, or land or improvements, have been valued too high."

Statement

Counsel for the respondent took the preliminary objection that no point of law was raised in the Court below, that the case did not come within section 228(7) of the Municipal Act and there was therefore no appeal.

The appeal was argued at Victoria on the 12th of April, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

O'Halloran, for appellant.

Argument

Mayers, for respondent, took the preliminary objection that there was no appeal. Under section 228(7) of the Municipal Act an appeal lies only on any point of law raised on the hearing before the judge below: see *Grand Trunk Pacific Development Co.* v. *City of Prince Rupert* (1923), 32 B.C. 463. The whole question is whether the assessment is too high or too low: see *Coquitlam* v. *Hoy* (1899), 6 B.C. 546; *Nickle* v. *Douglas* (1875), 37 U.C.Q.B. 51; *London Mutual Ins. Co.* v. *City of London* (1887), 15 A.R. 629; *The City of London* v. *Watt & Sons* (1893), 22 S.C.R. 300; *Toronto Railway Co.* v. *Toronto Corporation* (1904), A.C. 809 at p. 815. There is no objection to the evidence at all; the judge deals purely with the weight of evidence.

O'Halloran: The points of law are that the assessor did not comply with the Municipal Act and the learned judge proceeded on a wrong principle.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Mr. *O'Halloran,* the Court is unanimous. The Court is satisfied Mr. *Mayers* is right on that point, that there has been no point of law raised, either by counsel or

judge. You are relying upon a mistake at law, that they did not produce the by-law when asked. Now if you thought that was necessary you had a right to give evidence on it.

I would quash the appeal on the preliminary objection.

MARTIN, J.A.

MARTIN, J.A.: That is my opinion. The case is within our unanimous decision in *Grand Trunk Pacific Development Co.* v. *City of Prince Rupert* (1923), 32 B.C. 463, wherein we decided that the question of law must be clearly brought out for adjudication. It is not sufficient to raise these matters in objections to notice of appeal, because, as the Chief Justice has pointed out, such objections taken in the notice of appeal are treated as abandoned unless brought out for adjudication during the hearing of the appeal. In this case nothing of the kind occurred and there is no question of law.

GALLIHER, J.A.

GALLIHER, J.A.: I agree and I think we should be able to say without a doubt that a question of law has been raised, otherwise if we are to assume from remarks that may be made, isolated pieces of evidence, none of them being the direct raising of the question, that a question of law has been raised, we are liable to find ourselves in difficulties more often than we should.

MACDONALD, J.A.

MACDONALD, J.A.: I think it is the intention of the Act that the point must be specifically raised. I do not think a general expression which may contain an element of law can be relied on to shew that a point of law was raised. It must be raised and passed upon by the judge and then raised on appeal.

Mayers: I do not know whether your Lordships would again express an opinion as to whether the point should be raised by judge or counsel. I take it, it does mean it is a point of law to be raised by counsel.

MARTIN, J.A.: Judge or counsel, in my opinion.

MACDONALD, C.J.A.: I have not decided that. I did not decide it in the *Prince Rupert* case, I left that point, and it is not decided here.

Appeal quashed.

Solicitor for appellant: *C. H. O'Halloran.*

Solicitors for respondent: *Fulton, Morley & Clark.*

SWANSON, CO. J.

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April 13.

MARSH v. SIMPSON

MARSH v. SIMPSON.

Conditional sale—Motor-car—Default in payments—Vendor takes possession—Notice of resale—Sale abortive—Notice of wrecking car—Action for balance—R.S.B.C. 1924, Cap. 44, Sec. 10 (3).

In an action for the deficiency on a resale of a motor-car repossessed by the vendor after default by the purchaser under a conditional sale agreement, the notice to the purchaser of the resale must be in strict accordance with the requirements of section 10 (3) of the Conditional Sales Act, notwithstanding the provision in the conditional sale agreement that the vendor can exercise the power of resale "by public or private sale with or without notice." It was held that the notice herein not being in compliance with said section the action should be dismissed.

The attempt to resell the car by auction after repossession being abortive, the vendor "wrecked" the car after notifying the buyer that he was doing so and would allow him "the price of $45."

Held, that the vendor thereby rescinded the contract and the purchaser was relieved from all further liability thereunder.

Statement

ACTION to recover $117.50 the balance owing on the sale of a second-hand Gray Dort motor-car. The facts are set out in the reasons for judgment. Tried by SWANSON, Co.J. at Kamloops on the 11th of April, 1928.

Chalmers, for plaintiff.
H. Alan Maclean, for defendant.

13th April, 1928.

Judgment

SWANSON, Co. J.: The plaintiff sues to recover $117.50 balance alleged to be owing on the sale of a second-hand Gray Dort motor-car. The car was sold August 14th, 1926, the sale price being $225, a promissory note for $150 being signed by defendant and his step-son James, who was then under age. At the same time a conditional sale agreement, Exhibit No. 2, was signed by James, who was the real purchaser of the car, and by the plaintiff. When plaintiff found that James was under age he insisted on his step-father, the defendant, signing the promissory note, Exhibit No. 1. The conditional sale agreement contains the following amongst many other clauses:

"It is further mutually agreed that the repossession retention sale or

right thereto shall not affect the purchaser's liability or the seller's right to sue the purchaser at any time for any moneys due, and payable whether due by the terms of payment as set forth in the said note and/or in this agreement, or which have become due and payable by reason of failure or default on the part of the purchaser in fulfilment of any of the terms conditions covenants or provisions of this agreement."

The clause immediately preceding, which is a long involved one, provides for the right of the seller to repossess the car on default in payment occurring, and for right of sale "by public or private sale with or without notice," etc.

Only two payments were made on the car, $50 by James and $25 by defendant Simpson. After default had occurred and demand for payment had been made several times by plaintiff, and promises to pay by defendant the car was repossessed by plaintiff on the 28th of February, 1927. Plaintiff states that the car was then in very bad condition, battery useless, transmission strained so that gears would not function, engine head split, tires all flat, top torn, wind-shield broken, frame of car broken.

On April 21st, 1927, a "notice" by way of registered letter was sent to defendant at Kamloops, and copy to James at Kamloops, in the following words:

Judgment

"In connection with the Gray Dort which we have recently repossessed on account of non-payment by you on your instalments on the same we are advertising this car by public tender. The highest bidder will take possession of the car, and you will be advised of the price given, together with the amount of our costs in connection with the repossession and advertising: after which we shall enter action against you for the balance owing as you have intimated on several occasions that you have no intention of paying anything on the car. The sale of the car will be advertised in the Kamloops Sentinel April 22nd, 1927."

The car was advertised as stated in letter. Two people came to look at the car but no offer was received for same. Then on June 30th, 1927, the plaintiff addressed another registered letter to defendant Simpson, but apparently not to James, which letter is as follows:

"As per our previous letter to you we advertised the Gray Dort car for sale, but we did not receive any bids on it, therefore, we are wrecking the same and allowing you the price of $45. As you know you have broken the frame, crashed half the wind-shield and cut the top, besides having got the car in a generally bad condition, so naturally no one would buy the same. There is now a balance of $117.44 owing by you to us and we are giving you the opportunity to pay this sum within the next few days failing which our solicitor has instructions to proceed against you."

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It is submitted by Mr. *Maclean*, counsel for defendant Simpson, that these letters do not constitute proper "notices of the intended sale" within the purview of section 10 of the Conditional Sales Act, Cap. 44, R.S.B.C. 1924. This section is an amplification of section 33 of the Sale of Goods Act, Cap. 203, R.S.B.C. 1911. Part of said section 10 reads as follows: [The learned judge set out subsections (3), (4), (5), (6) and (7) and continued].

I am of the opinion that the contention of the learned counsel for the defendant is entirely correct, and that the notices quite fail to comply with the requirements of section 10 of the Act.

In *Blanchette* v. *Massey-Harris Co.* (1919), 3 W.W.R. 870 at pp. 871-2, Walsh, J. says:

Judgment

"As I have said, no notice whatever was given of this intended sale. The contract of the parties gave the company the right 'to sell the said property at public or private sale' but that is the extent of the power of sale which it gave. Stuart, J. held in *Sawyer & Massey, Ltd.* v. *Bouchard* (1910), 13 W.L.R. 394 at p. 400, under a similar agreement, that the above-mentioned section of the ordinance applied notwithstanding the provision for a private sale. The present Chief Justice [Harvey, C.J.A.] reached the same conclusion in *North-West Thresher Co.* v. *Bates* [(1910)], 13 W.L.R. 657 at p. 660. To the same effect is the judgment of Lamont, J. in each of the cases of *Sawyer-Massey Company* v. *Dagg* [(1911)], 4 Sask. L.R. 228, 18 W.L.R. 612, and *The American-Abell Engine and Threshing Co.* v. *Weidenwilt* [(1911)], 4 Sask. L.R. 388; 1 W.W.R. 321; 19 W.L.R. 730. I concur in this opinion. The sale of these goods which was held therefore was not one which was in conformity with the requirements of Sec. 8, which says distinctly that the goods shall not be sold without the notice thereby required. I concur with Lamont, J. in the view that he took in the two cases above noted, that as this sale took place without this statutory condition having been complied with the resale was not as provided for in the contract and therefore operated as a rescission."

In *Advance Rumely Thresher Co.* v. *Cotton* (1919), 2 W.W.R. 912 the Court of Appeal of Saskatchewan decided that where a vendor under a conditional sale agreement retakes possession of and resells the property, he cannot sue the purchaser for the unrealized balance of the price unless the agreement so provides, and if it does, then, in the absence of waiver by the purchaser of the terms of the Conditional Sales Act, the vendor must in reselling have complied therewith (for example by giving the proper 8 days' notice of sale required by the Saskatchewan Act) and if the purchaser specially pleads non-

compliance the onus is on the vendor to shew such compliance. Newlands, J.A. at p. 914 adopts the language of Lamont, J. in the *American-Abell* case as follows:

"As nothing appears to the contrary, the resale agreed to must be taken to be a resale according to law, that is, in accordance with these statutory provisions. I am, therefore, of opinion that the resale by the plaintiffs, without complying with the statutory provisions, was not such a resale as was contemplated by the parties in their agreement. Such being the case, its effect was to rescind the contract."

See 1 C.E.D. p. 736, sec. 56.

In *North-West Thresher Co.* v. *Bates* (1910), 13 W.L.R. 657 at p. 661, Harvey, J. said:

"It seems more reasonable to suppose that the words 'intended sale' mean what they say, as only by giving notice of the time and place of a proposed sale by auction, or of the particulars of a proposed private sale, could any benefit accrue to the purchaser by the notice."

Buckles, D.C.J. held that the notice under the Saskatchewan Act should give the time and place of the proposed sale if it is to be by auction, or the particulars of a proposed private sale: see *Thompson* v. *Sholinder* (1928), 1 W.W.R. 386. See also judgment of the Court of Appeal of Saskatchewan in *Hayes* v. *Mayne* (1927), 3 W.W.R. 524.

Judgment

Our own Court of Appeal has dealt with this Act in two recent judgments, *The Ash-Temple Co.* v. *Wessels* (1926), 36 B.C. 424, holding that a notice stating that the balance due was $1,799.52, whereas it was in fact $132.79 less than that amount, was defective and a judgment for the seller for the deficiency on the resale was reversed. The most recent judgment given by our Court of Appeal March 14th last is *Motorcar Loan Co.* v. *Bonser* (1928), [*ante*, p. 55]; 1 W.W.R. 801 holds that the words "intended sale" mean the particular sale which the seller has in view, and not merely his intention to sell.

If the alleged notices in the case at Bar are carefully compared with the requirements set forth in section 10 of our Act it will be seen in the light of the above decisions how very far short such notices come from being legal and effective notices under the Act. The learned counsel for the plaintiff has taken the novel ground that in the case at Bar there has not been in fact any "resale" and that therefore section 10 of the Act has no application. His contention is that the plaintiff was within his

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rights in repossessing and retaining the car and in the so-called act of "wrecking" the car and allowing defendant a valuation therefor of $45, and that plaintiff is legally entitled under his contract to sue for the balance of account after giving defendant such credit of $45. I cannot accede to any such argument. That is in effect to constitute the seller, plaintiff, a buyer of the defendant's car at a private sale at a valuation fixed entirely by himself without any notice whatever to the defendant. The words in the conditional sale agreement that the seller can exercise the power of resale "by public or private sale with or without notice" is entirely subject to the statutory requirement in subsection (7) of section 10: "This section shall apply notwithstanding any agreement to the contrary." Notice must be first given in strict accordance with the statute, and as no such notice has been given the whole transaction of the so-called "wrecking" of the car, and allowance of $45 therefor to defendant must fall to the ground. The act of the plaintiff therefore constitutes the clearest evidence of his repudiation or rescission of the contract, with the inevitable result that the defendant is relieved of all further liability thereunder. The action therefore against the defendant must clearly fail.

The action will accordingly be dismissed with costs.

Action dismissed.

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May 9.

NICHOL v. SUGARMAN

NICHOL v. SUGARMAN.

Practice—Interpleader—Affidavit in support of claimant—Must be made by claimant, if practicable.

On an application for interpleader the affidavit in claimant's support should be made by herself unless it is impracticable owing to illness, absence in a foreign country or inaccessibility.

Statement

APPLICATION for interpleader by the sheriff of the County of Vancouver. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. in Chambers at Victoria on the 9th of May, 1928.

J. R. Green, for the execution creditor.
C. L. Harrison for the claimant.

Judgment

MACDONALD, J.: In this action the sheriff of the County of Vancouver, according to his affidavit, in support of this application for interpleader, states that on the 27th of March, 1928, he took possession of all shares of stock in the Northern Lights Mines, Limited (non-personal liability), in the name of the judgment debtor, and shortly thereafter Bertha B. Sugarman claimed these shares as her property. The result was that the sheriff sought the protection of the Court, through interpleader proceedings.

Upon the matter first coming before me for consideration, it was assumed by the solicitor for the execution creditor, that as he had received a copy of an affidavit made by the claimant, such affidavit had been filed. It appeared, however, that while he had been served with such copy, that the affidavit had not in fact been filed in the Court, and thus could not be considered upon the application, nor was any attempt made at the time to ask leave of the Court to then file such affidavit. An adjournment took place. Upon the return of the summons for the second time, the objection was made by the solicitor for the execution creditor that in default of an affidavit being filed by the claimant, it should be decided by the Court that she had failed

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to appear and maintain her claim, and thus the result would follow, that her claim would be barred.

It is apparent, that the matter had thus become in a rather involved position, through misunderstanding. Upon the application of the solicitor for the claimant I then allowed an adjournment, upon the strength of the judgment in *Powell* v. *Lock* (1835), 3 A. & E. 315. The short judgment in that case held that it was necessary for an affidavit of a claimant to be filed. It was, however, considered that the omission to make such affidavit had arisen through a misconception of the law, and time was granted for an affidavit to be made.

The time suggested by the solicitor for the claimant in this action having elapsed, it appears this morning that the affidavit thus obtained, upon leave granted, is not the affidavit of the claimant, but that of her solicitor. It is now submitted by solicitor for the execution creditor that this affidavit should not be accepted as sufficient, but that the usual practice should be followed, namely, requiring that the affidavit should, if practicable, be made by the claimant, and not by some one purporting to act on her behalf.

Judgment

Cababe on Interpleader, 3rd Ed., p. 55, states the position shortly as follows, with respect to the appearance required upon the interpleader summons taken out by a sheriff:

"If, however, both parties appear, then they must be prepared to support their claims by affidavit, shortly stating the grounds of their respective claims";

and reference is made to the affidavit of the claimant in the Appendix.

Then, applying this statement, particularly to the facts here presented, the following appears (p. 56):

"These affidavits had better be sworn by the parties themselves; but this is not absolutely necessary if it is impracticable."

Reference is made to the case of *Webster* v. *Delafield* (1849), 7 C.B. 187, where it was held that an affidavit by the solicitor of a claimant who resided abroad, was sufficient to entitle the claimant to have the matters in dispute settled by an issue.

Then, again, in the Annual Practice, 1928, p. 1159, in the same connection, the following appears:

"An execution creditor need not file an affidavit, as his claim is obvious.

A plaintiff had better file one, though it may not be vitally necessary; but a claimant must do so."

The basis for that proposition is the case which I have mentioned, of *Powell* v. *Lock, supra.*

As to who should make the affidavit, it is stated that the affidavit should be sworn by the claimant personally, unless circumstances prevent it, for example, the solicitor of a claimant living abroad may do so.

Notwithstanding this statement of the practice, in the cases referred to, it is argued by the solicitor for the claimant that it is not necessary that the affidavit should be made by the claimant herself, in this case. Some support is given to this argument by remarks of Maule, J., in *Webster* v. *Delafield, supra.* These remarks arose during the argument of counsel, and are not to be received with the same weight as if they had been found in the judgment of the Court or any member thereof. However, reading *Webster* v. *Delafield,* one cannot come to any other conclusion than that the affidavit should be made ordinarily by the claimant, and it is only under particular circumstances that an affidavit should be allowed by a third party, whether such party be a solicitor or some other person occupying a position which would justify the making of such an affidavit.

Judgment

Now, if I were to pursue the course which was taken in *Webster* v. *Delafield,* I might bar the claim; but, then, I bear in mind that in that case Coltman, J., in barring the claim, had already allowed adjournments for the purpose of an affidavit being filed; and even then, when his decision was reviewed, it was thought that under the circumstances the affidavit made by the solicitor was held sufficient, on account of the absence of the claimant in France. Here, if the circumstances were, that the claimant was living in a foreign country, or inaccessible, or so ill that she could not make the affidavit, then upon these facts being submitted through an affidavit covering the ground, it might be that I should receive an affidavit made under such circumstances. However, I feel that having become aware of the fact that the claimant has already made an affidavit, I see no reason why the rule of practice in vogue for such a length of time, should not be followed, and that she should be called upon to make the

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required affidavit, under the circumstances shewn on the affidavit of the sheriff upon the application.

For that purpose I grant an adjournment until Monday, the 14th of May.

MCDONALD, J. 1928 May 10.

EDWARDS v. GATTMANN

EDWARDS v. GATTMANN.

Slander—Damages—Statement by an alderman at a meeting of city council —Privilege—Malice.

The plaintiff kept a candy and tobacco store on a premises in Port Alberni which had previously been known as "Tom Garvin's place." Garvin the former owner (now deceased) when in occupation, was convicted on several occasions for the illicit sale of liquor on the premises. At a meeting of the city council of Port Alberni when they were discussing the advisability of having the policing of the city taken over by the Provincial police, the defendant, sitting in the meeting as an alderman said "I hear the Arbor is still running and that Garvin's old place is opened up again." In an action for damages for slander:—

Held, that the communication to the city council by the defendant as a member of that body was made upon a privileged occasion and no actual malice being proven the action should be dismissed.

Statement

ACTION for damages for slander. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Nanaimo on the 3rd of May, 1928.

Arthur Leighton, and *A. Macneil*, for plaintiff.
Cunliffe, and *Hanna*, for defendant.

10th May, 1928.

Judgment

MCDONALD, J.: This is an action for slander. The defendant is an alderman of the City of Port Alberni and the plaintiff is a married woman operating a candy and tobacco store in premises that have been known in Port Alberni for a long time as "Tom Garvin's place." Garvin, who is since deceased, had been convicted several times for the illicit sale of liquor in these premises. After his death, the place was operated as a music

store for a time and shortly before the 14th of November last the plaintiff came to Port Alberni and opened the premises as a candy and tobacco store. For a considerable time it was a matter for consideration in Port Alberni as to whether or not the city police were effectually enforcing the law and it was thought by some that better results could be obtained if the policing of the city were taken over by the Provincial police. The municipal clerk had been instructed to ascertain from the Attorney-General upon what terms an agreement to that effect could be arranged and at a meeting of the city council, held on the 14th of November, 1927, the city clerk announced the result of his communications with the Attorney-General. The Mayor of the city, who is also the chairman of the City Police Commission, presided. Some discussion arose and the defendant, sitting in the meeting as an alderman, said: "I hear the Arbor is still running and that Garvin's old place is opened up again." These are not the words which were alleged to have been spoken but, on the conclusion of the evidence tendered by the defendant, I allowed the plaintiff to amend his pleading and to set up the words above quoted. There was undisputed evidence that the people in Port Alberni would understand these words to mean that in the premises then occupied by the plaintiff the illicit sale of liquor was taking place. No special damages are proven and the plaintiff contends that the words are actionable *per se* as tending to injure her in her trade, business or calling. I doubt very much if this contention is sound but I find it unnecessary to decide this point as I am satisfied that the occasion was privileged and that the defendant was not actuated by actual malice. He did not know the plaintiff and he had no ulterior motive in view nor any purpose other than to bring to the attention of the mayor and council the fact that, in his opinion, the law was not being properly enforced by the city police. It is argued that, inasmuch as the mayor had formerly instructed the aldermen that any criticism of the police force should be made to the Police Commission and not to the city council nor to the mayor *qua* mayor, it follows that the defendant must have been actuated by malice. I think this is not so. The question of the policing of the city was up for discussion

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before the city council, which was the only body competent to enter into an agreement with the Attorney-General for the policing of the city by the Provincial police, and it seems to me that a communication made to that body by a member of that body was made upon a privileged occasion and no actual malice being proven, it follows that the action must be dismissed with costs.

Action dismissed.

GREGORY, J. 1928 April 23. TOM v. TRUSTEE OF HANS C. CHRISTENSEN LTD. AND EVERETT

TOM v. TRUSTEE OF HANS C. CHRISTENSEN LIMITED AND EVERETT.

Land Registry Act—Equitable mortgage—What constitutes—Deposit of documents of title—Conveyance in blank—Effect of.

By agreement of the 30th of April, 1927, the C. Company was to build a house on a certain lot for E. and convey the lot to E. upon completion of the house for $5,225. Of this sum $2,325 was to be paid by E. conveying his own house and premises to the Company and the balance of $2,875 to be raised by a mortgage on the new house when built. On the 2nd of May, 1927, E. executed a conveyance of his house under seal (the grantee's name not being filled in) which, with an insurance policy upon the house and furniture was delivered to the Company. The new house was never built. On the 5th of May, 1927, one McG., alleging he was raising a loan for the Company, interviewed the plaintiff T. who advanced him $1,200 and McG. handed him the conveyance in blank of E.'s house and the insurance policy. T. later through an order of E.'s agent obtained the certificate of title to E.'s property from the registry office and induced the insurance company's agent to sign a transfer making any loss under the policy payable to him. E. had no knowledge whatever of the loan made by T. to the Company. In an action by T. for a declaration that he holds an equitable mortgage on the property registered in E.'s name and for its enforcement:—

Held, that the only instrument of title the plaintiff had was the certificate of title but the certificate was in E.'s name and it was not E. but the Company that deposited it with the plaintiff. The conveyance delivered to the Company was in blank and therefore void and assuming it could be treated as an instrument sufficient to pass title when properly filled in and registered, it was never filled in or registered, and it could only operate from date of registration. The insurance policy included the

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furniture in which E. never gave the Company any interest, and the agent of the insurance company had no authority to sign a transfer of the policy to the plaintiff. The plaintiff has no right to hold the certificate of title nor has he the right to any loss under the insurance policy and has not established his right to an equitable mortgage.

ACTION for a declaration that the plaintiff holds an equitable mortgage over certain lands registered in the name of the defendant Everett and for its enforcement. The facts are set out in the head-note and reasons for judgment. Tried by GREGORY, J. at Vancouver on the 3rd of April, 1928.

C. L. McAlpine, for plaintiff.
Symes, for defendant Everett.
McLorg, for trustee of Hans C. Christensen Ltd.

23rd April, 1928.

GREGORY, J.: The plaintiff claims a declaration that he holds an equitable mortgage over certain lands registered in the name of the defendant Everett and asks for its enforcement.

The defendant trustee has filed no defence but appeared by counsel at the opening of the trial and submitted to any order the Court might make.

The defendant Everett denies the plaintiff's claim and, by counterclaim, claims the enforcement of a vendor's lien for the unpaid purchase price of his lands by the Christensen Company.

The plaintiff is a barrister and solicitor and the defendant Everett is a bank messenger.

Judgment

The facts shortly stated are as follow:

By agreement under seal, dated the 30th of April, 1927, between the Christensen Company and Everett, the Company agreed to build a house for Everett upon a certain lot therein described and to convey the same to Everett free from all charges, etc.; in consideration for which Everett agreed to pay the Company $5,225 as follows: $2,350 "by transferring clear deed to house and premises at 134 6th Avenue West, Vancouver," being the premises now in dispute, and to raise the balance $2,875 by mortgage on the house to be built and to pay the same to the Company. The Christensen Company further agreed to permit Everett to use and occupy, rent free, the house at 134

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6th Avenue West, Vancouver, until the new house was ready for occupation.

The Company was in difficulties and the new house was never built.

On the 2nd of May, 1927, Everett executed a conveyance under seal of the premises 134 6th Avenue, the consideration was expressed to be "one dollar ($1.00) and other valuable considerations now paid," etc. The grantee's name was not filled in. This deed was handed to the Company.

About the 5th of May, 1927, one McGowan, not an officer or employee for the Company, who says he was "getting money for Christensen Co." interviewed the plaintiff and asked for a loan of $1,500 on behalf of the Company. They together went to 134 6th Avenue and looked over the house, the plaintiff being introduced to Everett's wife. McGowan asked to be shewn through the house and explained that it was in connection with making a loan to Christensen Company. There is practically no evidence of what took place when the loan was made but plaintiff eventually advanced $1,200 and McGowan handed him the conveyance in blank and an insurance policy upon the house and the furniture in it, loss payable to Everett, and it is the deposit of these documents which plaintiff claims establish an equitable mortgage in his favour with interest at 35 or 40 per centum.

On the house, when plaintiff went to see it, was a sign reading: "For Sale, by Owners. Hans C. Christensen Limited."

Defendant Everett never knew that plaintiff had been at the house, but he knew, through his wife, that people had been to see it. He had no knowledge that the plaintiff was making a loan. It is difficult for me to believe that the loan could have been negotiated with as little discussion as plaintiff and McGowan testify to. There is no suggestion of any one that Everett ever gave or intended to give the Company any interest in his furniture. Furniture was never mentioned so far as I know between the plaintiff and McGowan but on the 5th of May plaintiff took the policy to the insurance company to make the entire loss, if any, under the policy payable to him. How the company was induced to do this is beyond my comprehension for

there had been no assignment of any portion of the policy to the Christensen Company or anyone else. The Company's agent signed a transfer to plaintiff which is dated 5th May, 1927, but he had no right or pretence of right to execute it on instructions from the plaintiff. Plaintiff dealt with McGowan but he never pretended even that he had any right to execute an assignment of the insurance.

The plaintiff, it seems, now has possession of the certificate of title to the property but McGowan never gave it to him and in fact knows nothing about how he got possession of it. When asked about it on the stand, the plaintiff said:

"When I made the search [in Land Registry office] the certificate of title was on file to the order of Everett's agent, a chap by the name of McCurdy and I got the order from McCurdy to deliver the certificate of title to me."

He says later that McCurdy was in the employ of Christensen Co. but he does not know in what capacity. There is not a tittle of evidence to shew that McGowan, who negotiated the loan, or the Christensen Co., for whose benefit it was made, ever authorized McCurdy to deliver up the certificate of title or even that they knew he was doing so. If the plaintiff had not been blinded by his anxiety to get the exceedingly high rate of interest I should think that the manner in which the loan was negotiated, the absence of a certificate of title, and an assignment of the insurance policy would have induced him to make some enquiries of the registered owner Everett and if he had done so he would soon have learned of his agreement with the Company and that the Company was disposing of his house without giving him a single cent for it. Everett was more than foolish to have executed the deed but for all we know he might have thought that retaining control of the certificate of title and failure to assign the insurance was sufficient to protect him.

Judgment

Accepting the statements in Falconbridge on Mortgages, pp. 77-79 as accurate statements of the law with reference to the creation of an equitable mortgage it is only necessary to consider here that of creating by deposit of title deeds for that is the only method under which the plaintiff claims.

It is, I think, at least doubtful if under our present system of transferring and registering property an equitable mortgage can be created by depositing title deeds. The whole scheme of

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the Land Registry Act is based upon registration. It is true that section 46 speaks of equitable mortgages by the deposit of title deeds but only to say that such a mortgage cannot be registered even when a certificate of title is deposited. In *Hudson's Bay Co.* v. *Kearns & Rowling* tried twice and reported in (1894), 3 B.C. 330; (1896), 4 B.C. 536, where this Court recognized an equitable mortgage, it is to be noted that the certificate of title had been deposited with the mortgagee as well as the title deeds. That case was decided in 1896 at which time title deeds were always returned to the owner after registration of title. Title deeds are not now (since 1905) left in the possession of the owner but must be deposited in perpetuity in the Land Registry. The only instrument of title plaintiff has is a certificate of title, but here that certificate is in the name of Everett and it was not he but the Christensen Company (through McGowan) who deposited it with the plaintiff, if McCurdy's unauthorized act could be called a deposit. The conveyance to the Company, being in blank, was void—*Hibblewhite* v. *M'Morine* (1840), 6 M. & W. 200—as a deed and assuming that it could be treated as an instrument of some other nature sufficient to pass title when properly filled in and registered it has never yet been filled in or registered and until that is done it is inoperative and, if registered, it would only operate as from the date of registration: see sections 34 and 36 of the Act.

The decision of Beck, J. of Alberta in *Arnot and Smith* v. *Peterson* (1912), 4 Alta. L.R. 324; 2 W.W.R. 1, referred to by plaintiff's counsel as authority for the statement that a deed may be executed in blank, does not I think support that proposition. That was not a case of a deed under seal but a mere writing which the Alberta Act authorized and I do not think it has ever been questioned that verbal authority to fill in a blank or make a correction in an instrument not under seal is sufficient—it is only a question of proving the authority. The instrument here is a deed under seal and in pursuance of the Short Form of Deeds Act I do not think that it helps matters to say that section 20 of our Act permits every instrument required to be registered under the Act for the purpose of passing an interest in land may be executed without seal. The simple answer to

that is that that method was not used here and the law attaches certain well-known incidents to instruments under seals which have no application to instruments not under seal. Nor does section 53 of the Act help—it only provides that instruments (*e.g.*, a deed) "sufficient to pass or create an interest in land shall be registrable and for all purposes of registration effect shall be given to them according to their tenor." A deed in blank is not sufficient to pass or create an interest in land and its use here is not for the purpose of effecting registration but to create an equitable mortgage which under section 46 of the Act is not registrable.

There is no need to disagree with the statements in Falconbridge on Mortgages to which I was referred as the conditions stated there do not exist here. The Company had no title deeds to itself to deposit, there is no memorandum of agreement to deposit, etc.

Zimmerman v. *Sproat* (1912), 5 D.L.R. 452 does not help the plaintiff. It has not been pointed out to me what resemblance, if any, the Ontario Act bears to ours but in that case the depositor did have a good and effective deed of the property or an interest in it to himself and it was that deed which he deposited, but that is not the case here where the Company only held a void deed—probably it had a right of action upon the agreement—Exhibit 6—but that is not what it deposited with the plaintiff and the plaintiff testifies that he never saw it until examined for discovery but I notice that he has not yet testified that he never knew of any agreement between Everett and the Company with reference to the property. The right of Everett to a vendor's lien and the question of whether he is estopped from setting it up were not very fully argued by his counsel probably because of some remark of mine during the trial. The defendant trustee makes no objection to a vendor's lien being allowed and I do not see at present how its disallowance can benefit the plaintiff but if it is important I would like to hear further argument on these points.

Judgment

The plaintiff has not I think established his right to an equitable mortgage; he has no right to hold the certificate of title and he had no right to have the loss under the insurance policy, if any, made payable to himself.

COURT OF APPEAL

1928

Jan. 10.

JOHNSON v. ELLIOTT

JOHNSON v. ELLIOTT.

Negligence—Pedestrian run down by motor-car—Contributory negligence—Intersection of streets—Duty of motor-drivers at crossings.

As the defendant was driving his car southerly on Cambie Street, Vancouver, and approaching Broadway he admitted he saw the plaintiff on the west sidewalk about 15 feet from the corner, walking in the same direction hurriedly and evidently intending to catch a street-car on Broadway. He momentarily lost sight of him, but immediately after turning into Broadway to the west he suddenly saw the plaintiff in front of him crossing Broadway to the street-car. He sounded his horn but being too close to him to stop or turn aside he ran into him. The trial judge dismissed an action for damages holding that as the plaintiff, on hearing the horn, suddenly stopped and turned back in front of the car, he was therefore solely responsible for the accident.

Held, on appeal reversing the decision of HUNTER, C.J.B.C. (MCPHILLIPS, J.A. dissenting), that the defendant knew the plaintiff would probably cross his path. There was no obstruction to his view and the obligation rests upon a motor-driver coming from behind a pedestrian to avoid hitting him. It was his failure to exercise due care that caused the accident.

[Affirmed by Supreme Court of Canada.]

Statement

APPEAL by plaintiff from the decision of HUNTER, C.J.B.C. of the 14th of June, 1927, dismissing an action for damages for injuries sustained by the plaintiff through the alleged negligent driving of the defendant's car by the defendant. The facts are that the plaintiff was walking southerly on the west side of Cambie Street, Vancouver, at about 5.30 on the afternoon of the 23rd of August, 1926, approaching Broadway where he intended to catch a street-car. The defendant was driving his car in the same direction a few feet behind the plaintiff and defendant admits he saw the plaintiff and that from the way he was hurrying he was evidently trying to catch a street-car on Broadway. The defendant continued on (evidently losing sight of the plaintiff in the meantime) and just after turning westerly on Broadway he ran the plaintiff down as he (the plaintiff) was crossing Broadway to catch his street-car. It appeared from the evidence that there was nothing to obstruct the defendant's view as he turned the corner. The action was dismissed but the

learned Chief Justice assessed the damages at $4,770.71 with costs in case it should be found on appeal that he was wrong on the question of liability.

The appeal was argued at Vancouver on the 25th of October, and the 10th of November, 1927, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

H. I. Bird, for appellant: We submit there was negligence on the part of the defendant: (1) He did not keep a proper look-out; (2) he sounded his horn when he was too close to the plaintiff and startled him; (3) in any case he could have turned to his right and avoided hitting the plaintiff. That he did not keep a proper look-out see *Zellinsky* v. *Rant* (1926), 37 B.C. 119; *Rainey* v. *Kelly* (1922), 3 W.W.R. 346; *Rex* v. *Broad* (1915), A.C. 1110 at p. 1115. The failure of Elliott to look out was the cause of the accident. He knew their paths would cross: see *Beauchamp* v. *Savory* (1921), 30 B.C. 429 at p. 432. The Act only applies if the plaintiff was in any way negligent: see *Mason* v. *Snider* (1926), 31 O.W.N. 234.

Bray, for respondent: It was found on the evidence that the accident was due to the plaintiff's own negligence. The finding was justified on the evidence and should not be disturbed: see *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326; *Grant, Smith and Company and McDonnell, Ld.* v. *Seattle Construction and Dry Dock Company* (1920), A.C. 162; Halsbury's Laws of England, Vol. 21, p. 364, sec. 631; *Cousineau* v. *City of Vancouver* (1926), 37 B.C. 266; *Skidmore* v. *B.C. Electric Ry. Co.* (1922), 31 B.C. 282. The accident was not the proximate cause of the kidney trouble. As to the interpretation of the word "proximate" see *In re London, Tilbury and Southend Railway Co. and Trustees of Gower's Walk Schools* (1889), 24 Q.B.D. 326; *Sharp* v. *Powell* (1872), L.R. 7 C.P. 253; *Glover* v. *London and South Western Railway Co.* (1867), L.R. 3 Q.B. 25; Mayne on Damages, 10th Ed., 95; *Admiralty Commissioners* v. *S.S. Susquehanna* (1926), A.C. 655; *Admiralty Commissioners* v. *S.S. Chekiang, ib.* 637; *Hadley* v. *Baxendale* (1854), 23 L.J., Ex. 179. As to the application of the Con-

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tributory Negligence Act see *McLaughlin* v. *Long* (1927), S.C.R. 303.

Bird, replied.

Cur. adv. vult.

10th January, 1928.

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MACDONALD, C.J.A.: The plaintiff was walking south on the westerly sidewalk of Cambie Street, approaching Broadway; he was hurrying to catch a street-car about to stop at the south-west corner of Broadway. Defendant was driving his automobile in the same direction and was behind the plaintiff and plainly saw him running, and admits that he knew the plaintiff's objective. The defendant was about 40 feet from the intersection of Broadway with Cambie Street when he first saw the plaintiff running ahead of him. The plaintiff was then, defendant says, 25 feet ahead and consequently within 15 feet of Broadway. The defendant had, or ought to have, kept the plaintiff in view, it being broad daylight, but he paid no further attention to him, turned on to Broadway and ran him down at a point on or near the north rail of the car line. No reasonable excuse is given for the defendant's conduct. There was nothing to interfere with his vision, except a couple of poles which he passed on his way to Broadway. On Broadway it is said there was very little vehicular traffic. It is, however, contended by the defence that the plaintiff left the sidewalk before he got to Broadway, and cut across the corner. Assuming this to be so there was yet no reason why the defendant exercising reasonable care, and having the man in view, and knowing his objective, should have run him down. Two witnesses were called for the defence, who were standing at the stopping place of the street-car, and who said that plaintiff had turned around just before the impact. It is unnecessary to comment on this evidence because assuming that in the agony of the occurrence he had turned around to attempt to save himself, that fact would not lessen the defendant's liability. An examination of the evidence of these witnesses merely shews that he turned but did not have time to run back; it also accounts for him having been struck on the right thigh.

The only other question is that of contributory negligence on the plaintiff's part.

By a recent statute of this Province the Contributory Negligence Act, being chapter 8 of the statutes of 1925, it is provided that "where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault."

There was no jury and therefore it was the province of the judge to apportion the damages if such should have been made. The learned trial judge, however, dismissed the action, and as I think the defendant was guilty of negligence it becomes necessary to decide the question of contributory negligence, and if I should find such, to apportion the damages.

While it is in general negligent for a person to rush out into a street in an effort to catch a street-car, yet I think when the circumstances of this case are considered it must be conceded that the negligence of the defendant was the sole cause of plaintiff's injury. When a pedestrian is crossing a street he expects, and reasonably so, that drivers behind him will take care not to injure him; will not quarter into him. They can see; he cannot, without turning around. There was no contributory negligence here.

MACDONALD, C.J.A.

At the opening of the appeal the appellant made a motion for leave to admit new evidence of circumstances which transpired since the trial. The trial judge in dismissing the action assessed the damages so that in case of appeal it would not be necessary to order an assessment. Among the claims for damages was one for expense, pain and suffering on account of an anticipated operation for stone in the kidney. He excluded that item from his assessment, presumably because he was of opinion that it could not have developed since the accident but must have formed before that time.

The plaintiff spent several months in the hospital after the judgment and it was then demonstrated that he was not suffering from stone in the kidney, but from a sedimentary deposit which might eventually develop into stone, but was rapidly clearing up. It was argued that this condition was the result of the plaintiff's confinement in bed for the period of several months before the trial. That it was the natural consequences of the accident and

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therefore should be taken into consideration in the assessment of damages. We heard the evidence of the doctor who attended him and that of experts for the defence, the one to the effect that it was probably caused by the accident, the other that it was not. In my opinion, the weight of the evidence is against the plaintiff's contention, and this part of the case must therefore be decided against the appellant.

The plaintiff should have the costs of the action and the costs of the appeal applicable to his success.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: I think the defendant was negligent. Had he been taking due care and keeping a proper look-out, he would have avoided the accident.

The evidence satisfies me that the plaintiff merely turned around and did not traverse any distance and what he did can be termed to be in the agony of collision. I would therefore, with respect, set aside the judgment below and order judgment entered for the plaintiff for damages.

As to the amount of the damages: While the plaintiff was in hospital on account of the injury, a condition developed in the kidneys which was attributed by his attendant physician to lying so long on his back. This was at first diagnosed as stones in the kidneys, but at a time subsequent to the trial it developed that they were encrustations as the doctor describes them—"they were the shell of salts, the same salts that go to form the stones that we find in the kidney." The evidence of the attendant physician (Dr. McLennan) was taken before us during the argument owing to the condition that has developed after the trial—the learned trial judge having in assessing damages (as requested in case on appeal the defendant should be found liable) refusing to take into consideration any claim arising out of the condition of the kidneys. The evidence of Dr. McLennan is in short, that in his opinion the stones or encrustations as they afterwards turned out to be, in all probability were due to the treatment the plaintiff was obliged to undergo by reason of the accident. On the other hand, expert evidence was adduced tending to shew that they were more likely due to other causes

and treatises on the subject by recognized authorities were read to us.

From my understanding of these and the evidence, it does not seem to be definitely settled, in fact a considerable difference of opinion exists, and under these circumstances I would not feel justified in disagreeing with the learned trial judge in respect of his finding on this head. In this view I would allow the finding as to damages to stand as assessed.

GALLIHER, J.A.

In the result the appeal is allowed and judgment for the damages as assessed should be entered for the plaintiff.

As to the costs occasioned by bringing the witnesses before us and all attendant costs in that respect, I think they should be to the defendant to be taxed and set off against the plaintiff's costs.

McPHILLIPS, J.A.: This appeal is one in a negligence action brought by the plaintiff (appellant) for personal injuries consequent upon being struck by the motor-car of the defendant (the respondent) which was being driven by the defendant upon a street in the City of Vancouver. The learned Chief Justice of British Columbia was the trial judge, the trial being had without a jury. The learned Chief Justice in his reasons for judgment canvasses all the salient facts and arrays them in a manner which in my opinion is unassailable, demonstrating beyond question that no case was established of actionable negligence.

MCPHILLIPS, J.A.

In the way of a primary observation it may be stated that the evidence of the plaintiff himself cannot be accepted when the evidence of the independent witnesses who saw the accident take place is considered as it is plain that the plaintiff is in absolute error in his evidence when he says he continued up the street passing along the pavement and was struck down upon the intersecting street. The evidence that must be accepted is that he went diagonally on to the other street; if that was not the fact he could not have been at the place where the accident really took place. The defendant was driving his motor-car accompanied by a friend of his—who gave evidence on commission—and had his car well under control and turned upon the intersecting street on to which the plaintiff had proceeded in a diagonal manner, the plaintiff apparently intending to cross the

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intersecting street to board a street-car. When the defendant made the turn into the street and had proceeded but a little distance the plaintiff suddenly turns and comes back and projects himself in front of the defendant's car and is struck but not run over by the defendant's car. The defendant who is driving slowly—with his car well under control—upon seeing what the plaintiff had done, sounded his horn, which was in compliance with the municipal by-law, and brought his car almost immediately to a stop but in so doing, the plaintiff was struck. Can it be said upon these facts that there was actionable negligence? The case attempted to be made out was that the sounding of the horn caused the plaintiff to turn back, that it startled him, and that in the emergency of things the defendant's sounding of the horn flurried the plaintiff and caused him to turn in his tracks and precipitate himself in front of the defendant's car. It was not a case of the "agony of collision," often met with in the cases. The plaintiff makes this rash move which rendered it impossible for the defendant to avoid striking him, as it was, he was not run over, and the evidence in my opinion well supports the defence that the defendant exercised care and skill in the emergency having his car well under control and proceeding slowly at the time, and notwithstanding the exercise of all reasonable and ordinary care and skill the defendant was unable to avoid the accident, *i.e.*, striking the plaintiff.

In this view of the facts, and it is the only reasonable view, what happened was in its nature an inevitable accident. There was nothing to give rise in the defendant's mind to any likelihood of danger or that the plaintiff would do what he did when proceeding away from the course of the defendant's car—suddenly halt in his steps, turn, and precipitate himself in front of the car.

I do not think that I can usefully refer in detail to the points of evidence the learned Chief Justice proceeded upon, they are fully set forth in his judgment. In my opinion upon the facts there can be but one answer and that is that the plaintiff has wholly failed to make out a case of actionable negligence. Further, it is not to be forgotten with regard to any disputed facts that the trial judge has had the advantage of seeing and hearing the witnesses and in disturbing the judgment it must

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be shewn that the trial judge arrived at a wrong conclusion upon the facts. In *McIlwee* v. *Foley Bros.* (1919), 1 W.W.R. 403, at p. 407, Lord Buckmaster said:

"It is unnecessary to repeat the warnings frequently given by learned judges, both here and in Canada, against displacing conclusions of disputed fact determined by a tribunal before whom the witnesses have been heard and by whom their testimony has been weighed and judged, and did the question depend solely on the decision between rival evidence the case would be free from difficulty."

The present case is one of rival evidence and the learned trial judge has found on the facts for the defendant. It is true, that the evidence of the witness Hume was taken upon commission and the learned trial judge did not see this witness. This evidence, I may say, though, is most convincing and in a most graphic and what I deem to be a most impartial way, he tells the story of the happening and his evidence plainly exculpates the defendant from any actionable negligence in the driving of the car, and sitting by the defendant in the car he was in a position to detail all the circumstances attendant upon the accident. (Also see *Lodge Holes Colliery Co., Lim.* v. *Wednesbury Corporation* (1908), 77 L.J., K.B. 847 at p. 849; *Canadian Pacific Ry. Co.* v. *Bryce* (1909), 15 B.C. 510, and report of judgment on appeal to the Privy Council at p. 513).

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Upon the question of disturbing the judgment of the trial judge, the House of Lords has very recently dealt with the subject in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8.

I am wholly of the same view as the learned Chief Justice of British Columbia, the trial judge, and would affirm the judgment, and I agree that the action should be dismissed. The appeal therefore, in my opinion, should be dismissed.

MACDONALD, J.A.: There is a conflict in the evidence as to whether or not this was what might be called a "crossing accident." Some of the respondent's witnesses testified that the appellant was hit some distance west of the crossing after he ran across the property of a gasoline-station on the north-west corner of Cambie Street and Broadway. It is important to reach a conclusion on this point because I think there is a greater burden on the respondent if the accident occurred at a crossing

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where pedestrians usually cross a street intersection. In addition to that if it occurred at the crossing the appellant would or should be more clearly within respondent's view at all material times than he would be if he crossed through the gas-station property out of sight of the driver of the motor-car and then darted across the highway to the rear of a street-car standing some distance west of the corner. Two of respondent's witnesses testified that the injured man crossed through this property and if the learned trial judge accepted that evidence it would end the matter. The learned Chief Justice merely states, however, that he "accepts the evidence of witnesses who saw him turn in his tracks." That is another incident requiring separate consideration. There is no finding that appellant made the cross-cut suggested and we must ascertain the true facts as best we can from all the evidence.

MACDONALD, J.A.

Appellant's version is that he passed over Broadway at the usual place for pedestrians to cross intending to board a street-car headed east, presumably by crossing in front of it and going on to the rear to climb aboard. I think that would be the natural, certainly the safer, course to pursue. It is clear from respondent's evidence given on discovery that he substantially agrees with the appellant in this respect because he said he saw the injured man in front of him immediately before the impact just as he was turning the corner into Broadway and when his motor-car was at an angle of 45 degrees. Respondent first looked to the east to watch traffic from that direction and when he cast his eyes westward appellant was right in front of him. This places the point of impact at the corner or so close to it that it should be regarded as on the crossing. Pedestrians should be allowed a little latitude at these points. At the trial the respondent varied his evidence to some extent due, as he says, and I think honestly, to the fact that in the meantime he made measurements. That however, would not improve his memory in respect to the spot where the accident took place. He said at the trial that he was in the "general course of track on Broadway when I hit him." I think this means that he made the turn and was proceeding directly along Broadway. This is a departure from the previous statement that his motor-car was on the turn at an angle of 45 degrees when he suddenly discov-

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ered appellant in front of him. He also said at the trial that respondent "went across the gravel," that is, cut across the gas-station property. That does not agree with the main body of his evidence. I cannot therefore find any warrant in respondent's evidence, for finding that appellant did not, as testified, proceed in a straight line, or nearly so over the crossing without making the detour suggested. Respondent's other witness Hume does not suggest that this detour was made; in fact, his evidence is consistent with that of the appellant in that respect. In view, therefore, of this evidence, and the fact that the learned trial judge states that the "accident occurred at what might be called a very bad crossing," and also "he had just about completed his swing around the curve," I would find that appellant started to cross Broadway at the usual place for pedestrians or so close to it that the occurrence must be regarded as a "crossing accident." I think this finding is important because obviously pedestrians in making a crossing at the proper place while they must exercise care have, in my view, higher rights than if they attempted to cross elsewhere; and, on the other hand, motor drivers are under a greater obligation to maintain a sharp lookout at such points knowing it is the place pedestrians cross from curb to curb.

There is, however, another consideration. The appellant when about ten feet from the curb on the crossing (the exact distance is not material) suddenly turned about, and was knocked down by respondent's car.

The prevailing evidence appears to shew that if he had not done so the accident would not have happened. The learned Chief Justice did not appear to share this view. He said "all he had to do after he heard the horn was to accelerate his speed and get out of the way of the motor-car." Several of respondent's witnesses expressed the opinion that the sounding of the motor-horn when close to the appellant caused him to become flurried and to jump back quickly. It is difficult for eye witnesses to form an accurate opinion on this point without minute calculations of relative distances and speed. The injured man said he did not hear the horn but the finding that it was sounded must be taken as conclusive. I think it is immaterial whether appellant jumped back because of the horn suddenly distracting

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him or because his first glance at the motor-car suggested imminent danger. In any event it was for him a "moment of peril" and I do not think he can be charged with negligence because he may not have jumped in the right direction. I think there is a duty on motor-drivers at crossings, once the pedestrian has entered upon it to reduce speed to such a point that he need not "accelerate his speed" or jump one way or the other to avoid danger. This is not to suggest that the pedestrian may cross without care on his part. There are relative obligations.

Evidence was led to shew appellant crossed Broadway on the run. I think, viewing the whole evidence, this is likely although the learned trial judge does not say so. Ordinarily it would increase the risk of an accident to run across. This, however, was not one of the busy street corners of the city. As one of the witnesses testified "there was not much traffic at the time." So long as the way was clear to appellant on looking to his left I do not think negligence can be imputed to him because he hurried to catch the street-car. That is a familiar sight at street corners. It might be prudent also to glance over his shoulder to the rear to watch cars coming from behind him but that is not an absolute duty. It is the motor-driver coming up behind the pedestrian upon whom the obligation rests to avoid hitting any one using reasonable care crossing the street intersection. That is where the respondent failed to exercise due care and it was his failure to do so that caused the accident. True he was driving only six miles an hour. That is in his favour. But that is not enough. If it was it would be sufficient to say:

"I was only going six miles an hour and I was not obliged to take any other precautions."

He should have seen the appellant and avoided the accident either by further reducing his speed or by turning the corner closer to the curb as he could easily do without putting the appellant in a position of peril. It only required a moment for respondent to glance to the east after which his sole attention should have been given to pedestrians who had entered upon the crossing. A motor-driver approaching a corner to turn to his right, seeing a pedestrian likely to cross must contemplate that probability and govern himself accordingly. Here he knew

respondent was likely to cross because he remarked to his companion in the motor-car that he was doubtless running to catch the street-car. He may have lost sight of him by the intervention of a telephone pole on Cambie Street and some other possible obstructions on the gas-station property but that would be only momentarily and before he reached Broadway. It follows that in my view the appeal should be allowed.

MACDONALD, J.A.

The learned trial judge fixed the damages at $4,770.70, to avoid a new trial and an attempt was made by adducing additional evidence before us to increase this amount owing to developments in the condition of the appellant arising since the trial. Giving full credence to the honesty and value of the opinions expressed by Dr. McLennan on the one hand and Dr. Hunter on the other, I cannot find that the appellant upon whom the onus rests established that the additional damages claimed are attributable to the original injuries caused by the accident.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Wood, Hogg & Bird.*
Solicitor for respondent: *H. R. Bray.*

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SUMMERLAND DEVELOPMENT CO. v. CORPORATION OF DISTRICT OF SUMMERLAND

THE SUMMERLAND DEVELOPMENT COMPANY, LIMITED v. THE CORPORATION OF THE DISTRICT OF SUMMERLAND.

Assessment and taxation—Sale of land for taxes—Land admittedly liable for portion of taxes—Action to set aside sale—R.S.B.C. 1924, Cap. 179, Secs. 54(110), 169, 185, 193, 232 and 267(1) (c)—Cap. 271, Secs. 112 (3), (4) and (5), 126, 127 and 128—B.C. Stats. 1925, Cap. 61, Sec. 25.

The plaintiff Company being the owners of certain lands within the defendant Municipality and owners of water rights and an irrigation system used for the distribution of water to purchasers of these lands, sold and transferred by indenture the water rights and irrigation system to the defendants in 1910. Clause 3 of the indenture contained a stipulation that the Company agreed to obtain the supply of water required for irrigating their irrigable lands and to enter into contracts as soon as they required water for irrigating said lands, with the Municipality on terms not more onerous than those contained in contracts previously made by them with their sub-purchasers, the Municipality agreeing to supply the Company or their assigns with water from said system to irrigate said unsold lands and to enter into agreements to do so on said terms. Shortly after, in 1910, the Company sold under agreement for sale, lot 30, district lot 474, within the Municipality to K. who paid all taxes until 1923, but as K. did not carry out his agreement the land then reverted to the Company. No water was ever used on block 30 and no agreement was entered into with the Municipality for the supply of water. On the 30th of September, 1926, the lands were offered for sale for taxes for the years 1924 to 1926 and the Municipality declared the purchaser. The Company then tendered $220.81 which included the general taxes from 1924 to 1926 (refusing to pay the irrigation rates and general water rates) but it was refused. An action to set aside the tax sale was dismissed.

Held, on appeal, reversing the decision of SWANSON, Co. J., that no contract was entered into for the supply of water as provided in clause 3 of the agreement of 1910 and there is no provision in the Municipal Act relieving the Municipality from the obligations of said clause 3. Further, the water board have no power to authorize the imposition of tolls upon those who are under no obligation to pay them. The land was sold for a demand made up of arrears of land taxes, arrears of general water rates and to the extent of $260 of alleged arrears of irrigation tolls. The inclusion of arrears of irrigation tolls renders the sale invalid.

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Statement

APPEAL by plaintiff from the decision of SWANSON, Co. J. of the 7th of January, 1928, in an action for a declaration that the sale by the Municipality of block 30, district lot 474, group 1, Yale District (map 295) in the Municipality of Summerland for delinquent taxes incuding general taxes, irrigation rates and water rates for the years 1923, 1924, 1925 and 1926 is void and that the same be set aside. By agreement of the 2nd of April, 1910, the plaintiff Company sold the Municipality its entire irrigation system for the supply of water for irrigation purposes to lands situate within the Municipality. The agreement provided, *inter alia,* that the plaintiff Company agreed to obtain the supply of water required for irrigating such irrigable lands as they were still possessed of capable of receiving irrigation by gravity from the said system and to enter into contracts as soon as they required water for irrigating said lands on terms not more onerous than those contained in contracts theretofore made by them to sub-purchasers, the Municipality agreeing to supply the water so required. No contract was entered into as to the supply of water. On the 25th of October, 1910, the Company sold block 30, under agreement for sale to one Kirk who paid all taxes until 1922, when the agreement of the 25th of October, 1910 (not being carried out as to payments to the vendor), was cancelled and a new agreement was entered into between the same parties on the 1st of April, 1922, but this agreement was not carried through and no further taxes were paid. From 1910 no water was used on block 30 for irrigation purposes, the land remaining vacant and uncultivated. The land was offered for sale for taxes on the 30th of September, 1926, when the Municipality was declared the purchaser. On the 27th of August, 1927, the plaintiff Company being still the registered owner, tendered $220.81 in redemption of the lands, which was refused. This sum included the general taxes from 1924 to 1926 with interest and sale expenses, but they refused to pay the irrigation rates and general water rates. The plaintiff claimed that not having used water and not having been supplied with any the Municipality cannot require payment of any rates or tolls for water in connection with the land. The action was dismissed.

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The appeal was argued at Vancouver on the 7th and 8th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

H. V. Craig, for appellant: We do not dispute the land tax, but by the terms of the agreement under which the Municipality took over the water system we are made exempt from water rates. Under the agreement for the sale of the water system there was an agreement to enter into an agreement as to the supply of water, but this was never done. No water was ever used on the land so that under section 128 of the Water Act, there can be no charge against the property as they can only charge property upon which water is used. Next, the by-laws are *ultra vires* as under section 169 of the Municipal Act any modification must first have the assent of the ratepayers and this was never obtained: see *Canadian Northern Railway* v. *Rural Municipality of Springfield* (1919), 30 Man. L.R. 82; (1920), 1 W.W.R. 18; *Houghton Land Corporation Ltd.* v. *Rural Municipality of Ritchot and Joyal* (1927), S.C.R. 485.

Argument

Kelley, for respondent: We do not need to go to the Water Act. Section 54, subsection (110), and section 193 of the Municipal Act are sufficient authority for the sale. The Municipality is not a seller but only a conveyor of water. While Kirk was in possession of this land he paid all taxes including irrigation and water rates from 1911 until 1919. On the question of the invalidity of the by-laws see *The Attorney-General of Canada* v. *The City of Toronto* (1893), 23 S.C.R. 514; *City of Hamilton* v. *Hamilton Distillery Co. City of Hamilton* v. *Hamilton Brewing Association* (1907), 38 S.C.R. 239; *Town of Broadview* v. *Saskatchewan Co-Operative Creameries Ltd.* (1928), 1 W.W.R. 324. Section 3 of the agreement of the 2nd of April, 1910, does not bear at all the interpretation the appellant puts upon it. It would depend on an order of the Water Board as to whether they can compel those who do not use water to pay the rates. Section 193 of the Municipal Act overrules section 128 of the Water Act and my submission is that section 185 of the Municipal Act is a bar to this action.

Craig, in reply: Section 54, subsection (110) does not apply to a mixed irrigation system and water system. The point the

respondent raises, that the Municipality is a "conveyor of water" is in our favour. We rely on section 128 of the Water Act and that the by-laws are *ultra vires.*

Cur. adv. vult.

5th June, 1928.

MACDONALD, C.J.A.: The appeal is from a judgment refusing to set aside a tax sale of appellant's land by the respondent for arrears of taxes and rates including tolls for the supply of water for irrigation purposes.

The appellant was the owner of land within the respondent Municipality. Up to 1910 it was also the owner of water rights and an irrigation system used for the distribution of water to purchasers of parcels of these lands.

In 1910 it sold and transferred by indenture to the respondent its water rights and irrigation system, but retained its lands. The indenture, Exhibit 11, article 3, contains this stipulation:

"3. The Company [the appellant] hereby agrees to obtain the supply of water required for irrigating such of their irrigable lands as they are still possessed of capable of receiving irrigation by gravity from the said system and shall enter into contracts as soon as they require water for irrigating said lands, with the Municipality on terms and conditions not more onerous than those contained in the contracts heretofore made by them with their sub-purchasers, and the Municipality on their part hereby agree to supply to the Company or their assigns water from the said system to irrigate the said unsold lands or to any part thereof and will enter into agreements to do so on the said terms and conditions."

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The appellant subsequently agreed in writing to sell one of its unsold parcels, block 30, to a purchaser who thereafter made default and the agreement came to an end.

No agreement for the present supply of water either to the appellant or to its agreed purchaser was entered into nor was water "required" or taken or used by either of them at any time. The evidence shews that block 30 is a swamp and requires drainage not irrigation. It is true that the agreed purchaser though taking no water nor agreeing to take it paid gratuitously some tolls during the continuance of his agreement, but his acts even if they could amount to an estoppel against himself cannot, I think, affect the appellant in any way, it being neither party nor privy to the payment of such tolls.

The respondent relies upon the Water Act, Cap. 271, R.S.B.C.

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1924, by which elaborate provisions are made for the acquisition of water licences for municipal, manufacturing, irrigation, domestic and other purposes. The Act gave "public utility" companies extensive powers and by a later statute municipalities were included in the term "public utility" company. This gave them the privilege of distributing water for the purpose of irrigation. Under the Water Act a Board called the Water Board, was constituted with power to increase or reduce the tolls for the supply of irrigating water and for this purpose to ignore past agreements between the companies and their customers. The Board was therefore in a proper case competent to deal with tolls, and the respondent upon obtaining the authority of the Water Board could increase the rates notwithstanding any agreement which it had theretofore made or had taken over with the transfer of the irrigation system. If, therefore, there had been an existing agreement between the appellant and the respondent for the use by the former of water from respondent's system under which tolls could be legally charged, the Water Board could have validly made an order in respondent's favour.

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Mr. *Craig*, appellant's counsel, argued that Exhibit 11 is an agreement to take water only when requested by the appellant and that inferentially it precludes the respondent from demanding tolls until then or until the agreement contemplated therein has been entered into; that no tolls can be validly levied against it; that the obligation was conditional and that the condition had not yet happened. The contract is that the one shall supply water when required and the other shall take it if and when required, but there is no agreement to take water now.

Under the Water Act, section 310, which is the only section of that Act relied upon, the Board is given power to increase or reduce tolls where tolls are payable under agreements. The Board was given no power to authorize the imposition of tolls upon those who were under no obligation to pay them. It is only "the tolls or charges payable to any such company [here the respondent] under any agreement for the delivery of water" which they are empowered to readjust.

The Water Board was applied to by respondent in 1922 and it was authorized—

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"to impose and collect an additional toll which shall be graduated so that with the amount payable under any water agreement the total amount payable by water users for irrigation water, exclusive of general rates and taxes, shall not exceed the following . . ."

It thereupon passed a by-law increasing tolls of all customers using their water for irrigation purposes, and demanded tolls so increased from the appellant. The by-law contains these words:

"There shall be and is hereby assessed, levied, fixed, and charged on all lands within the said Corporation *liable to be charged and to pay an irrigation toll or rate* . . . the following," etc.

(The italics are mine).

Unless therefore, the respondent can support its tax sale by reference to powers conferred on it by the Municipal Act it must be set aside.

The section of that Act chiefly relied upon by Mr. *Kelley*, is section 54, subsection (33). This subsection, clause (*e*) enables municipalities to pass by-laws "for making rules and regulations governing the supply and distribution of water from the municipal irrigation system, for fixing the charges and providing for the collection thereof." Other sections were referred to, but in my opinion, they lead to nothing in the respondent's favour.

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Now it is true that clause (*e*) enables them to fix the charges. No doubt the municipality has power to impose rates for the maintenance of a water system, where there is no agreement imposing repugnant obligations such as are found in Exhibit 11. We have not been referred to any section in the Municipal Act enabling the respondent to impose rates or charge tolls contrary to an agreement, the stipulations of which they have agreed to carry out. If, therefore, the respondent was entitled to levy and demand tolls from the appellant, it must be because it has been relieved by the Municipal Act from the obligations of article 3 of Exhibit 11, and this I am unable to find. It relies only on the order of the Water Board, which if I am right in my conclusion stated above, is inapplicable to the situation here in question.

The land was sold for a demand made up of arrears of land taxes, arrears of general water rates, and to the extent of $260 of alleged arrears of irrigation tolls. The inclusion of the latter sum renders the sale invalid. *Canadian Northern Rail-*

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way v. *Rural Municipality of Springfield* (1919), 30 Man. L.R. 82, and *Houghton Land Corporation Ltd.* v. *Rural Municipality of Ritchot and Joyal* (1927), S.C.R. 485. Our statute is substantially the same as that construed in the first mentioned.

It therefore becomes unnecessary to consider the merits of the other grounds of appeal.

The appeal should be allowed and the sale set aside, with costs here and below.

MARTIN, J.A.: I concur in the allowance of this appeal.

GALLIHER, J.A.: In this matter the Court had the benefit of a concise and clear-cut argument from counsel on both sides. The case has been very fully set out in the reasons for judgment of SWANSON, Co. J. who has gone into the matter very carefully and with certain of his views, I am fully in accord.

It seems to me, however, that the case really narrows down to this: Do we find in either the Water Act or in the Municipal Act provisions which, in the absence of a contract, warrant the Municipality in charging water rates to the plaintiff for water which is not used and is not required to be used upon land which in its present shape is not irrigable land, and is covered with water to a considerable extent during the greater part of the year—which is in fact in its present condition a species of swamp, requiring drainage rather than irrigation?

GALLIHER, J.A.

It is contended that because the system is constructed past these lands and the water is available for use that the Company should pay as if actual user had been made.

I can understand this as applied to a construction or upkeep charge, such as we find under the head of frontage tax in cities and such as I understand the effect of subsection (110) of section 54 of the Municipal Act gives, and which tax is also imposed here, also subsection (203), charging owners or occupiers a sewer or drainage frontage rate whether connected or not. But when you come to apply that, or even the provisions of section 127 of the Water Act in these words:

"Such licensees may from time to time make and enforce by-laws, rules, and regulations, not inconsistent with this Act, providing for:—(*c*) Fixing tolls for the use of water, power, light, heat, electricity, appliances, or

works, or for the conveyance of water or power, or for establishing other tolls to be paid by consumers or users"

to lands of the nature of these in question, as and for actual user of water, I am of the opinion they have no such power, in the absence of an agreement to take water, nor would the Water Board have such power.

Then if this be so, we have included in the amount for which the lands were sold an item improperly included and within the words of our Act, section 267 (1) (*i.*) of the Municipal Act:

"That the land was not liable to taxation during the year or years in which the taxes for which the land was sold were imposed."

In *Canadian Northern Railway* v. *Rural Municipality of Springfield* (1919), 30 Man. L.R. 82, decided by the Court of Appeal, the words of the statute there were:

"Or that the land was not liable to taxation for the year or years for which it was sold."

GALLIHER, J.A.

The head-note in that case, in part, is:

"A tax sale is invalid for every purpose unless the property was at the time liable for all the taxes for which it was sold."

This was under the above wording which, as I view it, is in no way different in effect from the wording of our Act.

After the decision in that case, the Manitoba Act was amended to read as follows:

"Or that the land was not liable to the taxes or any portion thereof for which the same was sold."

And this was subsequently dealt with by the Supreme Court of Canada in a Manitoba case, *Houghton Land Corporation Ltd.* v. *Rural Municipality of Ritchot and Joyal* (1927), S.C.R. 485 at p. 490 wherein the sale under the amended Act was held valid.

I would allow the appeal.

MCPHILLIPS, J.A.

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

Appeal allowed.

Solicitor for appellant: *H. V. Craig.*

Solicitor for respondent: *W. C. Kelley.*

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HIGGINS v. MACDONALD, ROBERTSON, AND THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY.

Negligence—Breach of duty—Sheriff—Arrest by deputy—Prisoner escapes—Damages—Bond covering acts of sheriff and deputy—Liability of bonding company—R.S.B.C. 1924, Cap. 231, Sec. 13.

The deputy sheriff of Vancouver was given a writ of *capias* 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 deputy 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 for damages against the sheriff and his deputy and against the Guarantee Company on a bond given for the fulfilment of their duties, the plaintiff succeeded as against the deputy sheriff, and the Guarantee Company, but the action was dismissed as against the sheriff.

Held, on appeal, affirming the decision of MURPHY, J. that there was ample evidence to justify the finding below that from the moment B. had come under the influence of the deputy sheriff he was under arrest and the deputy was guilty of negligence in allowing him to escape.

Held, further, that the bond covers the acts of the deputy as well as the sheriff and the plaintiff is entitled to judgment against the bonding Company.

Statement

APPEAL by defendant from the decision of MURPHY, J. of the 24th of January, 1928 (reported, 39 B.C. 465), in an action for damages against the sheriff and deputy sheriff for Vancouver for permitting one F. O. Burckhardt to escape from custody after having been arrested by the said deputy sheriff under a writ of *capias* and for a declaration that the Dominion Gresham Guarantee & Casualty Company is liable on a guarantee bond entered into by the Company with His Majesty the King whereby the Company guaranteed that the sheriff and his deputy would properly perform their duties and obligations by

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virtue of their office towards His Majesty the King or any private person and in default make good the loss up to $10,000. The plaintiff had a claim against Burckhardt who was a resident of Seattle and finding Burckhardt was temporarily in Vancouver, he issued a writ and obtained an order for a *capias* under which the writ was issued. The writ was handed to the sheriff who handed it to G. W. Robertson, the deputy sheriff, for execution, the plaintiff warning him at the time to be careful as Burckhardt was very "slippery." Robertson found Burckhardt in the rotunda of the Vancouver Hotel and informed him he had a writ of *capias* for him. Burckhardt was in golfing clothes and asked if he could go to his room to change his clothes to which Robertson assented. They went to the room together and Burckhardt proceeded to take off his clothes. When almost completely undressed Burckhardt asked Robertson if he had any objection to his going into the next room where he could talk the matter over with his brother, the door leading to this room being open. Robertson said "no," and Burckhardt went into the next room leaving the door open. After an interval of some minutes, as Burckhardt did not return, Robertson went into the next room and found that Burckhardt had disappeared. He succeeded in escaping from the Province. The plaintiff recovered judgment against the deputy sheriff and against the Guarantee Company.

Statement

The appeal was argued at Vancouver on the 12th and 13th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant Robertson: Our submission is that: (1) There was no arrest; (2) the affidavit for the writ of *capias* was insufficient; (3) the Arrest Act requires that maintenance money be paid in cash, and the sheriff accepted a cheque. We say there was no arrest as mere words without touching is insufficient: see Halsbury's Laws of England, Vol. 25, p. 816, sec. 1418; *Russen* v. *Lucas* (1824), 1 Car. & P. 153; *Grainger* v. *Hill* (1838), 4 Bing. (N.C.) 212; *Genner* v. *Sparks* (1704), 6 Mod. 173; *Sandon* v. *Jervis* (1858), El. Bl. & El. 935; *Arrowsmith* v. *Le Mesurier* (1806), 2 Bos. & P. (N.R.) 211; 127 E.R. 605; *Berry* v. *Sempronius* (1827), 5 L.J., K.B.

Argument

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Argument

(o.s.) 215; *Warner* v. *Riddiford* (1858), 4 C.B. (N.S.) 180 at p. 205. The maintenance money must be paid in cash. Unless the money is given there is no obligation to make the arrest: see *Kinder* v. *Macmillan* (1919), 2 W.W.R. 248. Further the *capias* was directed to the sheriff only.

Brown, K.C., for appellant Guarantee Co.: As the Act is now, the deputy sheriff is appointed separately. He is not now the sheriff's deputy: see *Richards* v. *Wood* (1906), 12 B.C. 182. This is a bond between the Company and the Crown. There is no privity between the plaintiff and the Company: see *Disourdi* v. *Sullivan Group Mining Co. and Maryland Casualty Co.* (1910), 15 B.C. 305; Craies's Statute Law, 3rd Ed., 314. On the question of negligence see Beven on Negligence, 4th Ed., p. 40; *Dixon* v. *Muckleston* (1872), 8 Chy. App. 155; *In re City Equitable Fire Insurance Co., Lim.* (1924), 94 L.J., Ch. 445 at p. 451; *Lewis* v. *Great Western Rail. Co.* (1877), 47 L.J., Q.B. 131; *In re Munton. Munton* v. *West* (1927), 1 Ch. 262; *Montefiore* v. *Lloyd* (1863), 15 C.B. (N.S.) 203; 143 E.R. 761; *Lord Arlington* v. *Merricke* (1672), 2 Wm. Saund. 411; 85 E.R. 1221. As to the effect of the recitals on the scope of the bond see *Pearsall* v. *Summersett* (1812), 4 Taunt. 593; 128 E.R. 463.

Mayers, for respondent: As to the arrest see *Nicholl* v. *Darley* (1828), 2 Y. & J. 399; *Meering* v. *Grahame-White Aviation Company Limited* (1919), 122 L.T. 44 at p. 46. Where the sheriff makes it reasonably clear to the person that he is no longer a free agent, he is under arrest: see *Warner* v. *Riddiford* (1858), 4 C.B. (N.S.) 180 at p. 187. On the return of the warrant the deputy sheriff says he made the arrest in the rotunda of the hotel. This is evidence of an arrest. As to the maintenance money see *Ward* v. *Clark* (1895), 3 B.C. 609. The cheque was accepted by the sheriff and that settles the matter. The only one who can object is the sheriff when the cheque is tendered, but he accepted it. The word "sheriff" must include any one who performs his functions. The fact that the deputy is appointed by the Government does not affect his relationship to the sheriff: see Beven on Negligence, 4th Ed., p. 26.

Farris, replied.

Cur. adv. vult.

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5th June, 1928.

MACDONALD, C.J.A.: I think MURPHY, J. came to the right conclusion. I would therefore dismiss the appeal.

MARTIN, J.A.: Several questions are raised in this appeal and upon all of them the learned judge has, in my opinion, reached the right conclusion and so I think it necessary to remark upon the following only.

MARTIN, J.A.

First as to the arrest. Many cases were cited and I have examined many more not cited with the result that I find it has long been held that it is not necessary to touch a person to arrest him, so much so that Patterson, J. said in *Bird* v. *Jones* (1845), 7 Q.B. 742 at pp. 751-2:

"I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room; and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to imprisonment. . . . But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him."

And Williams, J., in concurring said, in language most appropriate to the present case, 748:

"So, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, constructively, an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood. The party addressed in the manner above supposed feels that he has no option, no more power of going in any but the one direction prescribed to him than if the constable or bailiff had actually hold of him: no return or deviation from the course prescribed is open to him. And it is that entire restraint upon the will which, I apprehend, constituted the imprisonment."

Before that, in 1838, it was held by the Court of Common Pleas *in banc* in *Grainger* v. *Hill* (1838), 4 Bing. (N.C.) 212; 132 E.R. 769, that actual contact was not necessary to constitute an arrest under a *capias;* Bosanquet, J. tersely and adequately puts the matter thus, p. 224:

"The plaintiff resigned his personal liberty under the authority of the writ; and actual contact was not necessary to complete the arrest."

And Vaughan, J. said, p. 223:

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"I think that in law this was clearly an arrest. If the party is under restraint, and the officer manifests an intention to make a caption, it is not necessary there should be actual contact."

Warner v. *Riddiford* (1858), 4 C.B. (N.S.) 180; 140 E.R. 1052, is to the same effect and there is an instructive review of the cases by Willes, J. wherein he adopts the said ruling in *Grainger* v. *Hill* as being an accurate statement of the law, and his opinion is cited with approval by Lord Justice Atkin in the recent case of *Meering* v. *Grahame-White Aviation Company Limited* (1919), 122 L.T. 44 at p. 53.

The best expressed view of the matter that I have found is a note to *Nicholl* v. *Darley* (1828), 2 Y. & J. 398 at p. 405, (Philadelphia Ed., 1869) *viz.*:

"The distinction seems to be, that if the party does not acquiesce, there must be an actual touching of his person by the officer, to constitute an arrest; and any touching of the person by the officer, in the execution of a writ, will be an arrest. But if the party submits, and comes within the power of the officer, who thereupon abstains from interference with his person, this is such a conclusive confession of arrest, as is equivalent in law to an arrest."

MARTIN, J.A.

In the circumstances of the present case I am of opinion that there was ample evidence to justify the finding below that, as Lord Justice Warrington puts it in the *Meering* case, *supra*, p. 46, "from the moment [Burckhardt] had come under the influence of [the deputy sheriff] he was no longer a free man."

Second, as to the bond. It is submitted that the plaintiff is not entitled to sue upon it because section 13 of the Sheriff's Act, Cap. 60, R.S.B.C. 1924, is inferentially repealed by section 51 in that its operation is excluded from the counties of Victoria and Vancouver by subsection (2). But, to my mind, a consideration of the whole Act shews clearly that the effect of the general legislation upon "security" is that as regards the said two counties, section 54 is substituted for section 12 and section 13 has the like operation in both cases in appropriate circumstances. This is such a reasonable and harmonious construction of the statute that it should only be displaced by unequivocal and mandatory language which admittedly is absent; the objection to the use of the word "sheriff" without reference to his deputy is covered by the Interpretation Act.

It is only necessary to consider the further objection that in

any event the action of the deputy sheriff does not come within the scope of the two distinct expressions "default or wilful misconduct" and "wilful or negligent misconduct in his office" to which the right to recover damages under section 13 is restricted, while by its bond the defendant agrees to insure and indemnify against loss, damage and expense occasioned by the "default, negligence, dishonesty or want of fidelity" and the condition declares that it covers the "faithful discharge of the duties of office and fulfilment in every way of duties or any other obligation undertaken towards the Crown or towards any private person or persons." An examination of a large number of cases ancient and modern, however, satisfies me that it is a "default . . . of the sheriff" for him to allow a person arrested on a *capias* to escape and that very word "default" has long been employed in the pleadings and in the reports of the same or cognate actions against sheriffs. Thus, for example, *Brown* v. *Jarvis* (1836), 1 M. & W. 704, wherein "default" in arrest was alleged and "due diligence" pleaded the Court said *per* Lord Abinger, C.B. (p. 714):

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"We think that it is the duty of the sheriff to arrest the party on the first opportunity that he can, and, if he does not do so, that he is guilty of negligence, and will be liable for any damage which may result from that negligence."

And in *Clifton* v. *Hooper* (1844), 6 Q.B. 467, the word is used in the head-note and three times on p. 470, including twice by Wightman, J. and Lord Denman, C.J. said, p. 474:

"When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount."

In *Yourrell* v. *Proby* (1868), I.R. 2 C.L. 460, the Irish Court of Common Pleas *in banc* made use of the expression no less than six times in its judgment *per* Chief Justice Monahan on an allegation that the sheriff "made default" in the execution of a *fi. fa.* And in *Pitcher* v. *Bailey* (1807), 8 East 171 at p. 173 the King's Bench held that

"an officer guilty of a breach of duty [in arresting on a *ca. re.*] could not recover money which he had paid in consequence of it, though for the benefit of the defendant."

In *Benton* v. *Sutton* (1797), 1 Bos. & P. 24, Rooke, J. said:
"I have no doubt, however, that where a party has been really injured

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by the sheriff's neglecting to arrest on the earliest opportunity, an action will lie for the injury sustained."

The use of the word "default" therefore in section 13 is entirely appropriate to the present action, and I am also of opinion that the breach of duty (*i.e.*, default) complained of is within the second expression "negligent misconduct in his office." The coupling of the word "negligent" with "misconduct" shews that the graver kinds of official misconduct which are, *e.g.*, punishable by attachment or otherwise, as conveniently set out in Churchill on Sheriff, 2nd Ed., Cap. XXVII., are clearly not exclusively dealt with by the section, and for the purposes of cases such as this, founded on breach of duty, they are equivalent to, and mean no more than "negligent conduct," and this a careful perusal of all the relevant sections will shew must have been the intention of the Legislature. It is to be noted that in *Brasyer* v. *Maclean* (1875), 44 L.J., P.C. 79, the Privy Council held that an action would lie against a sheriff for a false return to a *ca. re.* even where such return was not made maliciously, their Lordships saying (pp. 82-3):

"It appears, therefore, to their Lordships, that the sheriff in this case was guilty of a misfeasance in the exercise of the powers which were entrusted to him by law, and in the discharge of his duty as a public ministerial officer, and that in respect of that misfeasance he is liable to an action for the damage which resulted from that act, notwithstanding it was not proved against him that he was actuated by malicious motives. The mere fact of the misfeasance and the damage resulting from it by reason of the attachment issuing upon the return as conclusive evidence against the plaintiff was sufficient damage to enable the plaintiff to maintain an action against the sheriff for that misfeasance, and to recover the damage which he has sustained in consequence of it."

The decision of the English Court of Appeal in *Lee* v. *Dangar, Grant & Co.* (1892), 2 Q.B. 337 on the very obscure and perplexing section 29 of the Sheriffs Act of 1887 (p. 341) is of value in the reasoning for its restriction to criminal misconduct in office as distinguished from conduct which made the sheriff's officers "guilty of a mistake or a blunder, but that does not bring them within this section"—p. 349. Such being my view it is unnecessary to consider the meaning of the alternative expression "wilful . . . misconduct."

The result is that upon all grounds the appeal should, in my opinion, be dismissed.

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GALLIHER, J.A.: I am in entire agreement with the judgment of the learned judge below, and would dismiss the appeal.

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

MACDONALD, J.A.

MACDONALD, J.A.: The first point to consider is, Was an arrest effected, as without it there could be no escape and the action is based upon escape. As the learned trial judge so found, we should regard the evidence most favourable to the respondent on this point. Robertson, the deputy sheriff, advised two witnesses, in telling them what occurred, that he had "arrested" Burckhardt and he made a return to that effect. The point will turn however on what actually occurred not his interpretation of it. The deputy sheriff approached Burckhardt and said "I have a warrant for you." He did not add "for your arrest." Upon Burckhardt enquiring what it was for he was told "it is a claim of Mr. *Higgins,* Victoria." Burckhardt thereupon invited the deputy up to his room in the hotel where he was staying and they went up together. The deputy sheriff was armed with all necessary documents but merely laid the papers on the table in Burckhardt's room. Burckhardt then said to the deputy sheriff, "in order for me to have the thing adjusted I have to see my brother, would you have any objection to me stepping into the next room?" The answer was "No." He accordingly passed into the next room and from there escaped, the deputy vainly waiting for his return for about five minutes. His search for Burckhardt was then fruitless. One of respondent's witnesses—Sargent—in detailing his conversation with Robertson in which the latter related what occurred when Burckhardt left the room, said Robertson told him that Burckhardt asked "how he could get free, that is get away from the arrest—be liberated in other words." This, however, is evidently an improvisation of the conversation and I doubt if the trial judge found that these exact words were used. The material words suggesting that Burckhardt was conscious of being under restraint are—"Would you have any objection to me stepping into the next room?" We have therefore to decide the point mainly on the following words and acts: (1) "I have a warrant for you"; (2) following Burckhardt to his room, plac-

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ing the writ on the table and (3) granting liberty to him to leave the room under the honest belief that he wanted to go to the adjoining room for the purpose of securing the indebtedness by interviewing his brother—a ruse resorted to by Burckhardt to enable him to escape. Do these facts constitute an arrest?

We find this statement in Halsbury's Laws of England, Vol. 25, p. 816:

"Mere words without touching, are not sufficient to constitute an arrest, unless the person to be arrested acquiesces by going with the officer or otherwise, or unless he is actually placed under restraint."

It was suggested that the cases do not justify this general statement. I think, however, with the qualification as to acquiescence it is substantially correct. I think there was acquiescence by, not attempting to escape but rather inviting the deputy sheriff to accompany him. After being told that there was a warrant for him that act amounted to submission. If Burckhardt abandoned his liberty of action as a result of the words addressed to him there was acquiescence on his part, and an arrest was effected even without personal contact.

MACDONALD, J.A.

There is the difficulty that there was no statement as to what the warrant was for. Burckhardt might have regarded it as a civil process and if so, his actions which otherwise would amount to acquiescence, should not be so regarded. He would have to know the nature of the warrant before he could acquiesce to its purport. It is a little difficult to regard the words "I have a warrant for you" as equivalent to "I arrest you," although a layman usually associates a warrant with an arrest and I think Burckhardt did so.

In *Russen* v. *Lucas* (1824), 1 Car. & P. 153; 171 E.R. 1141, an action against a sheriff for an escape the latter used the words —"Mr. Hamer, I want you." He replied "wait for me outside the door, and I will come to you," and while the officer waited he escaped. It was held there was no arrest but Abbott, C.J., added:

"If Hamer had gone even into the passage with the officer, the arrest would have been complete."

Here Burckhardt, in effect, went with the officer to his room and we have the additional fact that he asked his permission to go to the adjoining room.

In *Genner* v. *Sparks* (1704), 6 Mod. 173; 87 E.R. 928, a bailiff with a warrant told defendant he had a warrant for him and used the word "arrest," whereupon the defendant resisted. Held no arrest. Had he however laid his hand upon him it would be an arrest. I think too that had he acquiesced in the restraint even without touching an arrest would have been effected.

In *Arrowsmith* v. *Le Mesurier* (1806), 127 E.R. 605, a magistrate's warrant was shewn by a constable to the person charged with an offence whereupon the latter without compulsion proceeded with the constable to the magistrate. It was held no arrest to support an action for false imprisonment. Sir James Mansfield, Ch. J., said:

> "I can suppose that an arrest may take place without an actual touch, as if a man be locked up in a room; but here the plaintiff went voluntarily before a magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the plaintiff. How can a man's walking freely to a magistrate prove him to be arrested?"

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Here there were no words to suggest restraint and the warrant appeared to be treated as an ordinary summons. Even if not so treated the additional facts in the case at Bar differentiate it. True the deputy following Burckhardt to his room on the latter's invitation might have no higher significance than if Burckhardt voluntarily accompanied the deputy and if he regarded the warrant as a civil process it would be somewhat analogous to the case referred to. There is, however, in the case at Bar the additional element of acquiescence to a recognized restraint as shewn by the request for permission to leave the room. Burckhardt knew that without permission he would be restrained.

We were referred to a later authority which I think possibly more accurately than the earlier cases summarizes the true principles applicable, *viz.*, *Meering* v. *Grahame-White Aviation Company Limited* (1919), 122 L.T. 44, and if on the facts in the case at Bar we can find that after Burckhardt was told the deputy sheriff had a warrant for him he was no longer a free man it is within the principle of this authority. The facts in that case in reference to methods employed to detain the party

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suspected justified the conclusion arrived at, and though possibly not so conclusive in the case under consideration, still I think that if a jury or, as here, a trial judge found from all that occurred that Burckhardt was convinced that "he was no longer a free man" we should not say such a finding was clearly wrong. He was under such restraint that he had not liberty to go where he pleased without the authority of the deputy sheriff. It is, I think, reasonable to find that Burckhardt felt he had not this liberty first by asking permission to leave and—to a lesser extent—by resorting to a ruse to escape.

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On the point that the sheriff accepted a cheque instead of cash for maintenance money, I am of the same opinion as the learned trial judge. I also agree with his conclusion as to the right to sue the bonding Company (see section 13, R.S.B.C. 1924, Cap. 231). The only difficulty is in respect to the words "wilful or negligent misconduct in his office." I am satisfied that there was no "misconduct" on the part of the deputy sheriff in the sense in which that word is popularly employed. If we adhered however to the view that the statute contemplates deliberate and active wrong-doing on the part of the sheriff the remedy it affords would not be available in many cases where I feel satisfied it was intended to apply. I think the dereliction implied in the word while it includes active misconduct in office also includes a failure through negligence or want of adequate precautions to properly conduct or carry out the duties assigned to the official. The learned trial judge found negligence. With reasonable evidence to sustain it we cannot interfere with that conclusion and I think it amounts to negligent misconduct in office in the sense referred to.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant Guarantee Company: *Ellis & Brown.*

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

Solicitors for respondent: *Harper & Sargent.*

SCHMIDT v. STUCKEY AND PEARSE.

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Woodman's Lien—Agreement to haul poles—Whether contractor or wage-earner—R.S.B.C. 1924, Cap. 276.

The plaintiff agreed with the defendants to haul poles with his own team at so much per lineal foot. He did all the work himself with the exception of some gratuitous assistance given him by his own son.

Held, that he was not a bare contractor, but a wage-earner, and entitled to a lien under the Woodmen's Lien for Wages Act.

ACTION to enforce a woodman's lien. The facts are set out in the reasons for judgment. Tried by SWANSON, Co. J. at Kamloops on the 24th of March, 1928.

Lindsay, for plaintiff.
Tuck, for defendants.

5th April, 1928.

Judgment

SWANSON, Co. J.: This is an action to enforce a woodman's lien for $123.25 and costs. The plaintiff made a verbal arrangement with defendant Stuckey to haul poles from Stuckey's place in the B.X. Valley some six or seven miles from the City of Vernon, in this county. He discussed with Stuckey as to whether he would haul poles at so much per lineal foot or at so much per day. At Stuckey's suggestion payment by the foot was agreed on, as plaintiff says that Stuckey said he was going to haul poles himself, and that each man would keep track of the number of feet hauled separately. He was informed by Stuckey that defendant Pearse had purchased the poles, and requested plaintiff to see Pearse to ascertain the place to which he wished the poles hauled. Plaintiff went to see Pearse about November 21st last, and was instructed by Pearse to haul the poles to the Canadian National siding at Vernon. Plaintiff says the distance from Stuckey's place to place of delivery would be about eight or nine miles. It was agreed between plaintiff and Pearse at this time that Pearse was to be responsible to plaintiff for all payments for hauling poles. Plaintiff says that the agreement was that he was to be paid every two weeks, as he was obliged owing to the wants of his wife and family of six to

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be paid periodically to keep going for groceries, and feed for his horses. Plaintiff says there was no agreement that he was to haul all the poles taken out at Stuckey's place, nor any definite number. Pearse states that it was definitely understood that plaintiff should haul out all the poles cut at Stuckey's. Stuckey states that he told plaintiff there were 654 poles cut which had to be hauled out from different places on his property to Vernon siding. Pearse states that plaintiff informed him that he understood that Pearse had bought Stuckey's poles, and that there had been trouble over liens placed on the poles, and that he asked Pearse if he would be responsible for payment for the hauling, and see that he got his money. Pearse agreed to this and said he would give him a "letter" to take to Stuckey containing a term to that effect so that he would be protected. Pearse says that he did agree to be responsible. The so-called letter of November 21st contains these words:

"F. R. Pearse also agrees to pay Valentine Smith [plaintiff] the sum of three cents per foot to haul said poles from the bush to C.N.R. yard at Vernon, B.C.," etc.

Pearse states that he read over this document which was signed by Pearse (and later on signed by Stuckey), to plaintiff, which plaintiff denies. This letter is in reality an assignment from Stuckey to Pearse. The document commences as follows:

"In consideration of payments made by F. R. Pearse of Vernon, B.C., for labour done on all poles owned by me and now lying on Brookside Road and on my property at B.X. I do hereby assign transfer and set over to Frederic R. Pearse of Vernon, B.C., all my right title and interest in and to all cedar poles now cut and owned by me," etc.

Pearse stresses strongly that the agreement was that plaintiff should haul all poles at Stuckey's, which plaintiff did not do. Stuckey is clearly shewn to be sheriff-proof. Plaintiff knew of Stuckey's inability to pay and insisted on Pearse being responsible, about which there is no dispute, Pearse stating the same. Plaintiff's wife gave evidence of a conversation with Pearse in which she stressed the point with Pearse that her husband would have to be paid every two weeks to enable the family to keep going. Plaintiff began the work of hauling the poles with his team, doing the work alone except for some help from his boy of 16 years of age. There is no suggestion as to any wages having been paid or earned by or promised to the boy by the

father. This fact is significant in dealing with the question whether plaintiff was a bare contractor or "a person performing labour or services," etc., within the purview of section 3 of the Woodmen's Lien for Wages Act, Cap. 276, R.S.B.C. 1924. Plaintiff began his hauling December 8th last, and did his last work January 24th, 1928. During part of that time he states he was sick. Stuckey thought the poles could have been hauled out in two or three weeks. Plaintiff hauled 249 poles, according to Pearse. Plaintiff says that he hauled out a total of 8,275 lineal feet of poles, which at 3 cents per foot comes to $248.25, on which plaintiff received from Pearse only two payments of $50 and $75, leaving a balance now sued for of $123.25. Plaintiff states that he was obliged to quit work as Pearse did not live up to his agreement to make payments to him every two weeks to enable plaintiff to keep going. Pearse's position is that sometime after he had made the payment of $75 to plaintiff after conversation with Stuckey he concluded that plaintiff had drawn more money than he was entitled to, and that he was not getting the poles out fast enough. He says that plaintiff asked him then for a little money, and he said what about the rest of the poles, and that plaintiff replied I do not know about that. Plaintiff said he wanted to get a cheque in full for the balance owing him. Pearse states that he then asked plaintiff what about the balance of the poles and that plaintiff replied that he did not know, and did not care. Pearse then replied that plaintiff would not get another cent until he had hauled out the rest of the poles. Stuckey says there would be 654 poles originally and that some 400 are yet left in bush. Plaintiff then said to Pearse that he would see about the matter, and thereupon took action by filing a woodman's lien and entering action to enforce same. The contention of Pearse and of Stuckey is that plaintiff hauled simply the poles, which lay handy along the roadway, and left the more inaccessible poles in the bush, which it would be more expensive to haul out. In other words (as they put it) plaintiff took all the cream off the contract. Pearse claims that the poles should have been promptly hauled out to fill his shipments, and that he was afterwards unable to get out the balance of poles, and that now he will be put to considerable

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more expense in getting out the 400 poles now lying in the bush, the cost of making roads and hauling at this season being much greater than in the usual winter lumbering season. Pearse has paid $150 into Court to free the poles of liens, disputes all liability and counterclaims for $150 damages through plaintiff's repudiation of his contract. Plaintiff is a foreigner who has lived in the district for a good many years. He was recently an applicant before me for letters of naturalization, some well-known witnesses including the police magistrate of the City of Vernon appearing to testify to his good character and to his industrious habits. Plaintiff like Stuckey has been in straightened financial circumstances, and according to his evidence he made an express agreement with Pearse that he must be paid promptly every two weeks to enable him to live and carry on. He stoutly repudiates the suggestion of Pearse that he was declining to undertake the heavy part of the contract hauling poles out of the sections back in the bush. He states that he worked for Sigalet for some years and never shirked his job, and that his sole reason for declining to do any more work was the breach of agreement on the part of Pearse. The impression I have formed from the evidence is that plaintiff is not the kind of man to shirk his job, and that he has had a dispute with Pearse about payments, which resulted in warm words and in Pearse unfortunately informing plaintiff that he would not get another cent until he finished up his job of hauling all the poles in question. I think under the circumstances that the plaintiff's position is the more reasonable one. I think the arrangement about hauling the poles did not contain any express condition that plaintiff was to haul all the poles. No doubt plaintiff would have done so had these people kept their temper a little better under control. I do not think plaintiff intended to shirk his job and skim all the cream off the so-called contract. Stuckey did not defend the action. He appeared as a witness to support Pearse's cause. He is no good financially in any event, as far as the plaintiff's claim is concerned. It was suggested that the position of Pearse was smiply that of a guarantor agreeing to be responsible for payment of haulage to plaintiff, that the primary debtor is

Stuckey. I am inclined to think that even on that footing Pearse's express undertaking in writing in Exhibit 3, the so-called letter of November 21st, 1927, is sufficient acknowledgment in writing to take the case out of section 4 of the Statute of Frauds. Apart from that I think that there has been a fresh agreement for valuable consideration made between plaintiff and Pearse under which Pearse is liable to plaintiff for value of his services in question. Plaintiff would certainly have at once declined to haul any poles without the express promise from Pearse (the purchaser of the poles) to be personally responsible to him.

I will now endeavour to state my views as briefly as I can on the most keenly contested branch of this case, *viz.*, the plaintiff's right to enforce a woodman's lien.

Judgment

It is strongly contended that under the decision of Mr. Justice GREGORY in *Stephens* v. *Burns* (1922), 30 B.C. 60, and of *Nelson* v. *Person* (1927), 3 W.W.R. 164, decision of Mr. Justice MACDONALD, it must be held that the plaintiff at Bar is a "bare contractor" and not a "labourer" or "wage-earner," that the plaintiff's claim is not for "wages" but that it arises under a "contract." I have considered these judgments with much care, also judgments of His Honour Judge FORIN in *Haglund* v. *Deer* (1927), 38 B.C. 435, and of His Honour Judge THOMPSON in *Boyd and Anderson* v. *Superior Spruce Mills Ltd.* (*No. 1*) (1927), 2 W.W.R. 54, case of a so-called "gippo" contractor who was held to be entitled to a "woodman's lien" by the latter judgment. Also judgment of His Honour Judge HOWAY in *Ross* v. *McLean and Peterson* (1921), 1 W.W.R. 1109, in which the learned judge held that a person who is a contractor and who does and performs "any labour, service, etc., in connection with any logs or timber" is entitled to a woodman's lien. I beg to also refer to a judgment of my own in *Rothery* v. *Northern Construction Co.* (1921), 30 B.C. 152; 2 W.W.R. 853, which was affirmed by the Court of Appeal reported in 30 B.C. 324. In that case I held that a person hired by a contractor to skid and haul timber with the aid of his team which he supplies himself at a rate per day for himself and team has a lien for his services under the Woodmen's Lien for Wages Act, notwithstanding that

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having no horses of his own he hires from another the use of the team for the purpose of the work. Chief Justice MACDONALD at p. 326 says:

"As to section 3 of the Woodmen's Lien for Wages Act I think the true construction of that section is that a person who is hired by another is within the purview of that section and that he is entitled to claim a lien for the amount agreed to be paid him as hire for himself and team."

The only difference between the *Rothery* case and the case at Bar is that in the former case Wolstenholme was to be paid at the rate of $9 for himself and team, and Loveway at the rate of $7 per day for himself and one horse or $9 per day for himself and team, Rothery being in that action the assignee of these two men. In the case at Bar the plaintiff did all the work himself, except some very small portion, which may be considered I think negligible as far as the evidence goes, done by the plaintiff's young son of 16 years of age, who was getting no wages and simply giving his father some help in a filial way. To call the plaintiff here a "bare contractor" earning "profits" and not "wages" seems to me to be forcing the natural meaning of language.

Judgment

I have read with much care the able article on Woodmen's Liens in 26 C.L.T. p. 249 containing very interesting references to a number of American decisions which are very pertinent to the point before me. At p. 253 the learned editor states:

"From these authorities it is quite clear that a person, performing the services mentioned in the Act [that is of New Brunswick], has a lien, and that the fact of having a contract does not in any way impair the right to such lien, even though the person having the contract employs assistants. On the other hand it is evident that a bare contractor, that is to say, a person who takes a contract for the performance of work which he employs others to do and does no work himself, has no lien, for the reason that the right to the lien is based on the performance of the labour and service mentioned in the Act."

It would make my judgment too lengthy to refer in detail to all the decisions quoted in the above article. I desire to briefly allude to the English cases under the Truck Act of England, 1 & 2 Wm. IV., Cap. 37: *Ingram* v. *Barnes* (1857), 26 L.J., Q.B. 319. Cockburn, C.J. at p. 320 quotes Maule, J. in *Sharman* v. *Sanders* (1853), 22 L.J., C.P. 86:

"'The intention of this Act was to afford protection to a class of persons not very able to protect themselves. . . . The persons the Act was

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meant to benefit are those who hire themselves to labour with their hands for daily or weekly wages. . . . I do not think it was at all designed for the protection of persons taking contracts for labour to be done by others—persons who speculate upon the state of the labour market.' "

And at p. 321:

"There is an essential distinction between wages, the remuneration for personal services to which the Act refers, and the profits of a contract."

Clearly in my opinion the case at Bar is one where the plaintiff has in effect earned "wages" as the fruit of his own toil, earned by the sweat of his brow, and not earned as the profits of the toil of others employed by him, not earned as Lord Bacon once put it *"in sudore alieni."* Baron Parke in *Riley* v. *Warden* (1848), 18 L.J., Ex. 120 at p. 124 says:

"I think the object of this Act was to protect those who earn their bread by the sweat of their brow, who are for the most part an unprotected class; and that it has no application to persons who take work on a large scale, and contract to do the work not by their own personal labour, and for pay as wages, but by the labour of others, and for a certain price for the work itself. Here the plaintiff was not bound to employ his personal labour at all. The reward he was to receive was not to be paid for his personal labour, but was a contract price out of which he may derive a profit by the labour of others."

Judgment

I also refer to the judgment of Mr. Justice Beck in *Desantels* v. *McClellan* (1915), 30 W.L.R. 485. As to how far the title of the Act, The Woodmen's Lien for Wages Act, is part of the Act, I wish to refer to Maxwell's Interpretation of Statutes, 3rd Ed., pp. 56 and 57. It is clear that the short title is no part of the Act as Lord Moulton says in *Vacher & Sons Limited* v. *London Society of Compositors* (1913), A.C. 107 at p. 128 in the House of Lords:

"The title of an Act is undoubtedly part of the Act itself, and it is ligitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope. This is not the case with the short title. . . . That is a title given to the Act solely for the purpose of facility of reference. If I may use the phrase, it is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title."

Scrutton, J. in *In re Vexatious Actions Act, 1896. In re Boaler* (1915), 1 K.B. 21 at p. 40 says:

"Maxwell on the Interpretation of Statutes, 5th Ed., p. 67, summarizes the authorities thus: 'It is now settled law that the title of a statute may be referred to for the purpose of ascertaining its general scope.' . . . I agree that the Court should give less importance to the title than to the enacting part, and less to the short title than to the full title, for the short title being a label, accuracy may be sacrificed to brevity."

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If this principle of interpretation of Scrutton, J. is kept in mind we should pay much less attention to section 1, the section giving the title to the Woodmen's Lien for Wages Act than to the effective enacting section 3 of the Act which declares what persons are entitled to this remedy. The Act should be liberally, I should say "benevolently" construed if I may adopt the language of Lord Chief Justice Russell in *Kruse* v. *Johnson* (1898), 2 Q.B. 91. I beg to also refer to subsection (6) of section 23 of our Interpretation Act, R.S.B.C. 1924, Cap. 1:

"Every Act and every provision or enactment thereof shall be deemed remedial . . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit."

Sir William Blackstone at page 87 of his Commentaries on the Laws of England, Lewis's Ed., Book 1, in discussing the construction of all remedial statutes says:

"It is the business of the judges so to construe the Act as to suppress the mischief and advance the remedy."

Judgment

I may say that the form of Statement of Claim of Lien, Schedule A to the Woodmen's Lien for Wages Act, framed pursuant to section 5 of the Act, does not narrow the claim down to one for mere "wages":

"A. B. claims a lien upon certain logs or timber . . . in respect of the following work, that is to say [here give a short description of the work done for which lien is claimed], which work was done for [here state the name and residence of the person upon whose credit the work was done], between the day of and the day of , at [per month or day, as the case may be]."

It has been urged that these latter words indicate that if a labourer were to be paid by the thousand or by the piece, rather than by the month or day he would not be entitled to claim the benefit of this Act. It appears to me that by the use of the words "as the case may be" the intention was to give the labourer a lien irrespective of the manner in which his wages or remuneration were to be paid.

Seider's Appeal (1863), 46 Pa. St. 57 at p. 61 says:

"Labourers employed by the persons or companies referred to in the Act are entitled to its benefits, whether the wages agreed to be paid them are measured by time, or by the ton, or by the piece, or any other standard."

"In 28 A. & E. Encycl. of Law, 1st Ed., p. 513, it is said: 'The word "wages" does not imply that the compensation is to be determined solely

upon the basis of time spent in service; it may be determined by the work done. It means compensation estimated in either way.' See also the case of *Hoffa* v. *Person*, 1 Pa. Super. Ct. 367 where it was held that a labourer was entitled to his lien even though he was to be paid by the thousand for cutting and hauling":

26 C.L.T. p. 265.

"In *Heebner* v. *Chave* (1847), 5 Pa. St. 115 at p. 117 and *The Pennsylvania Coal Company* v. *Costello* (1859), 33 Pa. St. 241, the 'wages of labourers,' which the statute was designed to protect, were defined to be the earnings of the labourer by his personal manual toil, and not the profits which the contractor derives from the labour of others. The cases illustrate the distinction between the two kinds of gains or rewards. It is the difference between the sale of your own labour and a sale of another man's labour at something more than you pay for it. What is received for another's labour over and above what is paid for it is called profit, and such profits were held not to be within the protection of the statute":

A. & E. Encycl. of Law, 2nd Ed., Vol. 29, p. 1086.

This follows closely the principle in the English Truck Act cases above alluded to, which are referred to by the Pennsylvania Courts. I wish also to refer to the usual form of pleading (statement of claim) used in the English and our own Courts in an action to recover "salary" or "wages." Bullen & Leake's Precedents of Pleading, 8th Ed., pp. 257-8:

Judgment

"The plaintiff's claim is for salary [or, wages] payable by the defendant to the plaintiff for work done and services rendered by the plaintiff, as a , for the defendant at his request. Particulars:—"

Had the Legislature intended to narrow a labourer's claim to one of mere wages it would have been natural to expect the Legislature to use such a short and simple form of "statement of claim of lien" for the guidance of workmen, who very often use these forms without the assistance of a solicitor and attend to the filing of their liens themselves.

I have looked up the formal definition of "wages" in several lexicons, from which I think not much help is to be expected in a matter of this kind. Stroud's Judicial Dictionary, 2nd Ed., Vol. III., pp. 2205-6, in dealing with the word "Wages" recapitulates the principles laid down by the judges in the English Truck Act cases above. He also quotes an American authority *Ford* v. *St. L., K. & N.W. Ry. Co.* (1880), 54 Iowa 723; [7 N.W. 126 at p. 128]:

"The word 'wages' does not imply that the compensation is to be determined solely upon the basis of time spent in service; it may be determined by the work done. It means compensation estimated in either way."

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I am quite clearly of the opinion that the plaintiff comes within the protection of the Act, and that he is entitled to enforce his rights to a woodman's lien under the Act.

There will be judgment therefore in favour of the plaintiff against the defendants for the full amount of the plaintiff's claim and costs, and judgment declaring his right to enforce a woodman's lien. The counterclaim will be dismissed. Money in Court sufficient to pay plaintiff's judgment and costs will be paid out to plaintiff's solicitor.

Judgment for plaintiff.

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CITY OF VANCOUVER v. RICHMOND.

Taxes—By-law—City tax on barristers and solicitors—B.C. Stats. 1921 (Second Session), Cap. 55.

On appeal from the decision of GRANT, Co. J. dismissing an action to recover $75 from the defendant, a barrister and solicitor residing and practising in the City of Vancouver, alleged to be due for three years' taxes under by-law 1558, the respondent contested the validity of the by-law: (1) Because of its illegal discrimination in that the Legislature delegated the City under the Vancouver Incorporation Act power without territorial limitation to tax all the "Professions" yet the City exercised that power within its corporate limits only.

Held, that the only reasonable construction to place upon the statute is that the Legislature had no intention of conferring upon the City any power or jurisdiction beyond its corporate limits except when the intention was expressly declared.

(2) That the action is barred by section 227 of the Act, namely, "Any action against any person for anything done in pursuance of this Act shall be brought within six months next after the act committed and not afterwards."

Held, that the section is one of a fasciculus—sections 226 to 234—entitled "actions and judgments against the City" and they are a weapon of defence and remedy for the City and not of attack against it.

(3) That no power is given to fix the date of payment of the amount of tax or licence.

Held, that under section 311 of the Act the City Council was justified in passing a by-law fixing the date of payment of taxes which it could lawfully impose, it being "necessarily incidental" to a power of annual

taxation to declare the time of year when such taxes should be due and payable. The appeal was therefore allowed.

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APPEAL by plaintiff from the decision of GRANT, Co. J. of the 2nd of February, 1928, in an action to recover $75, the amount of a tax due and payable by the defendant as a practising barrister and solicitor in the City of Vancouver during the years 1925, 1926 and 1927, under by-law 1558 as amended by by-law 1620 of the said City, being the Banking, Professional and Corporation Tax By-law.

Statement

The appeal was argued at Vancouver on the 9th and 12th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and McPHILLIPS, JJ.A.

Mayers, for appellant: The tax is authorized by subsection (122) of section 163 of the Vancouver Incorporation Act, 1921. The fact that the by-law was passed by the City Council is sufficient to shew it could have no operation elsewhere than in the City and lack of description of limits of its operation does not invalidate it: see *Re Boylan and the City of Toronto* (1887), 15 Ont. 13; *Township of Barton* v. *City of Hamilton* (1889), 18 Ont. 199; *Shawnigan Hydro-Electric Co.* v. *Shawnigan Water and Power Co.* (1912), 45 S.C.R. 585 at pp. 599 and 604.

Argument

Bray, for respondent: We submit (1) The by-law is discriminatory and unfair as the Act authorizing it is so worded that they can tax the whole Province. (2) It is *ultra vires* because it orders that the tax must be paid in advance. (3) There is no date fixed for payment of the tax. (4) The taxes are payable on the 1st of June in each year and action must be taken within two months, so this action is out of time. That the by-law is *ultra vires* see Halsbury's Laws of England, Vol. 27, p. 162, sec. 309; *Jonas* v. *Gilbert* (1881), 5 S.C.R. 356 at p. 365. That there is discrimination see *The Attorney-General of Canada* v. *The City of Toronto* (1893), 23 S.C.R. 514 at p. 520; *City of Hamilton* v. *Hamilton Distillery Co. City of Hamilton* v. *Hamilton Brewing Association* (1907), 38 S.C.R. 239; *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194 at p. 230. The tax was made payable in advance and the

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Argument

amending by-law enacts that in case of non-payment they are liable to a fine of $500 or imprisonment. You cannot sue until the tax is due and payable. They have imposed a tax without saying when it is due: see *Corbett* v. *Taylor* (1864), 23 U.C.Q.B. 454; *Bell* v. *McLean* (1868), 18 U.C.C.P. 416. The by-law is *ultra vires* as it is virtually a licence and not a tax and they can only tax. The Court must look at what the by-law really is and not what it is called: see *In re Board of Commerce Act and Combines and Fair Prices Act, 1919* (1922), 1 W.W.R. 20. The tax is due in January but not "payable." When an Act imposes a burden nothing can be assumed as payable. The action is barred by the limitations contained in the Act itself, and nowhere does it say when taxes are delinquent: see *Canada Atlantic R.W. Co.* v. *Cambridge* (1887), 14 A.R. 299; *Gesman* v. *City of Regina* (1909), 10 W.L.R. 136.

Mayers, in reply: As soon as a tax is imposed under section 123 (3), it at once becomes payable. Subsections (298) and (300) of section 163 gives power to impose a penalty: see *In re Clay* (1886), 1 B.C. (Pt. II.) 300 at p. 305. The limitation of six months does not apply to an action brought by the City.

Cur. adv. vult.

MACDONALD, C.J.A.

5th June, 1928.

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

MARTIN, J.A.

MARTIN, J.A.: This is a test action to recover the sum of $75 from the defendant, a barrister and solicitor residing and practising in the City of Vancouver, alleged to be due for three years' taxes under the plaintiff's by-law No. 1558 of which section 3 provides:

"On and after the passing of this by-law every person carrying on within the City the business of a banker, and every person practising, following, engaged in, or carrying on within the City any of the professions, callings, or businesses or occupations enumerated and set forth in the schedules 'A,' 'B,' and 'C' of this by-law shall pay to the City the amount of the tax set opposite their respective businesses, professions, callings, or occupations in the said schedules 'A,' 'B,' and 'C' hereto, to wit, as follows:"

Under the appropriate item of schedule "B" the "amount of tax" payable by "barristers or solicitors" is "$25 per annum."

Section 6 of the by-law (amended 25th February, 1924) declares that:

"(1) The tax or taxes specified in sections 3 and 4 of this by-law, shall be deemed to be due and shall be payable to the City annually, and in all cases shall be due and shall be payable in advance for each current year; and the said tax or taxes shall be deemed to be delinquent if not paid on the 1st week day (which is not a public holiday) in the month of January in each current year."

It is submitted that this by-law is invalid and therefore nothing can be recovered thereunder on several grounds. First: because of its illegal discrimination in that the Provincial Legislature has delegated to the plaintiff by its special Vancouver Incorporation Act, Cap. 55, 1921, Second Session, the power, without Provincial territorial limitation, under sections 162 and 163 to tax all the "Professions" set out in subsections (122) and (123) yet the plaintiff has exercised that power within its corporate limits only instead of including those "Professions" which are practised throughout the Province. This submission is founded on a suggested analogy between this incorporating Act and the general statutes of the realm, the operation of which extends to the whole thereof unless limited by express words. The matter is better put, however, by Lord Russell, C.J. (Pollock, B. and Hawkins, J. concurring) in *The Queen* v. *Jameson* (1896), 2 Q.B. 425 at p. 430, when he said, speaking of the Foreign Enlistment Act, 1870:

MARTIN, J.A.

"It may be said generally that the area within which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute."

And in *Moulis* v. *Owen* (1907), 1 K.B. 746 at p. 764, Lord Justice Fletcher Moulton said:

"Now *prima facie* the legislation of a country is territorial. Its Acts are intended to apply to matters occurring within the realm and not beyond it, and this principle applies more especially to Acts that are penal in their character. It is true that the language of an enactment or the nature of the subject-matter may indicate an intention to the contrary, but otherwise the *prima facie* presumption holds and the statute applies only to acts within the realm."

Lord Esher, M.R. said in *Colquhoun* v. *Brooks* (1888), 21 Q.B.D. 52 at pp. 57-8:

"The English Parliament cannot be supposed merely by reason of its having used general words to be intending to do that which is against the comity of nations. It is true that if we come to the conclusion that this

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has been intentionally done, we must carry out the law and leave to the government of the country the task of answering objections, but unless that is perfectly clear we ought to limit the words so as to make them reasonable and proper."

A consideration of this special statute and its comparison with the general Municipal Act, Cap. 179, R.S.B.C. 1924, make it "perfectly clear" to me that the only "reasonable and proper" construction to place upon it in this respect is that the Legislature had no intention of conferring upon the plaintiff's council any power or jurisdiction beyond its corporate limits except in cases where that intention has been expressly declared as, *e.g.,* in subsections (1), (5), (290) and (294) of 163, and in section 54, subsection (24) *et seq.* of the general Act, relating to public utilities, etc. This ground, therefore, is not sustainable.

Second. It is submitted that this action is barred by section 227, as follows:

"Any action against any person for anything done in pursuance of this Act shall be brought within six months next after the act committed, and not afterwards."

But that section is one of a fasciculus—sections 226 to 234—entitled "Actions and Judgments against the City" and a perusal of all of them shews that they are a weapon of defence and remedy for the City and not of attack against it.

MARTIN, J.A.

Third. It is submitted that no power is given to fix the date of payment of the amount of tax or licence, however it may be regarded, and considerable reliance was placed upon the Ontario decisions of *Corbett* v. *Taylor* (1864), 23 U.C.Q.B. 454, and *Bell* v. *McLean* (1868), 18 U.C.C.P. 416, but when examined they have no bearing because they are decisions upon covenants respecting the levy of taxes upon real property, as Chief Justice Draper was careful to point out in the latter case, saying "We are, moreover, in this case to construe the covenant, not the statute." Reliance is placed by the respondent (plaintiff) upon subsection (311) as follows:

"For authorizing the Council generally to do, perform, or execute and carry out any matters, things, or objects, or enter into any agreements or contracts, in respect of any matters or things necessarily incidental or conducive to the attainment or carrying-out of any of the purposes, powers, rights, or objects hereinbefore specified in this section and various subsections thereof."

Whatever may be the case in other statutes this one confers

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wide powers and under it the council was, in my opinion, justified in passing a by-law fixing the date of payment of taxes which it could lawfully impose, and subsection (*c*) of (123) supports this view as authorizing an annual payment of the taxes levied under it and subsection (122), and it must be "necessarily incidental" to a power of annual taxation to declare the time of the year when such taxes should be due and payable.

MARTIN, J.A.

The other objections to the by-law do not call for further consideration here because they are based upon the severable penal clauses of the by-law which are not in question in this civil action for the recovery, under section 337 of a debt created by statute and by-laws pursuant thereto which, however defective they might turn out to be in penal proceedings, are valid for the purposes of this civil one. In the above view it becomes irrelevant to consider the effect of remedial sections 332 and 339, which the respondent invokes if necessary.

It follows that the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree that the appeal should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would allow the appeal.

Appeal allowed.

Solicitor for appellant: *J. B. Williams.*
Solicitor for respondent: *H. R. Bray.*

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AICKIN v. J. H. BAXTER & Co.

AICKIN v. J. H. BAXTER & CO.

Agreement—Bonus—Saving on net cost of production—Based on schedule—Depreciation in plant and equipment—Included in cost of production—Evidence of intention.

The defendants hired the plaintiff to superintend the production of cedar poles in connection with logging operations at a monthly salary. The agreement contained the following clause: "The Company further covenants that it will as an inducement to the said superintendent to produce cedar poles according to the specifications laid down by the Company as cheaply and expeditiously as possible, pay to the said superintendent as a bonus to his salary any saving to the Company on the net cost of production (after deducting every and all charges and cost of such production including the superintendent's salary) based on the estimated cost of production as set out in the schedule hereto attached. It being understood that such bonus, if any, shall be payable on the 30th day of June and December in each year if at such dates (but not otherwise) the average cost of production on all poles delivered during the last preceding six months at ship's side shall be less than the amount it would have cost to have delivered the same number and variety of poles at the prices set out in the schedule hereto attached, and such difference shall constitute the amount of such bonus payable."

On application to vary the registrar's report, on a reference for taking accounts, it was held that the registrar had properly allowed for depreciation of plant and equipment.

Held, on appeal, affirming the decision of MORRISON, J. that there is nothing in the agreement between the parties excluding the general rule that depreciation of plant and equipment is an item in the cost of production.

Statement

APPEAL by plaintiff from the order of MORRISON, J. of the 24th of January, 1928, dismissing a motion to vary the report of the district registrar at Vancouver on an order for reference as to the plaintiff's claim for bonus under an agreement between the plaintiff and defendants of the 7th of December, 1922, whereby the plaintiff agreed to carry on operations on certain lands of the defendants for the production of poles, piles and timber for delivery to the defendants at a salary of $200 per month with the further provision that as an inducement to the plaintiff producing the timber as cheaply and expeditiously as

possible he should be paid as a bonus any saving to the Company on the net cost of production based on the estimated cost of production as set out in a schedule attached to the agreement. The district registrar in making his report included the actual cost of the plant and equipment in the estimate of the total cost of production of the timber delivered and then deducted therefrom the estimated value of the plant and equipment after allowing a certain percentage off each item of plant and equipment owing to depreciation. The plaintiff appealed on the ground that the allowance for depreciation was improper and should not have been allowed.

Statement

The appeal was argued at Vancouver on the 14th and 15th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for appellant: It is a question of the construction of the contract and where words are susceptible of more than one meaning, evidence is admissible to shew what the parties had in mind: see *Bank of New Zealand* v. *Simpson* (1900), A.C. 182; *Ford* v. *Beech* (1848), 17 L.J., Q.B. 114 at p. 115.

Walkem, for respondent: Our submission is that there is no ambiguity here: see *Canadian Collieries (Dunsmuir), Limited* v. *Dunsmuir. Dunsmuir* v. *Mackenzie* (1913), 18 B.C. 583 at p. 549; *Watcham* v. *Att.-Gen. on behalf of E. A. Government* (1918), 87 L.J., P.C. 150 at p. 152. On extrinsic evidence see *Forman* v. *Union Trust Co.* (1927), S.C.R. 1.

Argument

MacInnes, in reply, referred to *Canadian Collieries* v. *Dunsmuir* (1914), 20 D.L.R. 877 at p. 880.

Cur. adv. vult.

5th June, 1928.

MACDONALD, C.J.A.: The plaintiff claims a bonus amounting to the difference between the actual and the estimated costs, according to a schedule agreed upon, of cutting and hauling poles. The clause of the agreement to be construed is as follows: [already set out in head-note].

MACDONALD, C.J.A.

The cost of production includes everything such as wages, haul-

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ing, royalties and all other costs which go to make up the total cost of production.

The plaintiff while admitting that depreciation of the machinery and plant is ordinarily an item in the costs of production, yet argues that it is excluded under this agreement. There is nothing in the agreement which would lead me to that conclusion, and while there are some expressions used in evidence by the defendant's witness Stimpson which at first sight might lead to the conclusion that depreciation was not to be allowed for, yet on a careful consideration I think that even if those expressions were admissible at all, to prove intention, which in my opinion they were not, they at most shew that depreciation was not discussed between the parties any more than were other items of costs.

The appeal should therefore be dismissed.

MARTIN, J.A.

MARTIN, J.A.: I concur in the dismissal of this appeal.

GALLIHER, J.A.

GALLIHER, J.A.: The only point in appeal is as to whether the registrar was right in allowing for depreciation on plant and equipment. This calls for an interpretation of the agreement between the parties.

Under the agreement the defendants hired the plaintiff to superintend the production of cedar poles in connection with logging operations at or near Stilwater, B.C., at a monthly salary of $200. The agreement contains a further clause and it is under this clause that the dispute arises. It is as follows: [already set out in head-note].

Mr. *McInnes* contends that under the clause no depreciation in the plant and equipment should be allowed and that as they were charged the invoice price of this ($8,407.44) they should be credited with the same amount and not for that amount less depreciation in value.

Mr. *Walkem*, on the other hand, argues that depreciation is a cost of production, and with him the registrar, to whom the matter was referred, agreed, and fixed and allowed the amount of depreciation.

A motion was made to the learned trial judge to vary or amend the report by reversing or setting aside this finding.

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This the learned judge refused to do and this appeal was taken.

As I interpret clause 3 of the agreement above set out, it means in short, that defendants would pay to plaintiff by way of bonus, such sums as he could save the Company on net costs of production, taking as a basis the figures set out in the schedule attached to the agreement. If the actual net production is less than those figures call for to such extent you will be benefited by way of bonus. It is admitted that the poles were produced and that the plaintiff is entitled to credit for schedule rates which has been fixed by the registrar at $94,604.25. We have then to find the actual net cost of production. The total cost of the operation has been found at $96,511.66. This included an item for plant and equipment at cost prices of $8,407.44. If this plant and equipment when the operation ceased, was in as good condition and as valuable as when it was purchased, then Mr. *MacInnes* would be right in saying that having charged it in at full value as a cost of operation you should credit it back at the same value. But it is common knowledge that certain plant and equipment in these operations deteriorates to a very considerable extent by user and what was left to the defendants was not the new plant but one considerably depreciated in value.

As I understood the argument it is not the *quantum* allowed for depreciation that is objected to but the principle of allowing depreciation at all, in other words, if depreciation is a proper item to allow they are not complaining of the amount. If plant and equipment being necessary for the operation it was proper that its costs should be charged in the first instance to cost of production, but when operations ceased the defendants had this plant and equipment remaining as an asset and their total cost of production as originally charged would be reduced by the value of such asset. In other words, they spend so much money in conducting the operation and they get so much back out of that by way of plant and equipment thus establishing net cost.

I think the registrar was right in allowing depreciation and would dismiss the appeal.

MCPHILLIPS, J.A.

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

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

While the point is not free from difficulty, I feel satisfied that the bonus earned was the saving to the Company after deduction of cost of production, and depreciation is an element in that cost. That idea, while not clearly expressed, appears to run through the paragraph in question.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *MacInnes & Arnold.*

Solicitors for respondents: *Burns & Walkem.*

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RODDY v. B. C. ELECTRIC RY. CO.

RODDY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Heel caught in slat flooring of street-car—Sudden starting of car—Thrown to floor sustaining injuries—Liability.

The plaintiff boarded a street-car of the defendant Company, wearing high-heeled shoes. As she entered the vestibule her heel caught between the slats of the flooring of the car and, the car starting suddenly, she lost her balance and was thrown violently back, her head striking the door. Her ankle was sprained and she received other injuries. An action for damages for negligence was dismissed.

Held, on appeal, affirming the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that there is nothing in the evidence to justify interference with the finding of the trial judge and the appeal should be dismissed.

Statement

APPEAL by plaintiff from the decision of MORRISON, J. of the 31st of January, 1928, in an action for damages for negligence. On the 11th of July, 1927, the plaintiff boarded a street-car of the defendant Company in the City of Vancouver and when entering the body of the car to take her seat, the heel of one of her shoes caught between the slats of the flooring of the car and while so caught, the car suddenly started throwing her violently back, her head striking against the door of the car.

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Her ankle was sprained and she received other injuries. The action was dismissed, the learned judge holding that there was no proof of any negligence on the part of the defendant Company.

The appeal was argued at Vancouver on the 15th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Beck, K.C., for appellant: The plaintiff while entering the car caught her heel in the loose slats in the flooring of the car and when the car jolted forward, she lost her balance, falling and injuring herself. The accident was due to the defective flooring and the trial judge should have so found: see *Black* v. *Calgary* (1915), 8 W.W.R. 646 at p. 648; *Gaiser* v. *Niagara St. Catharines and Toronto R.W. Co.* (1909), 19 O.L.R. 31; *Roberts* v. *Mitchell* (1894), 21 A.R. 433 at p. 437.

Argument

J. W. deB. Farris, K.C., for respondent: It was held by the trial judge that there was no negligence and it being entirely a question of fact, unless the evidence shews his finding is perverse, he must be upheld. The only point in the case is the question of the slats. The plaintiff wore high-heeled shoes, which adds to the uncertainty as to what was the cause of her falling. The evidence as to the slats is all speculative.

Beck, replied.

Cur. adv. vult.

5th June, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I can find nothing in the evidence which would justify me in interfering with the finding of the learned trial judge; neither is there any fault to be found with the conduct of the trial.

The appeal should therefore be dismissed.

MARTIN, J.A.

MARTIN, J.A.: There should in my opinion be a new trial to assess damages in this action because the learned trial judge has, with all respect, decided the case on a misapprehension of the issues raised by the pleadings and not departed from in the course of the trial, as is shewn clearly, to my mind, in his reasons, whereby he deals with the alleged contributory negligence of the plaintiff as established by her having worn "high-

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heeled shoes" whereas the sole ground of contributory negligence set up is:

"In walking in a moving car without taking any precaution by taking hold of anything."

In the course of his reasons the learned judge said, *e.g.*:

"The plaintiff, apparently, when aided, was found to have suffered certain injuries. She did fall. There is no doubt about that. My opinion is the cause of the fall was her high-heeled shoes, and as one of the witnesses said, it might just as well have occurred on the sidewalk or in this room, or coming up or going downstairs. . . . I think the plaintiff has not discharged the onus of shewing that it was owing solely to the negligence of the defendant Company that she suffered her injuries."

And he goes on to say:

" . . . to find just exactly how it happened I would have to guess. There was nothing definitely clear. So under all the circumstances I find the injuries were not caused by the negligence of the defendant Company on this particular occasion as claimed."

MARTIN, J.A.

After reading the evidence I have no doubt how the accident occurred, just as the plaintiff describes it at several places in her testimony, *viz.*, that the heel of her shoe (which it was admitted before us was of ordinary size and unobjectionable in make) caught in a slat of the flooring which was not properly secured and this hidden defect, of which she had no notice, was the proximate cause of her severe fall, spraining her ankle, as the medical evidence shews among other more serious injuries.

Therefore I would allow the appeal and, in the present circumstances think this is a case where the damages can be better assessed below than here.

GALLIHER, J.A.: I do not find this case altogether easy of decision.

GALLIHER, J.A.

The learned trial judge dismissed the action, attributing the accident to the high-heeled shoes the plaintiff was wearing. A view was had but as objection was taken by Mr. *Beck,* counsel for the plaintiff, that the car viewed was not properly identified as the car in question the learned judge on Mr. *Beck's* objection, refused permission to defendant's counsel to re-open the case to call witnesses to identify the car viewed and to shew its condition had not been changed since the time of the accident and dealt with the case as if no view had been taken. The correctness or otherwise of this ruling is not before us. I agree with

the learned judge that the car in question was run with due care on the particular occasion but there are two other matters which were urged before us which I think have to be considered: (1) Were the slats which were nailed lengthwise in the part of the car where the accident occurred so insecurely laid or fastened as to permit the heel of the plaintiff's shoe to slip down between the slats due as the plaintiff says, to a swaying of the car in crossing over some car tracks (causing her to lose her balance); and (2) Even if the heel did not get between the slats but in trying to recover her balance a portion of the heel side slipped into the space thus rendering her footing uneven and causing her to fall, is the use of such slatted floor in itself negligence which entitles the plaintiff to recover?

These slatted floors are, as the motorman (a man of 25 years' experience) states, for two purposes, convenience in cleaning out the car and a preventative against slipping and they are more or less in common use, in fact, we ride in cars so fitted every day in Victoria.

GALLIHER, J.A.

Dealing with the first point: It is not clear to me from the evidence that the heel of the shoe could go down directly between the slats having regard to the measurements deposed to, even with pressure, as it might have been applied here, and while plaintiff does says that her heel got caught I would infer from all the evidence that what did occur was, as I have outlined in the second submission, and the heel or a portion of it, could be said to be caught against the side of the slat. The motorman says the car was in perfect order; there was nothing to repair—it was "O.K."

Dealing with the second submission: The motorman says, so far as these slats being a protection, they are a protection to keep one from slipping. No evidence was called by the plaintiff to shew that this was an unsafe method of equipping a car, and it is in cross-examination that the motorman makes his statements.

By reason of this and the fact that numbers of cars are so equipped, and in use (though that would not excuse wrong equipment) I do not feel that there is sufficient before me to say that this is not a reasonably safe method to use.

I would dismiss the appeal.

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McPHILLIPS, J.A.: I would order that there be a new trial.

MACDONALD, J.A.: I do not think we can say that the findings of the learned trial judge and the conclusion arrived at, are clearly wrong.

I would dismiss the appeal.

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

Solicitor for appellant: *Horace W. Bucke.*
Solicitor for respondent: *V. Laursen.*

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SLATER v. VELIE MOTORS CORPORATION

SLATER v. VELIE MOTORS CORPORATION.

Practice—Writ—Service out of jurisdiction—Breach of contract to be performed within jurisdiction—Evidence of contract—Marginal rule 64(e).

On an application for an order giving the plaintiff liberty to serve a notice of a writ of summons out of the jurisdiction under marginal rule 64(*e*) in an action for breach of contract, it is not necessary to conclusively establish a contract. If, however, on the material, it is clear that there is no such contract as alleged, the order should not be made.

Statement

APPEAL by plaintiff from the order of McDONALD, J. of the 8th of February, 1928, rescinding and setting aside the order for service of the writ of summons herein *ex juris* and the said writ of summons and the service of notice of same on the defendant. The action was for damages for breach within the Province of British Columbia of a contract or agreement made partly in British Columbia and partly in Moline, Illinois, or alternatively in British Columbia, whereby the plaintiff was appointed the sole and exclusive dealer or distributor for the sale of Velie automobiles in British Columbia, and for an injunction. The plaintiff appealed on the ground that there was error in holding that it was essential that a contract between the parties should

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be proved in order to justify the issuance of the said writ and service of notice thereof upon the defendant *ex juris*.

The appeal was argued at Vancouver on the 16th and 19th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Argument

Wismer, for appellant: The plaintiff became a distributor, and did the pioneer work for the sale of this automobile and commenced selling, then they dismissed him. All we need do is to disclose reasonable evidence of a contract to be partly performed within the jurisdiction: see *Lyall Shipbuilding Co.* v. *Van Hemelryck* (1920), 28 B.C. 196 at p. 201 and on appeal (1921), 90 L.J., P.C. 96.

Hossie, for respondent: We submit (1) The order was obtained on insufficient material; (2) there is no contract proven and (3) assuming there was a contract, it is not a case where the Courts here should assume jurisdiction. On the first point see *Comber* v. *Leyland* (1898), A.C. 524 at pp. 528 and 534; *Johnson* v. *Taylor Bros. and Company, Ld.* (1920), A.C. 144 at p. 151; *The Hagen* (1908), 77 L.J., P. 124 at pp. 126, 127 and 130. The amended rule now is the result of *Johnson* v. *Taylor Bros. and Company, Ld., supra*: see also *Young* v. *Brassey* (1875), 1 Ch. D. 277 at p. 278. It was found below that a good cause of action was not disclosed: see *Northern Counties* v. *Nathan* (1900), 7 B.C. 136. The word "ought" should be construed as "must"; see *Bell & Co.* v. *Antwerp, London and Brazil Line* (1891), 1 Q.B. 103; *The Eider* (1893), P. 119 at pp. 127, 132 and 135; *Oppenheimer* v. *Sperling* (1899), 7 B.C. 96 at p. 99.

Wismer, in reply, referred to *Call* v. *Oppenheim* (1885), 1 T.L.R. 622.

Cur. adv. vult.

5th June, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I am unable to find evidence of a contract. I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: In this case an *ex parte* order in Chambers was made by Chief Justice HUNTER, under r. 64, giving the plaintiff liberty to issue a writ of summons for service out of

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the jurisdiction against the defendant, but later, on the 8th of February, the said order was discharged by an order made in Chambers by Mr. Justice D. A. McDonald on additional material. This very special application (to review the discretion of one superior judge by another) while long recognized by our practice under said rule (*cf., Garesche, Green & Co.* v. *Holladay* (1884), 1 B.C. (Pt. II.) 83 is nevertheless of a delicate nature and I think it is always best, if possible, to bring the application to discharge the order before the judge who granted it—*vide, Garesche's* case, *supra,* which is an illustration of the advantage the judge who made the order in the first instance has in reviewing his own discretion; and *Davis* v. *Park* (1872), 8 Chy. App. 862 (n); *In re Burland's Trademark* (1889), 41 Ch. D. 542, 545; *Kinahan* v. *Kinahan* (1890), 45 Ch. D. 78, 83; *Collins* v. *North British and Mercantile Insurance Co.* (1894), 3 Ch. 228, 234-5; *Dickson* v. *Law and Davidson* (1895), 2 Ch. 62; and *Black* v. *Dawson* (1895), 1 Q.B. 848: The case of *Oppenheimer* v. *Sperling* (1899), 7 B.C. 96, is an illustration to the contrary. In a leading case on this subject, *Call* v. *Oppenheim* (1885), 1 T.L.R. 622, when an application was made in the Queen's Bench to Mr. Justice Lopes to discharge an order made by Mr. Justice Cave he referred it to the Queen's Bench Division, which refused it and the Court of Appeal affirmed that decision, and though that course has not always been followed in the Queen's Bench I think the practice in Chancery is the better. It may be that this application was referred by the originating judge to the learned judge appealed from (as in *Hartney* v. *Onderdonk* (1884), 1 B.C. (Pt. II.) 88 but we are not so informed, and I should feel on firmer ground if the application to discharge had been made to said originating judge and an opportunity given him to review his own decision on additional material, and the more so because on the original material his discretion was properly exercised and all the cases agree that such a decision will not be interfered with "except," as Lord Justice Rigby said in *Williams* v. *Cartwright* (1895), 1 Q.B. 142, "upon a very clear state of facts." That, in my opinion, is a safe guide and applying it to the present case I am quite unable to say

MARTIN, J.A.

that the result of the new material filed was to make it "very clear" that the original order was wrongly issued. The leading cases, *e.g.*, *Call* v. *Oppenheim*, *supra*, *Strauss and Co.* v. *Goldschmid* (1885), 8 T.L.R. 512; *Chemische Fabrik Vormals Sandoz in Basel* v. *Badische Anilin und Soda Fabrik* (1904), 20 T.L.R. 552 (H.L.); *Johnson* v. *Taylor Bros. and Company, Ld.* (1920), A.C. 144 (H.L.) and *Van Hemelryck* v. *Lyall Shipbuilding Co.* (1921), 90 L.J., P.C. 96; (1921), 1 W.W.R. 926, shew that it is not the duty of the judge to go into the merits or attempt to try the case but to satisfy himself that there is "a probable cause of action," or "a substantial case" or "*a prima facie* case," or "reasonable evidence of a contract," and such a reasonable probability, in my opinion, appears from the material before us, and therefore the original order should not have been discharged, and the appeal consequently should be allowed.

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GALLIHER, J.A.: I agree with my brother M. A. MACDONALD, and would dismiss the appeal.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: This is an appeal from an order made by Mr. Justice D. A. MCDONALD in which he set aside an *ex parte* order of the Chief Justice of British Columbia giving the plaintiff liberty to serve a notice of a writ of summons on the defendant at Moline, Illinois, in the United States. The order was made under marginal rule 64(*e*):

"Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever:—

"(*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which according to the terms thereof, ought to be performed within the jurisdiction."

MACDONALD, J.A.

The plaintiff sued for damages for breach within British Columbia of a contract alleged to be made by correspondence and telegrams, by which he claimed to be appointed sole dealer and distributor of the defendant's motor-cars in British Columbia.

It is not necessary on an application under this rule to conclusively establish a contract. That is left for final disposition at the trial (*Van Hemelryck* v. *Lyall Shipbuilding Co.* (1921),

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90 L.J., P.C. 96). If, however, on the material it is clear that there is no such contract as alleged, the order giving leave was properly set aside. A written contract was not entered into. One was forwarded and signed by the plaintiff but was not executed by the defendant. Its terms were to be subject to the approval of the defendant. The plaintiff, therefore, has the difficult task of making out a *prima facie* case to shew that although a written contract was clearly contemplated a binding agreement was nevertheless entered into by what occurred prior to defendant's refusal to sign the formal contract. Such a contract might of course be established apart from a formal document. It is clear from the evidence that the plaintiff did considerable preliminary work to establish a market for defendant's cars and his conduct is consistent with work done by one confident that he would secure the agency. But that preliminary work was simply done in expectation of a binding agreement which he asked the defendant to expedite. In the meantime, although acting in the same manner as, and following the methods of a distributor who had a binding contract yet failing its execution which he knew was necessary he must be treated in respect to the cars he received and sold in the *interim* simply as a purchaser of several cars.

I have studied the correspondence and telegrams exchanged to see if a *prima facie* case of a distributor's contract was established and rather regret my inability to find evidence of it because I think the plaintiff was led to believe that he would receive the appointment and performed a lot of useful work for the defendant's future benefit. I think he was treated badly. But the action must be founded on the contract sued upon and no such contract exists. Doing work in contemplation of the contract sued upon or on the wrong assumption that the defendant was committed is of no avail. Having reached this view it is not necessary to consider other points raised in argument.

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

Solicitor for appellant: *G. S. Wismer.*

Solicitors for respondent: *E. P. Davis & Co.*

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Real estate—Sale of—Commission—Agent—Negotiations carried on by agent's salesman—Licence required by salesman during negotiations—R.S.B.C. 1924, Cap. 143, Secs. 4 and 21.

The defendant listed his hotel for sale with the plaintiff a licensed real-estate agent who employed H. to negotiate a sale. H. submitted the terms of sale to C., shewed him the property and introduced him to the defendant. C. purchased the property at the price originally submitted but final negotiations were carried on by another agent. The defendant received the first deposit on the purchase price on the 18th of August, 1927. H. although he had applied for a licence under the Real-estate Agents' Licensing Act on the 30th of June, 1927, did not receive it until the following 22nd of August. In an action for a commission it was held that the work of H. the plaintiff's salesman, was the effective cause of the sale and the plaintiff was entitled to judgment.

Held, on appeal, reversing the decision of GRANT, Co. J. (MARTIN and GALLIHER, JJ.A. dissenting), that it was the plaintiff's unlicensed employee H. who effected the introduction of the buyer to the seller which he claims resulted in the sale. H. acted illegally in negotiating the sale and the contract to pay commission based upon an illegal act is not enforceable.

APPEAL by defendant from the decision of GRANT, Co. J. of the 22nd of December, 1927, in an action to recover a commission of $625, being 5 per cent. of the purchase price of a property sold by the defendant. The plaintiff alleges that the defendant listed the property known as the "Commercial Hotel" with him in June, 1927, and employed him as his agent to find a purchaser for $12,500 and in pursuance thereof the plaintiff found a purchaser named Cook whom he introduced to the defendant and to whom the defendant sold the property for the above sum. The evidence disclosed that the property was listed with Anderson in June, 1927. Anderson had a licence under the Real-estate Agents' Licensing Act. After the property was listed with Anderson he engaged a sales agent named Hart who in the course of his employment brought the property to the attention of Cook and by appointment Hart met Cook at the Commercial Hotel and introduced him to the defendant. The defendant received the first deposit on the sale on the 18th of

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August but Hart did not obtain a licence under the Act until the 22nd of August although he had applied for it on the 30th of June, the licence being of that date. The defendant appealed on the grounds that the plaintiff was not the efficient cause of the sale and that the sales agent did not have a licence during negotiations with the purchaser.

The appeal was argued at Vancouver on the 20th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Argument

Darling, for appellant: The work was done through a salesman who had no licence: see *Cudworth* v. *Eddy* (1926), 37 B.C. 407. The sale was really brought about by another broker named Rutter who had a licence and who was paid a commission by Cook. As to the necessity of a licence see *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297 at p. 306; *Brown* v. *Moore* (1902), 32 S.C.R. 93; *Melliss* v. *Shirley Local Board* (1885), 16 Q.B.D. 446; 55 L.J., Q.B. 143; *Komnick Brick Co.* v. *B.C. Pressed Brick Co.* (1912), 17 B.C. 454. It was Rutter who afterwards looked after the beer licences: see *Robins* v. *Hees* (1911), 19 O.W.R. 277; *Barnett* v. *Brown and Co.* (1890), 6 T.L.R. 463.

Housser, for respondent.

Cur. adv. vult.

5th June, 1928.

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MACDONALD, C.J.A.: The defendant listed his hotel for sale with the plaintiff, a licensed real-estate agent. The latter sent his unlicensed employee, Hart, to negotiate the sale which was afterwards completed by another agent. The plaintiff personally had nothing to do with the negotiations except to instruct Hart. His right to commission apart from the Real-estate Agents' Licensing Act, Cap. 143, R.S.B.C. 1924, is founded on the introduction of the seller and the buyer to each other by Hart and of the subsequent activities of Hart, who however did not bring the sale to completion but was, as found by the learned judge, the efficient cause thereof.

What then is the effect of said enactment? Section 20 subjects Hart to a penalty for acting as a salesman without having

first obtained a licence. Hart did not obtain a salesman's licence until defendant through another agent had practically completed a sale to one Cook. Defendant says that he received the deposit of $500 on this sale on the 18th of August; Hart did not receive his licence until about the 22nd of August, so that all that Hart did in connection with the sale was done by him illegally. Now the plaintiff's claim is not that he effected the sale but that his unlicensed employee effected the introduction of the buyer to the seller, which he claims resulted in the sale made behind his back by the defendant. That introduction was contrary to the statute, Hart acted illegally in making it. Can the plaintiff take advantage of that illegal introduction? I think not, and would allow the appeal.

MACDONALD, C.J.A.

MARTIN, J.A.: This appeal should, I think, be dismissed, the learned judge having, in the circumstances of the case, taken the right view of the effect of the statute, the principal facts being that at the time of the completion of the plaintiff's contract, upon which he became justly entitled to payment of his commission (as the learned judge rightly finds) both the plaintiff and his salesman were licensed under section 4 of the Act, Cap. 143, R.S.B.C. 1924. The plaintiff with whom the property had been listed in June, had been duly licensed from the beginning, and the salesman, Hart, entered his employment between the 15th-20th of July and carried on the negotiations which resulted in the sale of the property (hotel lease and licence) to the purchaser, Cook, which sale was not closed till the 15th of September when the consent of the Government Liquor Control Board to the transfer of the licence was obtained, and before that, on 22nd August, the salesman had obtained his licence which he had applied for in the latter part of July but its issuance had been delayed for some reason owing, he deposes, to the absence of the minister of finance from the Province.

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Said section 4 of the Act declares that:

"No person shall act or offer or undertake to act as a real-estate agent or real-estate salesman in this Province without first having applied for and obtained a licence under this Act."

Section 2 declares that:

"'Real-estate salesman' shall mean any person who is employed by a

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real-estate agent to negotiate the sale, exchange, purchase, lease, or rental of real estate, or to negotiate loans on real estate."

By sections 20 and 21A (of Cap. 26, 1925) penalties are imposed for certain specified infractions of the Act, and by section 21 it is declared that no real-estate agent or real-estate salesman can maintain an action for his services as such unless he has been duly licensed, but no penalty is imposed upon a real-estate agent for employing an unlicensed salesman. Section 3 of Cap. 37 of the amending Act of 1927 requires every such agent and salesman to furnish a bond or insurance policy to the minister of finance

"conditioned for the payment of all damages or compensation for which [they are] liable to any person by reason of wrongful or dishonest dealing on the part of the real-estate agent or real-estate salesman, and any person to whom the real-estate agent or real-estate salesman is so liable may recover the amount of such damages or compensation by action brought upon the security in his own name against the insurer liable under the bond or policy."

Furthermore by sections 11-15 *et seq.*, an extraordinary tribunal composed solely of the superintendent of insurance is set up to hear and adjudicate upon complaints preferred by persons claiming to have been damaged or injured by wrongful or dishonest dealing on the part of said agents or salesmen and to suspend or revoke their licences if the complaint is established.

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Said section 21A of 1925 provides that:

"No real-estate agent or real-estate salesman licensed under this Act, and no officer, agent, or employee thereof, shall, directly or indirectly, pay or allow, or offer or agree to pay or allow, any commission on or other compensation or thing of value to any person for acting or attempting or assuming to act as a real-estate agent or real-estate salesman, unless that person holds at the time a licence under this Act; and every person who violates any provision of this section or who knowingly receives any commission, compensation, or thing of value paid or allowed in violation of this section shall be guilty of an offence against this Act."

This, to my mind, has an important bearing upon the matter and further tends to shew that the intention of the Legislature, apart from the said specified penal provisions, was to prevent any unlicensed person from obtaining any "commission or other compensation" for his services, but the section does not apply to this plaintiff who was simply making use of the services of his servant in the ordinary way, so far as the evidence discloses.

That the Act is founded upon a public policy is plain but the

precise direction and exact extent of that policy are obscure and I find myself unable after a careful and necessary consideration of this whole special and unusual statute in the light of the authorities cited, none of which is on a similar statute, to do otherwise than hold that in such a case as the present (wherein both master and servant were duly licensed at the time the master's cause of action accrued and the master was licensed from the start) the master is entitled to maintain his action: to go further than that would, in my opinion, penalize the licensed master in a manner not contemplated by the spirit nor covered by the letter of the statute. It would be going unwarrantably far to hold upon this statute that where, as here, a licensed agent has entered upon the performance of a contract the temporary interjection of an unlicensed servant into its train of completion has the effect of avoiding that contract and this view is in accord with the decision of this Court in *Cudworth* v. *Eddy* (1926), 37 B.C. 407 on said section 21, wherein the Chief Justice said (p. 409):

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"My construction of that section is that at the time the cause of action arose he must shew that he was a licensed real-estate agent or salesman. And I find this, that the right of action arose when the sale was completed, and not before. And that might be when the agreement was finally entered into, binding upon both parties, or it might be when the agent had produced a purchaser ready, able and willing to purchase, and the defendant, the principal, had unwarrantably refused to accept the purchaser. In this case the sale was not completed in a binding fashion by writing until the 27th, it was not even assented to verbally before the 20th, and on the 16th, four days prior thereto, this agent had obtained her licence."

Mr. Justice GALLIHER said (p. 410):

"I agree that at the important time, namely, on the 20th, when an outstanding term of the sale, without which the sale evidently would not have gone through, was consented to, the plaintiff had a licence."

And Mr. Justice McPHILLIPS said (p. 411):

"The present case is a completed sale and the sale was made after the licence was in the hands of the plaintiff. Therefore I cannot see that there is any difficulty whatever in the plaintiff's right to the recovery of the commission."

These views distinguish cases of this kind from such well-known decisions as, *e.g.*, *Brown* v. *Moore* (1902), 32 S.C.R. 93 and *Melliss* v. *Shirley Local Board* (1885), 16 Q.B.D. 446, and *cf.*, *Soothill Upper Urban Council* v. *Wakefield Rural Council*

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(1905), 1 Ch. 53; (1905), 2 Ch. 516. The appeal therefore should be dismissed.

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

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

MACDONALD, J.A.: I have no doubt, after reading the evidence that the learned trial judge's finding that the work of Hart, a salesman employed by the plaintiff, was the effective cause of the sale, should not be disturbed and that the attempt chiefly on the part of the purchaser Cook to interject Rutter into the deal fails. It is true, as Middleton, J.A. said in *Robins* v. *Hees* (1911), 19 O.W.R. 277 at p. 278, that:

"The fisherman who actually lands the fish is entitled to it, even though it was first allured by the bait of another."

And Rutter landed the fish. If, however, he poached on preserves obtained and cultivated by another he should not be allowed to keep it.

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It was submitted, however, that the contract for commission was illegal under section 4 of the Real-estate Agents' Licensing Act, R.S.B.C. 1924, Cap. 143, because when the sale was arranged and a deposit paid and *interim* receipt given, although the plaintiff had a licence under the Act his employee Hart had not. The latter received his licence a few days later although he applied for it some time before. I will deal first with the matter, apart from the fact that it was the plaintiff who was holder of a licence, who recovered the judgment. The sale was effected by his unlicensed salesman. I can see no escape from the general proposition that section 4 of the Act is an effective bar. The section reads:

"No person shall act or offer or undertake to act as a real-estate agent or real-estate salesman in this Province without first having applied for and obtained a licence under this Act."

Penalties for infractions are provided by section 20, as amended by Cap. 26, Sec. 12, of the 1925 statutes. Even if the sale was not completed until Hart received his licence he yet "offered or undertook to act" as a salesman and there is a statutory prohibition against it. He if plaintiff, could not enforce payment for work done in violation of the Act. *Northwestern Con-*

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struction Co. v. *Young* (1908), 13 B.C. 297. It was submitted however, that it was not necessary for Hart the salesman, and servant of the plaintiff to have a licence. Section 13, Cap. 26, B.C. Stats. 1925 was referred to. I cannot read it however to support the suggestion that it contemplates a licensed real-estate agent employing an unlicensed salesman. It is clear from the whole Act that real estate salesmen (defined in section 2 as "any person who is employed by a real-estate agent to negotiate the sale . . . of real estate") must have a licence. It is not possible I think to find authority to support the view that the principal may benefit by an act of the servant which the statute prohibits. That view would virtually mean that salesmen need not be licensed at all.

It was urged, however, that Hart obtained his licence on the 22nd of August and plaintiff's cause of action arose after that date. Section 21 of the Act was referred to:

"No person shall bring or maintain any action in any Court for the collection of compensation for any act or expenditure done or incurred by him as a real-estate agent or real-estate salesman in respect of the negotiation of any sale, exchange, purchase, lease, or rental of real estate, or in respect of the negotiation of any loan on real estate, without alleging and proving that he was duly licensed under this Act as a real-estate agent or real-estate salesman, as the case may be, at the time the alleged cause of action arose."

Assuming that he had his licence when the cause of action arose what follows? Section 4 as pointed out contains a prohibition against any person who "offers or undertakes to act" as a real-estate salesman. Nearly, if not all the effective work was done by Hart before he obtained his licence. If it were not for the work done by him prior to the 22nd of August he would not have earned the commission for his employer and that work was in violation of the Act. The contract therefore to pay commission based upon illegal acts is not enforceable. We were referred to *Cudworth* v. *Eddy* (1926), 37 B.C. 407. There, as the report shews, section 21 of the Act only was relied upon. Section 4 was not referred to. If it had been called to the attention of the Court the result might have been different. I think sections 4 and 21 are to some extent in conflict. Section 4 prevents unlicensed salesmen from even undertaking to act as such. Section 21 makes the time when the cause of action arises the

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controlling date. To maintain an action he need only shew under section 21 that he had his licence, not when the preliminary work was done but at the time he had a right to sue. Section 21 however relates to procedure and proof. Section 4 is a substantive enactment relating to the whole subject-matter of the statute and must prevail. To hold otherwise would be to make the general purpose of the Act ineffective. I do not think section 21 can be treated as in the nature of an exception to or qualification of section 4. We should adopt such a construction of the whole Act as will suppress the mischief aimed at, *viz.*, to prevent unlicensed agents or salesmen engaging in the work to any extent. The plaintiff had a right to undertake to sell the defendant's business but no right to engage an unlicensed salesman to do so. He procured the performance of an illegal act and he cannot rely upon the illegal acts of his salesman as a basis of a right of action.

MACDONALD, J.A.

It was also urged that the statutory defence was not pleaded and should not now be raised. I think, however, that as no additional evidence is involved, which if an amendment was allowed might necessitate a new trial we should not give effect to this objection.

I would allow the appeal.

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

Solicitor for appellant: *A. G. Hodgson.*
Solicitors for respondent: *Walsh, McKim & Housser.*

DAVIES v. SCHULLI AND MULLIN.

HUNTER, C.J.B.C.

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Mines and minerals — Coal — Co-owners — Partnership — Evidence of— Admissibility.

The plaintiff and the defendants were co-owners in a coal lease of lot 88 in the Yale District, each bearing his share of the expense of the assessment work for two years. During this period they discussed acquiring adjoining property when it became vacant. The plaintiff and the defendant Mullin then quarrelled and the plaintiff left for Alberta. A year later Schulli found the adjoining lands were vacant and he wrote the plaintiff asking him for $100 as his share of location expenses which the plaintiff sent him. Schulli acquired leases on the adjoining ground but Mullin refused to recognize Davies in the transaction and on demanding a half interest in the new leases Schulli gave him a half interest and kept the other half himself. The plaintiff then brought action for a declaration that he was entitled to a one-third interest in the newly-acquired leases and that a partnership existed between the parties. Schulli conceded the plaintiff's claim and the action proceeding against Mullin the plaintiff recovered judgment.

Held, on appeal, affirming the decision of HUNTER, C.J.B.C. (MACDONALD, C.J.A. and MARTIN, J.A. dissenting), that the evidence (apart from the letters and Schulli's statements in the absence of Mullin) raises a strong presumption of partnership, making the letters admissible and therefore strengthening that *prima facie* case.

Held, further, that the plaintiff is not estopped by his action in disposing of his one-third interest in lot 88 or in not asserting his rights when Mullin obtained a one-half interest in a further lot that Schulli had acquired.

APPEAL by defendant Mullin from the decision of HUNTER, C.J.B.C. of the 24th of November, 1927, in an action for a declaration that the plaintiff is entitled to a one-third interest in certain coal lands upon lot 88 in the Yale Division of Yale District, B.C., and two certain licences to prospect for coal on said lands and adjoining lands. In June, 1922, the plaintiff and defendants agreed to become partners in locating, prospecting and acquiring coal lands and the defendant Schulli located and obtained a lease to prospect for coal on said lot 88 upon which the plaintiff did prospecting work with the defendant Mullin. In 1923, the partnership agreed to locate and obtain a lease to prospect on lands adjoining lot 88 to the east and south-

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east hereof and in pursuance thereof in August, 1924, Schulli located these lands and obtained in his own name two licences to prospect same and in June, 1924, the plaintiff paid Schulli $100 towards the expense of locating and obtaining the licences. In August, 1925, the defendants entered into an agreement for the sale of the lands in question to one Ridgeway R. Wilson of Victoria for $35,000 of which $20,000 has been paid to the defendants, and the plaintiff claims he is entitled to one-third of the moneys so paid.

Wood, and *H. I. Bird,* for plaintiff.
A. M. Whiteside, and *P. A. White,* for defendants.

HUNTER, C.J.B.C.: Inasmuch as the learned counsel have both fully and carefully gone into all matters which the case raises, I do not think I would gain anything by reserving judgment.

The action was originally brought against two partners by the plaintiff. Since the action was commenced, one of the defendants has conceded the claim of the plaintiff, and settled with him on that basis and the action is now being continued against the other defendant.

HUNTER, C.J.B.C.

Admittedly, these parties were all co-owners in lot 88. When people become co-owners in mining property and start in to work it together, the inference that they have assumed the relationship of partners with each other becomes comparatively easy. In this particular case we find they started in to work this lot 88, the two of them, Davies and Mullin, that is to say, the plaintiff and the now defendant had been working together in a colliery, and were undoubtedly on terms of friendship at that time. The three of them started in, as I say, working this claim, at all events the plaintiff and the present defendant. They evidently had agreed to work the claim in common and share the expenses. They did assessment work in the years 1922 and 1923, dug a shaft, and they had a man named Vincent come down and look over the ground in July, 1923, for the purpose of looking over the proposition, and as to whether it would be advisable to take up adjoining claims, and on his advice they agreed to take two adjoining claims and agreed to

share the expense. If there is one undeniable proof of the existence of a partnership it is the agreement to share the expenses and losses. So, if they were only co-owners in the first place they had eventually drifted into the legal position of co-partners. That is only an example of the whole trend of the evidence. It is more important to judge men by what they do than by what they say. The fact is these men worked this claim in common and prospected in the neighbourhood and also agreed to take up more claims. There is also the evidence of young Schulli that Davies and Mullin talked about taking up more land when it was open.

In respect to the admission of these letters, I agree that the cases shew that if there had been no other evidence in existence apart from these letters of Schulli to Davies, then they would not be admissible, but in this case there is other evidence of partnership, and, that being the case, these letters become admissible. There is the clear statement in the letter from Schulli to Davies on June 25th, 1924, to the effect he was going to stake two more claims, "For you, me and Denny" and asking Davies for $100 for expenses incurred on lot 88 as well as other claims which were to be taken up. He acknowledges receiving the $100 in Exhibit 9, July 22nd, 1924.

HUNTER, C.J.B.C.

In regard to the point raised about the Statute of Frauds: It has been long well settled that where there is a contest as to the existence of a partnership, when that is found, then parol evidence may be given to shew what constitutes the assets of the partnership and it is absolutely immaterial that those assets consist of land.

I think the plaintiff is entitled to the declaration asked for. There will be an accounting if necessary.

From this decision the defendant appealed, and the appeal was argued at Vancouver on the 21st, 22nd and 23rd of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

A. M. Whiteside, for appellant: This is an appeal by the defendant Mullin only. The plaintiff was co-owner with Mullin in the prospecting lease on lot 88, but there is no evidence to

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shew that he was entitled to any interest whatever in the later licences of adjoining properties and the learned Chief Justice should not have found that any of the acts of the parties constituted a partnership. The letters written by Schulli to Davies were improperly admitted in evidence. There was no agreement of co-partnership between Davies and Mullin. The evidence shews that Davies made a separate sale of his undivided one-third interest in lot 88 and he is estopped from saying that any partnership existed between Mullin and himself. Schulli should be heard to say Davies was a partner.

Argument

Wood, for respondent: The three men launched on this scheme together and from the evidence it must be inferred they were to have equal shares: see *Wells* v. *Petty* (1897), 5 B.C. 353 at pp. 356-7. Lot 88 is merely an incident in the whole transaction. They were co-partners and co-owners: see *Sabin* v. *Pine Creek Power Co., Ltd.* (1904), 2 M.M.C. 141. That the letters from Schulli should be admitted in evidence see Taylor on Evidence, 11th Ed., Vol. I., p. 518, par. 753. That evidence of the parol agreement proves the partnership in lands see *Dale* v. *Hamilton* (1847), 2 Ph. 266; *Warren and MacDonald* v. *Gallagher* (1921), 2 W.W.R. 346; *Forster* v. *Hale* (1798), 3 Ves. 696 and on appeal (1800), 5 Ves. 308 at p. 309.

Whiteside, in reply, referred to *Porter* v. *Armstrong* (1926), S.C.R. 328 at pp. 329 and 331; *Robert Porter & Sons, Ltd.* v. *Foster* (1925), 36 B.C. 222.

Cur. adv. vult.

5th June, 1928.

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MACDONALD, C.J.A.: This appeal is taken by the defendant Mullin alone, his co-defendant having settled with the plaintiff. The defendant Schulli, who is a railway section foreman, acquired a coal lease of lot 88, in Yale Division of Yale District, which though taken in his own name belonged equally to himself and the appellant. Subsequently the appellant introduced the respondent to Schulli and it was then verbally agreed between the three that the respondent should be given a one-third interest in the lease upon his promise to do his share of the statutory assessment work in future, and to reimburse the others the costs already incurred by them. An assignment was

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then executed vesting an undivided third in each. The assessment work thereafter was done at the expense of the three men for the two following years. Each was engaged in his usual occupation, the appellant and respondent working in coal mines and Schulli upon the railway. From time to time they visited the property and on one occasion took a friend who was an engineer with them, who advised them gratuitously to acquire some adjoining property in order to increase their holdings. This suggestion was assented to by all three and Schulli was asked to endeavour to procure these additional lands for himself and his associates if the same were available. Schulli upon enquiry found that they had already been taken up by others and so notified the appellant and the respondent. About this time the appellant and the respondent had a bitter quarrel. Defendant left the Province to work in a coal mine in Alberta. About a year afterwards Schulli discovered that the said additional lands had been abandoned and were again open to location. He thereupon wrote to the respondent asking him for $100 to cover his expenses in locating them, which was duly sent. Mullin, however, was not a consenting party to this demand on the respondent. In fact it appears from the evidence that he knew nothing about it until after Schulli had acquired the new leases, and when he did hear of it he repudiated the notion that respondent had any interest in these new leases and demanded an assignment of half interest in them and got it.

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The learned trial judge held that the three were co-partners in working lot 88, and that the new ground, being as he held, an addition to it was also partnership property. Prospectors and persons of that class are prone to speak of others associated with them as partners. Appellant in his evidence refers to this and said "We always call whoever is working with us partners." When lot 88 was acquired the appellant and respondent were working as miners in the Coalmond Collieries at Blackburn. They were partners in the sense in which miners and prospectors are accustomed to speak of each other.

The relation of these three men had none of the characteristics of a co-partnership in the legal sense. Each was assigned a third interest by a legal document drawn up by a lawyer in

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which nothing is said about a co-partnership. The learned trial judge was of the opinion that in the beginning they were co-owners. In his reasons for judgment he said:

"Admittedly, these parties were all co-owners in lot 88. When people become co-owners in mining property and start in to work it together, the inference that they have assumed the relationship of partners with each other becomes comparatively easy."

It may be admitted at once that if they had started to work lot 88 as a coal mine for profit it might be an easy matter to infer a partnership in the working of it from their acts but there is no evidence at all that they worked lot 88 either for profit or in any true sense at all; that they did anything more than the statutory assessment work in order to protect their title as co-owners. Moreover, the appellant and Schulli each sold his one-third interest in lot 88 to a purchaser and the respondent on learning of this gave an option to purchase his one-third to the same person.

I therefore find no difficulty in coming to the conclusion that upon the inferences of fact to be drawn from the evidence, these three men were nothing more than co-owners in lot 88.

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The learned judge having found that they were co-opartners in lot 88 found them also co-partners in what he regarded as additions to that lot, namely the new leases. Having come to the opposite conclusion as to their relationship to each other in lot 88, I have to decide what their relationship was in respect of the new leases. It is common ground that they met and decided that it was desirable to acquire the new leases if the lands were open to location. It is also common ground that they learned shortly afterwards that they were not open. No further communications took place between them for a year. Respondent went to Alberta and a year afterwards was induced by Schulli to send him $100 towards securing leases on the ground which they had intended to acquire a year previously. It is also common ground that appellant and respondent had quarrelled and were bitter enemies long before the new leases were secured, before, in fact, rspondent had gone to Alberta, and when no leases could be secured such as they had contemplated. Therefore, when Schulli had secured the new leases what were the rights of the respective parties in them?

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Schulli was unquestionably a trustee for the respondent to the extent of one-third interest, since it was on that footing that he received respondent's money. The appellant refused to recognize the respondent in the new transaction. He has sworn that he knew nothing of Schulli's relations with the respondent after he had gone to Alberta. When the ground was abandoned by the previous locators the defendant himself did some prospecting over it and suggested to Schulli that he should locate it, but only for himself and Schulli. I think he was at that time quite free to insist upon that and that when Schulli obtained the leases he became a trustee of a one-half interest for him.

It would be quite open to me to hold that the appellant was a party to the breach of trust committed by Schulli towards respondent if the evidence would sustain such a finding, in which case the appellant might be declared a trustee of one-sixth of the new leases or the proceedings thereof for the respondent. But this is open to doubt since Schulli retained enough to satisfy the trust. There is, however, no evidence of such participation and the appellant has denied knowledge of the facts upon which it might be founded. The onus of alleging and proving such a breach was on the plaintiff, and he has not attempted, or if he has, he has not succeeded in sustaining that position. Moreover, the respondent had settled that matter with Schulli when he released him.

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I would allow the appeal and dismiss the action with costs here and below.

MARTIN, J.A.: I am so much in accord with the judgment of my learned brother the Chief Justice that I shall only add a reference to the decision of the old Full Court in *Sabin* v. *Pine Creek Power Co., Ltd.* (1904), 2 M.M.C. 141, as shewing the great difference in the facts between the present case and that, wherein working co-owners of a placer claim were held to have "drifted into the position of co-partners" the principle of which the learned trial judge erroneously, with respect, in effect extended to the very dissimilar facts of this case.

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GALLIHER, J.A.: I think sufficient foundation was laid tending to establish partnership, so as to render the evidence admis-

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sible which has been objected to and that on the whole evidence a case of partnership has been established.

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

MACDONALD, J.A.: It is important to determine the relationship of the parties whose names appear on the record as plaintiff and defendants in respect to lot 88. Were they co-owners or partners? It was originally located by the defendant Schulli in 1922. He told the plaintiff that "he would like me as a partner on account of my mining experience," and added "he would like to have me in and also Mullin because Mullin put him wise to it." Mullin was not present. If there is sufficient evidence apart from this conversation to raise the presumption of a partnership it is admissible. This also applies to letters written by Schulli to the plaintiff and later referred to.

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The plaintiff also had a conversation with both Schulli and Mullin in regard to lot 88. In detailing it, the plaintiff said "we agreed that we would go in as partners and pay our own individual shares of all expenses and do the assessment work." And again, "we three would all be partners for any coal or anything that we later staked." In cross-examination he is not so explicit and it is true that his evidence in so far as it purports to bind Mullin to a partnership arrangement is somewhat nebulous. I do not think however his evidence in chief is destroyed. Where, as in this case, I am convinced that it was the intention of the three of them that each should be equally interested in some form and work was done and payments made pursuant thereto I am inclined to give full effect to any evidence that supports an honest claim and defeats an unjust attempt to deprive one of the parties of his rights. Plaintiff further testified, "Mullin thought I would be a good partner also in the claim on account of my experience and my papers." Whether he meant by this a legal partner or simply a fellow-workman is, I confess, open to argument, but again I do not feel inclined to adopt an interpretation favourable to the defendant Mullin. They were doing team work in the Coalmont Collieries at Blackburn, that is, engaged on contract work dividing earnings between them, and miners often refer to others so employed

with them as partners (pardners) using the word in a colloquial not a juridical sense. Where, as in this venture however they were to be engaged not in working side by side as "pardners" but rather in acquiring proprietary interests in coal lands I think the better view is that they used the word "partners" in the legal sense.

Later an agreement (not of partnership) was drawn up by which Schulli transferred an undivided one-third interest in lot 88 to Mullin and to the plaintiff. Thereafter each paid their share of assessment work rentals and expenses in work or money for 1922 and 1923. For 1924 and 1925 Mullin did the work presumably for all of them.

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Then in reference to subsequent stakings plaintiff testified "we agreed and understood that anything we got, that we were all one-third—we had a one-third interest and share in it." Also "we had in mind the view of staking more claims further down the river." They meant by "anything we get" the staking of any other coal claims. In cross-examination in referrng to these subsequent stakings the plaintiff said he expected to have the same interest in these claims that he had in lot 88 and that they would be held under the same conditions. He insists on a partnership in all property acquired including lot 88. If that relationship therefore is not established in respect to lot 88 it may be difficult to establish it in the remaining properties. Assessment work and cost of staking of the later acquired properties was to be borne equally. Mullin on the other hand testified that "he and Schulli only were to be in on a fifty-fifty basis" in property subsequently staked. He admits however that when they had lot 88 it was understood that if they could have got lots 86 and 87 Davies and Schulli should share it with him. Their purpose in acquiring coal lands was "to work it ourselves if possible" or "sell it." If sold the proceeds were to be divided equally.

In May, 1923, Mullin and the plaintiff spoke of staking adjoining claims if open for location and asked one Vincent a mining engineer to look over the ground and advise them. He advised them to stake as much land as possible in a certain direction. All three were present when this advice was given

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and to quote the plaintiff, "we decided that the whole three of us would stake this as soon as it was available." This was land adjoining lot 88 and extending in the direction of Princeton. The properties were lots 244, 982, 232, 985, 984, 987 and 986. Mullin also admits that Vincent advised that it would be better to have more than one claim. Subsequently Schulli staked additional lands in the area Vincent recommended. Subsequent to Vincent's recommendation to acquire other lands plaintiff with Schulli's son did further assessment work on lot 88. He kept account of the value of the work for future adjustment—each to bear one-third. Then he went to Alberta. Before leaving it was agreed between plaintiff and Schulli (he was not now on speaking terms with Mullin due to a fistic combat) that Schulli should keep his eye on the claims Vincent recommended and stake them if they became vacant and also send to plaintiff for his share of the expenses. On or about June 25th, 1924, Schulli wrote to the plaintiff in his own illiterate way, in part, as follows:

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"You ask about claim. Lot 88 is due to pay June 28th and soon I stake two more claims for you, me and Denny [Mullin] what you tell me from near tunnel; to lot 88, 1,280 acres more then we have one big claim all close to railroad. Denny pay up for last year alright and you got some money coming. Send me $100 quick to soon stake new claim and pay lot 88 then we fix up good."

The plaintiff at once forwarded $100 as requested. The admissibility of this letter was questioned. It was admitted because the learned Chief Justice found that a partnership was established by other evidence. It was also suggested that agency was established through a verbal arrangement that Schulli was to look after all correspondence. I do not think the evidence warrants this view, but the first proposition is sound. Schulli acknowledged receipt of the $100 by letter on July 22nd, 1924. In this letter he says one "Glover wants to build a narrow-gauge railway across our place" meaning lot 88. As Schulli staked later claims he sent to the plaintiff in respect to some of them at all events, clippings from a newspaper containing notice of application.

The plaintiff remained in Alberta until 1925. He then learned that Schulli and Mullin negotiated a sale of the whole

property to Ridgeway R. Wilson without regard to his claim of a partner's interest in the proceeds and he returned to British Columbia. The agreement with Wilson was signed by Schulli and Mullin and purported to transfer the entire interest in all lots except 88 as to which only their two-thirds interest was transferred leaving plaintiff's one-third outstanding. Later the plaintiff made a separate agreement with Wilson in respect to his one-third. This it was submitted was a recognition by him of co-ownership rather than a partnership. He remonstrated with them for selling without his knowledge or consent. They took the ground that he had not done assessment work—had been away a long time and "never came back to help us," to which the plaintiff replied that he was back in time to do any assessment work that was required as the time had not expired for doing the work they referred to. The plaintiff declared that he would sell his one-third interest in lot 88 and with the proceeds take action to recover the amount due him from the sale of the other claims. He gave Wilson an agreement for the purchase of his one-third interest in lot 88 but only received the first payment of $100. It was subsequently abandoned. It may be mentioned that Schulli staked another lot, *viz.*, 253 in his own name. He claimed this for himself but upon Mullin declaring that "we were partners from the beginning" he transferred a half interest to Mullin. The plaintiff makes no claim to this lot nor did he object (although he was aware of it) to the transfer of one-half interest to Mullin. His explanation is that they would not recognize his interest in the other claims and he therefore thought it useless to claim an interest in 253. Before the trial of the action Schulli made a settlement with the plaintiff on the basis of paying to him a one-third proportion of the amount received and in doing so admitted plaintiff's right to be regarded as a partner. The action proceeded only against Mullin.

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I have outlined nearly all the material evidence. What does it disclose as to the relationship between the parties? Partnership does not necessarily follow from joint ownership of lot 88. Nor do I think with respect as the learned Chief Justice assumed that if they were co-owners in the first place they eventually

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drifted into the legal position of co-partners. That statement, *viz.*, that an original *status* as co-owners might drift to that of partners was given expression to in *Sabin* v. *Pine Creek Power Co., Ltd.* (1904), 2 M.M.C. 141. There, however, three co-owners were working placer claims together from day to day, sharing in necessary outlays and obtaining returns each day necessitating a division of profits. If it is true to say in such a case that the original *status* of co-owners might change without words or words and conduct evidencing it, into an agreement of partnership it is quite different in the case at Bar where there was not that daily contact in work and in the sharing of returns. I do not think we can assume partnership without apt words and acts signifying an agreement. The question of partnership must be decided like any other issue of fact and it may be established by parol evidence. The Statute of Frauds is not a barrier. I think that the evidence of the plaintiff which the learned trial judge believed, coupled with conduct is sufficient to establish a partnership agreement. To repeat again some of the plaintiff's evidence: "We agreed that we would go in as partners and pay our own individual shares of all expenses and do the assessment work," and also "We three would be all partners in anything that we later staked." This it is true is a summary only of what was said but on the whole evidence it is a true summary. I have already pointed out why I regard the use of the word "partners" as so employed in the juridical sense. True the assignments in respect to lot 88 suggest co-ownership. But if parties entered into written partnership agreement about which there could be no question and by a further agreement an undivided one-third of the partnership property was vested in each of them it would none the less be partnership property. The whole evidence (apart from the letters and Schulli's statements in the absence of Mullin) raised at the very least a strong presumption of partnership making the letters admissible and therefore strengthening that *prima facie* case. The letter in part quoted *ante* is very material; also the prompt remittance of $100 referable only to a joint adventure. Nor do I think plaintiff's action in disposing of his one-third interest in lot 88 or in standing by when Mullin obtained a one-half interest from

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Schulli in lot 253 is fatal to his claim. He made demand for a partnership interest after the sale was consummated and it was refused. He is not estopped from now asserting his claim because he did not press it with greater vigor or because he permitted the others without further objection to appropriate moneys in which he was interested. He knew it was useless to protest further except through the Courts. The defendants therefore were trustees for the plaintiff for his share of the proceeds of the sale of the property. Schulli, as stated, recognized his trusteeship after taking legal advice and effected a settlement.

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I would dismiss the appeal.

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

Solicitors for appellant: *Whiteside, Wilson & White.*
Solicitors for respondent: *Wood, Hogg & Bird.*

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Negligence—Careless use of torch in thawing water-pipes—Fire originating from spot where torch was used—Spreads to plaintiffs' building destroying it—Damages.

The water-pipes in the defendant's building in the City of Rossland having become frozen on a cold morning he, with the assistance of F., attempted to thaw them out by the application of a gasoline torch. They were unsuccessful in their attempt and afterwards at about the noon hour F. of his own initiative returned to the premises and again attempted to thaw the pipes by the application of the torch. At about 6 o'clock in the evening fire broke out near the place where the torch had been applied, enveloped the building and spread to the plaintiffs' premises destroying it. In an action for damages owing to the defendant's negligent application of the gasoline torch to the water-pipes the plaintiffs recovered damages.

Held, on appeal, reversing the decision of McDONALD, J. (GALLIHER, J.A. dissenting), that on the evidence it is clear that the fire originated

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from the negligent application of the torch by F. who acted without the knowledge or authorization of the defendant, and he should be exonerated from any responsibility to the plaintiffs for their loss.

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 21st of November, 1927, in an action for damages for the loss by fire of a building and contents thereof on lots 23 and 24, block 40, in the City of Rossland, owing to the defendant's negligence. The defendant is the owner of a building known as "The Morris Building" which is separated from the plaintiffs' building by a number of other buildings in the same block. On the morning of the 20th of January, 1927, when the weather was very cold, the water-pipes in the basement of The Morris Building were frozen and the defendant, with one Howard Ferguson, tried to thaw the ice in the pipes by the application of a gasoline torch. They failed in their attempt to make the water run and both left the premises. Afterwards at about the noon hour Ferguson returned with the torch on his own initiative and again tried to thaw the pipes but was unsuccessful. The fire broke out at about six o'clock in the evening near the place where the torch had been applied to the pipes. The plaintiffs claim that the fire originated from their not taking reasonable and proper care to see that the flame did not reach the sawdust and paper packing around the water-pipes. The fire enveloped The Morris Building and spread to the plaintiffs' building, destroying it. The plaintiffs recovered judgment for $2,805.

The appeal was argued at Vancouver on the 23rd and 26th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Locke, for appellant: The defendant and Ferguson went to the basement early in the morning and moved the casing from the pipe. They used the blow-torch and left the place at 11:30 a.m. Ferguson was a pure volunteer. Ferguson came back alone, and without McNeill's authority, at 1 p.m. and left at 2. The fire was discovered at 6 p.m. It was found by the trial judge that the fire was caused by Ferguson applying the blow-torch when he came back the second time.

Even if this were so our submission is that he acted without authority. The trial judge applied *Crewe* v. *Mottershaw* (1902), 9 B.C. 246; *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 and *Jones* v. *Festiniog Railway Co.* (1868), L.R. 3 Q.B. 733, but it must be shewn that the fire was caused by the torch: see *Bain* v. *Central Vermont Railway Co.* (1921), 2 A.C. 412 at p. 415. That Ferguson was acting without authority see *McDowall* v. *Great Western Railway* (1903), 72 L.J., K.B. 652 at pp. 655-6; *Wheeler* v. *Morris* (1915), 84 L.J., K.B. 1435; *Samson* v. *Aitchison* (1912), A.C. 844.

Argument

E. A. Lucas, for respondents: The principle involved in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L 330. applies here. This case is substantially the same as *Wilson* v. *City of Port Coquitlam* (1922), 30 B.C. 449, and on appeal (1923), S.C.R. 235: see also *Rickards* v. *Lothian* (1913), A.C. 263; *Engelhart* v. *Farrant & Co.* (1897), 1 Q.B. 240; *Black* v. *Christchurch Finance Co.* (1894), A.C. 48; *Musgrove* v. *Pandelis* (1919), 1 K.B. 314 and on appeal (1919), 2 K.B. 43; *Coryell* v. *Bertha Consolidated Gold Mining Co.* (1923), 33 B.C. 81.

Locke, replied.

Cur. adv. vult.

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MACDONALD, C.J.A.: This case, as I see it, comes down to the question of when the fire started and whether the defendant is responsible for Ferguson's act, and on these two questions there is no conflicting evidence.

The defendant was the owner of a building in the City of Rossland, containing a store which was vacant, a basement also vacant and an upper storey containing living apartments. Having been notified by his tenant that her water-pipes were frozen he attempted to thaw them and was joined by a neighbour one Ferguson, who gratuitously offered to assist him. The two men took a gasoline torch from the vacant store and went to the place where the water-pipe entered the building from the ground. The pipe came in underground to a point beneath the building and there joined an upright pipe passing through the basement, the vacant store and up to the said apartments. Between the basement and the ground was a space of considerable height, the

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building having been erected on posts. There was a casing about the vertical pipe filled with sawdust. They removed this casing and pulled out some of the sawdust. Having sounded this vertical pipe they decided that the frost was not there, whereupon they uncovered the pipe in the ground for a distance of twelve inches. Ferguson then applied the torch to this portion of the pipe, while the defendant went back to his dwelling and brought hot water which he poured upon it. After considerable efforts the defendant decided that it would be useless to do anything more. He told Ferguson that he would give up the attempt to thaw the pipe until the weather had moderated when the ground could be dug up. The two men thereupon left and went to their respective homes. This evidence is corroborated by that of Ferguson. Ferguson, however, after the had had his lunch, without defendant's knowledge, thinking to assist the tenant to procure water, went back to the building and again attempted with the torch, which had been left in the vacant store, to thaw the pipe but without result. He then went up to the tenant's apartment and applied the torch to the pipe there, also without result. The tenant thought she smelled smoke and said so to Ferguson, whereupon he went back to the place where he had been applying the torch under the house but could find no trace of smoke or fire there. He attributed the smell to the application of the torch to the pipe in the tenant's apartments. He then left and went home.

At six o'clock that evening fire broke out at or near the place where the torch had been applied in the morning and again in the afternoon. This fire escaped and destroyed the plaintiffs' building.

The onus may not in the first instance be on the plaintiffs to prove how the fire which destroyed their building originated. The cases seem to indicate that in the absence of evidence of this sort negligence may be inferred from the fact that the fire came from defendant's land. In my view of the case it is not necessary to pursue this subject. It is a fair inference that the fire originated from the torch applied by Ferguson either in the morning or in the afternoon. If from its use in the morning, the defendant was properly held liable; if from its use in the

afternoon the defendant can be liable only on the finding that he was a party to what was done in the afternoon. I have no doubt that the proper inference to draw is that Ferguson's activities in the afternoon started the fire. Several circumstances I think, support this inference. It is difficult to infer that a fire started at between half-past eleven and twelve in the forenoon had smouldered until nearly six o'clock at night without blazing out. Moreover, defendant says that he made a careful examination before leaving the building in the morning. Again it is difficult to believe that Ferguson could have worked in the same place in the afternoon without discovering any evidence of a fire, which if started in the morning must have been smouldering then. Again, after the tenant had complained of smelling smoke Ferguson went below and made an examination and found no evidence of smoke or fire. The fair assumption, I think, is that a spark ignited a grain of sawdust which was not noticeable so soon after ignition. It is the more reasonable inference that fire smouldered in the sawdust from two o'clock in the afternoon until evening and then burst forth.

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Having come to the conclusion that the fire was started by Ferguson in the afternoon the only remaining question is, had the defendant any knowledge of Ferguson's unauthorized though well meant efforts? On this question the evidence is uncontradicted, and unless I am in this rehearing driven to the conclusion that that evidence is false I must exonerate the defendant from responsibility to the plaintiff for his loss. In these circumstances I ought not to disbelieve witnesses against whose credibility no suggestion has been made.

I would allow the appeal.

MARTIN, J.A.: I agree that this appeal should be allowed on the ground that the correct inference to draw from the evidence is that the fire was occasioned by the action of Ferguson alone on his purely voluntary visit in the afternoon, for which the defendant is not responsible.

MARTIN, J.A.

GALLIHER, J.A.: I think the learned judge below came to the only reasonable conclusion as to the cause of the fire. The blow-torch was being operated by one Ferguson in an endeavour

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to thaw out the water-pipes which had become frozen in the defendant's building. Ferguson volunteered his services in the morning and was taken over by defendant and furnished with the blow torch and operated same. Together they spent most of the morning using the blow-pipe and pouring hot water into the cut-off box, but without success, when the defendant remarked that it seemed useless to continue at that time.

Ferguson, however, came over in the afternoon without the knowledge of the defendant and continued operations for a time in the same manner as in the morning with like results, leaving everything as he thought, after examination, in safe condition.

It is urged that we should treat Ferguson so far as the afternoon proceedings are concerned, as a stranger or trespasser. He was not there in the afternoon with direct authority from the defendant, but I think in view of the morning proceedings we should treat him as having implied authority and in so doing it would make no difference whether the fire was caused by the morning or afternoon operations of which there seems some doubt.

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Whether Ferguson went there in the morning voluntarily or was employed by defendant to assist, to my mind, makes no difference—he was there with the sanction of the defendant and the necessary tools for carrying on the operations were furnished him by the defendant who assisted in the operations and though the defendant when they were not meeting with success stated they would abandon the work and that he would use other means later, Ferguson returned in the afternoon apparently without defendant's knowledge; it appears to me, under all the circumstances, that we cannot treat Ferguson as a stranger or trespasser.

What took place in the morning I think created a relationship from which Ferguson was not so disassociated as to place him in the class of a trespasser in what he did in the afternoon.

The learned trial judge based his decision on the rule in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330. With great respect, I think the facts in this case do not bring it within that rule or perhaps rather they create an exception to the rule or a qualification of it. In discussing the general rule as laid down

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in *Rylands* v. *Fletcher*, Wright, J., in *Blake* v. *Woolf* (1898), 2 Q.B. 426 at p. 428, proceeds thus:

"That general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him."

This is in agreement with the reasoning of Blackburn, J., in *Ross* v. *Fedden* (1872), L.R. 7 Q.B. 661 and these views are approved by their Lordships of the Privy Council in *Rickards* v. *Lothian* (1913), A.C. 263 at p. 281. The case at Bar is in my view on the same principle distinguishable from *Rylands* v. *Fletcher*.

GALLIHER, J.A.

The question then is, Was there default or negligence on the part of the defendant personally or through Ferguson? The plaintiffs plead negligence in the operation in attempting to thaw the pipes causing the ignition and also negligence in allowing the fire to spread which consumed the plaintiffs' premises. The defendant specifically denies this. We have then an allegation of negligence and a denial of same. Ordinarily the plaintiffs, if they allege negligence, must prove it in order to succeed and the onus is upon them.

"By the common law before it was changed by statute, if a fire originated on a man's premises by which his neighbour's premises were injured the latter in an action brought for such injury would not be bound in the first instance to shew how the fire began, but the presumption would be (unless it were shewn to have originated from some external cause) that it arose from the neglect of some person in the house":

Per Mignault, J., in *Port Coquitlam* v. *Wilson* (1923), 2 D.L.R. 194 at p. 209.

In considering the state of the law before the passing of the statute of Anne (Act of Anne 6, Cap. 3, Sec. 6), Bankes, L.J. in *Musgrove* v. *Pandelis* (1919), 2 K.B. 43 at p. 46, states it thus:

"A man was liable at common law for damage done by fire originating on his own property for the mere escape of the fire; (2) if the fire was caused by the negligence of himself or his servants, or by his own wilful act; (3) upon the principle of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330."

His Lordship then proceeds to say:

"The alteration which those statutes effected was to give protection in cases falling under the first heading of liability mentioned above. It is thus stated by Lord Denman, C.J., in *Filliter* v. *Phippard* [(1847)], 11

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Q.B. 347, 354: 'The ancient law, or rather custom of England, appears to have been, that a person in whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, must make good the loss.' That was the principle of the common law to which the statutes were directed. They altered the law so as to exclude the liability of a 'person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . accidentally begin.' It is plain that the statutes did not touch the other heads of liability at common law. The second head is not within the protection; that was decided by *Filliter* v. *Phippard* [(1847)], 11 Q.B. 347, where it was held that the Act of Geo. 3 did not apply to a fire which was caused either deliberately or negligently."

GALLIHER, J.A.

Since then under the second heading defendant is not within the protection of the statute we do not have to consider the question of "accidental fire" if the onus is on the defendant to satisfy the Court that there was no negligence and he has failed to do so, for in such case he would be liable.

In the view of Mignault, J. with which I most respectfully agree, and which I have set out above in the case of a fire such as here, there is a presumption of negligence and the onus is upon the defendant to rebut that presumption and not upon the plaintiff to shew how the fire began.

Satisfied as I am that in the operation either in the forenoon or the afternoon that the sawdust around where the defendant and Ferguson were working became ignited from the torch, and was smouldering unperceived for hours probably before it burst into flame, I feel that while certain precautions were taken we are left in doubt as to how far this sawdust was removed from the area in which the lighted torch was being used and whether all was reasonably done that should have been done to ensure safety, and that the onus cast upon the defendant (as I hold) has not been satisfied.

I would dismiss the appeal.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from the judgment of Mr. Justice D. A. MCDONALD awarding damages to the plaintiffs for loss sustained through a fire kindled on defendant's premises spreading to and destroying the property of the plaintiffs. It was in the generally accepted use of the word an "accidental"

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fire (I am not now referring to the word "accidental" in the juridical sense) simply one of those fires due it may be to the lack of some element of precaution which might have been guarded against if one were gifted with foresight but not involving conscious neglect. I think as the learned trial judge found that the fire originated from the gasoline blow-torch but why it should have started after the precautions taken it is difficult to understand. Six other buildings were destroyed in addition to the plaintiff's property and no doubt if the defendant is held liable he will be faced with other claims. If on some points which are perhaps not yet covered by authority Courts should virtually hold that the owner of the premises where a fire starts is responsible for the resultant loss one can easily conceive that consequences ruinous to such an owner will often follow. That may not be an element in deciding a legal question. It is important however in the interests of justice in deciding points still possibly unsettled that principles should not be laid down which in their application may offend against natural justice.

MACDONALD, J.A.

I do not find from the reasons of the learned trial judge that he found negligence by the defendant or by Ferguson who assisted him. He appears to find, if I read the judgment aright, that it was Ferguson's act in the afternoon that caused the fire when he was gratuitously assisting his neighbour (the defendant) without however the knowledge of the defendant. Ferguson with the defendant's permission assisted in the effort to thaw the frozen water-pipe in the forenoon but the work was abandoned defendant declaring it was useless to proceed. He did not expect Ferguson to continue in the afternoon. Ferguson, however, on his own initiative resumed work on the pipe with the blow-torch in the afternoon. If the fire smouldered in the sawdust from the morning's operations in view of all the evidence detailing Ferguson's actions, the examinations made and precautions taken, it seems incredible that he would not discover it in the afternoon. I think therefore that the learned trial judge meant to find—and his judgment means—that the fire originated in the afternoon.

As stated I do not think there is any finding of a negligent act of omission or of commission by Ferguson during the afternoon

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(or by either of them in the morning). I so gather from the statement of the learned trial judge, *viz.*:

"I have examined the cases cited by counsel and I am satisfied under the circumstances of this case the defendant must be held responsible for Ferguson's act."

And he goes on to refer to *Rylands* v. *Fletcher* and similar decisions. By Ferguson's "act" he does not mean failure to brush the sawdust away out of reach of the flame or failure to drench it with water but rather his act in using the blow-torch—bringing it on the premises. If there is no specific finding by the learned trial judge and the substantial facts are undisputed —as I think they are—we are free to draw our own inference. In that event I would find it started in the afternoon from the blow-torch coming in contact with the sawdust.

MACDONALD, J.A.

The finding is that because in a situation that frequently arose in Rossland, *viz.*, the freezing of water-pipes the ordinary and usual method followed by plumbers (and Ferguson had experience in this work) was resorted to, that act in itself fixes liability on the defendant if a fire is started without any proven act of negligence and escapes to neighbouring premises. I do not think the principles laid down in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 are applicable. The defendant was using his premises in the ordinary and usual manner of its use and adopted the recognized method of relieving a situation which frequently arose. The freezing of water-pipes was an ordinary occurrence anticipated by all and treated by all in the same way. It is not right to say that anyone following the usual course undertakes to remedy such a situation at his own peril. He simply must exercise due care. While the blow-torch may in itself be dangerous yet if used in the ordinary way as a well-known remedy for a well-known condition it does not, without proof of negligence, fasten liability on the defendant if damage ensues. He used the recognized tools for the purposes of effecting a repair, because the frozen pipe in a sense may be regarded as out of repair for the time being. The defendant was not making a "non-natural" use of his premises. If in *Rylands* v. *Fletcher* the damage was caused by water in its natural state flowing or percolating into plaintiff's property the defendant would not be liable.

In *Jones* v. *The Festiniog Railway* (1868), L.R. 3 Q.B. 733 referred to by the learned trial judge, the defendant company was liable because it had not express statutory authority to use locomotive steam-engines. Here, of course there is no question of statutory authority to use a blow-torch. There is, however, an implied sanction to use ordinary means for a specific purpose. There is no liability if one uses a match to light a fire for domestic purposes if without negligence a general fire is started. A blow-torch is not a match but if before matches were made other methods known and commonly used just as dangerous as a blow-torch were applied to start fires in the kitchen stove the same result would follow. Just as the match is used as the ordinary means of starting a fire in a stove for domestic purposes so a blow-torch is the ordinary and usual method of thawing a frozen pipe and in a sense water-pipes are articles of domestic use.

MACDONALD, J.A.

If the fire was started by the use of the blow-torch by Ferguson in the afternoon and he was negligent another question arises. Ferguson may be regarded as defendant's servant even although he acted gratuitously and on an isolated piece of work. But the element of control and supervision should be present at least impliedly to constitute that relationship. It was suggested that element was lacking in so far as the afternoon work was concerned. I am not satisfied however that in the afternoon Ferguson was in the position of a stranger or trespasser. What he did in the afternoon would meet with the defendant's approval had he known it. They left an unfinished job at the end of the morning's work and although there was a general expression, or it may be conceded a definite statement that the work should be abandoned and defendant did abandon it still when the means of resuming work were left available I think Ferguson continued to work in pursuance of a tacit understanding that he might do so and thereby advance his neighbour's interest. He was not acting against defendant's will. However it is not necessary to finally determine that point (and I am not doing so) because I do not find negligence.

The only possible negligence that can be suggested is that proper care was not taken to see that the flame did not reach the

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small heap of sawdust on the floor; or failure to sweep it away from the point where the torch was used. A fire might be started by the blow-torch without the visible part of the flame coming into actual contact with the sawdust. It had power to ignite a few inches beyond the visible flame. The sawdust therefore should have been so far removed that in working the torch about from one side of the pipe to the other or from point to point it could not come into contact with it. Here a question of onus arises. While the facts in *Port Coquitlam* v. *Wilson* (1923), S.C.R. 235, are not similar observations of Mr. Justice Duff at pp. 242-4, where his Lordship discusses the responsibility of an owner or occupier of a building for damage caused by a fire lighted there and escaping to adjoining premises are useful. I regard that as this case. This fire simply originated on defendant's premises while he was performing a domestic act without negligence save the possible suggestion of negligence mentioned above. The history of the law and the Statute of Anne and 14 Geo. III., c. 27, sec. 86 are referred to. His Lordship also observes that there are points still unsettled. Fires intentionally lighted are outside the statute. This fire was not intentionally lighted. So also fires arising through negligence. In such cases the principles of the common law apply. As to what is an "accidental" fire within the meaning of the statute speaking in a general way it is one started without negligence. If a fire lighted at a seasonable time and under proper conditions where a man using ordinary foresight could not reasonably foresee danger and an agency which he could not control or foresee intervenes causing it to spread it is an accidental fire. That agency might be a high wind suddenly arising. It is none the less accidental in such circumstances because he knows that occasionally high winds do arise with little previous warning. I doubt if it is possible to give an exhaustive or detailed definition of an "accidental" fire. One has to take a rational view of each case as it arises and determine if the party charged can reasonably be regarded as blameworthy. But is the onus on the defendant claiming the protection of the statute and claiming immunity from the rigorous liability imposed by the common law to shew that the fire began acciden-

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tally—in other words, to prove absence of negligence. Mr. Justice Duff raises the question in the case referred to but a decision on the point was not necessary. I think, notwithstanding the statute changes the common law, that the onus is on the plaintiff who alleges negligence to prove it. The point is important and requires determination in this case (unless it is held that the defendant is not answerable for Ferguson's acts in the afternoon), because if the onus is on the defendant he failed to prove that he swept the sawdust out of reach of the ambit of the torch. On the other hand, if—as I think it is—the onus is on the plaintiffs they have not shewn by reasonable evidence that the sawdust was so carelessly dealt with or left so close to the scene of operations as to likely cause fire by contact. From the evidence we do not know just how far away it was, or whether or not the torch where used would be within reach of it. The plaintiffs therefore fail. The plaintiffs can simply say—in a general way—that the defendant failed in his duty to exercise proper care to avoid doing him injury. That may be negligence but where the onus is on the plaintiff he must prove not in a general suggestive way but by specific evidence what defendant did which he should not have done or what he omitted to do which a reasonable and prudent man would not overlook. In that I think he fails. The evidence shews that the sawdust was brushed away by hand to one side. The plaintiffs fail to shew that it was not brushed far enough away to be out of the danger zone. He should have shewn that it was so close to where the torch was used that it would probably come in contact with it, keeping in mind the evidence (not very definite) that the torch would ignite a substance like paper (and presumably sawdust) if it was within six or seven inches from the end of the flame. In the absence therefore of proof of negligence I would allow the appeal.

Appeal allowed, Galliher, J.A. dissenting.

Solicitor for appellant: *R. J. Clegg.*

Solicitors for respondents: *Lucas & Lucas.*

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ROYAL TYPEWRITER AGENCY v. PERRY & FOWLER

ROYAL TYPEWRITER AGENCY v. PERRY & FOWLER.

Practice—Affidavit—Recitation of quarrel between solicitors—Scandalous matter—Application to strike out refused—Appeal—County Court Order XV., r. 11.

On appeal from an order dismissing an application to strike out certain paragraphs in an affidavit as scandalous, impertinent, and irrelevant, the discretion of the judge appealed from should not be interfered with unless a "gross miscarriage" of justice has been occasioned thereby.

Statement

APPEAL by plaintiff from an order of GRANT, Co. J. of the 16th of March, 1928, dismissing an application to strike out certain paragraphs of an affidavit filed by defendant Perry's solicitor. The plaintiff brought action against "Perry and Fowler holding forth as the firm of Perry & Fowler" for $70, being the balance due on the purchase of a Royal Standard Typewriter. Affidavits of service of the plaint and summons on the defendants were duly filed and the defendants having entered dispute notes, judgment was signed against them in March, 1914. No further action was taken until February, 1928, when a judgment summons was issued against R. T. Perry, and on the hearing, counsel for R. T. Perry raised the point that the judgment contained no Christian name of the said Perry, and though served with judgment summons he might not be the Perry referred to in the judgment. The matter was then adjourned in order that an application might be made to amend the plaint and judgment. Certain negotiations then took place between the solicitors with a view to settlement but this failed and an affidavit made by *H. R. Bray*, solicitor for the defendant Perry was filed, containing the following paragraphs:

"(4) The said *J. E. Jeremy* [plaintiff's solicitor] on the occasion of the said call then said he would take $25 in satisfaction of the said judgment, to which I replied that I must then have a release from the plaintiff."

"(7) The said *J. E. Jeremy* then and there in my presence changed the document by striking out the initials therein designating the said Perry and inserted the initials R. T. and further then and there signed with his own hand his own name and the name of one Hirst or Hirsch.

"(8) I then told the said *J. E. Jeremy* that I must have the person Hirst or Hirsch identified with the plaintiff, that I must know the address and occupation of the said Hirst or Hirsch, and that the due execution of the said Hirst or Hirsch must be authenticated on oath.

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"(9) Thereupon the said *J. E. Jeremy* said to me 'what do you mean?' to which I replied 'this is all rascality, you have in your hand a forgery.'

"(10) The said *J. E. Jeremy* then called me an offensive name and I then forcibly ejected him from my office, saying 'take your papers and burn them or they will get you into trouble.'"

The plaintiff then applied for an order striking out the above paragraphs of said affidavit and the application was dismissed.

Statement

The appeal was argued at Vancouver on the 29th of March, 1928, before MACDONALD, C.J.A., MARTIN and MACDONALD, JJ.A.

Jeremy, for appellant: This is an application under Order XV., r. 11 of the County Court Rules, and is the same as Supreme Court marginal rule 531. The paragraphs are scandalous and should be struck out: see *Millington* v. *Loring* (1880), 6 Q.B.D. 190 at p. 196; *In re Jessop (a Solicitor)* (1910), W.N. 128.

Argument

Beeston: The paragraphs merely set out the facts in relation to an attempt to settle the case. They are not scandalous. In any case the learned trial judge has in his discretion decided that they should not be struck out and this Court will not interfere except in a case of gross miscarriage of justice which cannot be applied here.

Jeremy, replied.

Cur. adv. vult.

5th June, 1928.

MACDONALD, C.J.A.: The appellant applied to the County judge to strike from the files paragraphs of an affidavit filed on behalf of the respondent, as being scandalous. This application was refused. If the County Court judge was not offended by the presence of such allegations on the files of his Court, I see no reason why we should interfere.

MACDONALD, C.J.A.

I would dismiss the appeal.

MARTIN, J.A.: This is an appeal from the refusal of His Honour County Judge GRANT to strike out, on the motion of plaintiff's solicitor, certain statements in an affidavit of the

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defendant Perry's solicitor on the ground that they are "scandalous, irrelevant and impertinent." The affidavit was filed in answer to an application in Chambers by plaintiff for leave to amend the default judgment and plaint by changing the defendants' names who had been improperly and wholly without precedent, described therein as "Perry and Fowler holding forth as Perry & Fowler."

By County Court Order XV., r. 11:

"The judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client."

This is the same as Supreme Court rule 531, but apart therefrom any Court of Record at least, as is the County Court, has inherent jurisdiction to prevent its procedure from being abused and its records "defiled" as the expression is—and may do so upon the motion even of a stranger or *ex mero motu*—*cf.*, *Erskine* v. *Garthshore* (1811), 18 Ves. 114; *Cracknell* v. *Janson* (1879), 11 Ch. D. 1; *Sadleir* v. *Smith* (1878), 7 Pr. 409; *In re Miller* (1884), 54 L.J., Ch. 205; *Hill* v. *Hart-Davis* (1884), 26 Ch. D. 470; *In re Jessop (a Solicitor)* (1910), W.N. 128, and *The Leonor* (1916), P. Cas. 90; (1917), 3 W.W.R. 861.

MARTIN, J.A.

A question arose as to our jurisdiction to hear an appeal from such an order, which the appellant submits lies under sections 116-19 of the County Courts Act and section 6 of the Court of Appeal Act, of which County Court section 119 provides:

"119. With the leave of the judge of the County Court appealed from, or of the Court of Appeal, an appeal to the Court of Appeal shall lie in respect of any cause or matter in which an appeal is not now allowed, if the judge or Court of Appeal thinks it reasonable and proper that such appeal should be allowed; and in respect of any such appeal the Court of Appeal shall have and may exercise the jurisdiction and powers mentioned in section 116 [hereof]."

The learned judge below has given leave to appeal and I think that this is a "matter" within the meaning of said section and therefore the appeal is before us in accordance with the statute. What disposition we should make of it however, depends, in practice, upon the question as to whether or no we should review the discretion of a judge in a matter of this kind which is peculiarly his own province, *i.e.*, the keeping of his Court's record free from "defilement."

No case has been cited on the point in similar circumstances, and after a careful examination of the authorities that have been cited and a prolonged search for and consideration of many more, the nearest, and it is still far off, is the following bare four-line note of a decision of the Chancery Division in *Warner* v. *Mosses* (1881), W.N. 69:

"An application by the defendants to strike out part of an affidavit as scandalous, had been ordered by Vice-Chancellor Bacon to stand over till the trial, but the Court of Appeal ordered the passage complained of to be expunged."

Such a meagre statement furnishes no guide for our conduct, even if we were bound by it, which we are not.

The appellant cited *In re Jessop, supra,* but that was not a case upon scandalous matter but merely "embarrassing, vexatious and oppressive" as alleged, in setting up extracts from letters written "without prejudice," and the Court dismissed the appeal as "misconceived" and premature and "a very bad example" of bad practice.

MARTIN, J.A.

Assistance, however, is to be derived from certain decisions on appeals in contempt of Court cases, though it is to be borne in mind that now such appeals are more restricted by later decisions, depending upon the nature of the contempt, as is pointed out in the Yearly Practice, 1928, p. 776, and *cf.* our recent decision in *In re Kean* v. *Bird* (1927), [39 B.C. 169]; 3 W.W.R. 369.

In *Ashworth* v. *Outram* (*No. 2*) (1877), 5 Ch. D. 943 the Court of Appeal (Lord Coleridge, C.J., and Baggallay and James, LL.J.) unanimously decided that it would not entertain an appeal from the discretion of Vice-Chancellor Malins in refusing to commit for contempt a defendant who had disobeyed an order to hand over the whole personal estate to the receiver in the action. Lord Justice James said:

"The Vice-Chancellor did not think fit to make an order to commit, thinking that it was not necessary to commit for contempt in order to ensure future obedience, and did not consider the case one for costs. Both points are matters of discretion, and you cannot appeal from such an order. In *Witt* v. *Corcoran* [(1876)], 2 Ch. D. 69 the defendant had been ordered to pay costs, and so had a right to have it decided whether he had been guilty of contempt or not."

This decision was considered by the same Court in *Jarmain* v. *Chatterton* (1882), 20 Ch. D. 493 (*coram* Jessel, M.R. and

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Brett and Holker, LL.J.) wherein Vice-Chancellor Bacon had refused to commit for contempt a defendant who, it was alleged, had prevented the receiver from getting in certain moneys that he had been directed to receive from defendant's theatre office. An appeal was taken from the Vice-Chancellor's refusal and the *Asworth* case was relied upon by respondent and Jessel, M.R. made the following observations upon it, p. 498:

"The case is shortly reported, and I never attempt to make minute distinctions between cases, but I think the case really meant this. There was there no question of right at all. It was admitted that the defendant there had done wrong, but that she had done so under a misapprehension, and that the wrong was a very trifling wrong, and that the Court would not under those circumstances interfere with the discretion of the judge below. If that is the meaning, Lord Justice Baggallay's observations are pertinent to that particular case only and not to the general law. If a question of right were involved they would not be so. It must be merely where the question is purely a matter of discretion. . . . It is clear that Lord Justice James never intended to lay down a new rule, and thus his words must mean that in the circumstances of that case there was no appeal. It means this, that as a general rule the Court of Appeal will not entertain an appeal unless there has been a gross miscarriage."

The *Jarmain* case was itself considered by the same Court (*coram* Cotton, Bowen and Fry, LL.J.) in *In re Wray* (*a Solicitor*) (1887), 36 Ch. D. 138, wherein North, J. refused, in his discretion, to attach a solicitor for disobedience of an order to pay over £350 to a trustee. The *Jarmain* case was relied upon by the appellant and Cotton, L.J., delivered the judgment of the Court dismissing the appeal:

"This is an appeal from Mr. Justice North. If the judge had held that the existence of the receiving order deprived him of jurisdiction to order the attachment, or that on any other grounds he had no such jurisdiction, we must have entertained the appeal. But as I understand the matter, Mr. Justice North said that he had jurisdiction to issue the attachment, but, looking at all the circumstances of the case, he, in the exercise of his discretion declined to do so, I give no opinion what order I should have made if I had been hearing the application in the first instance, but I cannot concur in interfering with the discretion of the judge below. In the case of a motion to commit for contempt, if the judge below merely orders the party against whom the application is made to pay the costs of the motion, I think it would be wrong for the Court of Appeal to interfere by committing, though if the contempt was deliberate it would be a serious question whether the judge below was right. I do not say that in no case would the Court of Appeal so interfere, but it must be a case of gross miscarriage."

We have, therefore, two decisions of the English Court of Appeal that in cases of that nature the discretion of the judge appealed from should not be interfered with unless a "gross miscarriage" of justice has been occasioned thereby, and in my opinion that test should, *a fortiori,* be applied to cases of this present nature because they cannot be said in any true sense of the word to "involve a question of right" of the parties or their solicitors but of the honour and dignity of the Court itself, and therefore I cannot imagine any case of greater delicacy or one wherein the interference of another tribunal should be more reluctantly undertaken.

It comes to this, then, that at least before we should be justified in interfering we must be prepared to go the length of saying that the order of the learned judge below has occasioned a "gross miscarriage of justice" and in order to satisfy myself on that point I have carefully read and considered the appeal book and the situation arising therefrom with the result that I am satisfied that there has not been a "gross miscarriage" but that the discretion of the learned judge was, in all the most exceptional circumstances, including a verbal dispute and personal conflict between solicitors, "exercised according to common sense and according to justice" as Lord Justice Bowen happily expresses it in *Gardner* v. *Jay* (1885), 29 Ch. D. 50, and so the appeal should be dismissed.

MARTIN, J.A.

In reaching this conclusion I add, *ex abundanti cautela,* that if it were necessary to review all the circumstances of this case I would not be prepared to say that a part at least of the paragraphs complained of were irrelevant for the learned judge to take into consideration on an interlocutory application for a very stale amendment asked for in circumstances which are in some respects peculiar, and if relevant there is, admittedly, no scandal, and furthermore and in any event the expression complained of relating to the altered document is obviously not used in a legal sense but is an exaggerated one in the course of a sharp dispute.

The learned judge apparently viewed the whole matter as a "trumpery" one, to adopt the language of the English Court of Appeal in *Re Hilliard* (1891), 36 Sol. Jo. 2, and having had

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both the rival officers of his Court before him and heard what they had to say about it, he is in the best position to form the best opinion thereupon. Compare also Farwell, L.J. in *Armitage* v. *Parsons* (1908), 2 K.B. 410, 420, and James and Fry, LL.J. in *In re National Assurance and Investment Association* (1872), 7 Chy. App. 221. From any point of view, therefore, I do not feel justified in interfering with the action taken by the learned judge below.

MACDONALD, J.A.

MACDONALD, J.A. would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *J. E. Jeremy.*
Solicitor for respondents: *H. R. Bray.*

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WINTER v. DEWAR & CO.

WINTER v. DEWAR & CO. LTD.

Estoppel—Action to recover possession under lease—Previous action to recover possession of same premises and other material in addition was dismissed—Res judicata.

The plaintiff brought an action to recover possession of certain buildings, plant and fixtures founding his claim on a memorandum of agreement. He had previously brought action for possession of all he now claims and for other material in addition, founded upon the same memorandum of agreement when it was held that the instrument was at an end and the action was dismissed. On the pleadings in the former action he could have raised the question of his right to possession of the material he now claims.

Held, that the matter in question is *res judicata* and the action should be dismissed.

Statement

ACTION to recover possession of certain lands. Tried by GREGORY, J. at Vancouver on the 29th of May, 1928.

Alfred Bull, for plaintiff.
Mayers, and *James H. Lawson,* for defendant.

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Judgment

12th June, 1928.

GREGORY, J.: This action must be dismissed. I am much inclined to agree with the contention of the defendant that all rights of removal are contingent upon the lessee not being in default, but I base my judgment solely upon the ground that the matter is *res judicata* and the plaintiff is now estopped.

The only difference between the present and the former case is that in the former plaintiff claimed all he now claims and something else in addition. In both cases he founds his claim upon the memorandum of agreement or lease of the 6th of December, 1923, and the former action decided that that instrument had come to an end, and that he had no further right of possession under it. If he has no right to possession of the whole, how can it now be urged that he has a right to a possession of a part? The evidence which would establish his right to possession is the same in both cases. He might easily have urged in the former case that if not entitled to all he there claimed he was at least entitled to that now claimed and the pleadings enabled the Court to grant that measure of relief. It was merely a question of argument as to the proper construction to place upon the agreement of the 6th of December.

I am quite unable to distinguish this case from the rule stated with approval in *Hoystead* v. *Commissioner of Taxation* (1926), A.C. 155. In that case Lord Shaw at p. 170, in delivering the judgment of the Judicial Committee of the Privy Council, says:

"The rule on this subject was set forth in the leading case of *Henderson* v. *Henderson* (1843), 3 Hare 114 by Wigram, V.-C. as follows: 'I believe I state the rule of the Court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' This authority has been frequently referred to and followed, and is settled law."

With reference to the case of *Brunsden* v. *Humphrey* (1884),

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14 Q.B.D. 141, cited by plaintiff's counsel, there is this to be said: if it is in conflict with *Hoystead* v. *Commissioner of Taxation* it can no longer be considered good law, but apart from that it is to be noted that *Henderson* v. *Henderson* so expressly approved by the Privy Council was not cited or referred to, in fact, Bowen, L.J., was the only judge who referred to any cases, and Lord Coleridge, C.J., dissented. Brett and Bowen, LL.J., both referred to the fact that at the time the first action was brought the personal injuries, the subject of the said action, were not known, and although they do not say so, that might well have been considered a "special circumstance" within the meaning of the rule laid down by Wigram, V.-C.

Judgment

Action dismissed.

MURPHY, J. 1928 June 14. CANADA MORNING NEWS LTD. v. THOMPSON

CANADA MORNING NEWS LTD. v. THOMPSON *ET AL.*

Distress—Right to levy—Relationship of landlord and tenant necessary——Action for illegal distress.

Distress can only be justified if, *inter alia*, the relationship of landlord and tenant exists.

Statement

ACTION for illegal distress. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 7th of June, 1928.

Locke, and *Nicholson,* for plaintiff.
Reid, K.C., and *Gibson,* for defendants.
Tupper, for Chinese National League of Victoria.

Judgment

MURPHY, J.: Action for illegal distress. The levying of the distress is proved. The defence is met by a large number of objections many of which I think are well founded. To dispose of the case, it suffices to mention the following: Distress, such

as here attempted, can only be justified if, *inter alia,* the relationship of Landlord and Tenant exists: Halsbury's Laws of England, Vol. 11, p. 121. I find, as a fact, that the distress warrant was signed and delivered by the defendants, Low Yee Quan and Way Hon, on behalf of the Chinese Nationalist Society of Canada, whom they believed to be landlord. The plaintiff in writing (Exhibit 7) seems to have been under the same impression. This is an unincorporated body, an entity unrecognized by the law, and consequently unable to enter into such a contract as a lease: Halsbury's Laws of England, Vol. 4, pp. 406 and 426 and authorities there cited. But it is said the property is registered in the name of an incorporated body, *viz.,* The Chinese Nationalist Society of Victoria, which body has ratified and adopted the act of defendants, Low Yee Quan and Way Hon. No such ratification could be effective unless the relationship of Landlord and Tenant existed between the Victoria body and plaintiff Company at the time the distress warrant was issued and executed. No such relationship in fact existed. Plaintiff never had any dealings with the Victoria body and I do not think it appears in evidence that plaintiff ever knew the Victoria body existed. But it is said the body referred to in evidence as The Headquarter acted as agent for the Victoria Society and that because plaintiff Company, previous to 1926, offset printing accounts due it from The Headquarter by credits for rent an implied contract of lease resulted between the Victoria Society and plaintiff. But in fact The Headquarter never acted as agents for the Victoria Society and never intended to so act. What The Headquarter really did was to ignore the Victoria Society, as a corporate entity altogether, and to deal with the property registered in its name, as under Headquarter control as the alleged executive of the unincorporated body and to regard its members as members of the body of which they claimed to be the executive. These Victoria members, as individuals, may possibly have been members of The Chinese Nationalist League of Canada but the corporation in Victoria never was such a member. Up to 1920, it had no power to become a member of an incorporated body since the statute under which it was incorporated did not authorize such action. The

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Act was amended in 1920 giving such authority if proper steps were taken pursuant to by-laws passed in that behalf. So far as the evidence shews, no such by-laws were passed and no action of any kind, to effect such membership or co-operation, was ever taken by the Victoria Society. The Headquarter had no power to make contracts for the Victoria Society, was never authorized to do so and never intended to do so. Neither the Victoria Society nor The Headquarter, or any of the members of the latter body, ever thought of making a contract of lease, express or implied, between the Victoria body and the plaintiff Company. This phase of the matter, I hold on the evidence, to be an afterthought. It is not, I think, seriously contended that a lease can be implied as existing between The Headquarter as such and plaintiff. That contention would be open to the same objection that The Headquarter is not an incorporated body. If it is argued that such lease existed between plaintiff Company and some member or members of The Headquarter, then there is no evidence who these individuals are or that the distress warrant was issued on their behalf or has since been ratified by them. Further, it is clear, on the evidence, that such individuals would not be entitled to the reversion, an essential requisite to the levying of a lawful distress: Halsbury's Laws of England, Vol. 11, p. 124.

I assess the damages at $500 but certify that the action was a proper one to bring in the Supreme Court. The plaintiff is to have its costs according to the appropriate scale as fixed by the tariff of costs.

Judgment for plaintiff.

COLWOOD PARK ASSOCIATION LIMITED v. CORPORATION OF THE DISTRICT OF OAK BAY.

MCDONALD, J.

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COLWOOD PARK ASSOCIATION LIMITED v. CORPORATION OF OAK BAY

Payment—Municipal corporation—By-law—Licence fee for race meeting—Action to recover back—R.S.B.C. 1924, Cap. 179, Sec. 54 (133).

The defendant Corporation passed a by-law under the Municipal Act fixing the fee for a horse-racing licence at $1,500. After the solicitor for the municipality had written the plaintiff demanding payment, the solicitor for the plaintiff replied that "in view of the peremptory and unconditional demands set forth in your letter, our clients are compelled to pay this licence fee and we herewith enclose our marked cheque for the sum of $1,500 and would ask you to kindly issue this permit and licence."

Held, in an action to recover back the fees so paid, that the money having been paid voluntarily under a mistake of law, cannot be recovered, even if the by-law were *ultra vires.*

Cushen v. *City of Hamilton* (1902), 4 O.L.R. 265 followed.

Statement

ACTION to recover from the defendant Municipality the sum of $1,500 paid in August, 1927, as its fee for procuring a licence to carry on a race meeting in the Municipality. Tried by MCDONALD, J. at Victoria on the 18th of June, 1928.

Bass, for plaintiff.

Mayers, and *H. G. Lawson,* for defendant.

19th June, 1928.

Judgment

MCDONALD, J.: The plaintiff sues to recover from the defendant Municipality the sum of $1,500 paid in August, 1927, as the fee for procuring a licence to carry on a race meeting in the Municipality. It is contended that the municipal by-law under which the licence fee was imposed was, what would have been called by the late Mr. Shepley "a child of municipal sin." To put it briefly, it is contended that section 54 (133) of the Municipal Act under which the by-law was passed, had been repealed by the Horse-racing Regulation Act of 1924. I have concluded that it is not necessary to reach a decision on this point, as I am satisfied that in any event, the action cannot succeed.

What happened was this: After the amending by-law was

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passed raising the fee to $1,500, the plaintiff's solicitor wrote to the defendant, as follows:

" . . . They had intended paying it under protest in the hope that they would have an opportunity of appealing before your Council and laying the case before them for reconsideration. However, in view of the peremptory and unconditional demands set forth in your letter of August 16, our clients are compelled to pay this license fee and we herewith enclose our marked cheque for the sum of $1,500, and would ask you to kindly issue this permit and licence."

This letter was written in reply to a letter from the Municipality insisting that the plaintiff, if it wished to carry on horse-racing in the Municipality, "pay forthwith and unconditionally the permit fee of $1,500 in accordance with the by-laws of the Municipality."

Judgment

It seems to me clear that the case falls exactly within the decision of the Court of Appeal for Ontario, in *Cushen* v. *The City of Hamilton* (1902), 4 O.L.R. 265, relied upon by Mr. *Mayers,* counsel for the defendant. Mr. *Bass* relies upon several English cases, all of which are dealt with and distinguished by Osler, J.A. in the above-mentioned case. The plaintiff's position is stated in a nutshell by Maclennan, J.A., in the same case at page 270, where, speaking of the plaintiff in that case, his Lordship said:

"The plaintiff knew all the facts, and that the fee was demanded only by reason of the by-law. He knew that if the by-law was valid he was bound to pay, and if not that he could refuse."

It follows that the money having been paid voluntarily under a mistake of law, cannot be recovered, even if (and as at present advised I am certainly not prepared to hold) the by-law were *ultra vires.*

In view of the conclusion reached it is not necessary to deal with the strong argument presented by Mr. *Mayers,* that in any event this action cannot succeed by reason of the terms of section 185 of the Municipal Act, which prohibits the bringing of any such action, unless and until the by-law in question shall have been quashed and one month's notice given of intention to sue.

Action dismissed.

ADAIR *ET AL.* v. TILTON *ET AL.*

MACDONALD, J.

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ADAIR *v.* TILTON

Lease—Rent—Action for—Damages for breach of covenant—Counterclaim for deceit—Lessor's statement as to crops previously grown—Proof.

The plaintiffs brought action to recover the rent due under a lease of a farm and other moneys owing and the defendant counterclaimed alleging that he had been induced to enter into the lease by the untrue statements of the lessor that the lands had produced a crop of a certain quantity per acre, and that he was entitled to recover damages in an action for deceit. It was held the plaintiffs were entitled to recover and that the lessees had failed to discharge the burden on them of proving that the lessors had made such a representation.

Statement

CONSOLIDATED ACTIONS, the first brought on the 1st of November, 1927, to recover rent overdue under a lease of farm property, and moneys due for rent of machinery and for goods supplied, the second brought on the 6th of January to recover a further balance due for rent on the farm. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 29th of March, 1928.

D. Donaghy, and *J. Ross,* for plaintiffs.
Read, for defendants.

29th June, 1928.

Judgment

MACDONALD, J.: In these consolidated actions, it appears that, in February, 1927, the plaintiffs leased to the defendants for three years, with option of renewal for a further term of two years, farm property in Hatzic District, B.C., at a yearly rental of $1,720, payable quarterly. The lease contained the usual covenants under the Short Form of Leases Act, also special covenants and provisions. It stipulated that the lessees should take care of and increase, through breeding, the pure bred Guernsey cattle and grade cattle on the farm. The lessees also agreed to pay a yearly rental of $150 for the use of implements and machinery in quarterly payments. The first payment of rent became due on the 1st of March, 1927, and was not paid until some time later. Friction arose between the parties shortly

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after the defendants took possession of the property in March, 1927. Before executing the lease, the defendants had ample opportunity of examining the land and making due enquiries but now contend that they were deceived, in leasing the property, by the statements of the planitiffs. They were aware of the alleged deception, long before the plaintiffs commenced their first action, on the 1st of November, 1927, to recover the rent overdue and other moneys claimed to be owing by the defendants. Defendants, after taking possession of the property and continuing in possession, dealt with the produce derived therefrom and, as it were, accepted the situation. I find that they are, upon the facts, now prevented from obtaining a rescission of the lease and the redress of the defendants, if any, is confined to an action for deceit. Before dealing with their claim in this respect, I will determine their liability to the plaintiffs and then consider their counterclaim.

In the first action plaintiffs sued for goods supplied $178.30, two quarterly payments of rent for the land $860, and rent of the machinery $112.50, in all, amounting to $1,150.80. This claim is not disputed by defendants.

Then, in the second action, commenced on the 6th of January, 1928, the plaintiffs sought to recover the balance of the quarterly rent of $430 due on the 1st of December, 1927, after crediting an amount realized through distress. After giving this credit, the balance was incorrectly stated in the particulars as being $197.73. It should have been $237.77 less a disallowance of $21, being a charge by the bailiff, for a second man in possession for seven days at $3 per day, thus leaving the proper credit, on the amount due for rent, as $216.77 and the net balance of the three months' rent, owing by the defendants in this respect, as $213.23. The three months' rent owing for machinery at $37.50 was admitted and I allow a claim of $48 for wood.

Plaintiffs also claimed damages against the defendants. The first item being one of alleged damage to the well in the premises, through defendants negligently allowing it to be polluted and thus breaking their covenant to leave such well in like condition to that existing at the time of the execution of the lease. I think liability was established and I allow the damage

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at $50. The second item is one for neglect and loss with respect to a pure bred calf called "White Faced Beauty." This claim was not fully outlined in the pleadings but no prejudice was occasioned to defendants thereby. The complaint was founded upon the breach by defendants of their special covenant as to the care and breeding of the pure bred Guernsey cattle. I think, upon the facts, the defendants are liable and fix the damage at $150.

Plaintiffs, in addition, claimed $900 for what is inaptly termed "general damages." Particulars were not demanded nor delivered, but the statement of claim refers to some of the matters of complaint, and alleged breach on the part of the defendants, without segregating them. Other grounds of complaint, outside the pleadings, were, however, developed at the trial and apparently they narrowed down to allegations, that defendants caused damage to the plaintiffs by introducing contagious abortion amongst their herd, failure to properly breed the cows and lack of care, causing ring-worm and a run-down condition. Plaintiffs proved liability but only partially succeeded in satisfying me, as to the extent of the damages, and should only be allowed $400. If the sums I have mentioned, as owing by defendants, be added to the damages thus allowed, they will amount to $2,049.53. There should, however, be credited to defendants the sum of $100 in respect of a silo constructed on the land to which the plaintiffs agreed to contribute, sometime after the defendants took possession, in order to assist in farming operations.

Judgment

The result is that the net amount which plaintiffs are entitled to recover is $1,949.53.

Then, as to the counterclaim, it is, as I have mentioned, an action for deceit. Defendants allege that they were induced to enter into the lease through the fraudulent misrepresentations of the plaintiffs and thereby suffered damage. This cause of action "is founded not in an absolute right of a plaintiff, but in the unrighteousness of the defendant." *Vide* Pollock on Torts, 12th Ed., p. 280. Did they, in order to lease their property to the defendants, make any untrue statements, which they knew to be false or with reckless carelessness as to their truth or

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falsity? If they did, then, as Sir J. Romilly, M.R. said in *Laver* v. *Fielder* (1862), 32 Beav. 1 at p. 13:

"[The Court] exercises its jurisdiction for the enforcement of the truth, and makes a man's acts square with his words, by compelling him to perform what he has undertaken."

The defendants, in order to succeed, must not only shew the untruth of the statements, so knowingly or recklessly made by the plaintiffs, but that it was intended that the defendants should act upon them and did so to their detriment. This task, especially as to some of the alleged misrepresentations, is rendered more difficult, if the facts surrounding the execution of the lease, and the conduct of the parties thereafter, be taken into consideration.

Defendants had not made a success of farming on Lulu Island and were in arrears for rent. They sought to lease some other property and advertised that they wanted to rent a farm "capable of carrying 25 head of cows." This advertisement appeared attractive to the plaintiffs and, after some negotiations, the defendants visited the property. There was no haste displayed on either side, in concluding an agreement of tenancy nor the terms of the lease. I repeat, every opportunity was afforded to the defendants for due consideration of their position and advisability of making the change in their farming operations.

Judgment

They went into possession shortly after execution of the lease and soon, as they now state, became dissatisfied. They rued their bargain, but took no steps to rescind their contract. Plaintiffs might rightly assume that, the defendants had no complaint, even though the venture was not proving as successful as they expected. They were constantly in arrears for rent but attached no blame to the plaintiffs for this situation. The tone of the correspondence during the summer, and up to the time when plaintiffs commenced their first action, leads to a conclusion that no cause of complaint against the plaintiffs really existed in the mind of either of the defendants during that period. At any rate, if it existed, there was no valid reason for non-disclosure. I particularly refer, in this connection, to Exhibits 17, 18, 19 and 20 as shewing that there was no suggestion from defendants as to any complaint or right of redress.

While, on the contrary, the plaintiffs were pressing for payment of the overdue rent, apparently in ignorance that, if they commenced action, they would be met with a counterclaim for damages far in excess of the rent due or accruing due.

When plaintiffs eventually commenced their first action the damages to which defendants claimed to be entitled were elaborated and specified in detail and repeated in a letter from their solicitors.

As to some of the alleged false and fraudulent misrepresentations, they are clearly, even if made by plaintiffs, only matters of opinion and would not, if untrue, form a ground for redress, for example, the statement alleged to be made by plaintiff, Thomas Adair, that the farms were the finest land in British Columbia. Also, as to the acreage capable of being ploughed and cropped, I find that the defendants were not deceived, as to the acreage in the farms, nor as to the flooding. There are two alleged misrepresentations, however, which have given me some concern and serious consideration, that is, as to the amount of oats and hay which had been and could be grown upon the farms. This was a matter within the knowledge of the plaintiffs and material to the defendants in leasing the property. If it were stated by either of plaintiffs to the defendants, as a fact, that the farms had grown such a large crop as two tons of oats or four tons of hay to the acre, then this would most likely influence the defendants in their agreement to rent the premises. I am satisfied that crops to this extent had not been so grown by the plaintiffs and, if they made any such statements, they would be untrue. The sole question then to decide is, as to whether representations of this nature were made by the plaintiffs. There is a flat contradiction between the parties. The burden of proof rests upon the defendants of satisfying me on this point and they have failed. In coming to this conclusion, I have not applied the principle of estoppel, as being inapplicable, under the circumstances, to a right of action for deceit, if it existed. The conduct of the defendants, as previously discussed, during the summer, has militated against them and strengthened my mind in coming to a decision. Pollock on Torts, 12th Ed., at p. 284, in dealing with an action for "deceit" states that

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"There is no cause of action without both fraud and actual damage; the damage is the gist of the action"; citing *Derry* v. *Peek* (1889), 14 App. Cas. 337 and Lord Blackburn in *Smith* v. *Chadwick* (1884), 9 App. Cas. 187 at p. 198. I have also borne in mind, as to fraud, a portion of the judgment of Brett, L.J. in *Wilson* v. *Church* (1879), 13 Ch. D. 1 at p. 51 as well worthy of consideration:

Judgment

> "I must confess to such an abhorrence of fraud in business that I am always most unwilling to come to a conclusion that a fraud has been committed, and I have very strong views with regard to what is the legal definition of fraud. It seems to me that no recklessness of speculation, however great, and that no extortion, however enormous, is fraud. It seems to me that no man ought to be found guilty of fraud unless you can say he had a fraudulent mind and an intention to deceive."

There will be judgment in favour of plaintiffs for $1,949.53 and costs. The counterclaim of defendants is dismissed with costs.

Judgment for plaintiffs.

ERICKSON v. THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK AND ERICKSON.

COURT OF APPEAL

1928

June 21.

ERICKSON v. THE PREFERRED ACCIDENT INS. CO. OF NEW YORK

Practice—Parties—Order adding a party defendant at instance of defendant —Opposed by plaintiff—Discovery—Marginal rule 133—Appeal—B.C. Stats. 1925, Cap. 20, Sec. 24.

Stanley Erickson recovered judgment against Eric Erickson (his brother) in an action for damages resulting from an automobile accident. The judgment was unsatisfied and a writ of *fieri facias* was returned *nulla bona*. Eric Erickson held an insurance policy against legal liability for bodily injuries or death to one person for $5,000. Stanley Erickson then brought this action against the Insurance Company to recover the amount of said judgment and costs under section 24 of the Insurance Act. The Insurance Company applied for and obtained an order adding Eric Erickson as a party defendant and that he be examined for discovery.

Held, on appeal, reversing the decision of MURPHY, J., that the defendant Company was not entitled to have Eric Erickson added as a defendant under marginal rule 133 and that as a matter of discretion it was improperly exercised in the Court below.

Statement

APPEAL by defendant Eric Erickson from the order of GREGORY, J. of the 1st of May, 1928, dismissing an application to set aside an order adding the said Eric Erickson as a party defendant in the action. On the 16th of February, 1926, the defendant Company insured Eric Erickson against liability for bodily injuries to one person for $5,000 and in respect of one accident for $10,000. On the 21st of October, 1926, Stanley Erickson, an infant, was injured in an automobile accident, Eric Erickson being responsible for the injuries so sustained and Stanley brought action against Eric on the 11th of March, 1927, for damages and recovered judgment for $2,500 and costs. Eric Erickson failed to satisfy the judgment and a writ of *fieri facias* was returned *nulla bona*. Stanley Erickson now sues by his father and next friend, the Company, under section 24 of the Insurance Act, to recover the amount of said judgment and costs. On the 16th of February, 1928, an order was made by MURPHY, J. adding Eric Erickson as a party defendant to the action with liberty to cross-examine him for discovery.

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ERICKSON v. THE PREFERRED ACCIDENT INS. CO. OF NEW YORK

The appeal was argued at Victoria on the 21st of June, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

Craig, K.C., for appellant: The plaintiff recovered judgment against his brother and now brings action against the Insurance Company on the policy. An order was made that the defendant be at liberty to add Eric Erickson as a party defendant. On his being so added he applied to have his name struck out as a party defendant and on refusal of the order he appealed. There is nothing in the statement of claim with reference to him and the plaintiff is made a plaintiff against a defendant against whom he has nothing. We are at the same time ordered to be examined for discovery. It is wrong to add parties in order to get discovery: see *Burstall* v. *Beyfus* (1884), 26 Ch. D. 35; *Weise* v. *Wardle* (1874), L.R. 19 Eq. 171; *Farnham* v. *Milward* (1895), 2 Ch. 730. A defendant against whom no relief is claimed will not be added against his will: see *Hood Barrs* v. *Frampton, Knight & Clayton* (1924), W.N. 287; *Bank of Hamilton* v. *Winters* (1911), 16 W.L.R. 218; *Moser* v. *Marsden* (1892), 1 Ch. 487.

Alfred Bull, for respondent: We are entitled to this order under marginal rule 133: see Annual Practice, 1928, p. 246; Holmested's Ontario Judicature Act, 4th Ed., p. 561. The plaintiff first brought action against his own brother and obtained a judgment upon which this action arose so there is very good reason for exercising discretion on this application: see section 24 of the Insurance Act which gives the right to sue the Company when they cannot recover against the wrongdoer: see Holmested's Ontario Judicature Act, 4th Ed., p. 568 (last paragraph).

MACDONALD, C.J.A.

MACDONALD, C.J.A.: No doubt if the Legislature or the rule-makers had foreseen that a case of this kind would arise, provision for it would have been made; but there are no such provisions, and we cannot make rules.

We must allow this appeal.

MARTIN, J.A.

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

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this is not a case within the rule, and the fact that discretion has been exercised does not, of course, entitle the respondent to obtain the benefit of that rule if that discretion has been improperly exercised, and that it has been so exercised in this case is apparent. This is borne out in the case of *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Company* (1893), 1 Q.B. 422, where it is pointed out that the exercise of this discretion under the rule is peculiar and ought to be exercised in accordance with the principles upon which, before the Judicature Act, a plea in abatement would have succeeded or failed.

MARTIN, J.A.

The effect of the order appealed from in the present case would be to give the plaintiff an unfair advantage, not intentionally, doubtless, because no such idea, I am sure, animates the respondent, but still an unfair advantage would be obtained over the present defendant by putting him wrongfully in that position. The statute, section 24, only contemplates him as in the position of a witness.

GALLIHER, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal allowed.

Solicitors for appellant: *Craig, Parkes & Tysoe.*
Solicitor for respondent: *R. L. Maitland.*
Solicitor for respondent Insurance Company: *W. W. Walsh.*

MCDONALD, J.

1928

June 28.

RIDLEY
v.
BARCLAY

RIDLEY AND RIDLEY v. BARCLAY.

Specific performance—Injunction—Contract to cut and remove timber within two years—Sketch shewing roads for removal of timber—Not attached to contract as agreed—Dispute as to roads for removal remedied by further agreement—Verbal statement by one of the plaintiffs—Effect of, on subsequent agreement.

The plaintiffs entered into a contract with the defendant on the 17th of December, 1925, for the right to cut and remove all fir timber from his property within two years along roads shewn on a sketch to be attached to the agreement, all timber and cord-wood remaining at the expiration of the two years to be the sole property of the defendant. No sketch was attached to the agreement and in the spring of 1927, after the plaintiffs had operated for more than one year the defendant for the first time submitted a road plan to them to which they objected as it was not in accordance with their removing operations during the previous year. After negotiations, a further written agreement was entered into on the 2nd of June, 1927, whereby the plaintiffs agreed to abide by the road plan submitted upon receiving an extension until the 31st of July, 1928, for the removal of their timber. The plaintiffs continued to cut timber until the expiration of the two years under the first agreement but the defendant claimed that prior to the agreement of the 2nd of June, 1927, one of the plaintiffs stated they had finished cutting wood and this was part of the consideration for entering into the later agreement. In June, 1928, when the plaintiffs were about to remove 300 cords of wood which they had cut, the defendant ordered them off the property. In an action for an injunction to enforce their right to remove the cord-wood:—

Held, assuming the statement made by one of the plaintiffs that they had finished cutting was part of the consideration moving the defendant to extend the time for removal, as the agreement was not to be performed within a year it must be wholly in writing, and the statement cannot be set up by the defendant as a ground for repudiating the later agreement. The plaintiffs are entitled to remove the cord-wood and an injunction is the proper remedy in such a case.

James Jones & Sons, Limited v. *Tankerville (Earl)* (1909), 2 Ch. 440 applied.

Statement

ACTION for an injunction to enforce the plaintiffs' rights to remove certain cord-wood from the defendant's property. The facts are set out in the head-note and reasons for judgment. Tried by McDONALD, J. at Victoria on the 26th of June, 1928.

Beckwith, for plaintiffs.
Maclean, K.C., for defendant.

29th June, 1928.

McDONALD, J.: On 17th December, 1925, the defendant as vendor sold to the purchasers for $450 cash "the right to cut and remove all the fir timber from off section 15 Metchosin District." It was agreed that the timber should be removed within two years over and along the roads which had been shewn to the purchasers by the vendor and delineated on a sketch which was to have been attached to the agreement. As a matter of fact no sketch was attached and no sketch was shewn to the purchasers until the spring of 1927, after the purchasers had been operating for over a year. It was further agreed that all timber and cordwood remaining on the lands after the expiration of the said two years should be the sole property of the vendor.

Judgment

In the spring of 1927 when the purchasers had about 100 cords cut and ready for removal (which removal could only take place during the dry summer months) the vendor presented his road plan. The purchasers objected that this was not in accordance with the previous agreement nor in accordance with the practice which they had followed during the preceding year, and they refused to initial the plan. Negotiations then took place which resulted in a meeting in the office of Mr. *Yates,* solicitor, when a further agreement was entered into on 2nd June, 1927, whereby the purchasers agreed to use the roads as delineated on the sketch thereto attached "for the balance of the time given by Captain Barclay to haul said [*sic*] balance of wood," and it was agreed that the time to complete hauling of said wood should be extended to 31st July, 1928. It is said by the defendant and by Mr. *Yates* that prior to the signing of this agreement one of the plaintiffs stated that they had finished cutting wood, and I think I must accept this statement as correct. As a matter of fact the plaintiffs were at that time still cutting and continued cutting until the 13th of June, 1927. They then ceased cutting until sometime in August, 1927, when they again commenced cutting. About this time the defendant engaged two men to cut wood on the property and plaintiffs caused the defendant to cease this operation and on the 19th of August paid the defendant $4,

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being the actual cost of felling one tree. This tree the plaintiffs cut up into cord-wood, and they continued cutting until on or about 17th December, 1927. This cutting continued with the full knowledge of the defendant and notwithstanding a letter written by his solicitor Mr. *Yates* on 1st September, 1927, in the following words:

"Captain Barclay informed me that you have recommenced cutting cord-wood on his property at Metchosin after your statement that you were finished cutting and on the strength of which statement he extended the length of time within which you were to be permitted to haul off the balance of the wood which you had already cut.

"This statement was made by you in my presence and I drew the extension agreement on that understanding. Now if you break your word with Captain Barclay with reference to cutting, Captain Barclay is free to and intends to withdraw his consent to the extended time for hauling off the wood from his property. And I hereby notify you on his behalf that all wood cut hitherto or hereafter upon his place, by you, must be hauled off therefrom prior to the 17th of December, 1927, in accordance with the original agreement dated the 17th of December, 1925, after which date all timber and cord-wood left or remaining on the said property, namely, section 15, Metchosin District, shall be the sole property of Captain Barclay, as set forth in the said agreement.

"Therefore please govern yourself accordingly."

In June, 1928, when the plaintiffs were arranging to remove the cord-wood which they had cut, which now amounts to some 300 cords, worth $3 a cord, the defendant ordered the plaintiffs off the property and refused them the right to remove any of such cord-wood. The plaintiffs seek an injunction, insisting upon their right to remove the cord-wood which they cut prior to the expiration of two years from the date of the original agreement.

In my opinion the plaintiffs are entitled to succeed. That an injunction is the proper remedy in such a case appears from the judgment of Parker, J., in *James Jones & Sons, Limited* v. *Tankerville (Earl)* (1909), 2 Ch. 440. The position taken by the defendant in September, 1927, and thereafter, and upon his pleadings, is, in my opinion, untenable; on the defendant's evidence the plaintiffs did not on 2nd June, 1927, agree to cut any more timber, they stated that they had finished cutting, and that could be at most a misrepresentation of fact. It could not be so for the reason that the defendant was well aware of the

position in this regard, and in any event, the defendant has not pleaded any such misrepresentation as inducing him to enter into the contract of the 2nd of June, 1927. It is contended, however, that the statement made by the plaintiffs was not a statement of fact but was an agreement to cut no more timber, such agreement being the consideration moving the defendant to extend the time for removal. Here again however, the defendant is in difficulties, because even if the evidence is admissible as to the conversation which took place in Mr. *Yates's* office (and I have admitted it subject to objection) nevertheless I am convinced that this evidence cannot be considered in this light for the reason that if such an agreement was made it is part of the agreement of the 2nd of June, 1927, which agreement was not to be performed within one year from its date and must therefore be wholly in writing. The defendant is therefore, I think, in this position, that he cannot set up the statement as a misrepresentation of fact by reason of which he would be entitled to repudiate his agreement of the 2nd of June, 1927, nor can he rely upon the statement as part of the said agreement. The plaintiffs have lost by reason of the act of the defendant, practically the whole of the month of June and will not be able to remove the cord-wood before 31st July without incurring a considerable amount of extra expense. The injunction will therefore go and will continue until the 31st of August, 1928, unless the defendant prefers that damages be assessed, in which case the plaintiffs will have their damages and will be allowed until the 31st of July to remove their cord-wood; defendant to declare his election on or before Tuesday, the 3rd of July, 1928. If there is to be an assessment of damages there will be a reference to the registrar to ascertain the amount. The plaintiffs will have the costs of the action including the costs of the motion for an *interim* injunction.

Judgment

Judgment for plaintiffs.

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KIPP v. SIMPSON

KIPP v. SIMPSON.

Crown grants—Description of lands—Described on plans annexed—Plans shew both sections bound by river—Plans to govern.

The defendant claims title to certain lands through G. whose Crown grant of the 7th of August, 1891, describes the land as "all that parcel or lot of land situate in New Westminster District, said to contain 84 acres, more or less, and more particularly described on the map or plan hereunto annexed and coloured red, and numbered the south-east quarter of section one (1), Township twenty-three (23) exclusive of the Indian Reserve on the official plan or survey of the said New Westminster District." The plaintiff claims title under a Crown grant to S. of the 19th of June, 1893, to land said to contain 150 acres . . . and more particularly described on the map or plan hereunto annexed and coloured red, and numbered north-east quarter of section one. . . . ." The respective plans are attached to the Crown grants and shew the south-east quarter as bound on the north by the south bank of Vedder River and the north-east quarter as bound on the south by the north bank of the Vedder River. A corrected plan made in 1927 shews that a small point of land (containing 4.84 acres and being the land in question herein) on the south side of the river extended north of the true section line dividing the north-east quarter section from the south-east quarter section. The defendant had actually occupied this point of land since 1921 and had made improvements thereon in the way of buildings. In an action for possession of the 4.84 acres as being a portion of the north-east quarter section it was held that where there is a conflict between the descriptions and the plans the descriptions prevail and the plaintiff is entitled to judgment.

Held, on appeal, reversing the decision of HOWAY, Co. J., that the plans shew that the river was adopted in both cases as the boundary of the quarter-sections. Neither quarter-section is a full quarter-section and while the quarter-sections are referred to in words in the deeds, it is clear on the true construction of them that the plans were to govern.

Statement

APPEAL by defendant from the decision of HOWAY, Co. J. of the 9th of December, 1927, in an action to recover possession of a certain strip of land adjoining the south bank of the Vedder River. The plaintiff claims he is the registered owner under a certificate of indefeasible title to lots 1 and 2 being a part of the north-east quarter, section 1, township 23, New Westminster District, said lots 1 and 2 including the strip of land in question. The defendant claims that this strip of land being on the south side of the Vedder River is a portion of the south-east quarter

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of said section 1. The defendant further claims that he and his predecessors in title have been in continuous possession since 1891 and the plaintiff is barred by the Staute of Limitations.

The appeal was argued at Vancouver on the 26th and 27th of March, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. A. MacInnes, for appellant: The land in question is a rocky promontory projecting out on the south side of the Vedder River. Hugh H. Gemmell who was engaged in lumbering in that district obtained a Crown grant in 1891 for the south-east quarter of section 1, township 23, on the assumption that this quarter-section was bounded on the north by the Vedder River and included the land in question. Through *mesne* conveyances this land is now held by Simpson. There has been continuous occupation since 1891 and the plaintiff is barred. The southerly boundary of the north-east quarter of section 1 is the Vedder River. The learned judge relied on *Mellor* v. *Walmesley* (1905), 74 L.J., Ch. 475 and *Eastwood* v. *Ashton* (1913), 83 L.J., Ch. 263, but the latter case was reversed in the House of Lords (see (1915), A.C. 900): see also *Seippel Lumber Co.* v. *Herchmer* (1914), 19 B.C. 436.

Locke, for respondent: It is the description that governs. There is no colour on the map attached to the Gemmell grant north of the straight line dividing the two quarter-sections. The cases appellant refers to are overruled. Where there is a true and adequate description of the property it should be adopted: see *Cowen* v. *Truefitt, Limited* (1899), 2 Ch. 309 and *Eastwood* v. *Ashton* (1915), A.C. 900 at p. 914. As to the certificate of indefeasible title the onus is on the defendant to shew continuous possession for the period claimed; see *Sherren* v. *Pearson* (1887), 14 S.C.R. 581 at p. 585; also Armour on Titles, 4th Ed., p. 348.

Cur. adv. vult.

6th July, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The defendant claims title through Hugh H. Gemmell, a Crown grantee. The deed describes the land grant to Gemmell as follows:

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"All that parcel or lot of land situate in New Westminster District, said to contain 84 acres, more or less, and more particularly described on the map or plan hereunto annexed and coloured red, and numbered the south-east quarter of section one (1), Township twenty-three (23) exclusive of the Indian Reserve on the official plan or survey of the said New Westminster District."

The plaintiff claims title under a grant from the Crown to John Shardelow of contiguous land,

"said to contain 150 acres, more or less, and more particularly described on the map or plan hereunto annexed and coloured red, and numbered north-east quarter of section one (1), Township twenty-three (23) on the official plan or survey of the said New Westminster District."

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The plans mentioned are attached to the Crown grants, that of Shardelow as so coloured being north of Vedder Creek, and that of Gemmell south of that creek. A small point of land in Shardelow's description as coloured on the map extends into the creek and slightly south of what is marked as the southerly section line. A small point (being the land in question herein) of Gemmell's land extends slightly north of the said section line. Shardelow's land, according to his map had for its southerly boundary the said creek and the land of Gemmell according to his map had for its northerly boundary the said creek. These maps do not conflict in any way, but because the section line takes in this small point of Gemmell's—now the defendant's—land, north of the section line, the defendant has claimed it. That is the dispute in this action.

Several authorities were cited to us by plaintiff who now owns the Shardelow land, which are said to have a bearing upon the dispute. The learned County Court judge felt himself bound by *Eastwood* v. *Ashton* (1913), 83 L.J., Ch. 263, and *Mellor* v. *Walmesley* (1905), 74 L.J., Ch. 475. These cases, in my opinion, have been erroneously applied by him here. In *Eastwood* v. *Ashton,* there was an accurate description in words and the plan was rejected as *falsa demonstratio.* Here the opposite is true; the plans shew that the river was adopted in both cases as the boundary and these descriptions are accurate. Neither quarter-section is a full quarter-section, and while the quarter-sections are referred to in words in the deeds, it is, I think, clear on the true construction of them that the plans were to govern.

The pleadings do not properly state the true issue but the

learned judge below stated that he would amend if necessary, but no amendment was actually made. We allow an amendment since the issue on which this judgment is founded was fully gone into by both parties in the Court below and I am satisfied that no injustice is occasioned by the amendment.

The appellant is entitled to the costs of the trial and appeal. There will be no costs of the motion to this Court for leave to amend as aforesaid.

MARTIN, J.A.: This is an action to obtain possession (*vide* Odgers on Pleading, 9th Ed., p. 132; Bullen & Leake on Pleading, 8th Ed., 936, and Supreme Court rule 254) of two certain parcels of land which the plaintiff claims to be entitled to under a certificate of indefeasible title dated 19th June, 1927, which land it is alleged the defendant wrongfully took possession of in 1923 and still retains. The defendant in his amended defence justifies his possession under a grant from the Crown of 7th August, 1891, to his predecessors in title and relies also on the Statute of Limitations, Cap. 145, R.S.B.C. 1924, and on the exception in section 37 (2) of the Land Registry Act, Cap. 127, R.S.B.C. 1924, *viz.*:

"(2) Every certificate of indefeasible title issued under this Act shall be void as against the title of any person adversely in actual possession of and rightly entitled to the land included in the certificate at the time of the application upon which the certificate was granted under this Act, and who continues in possession."

MARTIN, J.A.

He also alleges, paragraph 2, that the said two lots

"are not situated on the lands described in paragraph 2 of the plaint herein but on the contrary are situated on part of the S.E. ¼ of section 1, township 23 on the official plan or survey of the New Westminster District."

This allegation is framed, apparently, to bring the defendant within the scope of the exception from a certificate allowed by subsection (*d*) of section 38, which is relied on, *viz.*:

"No action of ejectment or other action for the recovery of any land for which a cerificate of indefeasible title has issued shall lie or be sustained against the registered owner named in the certificate for the estate or interest in respect of which he is registered, except in the following cases, namely:

"(*d*.) The case of a person deprived of any land improperly included in any certificate of title of other land by wrong description of boundaries or parcels."

It is difficult to know exactly what this indefinite and loose

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language means or includes, but in the case at Bar the "improper inclusion" by "wrong description" is limited and specified by the allegation above quoted, *viz.*, that the lots in question are part of the south-east quarter of section 1, and not of the north-east quarter thereof as alleged in the plaint and stated in the certificate. This is, therefore, the only "wrong description" that is open on the pleadings to the defendant to rely on, and it is a question of fact which is clearly established in the plaintiff's favour by the production of their respective Crown grants and by the evidence of the surveyor, Humphrey, who made the recent survey (in May, 1927) later registered as map 4118 (now before us as a blue print—Exhibit 1) and on which the certificate was issued to the plaintiff as already noted. It was not, indeed, submitted to us by appellant's counsel that the present lots 1 and 2 were, in fact, to the south of the section line of the original "official survey of New Westminster District" forming the boundary between the two quarter-sections and therefore necessarily within the north-east quarter, but his submission was that the south bank of the Vedder River was the boundary line in accordance with the true meaning of the Crown grants (irrespective of the section lines) as set up in paragraph 5 of the notice of appeal, *viz.*:

"The learned trial judge should have found, as the fact is that the plaintiff had failed to establish any title or right to any lands south of the Vedder River."

But that is an entirely distinct question which is not raised by the said amended defence and therefore not open to the appellant in his invocation of said subsection (*d*).

Then as to the first exception under 37 (2), *supra*, respecting adverse actual possession. The defendant has, in this case, no answer to the plaintiff's claim if the certificate she relies on covers the land in dispute because subsection (1) of said section 37 declares that:

"Every certificate of indefeasible title issued under this Act shall be received in evidence in all Courts of justice in the Province without proof of the seal or signature thereon, and, so long as it remains in force and uncancelled, shall be conclusive evidence at law and in equity, as against His Majesty and all persons whomsoever, that the person named in the certificate is seised of an estate in fee-simple in the land therein described against the whole world, subject to . . . ."

Of the exceptions in that section that follow the only one set up by defendant is (2) already cited.

In proof of her case the plaintiff put in evidence her said existing certificate of title (Exhibit 10) exactly covering the land described in her plaint and in the said registered map therein referred to as No. 4118, and the evidence of the surveyor Humphrey, who made that survey and map, identifies the property in dispute on the ground with that described in the plan in the registry. This evidence establishes a "conclusive" case at "law and in equity," as the statute puts it, "against the whole world," specially including even His Majesty, in the plaintiff's favour in the present circumstance unless the sole exception of adverse possession she sets up under subsection (2) has been established. That is a pure question of fact, and no sound reason has been advanced for disturbing the finding of the trial judge on that point in favour of the plaintiff.

MARTIN, J.A.

Much of the considerable body of evidence on the point of conflict between the Crown grants is, in my opinion, irrelevant, in view of the said express terms of the statute and it is not open to us upon this record as it now stands to go behind the certificate and enquire into the extent of the area that was originally included in those quarter-sections under their respective Crown grants, since the effect and the "strength of title" of the valid existing certificate is, upon the real issues raised by the pleadings, that when it was established that the parcels in dispute were in fact part of the north-east quarter there was an end of the case on that head.

The submission on the Statute of Limitations, apart from possession, is not, I think, one of substance in the circumstances —*cf.*, Armour on Titles, 4th Ed., p. 348.

It would follow from this ordinarily that the appeal should be dismissed, but on the matter being further spoken to, on the 3rd instant, the appellant's counsel submitted something not raised upon the argument of the appeal, *viz.*, that the learned trial judge had in effect dealt with the case at large and given a direction at the trial that all necessary amendments of pleadings should be made upon that basis and after a consideration of His Honour's remarks at those references I think this submission is

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correct, though it is to be regretted that the formal amendments were not made as they ought to have been, pursuant to the oft-repeated direction of this Court in that respect, nor is there any mention of them in the reasons of the learned judge nor even in the formal judgment, which is therefore defective as entered upon the original pleadings.

MARTIN, J.A.

This Court being agreed, however, after hearing counsel as aforesaid, that we should now decide this appeal after directing all proper amendments to be made to cover the other issues than those I have dealt with, I do not feel justified in dissenting from the view of my learned brothers that in the very unusual circumstances the appeal should now be allowed.

As a matter of precaution I add that the observations in Bullen & Leake, *ante* pp. 936-7, relied upon by appellant's counsel, on the effect of a plea of possession in England, must in this Province be read subject to our special statutory provisions (respecting the evidentiary and other effect of certificates of indefeasible title) hereinbefore considered.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.

MCPHILLIPS and MACDONALD, JJ.A. agreed in allowing the appeal.

Appeal allowed.

Solicitor for appellant: *E. S. Davidson.*

Solicitor for respondent: *J. H. Bowes.*

WOOD v. W. H. MALKIN CO. LIMITED.

MACDONALD, J.

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WOOD v. W. H. MALKIN CO.

Arbitration—Contract for sale of goods—Provision for arbitration in case of differences—Award—Finality—Arbitration Act—Legal misconduct—Order of giving evidence—Splitting of case—Materiality—Power of Court to consider evidence—Onus—R.S.B.C. 1924, Cap. 13, Sec. 14(2).

As to parties being bound by an arbitration when they agree to abide by the result, a distinction is to be drawn between parties generally referring their differences arising out of a contract and a case where a specific question of fact or law is submitted. In the former case when the arbitrator has failed to follow the recognized rules of law the award will be set aside.

The contract between the parties refers to "arbitration" without outlining the procedure to be adopted with respect to an arbitration, so this term of the contract must be treated as a "submission" and the Arbitration Act and the Schedule thereto becomes applicable, therefore under section 14(2) where the arbitrator has misconducted himself, or the arbitration, or award has been improperly procured, the Court may set the award aside.

In an arbitration as to the loss suffered by a seller of coffee, because of its non-acceptance by the buyer, on motion to set aside the award, objection was taken that the seller did not prove as part of his case, that the coffee tendered was in accordance with the contract and the arbitrator erred in allowing him to give evidence as to the quality of the coffee after the buyer had called his witnesses on the point.

Held, that there was error in allowing the seller to "split" his case, yet as he had exercised his discretion in the matter, and no substantial injustice was occasioned thereby the course adopted did not invalidate the award.

Whether the Court has power under its inherent jurisdiction to set aside an award, depends upon whether it is "bad on its face" or on some ground which is more or less an extension of the same principle.

The Court has the right to consider the evidence adduced before the arbitrator to determine if there was "legal misconduct" on his part which would be a ground for setting aside the award.

Statement

MOTION to set aside an award. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. at Vancouver on the 27th of June, 1928.

Davis, K.C., for Wood.
Griffin, for Malkin Co. Limited.

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WOOD v. W. H. MALKIN CO.

12th July, 1928.

MACDONALD, J.: On the 7th of September, 1926, I. A. Wood, by written contract, sold to the W. H. Malkin Co. Ltd. 300 bags of green coffee. It was to be "Santos," coffee of a quality, capable of fulfilling specified tests and be genuine "bourbons" from Dumont Fezenda. Upon coffee being tendered, in pursuance of the contract, to W. H. Malkin Co. Ltd., it was refused. Wood then entered suit against Malkin Co. to recover damages, arising out of its alleged breach of the contract. Malkin Co. thereupon applied for a stay of proceedings in the action, and invoked the arbitration provisions of the contract, reading as follows:

"Any other differences which cannot be adjusted satisfactorily through the mediation of the above shall be submitted to arbitration, and both buyer and seller agree to abide by the above decision without redress."

Upon application to the Court, under the Arbitration Act, Cap. 13, R.S.B.C. 1924, *W. S. Deacon,* Barrister-at-Law, was appointed arbitrator and, after a lengthy hearing, made his award allowing Wood $2,292.22, being the difference between $9,604.98 which was the price agreed to be paid for the coffee and $7,314.76 being the net amount realized on the resale of such property. Malkin Co., being dissatisfied with this result, seeks to have the award set aside.

Judgment

It is contended by Wood that Malkin Co. are without redress and that the "decision" of the arbitrator is final and binding and should not be set aside. It being, however, conceded that, if a mistake of law or fact appeared on the face of the award, then it could be successfully attacked. As to parties being bound by an arbitration; in principle, it would appear that they might so elect, but the question is, whether an agreement of this nature should not be clear and explicit, having reference to a specific matter. It should not leave any doubt whatever as to the intention of the parties to oust the jurisdiction of the Court. An agreement, not to appeal, was held in *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q.B.D. 314 as binding upon the parties who had entered into an agreement of reference, containing such a provision. The arbitration, however, in that case, was based upon an order, made by consent, in the action. It did not arise, as here, through an application to utilize the Arbitration Act. It was thus

similar to the course pursued in *In re West Devon Great Consols Mine* (1888), 38 Ch. D. 51 where the consent of counsel not to appeal became binding upon the parties. I think a distinction is thus to be drawn between parties generally referring their "differences" arising out of a contract and a case where a specific question of fact or law is submitted to a tribunal of final determination. This position is emphasized in *Parsons* v. *Brixham Fishing Smack Insurance Company Limited* (1918), 118 L.T. 600 where all matters in dispute, connected with a general average contribution in respect to a marine policy of insurance, were referred to arbitration. By the submission, the parties agreed that they would "in all respects abide by, observe, perform and obey the said award so to be made and published." The Court distinguished and refused to follow, on the facts, *In re King and Duveen* (1913), 2 K.B. 32, 108 L.T. 844. Lush, J. referred to that case as follows (p. 603):

"The question is, have these parties agreed within the meaning of that decision to refer a specific question of law? I have come to the conclusion that they did not. The operative part of the submission does not go so far. It seems to me that we should be unduly stretching the decision in *King* v. *Duveen* (*supra*) if we were to hold that it applies when all matters in dispute are referred. The principle of that case does not apply where the submission takes that form, and in making his award the arbitrator pays no attention to recognized rules of law. I think the award should be set aside."

Judgment

Compare, Sankey, J., p. 603:

"Even if the arbitrator had been wrong in law his finding could not be impeached. Can it be said that a specific question was submitted in the present case? What was in fact submitted? The operative part of the agreement expressly refers to 'all matters in difference between the parties hereto in reference to the said claim for a general average contribution by the assurer against the society.' That is not only not a specific question, but a question of the most general character. Nor can I see in the award of the umpire any answer to any specific question. I agree that the award must be set aside with costs."

On this point, it is further to be considered that the provisions in the contract between the parties, simply refer to "arbitration," without outlining the procedure to be adopted with respect to an arbitration. So it became necessary to treat this term of the contract as a "submission" and thereby to invoke the provisions of the Aribtration Act and the schedule to that Act thus became applicable. It contains a provision, even

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stronger in its terms than the one in question, as to the right of appeal or reversal of the award being destroyed. It reads as follows:

"(h) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively."

Notwithstanding such provision, it is not, and could not be successfully, contended that sections 13 and 14 of the Act would not apply to an award made thereunder. In other words, the legislation enabling a party to obtain arbitration should be applied in its entirety. This would mean that under said section 14, subsection (2)

"where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."

I think this legislation is applicable to the arbitration and award in question. It is to be borne in mind that the "misconduct" referred to has been construed as "legal misconduct." The question then to be decided is, whether Malkin Co. have shewn facts, bringing the award within the purview of this portion of the Act, as to setting it aside or can accomplish this end through the inherent jurisdiction of the Court.

Judgment

Amongst the grounds taken in support of the application, to set aside the award, it was contended by Malkin Co. that Wood had failed to establish his right to damages for rejection of the coffee, as he did not prove as part of his case, terming it such, that the coffee tendered, was in accordance with contract.

It was further submitted that Wood, having failed at the outset to afford such proof, the arbitrator erred in allowing him to give evidence, as to the quality of the coffee, after Malkin Co. had called witnesses on the point. It was complained that this course enabled Wood to split his case, to the prejudice of Malkin Co. The evidence taken before the arbitrator, without undue discussion, satisfied me that the opinion was prevalent in the mind of the arbitrator, at the close of the evidence-in-chief by Wood, that the onus did not rest upon him to shew that the coffee was in accordance with the contract. That it is requisite for a party, claiming damages for non-acceptance of goods, to shew that they answer the description, under which they are

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sold, is supported by abundant authority. *Vide* on this point *Shand* v. *Bowes* (1876), 1 Q.B.D. 470; (1877), 2 App. Cas. 455. Where the purchaser had agreed to purchase rice to be shipped during certain months and the seller had shipped a small portion of the goods a few days after the time specified. Seller could thus not shew shipment, according to the contract, and failed to recover damages. Compare Blackburn on Sale, 3rd Ed., p. 229 and cases there cited. In *Hayden* v. *Hayward* (1808), 1 Camp. 180, where a riding habit had been ordered by the defendant and rejected, counsel for the defendant contended that it was incumbent on the plaintiff to prove that the riding habit was made in accordance with the order, while the opposite view, as to where the onus rested, was taken by counsel for the plaintiff. Sir James Mansfield, C.J. was of the opinion "that, under the circumstances of this case, it behoved the plaintiff to prove, that the habit was made agreeably to the order, and that as he failed in this proof, the defendant was entitled to a verdict."

Considerable argument was presented on this question of onus and as to the splitting by Wood of his case. I think the submission made by counsel for Malkin Co., on both these points, was well founded. The difficulty which arises is, as to the remedy which should be afforded. If it had been a jury trial, I am satisfied that Malkin Co. would have been entitled to a new trial, under the circumstances. The prejudice which is created in a jury trial, by the right to begin, being improperly adjudicated upon by the Court, is referred to by Pollock, C.B. in *Ashby* v. *Bates* (1846), 15 M. & W. 587 at pp. 593-4 as follows:

Judgment

"The other question then arises, what is to be the effect of that right having been taken from the plaintiffs by the learned judge at the trial? It unhappily still remains of great importance to the administration of justice by a jury, that the right to begin should be correctly adjudicated on; for all who are conversant with those trials at Nisi Prius, in which the address of counsel may materially affect the result, well known that the issue often ultimately depends on the decision of the question, which party has a right to begin, and in such cases, the erroneous ruling of a judge on that subject should be corrected by the Court *in banc*. The increasing intelligence of juries may, ere long, render motions on this ground needless; but we cannot yet affirm that any erroneous impressions created in their minds in the course of a cause can be easily set right by the summing up of the judge. In some cases the right to begin may properly be matter for the judge's discretion, while there are others in which it is of the utmost importance that the suitor, who, in point of practice, has the right to begin, should

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exercise that right accordingly. It appears to me, that, in this case, the plaintiffs were entitled to begin; but that, by miscarriage at Nisi Prius, they were deprived of that right; and we think it possible that their case may have been injuriously or materially affected in consequence. We therefore think that there ought to be a new trial, in order that they may fully exercise that right."

Alderson, B. expressed doubt as to whether a new trial should be granted through the plaintiffs being prevented from beginning and an advantageous position thus being obtained by the defendants; but concluded, on the whole, to agree with Chief Baron Pollock. Rolfe, B. concurred, with considerable reluctance, stating (p. 596): "I consider it a sort of scandal . . . that . . . the right to begin at Nisi Prius should ever be made *per se* a ground for granting a new trial." He thought it would have been much better to have laid down some general rule that the discretion of the judge on such a point should be conclusive. He was dealing solely with the situation in a jury trial. Platt, B. expressed himself as not adverse to applications of this nature but was also discussing the matter from the same standpoint. I think, even assuming that the case has been "split" that a new trial should not be granted where the trial is before a judge, without a jury, unless the course pursued has occasioned substantial injustice. Upon the arbitration, at the conclusion of the evidence in chief by Wood, I think it was common ground, that Wood had only proved the contract coupled with rejection of coffee, tendered as fulfilling the contract. He had not proved that the coffee did answer the description in the contract. I am strengthened in this conclusion by a paragraph in the affidavit of Mr. *Ghent Davis,* one of the counsel for Wood, sworn on the 5th of June, 1928, as follows:

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"The letter of November 24th, 1926, referred to the third question of law set out in the summons herein was not put in to shew that the coffee accorded with the contract but that letter with another letter of earlier date were both put in to shew that Malkin & Company Limited had rejected the coffee in question."

There would have been no splitting of the case if, accepting this position, as being correct, counsel for Malkin Co. had refrained from calling any evidence. He did not pursue this course, however, but accepted the onus of shewing such lack of fulfilment or, in other words, began on this branch of the arbitration,

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instead of Wood being required to do so. Then Wood was allowed to give evidence in reply and in turn Malkin Co. afforded rebuttal evidence. While the course thus adopted was irregular and resulted in a splitting of the case, I think that the arbitrator, having exercised a discretion in the matter, it does not invalidate the award. I do not think that the way in which the hearing was conducted, occasioned substantial injustice. Numerous authorities might be cited dealing with this question, but it will suffice to refer to portions of the judgment in *Wright* v. *Wilcox* (1850), 19 L.J., C.P. 333 at p. 335. Maule, J. in the course of the argument, had queried counsel as follows: "Is there any case in which a new trial had been granted, on the ground of the admission of evidence in reply?" And the counsel answered: "There is no case to the contrary, and a general rule should be laid down." To which proposition the learned judge said: "It may be that a general rule on the subject would work great injustice." He, in a portion of his judgment, further amplifies this statement as follows:

> "To lay down that evidence must always be offered in a particular order would lead to inconvenience, and there is no case in which the allowing it to be given at a wrong time has been held to be ground for a new trial. In deciding upon the admissibility of evidence, at a time not strictly regular, the judge must exercise a discretion, considering all the circumstances of the case."

Taylor on Evidence, 11th Ed., Vol. I., paragraphs 387 and 388; Phipson on Evidence, 6th Ed., p. 39. In this connection Baron Bayley in *Williams* v. *Davies* (1833), 1 C. & M. 464 at p. 465 said as follows:

> "Where evidence is rejected improperly it is a ground for a new trial. But have you ever known a case, where a new trial has been granted, because a judge, in the exercise of his discretion, has allowed a party to give evidence at a late period of the cause?"

I have thus come to the conclusion that the course of the hearing does not afford any ground of attack against the award.

The question then arises, whether it should be set aside on other grounds. If the inherent jurisdiction of the Court is sought to be applied, then the power, to set aside the award, depends upon whether it is "bad on its face," or on some ground which is more or less an extension of the same principle. *Vide* Russell on Arbitration and Award, 10th Ed., p. 194. In Eng-

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land, the Arbitration Act, 52 & 53 Vict., Cap. 49, which is similar to our Act, has extended this power of the Court. It is pointed out in Russell on Arbitration and Award, p. 194, that there are two grounds under the Arbitration Act, for setting aside an award, which are wider than before the passage of such legislation. Section 11, subsection (2) of that Act is referred to as follows:

"Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

"This extended power must be taken into consideration in considering the decisions. The word 'misconduct' may be construed in its widest sense and need not be confined to the kind of misconduct which was necessary to justify the setting aside of an award before the Act."

In a general way the position, as to setting aside an award, and the law in respect thereof, is summed up, in the following citation from a judgment of Lord Parmoor in *Kelantan Government* v. *Duff Development Co.* (1923), A.C. 395 at p. 416:

"It has long been established, as a fundamental principle in the law of arbitration, that, so long as an arbitrator acts within his jurisdiction, and without fraud, or misconduct, an award cannot be set aside by a Court, unless there is an error in law which appears on the face of the award or in some document so closely connected therewith that it must be regarded as part of his award, or unless the umpire states that he has made a mistake of law or fact, leaving it to the Court to review his position. My Lords, in any case it would hardly be necessary to quote authorities for the above proposition, but the whole matter was fully discussed in a recent case decided in the Privy Council. *The Attorney-General for the Province of Manitoba* v. *Thomas Kelly, Ld.* (1922), 1 A.C. 268, 281. It is sufficient to quote the following passage: 'In a submission, in which the parties have agreed, that the decision of the umpire, on the matters referred to him, shall be final, the Courts will not inquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake of law or fact, leaving it to the Court to review his decision: *Holgate* v. *Killick* (1861), 7 H. & N. 418; *Fuller* v. *Fenwick* (1846), 3 C.B. 705; *McRae & Co.* v. *Lemay* (1890), 18 S.C.R. 280; *Adams* v. *Great North of Scotland Ry. Co.* (1891), A.C. 31, 39; *British Westinghouse Co.* v. *Underground Electric Rys. Co.* (1912), A.C. 673.'

"To the cases referred to in the above quotation may be added *Hodgkinson* v. *Fernie* (1857), 3 C.B. (N.S.) 189, a case referred to by Lord Haldane in his judgment in the *Westinghouse Case*."

Compare, *Attorney-General for the Province of Manitoba* v. *Thomas Kelly, Ld., supra,* at p. 281. This principle was approved

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by Parke, B. in *Phillips* v. *Evans* (1843), 12 M. & W. 309, on the ground that although, possibly, injustice may be done in particular cases, it is better to adhere to the principle of not allowing awards to be set aside for mistakes and not to open a door for inquiry into the merits, as this might lead to such an inquiry in almost every case. In the present case the umpire has not admitted any mistake, and there is no error on the face of the report.

I find that there is no error appearing on the face of the award or on any document so closely connected with the award that it must be regarded as part of the award. It is, however, contended that I should consider the evidence and determine whether it supports the conclusions reached by the arbitrator. While arbitrators are bound by the same rules of evidence as Courts of Law, *vide In re Enoch and Zaretzky, Bock & Co.* (1910), 1 K.B. 327, still it is the duty of the Court to support the award if possible—*vide Selby* v. *Whitbread & Co.* (1917), 1 K.B. 736.

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Should I consider the evidence or other material outside the award? In *Walford, Baker & Co.* v. *Macfie & Sons* (1915), 84 L.J., K.B. 2221—Halsbury's Laws of England Supplement, 1928, pp. 119 and 180—in an action respecting a contract for the sale of sugar, the Court was satisfied that, in making the award, the abritrator was influenced by the terms of an earlier contract and that the award should be set aside, on the ground that the arbitrator had allowed it to be given and had acted upon evidence, which was wholly inadmissible and which went to the root of the question submitted to him for his decision. Lush, J., at p. 2223, said:

"When it appears that an umpire allows to be given, and acts upon, evidence which is absolutely inadmissible, and which goes to the very root of the question before him, this Court has ample jurisdiction to set the award aside on the ground of 'legal misconduct' on the part of the umpire. Furthermore, this award is inconclusive and on that ground also it cannot stand."

The award in that case did not shew any error on its face but the course of the hearing and the admission of evidence objected to was proven by affidavits. Similar in that respect to the shorthand notes of evidence here presented.

Then in *Osmond* v. *Woolley* (1917), 87 L.J., K.B. 822, the

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Court refused to set aside an award on the ground of the technical misconduct of the arbitrator in not referring to or taking a certain statute into consideration. It was held that there was nothing to shew "misconduct" or "surprise" nor was the award bad on the face of it. It was clearly indicated that it was not apparent that the principle of the Act referred to, had not been followed, nor was it shewn that the arbitrator would have acted differently, had such Act been drawn to his attention. The deduction to be drawn from the decision is, that the result of the application would have been different had the award been inconsistent with the statutory provision. To the same effect Viscount Cave in *Kelantan Government* v. *Duff Development Co. supra,* p. 409, after stating that an award may be set aside for an error of law appearing on the face of it and that a question of construction is, generally speaking, a question of law, added: But where a question of the construction to be placed on a document is the precise matter referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court merely because it would have come to a different conclusion. Then follows *dicta* pertinent to the present case:

"If it appears by the award that the arbitrator had proceeded illegally—for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose."

I think that I have the right to consider the evidence adduced before the arbitrator to determine if there was "legal misconduct" on his part which would be a ground for setting the award aside. Dealing with the arbitration on what might be termed its "merits," the principal point to be determined was, as to whether the coffee answered the description of the contract. This was the "difference" between the parties. The arbitrator practically decided this question upon the admissions contained in a letter written by W. H. Grundy, who had signed the contract on behalf of the Malkins. It is conceded that on this motion I should not make any attempt to weigh the evidence. In other words, if there was any evidence to support the findings

of the arbitrator, then his conclusion should not be interfered with. There is no doubt that if there had been evidence, which was inadmissible, admitted, then a different result might, under the decisions referred to, have followed. I think, however, the letter was admissible and the weight to be attached thereto was solely for the arbitrator to determine. It was, however, contended that, aside from Malkin Co., through Grundy, being satisfied with the quality of the coffee and expressing their approval, through Grundy, that there was no proper evidence shewing that the coffee was the product of the Dumont Fezenda.

While it is true, that the question as to where the coffee was grown, did arise during the hearing, still, it was in an indirect way. There was no suggestion in the letter written by Grundy to Ackerman discussing the coffee, that its origin or place of production was of importance or formed any ground for rejection. When Malkin Co. still refused to accept the coffee and Wood entered suit, I do not think it was in the mind of either contending parties that the place or origin of the coffee would be an issue requiring proof on the part of Wood at great expense. It was immaterial. The quality of the article was to be the point to be determined. It was the real "difference" which was to be arbitrated, aside from damages, upon rejection being proved. If the action had proceeded to trial in the ordinary way the issues might have been extended so as to include one, as to the place of origin. In which event, if deemed necessary, Wood might by commission or oral evidence have satisfied the onus cast upon him, but in the arbitration sought by Malkin Co. I think the position was altered.

Judgment

There was some evidence, as to origin, but if an issue thereon had been properly raised at a trial, I doubt if it would have been sufficient. I think, however, that in this arbitration, arising out of a commercial transaction, in view of all the circumstances, Malkin Co. should not thereby be afforded a ground for setting aside or even remitting the award. In coming to a conclusion on this sole remaining objection, I have considered and might properly refer to the remarks of Scrutton, J. in *In re Olympia Oil and Cake Company and MacAndrew Moreland & Co.* (1918), 2 K.B. 771 at p. 778:

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"It is unnecessary to say that in differing from my Lord in a commercial matter I do so with the greatest hesitation.

"This is a motion to set aside an award. I have long held a strong view as to the position which the Court should adopt with regard to arbitrations. In old days there were comparatively few arbitrations, and those were of a subordinate nature. Now a great part of the disputes relating to the commercial business of the country is referred to commercial arbitrators, who deal with them according to substance rather than form. In my view it would be very undesirable if many of the old rules of a somewhat technical character were invoked for the purpose of interfering with decisions of commercial arbitrators where no injury in the matter of substance has been done by the form in which those commercial arbitrators have expressed their decisions. The system which some litigants seem to favour of having, in addition to two hearings before the arbitrators and the appeal tribunal, as many hearings as they can get in the law Courts, is one which we ought not to encourage. Hence I approach the decision of this case with a desire not to interfere with the award of commercial arbitrators unless I am satisfied that substantial injustice has been done apart from a question of form."

The fees charged by the arbitrators are not part of the award and so do not affect its validity. They are the subject of taxation—*vide Re Prebble and Robinson* (1892), 2 Q.B. 602.

The motion to set aside the award is dismissed with costs.

Motion dismissed.

REX v. WAH LUNG *ALIAS* WONG WA.

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Criminal procedure—Recognizance of bail—Estreatment—Effect of re-opening appeal after judgment, for further argument—Order admitting accused to bail—No direction to whom accused should surrender—Effect of.

An accused having been released on bail pending the hearing of an appeal, after the hearing and dismissal thereof the appeal was reopened for further argument and again dismissed.

Held, that this did not release the bail as the accused was released on bail until the determination of the appeal and the appeal was not determined until the final order was drawn up and entered.

The order of the judge admitting accused to bail did not state to whom the accused should surrender in the event of the appeal being dismissed.

Held, not to be necessary as the recognizance itself makes this provision and the bondsmen having entered into it are bound by it.

Statement

APPLICATION to estreat the recognizance of bail entered into by accused with three sureties on the 5th of June, 1928, pending the hearing of an appeal from his conviction for selling opium. Heard by MACDONALD, C.J.A., in Chambers at Victoria on the 24th of July, 1928.

Argument

Alexis Martin, for the Crown: The application is under Crown Office rule 124. The procedure on estreatment is set out in sections 1102 to 1110 of the Criminal Code: see *Re Talbot's Bail* (1892), 23 Ont. 65.

J. A. Russell, for the bondsmen: After judgment was delivered by the Court of Appeal the appeal was reopened on the application of counsel for accused and further argument heard. We submit that this releases the bail. The order releasing accused on bail did not state to whom the accused should surrender himself in the event of the appeal being dismissed: see *Rex* v. *McCoy and Brown* (1924), 34 B.C. 14; *Rex* v. *Moore* (1923), 41 Can. C.C. 164.

Judgment

MACDONALD, C.J.A.: On the 17th of March last I made an order for the release of the accused on bail pending the deter-

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mination of his appeal to this Court at the sittings commencing on the 5th of June last, upon his entering into a recognizance for his appearance and to abide the result of the appeal.

He duly entered into the recognizance with three sureties, the condition of which is as follows, that—

"If therefore the said Wah Lung *alias* Wong Wa appears and abides the result of the said appeal and in the event of said appeal being unsuccessful surrenders himself unto the custody of the Provincial police at the Court House at Victoria, B.C., the said recognizance to be void otherwise to remain in full force and effect."

Judgment

The appeal came on for hearing at the said sittings and was dismissed. On a subsequent day and before the order was entered, counsel for the accused moved the Court to reopen the appeal to enable him to argue a ground which he had omitted by mistake to argue on the first hearing. The request was granted and the reargument took place, whereupon the appeal was again dismissed, and on the same day the formal order was duly entered. The accused, however, failed to surrender as required by the terms of the recognizance, whereupon the clerk of the Court, on proof of his default and in pursuance of the provisions of the Criminal Code, sections 1102 and 1103, prepared and verified the roll mentioned therein. Mr. *Alexis Martin* for the Crown now makes application to me to estreat the recognizance, having first served notice thereof upon the bondsmen. On the return of the motion Mr. *J. A. Russell,* appeared for them and opposed the application, first on the ground that the reopening of the appeal as aforesaid released the bail, and secondly, that the order admitting to bail did not specify, in terms, to whom the accused should surrender himself in case of the dismissal of the appeal.

I do not think either ground is maintainable. The accused was released until the determination of the appeal and the appeal was not determined until the final order was drawn up and entered. As to the second ground, I do not think the order of the judge admitting the accused to bail need state to whom the accused should surrender. The recognizance itself makes that provision and the bondsmen entered into it and are bound by it. The provisions of the Criminal Code relating to bail are patterned largely after the statute, 3 & 4 Will. IV., Cap. 99, and

subsequent legislation in England and the procedure is further indicated by their Crown Office Rules. It is true the Crown Rules here make no reference to the subject of this application, and I am left to deal with it upon the provisions of the Code which requires that the roll is to be prepared under the direction of the presiding judge. I have perused the roll and affirm its correctness. It should therefore be filed with the registrar of this Court and enforced accordingly.

Application granted.

THE GRANBY CONSOLIDATED MINING, SMELTING & POWER COMPANY LIMITED v. WEST KOOTENAY POWER & LIGHT COMPANY LIMITED

Injunction—Interim—Application to continue to trial—Supply of electric power—Mines—Conditional water licences—Power to use water circumscribed as therein set out—B.C. Stats. 1897, Caps. 45, 62, 63 and 67—B.C. Stats. 1899, Cap. 77.

The defendant Company, incorporated by private Act in 1897, was authorized to generate and transmit electric power in that portion of West Kootenay within a radius of 50 miles from the City of Rossland. Within the same year two other companies, namely, the South Kootenay Water Power Co. and the Okanagan Water Power Co. were incorporated by private Act with like powers of generating and transmitting electric power, the first mentioned within an area adjoining the area of the defendant Company to the east and the last mentioned within an area adjoining the area of the South Kootenay Water Power Co. to the east. The two last mentioned companies never constructed any works for the generating of electric power but the defendant Company constructed extensive works at Bonnington Falls on the Kootenay River. The defendant Company, by separate agreements leased the whole of the undertakings of the other two companies and constructed extensive transmission lines in the respective areas of said companies. One of the transmission lines so constructed was connected up with the plaintiff Company's apparatus for using electric power in their mines which were within the area of the Okanagan Water Power Co. The plaintiff Company obtained an *interim* injunction restraining the

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defendant Company from cutting off the power it had hitherto supplied said mines and on an application to continue the injunction until the trial, contended that the defendant Company was under statutory obligation to supply power to the plaintiff under section 118 of the Water Clauses Consolidation Act, 1897.

Held, that the three private Acts do not deal with the matter of the Crown conferring upon the corporations thereby created the right to use water power in their respective areas or at all, except to the extent that each of them clothed its creation with the capacity to make application for such right. The Water Clauses Consolidation Act, 1897, deals with the manner in which corporations such as the defendant Company is to proceed to obtain the right to use water power and confers authority for the granting of such rights. In pursuance thereof the defendant Company obtained five conditional water licences but under these licences the use of the water thereby granted is confined to such area as is within 50 miles of the City of Rossland. As the mines referred to are outside this area the defendant Company has no right to supply the plaintiff Company with electric power for use in its operations therein and the application is dismissed.

Statement

APPLICATION to continue until the trial an *interim* injunction obtained *ex parte,* to restrain the defendant Company from cutting off the power that it had previously supplied the plaintiff Company. The facts are set out in the reasons for judgment. Heard by MURPHY, J. at Victoria on the 11th of September, 1928.

Mayers, K.C., for plaintiff.
A. H. MacNeill, K.C., for defendant.

17th September, 1928.

Judgment

MURPHY, J.: Application to continue until trial, an *interim* injunction obtained *ex parte* to restrain defendant Company from cutting off the power it has hitherto supplied to plaintiff Company. No contractual relations now exist between the parties but it is contended for the plaintiff Company that defendant Company is under a statutory obligation to supply power to plaintiff Company by reason of section 118 of Cap. 45, B.C. Stats. 1897, being the Water Clauses Consolidation Act, 1897.

This section, *inter alia,* provides:

"The Company shall, from time to time, supply electricity and electric power to any premises lying within fifty yards of any main supply wire or cable, suitable for that purpose, on being required by the owner or occupier of such premises."

This provision was subsequently repealed but it is argued such repeal does not affect the case at Bar. In my view it is not necessary to decide this point.

Defendant Company was incorporated by private Act, Cap. 63, B.C. Stats. 1897. Section 9 thereof authorized defendant Company to generate and transmit electric power to any part of the area set out in the recital to said Act, and being that portion of the District of West Kootenay within a radius of 50 miles from the City of Rossland. In the same year, 1897, the South Kootenay Water Power Company was incorporated by Cap. 62, B.C. Stats. 1897. It was likewise authorized to generate and transmit electric power in and to an area adjoining on the east the area of the defendant Company extending westward. By Cap. 67 of B.C. Stats. 1897, yet another company, the Okanagan Water Power Company was incorporated with like powers of generating and transmitting electric power in and to an area adjoining the area of the South Kootenay Water Power Company on the east and extending westward. The plaintiff Company's mines, the supplying of power to which is in question in this action, lie within this third area, and are entirely outside the territory which would be embraced in the statutory area of defendant Company. Neither the South Kootenay Water Power Company nor the Okanagan Water Power Company has ever constructed any works for the generating of electric power. Defendant Company has constructed very extensive works at Bonnington Falls on Kootenay River, within its statutory area, where it generates electricity by water power.

It has by separate agreements leased the whole of the undertakings of the other two power companies above named, which leases are now in force. Under said leases it has constructed transmission lines in the respective areas of said companies and has hitherto been transmitting power generated at its Bonnington Falls works over said lines and selling same in said areas.

One of the transmission lines so constructed by defendant Company is connected up with the plaintiff Company's apparatus for using electric power at their mines in the Okanagan Water Power Company's area. Defendant Company entered into said agreements with the other two power companies

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by virtue of section 25 of its incorporation Act. I agree with the argument that said section does authorize this to be done. No one of the three private Acts deals with the matter of the Crown conferring upon the corporations thereby created the right to use the water power in their respective areas or at all, except to the extent that each of them clothes its creation with the capacity to make application for such right. The private Acts are exclusively concerned with the creation of the respective corporations and with their internal management, their corporate capacities, powers, privileges and obligations.

Judgment

In the same session of the Legislature at which those private Acts were passed the Water Clauses Consolidation Act, 1987, was enacted. This Act deals extensively and in minute detail with, *inter alia,* the manner in which corporations such as the defendant Company is to proceed to obtain the right to use water power and confers authority for the granting of such rights on compliance with the specified conditions. The defendant Company is the holder of five conditional water licences. Apart from these so far as the material shews it has no authority to utilize any water power. The right to the use of all unrecorded water was by section 4 of the Water Clauses Consolidation Act, 1897, vested in the Province and it is thereby expressly enacted that no person shall divert or appropriate any water except under statutory authority except for domestic and stock supply. This legislation (with slight modifications not here material) has been carried forward into the subsequent legislation enacted in lieu of said Act. Two of these conditional licences numbered 8191 and 8719 respectively expressly state in paragraph (g) thereof, that the territory within which the power to be generated by the use of the water thereby granted may be sold bartered or exchanged is as shewn in Exhibit A thereto. This exhibit defines such area as being within 50 miles of Rossland as thereon outlined. Two others numbered 4812 and 4813 respectively in paragraph (b) thereof incorporate and make part of the licence Exhibit A attached thereto. This exhibit shews the boundary of the land within which the power may be sold bartered or exchanged to be the same territory set out in the exhibits to conditional licences 8191 and 8719. These last mentioned

licences contain a like paragraph also numbered (b). Clause (g) of said licences, 4812 and 4813, declares that said water may be used for the undertaking of the defendant Company subject to an order in council of November 26th, 1897, and subject to its certificate of approval dated 17th August, 1905. This certificate states that the power to be generated will be transmitted to any part of the District of West Kootenay within a radius of 50 miles from the City of Rossland. The conditional licence held by defendant Company not hitherto dealt with is licence No. 4811. This licence contains the same paragraph (b) as do all the others and the Exhibit A thereto attached and thereby made a part thereof is identical so far as material with those attached to other licences. The only material difference in No. 4811 that I can see is that paragraph (g) of 4811 does not contain the clause making the use of the water subject to the certificate of approval of 17th August, 1905. It does, however, as do licences 4812 and 4813 state the water may be used for the undertaking of defendant Company subject to the order in council of 26th November, 1897. This order in council merely confirms in so far as the Lieutenant-Governor in Council has power so to do certain water records granted to Prescott Campbell McArthur and Joseph Benjamin McArthur and the assignments thereof to defendant Company. This order in council seems to have been passed without statutory authority. At any rate, by Cap. 77, B.C. Stats. 1899, these records were validated and confirmed to defendant Company as fully as if they had been obtained under Part IV. of the Water Clauses Consolidation Act, 1897. From the material filed they have apparently been merged in one or more of the five records now held by defendant Company.

Judgment

In my opinion all these five records are issued as they purport to be under the general water legislation of the Province. Section 25 of defendant's private Act confers so far as I can see, no authority on the Executive or on any other body or person to grant the use of water to the defendant Company nor as already stated do I find any such authority anywhere in the Act, nor in either of the Acts incorporating the other two power companies. Section 25 of defendant Company's Act deals with capacity

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conferred upon defendant Company not with authority to grant the use of any water of the Province. As shewn each of the licences held by defendant Company incorporates Exhibit A attached to each of them and makes it a part of each of said licences. Two of them, Nos. 8191 and 8719 in addition in paragraph (g) in express words confine the selling bartering or exchanging of power to the area set out in said exhibit. Two others, Nos. 4812 and 4813, by a similarly numbered paragraph incorporate the provisions of the certificate of approval of 17th August, 1905, which sets out in express terms the same limitation. The remaining licence, No. 4811, in addition to paragraph (b) already mentioned by paragraph (g) states that the water may be used for the undertaking of defendant Company.

My interpretation of this is that the undertaking so referred to is such portion of defendant's undertaking as contemplates the use of water for power purposes. As already pointed out this portion of its undertaking is confined by its Act of incorporation to an area within 50 miles of Rossland. Further, Cap. 77, B.C. Stats. 1899, enacts that the water records in lieu of which licence No. 4811 was apparently issued (because of the reference therein to the order in council made 26th November, 1897) are to be regarded as having been obtained under Part IV. of the Water Clauses Consolidation Act, 1897. This Act and subsequent legislation in lieu thereof, fully authorizes indeed, in my opinion, requires that grants of use of water thereunder shall be circumscribed in manner in which each of said licences held by defendant Company is in fact circumscribed. If this view is sound the continuance of the injunction applied for would mean that the Court orders the defendant Company to continue an illegal course of conduct. The application is refused and the injunction dissolved.

Application refused.

AVENUE THEATRE LIMITED v. VANCOUVER GAS COMPANY.

HUNTER, C.J.B.C.

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AVENUE THEATRE, LTD. *v.* VANCOUVER GAS CO.

Nuisance—Theatre—Ammonia plant—Noxious vapours emanating therefrom —Loss of patronage—Damages—Costs.

In an action for damages for the loss of theatrical business caused by the emission of noxious vapours from the defendant's ammonia plant that spread about the theatre site:—

Held, that there was evidence of several other sources from which offensive odours may have reached the theatre and there was no satisfactory proof of the creation or maintenance of an actionable nuisance by the defendant: further, the books of the Company and the amusement-tax records shewed the theatre proved a failure before the establishment of the ammonia plant and this was due to its becoming submerged in the murk and squalor of an industrialized district where people would not resort for theatrical amusement.

Statement

ACTION for damages for loss in carrying on a theatrical business, caused by the emission of noxious vapours from the defendant's ammonia plant at the rear of the theatre. The facts are set out in the reasons for judgment. Tried by HUNTER, C.J.B.C. at Vancouver on the 20th of October, 1927.

A. H. MacNeill, K.C., and *E. I. Bird,* for plaintiff.
J. W. deB. Farris, K.C., for defendant.

21st January, 1928.

HUNTER, C.J.B.C.: In this case I have been prevented from going into the evidence at length as I had intended. I have, however, had the great advantage of the perusal of a thorough analysis of the evidence which has been furnished by both of the learned counsel, and for which I am greatly indebted. I will shortly state my conclusions.

Judgment

One cause of action was for damage done to the rear wall of the theatre by the explosion of an ammonia compressor. Inspection of the premises, as well as the evidence of the defendant's witnesses called as to this, convinces me that it was nominal, consisting for the most part of one or two abraded bricks. Twenty dollars at the most would cover it, but none the less this

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cause of action has not been satisfied. It was not for this, however, that the action was in reality brought. It was brought to fix the responsibility for the loss of the theatrical business during some years past on the defendant, it being alleged that it was caused by the emission of noxious vapours from the defendant's plant, which so interfered with the comfort of the patrons as to put the theatre out of business.

A number of witnesses, owners of adjoining buildings, and hence interested in the result, were called, but they seem somewhat at variance as to the nature of the odours and the times of their occurrence. And there were also some employees of the theatre. There was only one apparently disinterested witness, Savage, who on one occasion experienced the obnoxious odour which according to the evidence of others might have been wafted in from the fetid matter which had accumulated for many years in and about False Creek which is close by. At any rate, one might have expected that more independent witnesses either from among those who had passed and repassed the premises, or from among the patrons of the theatre, would have been called, but none such appeared.

The main witness for the plaintiff was Sattersfield, a self-styled practical chemist, who had been in the employ of the defendant Company and was discharged on alleged grounds of incompetence and insubordination. Whatever the real reason, he was a zealous witness and had gone through all the operating charts of the Company and had collated a number of instances of gas and other odours escaping by reason of defective appliances and the temporary blocking of the ammonia plant, but there was no clear proof that they had reached the theatre. He, however, did not prove a very skilful pilot of the plaintiff's case. Towards the close of the trial he testified to getting the characteristic odour of the ammonia plant on the 10th of November, between 10 and 11 a.m. near the Post Office, distant nearly a mile west of the plant, and again at Cambie Street, as he walked towards the plant. To meet this evidence the defendant brought forward a clerk in the Meteorological Station at Kitsilano, who proved from the official records that there was a prevailing westerly wind of about two miles an hour from early that morn-

ing till late in the afternoon (*i.e.*, in exactly the opposite direction) and also the engineer of the plant, who stated that the plant had been shut down on that day from 7 a.m. until 3 p.m.

In view of this debacle, I do not see how any reliance can be placed on Sattersfield's evidence. There is, in my opinion, no satisfactory evidence to fix the Company with the creation or the maintenance of an actionable nuisance. Even if there had been any reliable evidence going to prove the discharge of noxious vapours, which were disseminated far enough to interfere with the enjoyment of the theatre, it did not happen often enough to injure its business. As a matter of fact there has been no business to injure, from some years prior to the establishment of the ammonia plant down to the present time as was shewn by the books of the plaintiff Company and by the Government amusement-tax records. Several theories were propounded by the defendant as explanatory of the decline. It was suggested that the offensive odours which reached the theatre were the result of a junk-man's rubber boiling and lead-melting operations immediately behind the theatre, or that they came from the refuse which continuously gathered in and about False Creek, or that they originated in the basement from stagnant and polluted water and came up through the openings in the stage, and that the theatre itself was musty, poorly appointed and out of date. These things may have contributed in a minor degree to the passing of the theatre, but in my opinion, if the cause ought positively to be found, it lies in the fact that the theatre became submerged in the murk and squalor of an industrialized district. Theatres, like other places to which the public resort, must keep up with the times, and must be situated in clean and attractive parts of the city, and convenient to street-cars, and good restaurants. On the other hand, the main street of an industrial district, such as that on which this theatre is situate, inevitably becomes occupied by second class hotels, restaurants, and lodging-houses, second-hand stores and junk shops, and gets into such a ramshackle condition that it is useless to expect people to resort to such a street for their theatrical amusement, and while there is no doubt that this theatre has unfortunately lost

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its business, I am convinced that it cannot rightly be attributed to the operation of the defendant's plant.

With regard to the costs: The plaintiff having no right to recover more than the sum of $20 is not entitled to receive any costs by virtue of section 77 of the Supreme Court Act. On the other hand, the defendant is entitled to the costs of the issues on which it has succeeded, and there should be the usual set-off.

Order accordingly.

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Accounting—Moneys received by nephew of deceased—Evidence of intention to make gift to nephew—Corroboration.

One S. B. a large landowner, being a bachelor, brought a nephew (the defendant) from England in 1888 to live with him and as time went on the nephew, with the uncle's assent, gradually took over control of the affairs of the estate. In 1906, S. B. made a will leaving the bulk of the estate to the nephew and in 1907 he executed a power of attorney under which the nephew was formally given power to act for him in the management of the estate and according to the nephew's evidence S. B. then told him he intended to give him all his real and personal property and he could do what he pleased with it and was under no obligation to account for it. In 1908, S. B. became ill and went to a hospital; after his recovery he went to England where he remained until he died in 1913. In 1912, S. B. changed his will leaving a portion of his estate to relations in England, but still leaving a substantial portion to the nephew. In an action by the trustee under the will made in England it was held by the Supreme Court of Canada that the nephew was accountable for all moneys of deceased received by him since 1907. An appeal was taken to a judge of the Supreme Court from the registrar's report and he varied certain items.

Held, on appeal, varying the decision of MCDONALD, J., that considering the circumstances under which the estate was managed by the nephew his evidence of expenditure should be accepted on very slight corroboration.

Statement

APPEAL by plaintiff and cross-appeal by defendant from the decision of MCDONALD, J. of the 5th of March, 1928, on appeal

from the deputy district registrar's certificate on the taking of accounts in pursuance of the directions given by the judgment of the Supreme Court of Canada of the 4th of January, 1927, and of the order made herein on the 22nd of March, 1927. It was held on the appeal from the registrar that as the defendant was called upon to account many years after the transactions took place and after he was told by his uncle that he would not have to account, in the circumstances he should not be penalized in the same way as a trustee who mixes the funds of a *cestui que trust* with his own, but notwithstanding this the various claims against the estate had to be corroborated. The report was varied on certain items of expenditures as follow: (1) Item 97; this was noted as Victoria expenses $100 and disallowed as there was no corroboration of the expenditure; (2) Item 207, payment to E. S. Knowlton disallowed as no corroboration; (3) Items 156 and 332; these were payments of $2,000 each to W. A. Wilkinson on instructions from Sam Brighouse of which there was sufficient corroboration in connection with the Royal Ice Company; (4) Items 330 to 355 and 363 and 364; these were items with relation to the construction of the Royal Ice Company plant and should have been allowed; (5) Surcharge No. 60; this was a cheque for $2,000 received as rent by the defendant but the cheque was not paid and the defendant should not be charged with this amount.

Statement

The appeal was argued at Victoria on the 7th and 8th of June, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Craig, K.C., for appellant: As between relatives the ordinary presumption as to wages does not arise as to $2,000 payment to W. A. Wilkinson on the 13th of December, 1909, for commission: see *Redmond* v. *Redmond* (1868), 27 U.C.Q.B. 220. As to item 332 this was $2,000 paid Wilkinson for work done on the farm and the same rule applies: see *Iler* v. *Iler* (1885), 9 Ont. 551; *Sewery* v. *Ritchie* (1876), 23 Gr. 66.

Argument

Ghent Davis, for respondent: Sam Brighouse did not have a bank account since 1907, and after 1908 the defendant put Sam's moneys into his own account. Sam died in 1913, when

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he was 78 years old. There was sufficient evidence in corroboration: see *McDonald* v. *McDonald* (1903), 33 S.C.R. 145 at p. 152; *Mushol* v. *Benjamin* (1920), 47 O.L.R. 426. We are surcharged with $1,700. We say, in the first place, that we paid this and secondly the onus is on them: see Halsbury's Laws of England, Vol. 28, p. 192, sec. 399; *Fletcher* v. *Collis* (1905), 2 Ch. 24. The defendant is not in the position of an ordinary trustee. On the question of costs see Halsbury's Laws of England, Vol. 28, p. 191, sec. 386.

Craig, replied.

Cur. adv. vult.

2nd October, 1928.

MACDONALD, C.J.A.: The plaintiff and defendant both appeal from the judgment of the learned judge who reviewed the registrar's certificate, made on a reference to him to pass defendant's accounts in connection with his management of the affairs of his uncle, Samuel Brighouse, now deceased.

The defendant, whose name was Michael Wilkinson, received large benefits under his uncle's will on condition that he would take the name of Brighouse; he is therefore now known as Michael Wilkinson Brighouse.

MACDONALD, C.J.A.

The defendant appeals from the disallowance of Item 360 of the disbursement account and from the allowance of Items 58 and 59 of the surcharges.

I would not disturb the finding upon these items and would therefore dismiss the defendant's appeal.

The plaintiff appeals from the disallowance of Item 1 in the surcharge and from the allowance of many of the items in the disbursement account.

The appeal in respect of Item 1 should be dismissed.

Plaintiff also appealed from the disposition of Item 164 of the surcharge, but this I think was by mistake, since that item was disposed of in his favour by both the judge and the registrar.

The balance of the disputed items are disbursements. The registrar has divided them into classes. The disputed items in Class A consist of disbursements for goods alleged to have been supplied to the deceased's farm. In considering the evidence,

not only as to these items, but in respect to the items in other classes, it is necessary to bear in mind the circumstances and relationship of the parties. Samuel Brighouse was a bachelor; he virtually adopted the defendant, who was his nephew. The defendant assisted him in his various undertakings and lived with him at his home on the farm. In the latter years of his life, namely, from 1907 to 1913, when he died, Samuel Brighouse left the management of his business almost entirely to the defendant. At that time the sister of deceased, who was the mother of the defendant, had also come to live with the deceased on the farm bringing with her the two other sons. This occurred as far back as 1896. From 1907, and perhaps before that time, defendant paid the farm accounts from time to time by cheques of his own, although no doubt out of the moneys wholly or partially of the deceased, their moneys not having been kept in separate accounts. The deceased intended to leave his property to the defendant and had made a will to that effect in or prior to 1907. He had repeatedly told the defendant that he need not keep accounts as all would be his in the end. This circumstance may account for the absence of vouchers and for the loose way in which defendant conducted his uncle's business. The Courts, however, held that these statements of deceased did not amount to a gift of all his property to the defendant, and ordered him to account for his dealings with the estate since 6th March, 1907. These circumstances, shewing a consistent course of conduct with respect to the farm accounts during the deceased's residence on the farm as well as after his departure for England, coupled with the fact that the defendant has given extensive credits in his accounts for moneys received from the produce of the farm, I think furnish some corroboration of his evidence that these payments in Class A which are in dispute, were made for the benefit of his uncle.

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Class F is in very much the same position as Class A. The disputed items in this class were payments made by the defendant to his mother, who appears to have taken charge of the farm and used the moneys to pay for help and supplies for the family including the deceased before and after his departure in 1911 for England. These payments to the mother, Mrs. Pearson, I

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think were properly allowed as disbursements and that the circumstances above mentioned are sufficient corroboration of defendant's evidence in respect of them.

Class B. These were payments made not in connection with the business of the uncle but to individuals, allegedly on the uncle's behalf. The first four disbursements amounting to the sum of $141.40 are allowed by the judge and the registrar, and I would not disturb their finding. The fifth, Item 225, I would allow also. This is a sum of $300 which the defendant says he gave to his uncle on his departure for Los Angeles; that he handed it to him personally. Considering that he was looking after his uncle's money and that the particular purpose and the time are clearly identified by the defendant, I would allow it, even though the circumstances above mentioned furnish but slight corroboration.

In re Hodgson. Beckett v. *Ramsdale* (1885), 31 Ch. D. 177 at p. 183; *Minister of Stamps* v. *Townend* (1909), A.C. 633 at p. 639. I have not overlooked our statute.

There is no appeal in respect of Classes C and D. In Class E the only item in dispute is No. 156, an alleged disbursement of $2,000 for wages to W. A. Wilkinson, defendant's brother. It was disallowed by the registrar but allowed by the judge. There was no agreement by the deceased nor by the defendant to pay wages to W. A. Wilkinson. Moreover, I am convinced on the evidence that this sum, together with Item 332 of Class G, also paid to him was not a transaction with which Samuel Brighouse had anything to do; it was a private transaction between the brothers. The registrar's disallowance of both these items should be affirmed, reversing the learned judge.

The other items in Class G., namely, 330, 331 and 333 to 355 inclusive, and also Items 363 and 364, totalling $7,287.76, were disallowed by the registrar but allowed by the judge. I think the registrar was right.

The judge found the defendant's receipts to have been $68,286.18. He found his disbursements to have been $71,587.31, from which I would deduct $11,287.76, making $60,299.55, which sum deducted from the sum of the receipts, leaves a balance due to the estate of $7,986.63, and interest

thereon from the date of the death of Samuel Brighouse on the 31st of July, 1913, at the rate of 5 per cent. per annum.

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MARTIN, J.A.: After carefully considering these accounts in the light of the most exceptional circumstances of this estate, I would confirm the learned judge below in his ruling, except as to the two items, Nos. 156 and 332, of $2,000 each, which I think the registrar took a correct view of, and to that extent only should the appeal, in my opinion, be allowed; the cross-appeal should be dismissed.

GALLIHER, J.A.: As to the objections urged by Mr. *Craig* against the findings of the registrar confirmed by the judge upon reference, as they affect Class A items in the registrar's report, the Court intimated at the hearing of the appeal that these findings would not be disturbed and stopped Mr. *Davis* in his argument. I am still of the same view.

As to items in Class B—92 and 360 were disallowed by the registrar, the other items being allowed. Of these latter items Mr. *Craig* objects to the allowance of items 12, 42, 58, 108 and 225, totalling $441.40 by the registrar and confirmed by the judge. I think it is sufficiently shewn in the evidence that these items were disbursed on behalf of the deceased.

GALLIHER, J.A.

Mr. *Davis* appeals against the disallowance of item 360, which I will deal with in the cross-appeal.

Mr. *Craig* appeals against the ruling of the learned judge below who reversed the finding of the registrar on two items, 156 in Class E of $2,000 and 332 in Class G for a like amount, and asks that these sums be disallowed in the disbursement account filed by Michael W. Brighouse, and the registrar's report restored in that respect. It is alleged these moneys were paid to W. A. Wilkinson, a brother of Michael Wilkinson Brighouse, as wages for work done on the Brighouse farm. Without going into detail I have read the evidence in connection with the payment of these items and (with respect, I say it) it is far from convincing or sufficient in my opinion. I would therefore restore the registrar's finding in that regard.

Dealing with Class F: These items were allowed by the

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registrar and confirmed by the learned judge. They amount to $7,516 and I think it is sufficiently shewn that they were paid out in connection with the operating of the farm over a number of years, and would, in my estimation, be a conservative outlay in connection therewith. I would allow this to stand.

As to the items in Class G: Items 330 to 355, excluding 332 previously dealt with, and 363 and 364, were disallowed by the registrar but allowed upon reference by the learned judge. Mr. *Craig* appeals against this allowance. They all arise out of a note credited to the account of Sam Brighouse on June 13th, 1906, in the Bank of Montreal, Vancouver liability ledger.

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The memo. is "Bank of Montreal Vancouver, B.C., Obligant's name, Wilkinson, M. B. and Royal Ice & Dairy Company—Demand Note, $13,000." It does not appear who was the maker or endorsors of the note, or whether it was a joint note given to the Bank but it undoubtedly was placed to the credit of Samuel Brighouse in the bank and the proceeds were his moneys. The evidence would appear to support Mr. *Craig's* contention that these moneys were used in the erection of buildings and plant of the Royal Ice & Dairy Company in which Samuel Brighouse had no interest. This note appears to have been retired out of the funds of the Royal Ice Company at various times to the extent of $7,287.76. The real question with regard to this transaction seems to be—was the note discounted and the proceeds used for the benefit of the Royal Ice Company by way of an advance or was it a gift? The registrar held it was not proven as a gift but the learned judge held otherwise. If it was simply a loan then the retirement of the note out of the Royal Ice Company account would follow as the natural result and the respondent would not be entitled to charge it up against the estate. If it were a gift, of course, he would. The evidence of the respondent which I must say does not impress me very favourably on this point, is corroborated only by the proof of payment off of the note which would be equally consistent with a loan so that on the whole I agree with the registrar's finding and would restore it.

As to Item 1 of the surcharge, while some doubt might be cast upon this owing to the time that elapsed between the giving of

the cheque by Loewen & Harvey to the depositing of the same by the respondent, yet it seems to me it is sufficiently supported in the evidence of the respondent and Loewen. It has been found both by the registrar and the judge, and I would not disturb their finding.

Items 58 and 59 of the surcharge, amounting to $1,661.10, were allowed by both registrar and judge. Mr. *Davis* appeals against this allowance and says the onus is on the plaintiff to prove the surcharge. To this extent that is right—plaintiff would have to prove the receipt of these moneys which he did, then when the defendant paid them into his own account and mixed them with his own moneys the onus would shift, and he would have to identify these moneys as his which he is unable to do satisfactorily. I would therefore not disturb this finding.

GALLIHER, J.A.

As to Item 360, $1,500: Again the defendant finds himself in difficulty, and while I am satisfied he did from time to time advance Samuel Brighouse certain moneys, I do not think the placing it at $1,500 can from the evidence be said to be more than a guess at the amount and I would not disturb the finding of the registrar confirmed by the judge.

As to Item 164 of the surcharge, being for interest, both the registrar and the judge have allowed interest and I do not see that I can interfere though it is a case where I would feel very much inclined to do so.

MACDONALD, J.A.: Appeal on several items of an account as found by the registrar, confirmed in some cases and varied in others, by Mr. Justice D. A. McDONALD.

(1) The first items relate to two sums of $2,000 paid, it is alleged, by the defendant (the accounting party) to his brother for wages. If so paid the defendant should be credited in the accounts. It was submitted that the evidence does not support this view, the fact being that these sums were paid not as wages but as the proceeds of the sale of certain property in which they were jointly interested. I think throughout we should give full credit to the defendant's evidence. The case giving rise to the accounting reached the Supreme Court of Canada and Mr. Justice

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Duff, referring to the defendant said (1927), S.C.R. 118 at p. 120):

"In passing, there is a remark which, I think, ought not to be omitted. In reading the evidence of the respondent, I have been impressed by his obviously straightforward desire to state the facts as he remembers them."

The fact however that the brother lived and worked on the farm for many years does not necessarily imply a hiring and promise to pay. There must be some evidence on that point. If it was a case of a labourer—a stranger—working on the farm that implication would arise and a reasonable wage would have to be paid in the absence of a specific bargain. Not so here. The evidence simply discloses these facts. The defendant says he paid his brother these sums on account of wages. He also says the deceased Sam Brighouse (it is in connection with his estate defendant has to account) told him (the defendant) many times—"to pay him as soon as I could give him something." He says too that his brother was pressing him for money although not stating that he referred to it as a demand for wages. Defendant testified:

"You then decided to treat this $2,000 that you paid him as wages? I have already said that my brother was after me all the time to get it, up to 1906 [apparently a wrong date] he had been working, and after that he was pressing me the whole time. I was then in a position to pay him the money."

He adds that he paid it out of his own money.

The fact that one sum of $2,000 was paid on the day defendant received $4,000 from the sale of the property referred to does not necessarily indicate that he simply handed over the brother's share. It might simply shew that he was in funds on that date. The accounts appear to shew that the brother received his proper share from the property referred to. However, the registrar disallowed one at least of the $2,000 payments on this ground but was reversed by the learned judge who allowed both items. Corroboration of defendant's evidence should be found to support these payments *qua* wages. The alleged corroborative evidence is as follows: He paid the brother $40 at one time. "On December 24th I paid $40 to W. A. Wilkinson who was working at the ranch," etc. Then Sauerberg his bookkeeper testified that he knew the brother worked on the farm practically

running the ranch along with Mrs. Pearson, defendant's mother. McKay, another witness, testified that the brother was on the farm presumably working. Is this sufficient corroboration to shew that the brother was actually hired with the consent of the deceased to work on the farm? I cannot so hold and would reverse the finding of the learned judge.

(2) The next group of items is in respect to a loan received from the Bank of Montreal on a promissory note signed, it is alleged, by the deceased Sam Brighouse. The proceeds were apparently used to erect the Royal Ice Company plant on land owned by the defendant. Repayment to the bank was made by the defendant in different amounts and he seeks to charge the estate with such repayments. The registrar disallowed the items but the judge reversed his finding. If the defendant was merely liquidating his own liabilities the registrar was right; not however, if as alleged, he was discharging an obligation of the late Sam Brighouse. Defendant testified that the note was signed by Sam Brighouse and endorsed by him and by the Royal Ice Company. On the whole the evidence and exhibits support this statement. The note was signed in 1906. At that time defendant owned the land but apparently the plant was not erected until three years later. It was urged that in any event the defendant and the Ice Company were jointly liable with Sam Brighouse on this note and he was simply discharging his own obligation. If, however, as the evidence on the whole suggests defendant endorsed it at the instance of the bank, the estate of Sam Brighouse was primarily liable. But that does not dispose of the question. The moneys were as the judge found used to assist in erecting the ice plant belonging to the defendant. The defendant as endorser was liable to the bank and he met this obligation. He can only charge the Brighouse estate by proving that the late Sam Brighouse gave it to him as a completed gift. The onus is on him. Unfortunately for the defendant I cannot find any corroborative evidence to in any way support this main fact and the finding of the registrar should be restored.

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(3) In respect to items in Class A in the registrar's certifi-

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cate, I think we intimated at the hearing that his finding should not be interfered with, at all events, I so rule.

(4) The items under Class F in the registrar's certificate were allowed by the registrar and confirmed by the judge. They include various payments amounting to about $7,000 made from time to time to defendant's mother (sister of deceased) who was living on the ranch directing operations in the manner usually followed by the wife of a proprietor. The defendant must shew that these payments were made to her and used for the benefit of the Brighouse estate. It is conceded that part of it, in any event, was used on the ranch. Defendant testified that his mother paid all accounts "practically all the labour, practically all the expense of running the farm" out of these advances. As to corroboration it was shewn that she took an active part in farm management and at least after 1911 when there were labourers to pay, no payment for wages appears in defendant's accounts shewing that his mother must have looked after this obligation. Further the bookkeeper referred to testified that in one instance at least, he made a payment to defendant's mother from defendant's funds. "She was," he said, "practically running the ranch together with Mr. Wilkinson's brother." The cheques have been lost. I think the evidence that his mother actually managed the farm along with others and that she had no money of her own together with the bookkeeper's evidence is sufficient corroboration and the finding of the registrar and judge should not be disturbed. These are material corroborative facts which lead one to the conclusion that defendant's evidence is true. These various payments obviously made for one purpose (because the mother spent very little on herself and was always on the farm during this period) are so connected that they should be regarded as a series of payments for one purpose as defendant testified and corroboration in respect to any of them should, with the additional evidence referred to, be taken as corroboration of all the payments.

(5) The next item is a sum of $1,700. Defendant testified that this was part of a larger sum he received from a real-estate firm in connection with his own private affairs. It was proved that he did receive such a cheque but as he did not keep his own

accounts and the estate accounts separately it is sought to charge him with this amount unless he discharges the onus resting upon him of identifying this sum as his own. He produced the documents relating to the property from the sale of which the larger cheque was received. He also testified that there was no other possible source for this $1,700. The real-estate agent testified that the larger cheque was paid to the defendant and that the proceeds belonged to him. There was therefore sufficient corroboration. The defendant was able to pick out this amount as his own money to the satisfaction of the registrar and judge, and apart from the consideration to which I think, if necessary, we might give some weight, *viz.,* the acquiescence of the *cestui que trust* in the mixing of funds, this finding should not be interfered with.

(6) The next items are included by the registrar in his certificate under Class B. Mr. *Craig* appeals in respect to five of them, *viz.,* Items 12, 42, 58, 108 and 225, amounting, I think, to $441.40. The defendant should be allowed these amounts.

MACDONALD, J.A.

(7) The defendant cross-appeals in respect of Item 360—"money paid to Sam Brighouse, $1,500." This he says is made up of odd amounts advanced to deceased from time to time—"I would estimate at least $1,500." He produces no receipts or other evidence. There is evidence to shew that deceased received money from defendant at intervals, *i.e.,* statements made to others to this effect by the deceased. The bookkeeper also testified that he paid deceased small sums from defendant's account. I think however the registrar took the right view of this item. There is no corroboration of the claim made that the sum of $1,500 was advanced in this way.

(8) Defendant also cross-appeals in respect to Items 58 and 59, amounting to $992.80 and $668.30 respectively. However he fails to produce any evidence identifying these moneys and as he cannot shew otherwise they must be treated as trust funds.

Appeal allowed in part.

Solicitor for appellant: *W. D. Gillespie.*
Solicitor for respondent: *Ghent Davis.*

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GEORGIA CONSTRUCTION COMPANY LIMITED AND BANK OF TORONTO v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

Contract—Railway construction—Method of work—"Over-haul"—Engineer's certificate—His subserviency to one side—Effect of—"Instruct"—Meaning of—Courts—Precedent—House of Lords.

In an action to recover the price of over-haul work done under a railway-construction contract the defendant pleaded want of the engineer's certificate which the contract provided for and the plaintiff claimed the certificate was wrongly refused by reason of the defendant's interference with the engineer's functions and prevented him from being a free agent. The work consisted of a "cut" and a "fill" adjoining, and the contractor attacked the end of the cut that was farther from the "fill" bringing the earth around by a circuitous route to the "fill" thus creating a large amount of over-haul that would have been avoided by first attacking the cut at the end adjoining the fill. The contractor claimed this was the most feasible method of doing the work as the surface of the ground at the end of the cut adjoining the fill was so steep it was impossible to work from that point. It was held on the trial that in the circumstances the engineer's certificate could be dispensed with and that from the nature of the locality the plaintiff was justified in adopting the system he did in carrying out the contract and was entitled to judgment.

Held, on appeal, reversing the decision of MORRISON, J., that the obvious way to commence this work would be from the end of the cut nearer the fill, the onus resting with the plaintiff to prove that there were obstacles or conditions which rendered it impracticable to proceed in that way. He has not satisfied this onus and having chosen to adopt a more expensive method than the contract properly interpreted calls for, the loss is his own.

Per MARTIN, J.A.: The engineer had not become "the man" of the owners, applying the principle laid down in *The Dominion Construction Co.* v. *Good & Co.* (1899), 30 S.C.R. 114, so that the engineer's certificate could not be dispensed with. *Hickman & Co.* v. *Roberts* (1913), A.C. 229 decided no more than the *Good* case and even if it did the law as declared by the Supreme Court of Canada should be followed.

Per MACDONALD, J.A.: The action taken by the defendant's directors was tantamount to explicit orders to the engineer as to how he should act and that he had been subservient thereto and following *Hickman & Co.* v. *Roberts*, the certificate should be dispensed with.

Statement

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

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the 21st of March, 1928 (reported *ante* p. 81), in an action to recover $126,612.41 under a contract of the 20th of May, 1926, between the plaintiff Company and the defendant, whereby the plaintiff Company agreed to perform certain grading, excavation and fill work incidental to the maintenance of the defendant's railway line at mile 13.7 north of Lillooet. The said contract contained, *inter alia,* the following term:

"Extra Haul. 12. The contract prices for the several classes of excavation shall be taken to include the cost of depositing the material in embankments, crib work, and all other expenses connected therewith except extra haul, which will only be paid for where it exceeds five hundred (500) feet, at so much per yard per additional one hundred feet. No allowance or compensation whatever shall be due or paid to the contractor for any temporary roads, bridges or trestles he may make to facilitate his work."

The defendant was to pay the plaintiff Company one cent per yard per one hundred feet over-haul. By assignment in writing of the 20th of May, 1926, the plaintiff Company assigned to the plaintiff Bank of Toronto all moneys at any time due under or in respect of the said contract, said assignment being duly registered and a copy thereof sent the defendant.

Statement

The plaintiff Company claims that in the course of operations it hauled 240,000 yards of earth an average of an extra 3,659 feet and 73,912 yards of earth an average of an extra 470 feet, that it has received on account thereof $12,868 leaving a balance of $78,445.86 due and owing by the defendant. The fill adjoined the cut at its south end and owing to the precipitous nature of the cut at its south end the plaintiff Company claims it was necessary to attack the cut from its north end, haul the earth back and around to the south end of the embankment and dump it into the fill. This necessitated a substantial deviation and increase in distance of haul compared to the direct line from the centre of the mass of the cut to the centre of the fill. The engineer refused his certificates for the actual extra or over-haul, construing the words "extra haul" or "over-haul" as meaning only the distance between the centre of the mass of the cut and that of the fill measured along the proposed line of railway. The plaintiff Company complained that the Board of the railway Company exercised its authority over the engineer as to the interpretation of the words "over-haul" and he was no longer

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a free agent. The plaintiff Company further claimed that the defendant undertook to construct a culvert at mile 13.7 required for the work under the contract but owing to delay in constructing the culvert it was put to additional expense of $24,929.36. During the course of the operations the plaintiff had to move 8,000 yards of what is classified as "wet excavation" which was not provided for in the contract and for which the defendant agreed to pay a reasonable amount, the plaintiff Company claiming $6,720 as the balance due thereon. The plaintiff Company further claimed $10,799.75, being the 10 per cent. drawback held by the defendant Company under the contract, $877.44 for extra work, and $4,840 owing for work for the month of October, 1927. The plaintiff Company obtained judgment for the price of the over-haul as claimed.

The appeal was argued at Victoria on the 8th to the 15th of June, 1928, before MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

Mayers, for appellant: The main question is whether they are entitled to the over-haul claimed. If they had started from the south end of the cut the average haul for the whole work would have been 4,000 feet, whereas, by starting from the north end the average haul was 4,500 feet. The engineer's certificate is a condition precedent to any claim by the contractor and it cannot be dispensed with unless there is fraud on the part of the railway. The material was hauled by a circuitous route but the measurement for "over-haul" must be by a direct route and this is the system the engineer adopted. As to what will enable the Court to dispense with the certificate see *Eaglesham* v. *McMaster* (1920), 2 K.B. 169 at p. 176; *Clarke* v. *Watson* (1865), 18 C.B. (N.S.) 278 at p. 284. The cases of *Hickman & Co.* v. *Roberts* (1913), A.C. 229 at p. 234 and *Wallace* v. *Temiskaming and Northern Ontario Railway Commission* (1906), 12 O.L.R. 126 at p. 134 can be distinguished. To sustain an allegation of fraud there must be evidence of fraud. Until the second day of the trial it was simply an action for work and labour done. Under the contract the contractor can have no possible claim without the certificate of the engineer unless there is fraud: see *Walkley* v. *City of Victoria* (1900), 7 B.C. 481

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at p. 499. They say it was no part of the engineer's duty to interpret the contract and they referred to *Kinlen* v. *Ennis Urban District Council* (1916), 2 I.R. 299, but see *Re Spencer; Hart* v. *Manston* (1886), 54 L.T. 597. In order to succeed in the absence of the certificate they must shew they did the work in the only way it could be done, but the work could have been done in several ways commencing from the south end of the cut: see *Bowes* v. *Shand* (1887), 2 App. Cas. 455 at p. 468.

J. W. deB. Farris, K.C., for respondents: The final certificate was not issued until after the writ was issued and he says to get over want of certificate we must prove fraud, but *Hickman & Co.* v. *Roberts* (1913), A.C. 229 has changed the law in this respect; see also Hudson on Building Contracts, 5th Ed., 320. As to our agreeing to accept the engineer, we did not agree to accept him, plus instructions to him from the Railway Company: see Hudson on Building Contracts, 5th Ed., pp. 300, 301 and 306. We can attack either the certificate or the employer: see *Kimberley* v. *Dick* (1871), 41 L.J., Ch. 38; *Pawley* v. *Turnbull* (1861), 4 L.T. 672; *Northern Construction Co.* v. *The King* (1925), 2 D.L.R. 582; *Wallace* v. *Temiskaming and Northern Ontario Railway Commission* (1906), 12 O.L.R. 126. Any conduct inconsistent with the basis on which we made the contract is sufficient to repudiate it. The engineer was subservient to his employer's directions and he tried to modify this by his subsequent evidence: see *Northern Construction Co.* v. *The King, supra,* at p. 586; *Allinson* v. *General Medical Council* (1894), 63 L.J., Q.B. 534 at p. 537. We say they are estopped from raising the question of not putting in estimates as to "over-haul" because of their interference. He argues there is a custom that the haul be measured along the centre line of the right of way but he is attempting to merge custom into the contract in order to get away from decisions. All definitions of over-haul support our contention. If the haul is made in the most practical way it should be measured that way: see Halsbury's Laws of England, Vol. 10, secs. 465, 470 and 498; *Nelson* v. *Dahl* (1879), 12 Ch. D. 568 at p. 575; *Reg.* v. *Inhabitants of Stoke-upon-Trent* (1843), 5 Q.B. 303; *The Lizzie* (1918), 88 L.J., P. 83 at pp. 88 to 90; *Devonald*

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v. *Rosser & Sons* (1906), 75 L.J., K.B. 688 at p. 691; *Laurie & Morewood* v. *John Dudin & Sons* (1925), 95 L.J., K.B. 191 at pp. 193 and 197; *The "Freiya"* v. *The "R. S."* (1922), 21 Ex. C.R. 232; (1922), 1 W.W.R. 409 at p. 413; *Yeates* v. *Barrett* (1927), 3 W.W.R. 286; *Burke* v. *Blake* (1875), 6 Pr. 260; *Northern Elevator Co.* v. *Lake Huron and Manitoba Milling Co.* (1907), 13 O.L.R. 349 at p. 360. We should be paid by the circuitous route if that is the proper method to do the work. The principle is the same in "over-haul" in borrowing and "over-haul" from the cut. On the method of work see Bower on Estoppel by Representation, p. 60; Everest & Strode on Estoppel, 3rd Ed., p. 288; *Cairncross* v. *Lorimer* (1860), 3 Macq. H.L. 827.

Mayers, in reply, referred to *The Dominion Construction Co.* v. *Good & Co.* (1899), 30 S.C.R. 114; *Good* v. *Toronto, Hamilton and Buffalo R.W. Co.* (1899), 26 A.R. 133 at p. 144; *Farquhar* v. *City of Hamilton* (1892), 20 A.R. 86 at pp. 91-2; *McDougall & Co.* v. *Municipality of Penticton* (1914), 20 B.C. 401; *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha, and Telegraph Works Co.* (1875), 10 Chy. App. 515 at p. 523; *Page* v. *Llandaff and Dinas Powis Rural District Council* (1901), Hudson on Building Contracts, 4th Ed., Vol. II., p. 316; *Kennedy, Ltd.* v. *Barrow-in-Furness (Mayor of)* (1909), *ib.* 411. On the question of custom see *Brown* v. *Byrne* (1854), 3 El. & Bl. 703 at p. 714; *Myers* v. *Sarl* (1860), 3 El. & El. 306 at p. 318; *Hutton* v. *Warren* (1836), 1 M. & W. 466.

Cur. adv. vult.

2nd October, 1928.

MARTIN, J.A.

MARTIN, J.A.: Two substantial questions are raised by this appeal from a judgment by Mr. Justice MORRISON for $59,503 in favour of the plaintiff (respondent) Company as being due to it for "over-haul" work done under a contract respecting a cut and fill on the defendant's (appellant) railway line.

It is submitted by appellant that, first, in the absence of a certificate from the engineer allowing said over-haul work the plaintiff cannot recover, and also, second, that even if the certifi-

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cate can be dispensed with the plaintiff is not entitled to charge for such work. I agree with both my brothers that the second submission is correct and I do not think it would be profitable to add anything to the views which they so well express; the learned judge below, by some unexplained error, dealt with the matter upon the basis of "custom" though that was, and is not, relied upon by defendant and it is foreign to the contract as regards this dispute thereunder.

As to the second question, the learned judge below on the second day of the trial (21st February, 1928) allowed the plaintiff to amend its claim by alleging that the absence of the certificate was caused by the engineer's "wrongful and improper" refusal to give it, for several reasons set out including these—that he "wrongfully took advice and instructions from the general manager of the defendant Company and made his certificates accordingly," and he "was thereafter no longer a free agent," and that "the defendant had hindered the giving of proper certificates by the engineer" and had "annulled the effect of said provision for the engineer's certificate by taking the matter out of his hands." The learned trial judge found that the engineer had yielded to the "pressure" of the defendant Company and that it had "appropriated the functions of the engineer," and so he dispensed with the otherwise admittedly necessary certificate under the clauses of the contract set out in the judgment below and by my learned brother M. A. MACDONALD.

The law applicable to this important present question has been further expounded but not altered, in my opinion, since I considered it at length nearly 28 years ago in the leading case of *Walkely* v. *City of Victoria* (1900), 7 B.C. 481, which has often been cited and never yet questioned in this Province; on the contrary, it has been applied by this Court (*per* my learned brothers GALLIHER and MCPHILLIPS and myself) in *McDougall & Co.* v. *Municipality of Penticton* (1914), 20 B.C. 401, wherein at pp. 406, 421, the learned trial judge took essentially the same view of the engineer's action as was taken here but without foundation, as was admitted, and so we reversed his decision, and on the facts of this case, which, in essentials,

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present little real conflict, we should, in my opinion, and with the utmost respect for the contrary opinion of my brother M. A. MACDONALD, adopt the same course. The leading decision in Canada on the subject is the one I considered in the *Walkley* case (p. 491), *viz.*, *The Dominion Construction Co.* v. *Good & Co.* (otherwise *Good* v. *Toronto Hamilton & Buffalo Ry. Co.*) (1899), 30 S.C.R. 114; 26 A.R. 133, wherein our National Supreme Court affirmed at large the judgment of the Ontario Court of Appeal, on a railway contract, that, as Osler, J.A. put it, p. 147, the engineer

"Wingate was not such a person as the plaintiffs had chosen under their contract to decide the questions arising between themselves and the construction company, but was really the engineer of and in the pay of that company, or was, as the learned judge compendiously expresses it, 'from the beginning Young's man,' whose final estimate and decision with regard to these matters in dispute the plaintiffs were not bound to procure as condition precedent to payment."

But, at p. 144, he made this distinction and qualification, *viz.*:

"We have not to determine the question whether the plaintiffs would have been entitled to relief if their contract had been one which bound them to accept the judgment and decision on the several points in dispute of a person stated in the contract to be the engineer of the company with whom they were contracting. Very different considerations would then have arisen and the evidence would perhaps fall short of making out a case for relieving the plaintiffs from their obligation to be bound by the decision of the construction company's own officer, on whose professional honour, position and intelligence, they would in such a case be taken to have deliberately relied, notwithstanding the fact that his relation to his own employers might inevitably or insensibly prevent him from acting with what the late Lord Justice Bowen described as 'the icy impartiality of a Rhadamanthus.'"

And Burton, C.J.O., likewise said, p. 142:

"It is, as we know, almost the universal practice that in railway contracts of this character it is usual to provide that all disputes and questions arising as to the construction of the contract or as to anything done under it shall be submitted to the chief engineer of the company, although he must almost of necessity have a bias in favour of the company, but the contractor has in that case the opportunity of judging from the reputation and character of the engineer whether it would be safe for him to place himself so much within his power."

The opinions of these distinguished judges are shared by the House of Lords in *Bristol Corporation* v. *Aird* (1913), A.C. 241, wherein Lord Atkinson said, p. 251:

"The parties must be held to have contemplated that they would have to

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go before a man with preformed views, but not to have contemplated that he would put himself in the position of a witness and adjudicate under such circumstances. That is, I think, to push matters to an extreme that is unwarranted."

Lord Atkinson was referring to the unusual fact in that case (p. 248) that the engineer would in the circumstances be placed "necessarily at once in the position of a judge and witness" and therefore the Court exercised its discretion (under section 4 of the Arbitration Act) not to compel the parties to go to arbitration (pp. 247, 260) under a special agreement to that effect. In the exercise of that discretion to stay arbitration proceedings the Court has a power which it does not possess in cases like the present, but even under said Act it recognizes the existence of an inevitable bias, "pre-formed views" as aforesaid, and see also Lord Moulton, at p. 258, who says:

"I think that in each case the Court is bound to consider all the circumstances. There may be something in the arbitrator which makes him an unfit person to be judge in the matter. It may be his personal conduct; it may be the position in which his actions have placed him. The Court is bound to consider all these things; but in considering them it ought to hold that nothing known at the time of the contract, nothing fairly to be expected from the position of the engineer, when he becomes arbitrator, can be alleged as a ground why it should not keep the parties to the bargain, because those things must be supposed to have been in their contemplation at the time when they entered into the contract."

That language is singuarly appropriate to the present case. And again, at p. 259:

"I do not cite these as exhausting the considerations which are legitimate for a Court to pay attention to in a case like this. It must consider all the circumstances of the case, but it has to consider them with a strong bias, in my opinion, in favour of maintaining the special bargain between the parties, though at the same time with a vigilance to see that it is not driving either of the parties to a tribunal where he will not get substantial justice."

Lord Parker, at pp. 260-1 says:

"My Lords, it appears to me that it is absolutely impossible to define, and certainly undesirable to attempt to define, with any precision what circumstances will prevent the Court from exercising its discretionary power. It will certainly not be enough to allege that the arbitrator is not an independent person, if the parties with knowledge that this is so have nevertheless agreed to accept him as arbitrator. But it may be a different matter altogether if by some action of his own the arbitrator has already irrevocably committed himself to some particular view; and I think it is certainly a different matter altogether if there be a *bona fide* dispute involving substantial sums and a probable conflict of evidence on matters as to

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which the arbitrator himself will in the normal course be the principal witness on one side. In such a case it might lead to a miscarriage of justice if the arbitration were allowed to proceed, and one of the parties were in consequence deprived of the chance of testing the truth by means of cross-examination, or if the arbitrator had to determine whether he had himself done anything by which one of the parties might be estopped from raising any particular point."

There is no suggestion that in this case at Bar the engineer occupied the position of a witness.

Much reliance here and below was placed on the decision of the same tribunal (House of Lords) about two years before (9th May, 1911) in *Hickman* v. *Roberts*, but not reported till 1913, A.C. 229, and consequently I have given it very careful consideration in the light of the particular facts upon which it was decided following the invaluable rule of construction in that respect laid down by Lord Chancellor Halsbury in the great case of *Quinn* v. *Leathem* (1901), A.C. 495, 506. After such consideration it is clear that it decides no more than *The Dominion Construction Co.* v. *Good, supra,* and it was a case of exactly the same nature and one wherein collusion was set up, p. 230, and as Lord Shaw pointed out, p. 239, the crucial fact of the decision was that the architect had under his own hand, in a letter, made

"an open and frank avowal that the judicial actor on this stage [*i.e.*, himself] was playing his part under instructions and orders from one party in the cause."

This means that in other words he had become that party's "man," as was held in *Good's* case, *supra*. There is no fact in the case at Bar that approaches such an admitted state of subjugation, nor also of the other sinister facts of the same kind recited on pp. 231-2 of the report, which, after Lord Shaw's observation, it were superfluous to quote, and the more so because they are cited by Lord Alverstone, at pp. 235-6, and Lord Atkinson commented, p. 230, upon the absence of any explanation of the architect's unjustifiable delay in issuing the certificate till after action brought and then only after the owners had consented thereto—232, 240.

The observations of Lord Moulton in the *Bristol* case, cited *supra,* and others by him, have been recently adopted by the Court of Appeal in the similar case (under the Arbitration Act)

of *Metropolitan Tunnel and Public Works* v. *London Electric Ry. Co.* (1926), Ch. 371 at pp. 386, 389, and at p. 393, Lord Justice Scrutton says:

"I am going to conclude by saying what I began with—namely, that in my view it is of the greatest importance, unless you are otherwise obliged, to uphold the bargain which the parties themselves have made; and when the parties themselves have agreed to refer the construction of their contract to an engineer for what seems to me a very obvious reason, it requires in my view a very strong case to allow one of the parties to break his bargain to refer."

It is to be borne in mind, by way of precaution, that the expression "arbitrator" has, *e.g.*, in *Hickman's* case, been sometimes loosely used instead of "*quasi*-arbitrator" which is the more correct expression in cases outside of the general Arbitration Act, as is pointed out by that truly learned and exact judge Lord Justice Collins, afterwards Lord Collins, in *Chambers* v. *Goldthorpe* (1901), 1 K.B. 624 (C.A.), and he uses the proper term, "*quasi*-arbitrator," seven times in his judgment; and this proper distinction between the two terms and its misuse in *Hickman's* case is also noted in Hudson on Building Contracts, 5th Ed., pp. 18, 313.

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I shall, therefore, proceed to deal with the particular facts of the case at Bar upon the assumption that the law as stated by the House of Lords in *Hickman's* case and further explained by the same tribunal in the later *Aird's* case does not conflict with that laid down as aforesaid by our National Supreme Court in the *Good* case, but if it does then I shall follow the law as declared by our said National Court because it is not bound by or subject to the decisions of the House of Lords unless and until the Parliament of Canada shall so declare that Parliament being now, as the result of the Imperial Conference of 1926, the only authority which has jurisdiction to make such a binding declaration upon the Courts of this Nation, and though its Courts continue to be bound by the decisions of the Privy Council (so long as Canada thinks it best to continue that tribunal as the final Court of Appeal of our country, but no longer) yet no decision of the Privy Council has been cited to us as altering the views of our National Court on this question.

Turning, then, to the special facts before us upon which alone

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can be formed a sound opinion of the question as to whether or no the engineer had become the "man" of the owners, I have, after a careful consideration of all of them (too voluminous to attempt to set out here) reached the clear conclusion, with all due respect to the learned trial judge, that his finding cannot be supported upon the essential facts about which there is little real uncertainty. There is no admission here, as there was in black and white in *Hickman's* case (as already pointed out) relied on by the learned judge, of any surrender of his functions by the engineer; on the contrary there is a specific denial of such a state of affairs and an assertion of his constant independence, and also a full, and to my mind reasonable, explanation (entirely wanting in *Hickman's* case and hence animadverted upon by Lord Atkinson) not only by the engineer but by every member of the Board of Directors concerned and by the general manager, of their respective proper intentions which evidence was rightly admitted on a charge of this kind against them. While it is unfortunate that the Board expressed its views in a way to give any opportunity for complaint, however unfounded, yet there is, to my mind, nothing substantial, when all the unusual circumstances are kept in mind, to warrant the inference that such expressions had any improper object or the effect of making the engineer act improperly in any way; it must be borne in mind that it is not in any event enough to prove that the owners (Board) intended to influence the engineer improperly, it must also be proved that their improper intentions, if established, actually had that effect. Too much weight has been attached, in my opinion, to the use of the word "instructed" in the Board's resolution of the 20th of July, 1926, because such an expression does not ordinarily import an imperative direction—that is not the primary and usual meaning of the word "instruct" as defined by the highest authority on our language, the Oxford Dictionary, thus, Vol. V., p. 355:

"1. To furnish with knowledge or information; to train in knowledge or learning; to teach, educate.

"b. To furnish with knowledge in an art or branch of study. . . . .

"2. To impart knowledge to (a person) concerning a particular fact or circumstance; to apprise, inform."

"c. To give information as a client to a solicitor, or as a solicitor to a counsel; to authorize one to appear as advocate."

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And then we come to:

"3. To furnish with authoritative directions as to action; to direct, command."

Now though said resolution said that:

"With reference to the question of over-haul, the engineer . . . be instructed that the Board cannot consider any other than the shortest haul or the nearest way."

yet the defendant's general manager on the following day in conveying this view of the Board to the engineer wrote:

"With reference to the question of over-haul, I am instructed to advise you that the Board of Directors cannot consider any other than the shortest haul or the nearest way."

The manner in which he properly uses the word "instructed" as applied to himself as the servant of the Board in contra-distinction to the words "advise you" as applied to the engineer, the *quasi*-arbitrator, is not only an indication of the Board's real intention to "advise" or "inform" the engineer merely but also that the "instructions" even if they are (wrongly, in my opinion) to be construed as "orders" were not in fact conveyed to the engineer; and this fact of prime importance has been overlooked by the learned judge below. It is in my opinion not open to serious doubt that if the said resolution had used the word "informed" or "advised" or "notified" instead of "instructed" there would be no substantial foundation even to advance an argument upon to support the charge of surrender and usurpation of the engineer's functions, and yet it is certain that he never was "instructed" but only "advised." A further indication of the Board's use of the word "advised" is to be found in its later resolution of 14th September, 1926, *viz.*:

"A letter was read from the Georgia Construction Company Limited protesting the decision of the Directors that they could not consider any other than the shortest haul or nearest way and on motion, duly seconded, it was resolved that they be advised that we expect them to carry out the terms of their contract and that our interpretation of its conditions regarding over-haul is as previously advised."

And see the letter of the general manager next day pursuant to that resolution; and also Nickson's use of that word which confirms the engineer and the Board's intentions.

The question of the meaning of over-haul under the contract arose shortly after the appointment of the engineer on 20th May, 1926, when it was first raised with the engineer by

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defendant's general manager, Kilpatrick, and again, beyond serious doubt, on the 4th of July by the plaintiff's vice-president and manager Nickson (whose evidence is often very unsatisfactory) shortly before he began work on 9th July, and to both parties the engineer gave his interpretation of that expression based upon his long (26 years) and wide professional experience and to which he adhered all through; the learned trial judge finds he "reiterated his own views"; and that his "views" (interpretation) was and is the correct one this Court unanimously finds. The engineer testified that upon that occasion he told Nickson that "his contention could not be supported and that any different arrangement from that decided by me would be between him and Mr. Kilpatrick (general manager)." It would, of course, have been just as improper for the engineer to refuse to listen to the contractor's views upon the interpretation of the contract as it would have been to deny the owner the same right because he should listen to a reasonable extent to both sides if they so desire, but there is no allegation that such an opportunity was denied him; on the contrary, he testified that he "argued the thing" with the engineer, and not only that, but he applied to the Board on two subsequent occasions and argued the matter with them in an attempt to persuade them to overrule the ruling of the engineer in his favour; upon neither of these applications, be it noted, did he make any complaint to the Board of any improper conduct by the engineer, and he admitted, moreover, that he had threatened the engineer that if his own interpretation of payment for over-haul was not accepted he would "shut the work down." The learned judge below rightly remarked during the course of the trial that the "engineer seemed to be sympathetic with the plaintiff."

It would not be profitable to continue to discuss in further particular the large body of evidence before us; all of it I have carefully examined and considered; I have, indeed, discussed it more than is my custom, out of deference to contrary opinion. I shall, therefore, content myself by saying that upon both grounds submitted to us the appeal should, in my opinion, be allowed.

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GALLIHER, J.A.: I am satisfied upon the facts of this case and the law applicable to such facts that the plaintiffs were entitled to bring their action. The main features in this dispute all centre around over-haul and this, as claimed, was allowed by the learned trial judge. The word "over-haul" as applied in railway construction is well understood by contractors and engineers. The dispute here is as to how that over-haul should be calculated. Much expert evidence was adduced on both sides, and the case occupied considerable time in the Court below and was ably and exhaustively argued before us. Without minimizing the importance of the evidence given or the arguments made, there seems to me one common-sense view which very readily and shortly disposes of the matter.

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In constructing the railway cut-off contracted for, the plaintiff Company came to a ravine and on the opposite bank of that ravine which had to be crossed, there was a rock bluff through which a thorough cut had to be made to continue the line, the excavation from which would be dumped into the ravine to make the fill. The plaintiff started at the north end of this rock bluff and away from the ravine, and hauled by a circuitous route the excavated material and dumped it into the ravine as a fill thereby causing a much greater haulage distance than if the work had been carried on from the south end of the rock bluff and a consequently much greater quantity to be classed as over-haul than would have been occasioned by starting at the south end continuing along the line of the track being constructed, and it at once strikes me that unless the plaintiffs can justify the departure from what would seem the obvious way to do the work they should not succeed.

I found the model produced very instructive in demonstrating what would be the obvious way to do the work, unless as I said, there were obstacles or conditions which rendered it impracticable to proceed in that way (or unless there was consent to its being done otherwise, which I find has not been established). The onus of proof of this rests upon the plaintiff, and in my opinion is far from satisfied and in the absence of such proof it would seem to me that it requires no law to demonstrate that a contractor cannot burden the other party to the contract by

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departing from the obvious and less expensive course and adopting a much more costly one.

I would allow the appeal and dismiss the action.

MACDONALD, J.A.: This is an appeal from the judgment of Mr. Justice MORRISON by which the plaintiff recovered judgment for $59,503 under a contract dated May 20th, 1926, for excavation and fill work on defendant's line of railway. The main question is in respect to the amount the plaintiff should recover, if at all, beyond the amount uncontested for making a cut in an embankment and hauling the material therefrom to a fill or ravine some distance away and turns largely on the meaning of the word "over-haul" or "extra haul" as referred to in the following clause of the contract: [already set out in statement].

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For "over-haul" the plaintiff was entitled to the additional sum of .01 per yard for each 100 feet material that was carried beyond a free haul of 500 feet. The embankment and fill were along the proposed route of a diversion in the railway line. The south end of the embankment was nearest to the fill, and as suggested should have been attacked on that side, but the contractor started to work at the north end hauling the material to the fill by a circuitous route. The plaintiff now claims payment as over-haul for the whole distance (beyond the free haul), the material was actually carried. The defendant on the other hand, while not objecting to the contractor's method of doing the work only admit liability to pay for the shorter haul from the centre of mass in the embankment to the centre of mass in the fill. The shorter route was approximately 400 feet; the longer about 5,000 feet.

The defendant contends that the plaintiff cannot succeed in any event because under the contract the certificate of the engineer was a condition precedent to the right to receive payment. No certificate was obtained providing for payment by the circuitous route. The clauses dealing with this requirement are as follows:

"8. The engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard thereto shall be final, and no work under this contract shall be

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deemed to have been performed, nor materials nor other things provided, so as to entitle the contractor to payment therefor, until the engineer is satisfied therewith, and has issued to the contractor his certificate in writing in respect thereof.

"9. The work shall, in every particular, be under and subject to the control and supervision of the engineer; and all orders, directions or instructions, at any time given by the engineer with respect thereto, or concerning the conduct thereof, shall be by the contractor promptly and efficiently obeyed, performed and complied with to the satisfaction of the engineer. . . ."

"28. Cash payments equal to about ninety per cent. of the value of the work done, approximately estimated from progress measurements and computed at the applicable schedule prices, or the prices fixed with respect thereto, as the case may be, under the provisions of this contract, will be made to the contractor monthly, on the written certificate of the engineer stating that the work for, or on account of which, the certificate is granted, has been done, and stating the value of such work computed as above mentioned; and the said certificate shall be a condition precedent to the right of the contractor to be paid the said ninety per cent. or any part thereof. The remaining ten per cent. shall be retained until the final completion of the whole work to the satisfaction of the engineer, and will be paid within two months after such completion. The written certificate of the engineer, certifying to the final completion of the said works to his satisfaction, shall be a condition precedent to the right of the contractor to receive or to be paid the said remaining ten per cent. or any part thereof."

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Plaintiff submits that the absence of the certificate is not a bar to its right of action because of interference with the engineer by the directors of the defendant Railway Company, preventing him from exercising an independent judgment. There was undoubtedly interference. The action taken by its directors was tantamount to explicit orders as to how the engineer should act preventing him at the very least from maintaining an open mind. The evidence however, does not disclose fraud on the part of the directors, nor fraud and collusion between them and the engineer, at all events in the sinister sense in which the word "fraud" is usually employed. I do not think it is an appropriate word where, for example, the owner (here the directors) anxious that the engineer should keep within the terms of the contract as he conceives it, uses persuasion or even resorts to peremptory orders to secure such compliance. If that is fraud the owner is not aware of it and one is usually conscious of a fraudulent act. The owner may in all innocence under a mistaken view of his rights obviate the necessity of the certifi-

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cate by in effect ousting the engineer or by inducing him to abandon his own judgment for that of his employer. The engineer should be allowed to maintain an open mind and have freedom to change it up to the time for final decision.

Counsel for defendant submitted that the certificate can not be dispensed with unless fraud is shewn on the part of the directors, or at all events, wrongful conduct or collusion with the engineer. As already indicated, the term "fraud" is not an apt word in this case and in many others of a similar nature. It is enough if an employer knowing that the engineer stands between him and the contractor interferes with and induces him to adopt the employer's view for the latter's benefit. Counsel for defendant would, as I consider his submission, regard such conduct as fraud. Actual fraud should be taken to involve some wicked or dishonest act on the part of the person charged.

While the plaintiff agreed to abide by the decision of the engineer it did not agree to abide by his judgment with superadded instructions from a board of directors. The contract should be construed according to the intention of the contracting parties and such interference was not only not contemplated but actually destroyed its true basis. If the directors virtually supersede, or at all events, control and direct the engineer then a new tribunal is set up *de hors* the contract. There is the further point submitted by the defendant that the engineer may or may not have been influenced by the action of the directors. He submitted he was not so influenced and would have given the same decision in any event. Whether or not ineffectual interference is enough to dispense with the certificate may in other cases, require consideration. On my view of the evidence we are not obliged to speculate on that point.

The decision in *Hickman* v. *Roberts* (1913), A.C. 229, should determine this case. True the intervention by the owners and other circumstances were more pronounced in the *Hickman* case, but a question of degree does not affect the principle. Certain facts there led to statements in the judgments which are not necessarily suggestive of general principles of law. For instance, Lord Loreburn, L.C., says at p. 233:

"It is undoubted that the defendants, Messrs. Hickman, tried in this respect to lead him astray in their own interests."

This was true on the facts and it suggests sinister or fraudulent conduct. But it does not follow that fraud must be present although some earlier authorities in our own Courts and elsewhere appear to support that view. The directors in the case at Bar did not try to lead the engineer astray. They were trying to keep him within the contract, as they understood it but they nevertheless usurped his functions. The true interpretation of *Hickman* v. *Roberts*, as I understand it, may be derived from the following quotations:

Lord Ashbourne, p. 234:

"I am of opinion that the arbitrator, Mr. Hobden, did not preserve that attitude of judicial independence which was needed and required of him in the discharge of his responsible and possibly difficult duties; but I do not think it necessary to go so far as to adopt the words which may be noticed in the reading of the case to have been used, the words 'turpitude' and 'fraud.' I think that he had not present in his mind, and did not act upon, that need for judicial independence that is requisite for any one in his position. . . ."

Lord Alverstone, p. 234:

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"It is therefore very important that it should be understood that when a builder or contractor puts himself in the hands of an engineer or architect as arbitrator there is a very high duty on the part of that architect or that engineer to maintain his judicial position."

Lord Atkinson at p. 238, pointing out facts which he apparently assumes are sufficient to dispense with the certificate, says:

"I think it is clearly established upon the evidence that this arbitrator had ceased to be a free agent, that he had forfeited his independence as an arbitrator, and had allowed himself to be under the control or under the influence of the building owners. I think it is not satisfactorily found that he ever recovered his independence, but that on the contrary the fair presumption from the entirely unexplained delay in giving his final certificate is that he continued to be under the influence of the building owners."

Then in regard to the alleged ingredient of fraud or wilful wrong, Lord Atkinson says, at p. 238:

"At the same time, my Lords, I quite concur with what has fallen from my noble and learned friend upon the woolsack that the conduct of the architect in this case has probably been too severely censured. He was led astray. He was induced to forfeit his independence, and was influenced by an anxiety to promote the interests of the building owners, but I think it is quite possible that that may have happened without any intention on his part to do what was wrong, or possibly without even the knowledge that

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he was doing what was wrong. Therefore, as regards the use of the words 'collusion,' 'corruption,' or 'fraud,' these are rather extravagant terms to apply to the conduct that has been established against him."

Again, Lord Shaw of Dunfermline, at p. 239, reviewing facts which justify the conclusion reached, says:

"With regard to Mr. Hobden, I desire to say that I do not think anything has occurred in this case to suggest for one moment that when the ultimate accounting between the owners and the contractor took place Mr. Hobden's certificate would have overstated by a single penny or understated by a single penny the amount that in his judgment was due between these parties. It is right and just to Mr. Hodben that I should say so; but upon the other hand, my Lords, I look to his judicial position, which, as I say, was one of great delicacy—delicacy which ought to be carefully regarded by judgments of Courts of law—and I find that it is established, conclusively as I think, that he did not act with sufficient firmness to enable him to decide questions according to his own opinion, those questions affecting the issue of certificates and the interim amounts thereof. Instead of doing so, my Lords, he accepted the instructions or orders of the owners and their solicitors upon that topic."

That is what occurred in the case at Bar. His Lordship's judgment shews that if "the judicial actor on this stage was playing his part under instructions and orders from one party in the cause" that was enough to obviate the need for his certificate. He concluded, p. 240:

"The grant of a certificate cannot, my Lords, in my judgment, be a condition precedent to a right to recover if the architect's conduct and judgment are controlled as stated."

The evidence in the case under consideration shews that the engineer was subservient to the directors and their resolution of instructions was too peremptory and too much in keeping with other incidents to be whittled down by oral evidence or verbal explanations at the trial. What could be more directory than a resolution in these words? That,—

"with reference to the question of over-haul, the engineer in charge of the work of diversion at mile 13.7 be instructed that the Board cannot consider any other than the shortest haul or nearest way."

Their actions (which are more potent than words) were inconsistent with the basis of the contract. The engineer's actions in respect to the $16,000 certificate in the early stages of the work, apart from whether or not it should have been issued, sheds light not on the independent, but rather the dependent relations between him and the directors.

I find therefore that the plaintiff may resort to the Courts for

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the decision of the point in issue, *viz.*, the question of payment for over-haul by the long route. Unfortunately for it a favourable decision on the first point is of little value to the plaintiff, as I cannot agree with its contention. On the evidence the plaintiff fails to establish such conduct on the part of the directors, the engineer or general manager, or by all combined, which would either amount to a new agreement or create an estoppel. The contractor might excavate and haul the material any way he thought best. The engineer was not called upon to interfere. He says he did tell the plaintiff's manager that he would not be paid on that basis. But I do not rest on that. If the contractor chooses to adopt a more expensive method than the contract properly interpreted calls for the loss is his own.

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It was suggested that the contractor was entitled to be paid for hauling by the circuitous route by the terms of the contract itself on its true interpretation. The clause (12) is quoted *ante*. There is no distinction between "over-haul" and "extra haul" nor can I see that it makes any difference that the two words are employed interchangeably throughout the written contract. It was also suggested that "over-haul" is not a word bearing a technical meaning limited to a line along the centre line of railway between the centre of mass in the excavation and the centre of mass in the resultant embankment less the free haul, because of the method admittedly followed in estimating payment for hauling extra material from a borrow pit off to one side of the line of railway. The suggestion was that a definition must be broad enough to cover all cases that arise under it. This, however, was an isolated piece of work which occasionally, or which may indeed often arise. I do not think, however, that because use and application of the word "over-haul" is made in an isolated case only incidental to the main portion of the work, it must be deprived of a settled meaning acquired when applied to the main construction work. Borrow pits are in such a position that the question is not raised.

Laymen or Courts are not familiar with the meaning assigned to such a word in contracts. They must ascertain if it has any particular meaning, whether technical or popular among contractors in railway or kindred construction work. Evidence was

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led to shew it had such a meaning, the meaning I have already indicated.

The measurement is worked out in a somewhat technical way by mass diagrams. The weight of evidence supports the view of measuring from centre to centre along the line of railway as the proper interpretation of the word, and it is further supported by hand-books and manuals on the subject. It is not, as submitted, a question of custom or of proving a custom. It is solely a question of the meaning and application of a word that has acquired a particular meaning in a certain branch of work. Witnesses in explaining the meaning of the word are not speaking of a custom. If the contract was silent on the point and a universal practice of measuring proven that consideration might arise. Further, particular words in a contract by usage in the trade may acquire a special meaning or one differing from that commonly employed by laymen and the contracting parties must be taken as using them with that special meaning and parol evidence is admissible to shew that usage assigns that restricted meaning to the word. That again is not a question of custom; it is a question of interpretation. As Blackburn, J. points out in *Myers* v. *Sarl* (1860), 3 El. & El. 306 at p. 319:

> "The words of a written commercial contract are to be understood in the sense which they have acquired in the trade to which the contract relates. It is a *prima facie* presumption that if the parties to such a contract use expressions which bear a peculiar meaning in the trade they use them in that peculiar meaning; which can be ascertained only by parol evidence."

And he adds:

> "I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which has to be construed."

Part of the plaintiff's expert evidence on this point was predicated on the suggestion that the practical method of doing the work was by hauling the material by the circuitous route and, based on that assumption, evidence was given that on the true construction of the word payment should be made for the haul along the line throughout that route, that is, the route the material was actually hauled. This basic assumption begs the question. It makes the physical operation by any practical method the determining factor and ignores the view that the

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word has acquired a definite meaning, as the weight of evidence to my mind establishes. I am far from being convinced, looking at the model and reading the evidence that the practical course was adopted by the contractor, as the reasons assigned for the long haul are not convincing, although I do not rely on this view. I might be mistaken. One at least of plaintiff's witnesses (Hazon) stated that payment by the circuitous route was proper only if it was not practical to remove it by the centre line of railway and that point he at first said should be decided by the engineer, but later on cross-examination admitted that the method of doing the work was "up to the contractor." In any event, no such decision was given by the engineer. He simply did not object. It is not for the engineer to dictate the method of doing the work. That might cause endless interference in details. Further the contractor's rights are found in the contract and do not depend upon what he may or may not do in carrying it out.

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Mr. *Farris* also submitted in dealing with the hand-books and manuals filed that they only deal with a problem of computation and have nothing to do with methods of measurement. A part of the material in the embankment, if attacked from the south end would only have to be hauled a short distance, the length increasing as the work progressed. The method of computation outlined, however, only obviates an otherwise laborious and perhaps impracticable method of measuring as the material is moved parcel by parcel but that does not interfere with the principle. On the whole, I think the evidence establishes the meaning of the word "over-haul" as contended for by the defendant.

Counsel for plaintiff complained that evidence offered to the effect that Nickson, plaintiff's manager, in charge of construction work, told Kirkpatrick, defendant's general manager, that he proposed to haul the material by the circuitous route the latter agreeing that it was the proper way to do it, was wrongly excluded. Such evidence he submitted was admissible not to affect the contract but on the question as to whether or not the Court would review the matter after the work was completed on this alleged mutually satisfactory basis. I found it difficult to

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ascertain from the discussion just what occurred. It appears that there was some evidence adduced and cross-examination on this point and if I correctly apprehend it was rejected only when offered in rebuttal whereas if admissible it should have been evidence in chief. I do not think in any event, that it is a determining factor in the case. I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Mayers, Locke, Lane & Thomson.*
Solicitors for respondents: *Farris, Farris, Stultz & Sloan.*

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WINTER v. DEWAR

WINTER v. DEWAR.

Practice—Costs—Successful defendant—Not liable for costs of defence—Cannot recover from unsuccessful plaintiff.

Where a defendant is not liable for the costs of the defence, he cannot, if successful in the action, recover costs from the plaintiff.

Statement

APPLICATION by the defendant to recover the costs of the action. Heard by GREGORY, J. at Vancouver on the 17th of September, 1928.

J. H. Lawson, for the application.
Alfred Bull, contra.

24th September, 1928.

Judgment

GREGORY, J.: The right of a successful defendant to recover the costs of his action from the plaintiff depends upon whether he is himself liable for the costs of the defence. If he has no costs to pay, that is, if he is not liable he cannot recover costs from the plaintiff, the plaintiff being only liable to indemnify him for the loss he has suffered or is liable to suffer.

The cases of *Adams* v. *London Motor Builders* (1921), 1 K.B. 495, and *Armand* v. *Carr* (1927), 2 D.L.R. 720, decided by the English Court of Appeal and the Supreme Court of Canada respectively, are not inconsistent with this statement. In both of these cases the defendant had, as here, a bond of indemnity but in each of these cases the Court held on the facts, that there was a primary liability to the solicitor, he having been

retained to defend the action for the defendant. It is true that the employment was by an agent who had agreed to indemnify the defendant but there was an actual employment to defend for the defendant.

I can find no evidence here that Messrs. *Lawson & Clark* were employed to defend or act for the defendant Dewar, Mr. *Baird,* Dewar's solicitor, would have, I think, no general authority to retain a solicitor, but in any case the evidence offered in support of such employment consists of *Baird's* letter of the 31st of January to Mr. *Lawson,* and *Baird's* formal notice to the plaintiff of the change of solicitors. The letter is nothing more than a notice that defendant has been sued; that he has a good defence but that he is looking to the Capilano Company to defend the action under its agreement to indemnify him and for the purpose of allowing the Company to consider its position, he has entered an appearance for the defendant and offering to conduct the defence or to allow the Company to do so through its own solicitor. The only inference to be drawn from subsequent events is that Mr. *Lawson* elected to take charge of the litigation. The filing of the notice of change of solicitor by Mr. *Baird* is a formal matter required by the rules of practice, it is in no sense an appointment of a solicitor but merely a notice that the change has been made. I cannot see how in these circumstances Mr. *Lawson* could ever successfully maintain an action against the defendant for his costs of defence, and in fact it is evident from Mr. *Clark's* cross-examination upon his affidavit that not until after the litigation was over did *Lawson & Clark* ever consider the question of Dewar being in any way liable to them. They looked to the Capilano Company their own client.

Judgment

So far as the trifling assistance Dewar gave to the defence, was concerned, it was only what the law would require him to do if he sought to take advantage of the agreement to indemnify him.

As Dewar never by himself or his agent employed *Lawson & Clark* to defend the action on his behalf, he is under no liability to them for their costs of defence and therefore cannot recover them from the plaintiff.

Application dismissed.

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PETERSON v. MILLERD PACKING CO.

PETERSON v. MILLERD PACKING COMPANY LIMITED.

Shipping — Charter-party — Extension clause — Evidence of terminating charter-party.

The defendant chartered the plaintiff's vessel for 60 days for fishing north of Vancouver, the charter-party containing an extension clause should the defendant require it longer. The plaintiff's engineer was kept by the defendant on the boat, he having instructions from the plaintiff what to do with the vessel on the termination of the contract. The principals resided in Vancouver and at the end of the 60 days the defendant notified the plaintiff personally that he would require the boat no longer and that he would notify his cannery manager in the North to that effect. The notification did not arrive at the cannery until the boat had left for another cannery the cannery manager having told the engineer to get his instructions as to extension of the charter-party from the cannery manager on his arrival there. Upon his arrival the cannery manager told him he had no instructions but would keep the boat until he received instructions. The engineer continued to fish for an additional 32 days and deliver to the defendant's canneries. The plaintiff recovered in an action for hire for the additional period under the charter-party.

Held, on appeal, reversing the decision of MCDONALD, J. (MARTIN, J.A. dissenting), that the principals themselves having on the termination of the 60 days declared the charter-party at an end, a local manager at a cannery would not, without instructions, have authority to continue the contract.

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 9th of May, 1928, in an action to recover $1,018.92, balance owing the plaintiff by the defendant for hire of a motor-boat "Snoqualomie" under a charter-party in writing of the 5th of August, 1927, whereby the defendant chartered the said motor-boat for 60 days from the 6th of August, 1927, or longer if required, the defendant agreeing to pay $25 a day for its use. The plaintiff claims the defendant did require the boat after the expiration of the 60 days until the 7th of November following, in all 94 days (less two days when the boat was undergoing repairs). The plaintiff further at the defendant's request supplied for use on the boat, fuel-oil, mobile oil and naptha in the sum of $22.92. The boat was used for fishing purposes and the

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defendant claims that on the expiration of the 60 days the boat was no longer required of which notice was given the plaintiff. The boat worked on what is known as a share basis. There were twelve shares, two for the boat, two for the nets and the balance divided amongst the crew, the captain getting one-half of one of the boat's shares. At the end of the 60 days the manager of the defendant Company at Vancouver told the plaintiff personally that he no longer required the boat and at the same time told him he would notify his cannery manager in the North to that effect. The notification reached there too late and the boat in the meantime went to another cannery where he was told he would receive instructions but on his arrival the manager there had no instructions but told him to continue his fishing which he did until the 7th of November. It was held by the trial judge that the plaintiff was entitled to recover under the charter-party until the 7th of November.

The appeal was argued at Victoria on the 22nd of June, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, and MACDONALD, JJ.A.

Argument

Hossie, for appellant: The question is whether the charter-party automatically lapses at the end of 60 days. At that time the boat was out and continued on fishing. We say the charter-party expired unless we did some overt act to continue it. As to anything having been done to extend the charter see *Smith, Hill, and Co.* v. *Pyman, Bell, and Co.* (1891), 7 T.L.R. 417.

Craig, K.C., for respondent: They must properly deliver up the boat at the expiration of the 60 days. The evidence shews there was no delivery whatever. They continued using the boat for fishing purposes without any change. In any case we are entitled to damages: see *Smith* v. *Roberts* (1892), 8 T.L.R. 506. As to amending pleadings during the course of the trial see *Shickle* v. *Lawrence* (1886), 2 T.L.R. 776 at p. 777.

Hossie, in reply: This claim for damages would be a totally different cause of action: see *Hipgrave* v. *Case* (1885), 28 Ch. D. 356.

Cur. adv. vult.

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2nd October, 1928.

MACDONALD, C.J.A.: The defendant chartered the plaintiff's boat, to fish in the north, for 60 days, with an extension clause, should he wish to keep her longer. The engineer, Timsen, was kept on the boat to look after plaintiff's interests and had his instructions of what to do if the boat were not required by defendant after the 60 days had expired. Both the principals resided in Vancouver. At the end of the 60 days, defendant notified the plaintiff personally that he would not require the boat longer. He said gratuitously that he would notify his cannery manager in the north to that effect. The notification either went astray or came too late to reach him before the boat had left for another of defendant's canneries, where the engineer was told to get his instructions. The manager of that cannery told him that he had no instructions but would keep the boat until he got them. Timsen then wired to his principal the plaintiff, telling him of this, but the plaintiff appears to have done nothing, as a result of that wire. What he should have done was to have got in touch with the defendant and ascertained how the confusion had come about. Instead, the engineer, Timsen, continued to fish, delivering his fish to the defendant's canneries, either believing that the charter had been extended or on the basis which had been agreed upon between him and his principal when he left Vancouver in the first place.

MACDONALD, C.J.A.

Had the fishing been good plaintiff would have benefited by the expiry of the charter, but as it was bad, he suffered a loss, for which he endeavours to hold the defendant liable. I think he brought his trouble upon himself. The contract being at an end he should have gone at once to his co-contractor for an explanation of what had happened up at the canneries.

The appeal should therefore be allowed and the action dismissed.

MARTIN, J.A.: Under the charter-party in question, entered into at Vancouver on 5th August, 1927, the plaintiff, the owner of the M.B. Snoqualomie chartered her to the defendants for fishing under these clauses:

MARTIN, J.A.

"That the boat is to go on charter August 6th [1927] and to remain under charter for a period of 60 days or longer if required.

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"That the owner will supply an engineer who will obey all orders and instructions given to him by the charterers or the managers and the said man will do everything possible in the best interests of the charterers.

"That the charterer shall pay to the owner as consideration money the sum of Twenty-five Dollars ($25) per day."

The question in dispute arises out of a period of about 30 days after the 60-day period which the plaintiff claims the defendant should pay him for, but the defendant alleges that,—

"At the expiration of the said period of 60 days, the said vessel was no longer required, and the plaintiff was so informed. Subsequent to the expiration of the said period of 60 days the plaintiff used the said vessel for his own purposes in fishing in the usual customary manner upon shares, in the course of which fishing operation, subsequent to the expiration of said charter, he became entitled in respect of the said boat to the sum of One Hundred and sixteen Dollars and 40/100 ($116.40)."

The learned trial judge found the facts in favour of the plaintiff and gave judgment for $1,018.92, which holds the defendant liable for the use of the boat till 7th November. It is admitted that at the expiration of the 60 days the boat was in the possession of the defendant, and the whole question comes down to whether or not the defendant gave up the boat to its owner at the end of 60 days as it was his duty to do, or exercised its right to continue to employ it for the longer period of its requirements as contemplated by the said clause; the boat was not returned to its home port, Vancouver, till the 8th of November.

MARTIN, J.A.

After considering carefully the evidence, in my opinion, the learned judge below has reached the right conclusion and the plaintiff is entitled to recover on contract under the terms of the charter-party for the additional days it "required" the continued use of the vessel then in its possession and control. This continued use was not a new chartering but the continuation of the original period as contemplated and provided for by the charter-party to meet just such circumstances as arose in the course of fishing. The evidence of the engineer, Timsen (who under the contract was the charterer's servant, not the owner's), as to what occurred between him and Sundstrum (the defendant's cannery manager at Sointula) and the lawful orders that the latter gave Timsen on the 11th of October justify the learned judge in his conclusion—see A.B. pp. 65, 97, 100, 109, 111, at which last

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page on cross-examination and in answer to a question about his opportunity to telegraph the owner, Timsen says he did telegraph the owner that defendant's "manager said he would keep the boat." The dispute between those parties has apparently arisen from some misunderstanding between the defendant's officers as to the intentions and orders of the head office, but for that the plaintiff is not responsible.

The appeal, therefore, should be dismissed.

GALLIHER, J.A.: The plaintiff chartered his boat Snoqualomie to defendant for fishing. The clause in the charter-party over which the dispute arises is in these words:

"That the boat is to go on charter August 6th, and to remain under charter for a period of 60 days or longer if required."

GALLIHER, J.A.

The plaintiff supplied the engineer who was to obey all orders and instructions of the charterers or their managers. The charterer was to receive for the use of the boat $25 per day. The captain and crew of the boat (except the engineer) were hired by the defendants. They and the engineer (who owned the net) were paid by shares in the fish caught and no dispute arises with regard to them. The sole question is—Was the charter-party put an end to at the expiration of the 60 days, and did the boat continue fishing on after that date for the Company, or was it fishing independently? The boat was fishing some 200 miles from Vancouver, the head office of the Company. The season was not very good and on or about the expiration of the 60 days the plaintiff saw Millerd at the office and was informed by him that the boat would not be required any longer. This the plaintiff admits and says Millerd was to wire his manager at the Laura Whalen, a floating cannery owned by the defendant, and where the boat had been fishing, to that effect. The plaintiff had an arrangement with the engineer of the boat that if the Company did not require the boat longer than the 60 days, they would continue fishing independently on shares. Millerd did wire the cannery superintendent at the Laura Whalen as promised the plaintiff, but in the meantime the season having closed up there, the boat had left some few hours before the wire arrived, the superintendent Mathers having informed the captain and engineer when leaving that he had then no notice that their boat

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would be required longer and that they had better call in at Sointula where one Sundstrum was local manager for the defendant Company and (as he says) would be able to tell them as to where the best fishing might be expected. The captain and engineer had the impression from what was said that they were to continue fishing for the Company while Mathers said, not having heard from his Company when they left, he considered they were no longer in the Company's employ and would be fishing independently and he thought Sundstrum would be able to assist them as to where the best fishing was. Be that as it may, they went to Sointula and there the captain and engineer separately went to see Sundstrum. Here the stories of the captain and the engineer on the one hand and Sundstrum on the other, are at variance, but the learned judge below finds as follows:

"They did go to Sundstrum and they received instructions to the effect that as he had no instructions from the defendant at head office he would not release the boat, and that they would fish at Sointula, which they did to the 6th November."

and awarded the plaintiff $1,018.92, holding that the charter-party was in force until that date.

When John Millerd who had executed the charter-party on behalf of the defendant, and Peterson on his own behalf, met on October 5th it was clearly understood that the charter-party was at an end and the boat would no longer be required. Now whether Millerd notified Mathers at the Laura Whalen of his own motion or at the request of Peterson, of the boat not being longer required, seems to me under the circumstances, not to be of much moment. The principals to the charter-party agreed that it should be at an end and the notification would be authority to Mathers for turning the boat over to the engineer Timsen, who was Peterson's representative.

This question arises: When once the principals had declared the charter-party at an end and as the principals here only can be affected by the result and assuming that there was a duty upon Millerd to formally hand over the boat to Timsen and he or his subordinates did not do so, what would Peterson's cause of action be? I would think for breach of that duty and not under the contract which was put an end to. And supposing we

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could amend the pleadings so as to conform to the evidence, what would the damages be? Peterson had all his arrangements made for fishing independently and the fishing went on for a month longer and the results were the same as if the notice had been given and the turning over of the boat formally made, so no loss was suffered by reason of this and no damages could be awarded other than perhaps nominal damages. But on the pleadings as framed the plaintiff is relying on the acts of Sundstrum as continuing the charter-party.

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When the principals themselves had declared the charter-party at an end, a local manager such as Sundstrum was would have no authority, at all events without instructions, either to continue the old or make a new contract, especially as he was as such manager at Sointula not in touch with the arrangements, the boat not having fished for the cannery he was managing. Moreover, Peterson had been informed by wire from Timsen that Sundstrum was keeping the boat (this was brought out in cross-examination by Mr. *Davis*) and knowing what had taken place between Millerd and himself which was exactly the opposite, he took no steps to ascertain from Millerd if any different arrangements had been made, thus leaving himself in the position of asserting if the fishing was poor the charter-party had been continued, and if good that it had been put an end to. This may not be all-sufficient, but it is a circumstance.

I would hold first, that the charter-party was at an end on the 5th of October; second, that if there was a duty on the defendant's part to turn the boat over to Timsen and a breach of that duty owing to the circumstances I have detailed, no damage was sustained by reason thereof, except the nominal sum of $1; third, there was no authority in Sundstrum to continue the charter-party, or make a new agreement.

I would allow the appeal with costs.

MACDONALD, J.A.

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

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *E. P. Davis & Co.*

Solicitor for respondent: *T. J. Baillie.*

VITOMEN CEREAL LIMITED v. MANITOBA GRAIN COMPANY LIMITED *ET AL.*

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VITOMEN CEREAL LTD. *v.* MANITOBA GRAIN CO.

Company—Sale of assets by directors of company—Secret profits—Fraud—Damages.

A promoter who makes a secret profit, at the expense of the company he promotes, by purchasing for the intended company, property which he sells to it at an enhanced price, is liable in damages for the resultant loss to the company.

Statement

ACTION for damages for loss to the plaintiff Company through fraudulent sales made to the Company by the defendant. The facts are set out fully in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 12th of June, 1928.

Reid, K.C., and *Gibson,* for plaintiff.
Harold B. Robertson, K.C., for defendants Matchetts.
Elmore Meredith, for the bookkeeper.
S. S. Tufts, for defendant Manitoba Grain Co.
J. A. C. Smith, for defendants Langs.

10th July, 1928.

Judgment

MURPHY, J.: The Manitoba Grain Co. Ltd. was incorporated as a private company early in September, 1925. On September 9th, 1925, its capital stock was allotted as follows:

Defendant, J. W. Langs, one share; defendant, E. T. Matchett, one share; defendant, J. W. Langs 249 shares and 249 shares to defendant, Alma A. Matchett, wife of defendant, E. T. Matchett. On the same day, defendant, J. W. Langs, transferred 249 shares out of his total of 250 shares to his wife, defendant Elva C. Langs. Neither defendant, Elva C. Langs, nor defendant, Alma A. Matchett, gave any consideration for said shares. Defendant, Elva G. Langs, when examined for discovery in this action, did not know that she was or ever had been a shareholder of the Manitoba Grain Co. Her husband held her power of attorney and, as stated by him in his discovery, could do anything he liked.

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Defendant, Alma A. Matchett, by her answers to interrogatories, states that her husband held her proxy at all material times. Though nominally owning within one share of half the issued capital of the Manitoba Grain Co., she had no knowledge of the negotiations that resulted in the purchase hereinafter referred to made by that Company from the American Vitomen Co. nor did she know anything about the terms of that purchase. She received 49,715 shares of the plaintiff Company's capital stock, as hereinafter stated, but why she did not know. Defendant, E. T. Matchett, when asked in discovery if these shares were issued to his wife in her own right, on the advice of counsel, refused to answer. On March 31st, 1927, she, without consideration, transferred the whole 49,715 shares in plaintiff Company to her husband. On July 27th, 1927, her husband retransferred to her without consideration 44,715 of said shares.

When the Manitoba Grain Co. was organized, defendant, J. W. Langs, and defendant E. T. Matchett became the directors. Defendant J. W. Langs was elected president, and defendant E. T. Matchett, secretary, which offices they have continuously occupied up to the present time. On January 4th, 1926, defendant Mrs. Langs transferred one share to Willie Davey, who, on that date, was elected a director. He so continued until June 29th, 1927, when he resigned and transferred his one share to one Helmer who thereupon became a director in his place. Thus at all material times the whole of the issued shares of the Manitoba Grain Co. was in the hands of Langs and his wife and of Matchett and his wife with the exception of one share. Davey took no part as director in the matters giving rise to these proceedings, the affairs of the Manitoba Grain Co. being in fact throughout managed by defendants, J. W. Langs and E. T. Matchett.

In September, 1925, that Company entered into an agreement for sale to purchase certain land, buildings and plant situate in Vancouver for $28,000, payable $4,000 in cash, $3,000 on December 15th, 1925, $3,000 on March 15th, 1926, $1,500 on June 15th, 1926, $1,500 on September 15th, 1926, $3,000 on December 15th, 1926, $3,000 on March 15th, 1927, $1,500 on June 15th, 1927, $1,500 on September 15th, 1927, $3,000 on

December 15th, 1927, $3,000 on March 15th, 1928, with interest at 8 per cent. on deferred payments. The property was subject to a mortgage on which was owing over $20,000 at the date of the sale. Said sum was included in the purchase price of $28,000 and the Company was at liberty to pay the instalments to the mortgagee until the mortgage was liquidated. The Company defaulted on the payments due on December 15th, 1925, and March 15th, 1926, but, as a result of the fire on March 19th, 1926, hereinafter mentioned, the mortgagee received sufficient funds from the insurance companies to liquidate the mortgage. The further payments made to the vendor are set out in Exhibit 32. There is still over $7,000 unpaid and overdue on the agreement for sale and foreclosure proceedings have been commenced by the vendor. After organization the Manitoba Grain Co. started business and speedily found itself in need of capital. It was decided, therefore, to change the Company into a public corporation so as to procure the needed capital by the sale of shares to the public. On December 10th, 1925, the first steps were taken and the change was effected on January 6th, 1926. Shortly thereafter defendant, J. W. Langs, went to Seattle with a view to getting the required capital. Through an agent of the Manitoba Grain Co. there, he got in touch with the defendant Black. Black was interested in and held the power of attorney of a company called Vitomen Cereal Co. which had a plant at Renton near Seattle. This plant had in January, 1926, been closed down for some six months and subsequently went into bankruptcy. Langs heard from Black that the company was not a success but this was attributed to mismanagement. The Vitomen Cereal Co. had a trade mark "Vitomen" registered in Canada and the United States. It, when operating, had manufactured breakfast foods, amongst others for a time, a brand which it called "Vitomen Shreds," which Black claimed to defendant, J. W. Langs, was made according to a secret process of great value. Defendant, J. W. Langs, discussed with Black the proposition of Black aiding in getting the needed capital for the Manitoba Grain Co. Black's reply was that he would not be interested in going on with that company but he would be interested in forming the Manitoba Grain Co. into a new com-

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pany in which he, Black, would like to share. As defendant J. W. Langs put it in his discovery, that was the beginning of "Vitomen Cereal" meaning the plaintiff Company. After negotiations, it was decided between Black, defendant J. W. Langs, and defendant Matchett, that a new company should be formed to take over the American company's trade-mark in Canada and the right to use its secret process for making "Vitomen Shreds" in Canada and also the assets of the Manitoba Grain Co. The negotiations were speedily completed. The idea of going on with the Manitoba Grain Co., as a public company, was abandoned by defendants, J. W. Langs and E. T. Matchett, and, on January 14th, 1926, an agreement was made between The American Vitomen Co. and the Manitoba Grain Co. for the sale to the latter of the trade-mark for Canada and the rights to manufacture in Canada, under its secret process. This document is signed for the Vitomen Co. by Black as its president and one Callahan as secretary and for the Manitoba Grain Co. by defendant J. W. Langs as its president, and defendant E. T. Matchett as secretary. The purchase price fixed was $10,000 payable $2,500 on the execution of an assignment of the trade-mark and the placing in escrow of full information of the secret process and the balance of $7,500 as follows: $2,500 on April 14th, 1926, $2,500 on June 14th, 1926, and $2,500 on August 14th, 1926, and 25,000 shares of par value of $1 each in a company which the Manitoba Grain Co. bound itself to incorporate forthwith under the Companies Act of Canada with a capital of not less than $500,000. The Manitoba Grain Co. further covenanted to cause "as soon hereafter as may be" to be allotted to the American Cereal Co., 25,000 one dollar ordinary shares in the proposed company as fully paid up. The Cereal Co. covenanted to release defendant Black so that he could assist in the financing of the proposed company and in the management of its affairs. The price was subsequently modified by excluding therefrom the share consideration but when or how this came about the evidence does not disclose. It is alleged that the $10,000 has been paid but when it was attempted on examination for discovery of E. T. Matchett, as an officer of the Manitoba Grain Co., to ascertain the particulars, he, on the advice of

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counsel, refused to answer. As no evidence was offered at the trial by the defence the record merely discloses that the $10,000 was paid by the Manitoba Grain Co. When or how is not stated. An application, dated January 30th, 1926, Exhibit 3, for incorporation of plaintiff Company, under the Companies Act of Canada was next signed. The signatories were the defendants Black, J. W. Langs and E. T. Matchett and *W. H. Patterson* and B. Predeaux. *Patterson* was solicitor for the Manitoba Grain Co. and B. Predeaux was his stenographer. The three defendants, Black, J. W. Langs and E. T. Matchett, were named as provisional directors. The capital was $500,000 divided into 500,000 shares of $1 par value subject to increase under the provisions of the Act. These documents were prepared by *Patterson,* the solicitor for the Manitoba Grain Co., and also solicitor for the plaintiff Company after incorporation. On March 1st, 1926, an agreement (Exhibit 1) apparently prepared by *Wood,* another solicitor, was executed between defendants Black, J. W. Langs, Elva Langs and E. T. Matchett of the one part and one Tretheway of the other part. This agreement contains the following recitals that the defendants just named control the Canadian manufacturing and selling rights of the secret process and the trade-mark of the cereal product known as "Vitomen Shreds" that they own and control the Manitoba Grain Co.; that they have undertaken the formation and promotion of a Dominion Company to be known as "Vitomen Cereals Ltd." with capital of $500,000 divided into 500,000 shares of $1 each; that on such incorporation being effected the said named defendants are to transfer to it all the assets of the Manitoba Grain Co. and the selling and manufacturing rights of the secret process of "Vitomen Shreds" and the trade-mark "Vitomen"; that in consideration of such transfer they are to receive 140,000 shares fully paid up from the new Company that they require $7,500 to be used for promotion and formation of the new company that they have agreed to sell to Tretheway 22,000 of the said 140,000 shares for $7,500 and that Tretheway has agreed to buy the said shares for $7,500 in consideration of covenants and conditions therein contained.

The said named defendants then covenant, *inter alia,* to incor-

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porate Vitomen Cereal Ltd. under the Dominion Companies Act with capital of $500,000 to be divided into 500,000 shares of par value of $1; that, upon incorporation, they will convey or cause to be conveyed to the new company all the assets of the Manitoba Grain Co. and will grant or cause to be granted to the new company the said manufacturing rights, trade-mark and secret process for "Vitomen Shreds" for Canada; that the new company shall issue to them 140,000 fully paid up shares for said transfers; that out of said shares said named defendants will at once transfer 22,500 shares to Tretheway; that the said named defendants will thereupon forthwith proceed to sell the shares so transferred to Tretheway at par on a 20 per cent. commission; that before June 29th, 1926, they will sell sufficient of said shares to repay to Tretheway the $7,500 in full and will sell, on the same basis, the balance of the said Tretheway shares before September 29th, 1926; that they will so sell the whole of Tretheway's shares before selling any of the other shares owned by them and before permitting the new company to offer any of its treasury shares; that they will furnish a bond from a reputable bonding house as security for the satisfactory carrying out by them of their covenants and agreements in the said document contained; that defendant Black will devote his whole and exclusive time to the selling of said Tretheway shares until they are all sold. The agreement provides that after Tretheway has received $7,500 the said named defendants may at their option have the right for a period of 60 days to sell treasury stock of the new company and thereupon the time for selling remainder of said Tretheway shares is to be extended for 60 days. The required bond was duly obtained and delivered. A statement in lieu of prospectus, undated, signed by the defendants Black, E. T. Matchett and J. W. Langs is the next document produced in order of date. It was filed with the petition for incorporation with the Secretary of State at Ottawa on March 11th, 1926. This document refers to the existence of four other documents all dated March 6th, 1926. The first is a promotion agreement for the allotment of 45,000 shares to defendant Black. No further details of this document are given. The second is an agreement for the allotment of 10,000 shares to

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defendant J. W. Langs for agreeing to act as president and for assisting in promotion of the Company. The third is an agreement for the allotment of 5,000 shares to the defendant E. T. Matchett for agreeing to act as secretary-treasurer and for assisting in the promotion of the Company. The fourth is an agreement for sale of lands, goodwill, trade-mark process of manufacture and sale of Vitomen food products made between Manitoba Grain Co. as vendor and defendant, J. W. Langs and E. T. Matchett as trustees for a company to be incorporated under the name of "Vitomen Cereal Ltd." The statement in lieu of prospectus states these documents may be inspected at an address which was solicitor *Patterson's* office. None of them is produced and no one of them can be found amongst the papers of the plaintiff Company. The purchase price payable to the Manitoba Grain Co., as stated in this statement, in lieu of prospectus, is $100,000 fully paid up shares and $78,500 in cash, $178,500 in all. No mention is made in the statement in lieu of prospectus of the Tretheway agreement nor is the fact disclosed that the whole of the issued shares of the Manitoba Grain Co., the vendor therein named, with the exception of one share, are held by defendants J. W. Langs, Elva Langs, E. T. Matchett and Alma Matchett. Incorporation of the plaintiff Company was effected at Ottawa on March 19th, 1926. On that same day a fire destroyed the plant of the Manitoba Grain Co. Insurance was collected sufficient to pay off the mortgage and leave a surplus of some $8,700. This sum was collected by the Manitoba Grain Co. Towards the end of March one Geiger was brought to Vancouver to enter the service of the plaintiff Company. He had worked for the American Vitomen Co. as an expert in the manufacture of cereal breakfast foods during 1925 at their Renton plant but early in 1926 he entered the employ of the Manitoba Grain Co. at Seattle. As such employee he met Langs some time in February, 1926, at Seattle. Geiger had discovered when working at Renton that the secret process for "Vitomen Shreds" was worthless and knew that after repeated experiments its use had been abandoned in the Renton factory. He swears that in February he advised Langs and Matchett that such was the case and that the trade-mark was valueless and that the

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American Company was practically a failure. Geiger, on coming to Vancouver, was, in the first instance, in the employ of the Manitoba Grain Co. and was paid his first month's wages in Vancouver by that Company. On April 1st, 1926, the provisional directors of plaintiff Company, defendants J. W. Langs, E. T. Matchett and Black, convened. One share was allotted to each of the signatories to the application for incorporations. E. T. Matchett was appointed secretary *pro tem.* and directed to call a meeting of shareholders. On the same day the shareholders meeting took place and defendants, J. W. Langs, E. T. Matchett and Geiger, above referred to, were elected directors. The meeting then adjourned to meet again after the directors' meeting. This meeting then took place. Defendant J. W. Langs was made president for a period of five years at a salary of $400 per month. It was resolved that the solicitor be instructed to prepare an agreement so engaging defendant J. W. Langs, such agreement to follow the terms of the draft agreement of March 6th, 1926 (one of the agreements above referred to as missing), that same be executed and 10,000 fully paid up shares be issued thereunder to defendant J. W. Langs. Geiger was made vice-president at a salary of $210 and travelling and living expenses. E. T. Matchett was made secretary-treasurer for a period of five years at a salary of $350 per month. It was resolved that the solicitor be instructed to prepare an agreement so engaging E. T. Matchett, such agreement to follow the terms of the draft agreement of March 6th, 1926 (another of the missing agreements) and that same be executed and 5,000 fully paid up shares be issued thereunder to defendant E. T. Matchett. It was further resolved that the solicitor be instructed to prepare an agreement securing the services of defendant Black for the plaintiff Company, such agreement to follow the draft agreement of March 6th, 1926 (likewise one of the missing agreements), and that 45,000 fully paid up shares be issued thereunder to defendant Black. Another resolution authorized the execution of the purchase agreement from the Manitoba Grain Co. Its terms are hereinafter summarized. The trustee agreement of March 6th, 1926 (the fourth missing agreement), was ratified and confirmed except as to purchase price and terms of payment

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because of the fire. The Producers General Agency Ltd. was made agent to sell the plaintiff Company's shares at a commission of 25 per cent. but did not actually function as such for any length of time, if at all. Another agreement hereinafter summarized between plaintiff Company and Manitoba Grain Co. in reference to a sum of $12,000 to be provided by that Company was authorized to be executed. *Patterson* was appointed solicitor and his account for incorporating Company directed to be paid. The directors' meeting then adjourned and the shareholders' meeting reconvened. The shareholders approved of a fee of $20 to directors for each meeting actually attended and ratified and confirmed all the agreements authorized by the directors.

Judgment

The purchase agreement from Manitoba Grain Co. with the plaintiff Company provided that the Manitoba Grain Co., as the owner in Canada of the trade-mark "Vitomen" and of the secret process for manufacturing "Vitomen" cereal food products and the rights for manufacture and sale of same in Canada and of certain real estate (being all the real estate owned by it and the only other asset owned by it) agrees to sell same to the plaintiff Company which agrees to purchase for $157,500 payable as to $100,000 by 100,000 fully paid up shares in plaintiff Company and, as to the balance as follows: $12,000 by the assumption and payment of a mortgage to be secured by the Manitoba Grain Co. which mortgage was to be registered in priority to the sale agreement to plaintiff Company; $10,000 on April 1st, 1926, *i.e.*, on the day the Company was regularly organized for business although it had no funds and could obtain none except by the sale of treasury stock which its actual directors, Langs and Matchett (for I accept Geiger's evidence that at this period he was their tool), had agreed with Tretheway should not be done until at least $7,500 had been realized from the sale of shares given to Tretheway; $10,000 on May 1st, 1926, $10,000 on June 1st, 1926, $10,000 on July 1st, 1926, and the balance $5,500 on August 1st, 1926. On the same day another agreement was made between the Manitoba Grain Co. and plaintiff Company whereby the Manitoba Grain Co. covenanted that it would try to raise on its property covered by agreement of sale

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to plaintiff Company a mortgage of $12,000 or failing that would expend $12,000 on building operations on said property for plaintiff Company. The mortgage was not raised but the money was so expended by the Manitoba Grain Co. The agreement with Black, *re* the issue to him of 45,000 shares, is missing. This, with the other four documents, dated March 6th, 1926, already referred to as missing, should be in the possession of the plaintiff Company but could not be found when searched for amongst its papers some time early in 1928 by Geiger. Up to that time control was in the hands of defendants Langs and Matchett up to May, 1927, and thereafter of Matchett, at any rate up to October 3rd, 1927, and apparently until about the middle of December, 1927, when he resigned as director. On April 12th, 1926, the 45,000 shares were allotted and issued to Black. On April 21st, 1926, Black transferred to Tretheway 22,500 shares out of the shares so allotted to him to cover the shares which Tretheway was entitled to for his advance of $7,500. On May 21st, 1926, a resolution was passed by the directors to the effect that Black, having declined to execute the agreement drawn pursuant to the draft agreement of March 6th, 1926, and having signified his intention to abandon his efforts in the Company's behalf, the allotment to him be reduced to 23,275 shares which would just cover the shares given by Black to Tretheway and other small lots of shares that Black had in the meantime sold. On May 25th, 1926, the whole of the balance of the 45,000 shares, *i.e.,* 21,725 shares were transferred by Black to Geiger. On May 12th, 1926, the 10,000 shares to defendant J. W. Langs and the 5,000 shares to defendant E. T. Matchett, were allotted as called for by the agreements with them. On May 25th, 1926, an agreement was entered into between plaintiff Company and Geiger whereby in consideration of Geiger agreeing to serve the Company for five years the Company is to allot him 21,725 shares. This was apparently carried out by the transfer of that date from Black to Geiger. On May 28th, 1926, a pooling agreement was made between Geiger, defendant J. W. Langs and E. T. Matchett whereby a share pool was created. Geiger was to contribute 45,000 shares or such less number of shares as would be required to make up

that number after deducting the shares contributed by defendant Black to a pool stated to have been created by him, defendant J. W. Langs and E. T. Matchett (if such pool was ever in fact created the evidence does not disclose that it was), defendant J. W. Langs 10,000 shares and defendant Matchett 5,000 shares. 22,500 of the pooled shares were to be used to carry out the Tretheway agreement and the balance were to be used for the assistance of the Company. Geiger's testimony is that this pool was to be created to provide a fund to cover up payments of commission to stock salesmen in excess of the 25 per cent. allowed by the prospectus filed and issued on behalf of the Company. Commissions greatly in excess of the maximum were in fact paid as will hereafter appear and all of the shares dealt with by the pooling agreement belonging to J. W. Langs and E. T. Matchett and all but 10,000 of Geiger's shares were donated later to the Company as an off-set against such excess payments. Geiger, his wife and children still have the remaining 10,000 shares. The pooling agreement was not in fact carried out.

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On May 10th, 1926, a prospectus was signed by defendants J. W. Langs and E. T. Matchett, and Geiger which was filed and used in the stock-selling campaign. It states that a building 40 feet by 100 feet is being built on the property purchased from the Manitoba Grain Co. which building will be included in the sale from that Company to plaintiff Company. In fact, as stated, Manitoba Grain Co. was to contribute but $12,000 to the cost of said building, the balance had to be paid by the plaintiff Company. This prospectus, like the statement preceding it, makes no disclosure of who are the shareholders of the Manitoba Grain Co., the vendor Company nor of the existence of the Tretheway agreement. The estimated preliminary expenses of the Company is stated to be $2,000. A new prospectus, dated October 9th, 1926, and another dated November 8th, 1926, signed by the same parties, were subsequently filed and issued but both are silent in reference to the shareholders of the Manitoba Grain Co. and the Tretheway agreement. A letter from Tretheway to the Producers General Agency Ltd. which, as stated, was to act as the fiscal agents of the Company but which in fact did not so act was obtained to the effect that, after

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thorough investigation of plaintiff Company, he believed its future possibilities were absolutely unlimited. This letter was used by stock salesmen in effecting sales. No mention is made in it of Tretheway's interest in having 22,000 shares sold. An intensive and highly successful campaign to sell shares was entered upon. By November 30th, 1927, over 160,000 shares had been sold to the public at par at a cost to the Company, through commissions and the establishment and maintenance of branch offices in Winnipeg, Calgary, Regina and Saskatoon, of slightly over $77,500 or approximately one-half of the total share proceeds. Other administrative expenses, such as advertising, salaries to president, vice-president, legal and travelling expenses, etc., amounted during the same period to over $54,000, making a grand total of over $130,000. On June 26th, 1926, the 100,000 shares provided for by the purchase agreement were allotted to the Manitoba Grain Co. On September 26th, 1926, the directors of the Manitoba Grain Co. resolved that these 100,000 plaintiff Company shares be distributed amongst their shareholders in amounts proportional to their respective share holdings. This was not done but, at a subsequent meeting of the directors held on February 1st, 1927, it was resolved that said 100,000 plaintiff Company shares be disposed of as follows: To defendant J. W. Langs 200 shares; to defendant E. T. Matchett 200 shares; to defendant Alma Matchett 49,715 shares; to defendant Elva Langs 49,715 shares; and this distribution was carried out. Defendant J. W. Langs acted as president until May, 1927, when he resigned and the affairs of the Company were carried on up to October, 1927, by defendant E. T. Matchett, and Geiger. The plaintiff Company by November, 1927, completed its three-storey factory building, measuring 100 by 40 feet and had installed therein plant and equipment and furniture at a total cost of about $53,000 but had not commenced actual manufacture of anything. The necessary machinery for making any form of product of the type of "Vitomen Shreds" has never been purchased. Up to date of trial plaintiff Company had sent out but one carload of product. Up to October 3rd, 1927, no part of the cash purchase price had been paid by plaintiff Company to the Manitoba Grain Co. Shortly

before October 3rd, 1927, defendant Langs demanded payment of at any rate a portion of said overdue payments. Geiger thereupon looked up the purchase agreement amongst the plaintiff Company's papers. He found a copy which inspection shews had been altered. According to this copy no cash payments were due before April 1st, 1928. He accordingly took the position that no money was due. Defendant Langs produced a copy of what doubtless is the true agreement shewing the payments falling due from April 1st, 1926, and thereafter as hereinbefore set out. A conference took place as a result of which an agreement was made between defendants J. W. Langs, E. T. Matchett, and Geiger whereby the plaintiff Company was to pay $3,000 to Manitoba Grain Co. and the latter Company was to postpone further payments until February 1st, 1928, when $2,500 was to be paid and thereafter $1,000 per month. There were other stipulations as to sales of shares, etc. The memo. recording this has affixed to it the seals of both companies but the evidence does not disclose how plaintiff Company's seal came to be affixed. There is no evidence that plaintiff's directors ever had the matter before them officially. The $3,000 was paid to the Manitoba Grain Co. out of plaintiff Company's funds. This is all that has been paid on the cash purchase price so that plaintiff Company still owes the Manitoba Grain Co. the balance of $54,500 apparently and interest thereon at 8 per cent. since April 1st, 1926. As stated, Burnet, the original vendor to the Manitoba Grain Co., still has some $7,000 due him and foreclosure proceedings have been instituted to recover this. Subject to this claim, the Manitoba Grain Co. holds the land and building of the plaintiff Company as security for the unpaid purchase-money since plaintiff Company holds under agreement of sale from it. On these facts, my conclusions are as follows: I hold that, in so far as these proceedings are concerned, defendant J. W. Langs and defendant E. T. Matchett, are to be considered the owners of the shares in the Manitoba Grain Co. standing in the names of their respective wives. As to Mrs. Langs, she gave no consideration for the transfer of said shares from her husband to herself; on discovery she did not know whether she then was, or ever had been, a shareholder of said Company; every-

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thing done as a result of her ownership was done by her husband who held her general power of attorney and who, as he himself stated on discovery, could do anything he liked. He on May 20th, 1926, transferred to her the 10,000 shares he received under his promotion agreement but made the pool agreement covering them on May 25th, 1926, and when he deemed it advisable to return them to plaintiff Company in February, 1927, this was done without demur from the wife so far as appears in evidence.

As to Mrs. Matchett, she gave nothing for the shares allotted to her by the Manitoba Grain Co.; she knew nothing about what was being done in her name in consequence of such ownership; everything so done was done by her husband under proxies given by her without consulting or reporting to her; she transferred the whole of the shares in the plaintiff Company which she acquired as a result of her ownership in the Manitoba Grain Co. to her husband without consideration and he subsequently retransferred the greater part of such shares to her without consideration. Finally, Matchett on discovery refused, on the advice of counsel, to state whether the shares in the plaintiff Company, that were handed over to Mrs. Matchett by the Manitoba Grain Co. were in her own right or not. He too transferred his 5,000 shares to his wife on May 20th, 1926, and, like defendant J. W. Langs, made the pool agreement covering them on May 25th, 1926, and had no difficulty when, in February, 1927, he deemed it advisable to return them to plaintiff Company; this was done without objection from Mrs. Matchett so far as the evidence shews.

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I hold that the secret process for manufacturing "Vitomen Shreds" was worthless when purchased by the Manitoba Grain Co. in January, 1926. I accept the uncontradicted evidence of Geiger that the process had been repeatedly tried out in the Renton factory and had been finally discarded there as incapable of use. I find that the trade-mark "Vitomen," at the time of its purchase by Manitoba Grain Co. had no value other than what might thereafter attach to it as a result of its future use in Canada and other than the fact that it had been registered in Canada. Its use in the United States, instead of being an

assistance to the creation of such value, would be a detriment. The Company, which used it in that country, had failed as a commercial venture. At the time of said purchase, the American factory had been closed down for some six months. Subsequently the American Company went into bankruptcy. I accept the uncontradicted evidence of Geiger that, in February, 1926, he informed defendant J. W. Langs and defendant E. T. Matchett that the secret process was worthless and the trade-mark valueless and that the American Company was practically a failure. Langs admits on discovery that he discussed the whole matter with Geiger before Geiger was made a director though whether in Seattle or after Geiger came to Vancouver, he cannot say. It is urged that I should not believe Geiger because he, as a director, was a party to the purchase by plaintiff Company from the American Cereal Co.; that he signed each prospectus filed except the first statement in lieu of prospectus; that he was mainly in charge of the stock-selling campaign, and, particularly, that he, as such director, put out, in June, 1927, Exhibit 44, and wrote Exhibit 45. Exhibit 44 is a document highly laudatory of "Vitomen Shreds" and other Vitomen foods and was issued to aid the stock-selling campaign and was used to Geiger's knowledge for that purpose. In fact he was largely concerned in its preparation. Exhibit 45 is a letter to a shareholder written by Geiger and contains a statement that, in Geiger's belief, the Company has in the trade name a word of exceptional value. If Geiger's present testimony is true, then, in my opinion, Exhibit 44, at any rate, is not an honest document and his act, in putting it before the public as he did, is not an honest act. But Geiger's situation in June, 1927, was very different to his situation in February, 1926. In June, 1927, and in fact from April 1st, 1926, he was a salaried director of plaintiff Company whose continued employment depended on shares being sold as appears from the financial position the plaintiff Company was in as late as November, 1927. He also held 10,000 shares of plaintiff's stock which had cost him nothing in cash. I accept his testimony that for months after he became a director of plaintiff Company, he was the tool of defendants J. W. Langs and E. T. Matchett and signed anything

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that was put before him. But in February, 1926, he was in the employ of the Manitoba Grain Co. with no interest, present or prospective, in plaintiff Company. What more natural than that when defendant J. W. Langs told him that he, Langs, was having difficulty with Black, Geiger should tell Langs the truth about the American Cereal Co. and "Vitomen Shreds." That Black was causing trouble is not unlikely. The agreement of purchase between Manitoba Grain Co. and the American Cereal Co., of January 14th, 1926, by its terms, contemplated speedy action by the purchaser in carrying it out. Such action was attempted. The application for incorporation of plaintiff Company was ready and signed on January 30th, 1926. But incorporation did not take place until March 19th, 1926, and the papers did not arrive at Ottawa until March 11th, 1926. Why the delay? The Tretheway agreement of March 1st, 1926, I think supplies the answer. The Manitoba Grain Co. was short of money. Black's company was in difficulties. The purchase agreement provided that $2,500 be paid as soon as certain conditions had been fulfilled by the American Cereal Co. Difficulty between Black and defendants J. W. Langs and Matchett could arise either as to the fulfilment of these conditions or as to the making of the first payment. The Court has been left much in the dark as to the carrying out of the purchase agreement between the Manitoba Grain Co. and the American Co., so far as the payments thereunder are concerned, owing to Matchett's refusal on discovery by advice of counsel, to give information and owing to the failure of any of the defendants to give evidence. Admittedly one modification was made. The American Cereal Co. did not get the 25,000 shares in plaintiff Company which the agreement calls for. Finally, there was nothing in Geiger's demeanour, as a witness, as distinguished from his conduct as a director of the plaintiff Company, to lead me to disbelieve him. Defendants J. W. Langs and E. T. Matchett were in Court, heard his testimony, and did not give evidence to refute it. In justice to Geiger, so far as his conduct as a director is concerned, it should be said that it is owing to him that the people, who have purchased shares in plaintiff Company, finally became aware of the real state of affairs. But

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is is said, even if Geiger's evidence is accepted, that does not prove fraud against defendants J. W. Langs and E. T. Matchett, because fraud for which damages can be given involves a guilty mind and, despite such information, these defendants might well have believed that the secret process and the trade-mark were valuable. The correctness of this proposition is unquestioned. But what is the situation? Defendants J. W. Langs and E. T. Matchett knew that Geiger, who was in a position to know the truth, alleged that the secret process was worthless. Defendant J. W. Langs knew the American venture was a failure and that the American factory was closed down for he inspected it. Defendant E. T. Matchett stated on discovery he investigated generally, the value of the trade-mark and secret process when they were acquired and from representations made to him considered them of great value but, when asked if his investigations shewed them to have been of any value to the American Cereal Co., on the advice of counsel, declined to answer. They remained in control of plaintiff Company for over a year after its incorporation—Matchett for some eighteen months, for I accept Geiger's statement that he was their tool up to October 3rd, 1927, at least. No attempt up to the time Langs resigned and only one attempt, which led to no result, was made by E. T. Matchett thereafter to get the machinery necessary to make a product of the type of "Vitomen Shreds," though they purchased plant and equipment to the amount of over $17,000 according to the books of the Company which defendant E. T. Matchett kept. No attempt has ever been made to actually use the secret formula. The history of the plaintiff Company, whilst under the control of defendants J. W. Langs and E. T. Matchett, jointly and thereafter, while under the control of E. T. Matchett, shews that share selling, at whatever cost, was its primary activity; that the erection of its buildings and the acquirings of plant proceeded leisurely and that it never during that period shipped any product. The first cash payment of $10,000 to the Manitoba Grain Co., under the purchase agreement, became due the day the Company was organized and like sums monthly thereafter though it was without funds and could only get money by the sale of treasury shares. Even this means

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the real directors, defendants J. W. Langs and E. T. Matchett, had agreed to prevent it from utilizing until the Tretheway agreement was carried out. The existence of the plaintiff Company from the outset, therefore, largely depended on the forbearance of the Manitoba Grain Co. As stated, I find defendants J. W. Langs and E. T. Matchett were to be the real beneficiaries of the unloading of the assets of the embarrassed Manitoba Grain Co. upon the plaintiff Company at a profit of over $40,000 above their cost to that Company at a time when that Company stood to lose the whole of said assets through its two defaults of December 15th, 1925, and March 15th, 1926, and at a time when money had to be procured at ruinous cost to plaintiff Company to carry out the Manitoba Grain Company's covenant contained in the purchase agreement of January 14th, 1926, to incorporate plaintiff Company as shewn by the Tretheway agreement. These facts lead me to conclude that when defendants J. W. Langs and E. T. Matchett, as directors of the Manitoba Grain Co., on April 1st, 1926, sold to plaintiff Company the assets of the Manitoba Grain Co., for the price agreed upon, they knew that, in so far as the secret process obtained from the American Cereal Co. was concerned, it was valueless or that, at any rate, they made such sale recklessly not caring whether said secret process was of any value or not. They were enabled to do this because they were at the same time the only directors of the plaintiff Company other than their then tool, Geiger. My conclusion is that defendants J. W. Langs, E. T. Matchett and Manitoba Grain Co. were guilty of fraud and are liable in damages for such loss as resulted to plaintiff Company through its purchase of said secret process. The Manitoba Grain Co. cannot escape on the ground that it is an incorporated body. A corporation can only act through agents and its directors are in cases such as the one at Bar, such agents. If they, as directors, act fraudulently for the benefit of the Company in the sale of the Company's assets, then, in my opinion, the Company cannot receive the Court's approval to its retention of such benefits. Certainly, in my opinion, a company used to effect a fraud by its directors for their own benefit cannot be set up as a screen behind which they are to receive the Court's sanction to carry

off the loot. The assessment of the damage sustained by plaintiff Company is rendered more difficult by the fact that the original assets of the Manitoba Grain Co. and the assets acquired from the American Cereal Co. were sold to plaintiff Company at a lump price. But that price was segregated both in the books of the Manitoba Grain Co. and of plaintiff Company kept by Matchett. The price so assigned for the American assets in the Manitoba Grain Co. books is $87,500. The price fixed for the same assets in plaintiff's books was $100,000 but this was subsequently reduced to agree with the figure in the Manitoba Grain Company's books, *viz.*, $87,500. The defendants J. W. Langs and E. T. Matchett were at all material times the directors in control of the Manitoba Grain Co. and were the controlling directors of the plaintiff Company when the segregation was made. Neither they nor the Manitoba Grain Co., therefore, can, in my opinion, complain if their own statement of what was received for the American assets is accepted. The segregated price $87,500 includes the trade-mark. The fact that a word so capable of exploitation in connection with food products was registered in Canada might lead defendants, J. W. Langs and E. T. Matchett, to honestly attach some value to its purchase even though they were aware that it had been used in the United States by a Company which had failed to make its business a success. These defendants, as directors of the Manitoba Grain Co., fixed the value of the trade-mark as acquired at $1,500. This figure I accept. Deducting that amount from the $87,500 there remains $86,000 as the figure paid by plaintiff Company for the secret process and rights connected therewith. Judgment against defendants J. W. Langs, E. T. Matchett and the Manitoba Grain Co. for $86,000. The contention that the fraud was condoned by the document of October 3rd, 1927, I find has no foundation. The matter was never before the Board, the true facts were in part unknown to Geiger and Matchett, the other director, was throughout a party to the fraud. Credit is to be given on this judgment of such amount as shall be ascertained by the inquiry hereinafter ordered to ascertain the value of such of the plaintiff Company's shares received as part of said purchase price as are still in the hands of defendants Alma

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Matchett and Elva Langs when same are returned to plaintiff Company. As to these defendants I have already held that, in the matters being investigated, they were mere blinds for their respective husbands and that the purchase shares received for them were received for their husbands' benefit. I direct that any of the purchase shares still held by them shall be returned to plaintiff Company and that an inquiry be made at a further hearing of this matter as to the cash value of such returned shares as of the date of such return. The shares at the time plaintiff Company parted with them were worth par less 25 per cent. commission as shewn by the fact that over 160,000 shares were sold to the public on that basis. What they are worth now is directly due to the act of the Company through its directors J. W. Langs and E. T. Matchett. Had I not found fraud, I would have held defendant Manitoba Grain Co., liable as being in fact a promoter of plaintiff Company and as having, as such, made a secret profit at the expense of plaintiff Company, and defendants Black, J. W. Langs and E. T. Matchett liable for knowingly aiding Manitoba Grain Co. to obtain same as incorporators provisional directors and as to J. W. Langs and E. T. Matchett permanent directors of plaintiff Company. A promoter, who makes a secret profit, at the expense of the Company he promotes by purchasing for the intended Company property which he sells to it at an enhanced price, is liable in damages for the resultant loss to the promoted Company. *In re Olympia, Lim.* (1898), 67 L.J., Ch. 433; *Jacobus Marler Estates, Lim.* v. *Marler* (1913), 83 L.J., P.C. 167; *Cook* v. *Deeks* (1916), *ib.* 161; *In re Hess Manufacturing Company* (1894), 23 S.C.R. 644.

In my opinion, the assets purchased from the American Cereal Co. by the Manitoba Grain Co. were, to utilize the language of Strong, C.J. in the *Hess* case bound by a trust both *ab initio* and in consequence of *ex post facto* events in favour of plaintiff Company. My reasons are as follows: When the purchase was made in January, 1926, the Manitoba Grain Co. was in no financial position to extend its operations. It had endangered its hold on the only assets in its possession by its default of December 15th, 1925, under its purchase agreement of those

assets. It repeated that default on March 15th, 1926. On March 1st, 1926, its directors and Black raised money at plaintiff Company's expense under the extremely costly Tretheway agreement to fulfil its covenant to incorporate the plaintiff Company. It had been changed from a private to a public because of its want of capital. This need of money I hold, on the evidence, was what induced its directors to make the purchase of the American Cereal Company's assets. To utilize these assets new machinery, expensive skilled labour as well as costly advertising would be required. In addition the purchase agreement, January 14th, 1926, to my mind, bears out this view. The Manitoba Grain Co. is thereby bound to incorporate just such a Company as the plaintiff Company is. It is further bound to see that such new Company shall so soon as possible allot 25,000 shares of its ordinary shares to the American Cereal Co. as part of the purchase price. It does not affect the question that, as a result of some unexplained arrangement made on a date not given this provision was not carried out. It is to be noted that the obligation was to obtain an allotment of such shares. The Manitoba Grain Co., therefore, bound itself to retain control of the proposed Company at least long enough after its incorporation to secure such allotment. In any event it is not suggested in evidence that the Manitoba Grain Company was ever released from its covenant to incorporate the proposed new Company. Further, as will be seen later, in my opinion, Black and defendants J. W. Langs and E. T. Matchett were the agents of the Manitoba Grain Co. in incorporating the plaintiff Company. For the purpose of promoting and incorporating that Company they raised $7,500 from Tretheway. The statement in lieu of prospectus signed by these three estimates the preliminary expenses of plaintiff Company at $1,000. The filed prospectus, dated May 10th, 1926, signed by Geiger and defendants J. W. Langs and E. T. Matchett raises this estimate to $2,000. That figure is retained in the filed prospectus similarly signed, dated October 9th, 1926, and the final one similarly signed, dated November 8th, 1926. By this last date the correct figure must have been known. What became of the other $5,500 obtained from Tretheway at the expense of

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plaintiff Company? The Manitoba Grain Co. purchase agreement with the American Cereal Co. called for but $2,500 before the new Company could be incorporated if indeed it required that. The other payments are postponed to dates on which they could easily be met by payments to the Manitoba Company by the proposed new Company if incorporation was proceeded with as the purchase agreement required. In fact as matters turned out these deferred payments were provided for by moneys to be paid by plaintiff Company to the Manitoba Grain Co. for, as stated, $10,000 (an amount sufficient to cover all moneys to be paid to the American Cereal Co.) of the purchase price, to be paid by plaintiff Company, became due under its purchase agreement with Manitoba Grain Co. on the very day it was organized to do business, *viz.,* April 1st, 1926. The second payment to the American Cereal Co. did not fall due until May 24th, 1926. In the absence of any evidence, it does not seem to me unlikely that, if any money was paid to the American Cereal Co. before April 1st, 1926, the money came out of the $7,500 borrowed from Tretheway at the expense of the plaintiff Company admittedly for promotion and incorporation expenses of plaintiff Company.

No attempt was made by the Manitoba Grain Co. to utilize the assets purchased from the American Cereal Co. On the contrary, incorporation of plaintiff Company was pressed forward for, on January 30th, 1926, the application for incorporation was signed by Black and defendants J. W. Langs and E. T. Matchett, *Patterson* and Predeaux. A delay of a month occurred obviously I think because funds were lacking to proceed. These were obtained as a result of the Tretheway agreement of March 1st, 1926, and, on March 5th, 1926, the four missing agreements were executed. One of these was the Trustee sale agreement to plaintiff Company. In view of all the other circumstances of this case, the disappearance of these documents is a matter of some significance. I am further of the opinion that Black and defendants J. W. Langs and E. T. Matchett, in incorporating plaintiff Company, acted as agents for the Manitoba Grain Co. The other two signatories may be ignored. Their names were used to make up the requisite number of incorporators. I base this on the facts that Manitoba

Grain Co. was bound, to the knowledge of all three, by the purchase agreement of January 14th, 1926, to incorporate plaintiff Company, that defendants, J. W. Langs and E. T. Matchett, were its directors whose duty it was to carry out its obligations and who would receive the accruing benefits and, as to Black, that he too would be benefited. In fact, on the evidence before me, the only chance of his Company getting its agreement carried out was through such incorporation. That he had no other interest in the plaintiff Company is shewn by his dealings with the 45,000 shares issued to him and by his refusal to execute the proposed agreement in reference thereto. That no formal resolution was passed by the directors of the Manitoba Grain Co. strikes me of no importance in view of all the facts. Defendants J. W. Langs and E. T. Matchett were its directors and in fact they and Black state, under seal, in the agreement with Tretheway that they own and control the Manitoba Grain Co. That document read in the light of the proved facts convinces me that plaintiff's incorporation was carried out by Black, defendants J. W. Langs and E. T. Matchett, not on their own behalf but in fulfilment of the covenant of the Manitoba Company because only by such fulfilment could they reap the benefits that have accrued to them. I would hold also that defendants Black, J. W. Langs and E. T. Matchett, having knowingly enabled Manitoba Grain Co. to obtain a secret profit, at the expense of the plaintiff Company out of property purchased by it for plaintiff Company of which they were all provisional directors and of which the last two were permanent directors, are each personally guilty of fraud and therefore responsible to plaintiff Company for the amount of such secret profit. I would ascertain the purchase price paid by plaintiff in manner hereinbefore described. It would, therefore, be $87,500. Against this would have to be credited the $10,000 paid by the Manitoba Grain Co. I would give judgment for the difference and would allow a credit thereon to be ascertained by such an inquiry as I have hereinbefore ordered, and because, viewing the case from this angle, I would find defendants J. W. Langs and E. T. Matchett guilty of fraud in knowingly assisting Manitoba Grain Co. in making this secret profit and because I regard their wives

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as mere conveniences to enable the husbands to reap the benefit of such fraud, I would make the same direction for return by defendants Alma Matchett and Elva Langs, and for an inquiry as I have already directed. But because I find fraud, as first herein stated, my judgment is, as above set out.

I have dealt with the other aspect of the matter as, in case I am held to be wrong in finding fraud, it may possibly be of service to have the involved facts set out and dealt with by the trial judge. I dismiss the action in so far as it is based on the Langdon, Wright & Loewes transactions. These parties may have a cause of action but the plaintiff Company has suffered no loss through what was done. If plaintiff Company received the properties in question, it would have to pay therefor in treasury shares of the value of such properties. Plaintiff is entitled to the costs of the action and the defendants concerned to the costs occasioned by the claims rested upon the Langdon, Wright & Loewes share transactions.

Judgment for plaintiff.

LYELL v. CORMACK *ET UX.*

COURT OF APPEAL

1928

Oct. 2.

LYELL
v.
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Land—Interest in—Contract—Personal services during lifetime of donor consideration for leaving land by will—Statute of Frauds—Partial performance.

The plaintiff, an elderly woman living on 160 acres of land at Half Moon Bay on the northerly coast of British Columbia, asked her niece to come there with her husband and in consideration of their personal services rendered to her during the remainder of her life she would give them possession of 16 acres of her land and bequeath it to them in her will for which she would give them written assurance on their arrival. The niece and her husband then sold their property in North Vancouver, went to Half Moon Bay, took possession of the 16 acres, built a house and a store on it, and made other improvements. They gave their services to the plaintiff as agreed but were never able to obtain any written assurance from her that she would will the 16 acres to them. Shortly after the completion of the store differences arose between them and the plaintiff brought action to recover the 16 acres, the defendants counterclaiming for a declaration that they are entitled to specific performance of the agreement on the plaintiff's death. The action was dismissed and the defendants succeeded on the counterclaim.

Held, on appeal, affirming the decision of MURPHY, J., dismissing the action but allowing the appeal on the counterclaim, as the defendants are entitled to possession of the land but the plaintiff being still alive and the land having been given in consideration of the performance of personal services during her lifetime, the declaration that the defendants be entitled to specific performance on her death is premature.

Statement

APPEAL by plaintiff from the decision of MURPHY, J. of the 29th of April, 1927, dismissing the plaintiff's action to recover possession of district lot 1638, group 1, New Westminster District. The defendants had been in possession of about 16 acres of said district lot on the foreshore and north of the road leading from the public wharf at Half Moon Bay since the 29th of August, 1925, and claim right of possession in pursuance of an agreement partly verbal and partly in writings contained in letters passing between themselves and the plaintiff from which it appeared that the plaintiff asked the defendants to give up their residence in Vancouver and move to Half Moon Bay and in consideration of their assisting her (the plaintiff) in and

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about her premises they could have and enjoy exclusive possession of the 16 acres in question. Since going into possession the defendants have cleared and cultivated a garden, built a three-room dwelling-house, a store, cleared the foreshore and fenced in their property. The defendants counterclaim for exclusive possession of said property and for an order that the plaintiff do carry out the agreement and deliver over a conveyance of the lands. The action was dismissed and the defendants succeeded on the counterclaim.

The appeal was argued at Victoria on the 6th and 7th of June, 1928, before MACDONAD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

D. J. McAlpine, for appellant: The plaintiff pre-empted lot 1638 in 1890. The defendant, Mrs. Cormack is her niece. Our submission is, first, that there was no contract, and secondly if there was a contract it is not enforceable in law or equity for four reasons: (a) By reason of the Statute of Frands; (b) owing to uncertainty; (c) absence of mutuality; and (d) it is a harsh and unconscionable bargain. If it is an agreement that cannot be enforced in equity, damages are not recoverable: see Fry on Specific Performance, 6th Ed., 220; *Webb* v. *Lugar* (1836), 2 Y. & C. 247 at p. 249; *Clarke* v. *Price* (1819), 2 Wils. Ch. 157; *Ogden* v. *Fossick* (1862), 4 De G. F. & J. 426; *Merchants' Trading Company* v. *Banner* (1871), L.R. 12 Eq. 18; *Blackett* v. *Bates* (1865), 1 Chy. App. 117; *Dominion Coal Company, Limited* v. *Dominion Iron and Steel Company, Limited and National Trust Company, Limited* (1909), A.C. 293; Halsbury's Laws of England, Vol. 25, p. 295, sec. 500, note (*g*); *Turner* v. *Melladew* (1903), 19 T.L.R. 273; *Lavery* v. *Pursell* (1888), 39 Ch. D. 508; *Britain* v. *Rossiter* (1879), 11 Q.B.D. 123.

G. Roy Long, for respondents: The Statute of Frauds cannot be invoked as there has been part performance: see *Coles* v. *Pilkington* (1874), L.R. 19 Eq. 174; Fry on Specific Performance, 6th Ed., 287. That there was part performance see Williams on Vendor and Purchaser, 3rd Ed., Vol. I., p. 12. As to there being no damages when specific performance would not be

granted see *Dominion Coal Company, Limited* v. *Dominion Iron and Steel Company, Limited and National Trust Company, Limited* (1909), A.C. 293 at p. 311.

McAlpine, in reply, referred to Pollock on Contracts, 9th Ed., pp. 757 and 760, note (*x*).

Cur. adv. vult.

2nd October, 1928.

MACDONALD, C.J.A.: I am of the opinion that the dismissal of the plaintiff's action ought to be sustained. The issue in it is the plaintiff's right (as against the defendants) to possession of the property in dispute.

I have no difficulty in coming to the conclusion that the plaintiff has not proved her right to possession at the present time.

The defendants counterclaimed for specific performance of the agreement between them and the plaintiff and in the alternative for an accounting or for damages for breach of the agreement. Accepting the defendants' evidence as the learned trial judge did, the agreement may be stated as follows: It was agreed verbally that the defendants should have exclusive possession of 16 acres of the plaintiff's land in return for personal services to be rendered by them to her during her lifetime. On her death she agreed to give the land to them by her will. This verbal agreement was validated so far as the Statute of Frauds is concerned, by part performance. The defendants took possession of the land, built a house and a store thereon and made other improvements referable only to the verbal agreement. The learned judge has found that up to the present time the defendants have performed their part of the agreement. He has found that the land of which defendants are in occupation is the parcel embraced within it, and that they are entitled to remain in possession.

MACDONALD, C.J.A.

The error into which, in my opinion, he has fallen is in going farther than dismissing the plaintiff's action. There is included in the judgment a declaration that the defendants are entitled to specific performance on the death of the plaintiff or upon her removing from the neighbourhood. The plaintiff is still alive

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and she has not removed from the neighbourhood, and as the land was agreed to be given in consideration of the performance of personal services during her lifetime, the declaration that the defendants shall be entitled to specific performance on her death or on her removal, is premature.

The defendants may yet disentitle themselves to specific performance by committing a breach of the agreement to perform the personal services during plaintiff's lifetime. The judgment must therefore be set aside so far as it deals with the counterclaim, and the counterclaim should be dismissed with costs.

Plaintiff should also have the general costs of the appeal except those occasioned by the issues upon which she has failed.

MARTIN, J.A.

MARTIN, J.A.: This is an action by the owner of a parcel of land to recover possession thereof from the defendants, and their defence is, in effect, that they were put in possession, which they still retain, by the owner herself under a verbal agreement by which they were entitled to possession in return for performing certain services during her lifetime or until she sold or disposed of the remaining portion of her adjoining property, in either of which events the said parcel was to become the property of the defendants by will or conveyance, as might be appropriate, from the plaintiff.

The learned judge upon conflicting evidence has found that the said agreement and due possession thereunder have been established, and no good reason is apparent why that finding should be disturbed, and if the judgment entered had ended there, dismissing the plaintiff's action and declaring the defendants' rights of possession as aforesaid, no substantial objection, apart from form, could be taken thereto though upon the record no declaration was really necessary to protect the defendants. But the judgment goes much further and in pursuance of the unnecessary counterclaim declares that the defendants,—

"upon the death of the plaintiff or upon the sale or conveyance by her of the remaining portion of said district lot 1638, and the permanent removal of her residence therefrom, that the defendants are, forthwith upon the happening of any of the aforesaid events, entitled to have and receive a conveyance in fee simple of the parcel hereinbefore particularly described, and that the plaintiff, if alive, or if deceased her personal representatives,

do then convey or cause to be conveyed the aforesaid particularly described parcel to the defendants, their heirs, executors, administrators or assigns."

It is submitted that in any event it is impossible to make such a declaration *in futuro* when on the defendants' own case they could only become entitled to an estate in fee simple if they continued to the end to perform their part of the contract by rendering said personal services in the meantime, which future part performance is, obviously something that the Court cannot assume or presently act upon in law. It is one thing, and a legal thing, to adjudge that up to the time of the trial the defendants have so discharged their part of the agreement that it would be inequitable to eject them, but it is another and an illegal thing to undertake to confirm them now in possession permanently though they might tomorrow refuse to continue to perform their part of the agreement, and yet in defiance of plaintiff's admitted rights debar her from the just enjoyment of the area in dispute in consequence of their own breach.

MARTIN, J.A.

The recent case of *Lowry* v. *Reid* (1927), N.I. 142, on part performance of a parol agreement respecting land supports largely my view of the facts of this case.

It follows that, in my opinion, the appeal should be allowed to the extent of varying the judgment by striking out all the irregular and unprecedented recitals and unnecessary and prejudicial declarations and substituting therefor the simple and appropriate order that the action be dismissed with costs and the counterclaim likewise. The appellant is entitled to the general costs of this appeal less those of the main issue upon which the defendants have been successful.

GALLIHER, J.A.: I would find upon the evidence, as the learned trial judge must have found, that there was an agreement between plaintiff and defendants—that the defendants had performed their part of the agreement and were entitled to retain possession of the lands and premises in question. But it is argued that the learned judge has decreed specific performance upon the happening of certain contingencies and that he is in error in so doing. In my opinion the learned judge was in error in decreeing specific performance upon the happening of future contingencies.

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In *Blackett* v. *Bates* (1865), 1 Chy. App. 117, Lord Cranworth, L.C., at p. 124, says:

"The Court does not grant specific performance unless it can give full relief to both parties"

and goes on to say that in the case before him the plaintiff gets at once what he seeks—the lease, but the defendant cannot get what he is entitled to for his right is not a right to something which can be performed at once but the right to enforce the performance by the plaintiff of daily duties during the whole term of the lease, and refused specific performance.

This seems to exactly fit the circumstances here, as the defendants are bound under the agreement they set up to perform certain duties on their part from time to time during the life of the plaintiff, or until she shall cease to occupy the adjoining premises or sell same.

In *Clarke* v. *Price* (1819), 2 Wils. Ch. 157 (referred to by Lord Romilly, M.R. in *Merchants' Trading Company* v. *Banner* (1871), L.R. 12 Eq. 18) Lord Eldon laid down the principle that if the Court cannot perform the contract as a whole it will not enforce performance of a part and if there is any remedy it must be at law.

I am therefore of the opinion that the learned judge was in error in granting specific performance and would allow the appeal to that extent.

The appellant should have the general costs of the appeal, and of the issue on the counterclaim, the respondents should have the costs of the issue as to possession to be set off as against appellant's costs.

MACDONALD, J.A.

MACDONALD, J.A.: We should not interfere with the finding of the learned trial judge that the evidence sustains an oral binding agreement by the plaintiff to give to the defendants the use and occupation of the property in dispute (it was sufficiently designated) during her lifetime. There was, too, part performance. The acts of part performance relied upon were solely referable to this agreement. These acts were—taking possession, expending money on the property and the further fact that the defendants changed their mode of life at the request of the

plaintiff, all of which was with her knowledge. Nor is the agreement void and unenforceable because of uncertainty. There was ample corroboration also by independent witnesses as to the terms of the agreement. There is too no substantial ground for the view that it was a conditional agreement or merely a suggestion of future intention, the plaintiff reserving the right to implement it only in the event that the defendants' services proved to be satisfactory. The plaintiff therefore having placed the defendants in possession under the circumstances mentioned cannot now maintain an action to dispossess them as set up in the statement of claim.

It was submitted, however, assuming the agreement alleged was entered into, it is unenforceable in equity because of lack of mutuality of contract and on other grounds. The defendants may successfully maintain their possession of the premises but will the Court decree specific performance of the agreement to transfer title to them? The consideration for the agreement, as intimated, was that the defendants should abandon their former means of livelihood, take up a new abode near the plaintiff and perform personal services for her as required from time to time. It was submitted that because the plaintiff can not specifically enforce the defendants' obligations to perform personal services the defendants can not obtain specific performance of the agreement to transfer the fee to them at the time and upon the conditions set out in the formal judgment appealed from. These conditions were that if and when the plaintiff sold the remaining portion of her property in that locality and removed her residence therefrom she would execute a deed to the defendants of the land in dispute or devise it to them by will.

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We are called upon to decree the performance of an agreement containing several terms some of which only may be specifically enforced. In such a case a decree would not be made if the several terms are inseparable. Here personal service by defendants is inseparable from the agreement. It is an important element in the consideration for the agreement by the plaintiff to transfer the property to the defendants. If the defendants failed to perform the services agreed upon, the agreement would have failed of consummation for want of considera-

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tion. The Court is asked to compel performance of a contract part of which cannot be made the subject of a decree, in other words, piecemeal performance.

The defendants are not entitled to the estate in fee unless they continue to the end to perform their obligation to render personal services. To decree specific performance would obviate this requirement and in reality ignore the terms of the agreement. The appeal should therefore be allowed in part.

Appeal allowed in part.

Solicitors for appellant: *McAlpine & McAlpine.*
Solicitor for respondents: *G. Roy Long.*

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Constitutional law—Produce Marketing Act—Validity—Property and civil rights—Regulation of trade and commerce—"Unduly"—"Unreasonable"—Construction—Criminal Code, Sec. 498—B.C. Stats. 1926-27, Cap. 54.

Under the powers granted by section 92 of the British North America Act to legislate with regard to property and civil rights, a Province may regulate the marketing of merchandise within the Province. This does not infringe upon the Dominion's power under section 91 either to regulate trade and commerce or to legislate with regard to criminal law; further, the passing of such legislation does not infringe upon section 498 of the Criminal Code, because, such legislation contains no authorization of the "undue" or "unreasonable" acts forbidden by said section.

Statement

APPLICATION for a writ of *habeas corpus.* Heard by MURPHY, J. in Chambers at Vancouver on the 20th of August, 1928.

Reid, K.C., and *J. W. deB. Farris,* for plaintiff.
Wood, K.C., and *Hogg,* for defendant.

27th August, 1928.

Judgment

MURPHY, J.: Application for writ of *habeas corpus.* Applicant was convicted of unlawfully marketing potatoes in Delta

Municipality without the written permission of the Mainland Potato Committee of Direction contrary to the provisions of the Produce Marketing Act and the orders and regulations made thereunder, said Delta Municipality being a locality in the Province where the provisions of said Act are in force. Applicant admitted the facts set out in the information.

Judgment

No question is raised as to the regularity of the steps taken under the Act to constitute thereunder the offence as charged. The application is based solely on the ground that the Act is *ultra vires* of the Provincial Legislature.

"Marketing" is defined under the Act as follows:

"'Marketing' means the buying or selling of a product, and includes the shipping of a product for sale or for storage and subsequent sale, and the offering of a product for sale, and the contracting for the sale or purchase of a product, whether the shipping, offering, or contracting be to or with a purchaser, a shipper, or otherwise, but does not include a sale by a wholesale or retail store in the ordinary course of business, and does not relate to the marketing of a product for consumption outside the Dominion; and 'market' has a corresponding meaning."

Section 3 constitutes a Committee of Direction with exclusive power to control and regulate under the Act, *inter alia*:

"(*b*.) The marketing of all vegetables (including tomatoes and melons) being products grown or produced in that portion of the mainland of the Province lying south of the fifty-third parallel of latitude, including all islands in the delta of the Fraser River."

To facilitate the carrying out of the provisions of the Act, the Committee of Direction may delegate any or all of its powers to local committees. This was done in the case at Bar but, as stated, no question arises on this phase.

Section 10 reads in part:

"10. (1.) For the purpose of controlling and regulating, under this Act, the marketing of any product within its authority, a committee shall, so far as the legislative authority of the Province extends, have power to determine whether or not and at what time and in what quantity, and from and to what places, and at what price and on what terms the product may be marketed and delivered, and to make orders and regulations in relation to such matters. . . ."

Without limiting the generality of the foregoing there follow various subsections setting out specific powers which the committee may exercise.

Section 14 is in part:

"14. (1.) Where a committee fixes the price at which a product within

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its authority shall be marketed or sold, the committee shall have due regard to the interests of the persons growing, producing, retailing, consuming, or using the product, so that the price fixed shall be fair and reasonable.

"(2.) In the exercise of the powers conferred by this Act a committee shall have due regard to the geographical and climatic conditions under which a product within its authority is grown or produced.

"(3.) A committee shall furnish promptly to a shipper on his request all necessary information in regard to any determination, order, or regulation made by it under this Act and affecting the shipper."

Section 15, Subsec. (1) provides:

"15. (1.) A shipper shall comply with every determination, order, or regulation made by a committee under this Act and affecting him, and shall not market or sell any product contrary thereto, and every shipper violating this provision shall be guilty of an offence against this Act."

Under the powers conferred by the Act specific regulation No. 1 was enacted reading as follows:

"No potatoes of any class, variety, grade, or size of the crop of the year 1928, raised within that part of the mainland of the Province of British Columbia which lies south of the 53rd parallel of latitude and west of the territory described in section 3 (1) (*a*) of the Produce Marketing Act and amending Act, including the islands of the delta of the Fraser River, are to be marketed without the written permission of the Mainland Potato Committee of Direction. Such permission, when given, will provide that all such potatoes for marketing are to be delivered to and dispatched from one of the following places, unless special permission in writing to do otherwise is granted by the Committee.

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"City Market (Front St. level), New Wesminster, B.C.; 119 Water Street, Vancouver, B.C.; 256 Georgia Street East, Vancouver, B.C.; Scott & Peden's Wharf, foot of Telegraph Street, Victoria, B.C."

No question is raised that this regulation was properly and validly passed if the Act is *intra vires.*

Under these circumstances, the only substantial question which the Court has to determine is whether it was within the legislative capacity of the Legislative Assembly to enact the statute in question. This involves a consideration of sections 91 and 92 of the British North America Act, 1867.

The Judicial Committee in *Toronto Electric Commissioners* v. *Snider* (1925), 94 L.J., P.C. 116 at p. 123 sets out the construction that has been authoritatively put on said sections as follows:

"The Dominion Parliament has, under the initial words of section 91, a general power to make laws for Canada. But these laws are not to relate to the classes of subjects assigned to the Provinces by section 92, unless their enactment falls under heads specifically assigned to the Dominion

Parliament by the enumeration in section 91. When there is a question as to which legislative authority has the power to pass an Act, the first question must, therefore, be whether the subject falls within section 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in section 91. If so, the Dominion has the paramount power of legislating in relation to it. If the subject falls within neither of the sets of enumerated heads, then the Dominion may have power to legislate under the general words at the beginning of section 91."

Applying this principle, does the subject of the legislation now being considered fall fully under section 92? In my opinion, both on principle and on authority, it clearly does. Subsection (13) of section 92 commits the making of laws, in relation to property and civil rights in the Province exclusively to the Legislatures of the Provinces.

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The pith and substance of the Produce Marketing Act appear in the portion of section 10 and in the definition of "marketing" above quoted. These provisions, to my mind, deal exclusively with property and civil rights in the Province. Section 10 and the regulations thereby authorized state in reference to any product covered by the Act whether or not and at what time and in what quantity and from and to what places and at what prices and on what terms same can be marketed and delivered. "Marketing," as defined, deals exclusively with a citizen's right to buy and sell and ship such product and to make contracts in reference thereto. All these are matters affecting property and civil rights. The decision in *Attorney-General of Canada* v. *Attorney-General of Alberta and Others* (1921), 91 L.J., P.C. 40 (the *Board of Commerce* case) is authority for this view, if such be needed. The provisions of Part II. of the Combines and Fair Prices Act there considered resemble closely the provisions of the Produce Marketing Act.

If then the legislation impugned falls fully under section 92 is the exclusive power *prima facie* conferred on the Province trenched on by any of the overriding powers set out specifically in section 91? There can be no question of—indeed there was no reference in argument to—possible conflict with the general power conferred on the Dominion by the opening paragraph of section 91. There is no suggestion in the record of the existence in the Dominion of such extraordinary peril to the national life

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of Canada as a whole in relation to the subject-matter of this legislation as the Judicial Committee lays down in *Toronto Electric Commissioners* v. *Snider* (1925), 94 L.J., P.C. 116 at p. 124 as a prerequisite to such conflict arising.

The case for applicant is placed under two heads: 1st, that the Produce Marketing Act infringes subsection (2) of section 91 which commits to the Dominion Parliament exclusive jurisdiction over the regulation of trade and commerce, and 2nd, that it infringes subsection (27) which grants to the Dominion a like jurisdiction over criminal law except the constitution of Courts of criminal jurisdiction but including the procedure in criminal matters.

An exposition of the meaning of the words "The regulation of trade and commerce," fatal to applicant's first contention, is, I consider, found in *Toronto Electric Commissioners* v. *Snider, supra,* at pages 124 and 125. It suffices to cite this language from page 125:

"It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in section 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces."

Further, as I read the case of *Attorney-General of Canada* v. *Attorney-General of Alberta, supra.* it is a decision directly in point against applicant's first contention on a set of facts which in essence raised the same questions as are raised by the facts in the case at Bar, *viz.,* control of the placing of goods upon the market and of their price.

The question with regard to conflict between the Produce Marketing Act and criminal law presents to me greater difficulty. The Dominion cannot by merely labelling an act a crime invade the jurisdiction exclusively reserved to the Provinces under the enumerated heads of section 91.

"The Parliament of Canada cannot by purporting to create penal sanctions under section 91 (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":

Attorney-General for Ontario v. *Reciprocal Insurers* (1924), 93 L.J., P.C. 137 at p. 144.

The Dominion has enacted legislation dealing with restraint of trade by section 498 of the Criminal Code which reads as follows (Snow, 4th Ed., p. 232):

"498. Illegal restrain trade.—Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,

(*a*) To limit transportation facilities.—To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(*b*) Restrain commerce.—To restrain or injure trade or commerce in relation to any such article or commodity; or

(*c*) Lessen manufacturing.—To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(*d*) Lessen competition.—To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property."

Judgment

In *Attorney-General for Ontario* v. *Canadian Wholesale Grocers Ass'n.* (1923), 2 D.L.R. 617, Meredith, C.J. held this section to be *ultra vires* because of the decision in the *Board of Commerce* case, *supra*. Hodgins, J.A., in the same case, was apparently of a contrary opinion.

Assuming that the section is *intra vires*, is there any real conflict between it and the Produce Marketing Act? It is to be observed that in each of the subsections, except subsection (*b*) the word "unduly" is introduced. Subsection (*b*) cannot be read as wholly unrestricted as was pointed out by Phippen, J.A. in *Rex* v. *Gage* (*No. 1*) (1907), 13 Can. C.C. 415, a view which I think is now placed beyond discussion by the *Board of Commerce* case, *supra*. Judges have differed as to what qualification should be introduced. Howell, C.J., in *Rex* v. *Gage* (*No. 2*) (1908), 13 Can. C.C. 428 at p. 430, was of opinion that subsection (*b*) should be confined in its application to such agreements as are declared to be conspiracies in restraint of

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trade by section 496. In *Weidman* v. *Shragge* (1912), 46 S.C.R. 1, Anglin, J., as he then was, was not prepared to accede to this view but it was not necessary to decide the point. On the other hand, Hodgins, J.A., in *Attorney-General for Ontario* v. *Canadian Wholesale Grocers Ass'n., supra,* at p. 633, agrees with Howell, C.J. Phippen, J.A., in *Rex* v. *Gage (No. 1)* (1907), 13 Can. C.C. 415 at p. 417, is inclined to adopt the view of Killam, C.J. in *Gibbins* v. *Metcalfe* (1905), 15 Man. L.R. 560 at p. 583 that subsection (*b*) relates to those restraints which are not justified by any personal interest of the contracting parties but which are malicious restraints unconnected with any such business relations.

Whatever be the correct qualification it is impossible, in my opinion, in view of the *Board of Commerce* decision, *supra,* to hold that subsection (*b*) has a wider application than subsections (*a*) (*c*) and (*d*) when the question under consideration is the respective ambits of Provincial and Dominion legislation.

If this view is correct, then the question is narrowed down to the meaning of the words "unduly" and "unreasonably" for granting that the Produce Marketing Act authorizes or compels at least an arrangement between two or more persons to do any or all of the acts enumerated in section 498, no conflict will necessarily arise unless such authorization is to do such acts "unduly" or in so far as enhancement of price is concerned "unreasonably" as forbidden by the latter portion of subsection (*c*).

"Unduly" and "unreasonably" are not, in this connection, synonymous terms. Anglin, J. in *Weidman* v. *Shragge, supra,* at pp. 42-3 says:

"The difference, in my opinion, between the meaning to be attached to 'unreasonably' and that which should be given to 'unduly' when employed in a statutory provision such as that under consideration is that under the former a chief consideration might be whether the restraint upon competition effected by the agreement [here by the statute] is unnecessarily great having regard to the business requirements of the parties, whereas under the latter the prime question certainly must be, does it, however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive, or oppressive restrictions upon that competition the benefit of which is the right of every one?"

And in *Rex* v. *Elliott* (1905), 9 Can. C.C. 505 at p. 520

Osler, J.A., delivering the judgment of the Ontario Court of Appeal, states:

"What is 'undue' with reference to the acts which are the subject of the conspiracy, combination, agreement, or arrangement is now a question of fact upon the circumstances of each particular case."

The only facts proven in the case at Bar on this phase are the provisions of the Produce Marketing Act and the regulations passed thereunder. Can these be said to be *ex facie* "undue" or "unreasonable" as these words are hereinbefore defined? In the first place they are the enactment of the Legislature or made pursuant to its authority. The Legislature, I take it, must be taken at any rate, *prima facie* to have authorized no undue or unreasonable Act in the above sense. But if the Court is to examine into the matter the provisions of the Act, on their face, do not seem to be either "undue" or "unreasonable" as these terms have been defined. The language used in *North Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited* (1914), A.C. 461 at p. 469 *mutatis mutandis* seems applicable.

Judgment

"Unquestionably the combination in question [here the Act] was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers [here producers of "product," as defined by the Act] out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers [here producers of "product"] in a particular trade is an evil from a public point of view."

Section 14 of the Produce Marketing Act, above quoted, provides for the protection of the interests of the persons growing, producing, retailing, consuming or using the product so that the price fixed shall be fair and reasonable. This would seem to include every person who could possibly be affected by the Act. Subsection (*c*) of section 10 protects each shipper by providing that the restriction on shipping is subject to the limitation that each shipper shall be permitted to ship such proportion of his supply of the product as the quantity fixed to be marketed at that time bears to the total estimated quantity available for marketing. Section 11 provides for arbitration of any grievance which any shipper may claim to have by reason of any determination, order or regulation made by the committee under the

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Act affecting him or by any suspension or cancellation of his licence. It would therefore seem that there are no grounds apparent on the present record that would justify the conclusion that what the Produce Marketing Act authorizes is necessarily a violation of section 498 of the Criminal Code.

Judgment

Nor can it be said that the Province by this legislation is, in reality, amending section 498 by attempting to define "unduly" or "unreasonably" so as to bring the case at Bar within such decisions as *Rex* v. *Lichtman* (1923), 42 Can. C.C. 1. The Province, in passing the Produce Marketing Act was in no way meddling with section 498. It was occupying a field of legislation exclusively its own as shewn by the *Board of Commerce* case, *supra*. In so occupying that field, it has, in my opinion, done nothing by the mere fact of passing the legislation in question that infringes upon section 498 because such legislation contains no authorization of the "undue" or "unreasonable" acts forbidden by said section. If this were not so, I would feel bound by what was said in the *Board of Commerce* case, *supra*, to hold that section 498 is *ultra vires* of the Dominion Parliament. No question of territorial jurisdiction arises on the facts of this case since the "marketing" occurred wholly within the Province. The application is refused.

Application refused.

REX v. PORTER AND MARKS.

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Criminal law—Joint trial—Charge of conspiracy with one another and others—Evidence—Direction to jury—Substantial wrong.

P. and M. were tried jointly and convicted on a charge of conspiracy to defraud the public. C. P. Porter & Company Limited carried on a brokerage business. P. was manager of the Company and M. and others were employed as travelling salesmen. The salesmen sold high-class securities under instructions from P. but Porter & Company never held any of the stock sold nor did they purchase it after sales. Certain purchasers paid for stock partly in cash and partly in other securities. Upon receipt of these securities Porter & Company sold them and kept the proceeds. On occasions Porter & Company paid purchasers the amount of dividends on stock that was never procured to keep up appearances. On the trial the jury was instructed that it must convict or acquit both the accused, that it could not convict one and acquit the other.

Held, on appeal, *per* MACDONALD, C.J.A., that there was no evidence from which conspiracy might be inferred and the conviction should be set aside.

Per MARTIN, J.A.: That the linking of M.'s guilt with P.'s was very prejudicial to M. he thereby suffering a substantial wrong and was entitled to a new trial, but as the case was clear against P. he suffered no wrong thereby and the appeal as against him should be dismissed.

Per GALLIHER, J.A.: That the conviction as against both appellants should be affirmed.

Per MACDONALD, J.A.: That M. should have a new trial, but P.'s appeal should be dismissed.

Statement

APPEAL by accused from their conviction by MORRISON, J. at the Vancouver Spring Assizes on the 1st of May, 1928, on a charge of conspiracy to defraud the public. In 1927, the accused Porter was manager of a firm known as C. P. Porter & Company Limited purporting to be carrying on a stock-broking business with offices in the Standard Bank Building in Vancouver. The accused Marks and four others were salesmen employed by Porter & Company for the purpose of selling shares to people throughout the Province. They travelled around and sold stocks and bonds of high-class companies, such as B.C. Electric, Howe Sound, Algoma Steel, and others. Porter & Company never held any of the stocks sold and never purchased them after sales. They paid the agents com-

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missions from 20 per cent. to 80 per cent. of the amount of the sales and in many cases where purchasers were unable to pay in cash the full amount of the purchase price of shares or bonds that they were buying they would put up securities to cover the purchase price until they were able to pay. Porter & Company, upon receipt of these securities would sell them and keep the proceeds. On occasions to keep up appearances, they would pay dividends to the purchasers when no dividends were declared by the companies whose stock was supposed to be purchased. Their manipulations resulted in losses to purchasers ranging from $100 to $10,000. Both the accused were found guilty and sentenced to seven years in the penitentiary.

The appeal was argued at Victoria on the 25th and 26th of June, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant Marks: We submit that Marks made full returns to his principal of such bargains as he made. There was improper evidence introduced against Marks to prove conspiracy. The entries made in Porter's books were used against us and are incorrect entries. As to its admissibility see *Rex* v. *McCutcheon* (1916), 25 Can. C.C. 310. There is no evidence to prove conspiracy on part of Marks: see *Rex* v. *Hutchinson* (1904), 11 B.C. 24 at p. 32; *Regina* v. *Barry and Others* (1865), 4 F. & F. 389. That there was material misdirection on a material matter see *Brooks* v. *The King* (1927), 48 Can. C.C. 333 at p. 357; *Rex* v. *Allen* (1911), 16 B.C. 9. If there is no evidence he should be acquitted. If there is other evidence upon which he might be convicted there should be a new trial. Further, there was misdirection in the charge that the jury must either convict both or acquit both: see *Rex* v. *Marino* (1927), 38 B.C. 452; Russell on Crimes, 8th Ed., Vol. I., p. 152; *Rex* v. *Plummer* (1902), 71 L.J., K.B. 805 at pp. 807-9; *Rex* v. *Bookhalter and Lanin* (1924), 3 D.L.R. 122; *Reg.* v. *Frawley* (1894), 1 Can. C.C. 253. In this case more than two are involved.

Murdock, for appellant Porter, adopted the argument of *Farris* as to conspiracy.

W. M. McKay, for the Crown: There was evidence shewing that Marks was agent for Porter. On inference to be drawn from overt acts by parties see *Rex* v. *Simington et al.* (1926), 45 Can. C.C. 249. On misdirecting as to both being convicted or both acquitted see *Rex* v. *Cohen and Bateman* (1909), 2 Cr. App. R. 197 at pp. 207-10. On the question of substantial wrong see *Eaglesham* v. *McMaster* (1920), 123 L.T. 198; *Rex* v. *Immer. Rex* v. *Davis* (1917), 13 Cr. App. R. 22; *Rex* v. *Williams and Woodley* (1920), 14 Cr. App. R. 135; *Rex* v. *Totty* (1914), 10 Cr. App. R. 78 at p. 79; *Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77 at p. 79; *Rex* v. *Boak* (1925), 36 B.C. 190; *Rex* v. *Beecham* (1921), 16 Cr. App. R. 26; *Rex* v. *Jones alias Wright* (1922), *ib.* 124 at pp. 127-8; *Rex* v. *Russell* (1920), 51 D.L.R. 1. As to entries in Porter & Company's books see *Collins* v. *Maule* (1838), 8 Car. & P. 502.

Argument

Farris, in reply, referred to *Gouin* v. *The King* (1926), 46 Can. C.C. 1; *Bishop of Meath* v. *Marquess of Winchester* (1836), 3 Bing. (N.C.) 183 at p. 188; *Rex* v. *Fitzpatrick* (1923), 2 W.W.R. 497; Halsbury's Laws of England, Vol. 13, p. 559; Russell on Crimes, 8th Ed., Vol. II., p. 1992; *Rex* v. *Regan* (1887), 16 Cox, C.C. 203.

Cur. adv. vult.

2nd October, 1928.

MACDONALD, C.J.A.: The appellants were convicted of criminal conspiracy. Grose, J., in *Rex* v. *Brisac and Scott* (1803), 4 East 164 at p. 171, refers to what is necessary to be proved in criminal conspiracy in words difficult to improve upon:

"Conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."

MACDONALD, C.J.A.

The question here is one of evidence; what were the criminal acts, if any in support of the inference?

C. P. Porter & Company, Limited, carried on a brokerage business and employed travelling salesmen, of whom the appellant Marks was one. C. P. Porter, the manager of the Company, and the appellant Marks were convicted of a conspiracy to defraud. The Company sent out its employee Marks, to sell shares on commission; no other connection between them has

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been proven. He sold shares to several persons, took, as instructed, part payment in cash and collateral security for the balance of the purchase-money and duly reported and accounted therefor. The Crown makes a point of the fact that the employer's entries in its books corresponded exactly with the customer's account of these transactions, and by some process of reasoning which I do not profess to follow, argues that that circumstance indicates guilt on appellant Marks's part though there was nothing irregular in the transactions themselves.

A mass of material relating to the business of the Company was found in its office in charge of its manager. Accountants who had no personal knowledge of the Company's affairs examined this material which consisted of the Company's books and documents. They were called as witnesses to what they had found. In my opinion, their evidence furnishes no legal proof of these documents and books. The letters were not shewn to have been signed by Marks or the others indicted; nor the telegrams to have been sent by him or them; nor entries in the books made by him or them. They may be evidence of fraud against Porter, in whose possession they were found, but not against Marks or the others, unless it had been shewn *aliunde* that the parties to the alleged conspiracy were pursuing a common purpose to defraud, upon proof of which the books and documents might then be evidence of the conspiracy. The common purpose must have been shewn either by the documents themselves legally proved, or by other evidence or by both together, before they could be used as evidence of overt acts.

Counsel for the Crown when asked to refer us to some evidence from which the alleged conspiracy might be inferred, handed up a written statement in which he gave us the following references to the evidence, *viz.,* Dr. McBirney, pages 90 to 119 inclusive, with particular reference to his cheque for $25 therein mentioned; the evidence of D. J. Fraser, at page 251, to the effect that the appellant Marks had told him he was Porter's auditor, and that of A. C. Fulton, at page 223, which may be discarded at once since it has no significance whatever in relation to the conviction.

This is McBirney's evidence relating to the $25 cheque, the

balance being in my opinion, negligible. One Brown, an agent of the Company, received from McBirney 20 shares of Durrant Motors in the ordinary course of the Company's business with instructions from McBirney to transfer them from shares in the Canadian to shares in the American Company. Marks had nothing to do with this transaction, but at a subsequent time McBirney complained to him that he had not been notified by the Company of the transfer of these shares. Marks told him that it took time to make a transfer and on a subsequent occasion told him that the expense of a transfer would be $35, but said that $25 would be accepted. McBirney made out a cheque for the amount and at Marks's request, made it payable to the Company or bearer so that he might cash it and save exchange. This was done but no evidence whatever is given of any wrongdoing on Marks's part in connection with the transaction. This is relied upon as some evidence of a conspiracy between himself and Porter to defraud, the inference suggested by Crown counsel being that Marks was a party to the Company's misappropriation of these shares in conspiracy with Porter.

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The evidence of Fraser is that he asked Marks if he was Porter's agent, and that he replied that he was Porter's auditor, the inference suggested by Crown counsel being that as auditor Marks must have been acquainted with the books and documents and that the mere production of them makes them evidence against him. There is no proof that he acted as an auditor either for Porter, or for the Company, or that an audit had in fact been made, or if made that he had made it or had any knowledge whatever of the books and documents or their contents.

Another argument advanced in support of the conviction was that the Company paid such enormous commissions to its agents including Marks, as to justify the inference that there was a conspiracy between them of a criminal character. It is enough to say that there is no legal proof that such commissions were bargained for or received by them or any of them. What the Crown relies upon are certain commission cards found among the documents aforesaid, with which the accused have not been connected, purporting to shew the commission paid. Since there is nothing in the evidence from which a jury could infer

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the crime charged, the conviction must be set aside. The Crown has failed to prove a conspiracy between any two or more of the accused.

MARTIN, J.A.: These are appeals from the conviction of both appellants tried jointly at the Vancouver Spring Assizes, *coram* Mr. Justice MORRISON, for unlawfully conspiring with four other persons named in the indictment and with each other to defraud the public.

Several objections were submitted and as regards Porter one of them, based on misdirection as hereinafter set out, is technically sound in law but in view of the fact that the case against him is so exceptionally clear that on a new trial he must inevitably be convicted it cannot be said, as it must be said before a new trial can be ordered, that he has actually suffered any "substantial wrong or miscarriage of justice" within the meaning of section 1014 (2) of the Criminal Code, and therefore his appeal should be dismissed.

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But the appellant Marks is in a different position because while, in my opinion, there is enough evidence to warrant the jury, if properly directed, in convicting him if they thought fit to do so, yet it is not certain that they would have done so because the case against him is appreciably less strong than against Porter, and therefore he might well have suffered a substantial wrong by the misdirection complained of. That misdirection is that the learned judge twice instructed the jury in the course of his charge to the effect, and finally in these concluding words, that:

"They are presumed to be innocent until the Crown has proven the contrary to your satisfaction, and you must convict both of them or acquit both of them, at least, the evidence must justify you doing so. You cannot convict one and acquit the other; either find them guilty or not guilty. You may retire."

It is conceded by the Crown counsel that this direction is incorrect, and though it can be given in cases where there are two conspirators only jointly indicted and tried yet not in cases like the present where two are charged with conspiring with others. The decision of the Manitoba Court of Appeal in *Rex v. Bookhalter and Lanin* (1924), 42 Can. C.C. 186, based upon

Reg. v. *Manning* (1883), 12 Q.B.D. 241; and *Rex* v. *Plummer* (1902), 2 K.B. 339, does not support the learned judge's instruction because two persons only were charged and jointly tried and there was no allegation that they conspired *cum multis aliis* which changes the aspect of the matter—*Rex* v. *Nichols* (1742), 13 East 412 (n); *Rex* v. *Kinnersley and Moore* (1719), 1 Str. 193, and *Rex* v. *Duguid* (1906), 75 L.J., K.B. 470, in which last the 9th count, p. 471, alleged a conspiracy between two indicted persons Duguid and Quayle and a third Florence Chetwynd and though Quayle was found not guilty the conviction of Duguid was unanimously upheld by the Court of Crown Cases Reserved. And in *Plummer's* case, *supra,* Lord Alverstone, C.J., and Jelf, J., emphasized p. 350, the "great reliance" the Court in quashing the conviction placed

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"on the fact that there was a joint trial on one indictment charging the three defendants jointly with conspiring together, and not alleging any conspiracy with other or unknown persons."

Here, as has been seen, the indictment does allege a conspiracy with other persons, four in fact, and names them.

It was submitted by the Crown counsel that no substantial wrong or injustice has "actually occurred" to Marks from this misdirection but in the circumstances the linking of Marks's guilt with Porter's was very prejudicial to him, because Porter's guilt was so clear that his conviction was a foregone conclusion. In my opinion therefore, Marks is entitled to a new trial and it should be directed.

GALLIHER, J.A.: There is no question in my mind that the appellants in this case, with others who deemed it advisable to absent themselves from Canada, conspired to defraud the public and that the evidence before us brings that conspiracy home to them and their conviction by the jury was right and should be maintained.

GALLIHER, J.A.

Counsel on behalf of the appellants submitted that the conspiracy must be proved before overt acts by any of the parties could be adduced in evidence or that in any event evidence would have to be adduced from which conspiracy could be reasonably inferred, and that such was lacking here.

The conspiracy itself is the crime whether overt acts follow

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or not, but the conspiracy itself may be proved by overt acts or words of any of the parties charged when they can be considered in the nature of an act done in furtherance of the common design. Such was the mode adopted in the case of *Reg.* v. *Connolly and M'Greevy* (1894), 25 Ont. 151, where the cases were fully considered.

In *Ford* v. *Elliott* (1849), 4 Ex. 78 Alderson, B. at p. 81 said:

"It is a mistake to say that a conspiracy must be proved before the acts of the alleged conspirators can be given in evidence. It is competent to prove isolated acts as steps by which the conspiracy itself may be established."

See also *Reg.* v. *Blake* (1844), 6 Q.B. 126 at p. 139.

But assuming that it is necessary that some evidence pointing to a conspiracy must first be presented, I hold that sufficient evidence was adduced to permit of the introduction in evidence of the books and documents impounded in the office of Porter, one of the conspirators.

It was urged on behalf of Marks that while what was contained in these books and documents might shew fraud on the part of Porter, Marks might be an entirely innocent sales agent. What was disclosed by these documents shews that in no honest way could these operations be carried out unless the parties were philanthropists, of which there is no suggestion. These documents disclose on the face of them that stocks of an established market value were sold (but never delivered) to purchasers at regular market value by alleged sales agents of which Marks claims to be one, for which his remuneration was to be as high as 40 per cent. on such sales, something which he knew or must have known, could never be carried out in an honest transaction where stocks could not have been bought in the first instance at less than their market value. The jury was not credulous enough to accept this version and there was only one proper inference to draw from such a transaction that Marks was a party to the whole fraudulent scheme and that these very acts were in furtherance of the common design, as were also his own acts of salesmanship.

The only other point I deem it necessary to deal with is the objection to the learned judge's charge:

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"They are presumed to be innocent until the Crown has proven the contrary to your satisfaction, *and you must convict both of them or acquit both of them*, at least, the evidence must justify you doing so."

The words I have underlined are objected to. The suggestion is that in so stating it the learned judge was practically telling the jury that in order to convict Porter they would have to convict Marks, whereas Porter could have been convicted if it had been shewn that any of the others who had escaped were in the conspiracy.

GALLIHER, J.A.

We must read the whole charge and when we do we find the learned judge instructed the jury as to what constituted conspiracy. After referring to Porter & Company employing Marks, Poulson, Barrett and Brown, the learned judge says:

"If these transactions are entirely Porter's, then there is no conspiracy. The Crown must shew you that these other men were in it with him and that they run through these transactions."

I think what the learned judge was trying to impress upon the jury when he said "you must convict both or acquit both," was, that it required the agreement of more than one mind to constitute the crime of conspiracy, and if it might have been more fully expressed—in view of what he stated, which I have referred to—in my opinion, no substantial wrong or injustice has been occasioned the accused.

MACDONALD, J.A.

MACDONALD, J.A. agreed that Marks should have a new trial.

Appeal allowed in part.

KELPON v. STEWART.

MCDONALD, J.

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Nov. 28.

KELPON v. STEWART

Landlord and tenant—Furnished house—Porch with railing—Railing gives way—Plaintiff's wife injured—Liability of landlord.

The plaintiff leased a furnished house from the defendant that included an upstairs porch surrounded by a railing. The plaintiff's wife stepping out on the porch to look for her husband, rested her hand on the railing which gave way owing to the nails holding it having rusted they having been put in when the house was constructed fifteen years previously. In an action for loss of *consortium* and hospital and medical expenses on account of injuries to his wife:—

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Held, that this is a case of ordinary defect of repair which could be easily remedied and the existence of such defect would not give rise to a right in the tenant either to repudiate or to sue for damages.

ACTION for loss of *consortium* and for hospital and medical expenses on account of injuries sustained by his wife through a defective railing giving way on the porch of a house leased by the plaintiff from the defendant. Tried by MCDONALD, J. at Vancouver on the 28th of November, 1928.

Fleishman, for plaintiff.
McTaggart, for defendant.

Judgment

MCDONALD, J.: The plaintiff leased from the defendant a furnished house on or about the 1st of March last. On the 11th of July last the plaintiff's wife stepped out of an upstairs door on to a porch to look down the street for her husband. She rested her hand upon a railing which gave way by reason of the nails having rusted, which nails had been put in to fasten the railing when the house was constructed some 15 years ago. There was no agreement proved that the landlord would keep the building in repair. The tenant sues for loss of *consortium* and for hospital and medical expenses on account of the injuries to his wife and the plaintiff relies upon the principle that a landlord who leases a furnished house does so with the implied condition or at least the implied warranty that the house is habitable. This principle of course is familiar in cases where a furnished house is found to be uninhabitable by reason of such things as vermin, danger from infectious disease, unsanitary drainage and the like, but counsel have searched the books in vain for a case like the present. The present is a case of an ordinary defect of repair which could be easily remedied and the existence of such a defect would not, as I understand the law, give rise to a right in the tenant either to repudiate or to sue for damages.

The action must, therefore, be dismissed.

Action dismissed.

THE COLLEGE OF DENTAL SURGEONS FOR THE PROVINCE OF BRITISH COLUMBIA v. NEFF.

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COLLEGE OF DENTAL SURGEONS *v.* NEFF

Dentists—Registration—"Graduate"—Meaning of—R.S.B.C. 1924, Cap. 66, Sec. 22 (b).

The word "graduate" in section 22 (*b*) of the Dentistry Act does not import that the receiving of a certificate of graduation was preceded by a course of training of a practical kind or otherwise.

Statement

APPEAL by the College of Dental Surgeons for the Province of British Columbia from the order of McDONALD, J. of the 5th of April, 1928, reversing and setting aside an order of the Council of the College of Dental Surgeons of British Columbia of the 10th of March, 1928, refusing and dismissing the petition of Edgar B. Neff to be registered as a member of the College of Dental Surgeons of British Columbia. On the 30th of April, 1900, Edgar B. Neff became a graduate of the Universitas Occidentalis at Chicago in the State of Illinois, U.S.A., and received a certificate, evidencing proficiency in and conferring the right to practice the profession of dentistry and dental surgery. On the 2nd of June, 1900, he was granted a certificate by the Saskatchewan College of Dental Surgeons. On the 1st of February, 1904, he received from the College of Dental Surgeons of the North-West Territories a Registration Certificate and on the 1st of July, 1906, he obtained a certificate from the College of Dental Surgeons of Saskatchewan. He became domiciled in British Columbia in July, 1914, and in February, 1926, obtained from the superintendent of education a certificate that he has a standing equal to that required for second-class non-professional certificates of teachers. He practised his profession in Saskatchewan from 1900-1914, and then joined the Allied Forces and practised his profession with the Canadian Expeditionary Forces until the 31st of March, 1916. The order appealed from declared that Edgar B. Neff was entitled to become registered as a member of the College of Dental Surgeons of British Columbia.

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The appeal was argued at Victoria on the 3rd of July, 1928, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Craig, K.C., for appellant.

J. A. McInnes, for respondent, took the preliminary objection that there was no appeal under section 51 of the Act, except by a person aggrieved under the Act and that the College had therefore no appeal.

Per curiam: The objection is overruled.

Argument

Craig, on the merits: Respondent was a graduate of a Chicago college of dentistry and a member of the College of Dental Surgeons of Saskatchewan. He was admitted there in 1906, without passing an examination. The question arises under section 22 of the Act as to whether the college in Saskatchewan is duly established, equipped and maintained. This is a question of fact and the evidence shews it was not.

MacInnes: The applicant has a certificate from the Universitas Occidentalis of Chicago which is an established, equipped and maintained school of dentistry. In June, 1900, he went to Saskatchewan and was granted a certificate there by the College of Dental Surgeons, and in 1906, he received a further certificate of the College of Dental Surgeons of Saskatchewan entitling him to practise and he practised continually there until 1914, when he became a member of the Allied Forces. He is fully qualified, there being no ground for refusing his petition and the learned judge has so held.

Craig, in reply: We are not bound by the certificates that are submitted.

Cur. adv. vult.

2nd October, 1928.

MACDONALD, C.J.A.

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

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from an order of Mr. Justice D. A. MCDONALD made under section 51 of the Dentistry Act, Cap. 66, R.S.B.C. 1924, declaring that the respondent is entitled to be registered as a member of the College of Dental Surgeons of British Columbia. His right to registration depends upon section 22, and the real question on the facts

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before us comes down to the point—Does the expression "graduate" in subsection (*b*) import that the applicant must have gone through a course of training prior to graduation? All that the statute requires, in this connexion, is that the person applying to the Council for registration shall be

"a graduate of any school or college of dentistry duly established, equipped, and maintained in any part of the Dominion . . . having authority . . . to grant degrees evidencing proficiency in and conferring the right to practise the profession of dentistry and dental surgery, and who produces his certificate of graduation evidencing his degree, together with such evidence as the Council may require that his degree has not been revoked or cancelled."

These requirements the applicant has, in my opinion, complied with by means of certificates from the Saskatchewan College of Dental Surgeons, the latest of which is as follows:

"By virtue of authority vested in it by the Legislative Assembly of Saskatchewan awards this certificate To E. B. NEFF who has complied with all the requirements of the law regarding the practise of Dentistry, and after due examination or by application to the Council has been adjudged qualified to practise dentistry, in all its branches in the Province subject to the provisions of the Dental Ordinance.

"IN WITNESS WHEREOF we the undersigned members of the Council of the College have hereunto signed our names and attached the Corporate Seal of the College, this First day of July nineteen hundred and six.

MARTIN, J.A.

"[Seal]
"College of Dental Surgeons
of Saskatchewan.

"W. D. Cowan, L.D.S., D.D.S.
"P. F. Size, L.D.S.
"L. D. Keown, L.D.S., D.D.S.
"J. M. Turnbull, D.D.S., L.D.S."

This document is in all essentials a certificate of graduation from a college of dentistry and there is nothing in the statute that authorizes the imposition of any additional requirements such as that the "proficiency" shall have been preceded by a course of training of a practical kind or otherwise. On its face the certificate purports to be one issued by a college which has been "duly established, equipped and maintained" by authority of the Legislature of Saskatchewan and there is no reliable evidence before us to displace that inference. The declaration of W. D. Cowan, filed in opposition to it, is of a most unsatisfactory nature in that it improperly deposes to questions of law, and as to fact is simply a bald denial of the statutory collegiate requirements without any particulars to test its veracity and is in important respects obviously erroneous; it moreover goes too

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far because if it be true then all the graduation certificates of the said college are invalid, which no one ventures to suggest.

The present applicant is, in my opinion, "a graduate" within the meaning of the statute, which the Oxford Dictionary primarily defines as,

"One who has obtained a degree from a university, college, or other authority conferring degrees."

and here the certificate declares that the applicant has by the Council of his college

MARTIN, J.A.

"been adjudged qualified to practise dentistry in all its branches."

It follows, therefore, that the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I would sustain the judgment below and dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Maitland & Maitland.*
Solicitors for respondent: *MacInnes & Arnold.*

TOPHAM v. MOTOR SECURITIES COMPANY LIMITED

AND

FEDERAL MOTOR COMPANY LIMITED v. TOPHAM *ET AL.*

MURPHY, J.

1928

April 19.

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TOPHAM *v.* MOTOR SECURITIES Co.

FEDERAL MOTORS Co. *v.* TOPHAM

Chattel mortgage—Registration—Defects in—Prior chattel mortgage—Registration defective—Rights as between—Foreclosure—Conditional sales—R.S.B.C. 1924, Cap. 22.

Where the registration of a chattel mortgage does not comply with the Bills of Sale Act, the holder thereof is not protected by the Act as against a prior chattel mortgage the registration of which was also not in compliance with the requirements of the Act.

Statement

APPEAL by Mark F. Topham from the decision of MURPHY, J. in two consolidated actions tried by him at Vancouver on the 5th and 23rd of March, and the 14th of April, 1928, the first brought by Topham to obtain an assignment of securities held by the Motor Securities Company Limited in connection with the title to a motor-car, he having paid the balance due thereon as guarantor of the purchaser, and the second brought by the Federal Motor Company Limited against Topham to enforce a chattel mortgage against two trucks in question in the actions. The facts are that in November, 1923, the Federal Motor Company Limited sold one Dogar Mall, a Hindoo, a 2½-ton truck under a conditional sale agreement. The cash payment was $1,700, and Topham advanced Dogar Mall $500 towards the cash payment, Dogar Mall giving a mortgage on certain hay he had for the balance of the $1,700 cash payment. Shortly after Dogar Mall got into difficulties and lost his hay and Topham then gave a mortgage on certain property for $1,200 to make up the cash payment. Topham then signed an "assumption agreement" rendering himself liable for the balance of the purchase price under the conditional sale agreement. Then two days later one G. R. Barwell signed an "assumption agreement" assuming all liabilities under the conditional agreement and making himself principal debtor thereunder. Four days after the date of the

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conditional sale agreement the Federal Motor Company Limited discounted said agreement with the Motor Securities Company Limited a financing concern. In May, 1925, payments were in arrears and on the 15th of May, Topham gave a mortgage on certain property in Chilliwack for $2,000 to even the balance due from Barwell on the truck. On the 30th of May following the Federal Motor Company sold another truck (known as the small truck) to Barwell Bros. under a conditional sale agreement for $1,035. The $1,035 was not paid but the vendors took a chattel mortgage as security on the two trucks for whatever interest the Barwells had in them. The Federal Motor Company discounted their agreement with one Barker and after certain payments were made, leaving a balance of $500 due, Barker seized the truck in December, 1926 (small one), and then Topham paid the balance due on it and took a bill of sale of the truck from Barwell Bros. In January, 1927, the Motor Securities Company pressed for payment of the balance on the big truck and on the 22nd of February following, Topham paid the balance due. They then gave a discharge of his mortgage but refused to give an assignment of the conditional sale agreement. On the 28th of February, 1927, Topham was advised for the first time of the mortgage given by Barwell Bros. to secure payment for the small truck.

J. A. MacInnes, and *E. S. Davidson,* for Topham *et al.*
J. W. deB. Farris, K.C., and *DesBrisay,* for the Companies.

19th April, 1928.

Judgment

MURPHY, J.: By his statement of claim plaintiff alleges that Barwell Bros. purchased through Federal Motors Limited a motor-truck, which truck was the property of the defendant Company upon the deferred payment plan; that Barwell Bros. procured plaintiff to become guarantor of such deferred payments; that plaintiff had to make certain payments to defendant Company under said guarantee, and paid the balance due in full on February 22nd, 1927; that defendant Company was well aware plaintiff was such guarantor and accepted his payments with such knowledge; that on payment in full being made plaintiff demanded an assignment of all collateral or other securi-

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ties held by defendant Company in connection with said motor-truck sale which assignment defendant Company refused. Plaintiff thereupon brought this action to compel assignment and delivery of said securities.

Admittedly the facts as proven at the trial do not bear out these allegations. If, however, the record shews that plaintiff has established a case for relief on grounds that have been fully litigated the Court should on such terms as would be just amend the pleadings to conform with the evidence. I have carefully perused the record and the exhibits and fail to find a case so made out. The original sale on November 10th, 1923, was by the Federal Motor Company Limited to Dogar Mall by conditional sale agreement. An absolute assignment of this contract and of the Federal Motor Company's interest in the truck was made by this Company to defendant Company on November 14th, 1923. On January 19th, 1924, plaintiff signed what is called an "assumption agreement" (Exhibit 4). This document was prepared by and delivered when signed to defendant Company. By its terms plaintiff asserts that he has acquired the interest of Dogar Mall and binds himself as principal debtor to defendant Company for the deferred payments.

No evidence was given of any contract between Dogar Mall and plaintiff whereby plaintiff acquired Dogar Mall's interest in the truck. Exhibit 3 expressly provides that Dogar Mall's liability to defendant Company is to continue and likewise preserves his rights under the conditional sale agreement. On January 21st, 1924, a similar "assumption agreement" was prepared by defendant Company and signed by Geoffrey Barwell, whereby Barwell bound himself as a principal debtor which after signature was delivered to defendant Company. It contains the same clause preserving the rights and liabilities of the parties to the original conditional sale agreement. The execution of this document was procured by plaintiff with the knowledge and concurrence of defendant Company. Plaintiff with the knowledge and consent of defendant Company had possession of the said truck, at any rate as from January 19th, 1924. Barwell, with knowledge and consent of defendant Company, had possession thereof as from January 24th, 1924.

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Barwell has paid considerable sums on the deferred payments and plaintiff has paid the balance. There is, however, a bill for repairs due the Federal Motor Company Limited. Hansuld is the manager of both the Federal Company Limited and the defendant Company but there is no other connection between said companies. No shareholder of the one is a shareholder of the other. It is true that in Exhibit 7 a mortgage executed by plaintiff and delivered to defendant Company as additional security for overdue payments on the truck, there is a recital that G. Barwell owes defendant Company $2,000, and that said Company has demanded additional security and that said mortgage is given as such security. This is a correct statement of fact but I cannot see that it in any way alters the position of plaintiff as a principal debtor to defendant Company as a result of Exhibit 4. There is nothing in the letters from defendant Company that affects this position. The letters from the Federal Motor Company Limited are on my finding not admissible against defendant Company, but even if they were, I see nothing in them altering plaintiff's position as a principal debtor. So far as I can make out the real legal relationship is that Dogar Mall was the purchaser and that in so far as defendant Company is concerned both plaintiff and Barwell bound themselves as principal debtors for the debt of Dogar Mall who still likewise remained a principal debtor. As to the legal relationship between plaintiff and Barwell, my view of the evidence is that plaintiff when he made payments of money on the truck was loaning money to Barwell. But I am not called upon to definitely decide these features. All I have to find is, as I do find, that the record does not disclose fully litigated facts upon which I should amend the pleadings and give judgment for plaintiff.

The action is dismissed with costs.

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MURPHY, J.: My decision in *Popham* v. *Motor Securities Company Limited* holds that Topham has failed to make out

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any property interest in the large truck. He therefore cannot resist the foreclosure decree as to said truck unless plaintiff is estopped from alleging that he has no such interest. The letter of January 29th, 1927 (Exhibit 39) is relied upon to effect such estoppel. It is written without prejudice but was finally admitted as evidence by consent. I do not see that this letter creates such estoppel. It is true this letter makes no mention of the chattel mortgage but states if defendant Topham makes certain payments he will get a clear title to the large truck. He did not make the payment for repairs. He did make the payment to the Motor Securities Company, but my view is that he did not thereby alter his position. He was bound to make such payment as a principal debtor by virtue of his execution and delivery of Exhibit 4. There is no evidence that the failure to mention the chattel mortgage was intentional. The statement as to clear title in Exhibit 39 was a slip on Hansuld's part which in my opinion had no legal effect. I hold Hansuld acted honestly throughout this complicated transaction, and that Topham's actions were in no way influenced by the receipt of Exhibit 39.

Judgment

The plaintiffs are entitled to a foreclosure decree in so far as the large truck is concerned since the other defendants made no defence. It follows from the foregoing findings that defendant Topham's counterclaim in so far as it rests on the seizure of the large truck must be dismissed.

As to the small truck, I hold on the evidence that the bill of sale (Exhibit 12) does not represent the true transaction. In my opinion the true facts are that Topham advanced the Barwells the money necessary to pay out Barker just as he had made similar advances in the past. He took Exhibit 12 not as absolute owner of the small truck, but because he wished security for moneys he had advanced. I do not think Barwells' possession at Princeton was the possession of Topham but possession in his own right subject to the chattel mortgage given to plaintiff and to the in form, absolute bill of sale but in reality mortgage to Topham. Topham made no definite bargain with Barwell. He simply paid out Barker and took security. He intended that Barwell should continue as heretofore to be in possession of the

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truck and to operate it on his own account and he (Topham) did not intend to do so or to look for new contracts to be fulfilled by the use of the trucks. He expected Barwell to make money by his operation of the trucks and thus eventually to repay him for moneys advanced. He intended that Barwell should retain $5 a day as living expenses, etc., and should pay over to him anything above that amount made by the use of the truck, on account of moneys advanced by him, but this intention was not reduced to an agreement with Barwell. Topham simply allowed matters to go on as they had been going up to the date of the Barker seizure with this difference, that he now held security on the small truck for moneys advanced up to the sum of $2,500. This being my view of the facts I am confronted with the position that the registrations of both plaintiff Companies' chattel mortgage and of Topham's bill of sale are invalid as neither document conforms to the requirements of the Bills of Sale Act for the chattel mortgage was in fact collateral to a promissory note, yet it contains no reference to that fact. The assignment to Barker from the plaintiff Company was not intended to transfer to him absolutely the chattel mortgage and the payment by Topham to Barker was not intended by either to include a purchase of the chattel mortgage. Topham did not know of its existence and neither did Barker, so far as the evidence shews. Exhibit 11, the only document produced signed by Barker merely evidences that all moneys due under the conditional bill of sale to Barwells have been paid. Under these circumstances, I think plaintiff Company is entitled to a decree of foreclosure as against Topham in reference to the small truck also, since he is a subsequent incumbrancer under a document, registration of which is invalid under the Bills of Sale Act. *Meade* v. *Deschene* (1922), 50 N.B.R. 150.

The other defendants not having appeared plaintiffs are entitled to a foreclosure decree as asked. It follows from what I have said above that the counterclaim in reference to the seizure of the small truck must also be dismissed.

Judgment for plaintiff with costs; counterclaim dismissed with costs.

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From these decisions Topham appealed. The appeal was argued at Victoria on the 29th of June, 1928, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

J. A. MacInnes, for appellant: The moment we pay the whole debt we are entitled to the securities the creditors hold: see Halsbury's Laws of England, Vol. 15, p. 505, sec. 954; Leake on Contracts, 7th Ed., p. 316. The second action is for foreclosure of the chattel mortgage, but it must be registered. He relies on *Meade* v. *Deschene* (1923), 2 D.L.R. 332, but the facts are different. The case of *Winn* v. *Snider* (1899), 26 A.R. 384 applies. The chattel mortgage only applies to the Barwell interest. There is no right to foreclose Topham at all. We became purchasers: see *Eby* v. *McTavish* (1900), 32 Ont. 187.

Argument

J. W. deB. Farris, K.C., for respondents: The pleadings do not set up the relationship between Dogar Mall and Topham. His claim, that the pleadings in the second action cures this is not sound. They took a bill of sale when they intended it to be a chattel mortgage. This was a chattel mortgage and not a bill of sale. On the question of *bona fide* see *Meade* v. *Deschene* (1923), 2 D.L.R. 332 at p. 335; Barron & O'Brien on Chattel Mortgages, 3rd Ed., p. 433. On the right of the surety to the securities when he has paid the debt see Halsbury's Laws of England, Vol. 15, p. 510.

MacInnes, in reply: Good faith is not a feature in estoppel at all: see *The Deutsche Bank* (*London Agency*) v. *Beriro & Co.* (1895), 1 Com. Cas. 255.

Cur. adv. vult.

2nd October, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: On the judge's finding of fact, which I think ought to be sustained, his conclusions of law are not erroneous. The appeal must therefore be dismissed.

MARTIN, J.A.

MARTIN, J.A.: These are two consolidated actions and they are of an unusually confused and complicated nature and deficient in satisfactory evidence on important points. The only thing I have no doubt about after reading all the evidence is that it would not be either safe or desirable to interfere with the

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learned judge's disposition of the whole matter, because I am satisfied it does substantial justice to all parties, and that he was right in refusing to allow an amendment in the circumstances set out on pp. 101-108 of the appeal book.

There is, however, one direction in the formal judgment, p. 219, that requires correction, *viz.,* a sale of the trucks should be ordered instead of foreclosure: this the respondent's counsel concedes but says it is a slip, and also that at the trial he set out his position clearly; nevertheless after the objection was taken, on 3rd May last, in the notice of appeal, pp. 225-6, pars. 9-10, it does not appear, before us at least, that an offer was made to correct the judgment and therefore, as the costs of this appeal would be affected by that oversight, I should like to hear counsel further on this point alone before that question is decided.

GALLIHER, J.A.

GALLIHER, J.A.: After careful consideration of the somewhat complicated transactions herein, I am of the opinion, that the learned trial judge reached the right conclusion, and would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *MacInnes & Arnold.*
Solicitors for respondents: *Bourne & DesBrisay.*

TOM v. TRUSTEE OF HANS C. CHRISTENSEN LIMITED, A BANKRUPT, AND EVERETT.

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Equitable mortgage—Transfer—Space for grantee's name left blank—Foreclosure—Estoppel—Rectification of documents of title.

The defendant entered into a written agreement with a building company for the erection of a new house in consideration for which he was to transfer his old house to the Company and give a mortgage for the balance of the purchase price on the new house when completed, he to remain in possession of the old house until the new one was ready for occupation. Shortly after the agreement was signed the Company's agent submitted a conveyance to the defendant for his signature which was executed under seal but the space for the name of the grantee was left in blank. The defendant did not read the deed but executed it thinking it was made out to the Company as grantee to enable it to sell the house, and his certificate of title was allowed to remain in the Land Registry office subject to the order of the Company's agent. The Company then obtained a loan from the plaintiff on delivering to him as security the deed (the space for the grantee's name still remaining blank) and the certificate of title. Almost immediately after this the Company became bankrupt and the new house was never built. The plaintiff's action for foreclosure of his alleged equitable mortgage and for rectification of the deed by inserting the name of the Company in it, was dismissed.

Held, on appeal, affirming the decision of GREGORY, J. (MARTIN, J.A. dissenting), that the doctrine of estoppel did not apply as the deed, whether treated as a deed or as an unsealed transfer, was equally ineffective to transfer any estate or interest legal or equitable to anyone but was at most an authority to insert the name of the person to whom delivered as transferee, and this was not done. Further, the case was not one for rectification of the document.

Statement

APPEAL by plaintiff from the decision of GREGORY, J. of the 23rd of April, 1928 (reported *ante* p. 124), in an action for a declaration that the plaintiff is entitled to an equitable mortgage on the east 33 feet of lot 6, block 34, district lot 200 A, group 1, New Westminster District; that an account be taken of what is due him on a mortgage of the 7th of May, 1927, by deposit of title deed given to secure payment of $1,200 with interest and for rectification of documents of title. The facts are that on the 30th of April, 1927, the defendant Everett entered into an agreement with

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Hans C. Christensen Limited (a building company) whereby the Company agreed to build a house for Everett on a certain lot and convey same to Everett for the sum of $5,225 payable as follows: $2,350 by transferring Everett's house and premises (above described and now in dispute) and to raise the balance by mortgage on the new house when completed and pay same to the Company, Everett to occupy his old house until the new house was ready for occupation. On the 2nd of May, 1927, Everett executed a conveyance of his old premises under seal in blank and handed it to the Company. On the 5th of May one McGowan, who was not an officer of the Company, but who said he was getting money for the Christensen Company, interviewed the plaintiff and asked for a loan of $1,500. They went to Everett's old house and looked it over. Everett was not there but his wife was present. The loan was made and McGowan handed over the conveyance in blank and an insurance policy upon the house and furniture (loss payable to Everett). On the same day the plaintiff took the policy to the insurance company and induced the company's agent to sign a transfer of same to the plaintiff without Everett's knowledge. The plaintiff then obtained possession of the certificate of title to the property explaining that when he made a search in the Land Registry office, the certificate of title was on file to the order of Everett's agent (one McCurdy) and he then got an order from McCurdy to deliver the certificate to him. Shortly after the loan was made Hans C. Christensen Limited got into difficulties, went into liquidation and the new house was never built. It was held that the plaintiff did not establish his right to an equitable mortgage nor had he any right to hold the certificate of title or to have any loss under the insurance policy made payable to himself.

The appeal was argued at Victoria on the 3rd and 4th of July, 1928, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Argument

C. L. McAlpine, for appellant: We say we have an equitable mortgage on the old house. We have a deed of the property and the insurance policy which is sufficient: see *Lacon* v. *Allen*

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Argument

(1856), 3 Drew. 579. The certificate of title came properly into our hands: see *Zimmerman* v. *Sproat* (1912), 26 O.L.R. 448. That an equitable mortgage may be created in British Columbia by deposit of title deeds see Hogg on Registration of Title to Land Throughout The Empire, p. 282; *White* v. *Neaylon* (1886), 11 App. Cas. 171; *National Bank* v. *Diffely* (1910), 1 I.R. 271; *Fialkowski* v. *Fialkowski* (1911), 4 Alta. L.R. 10. The deed was signed and sealed but was in blank as to the transferee. That it is nevertheless valid see *Doe, dem. Lewis* v. *Bingham* (1821), 4 B. & Ald. 672 at p. 676; *Adsetts* v. *Hives* (1863), 33 Beav. 52; *In re Howgate and Osborn's Contract* (1902), 1 Ch. 451 at p. 455; *Montreal Bank* v. *Baker* (1862), 9 Gr. 97 and on appeal at p. 298; *Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465 at p. 468; *Crediton (Bishop)* v. *Exeter (Bishop)* (1905), 2 Ch. 455 at p. 459; Hogg's Australian Torrens System, pp. 831 and 908; *Arnot and Smith* v. *Peterson* (1912), 2 W.W.R. 1. As to the effect of the seal see *Clement* v. *Gunhouse* (1803), 5 Esp. 83; *Reg.* v. *Morton* (1873), 12 Cox, C.C. 456; *Hunter* v. *Parker* (1840), 7 M. & W. 322. The defendant, having delivered the deed in blank, is estopped from denying its validity: see *Mauch* v. *National Securities Ltd.* (1919), 2 W.W.R. 740. As to the defendant's claim to a vendor's lien see *Denny* v. *Nozick* (1921), 2 W.W.R. 157; *Buckland* v. *Pocknell* (1843), 13 Sim. 406; *Parrott* v. *Sweetland* (1834), 3 Myl. & K. 655; *Dixon* v. *Gayfere—Fluker* v. *Gordon* (1857), 1 De G. & J. 655 at p. 661; *In re Brentwood Brick and Coal Co.* (1876), 4 Ch. D. 562 at p. 565; *Rimmer* v. *Webster* (1902), 71 L.J., Ch. 561 at pp. 565-6; *Tuytens* v. *Noble* (1908), 13 B.C. 484; *Fuller* v. *Glyn, Mills, Currie & Co.* (1914), 2 K.B. 168 at p. 177; *Rice and Others* v. *Rice and Others* (1853), 2 Drew. 73 at pp. 78 and 80-1.

Symes, for respondents: The question is whether the deposit of a certificate in Everett's name and a deed in blank creates an equitable mortgage. If it does not that is the end of the case. We say, first, there is no equitable mortgage at all: see Halsbury's Laws of England, Vol. 21, p. 78, sec. 140. Next, sections 34 and 36 of the Land Registry Act prevent any interest being acquired whatever without registration, and the transfer which

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was signed in blank has not been filled in yet: see *Howard* v. *Miller* (1915), A.C. 318; Hogg on Registration of Title to Land Throughout The Empire, p. 282. As to the effect of the deed in blank it is invalid both in law and equity and the property remains in the transferor: see Norton on Deeds, 2nd Ed., p. 36; *Hibblewhite* v. *M'Morine* (1840), 6 M. & W. 200. As to estoppel Everett did nothing whatever that would in any way mislead Tom.

McAlpine, replied.

Cur. adv. vult.

2nd October, 1928.

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MACDONALD, C.J.A.: The defendant Everett agreed in writing with Hans C. Christensen Limited, to exchange his house for a new one to be built by the latter. By the agreement Everett was to retain possession of his own house until the new house was conveyed to him. Shortly after the signing of the agreement the agent of Hans C. Christensen Limited, drew up a conveyance for Everett to sign which he did without troubling to read it. The document leaves a blank for the name of the grantee. This imperfect document was taken by Hans C. Christensen Limited to the plaintiff who loaned $1,200 on the security of it. Hans C. Christensen Limited thereafter became bankrupt, and the new house was not built nor is there any hope of it being built. The plaintiff brings this action for foreclosure of his alleged equitable mortgage.

In this Province it is not necessary that a conveyance of land should be made by deed, an unsealed instrument of transfer being sufficient for registration. It is therefore contended that the document in question may be treated as an unsealed instrument of transfer and that the delivery of it to Hans C. Christensen Limited imported that that company might fill in its own name or that of some other person as the transferee, thus converting what was a meaningless paper into one capable of registration.

Two Alberta cases were cited in support of this contention. One by Beck, J., *Arnot and Smith* v. *Peterson* (1912), 2 W.W.R. 1, the other by Ives, J., *Mauch* v. *National Securities*

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Ltd. (1919), 2 W.W.R. 740. Both relate to the transfer of land. Beck, J. cites no authorities; Ives, J. relied upon *Colonial Bank* v. *Cadey and Williams* (1890), 15 App. Cas. 267, and *Fuller* v. *Glyn, Mills, Currie & Co.* (1913), 83 L.J., K.B. 764. These were cases relating to the transfer of company shares. In the case in the House of Lords, the executors of a deceased owner signed the transfer on the back of the share certificates, leaving the name of the transferees blank, and gave them to brokers to procure transfer to themselves. Instead the brokers fraudulently borrowed on them filling in the names of the lender's nominees who obtained registration thereupon. In an action by the executors for the recovery of the shares, their Lordships held that the decision of the case depended entirely upon the doctrine of estoppel; that there was no estoppel since the bank was put upon enquiry by the fact that the signatures to the endorsements were those of the executors, not of the deceased owner, and that the shares might have been intrusted to the brokers merely for transfer to the executors themselves on the company's books. The other case was also one of shares in a company, the endorsements on which were signed by the owner. Pickford, J., following *dicta* in the above case, held that when the owner signs endorsements in blank and hands the shares to another that other has implied authority to fill them in; that the reasonable presumption is that when the owner delivers shares to a broker in that condition he intends that the broker should either sell or pledge the shares. Now it was said in these cases that while shares in companies are not negotiable instruments, they partake of the nature of negotiable instruments in some respects, and that the necessities of commerce require that they should pass from hand to hand in the way above indicated. In *Fuller* v. *Glyn, Mills, Currie & Co.* therefore, the owner was held to be estopped from disputing the right of the holder to insert his own name or that of a nominee in the blanks left in the endorsements.

I express no opinion as to whether the principle applied in these cases should be extended to the transfer of land. I do not need to decide that question here. I may assume that Hans C. Christensen Limited had implied authority to insert its own

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name in the document as grantee, which it did not do. Again, if the plaintiff had the same right he did not exercise it. Whatever may be said in favour of the right of the first holder to fill in the blank, I have grave doubts of the propriety of holding that a transfer of land may be issued at large leaving the name of the transferee to be filled in by any other person for the time being in possession of it.

I note that in all four cases the decisions were founded on estoppel. What was done may not have been legal but if not the plaintiff was not allowed, except in the one case, *Colonial Bank* v. *Cadey, supra,* to question their legality. In the present case we have the converse of those. Everett is resisting. It is true he signed a document, which was imperfect, in fact a nullity, so long as it remained in the condition in which it was, but he did not intend the plaintiff to act upon it; he did not know the plaintiff in the transaction. The most that can be said against him is, that by the act of delivering it to Hans C. Christensen Limited, it may be presumed against him that Hans C. Christensen Limited had authority to fill in the name of the grantee or transferee. It seems to be well settled that a deed in the condition in which this was could not be tampered with, that is why it is contended that it may be treated as an unsealed transfer, but whether treated as a deed or a transfer, it is equally ineffective to transfer any estate or interest legal or equitable to anyone, but at most an authority to insert the name of the person to whom delivered as transferee. How then can the doctrine of estoppel be urged against the defendant Everett? If the name of the transferee had been inserted by Hans C. Christensen Limited, he might have been estopped from denying the legality of that act, but that was not done. If it be said that his signing the deed in that condition enabled Hans C. Christensen Limited to commit a fraud on the plaintiff, the answer is that the plaintiff knew or must be presumed to have known, that the document was worthless as it stood. He would also be presumed to have known if that be the law, that the blanks could be filled in either by Hans C. Christensen Limited or by himself.

The plaintiff has also asked for rectification of the document by inserting the name of Hans C. Christensen Limited in it.

The plaintiff is no party to the deed, but apart from this and assuming that he has a right to ask for rectification, the principle of equity is well settled that where there is a prior written agreement rectification will only be made in conformity with it and that parol evidence in such a case is not admissible. If the deed were rectified so as to comform to the written agreement, it would not help the plaintiff, since under the agreement Hans C. Christensen Limited could not honestly deal with the property in violation of the stipulation that the defendant Everett should have the right to remain in possession until he had been assured of the new house. But apart from this, rectification being discretionary the Court must look to the conduct and the situation of the parties. Everett's acts throughout the matter have been innocent, the plaintiff's negligent. He accepted a worthless document as security, worthless without the name of the grantee being inserted and with notice apparent on the face of the document of its worthlessness, as it stood. He neglected to have Hans C. Christensen Limited fill in the name of the assignee or, if he had the right, he neglected to fill in his own name after he had acquired the security. To rectify the document would be in effect to make a new instrument of transfer. The defect is fundamental.

MACDONALD, C.J.A.

The possession of the certificate of title does not help the plaintiff. That is merely evidence. It is the registration of the transfer under our Act which passes the title. The certificate only emphasizes the fact that the borrower was not the owner and was offering evidence of another man's title, as security for the loan to himself.

I would dismiss the appeal.

MARTIN, J.A.: Pursuant to a written contract dated 30th April, 1927, to "transfer by clear deed a house and premises" the defendant Everett as registered owner gave on the 2nd of May to Hans C. Christensen Limited, contractors, an indenture of conveyance of said property under the Short Forms of Deed Act (Cap. 233, R.S.B.C. 1924) duly executed by Everett as grantor but without naming any person as grantee, and at the same time gave said company a deed from Yorkshire & Canadian Trust

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Company to him of the same property and also a fire-insurance policy on the house and certain furniture therein and his certificate of indefeasible title was allowed to remain in the Land Registry office subject to the order of one McCurdy, who was the Company's employee and agent in its transactions with Everett. It is admitted by Everett that he executed and delivered the deed thinking it was made out to the Company as grantee for the purpose of selling his house as the first payment (at an agreed valuation of $2,350) for a new house that the Company was to build for him at a cost of $5,225 and he says he did not notice at the time that the deed was in blank and there is no explanation for that omission; he also admits that the Company was thereafter trying to sell his house (in which it was agreed he should continue to live till the new house was ready for occupation) and put a sale sign upon it as owner and that prospective buyers came to inspect it.

The Company shortly thereafter wanted money to carry on its contracts and through a broker, McGowan, applied to the plaintiff for a loan of $1,500 for a short term on the security of Everett's old house, and after the plaintiff inspected the house he agreed to lend $1,200 for one month, and after searching the title and finding that Everett was registered as owner without encumbrances and after getting the deed in blank, the insurance policy, and the certificate of title upon the Company's order *per* McCurdy as aforesaid, he advanced the sum of $1,200 on the 5th of May taking the said documents as his security for an equitable mortgage and so continues to hold them without further registration.

Here it must be noted that the defendant's counsel in answer to our enquiry admitted that the plaintiff properly obtained said certificate and that the finding twice made by the learned judge in his reasons that its acquisition was "unauthorized" (A.B. 53, 55) is erroneous, and this important, indeed vital error (for if correct it put an end at once to the plaintiff's case) plainly affected the learned judge's conclusion in a substantial manner as is shewn, *e.g.*, by his strong condemnation of the plaintiff's conduct upon pp. 53, 55.

There is no evidence to support the view that there were any

circumstances which could reasonably place the plaintiff upon further enquiry as to any obligations of the Company to Everett or otherwise and the matter of the loan must simply be regarded as one between the plaintiff and the Company entirely apart from Everett.

In this state of affairs the first question arises as to whether or no equitable mortgages by deposit of title deeds have been abolished by our Land Registry Act, Cap. 127, R.S.B.C. 1924. They have long been recognized under the former system—*Hudson's Bay Co.* v. *Kearns & Rowling* (1894), 3 B.C. 330; (1896), 4 B.C. 536, and in Ontario *Zimmerman* v. *Sproat* (1912), 5 D.L.R. 452, and in Alberta *Fialkowski* v. *Fialkowski* (1911), 4 Alta. L.R. 10, and their present existence is thus recognized by section 46 of our said Act:

"No equitable mortgage or lien created by a deposit of title deeds or a certificate of title, whether accompanied or not by a memorandum of deposit, shall entitle the person interested to registration under this Act."

The effect of this is simply to prevent the equitable mortgagee from obtaining the benefits of registration of a legal instrument, and as there is nothing else in the Act that restricts the rights of such persons *inter se* no reason is apparent why this very convenient and long-standing method of raising money on landed property, cheaply and expeditiously should now be curtailed; such a mortgagee takes exceptional risks, but if he chooses to do so that is his affair—*cf.*, Hogg's Registration of Title to Land Throughout The Empire, 281-2-3, sec. 4, subsec. 1. Taking this case as an example, the borrower wished to get a short loan for one month only, on a security which banks cannot handle, and he got $1,200 without having to pay any conveyancing or registration fees or charges; he agreed to pay $40 for that accommodation which, in view of the fact that the ordinary procuration fee alone would have been $12, left $28 for the lender's profit on the transaction if the borrower repaid the debt as promised; this sum surely cannot be styled exorbitant where the lender assumes a special risk on a generally undesirable class of special temporary loan which also saves the borrower other considerable usual charges. In fairness to the plaintiff I mention these facts because they and his explanation at pp. 20-2 were entirely over-

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looked below and a position created in which he as a claimant for equity was placed in a very inequitable light much to his prejudice.

Then it is submitted by respondent's counsel that in any event this indenture delivered in blank is "void" and "incapable of having any operation" as Baron Parke said in the leading case of *Hibblewhite* v. *M'Morine* (1840), 6 M. & W. 200; 151 R.R. 380. That decision has been approved by the House of Lords in *Societe Generale de Paris* v. *Walker* (1885), 55 L.J., Q.B. 169, 172; and by Farwell, L.J. in *Burgis* v. *Constantine* (1908), 2 K.B. 484, 500; and in *Allen* v. *Withrow* (1884), 110 U.S. 119, the Supreme Court of the United States said, *per* Mr. Justice Field, pp. 128-9:

"The deed in blank passed no interest, for it had no grantee. The blank intended for the name of the grantee was never filled, and until filled the deed had no operation as a conveyance. It may be, and probably is, the law in Iowa, as it is in several States, that the grantor in a deed conveying real property, signed and acknowledged, with a blank for the name of the grantee, may authorize another party, by parol, to fill up the blank. *Swartz* v. *Ballou*, 47 Iowa, 188; *Van Etta* v. *Evenson*, 23 Wis. 33; *Field* v. *Stagg*, 52 Missouri 534. As said by this Court in *Drury* v. *Foster* [(1864)], 2 Wall. 24, at p. 33:

"'Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is, that the power is sufficient.'

"But there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named. Allen, to whom it is stated the deed was handed, with authority to fill the blank and then deliver the deed, gave it to his wife without filling the blank, and she died with the blank unfilled."

Many cases on alterations in deeds generally are conveniently collected in Norton on Deeds, 33-6, particularly *Adsetts* v. *Hives* (1863), 9 Jur. (N.S.) 1063; 33 Beav. 52, on an equitable mortgage, but they do not touch the present point. The effect of the decision in *Hibblewhite's* case so far as it relates to this case really is that where a "conveyance [is] required by the statute" to be by deed, a deed in blank is void, and so if the appellant's case solely depended upon the validity of the deed before us it would, in my opinion, fail. But that is far from saying that the document invalid as a deed may not be otherwise effective under

the radical changes in conveyancing history brought about by registration Acts similar to ours and I am in accord with the views on this subject expressed by the late Mr. Justice Beck—in truth a learned judge—in *Arnot and Smith* v. *Peterson* (1912), 2 W.W.R. 1 wherein he held that transfers under the Torrens system, like ours had not the nature of deeds, saying (p. 2):

"There has been some question raised about the validity of the transfer, because there is said to be an alteration in it. I do not think that the law which has been referred to here with regard to alterations in deeds of grant, and other documents under seal by which title passes, has any application to an instrument of that kind. In the first place a transfer made under the Land Titles Act is not a deed of grant. It does not pass the title, and its practical effect is nothing more, or at all events, little more than a mere order to the registrar by the holder of the registered title to transfer the title to somebody else. Now, there is no reason in law why an instrument of that sort should not be executed in blank with authority given to the person to whom it is handed or to anybody else, to fill in under certain instructions, the name of the so-called transferee, who in reality, is the person to whom the registrar is to be requested to issue a new certificate of title."

And to the same effect is the later decision of Mr. Justice Ives in *Mauch* v. *National Securities Ltd.* (1919), 2 W.W.R. 740, saying (p. 741):

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"It is true that a transfer of land is not a negotiable instrument but neither is it a deed. It is an order from the registered owner of land to the registrar to register another as owner. It invests no interest in the land. And I see no legal objection to the order (transfer) being left blank if the then transferee so desires and accepts it."

Our statute, section 20, declares that:

"Notwithstanding the provisions of any statute or any rule of law, and except in the case of the execution of an instrument by a corporation, or by an attorney on behalf of a corporation, every instrument required to be registered under this Act for the purpose of passing an estate or interest in land or creating, releasing, or dealing with a charge on land, and every power of attorney under which the instrument is executed, may be executed without seal."

And section 53 says:

"Instruments in statutory or other form sufficient to pass or create an estate or interest in land shall be registrable, and for all purposes of registration effect shall be given to them according to their tenor."

This, as is pointed out in Hogg on Registration, *supra*, pp. 309, 329, permits the use of "other forms" than the statutory one to effect the transfer, though ordinarily such is not the case.

The combined effect of these two sections is radical and far-

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reaching when it is borne in mind that at common law a deed was completed by sealing alone and the necessity for a signature is of comparatively recent date—Williams on Real Property, 24th Ed., 217:

"In all legal transactions, therefore, a seal was affixed to the written document, and the writing so sealed was, when delivered, called a *deed*, in Latin *factum*, a thing done; nothing in fact was in early times called a *writing*, but a document under seal."

And *cf.*, Norton on Deeds, *supra*, 5, and Halsbury's Laws of England, Vol. 10, p. 384, sec. 689.

MARTIN, J.A.

In support of my view there is a decision by Jessel, M.R., *In re Tahiti Cotton Co.* (1874), L.R. 17 Eq. 273, wherein, after considering *Hibblewhite's* case, he decided that certain blank transfers of shares though not deeds were valid because no deed was required by the articles of association but an "instrument in writing," and therefore the transfers should have been registered though counsel stated, p. 277, "the practice of the company has always been to require a deed and under these circumstances the applicant cannot rely on these transfers," and it was held that "express words" were not necessary to authorize the filling in of the blanks if the circumstances left no doubt as to what was "intended to be authorized" to effect registration of the shares. And *In re Queensland Land and Coal Company* (1894), 3 Ch. 181, it was held by North, J. that though debentures under seal delivered with the names of the obligee in blank by a company to lenders of a loan were void as legal instruments, nevertheless as there was a contract to deliver debentures to them the lenders had

"as good a claim as any debentures could give them, except that their claim is equitable and not legal. . . . They are equitable holders of debentures, just as they would have been legal holders if the names of obligees had been inserted before the debentures were executed by the company."

In the case at Bar the admitted object of the registered owner, Everett, was to transfer the property to the Christensen Company by delivery of a sufficient instrument for that purpose, so that money could be raised from the sale, or otherwise, of his old house by its new owner, the contractor, to pay in part for the building of the new one; and so the form that the instrument took for that purpose was immaterial. That decision was applied by Buckley, J. in *In re George Routeledge & Sons,*

Limited (1904), 2 Ch. 474, wherein he said at p. 480:

"I agree that if there is a contract that a person is to have a loan on the terms that the lender is to have a binding security, and he does not get that which he contracted to have, he has the right to be placed in the same position as if he had got it."

It was submitted that as the deed here was made under the Short Form of Deeds Act the parties must be controlled thereby, but, having regard to the said sections of the statute and cases cited, I am unable to take so restricted a view of its operation which is inconsistent with the said fundamental changes brought about by our registration Acts, and I see no legal or equitable obstacle in this case to prevent the imperfect deed being regarded as an instrument of transfer under said Act which can be given further and complete effect by filling in the blank left for the name of the transferee if and when the time shall arrive for the necessity to do so.

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Such being my view of the matter, it is not necessary to express a final opinion upon the question of the creation of an equitable mortgage by the deposit with the plaintiff of the certificate of indefeasible title alone and apart from the incomplete deed of transfer, though obviously much may be said in favour of that view because, as its name indicates, it is by the said statute, Cap. 127, Sec. 37, made a document of title of the most exceptional and highest kind and "conclusive evidence at law and in equity" even as against the King himself—*Kipp* v. *Simpson* (1928), 3 W.W.R. 331, 334.

It follows, therefore, that in my opinion the appellant has established his position and so the appeal should be allowed and judgment entered declaring the validity of his mortgage and directing an account with the other usual remedies of a mortgagee.

GALLIHER, J.A.

GALLIHER, J.A.: This case has given me some little difficulty and after very full consideration I am in agreement with the Chief Justice, whose reasons I have had the advantage of considering and in which I concur.

Appeal dismissed, Martin, J.A., dissenting.

Solicitors for appellant: *McAlpine & McAlpine.*
Solicitors for respondents: *Robertson, Douglas & Symes.*

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ECCLES v. RUSSELL

ECCLES v. RUSSELL.

Solicitor and client—Verbal retainer—Costs—Evidence—Conflict of between solicitor and client.

Where a solicitor has undertaken legal business without a written retainer and there is a conflict of evidence as to the authority between the solicitor and the client, and nothing but assertion against assertion, weight must be given to the denial of the party sought to be charged rather than to the affirmation of the solicitor.

Statement

ACTION to recover $1,450 paid by the plaintiff to the defendant, $450 of which was advanced on account of costs and $1,000 as deposit for bail. The plaintiff was a member of the Narcotic Drug Squad of the Royal North West Mounted Police in 1923, and was charged with infraction of The Opium and Narcotic Drug Act. He was advised by his superior officers to retain the defendant on the understanding that if he cleared himself to the satisfaction of his superior officers, the police department would pay the defendant's costs. The plaintiff cleared himself and he contends the police paid the defendant for his services in full and the above moneys should be returned by the defendant to himself. Tried by GREGORY, J. at Vancouver on the 1st of October, 1928.

J. A. MacInnes, and *G. L. MacInnes,* for plaintiff.
Nicholson, for defendant.

11th October, 1928.

Judgment

GREGORY, J.: This is a contest between the plaintiff, a client and the defendant, a solicitor, as to the terms of defendant's retainer.

It is unnecessary to set out in detail the respective contentions of the plaintiff and defendant but, in effect, plaintiff says that, under the terms of the retainer, defendant is not entitled to collect anything from him, that he has already been paid by the Department of Justice at Ottawa and that defendant should return him the sum of $1,450 advanced by plaintiff during the proceedings.

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There were a number of matters in which the defendant acted and in which he now says the plaintiff retained him but in one at least the plaintiff was not a party and he flatly denies retaining the defendant at all in it.

All the accounts were first rendered by the defendant to the Department of Justice and eventually paid by it less about 10 per cent. taxed off.

The plaintiff was never asked to pay the accounts or any of them until after this action was started and the account it is now suggested he should pay is practically the identical account already paid by the department except that the charges have been substantially increased. There is no counterclaim for the unpaid balance.

Judgment

In these circumstances and others not set out, I feel that I must, in view of the unanimous decision of our own Court of Appeal in *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241, accept the plaintiff's account in preference to that of the defendant, who failed to take the precaution of having a written retainer.

The payment of the accounts by the Department of Justice is, I think, satisfactory evidence that the plaintiff cleared himself to the satisfaction of his superiors.

There must be judgment for the plaintiff for the sum of $1,450.

Judgment for plaintiff.

MACDONALD, J. (In Chambers)

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Nov. 6.

REX v. TARCHUK

REX v. TARCHUK.

Habeas corpus—Prisoner committed under Code—Imprisonment—Removal from one gaol to another—Provincial Act providing for removal—Applicability—Release—R.S.B.C. 1924, Cap. 195, Sec. 33.

A prisoner convicted of an offence under the Criminal Code and after serving part of his sentence was removed by the Attorney-General from one gaol to another under the authority of section 33 of the Police and Prisons Regulation Act. On *habeas corpus* proceedings:—

Held, that said section cannot be invoked in support of the removal of a prisoner who has been committed for an offence under the Criminal Code from one gaol to another and an order was made for his release.

Statement

APPLICATION for a writ of *habeas corpus*. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. in Chambers at Vancouver on the 6th of November, 1928.

Nicholson, for the prisoner.
W. J. Baird, for the Crown.

Judgment

MACDONALD, J.: Upon this application for release, under *habeas corpus* proceedings, it appears that the applicant was, upon an admission of guilt, sentenced to be imprisoned in the common gaol for the county of Kootenay at Nelson, for a term of 21 months, with hard labour, by His Honour Judge BROWN, acting as a judge under the Speedy Trials Act. The Criminal Code, R.S.C. 1927, Cap. 36, Sec. 1056, provides that,—

"Everyone who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, . . . "

A subsection of this section, however, broadens this enactment and provides that, as to the Provinces of Manitoba and British Columbia, if anyone be sentenced to imprisonment for a term less than two years, he may be sentenced "to any one of the common gaols in the Province, unless a special prison is prescribed by law."

In this instance, the trial judge specified the gaol to which the guilty party should be committed and in which he was duly imprisoned. Subsequently the Attorney-General of the Prov-

ince, pursuant to a practice which has been in vogue, it is stated, for years, utilized the provisions of section 33 of the Police and Prisons Regulation Act, R.S.B.C. 1924, Cap. 195. This section reads as follows:

"The Attorney-General may from time to time direct that prisoners confined in one gaol be removed to some other gaol."

There is a previous section 32, which bears upon the point to some extent, which says:

"Every justice shall have power to direct that any person committed to prison by him shall be imprisoned in any of the gaols of the Province, and the Attorney-General shall from time to time instruct justices as to which gaol prisoners shall be committed."

If the latter portion of this section were sought to be applied, as to offences within the Criminal Code, I think it could be successfully contended that the "field," as it were, was already covered by the Dominion legislation.

Judgment

The applicant served a portion of his sentence before section 33 was invoked, and then was removed from the gaol at Nelson to the Oakalla prison farm, in the county of Westminster. From the return to the writ of *habeas corpus* it appears that the Attorney-General issued, what might be termed a warrant, on September 11th, 1928, for such removal, reciting the commitment and the reasons for pursuing such course. It is now contended that said section 33 is *ultra vires* of the Province, or rather that it does not give the power to the Attorney-General to thus remove a prisoner, who has been committed for an offence within the Criminal Code, from one gaol to another. There is a provision, whereby the Lieutenant-Governor in Council could possibly have acted along these lines, but that was not the procedure adopted. *Vide* Prisons and Reformatories Act, R.S.C. 1927, Cap. 163. Section 4 in part reads as follows:

"4. The Governor in Council or the Lieutenant-Governor of the Province may, if, from the insecurity or unfitness of any gaol of any county or district for the safe custody of prisoners, or for any other cause, he deems it expedient so to do, order any person . . . confined in such gaol, . . . to be removed . . . to any gaol . . ."

Compare sections 5, 6, 7 and 8 amplifying this provision as to removal of prisoners.

In the Province of Ontario there is an Act called The Gaols Act, R.S.O. 1927, Cap. 351. It provides for gaols to be estab-

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lished, and the maintenance of such gaols, the transfer of prisoners to the gaol of an adjoining county, and then, in giving the powers of the Lieutenant-Governor in Council with respect to the custody of prisoners in the gaol, section 18 is, I think, carefully worded, so as not to be *ultra vires*. It provides that,—

"The Lieutenant-Governor in Council shall, with respect to persons in custody undergoing imprisonment for offences against any law of Ontario or a by-law, or charged with any such offence, or for whose arrest a warrant has been issued, have all the powers conferred upon him in respect of offences against the laws of Canada by The Prisons and Reformatories Act of Canada, the provisions of which shall *mutatis mutandis* apply."

It thus being intended, by this enactment, to give the Lieutenant-Governor in Council control of the custody of prisoners who may be committed or who are undergoing imprisonment for offences coming within the purview of the Government of the Province of Ontario. It did not purport to give any right to deal with prisoners who were in custody, serving imprisonment for offences, coming within the Criminal Code.

I am assisted by this Ontario Act in coming to a conclusion that the section in question cannot be utilized in the manner, which, I understand, has been the practice in the past.

Judgment

My conclusion, therefore, is that the applicant is improperly detained in Oakalla. He has not, however, as yet served the full term of his imprisonment, even if the portion which has been served in Oakalla were allowed in his favour. In one sense he may be improperly at large, though I am not so deciding. It might, perchance, be contended (though I am not, of course, so holding) that he has, under the circumstances escaped from the proper gaol in which he was imprisoned—that is, that the circumstances would support such a contention; but I repeat it has not become necessary for me to decide such point, and no good purpose would be served by my making any further reference to the situation. It would be, besides, foreign to the question before me for adjudication.

I am asked to remand the applicant. I do not know of any such procedure. It is not as if he had only been committed for trial. He is convicted and supposed to be serving imprisonment for an admitted crime. There will be an order for release.

Application granted.

THE LAW SOCIETY OF BRITISH COLUMBIA v. STEWART.

COURT OF APPEAL

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July 5.

THE LAW SOCIETY OF BRITISH COLUMBIA v. STEWART

Notaries—Order for examination and enrolment of—Local Judge of the Supreme Court—Jurisdiction—B.C. Stats. 1926-27, Cap. 49, Secs. 5 and 6.

A County Court judge, acting as a Local Judge of the Supreme Court, has no jurisdiction to make an order for the examination and enrolment of an applicant under sections 5 and 6 of the Notaries Act.

APPEAL by The Law Society of British Columbia from the order of THOMPSON, Co. J. of the 12th of March, 1928, whereby it was ordered that the respondent be examined in the duties of a notary public and that if he were qualified on such examination he be enrolled as a notary public in and for the Province of British Columbia. The application was made under sections 5 and 6 of the Notaries Act (B.C. Stats. 1926-27, Cap. 49) and the Law Society appealed on the grounds: (1) That the local judge had no jurisdiction to make the order; (2) that there was no evidence that there was need of a notary public in the place where the applicant desired to practice; (3) that notice of the application was not properly served upon the Law Society.

Statement

The appeal was argued at Victoria on the 4th and 5th of July, 1928, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

P. R. Leighton, for appellant: We submit (1) The local judge had no jurisdiction to make the order; (2) there is no evidence of the need of a notary public in the district; and (3) notice of the application was not properly served on the Law Society. Notice of the application was mailed to the Secretary of the Law Society by registered post. This is not in compliance with the Act which requires personal service. The substantial objection is that the local judge had no jurisdiction. The Act requires that the application should be made to a Supreme Court judge: see *Hanna* v. *Costerton* (1918), 26 B.C. 347; *Royal Trust Co.* v. *Liquidator of Austin Hotel Co. ib.*, 353.

Argument

Bass, for respondent: The local judge has jurisdiction to deal

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with this application under section 18 of the Supreme Court Act. It is a "cause or matter" within said section. Service of notice of application by registered letter is sufficient under marginal rule 1013 and the post office receipt book shews that the notice was actually received.

Leighton, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed. The case of *Hanna* v. *Costerton* (1918), 26 B.C. 347, covers this case. There we held that the expression "Judge of the Supreme Court" would not include a Local Judge of the Supreme Court. There is no difference in substance and effect between the Act there construed and this one. The interpretation clause of this Act, the Notaries Act, B.C. Stats. 1926-27, Cap. 49, enacts that " 'Court' means the Supreme Court or any judge thereof." In the Act referred to in *Hanna's* case the expression was "a judge of the Supreme Court." Here it is "any of the judges of the Supreme Court." County Court judges are appointed by the Governor-General in Council to perform some of the duties of a Supreme Court judge, but that does not make them judges of the Supreme Court within the meaning of the Act in question.

MARTIN, J.A.

MARTIN, J.A.: I agree. And our present view is also in accord with our recent decision, on the 21st of November, 1927, in *Nanaimo Free Press* v. *Island Securities Co., Ltd.*

GALLIHER, J.A.

GALLIHER, J.A.: I am of the same opinion.

Appeal allowed.

Solicitor for appellant: *P. R. Leighton.*
Solicitor for respondent: *O. C. Bass.*

McSORLEY AND PRINCE EDWARD HOTELS LIMITED v. MURPHY.

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1928

Oct. 2.

McSORLEY v. MURPHY

Lease—Hotel—Option to purchase—Terms of option incomplete—Purchase price fixed—A certain payment down and "balance to be arranged"—Whether enforceable.

Where an option for the purchase of land provides for the purchase price, with the payment of so much down and "balance to be arranged" specific performance cannot be granted on the ground of uncertainty.

APPEAL by plaintiffs from the decision of MORRISON, J. of the 20th of February, 1928 (reported 39 B.C. 505) in an action to recover possession of the King Edward Hotel at Revelstoke, B.C., for the appointment of a receiver and for an accounting. By indenture of lease of the 30th of October, 1926, McSorley leased the said hotel to the defendant Murphy for one year from the 1st of November, 1926. 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 balance to be arranged."

Statement

Towards the end of the term Murphy saw McSorley, advised him that he intended to purchase the property and endeavoured to arrange as to subsequent payments under the option but McSorley insisted that $15,000 should be paid in cash and the balance should be placed in *escrow* pending delivery of title deeds. Murphy then stated that if he would reduce the purchase price by $5,000 he would pay him $40,000 cash. McSorley refused this offer and reiterated his former proposal. On the 29th of October, 1927, Murphy tendered McSorley a certified cheque for $15,000 as the cash payment which he refused to accept. On the 31st of October, Murphy endeavoured to find McSorley in order to pay him in full but McSorley had left Revelstoke for Vancouver and in due course brought this action. The defendant counterclaimed for damages for loss of profits owing to the plaintiff not carrying out the terms of the

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lease, and for the cost of construction of a new hotel. The action was dismissed and the defendant recovered on the counterclaim.

The appeal was argued at Victoria on the 5th of July, 1928, before Macdonald, C.J.A., Martin and Galliher, JJ.A.

Argument

Mayers, for appellants: The question is: (1) Whether there was an option; and (2) whether it was exercised. If they did not come to an agreement there was no contract at all. The words "balance to be arranged," clearly mean that an arrangement must be made before there is a contract: see *Townley* v. *City of Vancouver* (1924), 34 B.C. 201; *P. Burns & Co., Ltd.* v. *Godson* (1918), 26 B.C. 46 and on appeal (1919), 58 S.C.R. 404; *Bocalter* v. *Hazle* (1925), 20 Sask. L.R. 96. The learned judge does not say what "a fair and reasonable basis" is. He is not entitled to damages as his claim for specific performance was not abandoned until the trial: see Fry on Specific Performance, 6th Ed., 435.

Griffin, for respondent: Our submission is the contract was sufficient to be enforced but if not he had the right to pay in cash upon delivery. The option was accepted on what was done. The terms were that he was to accept the option within a year but not necessarily pay the money. As to the words "balance to be arranged" that can be struck out as he was willing to pay the $45,000 and was able to do so. The *Townley* case does not apply as there was no question of price here but merely a question of terms: see *Chartered Bank of India* v. *Pacific Marine Insurance Co.* (1923), 32 B.C. 60 at p. 64 and on appeal 33 B.C. 91. On the question of damages see *Jaques* v. *Millar* (1877), 6 Ch. D. 153.

Mayers, replied.

Cur. adv. vult.

2nd October, 1928.

MACDONALD, C.J.A.

Macdonald, C.J.A.: The respondent leased a hotel from the appellant for one year, with the privilege of purchasing it at any time within the year for the sum of $45,000; $15,000 cash and "the balance to be arranged." He tendered the $15,000 within the year but appellant demanded that the balance should be

placed in escrow pending the investigation of the title and be paid out to him if the title were satisfactory. This arrangement for the balance was refused by the respondent, and the year having expired he changed his mind and was willing to accept the terms offered but the appellant would not then sell.

MACDONALD, C.J.A.

In my opinion the judgment in favour of the respondent should be set aside. It is not open to doubt on the authorities, that an agreement which leaves one of the essential terms to be determined by the parties mutually at a future time is unenforceable. It was contended that since an election to purchase was made within the year respondent was in time when he notified the appellant of his election. There are two answers to that contention, first, the agreement is void *ab initio,* and secondly, if that be not a sufficient answer, there was an attempt to arrange the terms which failed—*Godson* v. *Burns & Co.* (1919), 58 S.C.R. 404; *Bocalter* v. *Hazle* (1925), 20 Sask. L.R. 96.

The respondent should pay the appellant's costs here and below, including those of interlocutory orders.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be allowed because the decision of the learned judge is, with all deference, contrary to the principles laid down by a majority of this Court in *Townley* v. *City of Vancouver* (1924), 34 B.C. 201, which I regard as being a stronger case to support a contract than the present.

GALLIHER, J.A.

GALLIHER, J.A.: In this case my view is that the learned trial judge came to the right conclusion, and the appeal should be dismissed.

I have read the cases, to which we were referred, in our own Court. *P. Burns & Co., Ltd.* v. *Godson* (1918), 26 B.C. 46; affirmed (1919), 58 S.C.R. 404; *Townley* v. *City of Vancouver* (1923), 34 B.C. 201; *Bocalter* v. *Hazle* (1925), 20 Sask. L.R. 96, and a number of cases in the English Courts in which the agreements were held to be incomplete and the Courts refused to step in and supply omitted details, but to my mind the case at Bar is distinguishable.

COURT OF APPEAL

1928

Oct. 2.

MCSORLEY v. MURPHY

GALLIHER, J.A.

In Fry on Specific Performance, 6th Ed., p. 171, sec. 368 (iv.), the learned author uses these words:

"It is of course essential to the completeness of the contract that it should express not only the names of the parties, the subject-matter, and the price, but all the other material terms. What are, in each case, the material terms of a contract, and how far it must descend into details to prevent its being void as incomplete and uncertain, are questions, which must of course be determined by a consideration of each contract separately. It may, however, be laid down that the Court will carry into effect a contract framed in general terms, where the law will supply the details; but if any details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded contract capable of being enforced."

This will be found more or less running through all the decided cases.

Taking then the agreement in the case at Bar—it is provided that the option to purchase must be exercised within a year from the date of the lease. The property is identified; the parties are identified; the price is fixed; the amount to be paid down is fixed, and the only thing lacking is the time when and amounts in which the balance shall be paid—the words used being "and balance to be arranged." Considering the nature of this transaction and reading the evidence adduced and the agreement itself, it would appear to me that this is a proper case for interference by the Court. To use the words as quoted from Fry—"Are any details to be supplied by modes which cannot be adopted by the Court?"—it would seem to me in this particular case there are none. I adopt the words of Pearson, J., in *Ozd* v. *Coombes* (1884), 28 Sol. Jo. 378, in dealing with the words of a contract—"the balance to be paid and the deeds passed over at such time as shall be mutually arranged."

The learned judge thus expresses himself:

"But looking at the agreement in the present case, he thought that it contemplated completion within a reasonable time, and that the day for completion was to be arranged so as to suit the convenience of both parties. The contract was a final one, and this term was only a subsidiary stipulation."

In my opinion I know of no more apt words that could be used to meet the circumstances of this case. It would seem to me, considering the nature of this transaction, that it would be idle to argue that the parties had in contemplation anything else. It looks to me as if McSorley having leased the King

Edward Hotel to Murphy, and Murphy having vacated the C.P.R. Hotel where he was carrying on business, and which was then closed down and which was the chief competitor of the King Edward Hotel, became desirous of getting rid of the option; in fact, some time before the time for exercising the option expired, he applied to be relieved of it, and on Murphy refusing, we hear for the first time that he must have the balance paid in cash if the option was to be exercised, something, I venture to say, never entered his mind at the time the option was given.

GALLIHER, J.A.

But of course, whatever his reasons may have been, or however we may regard his actions, if in law this is a case where the Court cannot carry the contract into effect, and the law supply the details, he is entitled to the benefit of it. In my opinion, it is a case where the Court can, and should act.

Appeal allowed, Galliher, J.A. dissenting.

Solicitors for appellants: *Harper & Sargent.*
Solicitors for respondent: *Griffin, Montgomery & Smith.*

COURT OF APPEAL

1928

Nov. 27.

VANDEPITTE v. BERRY

ALICE M. VANDEPITTE v. BERRY: E. J VANDEPITTE, Third Party.

Judgment—Application to set aside—Jurisdiction—Appeal.

Since the Judicature Act the right of a judge to set aside his own judgment cannot be exercised after judgment has been drawn up and entered. In the circumstances of this case the proper course is an appeal to the Court of Appeal.

Statement

APPEAL by plaintiff and third party from the order of MACDONALD, J. of the 1st of October, 1928, dismissing an application to strike out the appearance to the writ of summons and all proceedings and pleadings filed or issued subsequent thereto, to strike out the third-party notice of the defendant, and all proceedings and pleadings subsequent thereto, and that the judgment entered in the action by the plaintiff against the defendant and the defendant against the third party be struck out and declared null and void. The action was for negligence arising out of an automobile accident, and the defendant applied to have the plaintiff's husband added as a third party. The plaintiff recovered $4,600 for damages and joint negligence being found the defendant was held entitled to contribution from the third party, less one-half this amount. During the trial it was discovered that the defendant was not of age but no action was taken in regard thereto by either counsel. Upon the settlement of the order for judgment the trial judge stated that the defendant's father should have been made a party but counsel for the plaintiff stated he was not afraid of being able to collect from the defendant, and proposed to take judgment against her. Subsequently the plaintiff issued execution on the judgment against the defendant and it was returned *nulla bona.* The plaintiff moved to set aside the judgment as aforesaid.

The appeal was argued at Vancouver on the 26th and 27th of November, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

C. L. McAlpine, for appellants: We submit the defendant

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Argument

was never before the Court because she was an infant, being 19 years old: see *Yonge* v. *Toynbee* (1910), 1 K.B. 215; *Simmons* v. *Liberal Opinion Limited. In re Dunn* (1911), 1 K.B. 966 at p. 968; *Carr* v. *Cooper* (1861), 1 B. & S. 230; *Oliver* v. *Woodroffe* (1839), 4 M. & W. 650; *Fountain* v. *McSween* (1868), 4 Pr. 240. That the proceedings taken are void see *Leaver* v. *Torres* (1899), 43 Sol. Jo. 778; English & Empire Digest, Vol. 28, p. 298; *Sellappa Goundan* v. *Masa Naiken* (1923), I.L.R. 47 Mad. 79; *Daimler Company, Limited* v. *Continental Tyre and Rubber Company (Great Britain), Limited* (1916), 2 A.C. 307 at p. 337; *Re Sturgeon* (1911), 16 W.L.R. 415 at pp. 416-17; *Fernee* v. *Gorlitz* (1915), 1 Ch. 177 at p. 178; *Geilinger* v. *Gibbs* (1897), 66 L.J., Ch. 230. There is no judgment binding on the infant and if it is binding on us it is binding on the infant: see Holmested's Ontario Judicature Act, 4th Ed., pp. 474 and 476. This being a nullity it cannot be waived: see *Phillipson and Son* v. *Emanuel* (1887), 56 L.T. 858; *Hewitson* v. *Fabre* (1888), 21 Q.B.D. 6; *Hamp-Adams* v. *Hall* (1911), 2 K.B. 942.

Alfred Bull, for respondent: Marginal rule 138 provides for the procedure as to infants, but this rule has no application here: see Annual Practice, 1929, p. 255. Our submission is that the third party appearing waives the objection: see *Ex parte Brocklebank. In re Brocklebank* (1877), 6 Ch. D. 358 at p. 360; *Flight* v. *Bolland* (1828), 4 Russ. 298. There is no case where a judgment solemnly entered after trial, can be set aside by motion. The only course is by appeal from the judgment. The slip rule does not apply to this case. An infant is liable on a judgment in tort and he is wrong in saying he cannot enforce the judgment.

McAlpine, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: My opinion is that proceedings taken by way of motion to set aside a final judgment pronounced in Court are entirely wrong. They should be taken by appeal. The right of a judge, even of the trial judge, to set aside his own judgment cannot be exercised after judgment has been drawn up and entered. Before the Judicature Act, that could

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VANDEPITTE v. BERRY

have been done, but it cannot be done since. The appeal should be dismissed.

MARTIN, J.A.: I agree that this appeal should be dismissed on the point mentioned by the Chief Justice, *i.e.*, that in the circumstances of this case the only way in which a judgment which has been duly pronounced as the Court intended, and duly entered, can be set aside is by an appeal to this Court.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal dismissed.

Solicitor for appellants: *W. H. Campbell.*

Solicitors for respondent: *Walsh, Bull, Housser, Tupper & McKim.*

GREGORY, J.

1928

Dec. 11.

REX v. PENDRAY

REX v. PENDRAY.

Municipal corporation—Discharge of fire-arms—By-law—Validity—B.C. Stats. 1925, Cap. 13, Secs. 3 and 4.

The Game Act is passed for the protection of game and the qualifying clauses are only intended to restrict the operation of penal clauses in certain circumstances. The reason for the change of language in section 3 of the 1925 amendment to the Act was because the Legislature decided it should no longer be necessary for a farmer killing game found destroying his crops to report to the game warden, and was not intended to give him an absolute right to shoot game found doing damage, provided he did not shoot across a public highway. The statute of 1925 simply means that so far as the penalties imposed by the Game Act are concerned, they shall not be enforceable against a farmer shooting under the circumstances therein described and the right of the municipality to protect its citizens from the discharge of fire-arms is not interfered with.

Statement

APPEAL by way of case stated from a conviction of the appellant for discharging a gun within a certain restricted area

in the Municipality of Saanich. Argued before GREGORY, J. at Victoria on the 5th of December, 1928.

Bullock-Webster, for accused.
Heisterman, for the informant.

11th December, 1928.

GREGORY, J.: Appeal by way of a case stated from a conviction of the appellant for discharging a gun within a certain restricted area in the Municipality of Saanich, contrary to the provisions of By-law No. 89 of that Municipality.

The Municipal Act, Cap. 52, B.C. Stats. 1914, under which the by-law in question was passed, by section 54 provided that—

"In every municipality the council may from time to time make, . . . by-laws for any of the following purposes, . . . that is to say:—

"(142) For preventing or regulating the firing of guns or other fire-arms, and," etc.

It is admitted that the by-law in question, passed in 1914, was fully authorized by the above-mentioned section—54. But in 1915 the language of the above-mentioned section 54 was changed, B.C. Stats. 1915, Cap. 46, Sec. 3, to read as follows:

"In every municipality the council may from time to time make . . . by-laws not inconsistent with any law in force in the Province for any of the following purposes," etc.

Judgment

Subsection (142) was not altered.

The Game Act, Cap. 33, B.C. Stats. 1914, contained general provisions prohibiting the killing of game birds (including pheasants) outside of the close season duly established. It contained a similar prohibition against killing deer, but section 9 says: Provided that any farmer . . . residing in an unorganized district could kill deer for food and in an organized district might do so after having obtained a permit, etc.

The Game Amendment Act, 1923, Cap. 18, continued the right of a farmer to kill deer for food but the words used to effect this were changed to read:

"3. (2.) Notwithstanding the provisions of this Act, any farmer . . . may shoot any deer that is found actually depasturing. . . . but the provisions of this subsection shall not apply . . . unless the farmer . . . forthwith reports to a Game Warden."

And by subsection (3) a provision was introduced permitting the shooting of pheasants as follows:

"Notwithstanding the provisions of this Act, any farmer . . . within

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any part of the Province in which this subsection is declared by order of the Lieutenant-Governor in Council to apply may shoot any pheasant which is found to be actually doing damage . . . but the provisions of this subsection shall not apply . . . unless the farmer . . . forthwith reports . . . to a Game Warden."

In 1924 the Game Act was consolidated, Cap. 98, R.S.B.C., but the above last-mentioned provisions remained the same as enacted in 1923.

In 1925 the Act was amended and the above-mentioned subsection (3) was stricken out and the following substituted therefor:

"3. Notwithstanding the provisions of this Act, any farmer . . . . residing upon the land may shoot any pheasant which is found to be actually doing damage by feeding upon any land of the farmer then actually seeded to crop, or actually doing damage to the crop growing on any land of the farmer."

Section 4 of the consolidated Act of 1924 prohibited the discharge of firearms within certain therein described areas, being practically the harbours of Victoria and Vancouver and adjacent waters. It also prohibits the carrying of firearms or the trapping or killing of game, etc., except by virtue of a permit. This section is similar in effect to the 1914 section though somewhat enlarged in scope. The 1925 amendment added the following subsection to said section 4:

Judgment

"(3.) No person shall discharge a firearm of any description either on or across any travelled road or highway within the boundaries of any municipality."

The admitted facts are fully set out in the case stated, and it is clear that the appellant contravened the terms of the by-law in question, but it is contended that section 3 (3) of the amended Game Act, 1925, permitted him to do so, and that the by-law so far as it is in conflict with that subsection is *ultra vires* of the municipality.

I agree with the magistrate that there is no accessory inconsistency between the by-law and section 3 of the Game Act as amended in 1925. The Municipal Act authorizes the municipality to regulate the discharge of firearms within the municipality; this is for the protection of the public. The Game Act is passed for the protection of game only, and the qualifying clauses are only intended to restrict the operation of the penal clauses in certain circumstances. This, I think, is shewn clearly

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by the history of the Act as shewn above, and the reason for the change of language in 1925 was because the Legislature decided that it should no longer be necessary for a farmer killing game found destroying his crops, to report the fact to a game warden. It was not intended to give him an absolute right to shoot game found doing damage, provided he did not shoot across a public highway. The statute of 1925 simply means that so far as the penalties imposed by the Game Act are concerned, they shall not be enforceable against a farmer shooting under the circumstances therein described. The right of the municipality to protect its citizens is not interfered with, and game birds doing damage in municipalities must be frightened away from their depredations in some other way than by discharging firearms.

Judgment

The conviction must be sustained.

Conviction sustained.

IN RE NETTLETON.

GREGORY, J. (In Chambers) 1928 Nov. 30. IN RE NETTLETON

Habeas corpus—Warrant for arrest—Issued in another Province—Evidence for defence only submitted—Jurisdiction.

Where a warrant of arrest is issued in one Province and duly indorsed in another, where the accused is arrested, the Court, where the warrant is executed, has no jurisdiction in *habeas corpus* proceedings to go into the merits of the case as anything that may be alleged by way of defence is for the magistrate and Courts where the warrant is issued.

In re Luciano (1921), 54 N.S.R. 273 followed; *Rex* v. *Galloway* (1909), 2 Alta. L.R. 258 distinguished.

APPLICATION for a writ of *habeas corpus*. Heard by GREGORY, J. in Chambers at Vancouver on the 28th of November, 1928.

Statement

Marsden, for the application.

H. C. Green, for the Attorney-General.

30th November, 1928.

GREGORY, J.: A warrant for the arrest of the prisoner was

Judgment

GREGORY, J. (In Chambers)

1928 Nov. 30.

IN RE NETTLETON

issued in the Province of Alberta and duly endorsed by a British Columbia magistrate.

The legality and regularity of the arrest is not questioned, but it is urged by his counsel that I have the right on a return to a writ of *habeas corpus* to order his release on the ground that he has by the affidavits of several persons proved that he could not have committed in Alberta the offence with which he is charged because he was at that time in the City of Vancouver and the decision of Mr. Justice Beck in *Rex* v. *Galloway* (1909), 15 Can. C.C. 317 is referred to in support of this contention. I do not think that case is in point. The Court there had before it the facts upon which the prosecution relied and he concluded that the proceedings were frivolous, vexatious or an abuse of the process of the magistrate's Court and discharged the prisoner. But I am asked to discharge the prisoner without giving the prosecution an opportunity of presenting its evidence or cross-examining the witnesses for the defence. Even if it be imagined that I have jurisdiction to hear evidence in the matter it is a novel way of proceeding to begin and end with the evidence for the defence only. The only case that I know of where *Rex* v. *Galloway* was referred to is *In re Luciano* (1921), 35 Can. C.C. 28. There Harris, C.J. says at p. 29:

Judgment

"Assuming that case to be a correct statement of the law. . . . It is obvious that this Court cannot try the accused at all, and to discharge him . . . would be to try him on his own testimony alone without giving the prosecution any chance of producing evidence."

and Ritchie, J., with whom Russell, J. agrees, says at the end of the case:

"In my opinion anything that may be alleged by way of defence is for the magistrate and Courts in Ontario and not for this Court. With a warrant good on its face and an endorsement in compliance with the statute [as here] I think there is only one course for this Court and that is to refuse the application."

In the *United States* v. *Gaynor* (1905), 9 Can. C.C. 205, which was an extradition case, the Lord Chancellor in delivering the judgment of the Privy Council said, at p. 228, in speaking of the judge's duty on the hearing of a return to a writ of *habeas corpus*:

"Now the only question which the learned judge had to determine was

whether the accused were at the time of the issue of the writ in question in lawful custody. If they were he had no jurisdiction to release them."

It is clear to me that I have no jurisdiction to grant the application and the prisoner must be returned to custody.

Application dismissed.

DORNBERG v. SOMERVILLE.

COURT OF APPEAL

1928

Nov. 1.

DORNBERG v. SOMERVILLE

Vendor and purchaser—Contract—Option—Specific performance.

The defendants (husband and wife) agreed to sell a block of shares to the plaintiff for $3,000 of which $250 was paid on the date of the agreement, the balance payable at the plaintiff's office on a fixed day. The defendants did not appear at the plaintiff's office on the day so fixed for final payment and ten days later the plaintiff tendered the balance due to the defendants which was refused. The plaintiff recovered judgment in an action for specific performance of the agreement.

Held, on appeal, affirming the decision of MURPHY, J., that the defendants not having appeared at the plaintiff's office on the day fixed for final payment either to demand payment or put themselves in a position to accept payment, they could not claim that the plaintiff was in default and he is entitled to specific performance of the agreement.

APPEAL by defendant, Emily A. Somerville, from the decision of MURPHY, J. of the 4th of September, 1928, in an action for specific performance of an agreement for the sale by the defendants to the plaintiff of 135,000 shares in the Kootenay King Mining Company, Limited, of which 25,000 shares were held by Mr. Somerville and 110,000 shares by Mrs. Somerville. The purchase price was $3,000 of which $250 was paid on the signing of the agreement on the 28th of January, 1928, the balance to be paid the 6th of February following at the office of the purchaser. On the 6th of February the defendant, Mrs. Somerville, did not go to the purchaser's office to receive the final payment and deliver the shares, and on the 16th of February following, the plaintiff tendered the defendants the $2,750 and demanded delivery of the shares but the defendants then refused to accept the purchase price or deliver the shares. It appeared from the evidence that the husband saw the plaintiff on the 6th

Statement

COURT OF APPEAL

1928

Nov. 1.

DORNBERG v. SOMERVILLE

of February and in consideration of the plaintiff paying $500 on account he agreed to an extension of the time for making the final payment. The wife, however, denied that her husband had any authorization from her to grant an extension.

The appeal was argued at Vancouver on the 31st of October and 1st of November, 1928, before MACDONALD, C.J.A., GALLIHER and MACDONALD, JJ.A.

Argument

Woodworth, for appellant: Our submission is that this was an option and time is of the essence of the agreement: see *Cronholm* v. *Cole* (1928), 39 B.C. 405. When the final payment was not made as agreed there was a forfeiture: see Halsbury's Laws of England, Vol. 25, p. 398, sec. 681; *Mayson* v. *Clouet* (1924), A.C. 980 at pp. 985-7. That this was an option and time is of the essence: see *Hayden* v. *Rudd* (1922), 1 W.W.R. 884; *Morton and Symonds* v. *Nichols* (1906), 12 B.C. 9 and 485; *Manson* v. *Howison* (1896), 4 B.C. 404; English & Empire Digest, Vol. 12, p. 313; *Parkin* v. *Thorold* (1852), 6 Rul. Cas. 503 and 538; Fry on Specific Performance, 6th Ed., p. 506, sec. 1082. The husband had no authority from his wife to grant an extension and was not her agent: see *Millard* v. *The Bevan Lumber and Shingle Co.* (1928), 39 B.C. 430. The wife was in ill-health and was entitled to independent advice: see *The Bank of Montreal* v. *Stuart* (1910), 27 T.L.R. 117; *Turnbull & Co.* v. *Duval* (1902), A.C. 429; *Bischoff's Trustee* v. *Frank* (1903), 89 L.T. 188; *Chaplin & Co., Limited* v. *Brammall* (1908), 1 K.B. 233; Leake on Contracts, 7th Ed., p. 478; *Pordage* v. *Cole* (1669), 1 Wms. Saund. 319; *Manson* v. *Howison, supra.*

Locke, for respondent: There is evidence here of the husband being the wife's agent: see Halsbury's Laws of England, Vol. 1, p. 158, sec. 346. He was in a position to grant an extension. There is a clear case of estoppel *in pais.* The covenants are joint and one could bind the other in extending the time. The sale was for a lump sum for the whole block of stock. Time is not of the essence here. The case of *Cronholm* v. *Cole* (1928), 39 B.C. 405, does not apply as in that case it was merely an option and the relation of vendor and purchaser had not been established: see *Morton and Symonds* v. *Nichols* (1906), 12 B.C.

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1928

Nov. 1.

DORNBERG *v.* SOMERVILLE

Argument

485 at p. 486. There is no authority for the proposition that in the case of a sale of shares time is of the essence, but in any case there was no default as the share certificates were never endorsed and she did not appear at the place where payment was to be made at the stipulated time. Conversations between husband and wife were improperly admitted. In any case the conduct of the parties was such as to lead the plaintiff to believe the time would be extended: see *Steedman* v. *Drinkle* (1915), 85 L.J., P.C. 79 at p. 80; *Koop* v. *Smith* (1915), 51 S.C.R. 554 at pp. 557-8.

Woodworth, in reply, referred to Fry on Specific Performance, 6th Ed., pp. 1079-81.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal must be dismissed. The question in the final analysis comes down to this. There was an agreement by the two defendants to sell a block of shares to the plaintiff for a named sum. The balance after the first payment, a balance of $2,750, was made payable at plaintiff's office on a fixed day, the 6th of February.

Now, Mrs. Somerville, who owned the bulk of the shares, says that she did not authorize her husband to do a single thing in connection with the business, after the deal was made. He was not her agent to extend the time or to receive the money; he was not her agent for any purpose. Now, her obligation, if she intended to insist upon payment upon that day, was to go to the office of the plaintiff and either demand or put herself in position to accept payment of the money. If she did not do that, then, in my opinion, she could not claim that the plaintiff had made default in payment. Now, that is the whole thing in a nutshell. In my opinion, that obligation was upon her, if she intended to insist upon the plaintiff keeping the date. She did not perform it. The plaintiff was not in default and, therefore, he is entitled to specific performance of the contract.

GALLIHER, J.A.

GALLIHER, J.A.: That is my opinion.

MACDONALD, J.A.

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

Appeal dismissed.

Solicitor for appellant: *C. M. Woodworth.*
Solicitor for respondent: *C. S. Arnold.*

COURT OF APPEAL

1928

Oct. 11.

REX v. COLLINGE

REX v. COLLINGE.

Criminal law—Wilful attempt to defeat course of justice—Bribe to withhold evidence—Credibility—Appeal.

The accused was convicted of attempting to defeat the course of justice by agreeing to abstain from giving evidence against R. on consideration of $50 paid to her by R. The accused is a married woman with two children. Her son (17 years old) procured liquor from R., a bootlegger, and came home intoxicated. Accused then went to see R. but was put out of the house. She then complained to the police and R. was charged with an offence against the Government Liquor Act. R. then visited the accused and accused said "She offered me $50 if I would refuse to give evidence against her." R. on the contrary said that accused said "If you give me $50 I will not give evidence against you," but accused immediately told the police that she had been offered a bribe by R. not to give evidence on the liquor charge. Shortly after accused was visited by two men who tried to induce her not to give evidence. R. then repeated her offer to accused over the telephone and then accused (as she avers for the purpose of obtaining evidence of these offers) arranged to meet R. They met, but in the meantime R. told the police of the arrangement to meet accused and the police laid a trap. At the meeting accused took the $50 intending (as she says) to turn it over to the police.

Held, on appeal, reversing the decision of Magistrate Shaw (MARTIN, J.A. dissenting), that where credibility is an issue the word of a woman against whose character no evidence is offered should be accepted rather than that of a confessed law-breaker. The circumstances are against R.'s allegations and the appeal should be allowed.

Statement

APPEAL by the accused from her conviction by Magistrate Shaw, at Vancouver, on the 5th of September, 1928, on a charge of attempt to defeat the course of justice by agreeing to abstain from giving evidence against one Isabelle Robillard in consideration of $50, paid to her by the said Isabelle Robillard. The facts are set out fully in the judgment of the Chief Justice.

The appeal was argued at Vancouver on the 3rd and 11th of October, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

L. H. Jackson, for appellant: On the facts accused should have been acquitted as she gave a very reasonable explanation.

The Robillard woman supplied her son who was a minor with liquor and on a charge they laid against her she was arrested but on getting out on bail she immediately visited Mrs. Collinge at her house. The information is bad as it does not describe the offence with reasonable certainty: see *Rex* v. *Bainbridge* (1918), 30 Can. C.C. 214.

W. M. McKay, for the Crown, referred to *Cowan* v. *Deville* (1903), T.H. 798.

MACDONALD, C.J.A.: The facts of this case are not only distressing but they are peculiar. The accused is a married woman living with her husband, and is the mother of two children. The informant was a Mrs. Robillard, a bootlegger conducting an illegal business. The accused's young son, a youth of 17 years, procured liquor from Mrs. Robillard and came home intoxicated. Very naturally, the mother was indignant and went to see Mrs. Robillard. Mrs. Robillard put her out of the house. The accused complained to the police, and Mrs. Robillard was charged with an offence against the liquor laws. Mrs. Robillard then went to see the accused, and the accused says, "She offered me $50 if I would refuse to give evidence against her." Mrs. Robillard, on the contrary, says that the accused said to her: "If you give me $50 I will not give evidence against you." But this at all events is significant and is in favour of the accused that she went immediately to the police and told them that she had been offered a bribe by Mrs. Robillard not to give evidence on the liquor charge. The police inspector for some reason, possibly a good reason, told her not to have anything to do with the matter of her allegation of attempted bribery. She went home and thereafter two mysterious men came to visit her—it does not appear who they were—or who sent them—who tried to induce her not to give evidence. Mrs. Robillard then called her up by telephone and repeated her offer. The accused, for the purpose of obtaining evidence to prove these offers, as she says, made an appointment to meet Mrs. Robillard at a certain place on the street. They did meet. Mrs. Robillard, in the meantime, had gone to the police and said that, "The accused has asked me to pay $50 in consideration of not giving evidence."

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The police promptly arranged a trap for the accused and had two spies present at the appointed place where the two women were to meet. The accused took the money, intending, as she says, to turn it over to the police. The question is, what did she intend to do with it? Did she intend actually to accept it in consideration of her not giving evidence in the case against Mrs. Robillard on the liquor charge? That is the inference which the magistrate has drawn from all the evidence. Now, there is no question as to who first went to the police and disclosed the transaction. There is no question that the accused did not accept the money when offered on the first occasion. Is it not more likely that she took the money on the second occasion for the purpose of evidence? I have no hesitation as to which inference I should draw from the facts. Moreover, if credibility is an issue I would accept the word of a woman against whose character no evidence is offered rather than that of a confessed lawbreaker. I can imagine the feelings of the mother and her desire to convict the woman who had given liquor to her minor son. I can see reason in her conduct. I can see no reason on the other hand for Mrs. Robillard's statement except revenge. The circumstances are all against her allegations. I would, therefore, grant the appellant's motion for leave to appeal on facts and would allow the appeal and order the conviction to be set aside.

MACDONALD, C.J.A.

MARTIN, J.A.: This is, as my brother says, a very unusual case, and from the very inception of it there has been a conflict of evidence of the sharpest kind. Here we have a woman, a mother, who says she acted to save her son from the machinations and allurements of a bootlegger, but on the other side Mrs. Robillard says her real reason was that she came to her house and complained that a man who owed her $50 had spent it in her "liquor joint" instead of paying his debt, and therefore if she (Robillard) paid up the money to appellant Collinge that this man should have paid her, it would be "all squared" between them and nothing more would be done about it. Those are the two stories and that is where the conflict in the evidence starts, the sharpest conflict, and the magistrate in addressing his mind to the case must decide whether Mrs. Robillard's story is

MARTIN, J.A.

true or whether it was the indignant feelings of the mother that caused her to lay the information against this woman. Such being the case it is a matter, beyond question, of not only drawing inferences from admitted facts, but from conflicting facts of the most acute kind. The appellant says that in order that her charge against the accused should be established she thought the best thing to do would be to get her to pay her some money so that she could discredit her evidence and the charge of bootlegging she had laid against Mrs. Robillard would be proved and Mrs. Robillard punished. Her (Collinge) evidence reads:

"Why did you go ahead in opposition to the police inspector when he told you not to do this thing? Well, I figured if I accepted the money from her that would be evidence that she must have sold the liquor, or she would not have offered me the money."

She displays a really acute legal mind in supporting her story. Of course, as one of my brothers observed in the early stages, it was a case of diamond cut diamond. Then the two women met in the comfort-station and the evidence of two other witnesses establishes the fact of Mrs. Robillard speaking to the appellant thus:

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"I heard her say to Mrs. Collinge, 'Can I depend upon you not to appear against me if I give you this $50?' and Mrs. Collinge answered 'I will certainly give you my word.'"

Another witness also testifies to that language and there is no question about it. Then having found herself in that position and having deliberately set the trap for the other woman she emerged from the comfort-station and was confronted by the police. She had the marked money and the case was established against her by the other three witnesses. She states what she intended to do with the money was not to keep it, but to give it back to the police and in order to shew that was her intention she produced the money from her stocking. Well, of course, it all depends on how you have been educated in the atmosphere of the criminal law in deciding whether a story of that kind is going to be believed or not, and we have to say, before we can overturn the decision of this very experienced magistrate, that he has taken a view that is unreasonable of the credibility of the two hostile and conflicting witnesses he had before him. If we decide he has taken that kind of a view then I am glad to class myself with him as an unreasonable person.

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GALLIHER, J.A.: I take the same view as the Chief Justice. The point that impresses me most in the matter of coming to that view, I may say, is that I cannot understand and it does not strike me as a reasonable assumption to make that that woman would disclose to the police that the other woman had offered her money and then would deliberately go later and take that money for the purpose of keeping it. The whole thing appears a case of one laying for the other, and once you get into that element where they are setting a trap, it is not a taking of money without intending to use it for the purpose of driving the other further into the trap. I am not one, I may say, who takes the view that the police should be blamed for at times using methods which are probably what we might term not sporting, or ethical, because it is very necessary sometimes, I think, in the interests of justice and the protection of society where dealing with certain people that they may have to and they are justified in taking such methods. I think in view of this having been disclosed to Inspector Tuley by accused here that it is a case where he might very well have abstained from taking the course he did.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in entire accord with the reasons given by my brother, the Chief Justice. I think this is a case where, on consideration of the facts, it could not reasonably be said that the accused had any intention whatever of being guilty of an infraction of the Criminal Code, or a crime of any nature at all. The circumstances, too, are such that I cannot look with any favour upon the course of administration of justice in regard to this case. When the police were apprised of the fact that Mrs. Robillard had attempted to defeat the ends of justice by getting the accused to refrain from giving evidence, they did not shew any expedition at all in following that up as against Mrs. Robillard, in fact took no steps. Mrs. Robillard was faced with a prosecution, with the illegal selling of liquor and her attempt was to save herself, and she proposed to pay the accused $50 to abstain from giving evidence in the prosecution, and by way of vengeance, apparently, she decided she was going to have Mrs. Collinge put behind the bars, and therefore she immediately set to work that out, and what does not look to me to be at all commendable is that the police, to all appearances,

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take up a line of action favourable to the scheme of Mrs. Robillard, this bootlegging woman who brought this boy of 17 years of age into a state of intoxication. They pursue the accused, two spies are obtained to overhear what is said, and marked money is arranged and marked money is found. I can quite understand that the accused had no knowledge of any pursuit of this kind being waged against her, but she was anxious to convict Mrs. Robillard, and quite rightly, and she made up her mind that she would attempt in some way or other to discredit this Mrs. Robillard. Can it be said that there was any *mens rea* here? Can it be said in any shape or form that it was her intention after she had her home outraged in this manner that she was intending to allow all this to pass and take $50 and defeat the ends of justice? It is highly unreasonable. The prosecution was standing and was certain to go on, and the only conclusion I can come to is that she personally did it for the purpose of shewing the class of woman Mrs. Robillard was, and she intended at once to tell the police and hand over the money to them, which was the final result. I think we are entitled, as the Court of Criminal Appeal of British Columbia, to well weigh all these facts and endeavour to arrive at the proper conclusion upon all the facts and the surrounding circumstances. Even if the explanation given by the accused did not really appeal to or convince the magistrate, there is high authority for it—the Court of Appeal in England—that if the explanation might reasonably be true it should be accepted. The explanation of the accused was true in my opinion—everything points to this—and should have been accepted by the magistrate. There was the entire absence of any ingredient upon all the facts and circumstances that could warrant the conviction, and being of that opinion I would quash the conviction.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I would give leave to appeal on facts and allow the appeal. I think the outstanding matters are not disputed, and it is with respect and with deference to the learned magistrate.

MACDONALD, J.A.

Appeal allowed, Martin, J.A. dissenting.

Solicitor for appellant: *L. H. Jackson.*
Solicitors for respondent: *McKay & Orr.*

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Constitutional law—Produce Marketing Act—Validity—Extra-provincial "marketing"—Shipment from British Columbia to another Province—Regulation of trade and commerce—Property and civil rights—B.C. Stats. 1926-27, Cap. 54—R.S.B.C. 1924, Cap. 245, Sec. 89.

The Produce Marketing Act is *intra vires* in so far as it applies to "marketing" within the Province and it is not necessary to read it as intended to operate extra-provincially. A direct shipment of produce from a place within the Province to a place in another Province in pursuance of an order telegraphed from the other Province therefore is not a "marketing" within the Act, and the shipper does not commit an offence by making such shipment without first obtaining the written permission of the Committee of Direction.

Statement

CASE stated for the opinion of the Court under section 89 of the Summary Convictions Act, arising out of two informations laid under the Produce Marketing Act, B.C. Stats. 1926-27, Cap. 54, against the accused, a shipper of potatoes grown on the mainland of British Columbia south of the 53rd parallel of latitude. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. at Vancouver on the 25th of September, 1928.

Harold B. Robertson, K.C., for the Attorney-General.
Wood, K.C., for respondent.

8th October, 1928.

Judgment

MACDONALD, J.: The police magistrate of the Municipality of Richmond submits two cases stated for the opinion of the Court under section 89 of the Summary Convictions Act. They arise out of two informations, laid under the Produce Marketing Act and amending Act, against Wong Kit, a shipper of potatoes grown on that part of the mainland of British Columbia, lying south of the 53rd parallel of latitude. This territory is within the jurisdiction of the Mainland Potato Direction Committee, established under section 3 of the said Act by what is known as the "Interior Committee." Facts alleged in the information were proved with the object of shewing that the said Wong Kit was a person, who might come within the scope of the said Act,

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and further, that he had marketed (shipped) potatoes in the district referred to, during 1928, without the written permission of such Committee of Direction, contrary to the provisions of the said Act and orders and regulations made thereunder. Notwithstanding his findings, and upon consideration of the evidence, the magistrate acquitted Wong Kit upon both charges but, at the request of the prosecution, made these reservations. The magistrate rendered his decision without referring to the recent considered judgment of MURPHY, J. in *Rex* v. *Chung Chuck* (not yet reported*), that the Produce Marketing Act with its amendments was, in so far as it related to the application then under consideration, *intra vires* of the Province. In not following such decision, it may be assumed that the facts disclosed, and dealt with therein, differed so materially from those presented with respect to these two informations, that the magistrate did not consider the judgment a binding authority, as to the guilt of the accused. If it be intended, however, to submit for my consideration such decision, as already intimated during the argument, I decline to do so. Without hesitation, I follow the judgment in so far as it may affect the questions now submitted, especially as there is a pending appeal.

Judgment

The important point to be determined was, whether the Act improperly invades a field of legislation, expressly allocated under the B.N.A. Act to the Parliament of Canada, *viz.,* "the regulation of trade and commerce," it being contended, on the contrary, that the Act is a proper exercise of the powers of the Province, with respect to "property and civil rights in the Province."

The apparent distinction between the facts disclosed in the *Chung Chuck* case and the cases at Bar is, that in the former case the potatoes were "marketed" locally while in the present cases it is contended, and was so considered by the magistrate, that the "marketing" of the potatoes grown in this Province was in Alberta by shipments made to that Province. In other words, it was submitted that the Act controlled a sale and consequent shipment between a grower of products in one Province of Canada and the purchaser in another Province and was thus an

* Since reported, *ante* p. 352.

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interference with "trade and commerce." This distinction is emphasized by the last of the three questions of the magistrate in the cases stated, *viz.*:

"1. Was I right on the evidence in acquitting the said Wong Kit for the offence charged?

"2. Is the Produce Marketing Act as amended *intra vires* of the Legislature of the Province of British Columbia?

"3. Was I right in acquitting the accused when the evidence disclosed the fact that the potatoes in question were shipped to the Province of Alberta, and not to a point within the Province of British Columbia?"

While following the decision in the *Chung Chuck* case, I think it well, and almost necessary, before dealing with this distinction, as to the facts, and deciding whether a different result should follow from the one reached in that case, to shortly discuss the effect of the B.N.A. Act upon the point to be decided. When Lord Carnarvon introduced the B.N.A. Act in the House of Lords, he is quoted by Burton, J.A. in *Regina* v. *Hodge* (1882), 7 A.R. 246 at p. 273 as stating:

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"The object in view was to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation might be secured in those questions that were of common import to all the Provinces, and at the same time retain for each Province so ample a measure of municipal liberty and self-government as would allow them to exercise those local powers which they could exercise with advantage to the community."

Then, on the same lines, instructive extracts from decisions, as to the general character of Dominion powers, are to be found in Lefroy on Legislative Power in Canada, at p. 549. It is apparent that it is difficult to determine, where the power of Dominion legislation, as to the regulation of trade and commerce extends or where it should stop, as being an invasion of property and civil rights in the different Provinces. All regulations pertaining to trade, would necessarily involve some interference or restrictions with property or civil rights, but if the pith and substance of such Dominion legislation shewed such interference, then it would be an infringement of the powers of the Province. Conversely, if the Province enacted legislation of this nature, then the object of the legislation should be considered, as well as the result which would necessarily follow, as to trade and commerce.

As to lack of definition, as to what constitutes "regulation of

trade and commerce," Lord Watson, in 1895, upon the argument of the Liquor Prohibition Appeal (*Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348), said:

"I do not think any of the cases afford a definition, or anything like a precise definition, of what precisely is meant by the expression 'regulation of trade' in subsection 2. There are explanations of it, but the explanations, as far as I can find, require as much explanation as the section itself": Lefroy, p. 555.

He had probably in mind not only the previous decisions but particularly the case of *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96, especially the following portion of the judgment therein, at p. 113:

"Construing therefore the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single Province."

Judgment

Since 1897, when "Lefroy" was published, there have been a number of decisions upon this question, in most cases deciding that Dominion legislation had infringed upon "property and civil rights" within the Province. For example, it was held in the Court of Appeal in Manitoba in *Rex* v. *Manitoba Grain Co., Ltd.* (1922), 2 W.W.R. 113 that a provision of the Canada Grain Act, requiring a licence to sell on commission was *ultra vires*. Later, in *The King* v. *Eastern Terminal Elevator Co.* (1925), S.C.R. 434, the same result followed with respect to another provision of the same Act, purporting to transfer the ownership to certain grain in the elevators. The latter decision is of course binding in this Province and followed the principle of other decisions in the Privy Council, the more recent one being that of *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396. *Vide* p. 409:

"The contracts of a particular trade or business could not, therefore, be dealt with by Dominion legislation so as to conflict with the powers assigned to the Provinces over property and civil rights relating to the regulation of trade and commerce. . . .

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"Nor does the invocation of the specific power in s. 91 to regulate trade and commerce assist the Dominion contention. In *Citizens Insurance Co.* v. *Parsons* [(1881)], 7 App. Cas. 96, 112 it was laid down that the collocation of this head (No. 2 of s. 91), with classes of subjects enumerated of national and general concern, indicates that what was in the mind of the Imperial Legislature when this power was conferred in 1867 was regulation relating to general trade and commerce."

It is conceded that while these decisions would support a contention, that the Dominion could not thus legislate with respect to property within the Province, especially as to contracts affecting such property, still, that they do not lend aid nor have any bearing upon the Act in question, as being a regulation of "trade and commerce" or otherwise.

There is a presumption in favour of the validity of legislation. Lefroy, at p. 260, states the following proposition:

"18. It is not to be presumed that the Dominion Parliament has exceeded its powers, unless upon grounds really of a serious character; and so, likewise, in respect to Provincial statutes every possible presumption must be made in favour of their validity. . . ."

In *Severn* v. *The Queen* (1878), 12 S.C.R. 70 at p. 103; 1 Cart. 414 at p. 447, Strong, J. says:

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"It is, I consider, our duty to make every possible presumption in favour of such legislative Acts, and to endeavour to discover a construction of the British North America Act which will enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it; and in doing this, we are to bear in mind 'that it does not belong to Courts of Justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it.'"

Lefroy, pp. 261-2:

"And in the United States the rule of law is similar. Mr. Bryce says: 'It is a well-established rule that the judges will always lean in favour of the validity of a legislative Act; that if there be a reasonable doubt as to the constitutionality of a statute, they will resolve that doubt in favour of the statute; that where the Legislature has been left to a discretion, they will assume the discretion to have been wisely exercised; that where the construction of a statute is doubtful, they will adopt such construction as will harmonize with the constitution, and enable it to take effect.' (American Commonwealth (two-volume edition), Vol. 1, at p. 430. See *per* Swayne, J., *United States* v. *Rhodes*, 1 Abb. U.S.R. at p. 49, cited Bryce, *ib.*, at p. 387."

I deem it unnecessary to further discuss the validity of the Act in question, following, as I have mentioned, the decision of

MURPHY, J. on this point. He refers to the case of *Toronto Electric Commissioners* v. *Snider, supra,* being fatal to applicant's first contention, *viz.*:

"That the Produce Marketing Act infringes subsection (2) of section 91 which commits to the Dominion Parliament exclusive jurisdiction over the regulation of trade and commerce."

There is no doubt that section 10 of the Act, indicating the powers of the committee, clearly states "that, so far as the legislative authority of the Province extends, for the purpose of controlling and regulating the marketing of any product within its authority," such committee had power "to determine whether or not, and at what time and in what quantity, and from and to what places and at what price and on what terms the product may be marketed and delivered." These provisions beyond question constituted control and regulation, affecting the marketing of the products covered by the Act and were so intended. Does such legislation by the Province amount to a regulation of "trade and commerce" contrary to the B.N.A. Act? A perusal of the Act would indicate that such control and regulation of the "marketing," was the primary object to be attained. This feature was doubtless submitted to, and considered by MURPHY, J. It did not, however, tend to invalidate the Act and thus give no support to punishment thereunder.

Judgment

In view of my following the decision in the *Chung Chuck* case, I will only further refer to one or two cases on the question of "trade and commerce," before dealing with the distinction, as to the facts, between those presented herein and present in that case. In the judgment in *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (1922), 1 A.C. 191 Viscount Haldane in discussing the two Acts there in question said that (p. 197):

"It [might] well be in special circumstances, such as those of a great war, that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest."

He then added:

"It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess *quasi*-sovereign authority."

These Acts were criticized and declared to be *ultra vires* of the Dominion Parliament on several grounds and, *inter alia,*

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through jurisdiction being given to the Board to regulate profits and dealings which might give rise to profit.

Then in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), A.C. 328, the case just referred to, was followed. The judgment therein bears upon the law, as affecting the difference in the facts between the *Chung Chuck* case and the present ones. It was contended that the statute, there the subject of attack, was illegal on the ground that it was extra-territorial in its operation. The judgment proceeded as follows (pp. 344-5):

"Their Lordships find nothing in the language of the statute which necessarily gives to its enactments an extra-territorial effect. The enabling provisions of ss. 3 and 4 appear to be designed to exempt the transactions to which they relate from the above-mentioned prohibitions of the Ontario Insurance Act, and the terms of the statute as a whole are, in their Lordships' judgment, capable of receiving a meaning according to which its provisions, whether enabling or prohibitive, apply only to persons and acts within the territorial jurisdiction of the Province. In their opinion it ought to be interpreted in consonance with the presumption which imputes to the Legislature an intention of limiting the direct operation of its enactments to such persons and acts."

Here it was contended that the operation of the Act in question was extra-territorial, as it was sought to render the accused liable for shipments to the Province of Alberta. If the Act had clearly declared that it was an infraction of its terms, to ship the products referred to, from a point in British Columbia to one of the other Provinces of Canada, then I would consider such legislation *ultra vires* of the Province, but it is not so stated. In the *Chung Chuck* case MURPHY, J., in the last part of his judgment, refusing relief to the applicant by *habeas corpus,* remarked that:

"No question of territorial jurisdiction arises on the facts of this case since the 'marketing' occurred wholly within the Province."

It is worthy of consideration that the definition of "marketing" in the Act is somewhat unfortunate, reading as follows:

"'Marketing' means the buying or selling of a product, and includes the shipping of a product for sale or for storage and subsequent sale, and the offering of a product for sale, and the contracting for the sale or purchase of a product, whether the shipping, offering, or contracting be to or with a purchaser, a shipper, or otherwise, but does not include a sale by a wholesale or retail store in the ordinary course of business, and does not relate to the marketing of a product for consumption outside the Dominion; and 'market' has a corresponding meaning."

It might be contended, from this definition, that the "marketing" sought to be controlled and regulated and referred to in the Act, was only within the Dominion, as it states that "it does not relate to the marketing of a product of consumption outside the Dominion." It does not except from its operation, marketing (as defined) between the Provinces. The Legislature did not, in this respect insert any saving clause, similar to that enacted in the Government Liquor Act, R.S.B.C. 1924, Cap. 146, Sec. 62, as follows:

"62. Every provision of this Act which may affect transactions in liquor between a person in this Province and a person in another Province or in a foreign country shall be construed to affect such transactions so far only as the Legislature has power to make laws in relation thereto."

Compare Manitoba Liquor Act of 1900, Sec. 119 referred to in *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73.

The object of the legislation, however, is quite evident and not in any way disguised. It was apparently considered by the Legislature as being beneficial to those engaged in growing or producing certain products in different localities of the Province. Control and regulation was to prevail only so far as the legislative authority of the Province extends.

Judgment

I have already referred to the presumption in favour of the validity of legislation. Selwyn, L.J. in *Smith's Case* (1869), 4 Chy. App. 611 at p. 614; 38 L.J., Ch. 681, 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 the Act of the Legislature may be defeated."

So I think that the Produce Marketing Act should not be affected in its validity by the definition referred to or by its other provisions. It may be considered as only applicable to property and civil rights within the Province, concerning which the Legislature has complete jurisdiction. It dealt only with a "particular trade or business." The motive actuating the legislation is not material to the Court, its legality only requires consideration. It is contended that it is of a local or Provincial nature. On this point portions of the judgment in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at pp. 364-5 are instructive. It reads as follows:

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"The only enactments of s. 92 which appear to their Lordships to have any relation to the authority of Provincial Legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exclusive jurisdiction, (1.) 'property and civil rights in the Province,' and (2.) 'generally all matters of a merely local or private nature in the Province.' A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the Province, and does not affect transactions in liquor between persons in the Province and persons in other Provinces or in foreign countries, concerns property in the Province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the Province. It is not impossible that the vice of intemperance may prevail in particular localities within a Province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling *prima facie* within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the Province where prohibition was urgently needed."

Judgment

The Act does not in terms, at any rate, prohibit or restrict trade between Provinces of Canada. To support its validity this conclusion may be reached. It would be contrary to the letter and spirit of the Act or treaty by which the Provinces became united at Confederation, to hold otherwise. *Vide Attorney-General for Ontario* v. *Attorney-General for the Dominion, supra,* at p. 371. The question there submitted, and the reply on a similar point was:

"Answer to question 4.—Their Lordships answer this question in the negative. It appears to them that the exercise by the Provincial Legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament."

Compare *Rex* v. *Western Canada Liquor Co.* (1921), 2 W.W.R. 774 and cases there cited. Particularly *Re Hudson's Bay Co. and Hefferman* (1917), 3 W.W.R. 167 at pp. 169 and 170.

Then assuming that the Act is *intra vires* of the Province, and also that it does not prohibit or restrict trade between the Provinces, the question, as I have mentioned, remains as to whether, upon the facts, Wong Kit violated its provisions. The magistrate found that, on the 11th of September, 1928, Wong Kit, pursuant to a telegram from Wong Sing at Calgary, Alta., shipped from Steveston, B.C., to the said Wong Sing at Calgary, one-half ton potatoes, raised in the Municipality of Richmond.

MACDONALD, J.

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Oct. 8.

REX v. WONG KIT

The accused was not charged or, in any event, it was not found by the magistrate that there was any violation of the Act prior to shipment. The shipment to Calgary was the unlawful "marketing" referred to in the informations and a violation of the Act. It was contended that such shipment came within the definition of "marketing" according to the Act. In my opinion, such a "marketing," so terming it, is not properly included within nor covered by the Act. He did not commit an offence under the Act. It is not the case of a grower bringing his product to a point other than that indicated by the regulations without obtaining permission, for the purpose of disposing of such product locally either by shipment or otherwise. The result is that, upon the facts, as found, the magistrate was right in acquitting the accused.

Judgment

The answer to all three questions submitted in the two cases will thus be in the affirmative.

The Act, which is the subject of attack, having been held *intra vires* of the Province but the accused, upon the facts, having been found not to come within its provisions, and thus properly acquitted, there will be no order as to costs.

Questions answered in affirmative.

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1928

Oct. 2.

HODGKINSON v. MARTYN

HODGKINSON v. MARTYN.

Assault—Damages—No actual injury—Appeal—Reduction of damages—Costs.

The plaintiff recovered $500 in an action for assault. On appeal it appearing that the assault was merely a technical one and was courted by the plaintiff with a view to an action for damages, the damages were reduced to $10.

Per MARTIN, J.A.: While the sincere yet mistaken belief of the defendant in the propriety of his illegal action is no excuse therefor, yet it is a mitigation of his liability which must be taken into consideration where not the slightest injury has been caused the plaintiff's person, clothing or reputation.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 31st of March, 1928, in an action for damages for assault. On the 30th of September, 1927, Asser Diesel Engines (1926) Limited was adjudged bankrupt and a receiving order was made against the said company and the Prudential Trust Company Limited was appointed custodian of the estate. The plaintiff was employed as a bailiff by the Prudential Company and instructed to enter into possession of the premises of the Asser Diesel Engines (1926) Limited, situate on Granville Island, Vancouver, B.C., and remain upon the premises and in possession of the assets of the Asser Diesel Engines (1926) Limited. The plaintiff entered into possession at about 11.45 a.m. on the 30th of September, 1927. At about 5 o'clock in the afternoon of the same day the defendant entered said premises and, according to the plaintiff's evidence, seized the plaintiff and with great force shoved him out of the premises. The defendant claims that under the powers contained in a conditional sale agreement of the 28th of June, 1926, between the minister of industries and the Asser Diesel Engines (1926) Limited, he, in the course of his duties as industrial commissioner on the 1st of September, 1927, did distrain and seize the plant, equipment and assets of the Asser Diesel Engines (1926) Limited and was in possession of the premises under a lease from the landlord when the

plaintiff entered the premises on the 30th of September. He admits that he ordered the plaintiff off the premises but when he did so the plaintiff voluntarily withdrew without any act of violence on the part of the defendant. The plaintiff recovered judgment for $500.

The appeal was argued at Victoria on the 25th of June, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

Craig, K.C., for appellant: This was an assault of the most technical kind. Our submission is (1) There was no assault by actual contact; (2) there cannot be an assault without actual contact; (3) damages were assessed as punitive damages; (4) damages were excessive. As to what constitutes assault see Underhill on Torts, 10th Ed., p. 254; *Mortin* v. *Shoppee* (1828), 3 Car. & P. 373; *Read* v. *Coker* (1853), 13 C.B. 850. Under the conditional sale agreement, Major Martyn was rightly in possession of the premises that we say he held under a lease. He was acting in good faith and should not be punished with punitive damages. Our submission is that the principle of punitive damages is wrongly applied.

J. A. MacInnes, for respondent: There is conflict in the evidence as to the physical force that was used. But the trial judge decided that undue force was used and that finding cannot be disturbed. On the finding, punitive damages are justified. He was a wilful wrongdoer: see Halsbury's Laws of England, Vol. 10, p. 306, sec. 566.

Craig, in reply, referred to *Cobbett* v. *Grey* (1850), 4 Ex. 729.

Cur. adv. vult.

2nd October, 1928.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think there was a technical assault. It appears to me, however, that it was courted by the plaintiff for the purpose of founding an action for damages. The action is frivolous and vexatious, but at the same time the defendant's conduct was not free from offence, and renders him liable to the payment of nominal damages. I think justice will be done by reducing the damages to $1 with no costs here or below.

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MARTIN, J.A.: This is an action for trespass to the person and in view of certain unusual incidents I have carefully read the whole appeal book in addition to those portions cited by counsel with the result that it was, in my opinion, open to the learned judge below, upon the sharply conflicting evidence to take the view that the defendant, being the deputy minister of industries and industrial commissioner, laid his hands upon the plaintiff and wrongfully put him out of the office premises in question without using more force than was necessary to effect that object, and that the act was unlawful and therefore a trespass, and that it was done in the sincerely mistaken belief that the defendant was justified in the protection of the interests of the Crown in doing so in order to retain access to the premises which had been in his possession through his servants for ten days beforehand, and also that his intention in preserving such right of access was not to exclude the custodian in bankruptcy from the premises but to insure their common access thereto. If this is what the learned judge intended to find I am prepared to support him to that extent, and in the absence of any reasons I must conclude he did so find, but I cannot go further because I am clearly of opinion that there is no evidence to justify a graver finding against the defendant in the absence of any appreciable circumstances of aggravation.

MARTIN, J.A.

It then becomes a question of the amount of damages to be awarded, upon said facts and the appellant submits that the sum of $500 assessed below is excessive and can only be supported on the basis of exemplary damages which are foreign to the case. This, in my opinion, is the proper view to take of the matter which has been made too much of because while the sincere yet mistaken belief of the defendant in the propriety of his illegal action is no excuse therefor yet it is a mitigation of his liability which must be taken into consideration where not the slightest injury has been occasioned to the plaintiff's person, clothing or reputation. It is truly said in that high authority, Salmond on Torts, 5th Ed., p. 129, that "exemplary damages are given only in cases of conscious wrongdoing in contumelious disregard of another's rights," and see Clerk & Lindsell on Torts, 7th Ed., p. 140.

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MARTIN, J.A.

It is with reluctance that I feel compelled to interfere in the assessment of damages but having no doubt that nominal damages will amply compensate the plaintiff for the trespass it is my duty to give effect to my opinion by awarding the sum of $10 (the equivalent of the historic 40 shillings, Halsbury's Laws of England, Vol. 10, p. 305) and therefore my decision is that the appeal should be allowed and the judgment reduced to that amount, which I note is the same that the jury awarded in *Mortin* v. *Shoppee* (1828), 3 Car. & P. 373, which was cited below by the plaintiff's counsel. The appellant should have the costs of the appeal but I should like to have the question of the costs below further considered.

GALLIHER, J.A.

GALLIHER, J.A.: Technically this may be an assault. It is however of a very trivial nature, and it would appear to me that the plaintiff rather contributed to it by his actions with some such proceedings as this in view.

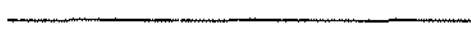
I would reduce the damages to ten dollars, and allow the appeal, with costs, and would deprive the plaintiff of costs below.

MACDONALD, J.A.

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

Appeal allowed in part.

Solicitor for appellant: *G. Roy Long.*
Solicitors for respondent: *Hamilton Read & Paterson.*



COURT OF APPEAL

1928

Nov. 22.

RAY v. RUBY HOU

RAY v. RUBY HOU *ET AL.*

Solicitor's lien—Costs—Money paid into Court—Order for payment out.

The plaintiff succeeded in an action for a writ of possession under the Landlord and Tenant Act of certain premises occupied by the defendants, and on an application for stay of proceedings pending appeal the defendants paid into Court $50, as security for costs and were ordered to pay an additional $1,000 into Court as security for the rent of the property accruing before the disposition of the appeal. The appeal was allowed with the costs of the appeal and of the Court below to the defendants. The plaintiff then brought another action to recover possession of said premises and recovered judgment. On the plaintiff's application for payment out of the $1,050, counsel for the defendants claimed that after his successful appeal in the first action he had a solicitor's lien on the $1,050 that was paid into Court.

Held (GALLIHER, J.A. dissenting), that when the first action was disposed of in the defendants' favour, their solicitor was entitled to his lien on the money in Court for his costs up to that time and what took place subsequently did not displace that lien.

Statement

MOTION by plaintiff for payment out to him of the sum of $1,050 paid into Court by the defendants. In an action in the County Court the plaintiff obtained judgment against the defendants on the 12th of April, 1927, for a writ of possession under the Landlord and Tenant Act of certain premises occupied by the defendants and the defendants on appealing paid $50 into Court as security for costs and pursuant to an order of GALLIHER, J.A. of the 17th of May, 1927, on an application for a stay $1,000 additional was paid into Court by the defendants as security for rent of said property, which would accrue between the date of the judgment in the Court below and the disposition of the appeal. The appeal was allowed with costs of the appeal and costs of the Court below to the defendants (see 39 B.C. 128). The plaintiff then brought a further action in the Supreme Court to recover possession of the said premises and succeeded in recovering judgment. Counsel for the defendants claim that after the appeal was allowed in the first action he had a solicitor's lien on the $1,050 that was paid into Court by his clients.

The motion was heard at Vancouver on the 22nd of November, 1928, by MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Killam, for the motion: Our submission is we are entitled to this money to satisfy our judgment. As to a solicitor's lien the case of *Inlay Hardwood Floor Co.* v. *Dierssen* (1928), 39 B.C. 514 governs and he is not entitled to a lien for this money: see *Puddephatt* v. *Leith* (*No. 2*) (1916), 2 Ch. 168; 85 L.J., Ch. 543 at p. 550.

Argument

Ginn, contra: The cases he refers to apply to independent actions. We paid the money in generally to abide the order of the Court. We were successful on the appeal, then the lien attached. There is no question of set-off here. He obtained judgment in an action commenced after the appeal was disposed of so that the lien takes priority: see *Bell* v. *Wright* (1895), 24 S.C.R. 656; Atkinson on Solicitors' Liens & Charging Orders, p. 9. There is a lien here in common law: see Halsbury's Laws of England, Vol. 26, p. 820, sec. 1342. The money in Court is property preserved.

Killam, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The facts have been stated as the argument proceeded. It is scarcely necessary to state them again. The money was paid in as security for rent which would accrue between the date of the judgment of the Court below and the date the appeal could be disposed of in this Court. Now, there was a stay granted, and $1,000 was paid into Court. The appeal came on and was disposed of, and the defendants in that action, Mr. *Ginn's* clients, were successful. At that time, there was no claim either under a judgment or by action on the part of the plaintiff, so that the $1,000 then belonged to Mr. *Ginn's* clients, and upon which Mr. *Killam's* client had no claim whatever at that time. Mr. *Ginn*, as soon as the matter had been disposed of in his client's favour, was entitled to his lien on that money for his costs up to that time. What took place subsequently did not displace that lien. If there was any question at all, it would be the question of priority. It is quite clear, how-

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ever, that there was no question of priority involved. Therefore, Mr. *Ginn* has made out his claim for a solicitor's lien against the money in Court, and if there is any sum left over it should be set off against the costs of the proceedings in which Mr. *Killam* was subsequently successful.

MARTIN, J.A.: That is my opinion, on the special facts set out in the affidavit before us.

GALLIHER, J.A.

GALLIHER, J.A.: On the facts, with great respect to different opinion, as at present advised I would grant the motion. It may be I am unconsciously or perhaps consciously influenced by reason of what occurred before me on a prior date, but I will simply say I feel that on what took place Mr. *Killam's* motion should be acceded to.

MACDONALD, J.A.

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

Motion dismissed.

LESLIE *ET UX.* v. CLARKE & BUZZA LIMITED, AND BUZZA.

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1928

Nov. 27.

LESLIE v. CLARKE & BUZZA LTD.

Practice—Pleading—Death of minor through defendants' negligence—Action by parents for damages—Order for further particulars—Appeal—R.S.B.C. 1924, Cap. 85, Sec. 6.

The plaintiffs, as parents of a deceased (killed by a motor-truck) brought action for damages in respect of benefits expected to be derived by the plaintiffs had the deceased not been killed through the negligence of the defendants. The defendants in "demand for particulars" asked "what benefits were expected to be derived by the plaintiffs had the deceased not been killed as claimed?" the answer being "the benefits expected were the reasonable and probable benefits that the plaintiffs would have derived had the deceased not been killed." On the defendants' application an order for further particulars was made.

Held, on appeal, reversing the decision of GREGORY, J. (MACDONALD, C.J.A. and MCPHILLIPS, J.A. dissenting), that section 6 of the Families' Compensation Act specifies all that is required to be set forth by the plaintiffs. This section has been complied with and nothing further is required, the question of pecuniary injury being a matter of evidence only.

Per MARTIN, J.A.: The provisions of the English Act (Lord Campbell's Act) which require "a full particular to be delivered" has been omitted from our statute.

APPEAL by plaintiffs from the order of GREGORY, J. of the 13th of November, 1928, whereby the plaintiffs were ordered to deliver further and better particulars of the damages "for benefits expected" as claimed in the statement of claim. The action was for damages for the death of the plaintiffs' son from injuries received through being struck by the defendants' motor-truck while negligently driven by W. M. Buzza, the defendants' servant. Paragraph 7 of the statement of claim was as follows:

Statement

"This action is brought on behalf of the plaintiffs as parents of the deceased, James Sim Leslie, for damages in respect of benefits expected to be derived by the plaintiffs had the deceased, James Sim Leslie, not been killed through the negligence of the defendants."

The defendants in "demand for particulars," asked:

"What benefits were expected to be derived by the plaintiffs had the deceased, James Sim Leslie, not been killed as claimed in paragraph 7 of the statement of claim?"

the plaintiffs' answer being:

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"In reply . . . the plaintiffs say that the benefits expected were the reasonable and probable benefits that the plaintiffs would have derived, had the deceased, James Sim Leslie, not been killed."

The appeal was argued at Vancouver on the 27th of November, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Lefeaux, for appellants: This action is under the Families' Compensation Act and all that is required is set out in section 6 thereof. We have complied with this section: see *Chapman* v. *Rothwell* (1858), 27 L.J., Q.B. 315; *Blake* v. *The Midland Railway Company* (1852), 21 L.J., Q.B. 233 at p. 237; marginal rule 200.

J. M. Macdonald, for respondents: As to the operation of the Act see English & Empire Digest, Vol. 36, p. 131; 3 C.E.D., p. 39; *British [Columbia] Electric Railway Company, Limited* v. *Gentile* (1914), A.C. 1034. We have nothing here giving the nature of the claim: see *Walker* v. *Municipality of Portage la Prairie and Municipality of Cartier* (1919), 2 W.W.R. 888; *Gledhill* v. *Rogers* (1925), 28 O.W.N. 332; *Boulter* v. *Webster* (1865), 5 N.R. 238.

Lefeaux, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is a new question, in this Court. There are cogent reasons why particulars should be given. The expected benefits must be dependent to a large extent on the physical and mental condition of the child, and the training he had undergone by his parents. Now, an example, an extreme example, perhaps, but a good one is this: Suppose the child were a helpless cripple, there would not be expected benefits from such a person. Suppose he were a cripple, physically and mentally, weak as well, no benefits could be expected from his life. The other party would want to know the conditions of the child who had been killed, so as to be able to present his case properly to the Court.

On the other hand, suppose the child were exceptionally bright or talented, a musical genius or a mechanical genius, who had received a special training in music or some other art, the benefit to be expected from such a child would be much greater

than in the case of a normal, ordinary child of the same age, and the defendants ought to be informed upon the exceptional characteristics which are going to increase the amount to be recovered. In that view of the case, it seems to me that it is necessary to have particulars, and that there is nothing in our law which prevents the making of the order.

The ordinary case of damages, general damages, is a different case from this. There no particulars need be given of general damages. That has been very well settled, and I would not think for a moment of encroaching on that rule. But here it is not general damages. It is special damages, it is special compensation, based upon the probable benefits from the services of the child had he lived. I think the circumstances which affect those damages ought to be set forth.

MACDONALD, C.J.A.

MARTIN, J.A.: In my opinion, with all respect to other views of the matter, the plaintiffs in this case have given all the particulars which, under this statute, they are called upon to give. The Families' Compensation Act, Cap. 85, R.S.B.C. 1924, gives a cause of action which is based upon negligence occasioning death, and all that the plaintiff in such an action is required to set forth is distinctly specified in the statute itself, in the sixth section of it, where it says:

> "In every such action the plaintiff on the record shall, in his statement of claim, furnish and set forth the names, addresses and occupations of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

MARTIN, J.A.

Now, it is conceded that the first group is set forth, *i.e.*, names, addresses and occupations. And of the nature of the claim there could be no doubt for it is stated most clearly, *viz.*: That the child was killed through the negligence of the defendants in the operation of their motor-truck, as set out in the third paragraph of the claim.

Nothing more is required by the statute. And it is quite striking to notice that the provisions of the English Act (Lord Campbell's Act), which require, "a full particular to be delivered," has been, for reasons that we do not know, but nevertheless we must give effect to, omitted from our statute. Therefore,

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MARTIN, J.A.

it is impossible, to my mind, with all respect, to read something into the statute which has been left out. Furthermore, in the very instructive case of *Chapman* v. *Rothwell* (1858), 27 L.J., Q.B. 315, the Queen's Bench there decided that the question of pecuniary injury is a matter of evidence only. Now, having regard to the requirements of our statute, the distinction between it and the English statute, and the statement of claim founded upon this very Act, I say, with respect, that the learned judge below has taken a wrong view and should not have ordered the particulars, and I would allow the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I take the same view as my brother MARTIN.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I am of the same opinion as my brother, the Chief Justice. I merely wish to add this: That, turning to the statute, which is chapter 85, R.S.B.C. 1924, it is clear that the action has to be one for the benefit of the persons entitled to sue. Here the action is being brought on behalf of the father and mother, the parents of the child. Now, the damages under section 4 are such damages as a Court or jury may think will be sustained and resulting from such death, to the parties respectively, for whose benefit such action shall be brought.

Now, if the action is one for damages, and if they are to be for the benefit of the father and mother, we should see what those damages are, reasonably, what they can be reasonably. As far as I can see here, there is no indication of it at all. It is not an action here for pain and suffering at all. Very different. There is an action, consequent upon death. Section 6 is the same as the English statute, except these two words, "full particulars," have been dropped out. How does that section read?

"6. In every such action the plaintiff on the record shall, in his statement of claim, furnish and set forth the names, addresses, and occupations of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

Now, because the words "full particulars" have been dropped is not to my mind a demonstration that there is to be nothing set forth of the nature of the claim.

Now, surely the plaintiffs can tell the nature of the claim which they seek to establish. The plaintiffs have put themselves

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LESLIE *v.* CLARKE & BUZZA LTD.

in the position of being required in conformity with the pleadings to give particulars. We find this paragraph:

"This action is brought on behalf of the plaintiffs as parents of the deceased, James Sim Leslie, for damages in respect of benefits expected to be derived by the plaintiffs had the deceased, James Sim Leslie, not been killed through the negligence of the defendants."

Now, that information "benefits expected to be derived" is in the possession of the plaintiffs. You are expected now before going to trial to have full disclosure of the facts upon which the plaintiffs intend to rely, that is the policy of the law. The facts upon which you intend to rely must be stated and the particulars must be given. Now, when they say "In respect of benefits expected to be derived" why should they not give particulars of the benefits they expected to derive from this little boy, who has been unfortunately killed?

MCPHILLIPS, J.A.

Therefore, I am quite of the opinion—as I said at the opening—of my brother, the Chief Justice, and in agreement with the learned judge of the Court below who made the order that further particulars should be given. Therefore the appeal, in my opinion, should be dismissed.

MACDONALD, J.A.: I do not think that any particulars should be ordered not required by the statute, and I therefore agree with my brother MARTIN. I think the cases support this view. I would allow the appeal.

MACDONALD, J.A.

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

Solicitor for appellants: *W. W. Lefeaux.*
Solicitor for respondents: *J. M. Macdonald.*

COURT OF APPEAL

1928

Oct. 26.

ATWOOD v. LUBOTINA

ATWOOD *ET AL.* v. LUBOTINA.

Negligence—Damages—Automobile left at curb of street—No tail-light—Struck in rear by plaintiff's car—Liability—R.S.B.C. 1924, Cap. 177.

At about 12 o'clock on a rainy night the defendant left his truck close to the curb-line near his home on the outskirts of Vancouver. The rear of his truck was about three feet out from the curb-line, and he left no tail-light. The plaintiff, driving a friend home, stopped to let him out about 60 feet behind the defendant's truck on the same side of the street. He then started his car and while still in low gear he ran into the defendant's truck damaging his car. He recovered judgment in an action for damages.

Held, on appeal, affirming the decision of RUGGLES, Co. J. (MARTIN, J.A. dissenting, and holding there was contributory negligence), that the defendant was negligent in failing to have a light at the rear of his truck and in the circumstances the plaintiff was not guilty of contributory negligence in not seeing the defendant's truck.

Statement

APPEAL by defendant from the decision of RUGGLES, Co. J. of the 14th of March, 1928, in an action for damages for negligence. On the night of the 29th of October, 1927, the defendant drove his Reo truck to his home at 1160 Pender St. East, Vancouver, at about 12 o'clock, and left the truck close to the curb-line on the south side of the street. He did not have a tail-light on the truck. Shortly after, the plaintiff, who was driving a friend home, stopped on the south side of Pender Street about 60 feet behind the defendant's truck. After letting his friend out he started his car in low gear and was still in low gear when he struck the rear left end of the defendant's truck suffering damage, the repairs for which cost $102. It was a rainy night and the nearest light was at an intersection some distance away. It was held by the trial judge that the defendant was guilty of negligence in leaving his truck on the street without a tail-light.

The appeal was argued at Vancouver on the 26th of October, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, for appellant: It is true we had no tail-light but

if the plaintiff had exercised reasonable care he would have avoided a collision as by his own lights he should have seen our truck in plenty of time to avoid it: see *Johnston* v. *McMorran* (1927), 39 B.C. 24.

Argument

P. McD. Kerr, for respondents: The appellant's truck not only had no tail-light but the rear end was two or three feet out from the curb-line in violation of the Municipal By-law as to parking cars. That the trial judge's finding of fact should not be disturbed see *Gerrard* v. *Adam and Evans* (1923), 32 B.C. 114 at p. 116; *Empey* v. *Thurston* (1925), 58 O.L.R. 168; *Comrie* v. *Fisher, ib.* 228.

Bull, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This case is pretty close to the line, and the learned trial judge has decided it in favour of the plaintiffs. It turns partly upon the credibility of the witnesses, upon the probabilities of the case, and upon the statute. There is this fact admitted, that the defendant broke the law in leaving his truck in the way he did, contrary to the Motor-vehicle Act, without a red light on the rear of it. That Act was passed for the purpose of preventing exactly what happened in this case. Persons who leave their cars on the public street, or who are driving on the public street, are required to have a light on the rear, so that a following vehicle may have warning of danger ahead. Drivers of following cars depend upon the regulation as their protection; and if they see no light they naturally enough assume that there is no obstacle ahead and that their attention may be directed to other things looking to their safety; they rely upon the provisions for a warning light and do not use as much precaution as they otherwise would. That is perfectly natural.

The defendant in this action left his truck on the public street, close to the bank—it might be called a curb if there had been a curb—but close to where the curb would have been. It was a bank standing four feet above the level of the lower part of the roadway next to the bank. It was a dark night. Mr. *Bull* says the visibility was fairly good, and he cites the plaintiff as authority for that. Fairly good is a rather vague expression; it

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was after midnight, in October, and raining. One could quite see that the visibility was not as good as his answer would suggest. Defendant's truck was standing there without the light. The plaintiff came in some 60 feet behind it, let off a passenger, and was turning out, in the act of turning out, and going ahead at the same time, when he struck the rear corner of the truck, causing the damage complained of. It is not contended that he saw the truck; but no one would suppose that the man, if he saw the truck, would deliberately run into it. He did not see the truck, he did not see the light, because the light was not there. In these circumstances, I think the learned judge was not in error in finding in favour of the plaintiffs, and I would sustain his finding.

MARTIN, J.A.

MARTIN, J.A.: The conditions in this case are somewhat unusual, in my opinion, because we have the situation, as the plaintiff himself says, of a street which has two big grass banks, one on each side, therefore the sidewalk is above the roadway, the road is four feet below the level of the sidewalk, and, as he himself says, there is not a big crown on the road, but that it is not unusual at all. Now in such circumstances, there being no curb, one would think that he would be more careful, because there is no curb-line to follow. He is perfectly certain, and his own witnesses say that this truck was "nosed" into the bank and the rear end of the truck was sticking out from what he calls the bank, three feet. The plaintiff's position is, that 60 feet from there in those circumstances he undertook to drive along the same side of the street, and yet, though his lights had a range of 50 feet he nevertheless ran into this big object, five feet wide and twelve feet long, without seeing it. To me that is absolutely inexplicable. Under no circumstances that I can bring before my mind can I justify such a thing as that. To say that in 60 feet a person cannot navigate such a position without distinguishing an object of that kind is, to my mind, only consistent with the view that he did not keep a good look-out. That object was in the beam of his light, as is shewn by the demonstration which Mr. *Bull* gave, and by his own description of what happened when he ran into the rear of that truck and found his radiator jammed up

against the left-hand corner, and the fender underneath it. He never suggested that he went over to one side of the road and curved back from there. In such circumstances all I can say is that, although it must be admitted that there was negligence on the part of the defendant, to me it is equally clear that upon the undisputed facts and on the statement of the plaintiff himself he was guilty of negligence also, therefore the Contributory Negligence Act of 1925 applies and I would apportion the damages equally because of that negligence.

GALLIHER, J.A.

GALLIHER, J.A.: As I understand the circumstances of this case, I would not interfere with the finding of the learned trial judge. I do not think I would be justified in doing so. I do not wish to canvass the evidence, but I have read it and have considered it, and so far as I am concerned, I agree with the learned judge's finding.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal, for the reasons given by my brother, the Chief Justice. I would only add further that it is impossible here to say upon the evidence that the findings of the learned judge were wholly wrong.

When questions of fact are decisive of the case it is not the province of a Court of Appeal to balance the probabilities in a different way to that of the learned trial judge. The case is one of that nature and upon the controlling authorities it is not a case where the Court of Appeal is entitled to interpose a different view.

MACDONALD, J.A.

MACDONALD, J.A.: There is a good deal in what Mr. *Bull* says about the radiator of the plaintiff's car coming in contact with the defendant's truck as tending to shew that he should have seen it. On the whole case, however, we should not find that the plaintiff was guilty of contributory negligence, much less the primary negligence, because on a wet night, when visibility is diminished, he failed to see the truck parked ahead of him on the highway. It is true the head-light from the plaintiff's car would momentarily expose the truck to view, but that would be at a time when plaintiff's attention was properly engaged in changing gears, getting under way, and giving the

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car more gas. I think that the real cause of the accident was the absence of a warning light, which should be on all objects left on the street overnight. We should not, therefore, disturb the finding of the learned trial judge.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Walsh, McKim & Housser.*
Solicitor for respondents: *P. McD. Kerr.*

MURPHY, J.

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Dec. 3.

MORAN v. CITY OF VANCOUVER

MORAN v. CITY OF VANCOUVER.

Municipal corporation—Sidewalks—Excavation in sidewalk area by abutting owner—Covered by iron frame—Pedestrian stumbles on frame—Injury—Damages—Onus on city.

An abutting owner having been allowed by the city to excavate within the sidewalk area of the street covered it over with an iron frame. The plaintiff while walking on the sidewalk stumbled over the iron frame and fell sustaining injury.

Held, that the accident happened because of want of proper repair and the city has failed to shew that it had done all that it reasonably could to prevent the want of repair.

Woodcock v. *City of Vancouver* (1927), 39 B.C. 288 applied.

Statement

ACTION for damages for negligence, the plaintiff having fallen and suffered injury owing to the alleged want of repair of a sidewalk in the City of Vancouver. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 14th of November, 1928.

P. McD. Kerr, for plaintiff.
McCrossan, K.C., and *Lord,* for defendant.

3rd December, 1928.

Judgment

MURPHY, J.: Plaintiff sues for damages for injuries received by him as the result of a fall on the sidewalk on Water Street in the City of Vancouver. Water Street is in the business section

of the City and runs through the wholesale district. At least one hotel—the Grand—abuts upon it. It was in front of this hotel that the plaintiff met with the accident. The City had allowed the owner of the Grand Hotel to make an excavation in the sidewalk area 4 feet long by 3 feet wide and which the view taken by me shewed to be of considerable depth. Around this hole an iron frame had been set to which was attached by hinges iron doors which opened along a centre line. This structure forms part of the travelled way of the sidewalk. The sidewalk itself is made of cement slabs. Originally apparently the iron frame was flush with the surface of the cement slab surrounding it for it is still practically so along the north side. On the west side however, the surfaces of the iron frame and of the surrounding cement slab gradually diverge from the north-west corner—where they are practically flush—to the property line on the south side of the sidewalk. At the point of intersection with the property line the difference in level of the two surfaces is at least five-eighths of an inch. The edge of the iron frame is square and thus forms a right angle with its surface. Looking east along Water Street the surrounding cement slab at a distance of two or three feet from its line of contact with the west side of the iron frame rises on an incline of about two and a half inches in a distance of some two to three feet. The plaintiff was walking east on this sidewalk when he stumbled over the iron frame thus projecting above the level of the cement and fell injuring his knee. Judging from the appearance of the spot when I viewed it I would conclude that the condition then shewn had existed for a considerable length of time. The point for decision is whether or not on these facts the city is liable. Section 320 of the Vancouver Incorporation Act, 1921, Cap. 55, B.C. Stats. 1921 (Second Session), as amended in 1928, Cap. 58, Sec. 38, reads:

Judgment

"320. (1.) Every public street, road, square, lane, bridge, and highway in the city shall, [with exceptions not applicable here] be kept in reasonable repair by the city."

The authorities useful in construing this legislation have been exhaustively collected by McDONALD, J. in *Woodcock* v. *City of Vancouver* (1927), 39 B.C. 288. From these it would appear

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that the City is not an insurer, that negligence is the only ground on which it can be held liable. I find that the accident happened because of want of proper repair. I see nothing in the evidence shewing want of ordinary care on defendant's part. That being so the authorities cited in the *Woodcock* case shew that the remaining question for decision is whether the defendant herein led evidence that it did all that could be reasonably done to prevent the want of repair. It is clear from the language used in several of said authorities that the Court must proceed cautiously in fixing liability on municipal corporations for want of repairs in streets or sidewalks else an intolerable burden will be placed upon taxpayers. The facts of each case must be carefully scrutinized and each decision must rest largely on the particular set of facts proven. Here it is to be noted—1st that the sidewalk on which the accident occurred is not on a "back street." Since Water Street runs through the wholesale district and since at least one hotel abuts upon it and since it is but two blocks from one of the City's main arteries a fairly large number of pedestrians may be expected to use its sidewalks. Next this accident did not occur because of any defect or difference in level of the cement slabs which constitute the sidewalk. It was caused by the surface of the west side of the iron frame becoming elevated above the surface of the cement slab surrounding it. The earth having been removed from beneath the iron doors it is clear that the strain caused by passing pedestrians stepping upon these doors would be transmitted to the iron frame and from it to the earth or other material upon which it rests. Weakness either in the iron frame itself or in its underlying support must obviously in time result in a surface condition of the sidewalk which may be dangerous. There is in this case therefore no question of the likelihood of the surface of a cement pavement becoming uneven because of peculiarities of the material or of weather or water conditions. No excavation in the sidewalk area, such as is in question herein, can be made without the permission of the City. The authorities therefore know or ought to know the number and location of such excavations, the manner in which they are covered and how such covers are supported. Excavations in sidewalk areas are obviously dangerous

unless properly covered and unless the covers and their underlying supports are kept in proper repair. The view in this case disclosed that the iron framework rests upon a tier of bricks or possibly a brick wall which had fallen into a bad state of repair. Probably this is the original cause of the condition which caused the accident. It is not I think placing an undue burden upon the defendant to say that it should examine such structures more frequently and with more care—at any rate when they are on such streets as Water Street—than it is called upon to do in reference to cement sidewalks. In my opinion, therefore, the defendant has not shewn that it did all that could reasonably be done to prevent the want of repair. These structures by their nature are more apt to fall into bad repair than are ordinary cement pavements for they cover holes instead of resting on solid ground. The task of inspection is not onerous since their number and location are known. No expense need be entailed upon the defendant Corporation nor should it be. Since such excavations are made for the benefit of adjoining property owners all expense necessary to obviate any danger to pedestrians resulting from their presence in the sidewalk ought to be borne by such owners. The City can amply protect itself in the agreement granting permission to make and cover such excavations. I assess the damages at $400.

Judgment

Judgment for plaintiff for $400 and costs.

Judgment for plaintiff.

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HOFFAR LTD. v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION

[IN BANKRUPTCY.]

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

Bankruptcy—Transfer or assignment of a debt owing debtor to a creditor—Made within three months before authorized assignment—Motion by trustee to set aside transfer—Transfer not made with view of giving preference—R.S.C. 1927, Cap. 11, Sec. 64—R.S.B.C. 1924, Cap. 97, Sec. 3.

W. a boat-builder, made an assignment for the general benefit of his creditors on the 13th of April, 1928, the Canadian Credit Men's Trust Association being appointed trustee for the benefit of the creditors. On the 18th of February, 1928, W. made a transfer or assignment in favour of Hoffar Limited of a certain debt owing to him by the Minister of National Revenue of Canada. On motion by the trustee to set the transfer aside on the ground that it is void as against the trustee by virtue of section 3 of the Fraudulent Preferences Act or in the alternative that it is void as against the trustee by virtue of section 64 of the Bankruptcy Act, it was held on the evidence that the assignment was not made with a view to giving Hoffar a preference, but the transaction comes within the purview of the Provincial Act and the trustee being entitled to the benefit thereof the assignment is void under that Act.

Held, on appeal, reversing the decision of MACDONALD, J., that section 3 of the Fraudulent Preferences Act renders void an assignment such as is attacked here and section 64 of the Bankruptcy Act makes preferential assignments and transfers made with a view to prefer one creditor over another void under conditions admitted to exist here but subsection (2) of section 64 declares that such assignments which have the effect of giving such preference "shall be presumed *prima facie*" to have been made with a view to giving such preference, the distinction between the two sections being that under section 3 the presumption of invalidity is irrebutable, whereas, under section 64 (2) it may be rebutted. In this case the judge below has found as a fact that that presumption has been rebutted. Section 3 of the Provincial Act has been rendered inoperative by the overriding enactment of section 64 of the Dominion Act and the transfer in question should be declared valid.

Statement

APPEAL by plaintiff from the decision of MACDONALD, J. on a motion heard in Chambers at Vancouver on the 9th and 10th of July, 1928, on behalf of the Canadian Credit Men's Trust Association Limited, trustee of the property of S. R. Wallace, debtor, for an order setting aside an assignment made by the

debtor on the 18th of February, 1928, in favour of Hoffar Limited to the extent of $4,053.95 of a certain debt owing to the debtor by His Majesty the King as represented by the Honourable the Minister of National Revenue of Canada, and declaring for the title of the said trustee to the said moneys on the grounds: (1) That the assignment is utterly void as against the said trustee under section 3 of the Fraudulent Preferences Act, being chapter 97, R.S.B.C. 1924, as having been made at a time when the said debtor was in insolvent circumstances or knew that he was on the eve of insolvency having the effect of giving Hoffar Limited a preference over the other creditors, the said debtor having within 60 days after the transaction, made an assignment for the benefit of his creditors under the Bankruptcy Act; (2) alternatively that the assignment is fraudulent and void as against the trustee by virtue of section 64 of the Bankruptcy Act as having been made with a view to giving said Hoffar Limited a preference over his other creditors, he having made an authorized assignment under the Bankruptcy Act within three months after making said assignment. The other necessary facts are set out in the reasons for judgment of the trial judge.

Statement

Ginn, for plaintiff.
Griffin, K.C., for defendant.

MACDONALD, J.: S. R. Wallace was engaged in business as a boat-builder in North Vancouver, British Columbia, and found it necessary to make an assignment for the general benefit of his creditors on the 13th of April, 1928, in pursuance of the Bankruptcy Act. Subsequently the Canadian Credit Men's Trust Association was appointed trustee for the benefit of the creditors and became possessed of all the property of the debtor subject to the claims that might have been secured at the time. Prior to this assignment taking place there had been a meeting of creditors of S. R. Wallace and it then became apparent that the bulk of the liquid assets available for satisfying his debts had been assigned to Hoffar Limited by a formal assignment dated the 18th of February, 1928. Under these circumstances it

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MACDONALD, J.

was necessary for the trustee upon the advice of the creditors who were unsecured, to determine what action should be taken. It then invoked the provisions of rule 142 of the Bankruptcy Rules and sought to set aside this assignment to Hoffar Limited. The assignment, thus the subject of attack, contained a misstatement on its face, as it recites that it is made in consideration of $4,053.95 now paid to the assignor by Hoffar Limited; the fact being that there was no money paid at the time, but that this assignment was given in order to secure moneys due or to accrue due by the debtor to Hoffar Limited. In order to obtain the benefit of said rule 142, the trustee launched a motion in Chambers for that purpose. It recites that the Canadian Credit Men's Trust Association Limited, trustee of the property of S. R. Wallace, a debtor, sought to obtain an order setting aside or avoiding the assignment to which I have referred, upon three grounds, the first ground being that the assignment was utterly void as against the trustee by virtue of the provisions of section 3 of the Fraudulent Preferences Act, R.S.B.C. 1924, Cap. 97, as having been made to the said Hoffar Limited by Wallace, the debtor, at a time when he, Wallace, was in insolvent circumstances, or unable to pay his debts in full, or was on the eve of insolvency, and has had the effect of giving said Hoffar Limited a preference over other creditors of the said debtor, such debtor having made his assignment for the benefit of creditors under the Bankruptcy Act, within 60 days from the time when the assignment thus sought to be impeached, was executed.

The second ground was that the assignment was fraudulent and void as against the trustee by virtue of the provisions of section 64 of the Bankruptcy Act, as having been made by the debtor with a view of giving the said Hoffar Limited a preference over his other creditors and that the debtor had made an authorized assignment within three months from the making of such assignment.

The third ground I need not refer to, on account of the view I entertain as to the two grounds thus shortly outlined.

In the first place, it is contended that upon the summary trial, directed, when the motion came on to be heard in Chambers, I am confined to a consideration of the effect of section 64 of the

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Bankruptcy Act, or, in other words, that the assignment, the subject of attack, having taken place within the time mentioned in the Bankruptcy Act, a Provincial statute cannot be invoked for the purpose of attacking such assignment.

Bankruptcy rule 142 does not, in my opinion, confine the trustee upon an application of this nature to the Bankruptcy Act, in seeking to set aside an assignment of the nature here presented. The rule states that application by a trustee to set aside or avoid under the Act, or any other Act or law, any settlement, conveyance, transfer, etc. It is evident from the wording of this rule that it was not intended to be limited, as is now contended by counsel for Hoffar Limited. I am supported in this conclusion by some authorities, particularly *In re Davison* (1925), 5 C.B.R. 860; *In re Berman and Chapman* (1923), 4 C.B.R. 233, and a Manitoba case, *In re Rinn* (1923), 3 C.B.R. 828.

If the Court was confined in an application of this nature to section 64 of the Bankruptcy Act, it would mean that creditors who had no choice in the debtor having made an assignment, would be prevented from availing themselves of a Provincial statute for their benefit. I repeat that I do not think it was the intention of the Legislature to bring about such a result. The object of the legislation for a great number of years has been where a debtor becomes unable to pay his debts, that his assets should be divided equally among his creditors, unless in the meantime one of those creditors has obtained security in a manner that does not render it subject to attack.

MACDONALD, J.

So, I consider, that I am entitled in dealing with this application to set aside this assignment, to utilize the provisions of the Bankruptcy Act as well as the Fraudulent Preferences Act of this Province. I think it well, however, to deal with section 64 of the Bankruptcy Act in order to make some finding in connection therewith. This section provides in part that

"every conveyance or transfer . . . taken or suffered by any insolvent person . . . "

and in passing I might say that within the meaning of the law, Wallace was insolvent at the time the assignment was made,

"with a view of giving such creditor a preference over other creditors shall, if the person making, incurring, taking, or paying or suffering the same is

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adjudged bankrupt . . . or . . . makes an authorized assignment, within three months after the date of the making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorized assignment."

Then subsection (2) of 64 provides:

"If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction."

I find that the giving of this assignment had the effect of giving Hoffar Limited a preference over the other creditors of the debtor. Then, has the *prima facie* presumption thus created been destroyed by the facts as given in evidence? The point to be decided was, what was the view or intention of the parties in executing the assignment?

MACDONALD, J.

Hoffar Limited were in a peculiarly strong position with respect to obtaining security or an assignment of moneys that might be paid by the Government in connection with the construction of the boat "Despatch." Hoffar was the inspector appointed by the Government, and his company having supplied the engine for the boat, he would know the progress being made, and when money would be payable by the Government in connection with such construction. I am satisfied that if he had so desired on behalf of his company he could have obtained an order at the time when the engine was delivered to Wallace. If such order had been obtained then it would, if events had followed in the course they did, have been more than three months prior to the date of the assignment by Wallace for the benefit of his creditors. But, such an assignment was not given, and I accept the statement made by Hoffar in his evidence that he trusted Wallace in the matter. He may have felt perfectly safe and thus reposed trust in Wallace because he was in the position to which I have referred. However, time wore on and he was pressing for payment, and was well aware, to my mind, that his company could only hope to obtain the moneys from and out of the proceeds derived from the Government in connection with the construction of the boat.

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There is a conflict of testimony between Hoffar and Wallace as to what took place with respect to payment of moneys to be thus derived by Wallace. I feel confident that there was some discussion between them which would amount to a belief on the part of Hoffar that his company would be paid out of such proceeds. I am also of opinion that the other creditors of Wallace may have had a like belief on their part, though no evidence has been given that they gave credit on that expectation. Morally there was an obligation resting upon Wallace to pay Hoffar in common with his other creditors when moneys were received in due course.

Then, as far as the question of whether there was an assignment of moneys to come out of a specific fund at the time when the engine was delivered, I do not deem it necessary to pass upon that situation any more than to say that nothing of a specific and definite nature was arrived at between the parties. So in the conflict of testimony to which I have referred, the burden would rest upon Hoffar of satisfying me that there was a definite arrangement that at some time some portion of the money thus to be received for the construction of the boat should be assigned to his company, but, as I mentioned before, and I think I have his exact words, he said, "We trusted Mr. Wallace to pay us when he got the money," and then in the next breath, if my notes be correct, Hoffar stated that Wallace said, "he would give an assignment." Upon that point, as I have already intimated, there is a flat contradiction. Now, this question as to whether or not there was discussion as to the assignment and as to how the money was to be obtained by Hoffar is only material upon the issue before me upon the question as to whether or not the presumption of intended preference had been destroyed.

MACDONALD, J.

I find upon that point that accepting the evidence of both Hoffar and Wallace, there was not an assignment at that time with a view of giving Hoffar a preference, though it had such a result. There is no doubt that the bulk of the assets will, as I have mentioned, be paid over to Hoffar, if his assignment is held valid and sufficient for that purpose.

It is apparent from what I have just said that if the trustee were confined solely to section 64 of the Bankruptcy Act that the

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presumption created by the preference would have been destroyed, in my opinion, by the evidence.

Then the trustee in the alternative says, or contends that the Provincial Act should be applied. Without discussing that Act at length, it is much more drastic, if I might term it so, in its terms than the provisions of the Bankruptcy Act. In my opinion, the transaction comes within its purview and the trustee is entitled to take the benefit of that Provincial statute, and that the assignment, the subject of attack, is void under that Act.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 7th and 8th of November, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Craig, K.C. (*Ginn,* with him), for appellant: The two Acts are in question here and Dominion enactments when competent override but do not directly repeal Provincial legislation. The trial judge has found that this assignment was not made with a view of giving Hoffar a preference so that under the Dominion Act, which governs, the assignment must be held to be valid: see *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (1894), A.C. 189 at pp. 200-1; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at pp. 366 and 369; *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1898), A.C. 700 at p. 715; *La Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Company* (1909), A.C. 194 at p. 198. As to the cases cited to the learned judge below see *In re Davison* (1925), 5 C.B.R. 860.

Griffin, K.C., for respondent: If we can use the Provincial statute we must succeed. On the interpretation of the British North America Act see *Citizens Insurance Company of Canada* v. *Parsons. Queen Insurance Company* v. *Parsons* (1881), 7 App. Cas. 96 at p. 114; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at p. 130. The overlapping position exists in many topics, but both Acts are in force: see *In re United Exhibitors*

of Canada (1924), 5 C.B.R. 200 at p. 204; *In re Morse Estate, ib.* 113 at p. 121; *In re Rice* (1927), 8 C.B.R. 572 at p. 575; *Canadian Credit Men's Association Ltd.* v. *Jenkins* (1928), 62 O.L.R. 281 at p. 287; *McLeod, Assignee of the Petitcodiac Lumber Company* v. *Vroom et al.* (1881), Tru. 131; *In re DeVeber* (1882), 2 Cart. 552.

Craig, replied.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.: The only question involved in this appeal is one of conflict between a Provincial and a Dominion statute.

The facts are not in dispute. The neat question is as to whether or not section 64 of the Bankruptcy Act, Cap. 11, R.S.C. 1927, is repugnant to section 3 of the Fraudulent Preferences Act, Cap. 97, R.S.B.C. 1924. The learned judge held that it was not.

No question of the validity of either statute was raised in argument.

For many years there was no Bankruptcy Act in Canada, and during that period of time this and other Provinces enacted legislation *pari materia* with 13 Elizabeth, and 27 Elizabeth, with some amendments. After the enactment of the Bankruptcy Act the Provincial Fraudulent Preferences Act was retained on the statute book. It professes to deal with preferences given by a debtor to one creditor to the prejudice of others. Shortly, section 3 renders void an assignment such as the one attacked in this action, if attacked within a specified time, which this one was.

MACDONALD, C.J.A.

Section 64 of the Bankruptcy Act makes preferential assignments and transfers made with a view to prefer one creditor over another void under conditions admitted to exist here, but subsection (2) of section 64 declares that such assignments which "have the effect" of giving such preference "shall be presumed *prima facie*" to have been made with a view to giving such preference. The distinction between the two sections is found in this, that the presumption of the invalidity under

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section 3 is irrebuttable, while under section 64, subsection (2) it may be rebutted. In this case the judge has found as a fact that that presumption had been rebutted and the finding is accepted by both parties.

Assuming then that the Provincial Act is *intra vires,* section 3 has, in my opinion, been rendered inoperative by the overriding enactment of section 64. It would, I think, be difficult to find a clearer case of repugnancy. I would allow the appeal.

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

GALLIHER, J.A.

GALLIHER, J.A.: It seems to me that the Bankruptcy Act (Dominion) and the Fraudulent Preferenes Act (Provincial) are, in respect of the matter to be decided upon in this appeal, clearly in conflict.

In such case the law is well settled that where, as here, the field of legislation is within the competence of both Parliaments and both have legislated, the enactments of the Dominion Parliament must prevail—*La Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Company* (1909), A.C. 194 at p. 198.

I do not think the cases cited to us apply.

The appeal should be allowed.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from an order made on a motion in Supreme Court to set aside an assignment made by S. R. Wallace (the bankrupt) to Hoffar Limited on the 10th of February, 1928, of certain moneys amounting to $4,053.95, due by the Government of Canada to Wallace in connection with the construction of a boat for the Customs Service. The Canadian Credit Men's Trust Association, trustee, under the Bankruptcy Act launched the motion on two grounds, (a) that the assignment was void as against the trustee under the Fraudulent Preferences Act, R.S.B.C. 1924, Cap. 97, Sec. 3; (b) alternatively the assignment was fraudulent and void as against the trustee under section 64 of the Bankruptcy Act, R.S.C. 1927, Cap. 11.

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The facts as found by the learned judge who heard the application are not questioned. He found that there was not an assignment at that date with a view of giving Hoffar Limited a preference although it had that result. It followed therefore that if the trustee is confined to section 64 of the Bankruptcy Act "the presumption created by the preference would have been destroyed in my opinion by the evidence." Under the Bankruptcy Act therefore the application would fail. He found, however, that it did come within the provisions of section 3 of the Provincial Fraudulent Preferences Act above referred to and avoided the assignment.

Only one point was raised by the appellant. He submitted that as both Acts deal with the same subject-matter and contain conflicting provisions the Bankruptcy Act supersedes the Provincial Act to the extent of the conflict and the provisions of the latter are therefore not available to the respondent. He does not say that a Provincial Act cannot be invoked in bankruptcy proceedings but only that if there is conflict the Dominion Act overrides it.

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First as to the alleged conflict. The material parts of section 64, confining it to the point in question, may be taken to read as follows:

"(1) Every . . . transfer of property [property includes money] . . . . made . . . by any insolvent person in favour of any creditor . . . . with a view of giving such creditor a preference over the other creditors shall, if the person making . . . the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making . . . the same, or if he makes an authorized assignment, within three months after the date of the making . . . the same, be deemed fraudulent and void as against the trustee in the bankruptcy. . . .

"(2) If any such . . . transfer . . . has the effect of giving any creditor a preference over other creditors . . . it shall be presumed *prima facie* to have been made . . . with such view as aforesaid whether or not it was made voluntarily or under pressure. . . . ."

As stated the undisputed findings of fact do not bring the case within this section. Briefly the effect of section 64 is that an assignment by an insolvent with a view of giving a preference is deemed void if made within three months. Then under subsection (2) if the assignment has the effect of giving a preference there is a *prima facie* presumption that it was given "with such view as aforesaid." That presumption may be rebutted.

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Turning to section 3 of chapter 97, R.S.B.C. 1924, to ascertain if it deals with the same subject-matter, because where

"a given field of legislation is within the competence both of the Parliament of Canada and the Provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the Province if the two are in conflict":

La Campagnie Hydraulique de St. Francois v. *Continental Heat and Light Company* (1909), A.C. 194 at p. 198, and summarizing the material parts it reads:

"3. (1.) . . . every . . . transfer, . . . of goods, chattels, or effects, or of bills, bonds, . . . made by a person at a time when he is in insolvent circumstances, . . . shall:—

"(*a.*) If made with intent to defeat, hinder, delay, or prejudice his creditors . . . be, as against the creditor . . . injured, delayed, or prejudiced, . . . void; and

"(*b.*) If made to or for a creditor with intent to give such creditor preference over his other creditors . . . be, as against the . . . creditors injured, delayed, prejudiced, or postponed, utterly void."

"(2.) . . . every such . . . transfer . . . made to or for a creditor by a person at any time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, and which has the effect of giving such creditor a preference over the other creditors of the debtor . . . shall:—

"(*a.*) . . . . with respect to any . . . proceeding which, within sixty days thereafter, is . . . taken to . . . set aside such transaction, be utterly void as against the . . . creditors injured, delayed, prejudiced . . . ; and

"(*b.*) If the debtor, within sixty days after the transaction, makes an assignment for the benefit of his creditors, be utterly void as against the assignee or any creditor authorized to take proceedings to avoid the same."

Then subsection (3) after setting out what transactions are deemed to be preferential, provides:

"And such effect shall not be deemed dependent upon the intent or motive of the debtor."

Comparing the two Acts, if we find the Dominion Act provides that on a certain state of facts one result follows and the Provincial Act provides that on the same state of facts another result follows there would undoubtedly be conflict. That would not be legislation on different points or subject-matter. The given facts under both statutes are: (1) An insolvent person; (2) three months' period in one case and sixty days in the other; (3) made with a view of giving a preference or with intent to defeat, hinder and delay; (4) shall be deemed fraudulent and void.

The two statutes are so far substantially the same, so far as subject-matter is concerned, except as to the respective periods of 90 days and 60 days, which is, I think immaterial.

The Dominion statute adds, however, subsection (2) quoted *ante*, stating when the view or intent to prefer shall be presumed.

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If it has the effect of giving a preference it is *prima facie* proof that it was made with that intent. That is a presumption and evidence may be adduced to rebut it. That right is given by the Dominion Act on a state of facts common to both Acts. The Provincial statute denies that right. Given the insolvency as in the Dominion Act and the intent as in the Dominion Act ("with a view of") the transfer is utterly void under section 3 (1) without any right to offer evidence to rebut it. And under section 3 subsection (2) if action is taken within 60 days or if an assignment follows within 60 days the transfer is void.

The Provincial Act is not dealing with a new situation; the variation in words and figures does not affect the subject-matter. But the result is different. Under the Provincial Act the transfer is void; under the Dominion Act it is deemed void with however the right to rebut. If this right is given by Dominion legislation a Provincial Act destroying it is *ultra vires* to the extent of the conflict. Under the Dominion Act the assignor has the benefit of that right. Under the Provincial Act invalidity is an irrebuttable presumption. That is the conflict.

MACDONALD, J.A.

This is not to say that the trustee cannot resort to a Provincial Act to impeach a transaction. Provincial legislation respecting fraudulent conveyances may be resorted to. The Bankruptcy Act does not abrogate Provincial Acts simply because they deal with preferential transactions. But obviously both Parliaments cannot enact that one result shall follow in one case and a different result in the other. Counsel for respondent submitted that the section in the Provincial Act deals with a topic not dealt with by the Dominion Act. I cannot agree. He also urged that there is no conflict where the Dominion Act voids a transaction on one ground and a Provincial Act avoids it on other and additional grounds; in other words, the Dominion Act does not say that transactions of another kind shall be lawful. That is not this case. We are dealing with legislative results following the same transaction and the results differ. That result in case of conflict must be determined by the Dominion Act. The test is, can both sections be enforced?

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *R. W. Ginn.*

Solicitors for respondent: *Griffin, Montgomery & Smith.*

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ANDERSON AND CRAIG *v.* MCNAIR LUMBER AND SHINGLES LTD.

ANDERSON AND CRAIG v. McNAIR LUMBER & SHINGLES LIMITED.

Company law—Debentures—Trust deed—Delivery of debentures without resolution of directors—Future advances on strength of delivery—Knowledge of directors—Estoppel—Action to enforce trust deed.

The McNair Lumber Company being indebted to P. B. Anderson Limited in the sum of $90,000 and to P. B. Anderson personally as endorser for the company in an additional $40,000, the parties met and it was arranged that $200,000 should be raised on debentures secured by a trust deed on the whole of the company's assets. The debentures were duly issued, the trust deed executed and one *Craig*, the company's solicitor was named as trustee to whom the debentures were delivered under resolution of the directors of the company. The company found they could not sell the debentures and Anderson then asked one McNair, the managing director of the company to instruct the trustee to deposit the debentures with him (Anderson) as collateral security for the aforesaid indebtedness and for future advances. The trustee deposited the debentures with Anderson as instructed (although no resolution was passed by the directors authorizing same) and the company proceeded with its business for another year during which time Anderson continued to make further advances. The business proving a failure, Anderson requested the trustee to take proceedings to enforce the trust deed and judgment was obtained for the appointment of a receiver, for the taking of accounts and that the property be sold.

Held, on appeal, affirming the decision of GREGORY, J., that although the resolution requiring the trustee to deliver the debentures had not been passed by the directors, this irregularity is waived and the defendant is estopped from setting it up as the directors must be assumed to have had knowledge of their business and were aware that advances had been made to the company by Anderson on the faith of the pledge.

Held, further, on the contention that a pledgee of debentures has no right to foreclose them, that here the pledgee is not seeking to foreclose the debentures, but to enforce its security by requiring the trustee to enforce the trust deed in the usual manner, the trustee having the discretion when he thinks the circumstances justify, to enforce the deed in the interests of those who hold the debentures.

Statement

APPEAL by defendant from the decision of GREGORY, J. of the 31st of May, 1928, in an action for an accounting of what is due from the defendant to the plaintiff Anderson as holder of bonds issued by the defendant and as such entitled to the benefit of an indenture of the 1st of November, 1926, made between

the defendant and the plaintiff *Craig,* to have the trusts of said indenture carried into execution under order of the Court and for a receiver. In October, 1926, the defendant was indebted to P. B. Anderson Limited in the sum of $90,000 and to P. B. Anderson personally in an additional sum of $40,000 as endorser of certain promissory notes given by the defendant in favour of one C. A. Mauk. The parties met and it was agreed that the defendant should borrow money on debentures secured by a trust deed on the whole of its assets. The directors of the company then passed a resolution providing that $200,000 should be borrowed on debentures as aforesaid and McNair, the managing director of the company, employed the plaintiff *Craig* to prepare the bonds and trust deed, said *Craig* being made the trustee. The defendant tried to sell the debentures but not being able to do so, McNair, at Anderson's request, instructed *Craig* to deposit the debentures with Anderson as collateral security for the aforesaid indebtedness. Anderson then made further advances to the defendant and the business continued for another year, but not being a success Anderson requested the trustee to take proceedings to enforce the trust deed. Judgment was obtained for the appointment of a receiver, that accounts be taken, and that the trust property be sold.

Statement

The appeal was argued at Vancouver on the 23rd and 26th of November, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Woodworth, for appellant: We say the bonds are not the property of Anderson and he has no *status* to bring the action. They were pledged and not assigned or mortgaged; further there was no resolution of the company to deliver the bonds to Anderson: see *The Odessa* (1916), 1 A.C. 145 at pp. 158-9; *Carter* v. *Wake* (1877), 4 Ch. D. 605. He can only sell the debentures, they being secured by the trust deed. The defendant is the holder and by this action it is suing the holder on behalf of the holder: see *Fraser* v. *Byas* (1895), 11 T.L.R. 481; *Stubbs* v. *Slater* (1910), 1 Ch. 632 at p. 639. If a deposit of stock is made it is treated as a mortgage: see *Donald* v. *Suckling* (1866), L.R. 1 Q.B. 585. The bonds must become due before

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there is the right of action. There is no default as they were never presented for payment where payable: see *Thorn* v. *City Rice Mills* (1889), 40 Ch. D. 357. In fact the bonds were never pledged as McNair had no authority to hand them over: see Stiebel's Company Law and Precedents, 2nd Ed., Vol. I., p. 357; *George Whitechurch, Limited* v. *Cavanagh* (1902), A.C. 117; *Cartmell's Case* (1874), 9 Chy. App. 691; *Horn* v. *Henry Faulder and Co. Limited* (1908), 99 L.T. 524. They cannot say this was "indoor management": see *Tyne Mutual Steamship Insurance Association* v. *Peter Brown & Others* (1896), 74 L.T. 283; *In re Bridport Old Brewery Company* (1867), 2 Chy. App. 191; Stiebel's Company Law and Precedents, 2nd Ed., Vol. I., pp. 432-3; *Howard* v. *Patent Ivory Manufacturing Co.* (1888), 57 L.J., Ch. 878.

Craig, K.C., in person: In October, 1926, the parties met. Anderson was owed large sums by the defendant and the object was to secure the debt. It is admitted we had no resolution of the company authorizing the handing over of the debentures. The debentures were issued and are a charge on the company's property and the pledgee is not bound to find out whether a resolution was passed by the company: see *Royal British Bank* v. *Turquand* (1855), 5 El. & Bl. 248; *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382; *McKnight Construction Co.* v. *Vansickler* (1915), 51 S.C.R. 374. There is nothing to shew that either Anderson or myself knew that a resolution had not been passed. The innocent purchaser of bonds must be protected. That we are entitled to a declaration that the debentures were validly pledged see *Guaranty Trust Company of New York* v. *Hannay & Company* (1915), 2 K.B. 536; *Hulton* v. *Hulton* (1916), 2 K.B. 642 at pp. 656-7. A resolution authorizing borrowing is authorizing a pledge: see Lindley's Law of Companies, 6th Ed., Vol. I., p. 291; Leake on Contracts, 6th Ed., 422; *In re Inns of Court Hotel Co.* (1868), L.R. 6 Eq. 82; *In re Patent File Company. Ex parte Birmingham Banking Company* (1870), 6 Chy. App. 83; *Howard* v. *Patent Ivory Manufacturing Company* (1888), 38 Ch. D. 156 at p. 169; *Seligman* v. *Prince & Co., Lim.* (1895), 2 Ch. 617. The appointment of a managing director is tantamount to his having

the powers of the Board: see *Mid-West Collieries Co.* v. *McEwen* (1925), S.C.R. 326. A pledgee has all the rights of an owner until paid in full and where the bonds are pledged the action is brought by the trustee: see *In re Regent's Canal Ironworks Co.* (1876), 3 Ch. D. 43; *Robinson* v. *Montgomeryshire Brewery Company* (1896), 2 Ch. 841. The notes outstanding are demand notes and are payable at once without any demand: see Leake on Contracts, 4th Ed., pp. 453 and 610; *Norton* v. *Ellam* (1837), 2 M. & W. 461; *Maltby* v. *Murrells* (1860), 5 H. & N. 813; *In re George. Francis* v. *Bruce* (1890), 44 Ch. D. 627 at p. 631; *Jackson* v. *Ogg* (1859), 5 Jur. (N.S.) 976; 70 E.R. 476. The trustee can bring action, even if there are no arrears or default, if the property is in jeopardy: see *McMahon* v. *North Kent Ironworks Company* (1891), 2 Ch. 148; *In re Victoria Steamboats, Limited. Smith* v. *Wilkinson* (1897), 1 Ch. 158; *In re London Pressed Hinge Company, Limited. Campbell* v. *London Pressed Hinge Company, Limited* (1905), 1 Ch. 576; *In re Carshalton Park Estate, Limited* (1908), 2 Ch. 62. Apart from the notes Anderson is entitled to relief through the trustee: see *Ascherson* v. *Tredegar Dry Dock and Wharf Company, Limited* (1909), 2 Ch. 401. That the debentures were not presented for payment, this was not raised in the defence: see marginal rule 210, but *In re Harris Calculating Machine Company* (1914), 1 Ch. 920 is an answer to it.

Argument

Tysoe, for respondent Anderson: The appellant is estopped from claiming that the company did not ratify the pledging of the bonds as on the strength of this Anderson continued to lend the company large sums and the directors had full knowledge of what had been done.

Woodworth, in reply, referred to *Trottier* v. *National Manufacturing Co.* (1912), 3 W.W.R. 383; *McCutcheon* v. *Wardrop* (1919), 1 W.W.R. 925.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant (defendant) was indebted to P. B. Anderson Limited in the sum of $90,000, and to P. B. Anderson personally as endorser for the defendant to

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the amount of $40,000. In October, 1926, the parties met and it was agreed that defendant should borrow money on debentures secured by a trust deed on the whole of defendant's assets. It was expected that these debentures would be saleable and that the proceeds derived from their sale would be used in paying off creditors and providing a fund for continuing the defendant's business. The directors of the company passed a resolution providing that $200,000 should be borrowed on debentures secured as aforesaid. The debentures were duly issued and the trust deed executed, in which the respondent, Mr. *C. W. Craig* was named as trustee. The deed provided that the debentures after execution thereof by the directors, should be delivered to the trustee and should be certified to by him from time to time as required by resolution of the directors and should be returned to them or delivered to their order.

The defendant had finally to admit the impossibility of selling any of the debentures, whereupon at the request of Anderson, defendant's managing director J. A. McNair, instructed the trustee, who had certified to the same, to deposit the debentures with Anderson as collateral security for the indebtedness aforesaid and to secure further advances. Thereafter advances were made by Anderson, and the business was continued for the period of one year.

The parties then realized the hopelessness of carrying on further and Anderson requested the trustee to take proceedings to enforce the trust deed, and judgment was obtained for the appointment of a receiver and ordering the accounts to be taken and the trust property to be sold.

The questions for decision therefore, are: Could these debentures be pledged as security for debts, if so, were they validly pledged? If not, are the directors estopped from disputing the validity of the pledge and, lastly, is the procedure to enforce the trust deed properly taken at the instance of a pledgee or by the trustee himself? It is clear enough on the authorities that the directors had power to pledge the debentures notwithstanding that their purpose was the borrowing of money. Did the Board authorize the pledge in question? It is admitted that the resolution requiring the trustee to deliver the debentures to the Board

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had not been passed, it was therefore contended that this irregularity was fatal to the pledge. *Royal British Bank* v. *Turquand* (1855), 5 El. & Bl. 248, was relied upon by respondent's counsel, as well as the doctrine of estoppel. I have some doubt as to whether *Turquand's* case is applicable to the facts of this case. The trustee was Anderson's solicitor, and was called to the initial conference by the parties and acted for Anderson up to the point where it was decided to issue the debentures. He was requested by the appellant to prepare the trust deed and the debentures and to act as trustee, which he consented to do. I am inclined to think, although I do not find it necessary to decide the point, that in these circumstances *Turquand's* case is not applicable. I have, however, no doubt that the irregularity aforesaid was waived and that defendant is estopped from setting it up. The directors must be assumed to have had knowledge of their business. It is inconceivable that the directors were not aware that advances had been made on the faith of the pledge.

I come now to a question which was very strongly pressed by Mr. *Woodworth,* counsel for the appellant, namely, that the pledgee of debentures has no right to foreclose them. He cited in support of this contention *The Odessa* (1916), 1 A.C. 145, and *Carter* v. *Wake* (1877), 4 Ch. D. 605. The first case is valuable only as shewing that a pledgee of chattels is not the owner of them, the balance of the decision is founded upon international law and does not touch upon any question here in issue. *Carter* v. *Wake* is quite distinguishable from the present case. There the owner of a debenture of a railway company pledged it as security for a debt. It was held that the pledgee could not foreclose the owner, that his right was either to hold or to sell it. The reason for this is well stated by Jessel, M.R., in his reasons for judgment. The debenture in that case was secured also by a trust deed, so that the facts are analogous to those in evidence here. The only question there was the right of the pledgee to foreclose the debenture not his right to call for the enforcement of the trust deed. Here the pledgee is not seeking to foreclose the debentures, he is seeking to enforce his security by requiring the trustee to enforce the deed in the usual manner. It was not even necessary that he should demand that

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the proceedings should be taken since the trustee had himself a discretion, when he thought circumstances justified him, to enforce the deed in the interests of those who hold the debentures. The pledgee is not strictly a debenture-holder, but he unquestionably has an interest in them which entitled him to rank as a secured creditor. The language of Kay, J., in *Howard* v. *Patent Ivory Manufacturing Company* (1888), 38 Ch. D. 156 at p. 171, is of interest as shewing the attitude of the Courts where a result which can be obtained in a round-about fashion ought to be obtained without such a device.

MACDONALD, C.J.A.

There were other points argued, but in my opinion they are not tenable, and therefore I find it unnecessary to refer to them in detail.

The appeal should be dismissed.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: On October 18th, 1926, the defendant was indebted to the plaintiff Anderson in the sum of approximately $90,000, and also to one Mauk in the sum of $40,000, upon which latter sum Anderson became liable by endorsement of notes given by the defendant to Mauk.

The defendant was the owner of and operated lumber and shingle mills at or near Vancouver, B.C. Most, if not all, of the indebtedness to Anderson was for logs sold the defendant. Anderson had been for some time pressing for security and finally on 18th October, 1926, Anderson, his solicitor *Craig* (the plaintiff) and McNair met and discussed ways and means of giving security. A mortgage to Anderson was proposed but McNair seemed disinclined to give this and it was finally decided that bonds to the amount of $200,000 should be issued secured by a trust deed on the defendant's property. McNair employed *Craig* on behalf of his company (he being the managing director) to prepare the bonds and trust deed, the cost being charged to the company. *Craig* was made the trustee. The evidence to my mind is quite clear that these bonds were to be deposited with Anderson as security for all the indebtedness to Anderson and Mauk, and also to cover future advances and

after some delay they were so deposited. The evidence of McNair and his witness that they were merely placed in his keeping and not pledged as security, is scarcely worthy of consideration. I therefore hold that Anderson is a pledgee of the bonds.

But Mr. *Woodworth*, counsel for defendant, says the bonds were not handed over to Anderson in accordance with the provisions of the trust deed. They could only be handed over by a resolution of the directors. It is admitted there was no such resolution. What took place was this: Since the agreement for the issuing of bonds had been reached Anderson had been making further advances of logs and pressing for the bonds to be handed over and finally, McNair informed him that the bonds were in *Craig's* office and he could get them from *Craig*. McNair also instructed *Craig* to hand them over according to *Craig's* evidence, which I accept. *Craig* certified to the bonds but did not obtain the resolution of the directors before handing over. It seems to me this objection is overcome in two ways: First, the passing of the resolution is a matter of indoor management. In the issuing of the bonds and preparation of the trust deed, *Craig* was not the solicitor of Anderson and his knowledge as to the necessity of the resolution could not be said to be the knowledge of Anderson, so that Anderson in accepting the bonds as a security for his debt would, I take it, be in no different position to what a purchaser of the bonds would be in being called upon to investigate whether a resolution had been passed. He received the bonds from the trustee, certified by the trustee and was entitled to assume that the necessary formalities had been complied with. If every purchaser of bonds had to enquire into these formalities it would be impossible to deal in bonds in the manner in which they are dealt with. But if I am wrong in assuming that *Craig's* knowledge could not be said to be the knowledge of Anderson, then there is the further answer. Anderson on the strength of the bond issue and deposit with him as security increased his account by further supply of logs by some $50,000 and monthly statements were rendered of these to the company. The evidence is that the directors were aware of these advances so that they had knowledge of the increase

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from time to time of their debt to Anderson, nevertheless they stood by accepting these logs and knowing they were being supplied as agreed upon by virtue of the pledged security with Anderson, and they are in my opinion estopped from now claiming that the bonds were not regularly pledged.

The question was also raised that while the company was empowered to borrow that did not include the pledging of bonds for past debts. This point was dealt with and decided adversely to this contention in *In re Patent File Company. Ex parte Birmingham Banking Company* (1870), 6 Chy. App. 83; *Howard* v. *Patent Ivory Manufacturing Company* (1888), 38 Ch. D. 156 at pp. 169-70, and *In re Inns of Court Hotel Co.* (1868), L.R. 6 Eq. 82.

A number of other objections were taken by Mr. *Woodworth* which I have considered, but do not think effective.

GALLIHER, J.A.

That leaves to be dealt with, what are the rights and remedies of Anderson as a pledgee? and whether *Craig* as trustee is warranted in bringing this action in aid of Anderson and as to what relief the Court should grant. GREGORY, J., before whom the case was tried, granted the relief prayed for.

Mr. *Woodworth's* submission is that as pledgee of the bonds by way of security, Anderson can only sell the bonds and has no right to call upon the trustee nor can the trustee come to his aid by bringing in the trust deed and instituting this action, and cites *The Odessa* (1916), 1 A.C. 145, and *Carter* v. *Wake* (1877), 4 Ch. D. 605. These cases are not, I think, applicable in the nature of the proceedings instituted here. Anderson would have the right to call upon the trustee to enforce the security for the bonds held by him, or the trustee might of his own motion take like proceedings for the protection of the bondholders. These proceedings are not for the purpose of foreclosing the bonds as in *Carter* v. *Wake, supra.*

I would dismiss the appeal.

MACDONALD, J.A.

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

Appeal dismissed.

Solicitor for appellant: *C. M. Woodworth.*

Solicitor for respondents: *J. F. Downs.*

IVEY v. SMITH.

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IVEY
v.
SMITH

Guarantee—Creditor and primary debtor deceased—Action by administratrix against guarantor — Guarantor's right to proof of non-payment—Failure of proof.

By agreement in writing, one Ivey, loaned one Hamilton, the sum of $400 for one year and the defendant agreed that if Hamilton did not repay said sum he would repay same to the said Ivey. Hamilton died shortly after the maturity of the debt, and Ivey died two years later. Ivey's wife as administratrix of his estate brought action against the guarantor for the amount of the debt. The only evidence submitted in proof of non-payment of the debt was that of the plaintiff, her sole information on the subject having been obtained from her husband prior to his death, and the action was dismissed.

Held, on appeal, affirming the decision of HOWAY, Co. J. (MARTIN, J.A. dissenting), that although the plaintiff swears positively that the debt was not paid it is apparent that her knowledge is derived solely from her deceased husband and as this is mere hearsay it should not have been admitted.

Statement

APPEAL by plaintiff from the decision of HOWAY, Co. J. of the 20th of June, 1928, in an action to recover the sum of $400. By agreement of the 8th of May, 1922, W. E. Ivey loaned one C. E. Hamilton $400, said sum to be repaid in one year from the date of the agreement, and the defendant covenanted and agreed with the plaintiff that if the said C. E. Hamilton failed to repay the said sum to W. E. Ivey as agreed, he would become responsible and repay said sum to the said W. E. Ivey. On the 17th of February, 1926, W. E. Ivey died and the plaintiff became administratrix of his estate. C. E. Hamilton had died previous to the death of Ivey. The plaintiff was the only witness called. She had no personal knowledge of the transaction but stated her husband had told her the debt was never paid and he considered bringing an action against the defendant for the above sum shortly before his death.

The appeal was argued at Vancouver on the 30th and 31st of October, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

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Argument

Gillespie, for appellant: This loan was made in 1922. The primary debtor is dead and W. E. Ivey who made the loan died early in 1926. We have proved the debt and once the debt is established it is presumed to exist until the trial: see *Jackson* v. *Irvin* (1809), 2 Camp. 48.

P. McD. Kerr, for respondent: It is his duty to establish that the debt has not been paid: see *Bank of Montreal* v. *Campbell* (1925), 3 W.W.R. 166; Odgers on Pleading & Practice, 8th Ed., 150. The evidence of the plaintiff should not have been received as she knows nothing of her own knowledge. The *Jackson* case is very old and has not been cited since 1858: see *Rex* v. *Faulkner* (1911), 16 B.C. 229 at p. 239.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff is the administratrix of the estate of her late husband, William E. Ivey. The deceased loaned one, Hamilton, now also deceased, the sum of $400; the defendant guaranteed the repayment of this sum, but owing to the death of plaintiff's husband and of said Hamilton, no legal proof of the non-payment of the debt by Hamilton was forthcoming at the trial. The plaintiff indeed, positively swears that the money was not repaid, but it is quite apparent from her own evidence that her knowledge was derived from her deceased husband, it was mere hearsay and not admissible.

The cases to which we are referred by Mr. *Gillespie,* plaintiff's counsel, do not assist her to any degree; they have no bearing upon the point at issue. The appeal must therefore be dismissed.

MARTIN, J.A.

MARTIN, J.A.: While I do not differ from my learned brothers in their view of the law governing this case, yet on the facts there is, in my opinion, sufficient in the circumstances to establish a *prima facie* case of non-payment by the debtor and therefore the surety is liable and so the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I cannot see my way clear to interfere with the judgment below, through failure of evidence. The appeal must be dismissed.

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IVEY v. SMITH

MACDONALD, J.A.

MACDONALD, J.A.: Because a debtor must seek out and pay his creditor, giving rise to the presumption that unless he proves repayment the debt will be treated as subsisting, it is sought to apply that principle to a different situation where three parties are concerned, *viz.,* creditor, primary debtor and guarantor. Here the creditor cannot prove that the debt is still unpaid. All she proves is that at one time there was a debt and as the debtor (who is dead) cannot assist with evidence we are asked to presume not as against the creditor but as against the guarantor that the debt is still unpaid. The guarantor however stands in a different position. The creditor can only compel him to pay on one condition, *viz.,* that the primary debtor failed to pay. If she cannot establish that fact (not by relying on a legal principle applicable to a different state of facts but by positive evidence) she cannot succeed against the guarantor. I think therefore the appeal must be dismissed. On the other point, I cannot agree that there is admissible evidence in the book to shew that the debt is still unpaid.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *W. D. Gillespie.*
Solicitors for respondent: *Craig, Parkes & Tysoe.*

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REX v. FITZPATRICK

REX v. FITZPATRICK.

Criminal law—Evidence—Child of tender years—Knowledge of nature of an oath—Criminal Code, Sec. 1003.

The competency of a child as a witness rests primarily with the trial judge who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath.

Statement

APPEAL by accused from a conviction by CAYLEY, Co. J. of the 8th of October, 1928, on a charge of indecent assault upon a female. The child upon whom the assault was committed was seven years old. She was called as a witness, and after being questioned, the learned judge concluding that she did not understand the nature of an oath, decided to take her evidence without her being sworn. Her brother, who was eight years old, after being examined as to his knowledge of an oath, was duly sworn before giving his evidence.

The appeal was argued at Vancouver on the 19th of November, 1928, before MACDONALD, C.J.A., MARTIN, and MACDONALD, JJ.A.

Argument

Fleishman, for appellant: The child was not properly examined as to her knowledge of the nature of an oath: see *Sankey* v. *The King* (1927), S.C.R. 436. On the question of corroboration the girl could have complained to Mrs. Sharples with whom she lived but did not say anything until her mother came home from the hospital some days later. She must complain on the first opportunity: see Russell on Crimes, 8th Ed., Vol. II., p. 2111; *Rex* v. *Harris* (1919), 3 W.W.R. 820; *Rex* v. *Williams* (1835), 7 Car. & P. 320; Roscoe's Criminal Evidence, 15th Ed., p. 173; Wigmore on Evidence, Can. Ed., Vol. III., p. 1821; *Trial of Braddon and Speks* (1684), 9 St. Tri. 1127; *Rex* v. *Gemmill* (1924), 43 Can. C.C. 360; *Rex* v. *Lamond*

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Argument

(1925), 45 Can. C.C. 200; *Rex* v. *O'Neil* (1916), 25 Can. C.C. 323.

DesBrisay, for the Cown: On a child being called there should be enquiry (1) As to knowledge of the nature of an oath; (2) as to the necessity of telling the truth; (3) as to sufficiency of the intelligence of the child to make a statement. There was sufficient enquiry as to the boy who was eight years old knowing the nature of an oath: see *Rex* v. *Armstrong* (1907), 15 O.L.R. 47; *Rex* v. *Harris* (1919), 12 Sask. L.R. 473.

Fleishman, replied.

Cur. adv. vult.

On the 8th of January, 1929, the judgment of the Court was delivered by

Judgment

MACDONALD, C.J.A.: The two principal witnesses for the prosecution were the victim of the alleged assault, a child of seven years, and another child a boy of eight years of age. The evidence of the former was received without oath, and while the foundation laid for its reception appears to me to be not quite satisfactory, yet I cannot say it was not sufficient to justify the exercise of the learned judge's discretion. The same may be said of the preliminary enquiry into the boy's comprehension of his obligation to tell the truth under oath. The following language of the Court in *Wheeler* v. *United States* (1895), 159 U.S. 523 at pp. 524-5, to which we were referred by my brother MARTIN, is illustrative of the judge's duty in this regard:

"The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath."

Much the same thing was said in *Sankey* v. *The King* (1927), S.C.R. 436 at p. 439, where the Chief Justice delivering the judgment of the Court, said:

"The learned judge made no enquiry as to the capacity or education of the girl in regard to her comprehension of the meaning, effect and sanction of an oath. . . . It is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness

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does, or does not, understand the nature of an oath, as it is to satisfy himself of the intelligence of such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds."

I have made these two excerpts because it frequently occurs that insufficient or at all events, unsatisfactory examinations are made when children of tender years are proposed as witnesses.

We do not, however, decide this appeal on the ground of insufficient examination by the learned judge into the fitness of these children to give evidence under oath, or without oath. We think on other grounds that the trial was most unsatisfactory, and that justice will be served by ordering a new trial.

New trial ordered.

Solicitor for appellant: *A. H. Fleishman.*
Solicitor for respondent: *A. C. DesBrisay.*

SALO *ET AL.* v. ANGLO-BRITISH COLUMBIA PACKING COMPANY LIMITED.

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SALO v. ANGLO-BRITISH COLUMBIA PACKING CO.

Contract—Canning company and fishermen—Agreement to sell fish exclusively to company—Sale of goods—R.S.B.C. 1924, Cap. 225, Sec. 11.

The defendant Company, through an agent, engaged a group of men to fish exclusively for the Company in a certain area on the terms that the Company would pay the men the same price for fish as "any other cannery" in the area; that they would be allowed free bluestone to treat their nets, four gallons of gasoline per week free to each boat, free mending twine and be furnished nets for the use of which one-fifth of the price paid for fish would be deducted, boats and line and all necessary equipment to be provided by the men themselves. The men proceeded to the fishing area but on their arrival demanded that they be paid 35 cents per fish. Upon the Company refusing to accede to this the men refused to fish and brought action for breach of contract. It was held on the trial that the contract was one for hiring and service, and the Company having repudiated, the plaintiffs were entitled to succeed.

Held, on appeal, reversing the decision of MACDONALD, J., that under the terms of the contract it was not one of service or employment but one for the sale of fish coming within section 11 of the Sale of Goods Act the requirements of which not having been complied with, the plaintiffs cannot recover.

Statement

APPEAL by defendant from the decision of MACDONALD, J. of the 6th of June, 1928, in an action for breach of contract to employ the plaintiffs as fishermen. In the Spring of 1925, the defendant Company employed one Hilton as its agent to find fishermen to fish for the Company in Kingcome Inlet and Knight Inlet. Hilton was instructed to employ the men on the terms that they would be paid the same price for fish as "any other cannery" in that area; that the fishermen would be allowed free bluestone to treat their nets; four gallons of gasoline per week free to each boat and free mending twine and the Company would furnish the nets for the use of which one-fifth of the price paid for the fish would be deducted but the fishermen were to provide themselves with boats and line and all other necessary equipment. Hilton employed the plaintiffs on the terms above outlined and as he was to act on behalf of the Company as "camp

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boss" while the fishing was in progress, he with the plaintiffs proceeded to Moore Bay where the Company had constructed and equipped a floating camp for the use of the fishermen during the fishing season. Upon their arrival at the camp a dispute arose as to the price to be paid for fish the fishermen insisting on a fixed price of 35 cents per fish. The Company refused to comply with this demand and the plaintiffs refused to fish.

The appeal was argued at Vancouver on the 5th, 8th and 9th of October, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, K.C., for appellant: The fishermen arrived at Moore Bay on the 9th of August, and on the following day they insited on getting 35 cents per fish. When the Company refused to accede to this the fishermen declined to fish. In order to succeed they must shew other canneries were paying 35 cents per fish, but it was not until the 14th of August that any other cannery was paying 35 cents. This was a contract for the sale of goods and they come within section 11 of the Sale of Goods Act: see *Atkinson* v. *Bell* (1828), 8 B. & C. 277; *Lee* v. *Griffin* (1861), 1 B. & S. 272 at p. 276; *Grafton* v. *Armitage* (1845), 2 C.B. 336; *Dixon* v. *London Small Arms Company* (1876), 1 App. Cas. 632; *Smith* v. *Surman* (1829), 9 B. & C. 561 at p. 573. The price to be paid is immaterial: see *Isaacs* v. *Hardy* (1884), 1 Cab. & E. 287; Pollock on Torts, 12th Ed., p. 79; *Farrell* v. *The "White"* (1914), 20 B.C. 576 at pp. 578-9; *Frewen* v. *Hays* (1911), 16 W.L.R. 253. Our position is that the plaintiffs repudiated the contract: see *Directors, &c., of the Midland Great Western Railway of Ireland* v. *Johnson and another* (1858), 6 H.L. Cas. 798 at p. 811.

Donaghy, K.C., for respondents: This was a contract for work and labour, and the statute does not apply. We were to go where and when we were ordered. We were to fish for them and we were under their control. Our exclusive services were tied up which is a strong indication of hiring. It is admitted that on the 14th of August canneries were paying 35 cents per fish. From the 9th of August preparatory work would keep us occupied until the 14th so that we would not fish until that date. On

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the question of whether this was a contract for sale of goods or a contract for work and material supplied or that these men were employees the cases referred to by appellant are not directly in point: see Benjamin on Sale, 6th Ed., p. 190; *Dixon* v. *London Small Arms Company* (1876), 1 App. Cas. 632. On the question of what is a servant see *Reg.* v. *Bailey* (1871), 12 Cox, C.C. 56. The essential feature is the labour contemplated which is that they were to fish for the defendant.

Mayers, replied.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The contract, if there be one, is that to be gathered from the correspondence, and in my opinion, no agreement of hiring is there disclosed. I would go further even, and say, that no contract of any kind is disclosed. The parties were never *ad idem.* They met on the 10th of August for the purpose of effecting an agreement but failed. The plaintiffs have therefore no cause of action.

The decision of this case covers the other cases which were made to depend upon it.

The appeal should be allowed.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: After a careful perusal of the evidence in this case I have—with respect to the views of the learned trial judge—come to the conclusion that what these fishermen contracted to sell to the defendants, was not their labour but the product of their labour when won from the sea. That product, in my opinion, was a chattel and Mr. *Donaghy,* counsel for the plaintiffs in this appeal, admitted if that were so he was out of Court.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal, in my opinion, should be allowed. It is clear as I look at all the facts and circumstances that the contract was one for the sale of fish—salmon—when caught. Now anterior to any fish being caught the respondents

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demanded that all fish caught by them and delivered to the appellant should be paid for at the inception of the fishing season at 35 cents per fish. And on the 10th of August, 1925, the respondents repudiated the contract and absolutely refused as requested by the appellant to proceed with fishing operations upon the basis of the appellant paying to the respondents the ruling price from day to day prevailing amongst the canneries then operating in the vicinity of Moore Bay. The demand made by the appellant upon the respondents was unquestionably in accordance with the contract or understanding come to between the appellant and the respondents and when it is considered that fish advanced in price to 90 cents and more during the season it is unquestionably made plain that the demand at the outset for a fixed price was not even in the interests of the respondents themselves. The situation undoubtedly was one of an agreement to enter upon fishing when the season opened, and to deliver the fish, the purchase price therefor to be the then ruling price prevailing from day to day, *i.e.*, the ruling price amongst the canneries in the vicinity of Moore Bay. In other words, it was not a contract of employment but one of the sale of fish only complete when delivery was made of the fish. *Dixon* v. *London Small Arms Company* (1876), 1 App. Cas. 632, Lord Penzance at pp. 652, 653, 654. "The contract was not of service but of sale. . . .": Lord O'Hagan at p. 657. "There was clearly no contract of hiring and service. . . .": Lord Selborne at p. 660. I do not think it at all necessary to canvass the evidence in detail. As I read it, it all points to the establishment of the arrangement being as contended for by the appellant, the contrary contention in my opinion is wholly unsupported upon a true analysis of the evidence and as already pointed out the contention of the respondents would operate against their best interests. This contention must be rejected it being against all the probabilities. In any case it being incontrovertible as I look at it, that it could only be said to be a contract or agreement for the purchase of fish yet to be caught, the respondents by their action in not proceeding to fish and making tender thereof to the appellant, upon their part put at an end any contract or agreement come to. That is, being a contem-

plated sale of goods, the respondents upon their part failed to do that which in law they were called upon to do.

The demand made upon the appellant by the respondents was a wholly unauthorizable demand and admitted of the appellant treating the contract or agreement previously entered into as being at an end and that was the stand taken by the appellant and advanced at this Bar.

To well understand that it was a contemplated sale of goods, *i.e.*, fish, it is only necessary to consider who had property in the fish when caught. Assuredly the fishermen who caught them became possessed of the property in the fish. That being the case it follows that the disposition of the fish to the appellant would be by bargain and sale the price to be the ruling price. Now, the respondents by their own action never proceeded to perform the contract upon their part, on the contrary, failed to fish and failed to make delivery of fish. It follows that the respondents were not in the position to enforce any contract or agreement having refused to proceed and carry it out this action being taken before even any fishing had begun. Even if it could be contended that the respondents were entitled at the outset and before entry upon fishing to have an initial price stated to them and agreed upon there is no evidence that on the 10th of August, 1925, that any cannery in the vicinity of Moore Bay was paying 35 cents per fish, so the demand made was an unwarranted demand. It was only when the fish were tendered or delivered that the price would be determined (see MARTIN, Lo. J.A. in *Farrell* v. *The "White"* (1914), 20 B.C. 576 at p. 579—"immediately upon the whales being brought into the station every man on the articles was entitled to credit on his wages for the amount of his lay").

MCPHILLIPS, J.A.

It is indeed regrettable that the respondents acted as they did. Their plain course was to enter upon their business, that was to fish, and producing the fish to the appellant, it would have been the duty of the appellant to accept the fish and pay the ruling price from day to day as the fish were delivered, the ruling price being the price prevailing amongst the canneries then operating in the vicinity of Moore Bay. Did the respondents proceed in this way, the only way under which the contract

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or agreement could be carried out? The answer must be No. It is common ground that the respondents did not do this. On the other hand what they did do was to make a demand wholly incompatible with the contract or agreement come to, that is, demanded a fixed price for the fish, *viz.*, 35 cents per fish before even entering upon their work to produce the fish for delivery. This was plainly not covered by contract. The appellant was quite entitled to refuse to accede to this demand and entitled to treat the contract or agreement at an end. With very great respect to the learned trial judge, I cannot agree in the conclusion at which he arrived, that the present case is one of breach of contract upon the part of the appellant, rather is it the repudiation and breach of contract of the respondents, and because of this the appellant was rightly entitled to treat the contract as at an end (*Adolph Lumber Co.* v. *Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306; (1919), 1 W.W.R. 823).

MCPHILLIPS, J.A.

I deeply sympathize with these respondents but it is to be remembered that the appellant after all preparation for the salmon run was left unsupplied with fish resulting in the closing down of the cannery for the season. The respondents unfortunately brought their loss upon themselves. In *Directors, &c., of the Midland Great Western Railway of Ireland* v. *Johnson and another* (1858), 6 H.L. Cas. 798, the Lord Chancellor (Lord Chelmsford) at p. 811, said:

"The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be in law."

I therefore would allow the appeal and dismiss the action.

MACDONALD, J.A.: The respondent in a test action on behalf of himself and fourteen other plaintiffs similarly situated claims damages for breach of contract to employ them as fishermen for the season commencing August, 1925. A difficulty with the pleadings arises as the contract therein alleged (partly verbal and partly in writing) was said to have been entered into in July or August, 1925, whereas in argument before us Mr. *Donaghy* for the respondents shifted the date to May and eliminated the writing. He submitted that this departure was adopted at the trial. I cannot find, from the course of the trial, that this should

MACDONALD, J.A.

be taken as established. However, in the view I have formed on a decisive point, it is not necessary to consider this feature because assuming a contract whenever formed and assuming (without deciding it) a breach by the appellant the respondent cannot succeed if he and his co-plaintiffs must be regarded as a body of men following a distinct and special occupation and disposing of the product of their labours, *viz.*, fish or "goods" to the appellant or to any one else in the usual course of trade. To overcome the requirements of the Statute of Frauds for a note or memorandum in writing (R.S.B.C. 1924, Cap. 225, Sec. 11) the Court must be convinced that the respondent was the servant or agent of the appellant and that the contract was not one for the sale of goods but for work and labour. If it is a contract whereby fish were to be caught and sold to the cannery at a fixed or at a variable price per fish, according to the market price, the respondent fails.

MACDONALD, J.A.

To determine the true relationship we look first to the contract. In doing so, I adopt the verbal contract as contended for by the respondent. The appellant—Anglo-British Columbia Packing Company Limited—engaged one Hilton as (I find) its agent to engage a group of men to fish for said Company in Kingcome Inlet and Knight Inlet in 1925. Hilton was also to act as "camp boss" while fishing was in progress. Following instructions from the appellant, Hilton was not only to engage the men but to define to them the terms of the engagement as previously outlined to him, *viz.*, that appellant would pay respondent the same price per fish as "any other cannery" in that area; allow the fishermen free bluestone to treat their nets; four gollons of gasoline per week free to each boat and free mending twine, appellant also to furnish the nets for the use of which one-fifth of the price paid for the fish would be deducted. Boats and line and all other necessary equipment were to be provided by the respondent and his co-plaintiffs. There were two other canneries in that area, *viz.*, Stump's cannery at Charles Creek and the B.C. Packers at Alert Bay. Hilton instructed the respondent that he and his fellow fishermen were to start to work about the 9th of August at Moorė Bay in Kingcome Inlet. They were to

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fish five nights a week, that being the full limit of time permitted by the regulations.

Whether the contract on its true interpretation means that the respondent should receive as much per fish "as any other cannery" in that area actually "paid" or "would pay" on and after the season opened or the same price "as other canneries" or a uniform price paid by all is not material on the point upon which I rest my judgment. It is not necessary to decide either if in fact, as respondent claims, 35 cents or a lesser sum was the amount they were entitled to receive as an initial price when the season opened nor yet whether the contract on this point was so vague as to be wholly illusory. I am, as stated, assuming the existence of the contract as contended for by respondent and the breach by appellant in deciding the legal relationship subsisting between them. All the incidents of the contract should be considered in determining that relationship. A servant is under the supervision, direction and control of his master. He has a well-recognized *status*. The respondent and his fellows were directed by the appellant as to the time when and the place where they should report for operations. Their method of fishing—if any different methods are followed—was left to themselves. They were expected—whether obliged to or not is not clear—to devote the whole of the fishing period to catching fish for appellant and it was "expected" that they would, under the contract, sell all their fish to the appellant or be liable to dismissal. It is the practice under such contracts—and close watching insures it—for the fishermen to sell all their catch to the cannery engaging them. To more particularly set out the incidents of the contract in respect to supervision and control I quote part of the evidence of the appellant's manager:

"Now, you employed Hilton to hire fishermen for you, didn't you? Yes.

"And this is true, is it not, that when the cannery supplies the nets that the fishermen are considered in the employ of that cannery and are subject to orders by the cannery management? Yes.

"That is correct? Yes.

"And the fishermen engaged in fishing for you, with your nets on a rental basis, would have to fish at all reasonable times, wouldn't they? Yes.

"And if he didn't you would take his net away from him, wouldn't you? When we had got some really good excuse for it.

"And once you take the net away from him he is finished in your employment? Eh?

"He is fired? Yes.

"So he has to work at all reasonable times? No, he hasn't . . . .

"Now, if you thought there were more fish in one particular part of Kingcome—what is this Inlet where Moore Bay is? Kingcome.

"Than in another part you would send him into that part, wouldn't you? I would go down and tell them about it and advise them.

"And they would have to go there, wouldn't they? No.

"What would happen if they didn't go? They would most likely lose on the catch.

"And you would take their nets away, too, from them? No . . . .

"Well, let us try to get together on this, because we are only wasting time. Supposing there are more fish in a part of Moore Bay than in another part, say, Kingcome Inlet and you say these two parts are two miles away. Now, if you told the fishermen to go down to this particular part and fish there you would expect them to do it, wouldn't you? No.

"Why not? Because those men might know there are as much fish in 'A' as there are in 'B.' . . .

"And if they didn't catch fish where they went—instead of going to your place what would happen? A fisherman is usually at liberty to go where he chooses himself. . . .

"You have fired fishermen before and have had them return your net? Oh, yes."

MACDONALD, J.A.

I quote this evidence to shew the nature of the alleged control to determine whether or not—as one element in the case—it represents the exercising of control pursuant to the powers an employer usually exercises over an employee. It is not very satisfactory evidence and in part self-contradictory. It is the evidence of a witness uncertain of his rights or at least vague as to the extent of those rights.

On that evidence and the principles of law applicable we have to decide where the ownership in the fish resides after they are caught if that is an element for consideration. Fish are of course capable of ownership. The rival contentions are as follows: The appellant submits that the subject-matter of the contract is the fish caught and it is the property of the respondent when caught and so remains until transferred to the appellant. The respondent contends that the catching of fish is only ancillary to the main feature of the contract, *viz.*, the labour of winning them and that labour was not primarily expended for the purpose of effecting a sale when in a state capable of delivery.

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It may be stated in another way, *viz.*, were these fishermen working for themselves or for the appellant when engaged in the physical act of fishing? If it is a contract for work and labour the fish belonged to the appellant at the moment of capture and in considering whether it is such a contract by a servant or agent of an employer we should bear in mind all the facts recited including the limited control exercised by appellant over respondent's operations. This latter observation is subject to the further view that in exercising the limited control outlined the appellant may have been stepping beyond his rights involving possibly legal consequences but without disturbing the true relationship. If it can be said that the contract was intended to create a situation where for a price certain chattels, *viz.*, the product of the sea, were to be transferred from respondent to appellant, chattels in which, until transferred the appellant had no property rights, no difficulty arises. It is a contract for the sale of goods. But what was the real intention? That intention may be derived in several ways. The appellant was to pay a certain price for each fish—it is so stipulated—not for the labour in winning them. If a fisherman's boat was wrecked through an act of God while in transit to the cannery and one-half the catch lost appellant would only pay for those delivered. It could not be contended that respondent could sue for the value of the fish lost, yet if it is a contract for work and labour in catching fish and the fish are the property of the appellant when caught the latter would have to pay for all. The fishermen have none of the characteristics of servants as usually understood. One can imagine a case of a servant universally recognized as such where certain conditions are added to the usual terms of employment, such as furnishing him with material to better perform his work (as in the case at Bar furnishing nets) giving him the appearance of an independent contractor yet his *status* as a servant remains. Here we cannot begin the inquiry in that way. Quite the reverse. The fishermen have none of the attributes of a servant performing work and labour. On the contrary, they have their own special and independent calling as separate and distinct as that of the canners. Their business is to catch fish. That is not a chattel on which work and

material is expended but they do expend skill and energy in capturing a chattel that will when reduced into possession find a ready market in adjoining canneries. If without a contract at all they sold all their catch to a cannery there would of course be no problem to decide. Is that situation changed because before starting out to prosecute their regular calling they arrange for a sale of their catch in advance and submit to terms it may be involving directions and a limited measure of control by their ultimate customer? I cannot think so. I think *Dixon* v. *London Small Arms Company* (1876), 1 App. Cas. 632, where somewhat analogous elements as in the case at Bar were interjected into the main contract, is of assistance. Notwithstanding the terms of the contract when carried out it resulted in the sale of chattels, *viz.*, fish at a set price for each and every fish delivered. That is the overriding consideration, and, to my mind, determines the question.

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Tiffin & Alexander.*
Solicitors for respondents: *McAlpine & McAlpine.*

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GARRISON v. THOMSEN & CLARK TIMBER Co.

GARRISON v. THOMSEN & CLARK TIMBER COMPANY LIMITED.

Practice—Costs—Contract—Breach—Judgment for damages and costs—Reference—Registrar finds no damages—Plaintiff enters judgment for costs of action and reference—Appeal from registrar's certificate—Marginal rule 987.

In an action for breach of contract judgment was given for the plaintiff with costs and the matter was referred to the registrar for the assessment of damages with a direction that the plaintiff might enter judgment for the amount so found with costs of the reference. The registrar found that no damage had been sustained and the plaintiff then entered judgment for the costs of the action and the reference. The defendant then applied to a judge in Chambers under marginal rule 987 which provides that "if . . . the plaintiff shall recover a sum not exceeding one hundred dollars if the action is founded on contract, or fifty dollars if founded on tort, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in the Court, or unless the Court, or a judge at Chambers shall, by rule or order, allow such costs." The application was dismissed.

Held, on appeal, reversing the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that as the plaintiff recovered nothing the difficulty here arises over the words in the rule "shall recover a sum not exceeding one hundred dollars" and to hold that the rule can only be applied to cases where a "sum" is recovered and is not broad enough to include one where nothing is recovered would defeat the object of the Legislature. The Court must look to the manifest object of the rule and the plaintiff should be refused the costs of both action and reference.

Statement

APPEAL by defendant from the order of MCDONALD, J. of the 6th of July, 1928, dismissing an application by way of appeal from the registrar's certificate on a reference to assess the damages to which the plaintiff was entitled under the judgment of MCDONALD, J. of the 31st of May, 1926, whereby the plaintiff recovered from the defendant such damages as he had suffered by reason of the wrongful rescission of a contract for the sale of certain poles and the costs of the action. Upon the reference being had before the registrar he found that no damage had been sustained by the plaintiff. The plaintiff then entered judgment for the costs of the action and of the reference.

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The appeal was argued at Vancouver on the 11th of October, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Mayers, K.C., for appellant: This is a question of the construction of marginal rule 987. There was a reference as to the damages to which the plaintiff was entitled and the registrar found that there was nothing due, so that under the rule the plaintiff can recover no costs: see *Keating* v. *Storey* (1911), 2 I.R. 109 at p. 111.

Argument

Walkem, for respondent: The judgment was a final judgment and he is now endeavouring to appeal from the judgment without bringing an appeal. He has now lost his right of appeal. Under the judgment we received the costs of the action. We are entitled to nominal damages for breach and the costs is a question of discretion: see *Beaver Lumber Co.* v. *Dolsen* (1915), 8 Sask. L.R. 231; *Scott-Elliott* v. *Hatzic Prairie Co.* (1913), 18 B.C. 668 at p. 674; *Ingram & Royle, Limited* v. *Services Maritimes du Treport, Limited* (1914), 3 K.B. 28; *Gibson* v. *Cook et al.* (1897), 5 B.C. 534; *Leonard* v. *Whittlesea* (1918), 13 Alta. L.R. 550.

Mayers, replied.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The learned trial judge found that there had been a breach of contract and gave judgment for the plaintiff with costs of the action. He referred the matter to the registrar for the assessment of damages and directed that the plaintiff might enter judgment for the amount so found together with the costs of the reference. He reserved nothing to himself. The registrar found that no damage had been sustained, and thereupon the plaintiff entered judgment for the costs of the action and of the reference.

The defendant might have appealed from this disposition of the costs, but instead he applied to a judge in Chambers under marginal rule 987, which provides that:

"If . . . the plaintiff shall recover a sum not exceeding one hundred dollars if the action is founded on contract, or fifty dollars if founded on

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tort, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in the Court, or unless the Court or a judge at Chambers shall, by rule or order, allow such costs."

The trial judge to whom the application was made dismissed it, holding that he had no power in the circumstances to deal with the costs. He apparently thought that the above rule was not applicable to the case because no sum had been recovered.

It would indeed be absurd if it were that the defendant should be in a worse position where nothing had been recovered than he would have been had $99 been recovered. The whole difficulty arises over the words "shall recover a sum not exceeding $100."

We then have to consider whether or not the object of the rule, being beyond the possibility of doubt, we should place a construction upon it which would lead to an absurdity and an injustice. Fortunately, we are not without authority upon that question. In *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627 at p. 634, Lord Hobhouse, delivering the judgment of their Lordships, said:

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"It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used. And they have set themselves to consider, first, whether any substantial doubt can be suggested as to the main object of the Legislature; and, secondly, whether the last nine words of sec. 1 are so cogent and so limit the rest of the statute as to nullify its effect either entirely or in a very important particular."

See also *per* Lord Esher, M.R. in *Barlow* v. *Ross* (1890), 24 Q.B.D. 381 at p. 389; also *The Queen* v. *Overseers of Tonbridge* (1884), 13 Q.B.D. 339 at p. 342, *per* Brett, M.R.

To hold that the rule can only be applied to cases where a sum is recovered and is not broad enough to include one where nothing is recovered would defeat the object of its authors, and I do not think the language so intractable as to justify the Court in closing its eyes to the manifest and unquestionable object of the rule.

The plaintiff should be deprived of the costs of both the action and reference.

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

GALLIHER, J.A.: The learned trial judge upon appeal to him from the certificate of the registrar as to costs, decided he had no jurisdiction to entertain the appeal.

Owing to the nature of the judgment pronounced 31st May, 1926, he was as trial judge *functus* but our rules provide that an appeal lies from the taxation of costs by the registrar to any judge of the Court, and as a judge of the Court he had jurisdiction to hear the appeal. By sending it back to the learned judge we would only incur unnecessary costs, as this Court on appeal can deal with the matter to the same extent as the judge below could and make the order he should have made.

As the judgment of 31st May, 1926, has not been appealed against we cannot deal with the question of the costs of the action as awarded, but I think the costs of the reference as dealt with in the said judgment are on a different basis. The order as to reference is as follows:

GALLIHER, J.A.

"And this Court doth further order and adjudge that it be and it is hereby referred to the district registrar of this Honourable Court at the City of Vancouver, B.C., to ascertain the amount of such damages and to certify the same:

"And this Court doth further order and adjudge that the plaintiff be at liberty to enter judgment for the amount of such damages so certified to be due to the plaintiff upon such reference, together with his costs of such reference to be taxed."

The reference was had and the damages certified to be nil. The result is that the plaintiff recovers nothing by way of damages upon the reference, and it seems to me to follow logically that he can recover nothing by way of costs of reference.

The direction is for liberty to enter judgment for the amount of damages certified as due upon the reference and no damages were certified. Having failed upon the reference the learned judge could never have contemplated giving costs in such an event. The event and the costs are interwoven and I interpret the order accordingly, *i.e.*, the recovery of costs is conditional upon the recovery of damages.

The appeal should be allowed and the taxing officer's certificate amended accordingly.

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MCPHILLIPS, J.A.: This appeal in my opinion, cannot succeed. The action was one for breach of contract and the respondent, the plaintiff in the action, succeeded at the trial, that is to say, the learned trial judge must be held to have so decided. In the learned trial judge's reasons for judgment we find this:

"It follows that, in my opinion, the Company was wrong in renouncing its contract in May, 1924."

Later on and the concluding words of the reasons for judgment we find this said:

"There will be judgment for the plaintiff with a reference to the registrar to ascertain the amount of the damages."

The formal judgment taken out and entered reads: [already set out in the judgment of GALLIHER, J.A.]

MCPHILLIPS, J.A.

It is common ground that no appeal was taken from this judgment. That being the case it is too late now to object that there was error in the learned trial judge in directing that the plaintiff do recover damages and the costs of the action, or the further direction that the plaintiff do have the costs of the reference. It is true the registrar later upon the reference reported that the damages were "nil." In this it is plain that the registrar erred in law, as with a breach of contract established the law is that the party in default, *i.e.*, the party guilty of a breach of contract is liable for at least nominal damages. In effect, the judgment is operative to carry out the law. What the learned judge did was in an anticipatory way to direct that the costs of the action and reference should be paid by the appellant and if the judgment was in error it should have been appealed against, that course not being adopted, it is futile to now contend otherwise.

The governing section as to the allowance of costs, being section 77, of the Supreme Court Act (Cap. 51, R.S.B.C. 1924), reads as follows:

"77. If in any action in the Court the plaintiff recovers a sum not exceeding one hundred dollars if the action is founded on contract, or fifty dollars if founded on tort, he shall not be entitled to any costs of suit, unless the judge certifies on the record that there was sufficient reason for bringing such action in the Court, or unless the Court or a judge at Chambers, by rule or order, allows such costs."

Here we have the Court expressly by order allowing the costs of the trial and the costs of the reference. The costs of the

reference are provided for by marginal rule 481, of the Rules of the Supreme Court, 1925, and reads as follows:

"In every action or proceeding in which it shall appear to the Court or a judge that the amount of damages sought to be recovered is substantially a matter of calculation, the Court or judge may direct that the amount for which final judgment is to be entered shall be ascertained by an officer of the Court, or of some person to be specially appointed for that purpose by the Court or a judge, and the attendance of witnesses and the production of documents before such officer may be compelled by *subpœna*, and such officer or other person may adjourn the inquiry from time to time, and shall endorse upon the order for referring the amount of damages to him the amount found by him, and shall deliver the order with such endorsement to the person entitled to the damages, and such and the like proceedings may thereupon be had, as to taxation of costs, entering judgment, and otherwise, as upon the finding of a jury upon a writ of inquiry."

It is therefore to be the same rule as to costs as "upon the finding of a jury upon a writ of inquiry."

Then we have marginal rules 976 and 977, of Order LXV., which read as follow:

MCPHILLIPS, J.A.

"976. Subject to the provisions of these Rules, the costs of and incident to all proceedings in the Court, including the administration of estates and trusts, shall follow the event, unless the Court or judge shall, for good cause, otherwise order: Provided that an executor or administrator, trustee or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, shall remain entitled to costs out of any estate or fund to which he would be entitled according to the rules hitherto acted on in Equity: Provided also that an appeal shall lie from any order by which the successful party has been deprived of costs to the extent of over two hundred and fifty dollars.

"977. When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall follow the event, unless the Court or judge shall for good cause otherwise order. And an order giving a party costs, except so far as they have been occasioned or incurred by or relate to some particular issue or part of his proceedings, shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, but the Court or judge, if the whole costs of the action are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment of such proportion thereof as the Court or judge shall determine."

I would refer to *Gibson* v. *Cook et al.* (1897), 5 B.C. 534. DRAKE, J., who delivered the judgment of the Court, said at p. 537:

"The fact that the learned judge ordered costs, which there was no necessity of doing, does not affect the question. His refusal to deprive the plaintiff of costs is not appealable."

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In my opinion, this Court, the Court of Appeal, has no jurisdiction to review the order for costs, firstly, because there is no jurisdiction in the Court, secondly, if there is jurisdiction, failure to appeal from the order as to costs in the judgment of the learned trial judge, itself concludes the matter. Unquestionably here we have a case entitling the plaintiff to nominal damages, and with nominal damages the event is in favour of the plaintiff, and we have the order of the trial judge giving costs with no appeal therefrom. In my opinion, in the interests of justice, no disturbance ought to take place of the judgment below. Further, it is my opinion the Court of Appeal is without jurisdiction to disturb the judgment below.

MCPHILLIPS, J.A.

Where there is a breach of contract nominal damages should be allowed. I would refer to *United Shoe Manufacturing Co. of Canada* v. *Brunet* (1909), 78 L.J., P.C. 101, Lord Atkinson at p. 107:

> "As the respondents have broken their contract, the appellants must, despite the finding of the jury that they sustained no damage, be entitled to nominal damages but to nothing more."

And further on in the judgment we find this language:

> "Judgment should be entered in favour of the appellants for nominal damages, say one dollar, and costs in both Courts."

I would dismiss the appeal.

MACDONALD, J.A.

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

Appeal allowed in part, McPhillips, J.A. dissenting.

Solicitors for appellant: *Lawson & Clark.*
Solicitors for respondent: *Burns & Walkem.*

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Contract—Breach—Sale of walnuts—Pleading—Breach of duty to employer (not a party)—Evidence of plaintiff's contract of hiring with employer —Admissibility.

In an action for breach of a written contract made with M. the defendant's agent, for the sale of 1,000 cases of walnuts the defence was raised that the plaintiff was guilty of a breach of duty towards his employer (a company dealing in walnuts) in entering into the contract, but as no fraud was alleged in this regard the paragraph on the plaintiff's application was struck out with leave to amend. The amended paragraph alleged that the contract was made by M. without authority and contrary to instructions and that he and the plaintiff fraudulently conspired together to bring about the contract, that the contract was procured by fraud and the plaintiff fraudulently obtained from M. a price lower than the market price of the goods. The trial judge refused to admit evidence of the plaintiff's contract of hiring with his employer and the jury found in favour of the plaintiff.

Held, on appeal, affirming the decision of MACDONALD, J. (MACDONALD, J.A. dissenting, would order a new trial), that the amended pleading after stating the respective duties of the plaintiff and of M. to their respective employers, alleges a fraudulent conspiracy, which is not an allegation of fraud upon the plaintiff's employers but upon the defendant, an allegation which was disposed of by the jury. Fraud must be distinctly pleaded and proven and as fraud is not alleged as against the plaintiff's employers evidence as to the plaintiff's hiring was properly rejected and the appeal should be dismissed.

Statement

APPEAL by defendant from the decision of MACDONALD, J. of the 13th of March, 1928, in an action for breach of contract. By contract in writing of the 2nd of September, 1926, the plaintiff purchased from the defendant 1,000 cases (55 pounds each) of Manchurian shelled walnuts at 24 cents per pound, shipment to be made from the Orient in December, 1926, to be delivered in Vancouver. The defendant failed to deliver the goods and the plaintiff claimed $5,500 being the difference between the contract price of 24 cents per pound and 34 cents per pound the market price at the time of the breach. At the time the contract was made the plaintiff was manager of the wholesale grocery department of the Hudson's Bay Company in Vancouver, his duties including the purchase of walnuts for

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his employer and one Mason was the defendant's agent in Vancouver with whom the plaintiff made the contract in question. The defendant alleged that the plaintiff and Mason in breach of their respective duties fraudulently conspired together to enter into this contract for the sale of walnuts at a price less than the market price at which the defendant was selling walnuts to their other customers.

The appeal was argued at Vancouver on the 24th and 25th of October, 1928, before MACDONALD, C.J.A., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Davis, K.C., for appellant: The learned trial judge improperly refused to allow in evidence of the plaintiff's contract of hiring with his employers which shewed that the plaintiff was guilty of fraud on the Hudson's Bay Company. The rule applies that a contract is voidable which involves a fraud on a third person: see Halsbury's Laws of England, Vol. 7, p. 392, sec. 813; Benjamin on Sale, 6th Ed., p. 561; Kerr on Fraud and Mistake, 5th Ed., p. 203; *Jackson* v. *Duchaire* (1790), 3 Term Rep. 551; *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549 at p. 551; *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha, and Telegraph Works Co.* (1875), 10 Chy. App. 515 at p. 526; *The Queen* v. *Justices of Great Yarmouth* (1882), 8 Q.B.D. 525 at p. 528; *Barry* v. *Stoney Point Canning Co.* (1917), 55 S.C.R. 51 at pp. 74 and 76; *Wanderers Hockey Club* v. *Johnson* (1913), 18 B.C. 367; *Sproule* v. *Isman* (1915), 8 W.W.R. 1133; *Williamson* v. *Hine* (1891), 1 Ch. 390 at p. 393; *Dean* v. *MacDowell* (1878), 8 Ch. D. 345 at pp. 351, 353 and 355; *Jones* v. *Linde British Refrigeration Co.* (1901), 2 O.L.R. 428.

Mayers, for respondent: The question of striking out the pleadings was before the Court: see *Maddison* v. *Donald H. Bain Ltd.* (1928), 39 B.C. 460. The cases to which the appellant refers do not apply to the facts in this case.

Davis, replied.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff sues for breach of contract

for the sale of 1,000 cases of walnuts. The defence was that the contract was made by the defendant's employee, Mason, without authority and contrary to instructions; that he and the plaintiff fraudulently conspired together to bring about the contract; that the contract was procured by fraud; that the plaintiff fraudulently obtained from Mason a price lower than the market price of the goods. All these defences were found against the defendant.

The appeal turns entirely upon the refusal of the trial judge to admit evidence of the plaintiff's contract of hiring with his employer, the Hudson's Bay Company; it turns on paragraph 10 of the amended statement of defence. There is no appeal from the verdict of the jury. Paragraph 10 differs from the original paragraph of the same number which was struck out, with leave to amend. As originally drawn it alleged that the plaintiff was guilty of a breach of duty towards his employer in entering into the contract. It however alleged no fraud in that connection and therefore it was struck out as shewing no defence to the action. Now, does the amended paragraph allege fraud on the Hudson's Bay Company? After stating the respective duties of the plaintiff and of Mason to their respective employers, it alleges a fraudulent conspiracy, which when the language is analyzed is not an allegation of a fraud on the Hudson's Bay Company but upon the defendant, an allegation which was also disposed of by the jury under other paragraphs of the amended statement of defence. If that be not its true meaning, then it is not a proper pleading of fraud. Fraud must be distinctly pleaded and proven and this paragraph does not distinctly allege a fraud on the Hudson's Bay Company. In my opinion it does not allege it at all. There is nothing there which amounts to anything other than an allegation of breach of the plaintiff's duty to his employer, not a fraudulent breach, and a conspiracy to defraud the defendant.

MACDONALD, C.J.A.

I think therefore, that the judge was right in rejecting the evidence. The most that was argued by Mr. *Davis* was that a contract tainted with fraud, even on a person not a party to the action, cannot be enforced against the other person to it by one who was a party to the fraud. There is *dicta* in *Harrington* v.

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Victoria Graving Dock Co. (1878), 3 Q.B.D. 549, to sustain this view. A mere breach of duty untainted by fraud is not enough.

If I should be wrong in this, I yet think, having regard to all the facts and to the verdict of the jury, that no substantial wrong was done by the exclusion of the evidence.

I would dismiss the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: If the issue of fraud against the Hudson's Bay Company had been raised upon the pleadings, I would think the authorities cited to us would support Mr. *Davis's* contention that the contract could not be enforced although the Hudson's Bay Company were no party to same if such fraud was established.

Paragraph 10 of the statement of claim is relied upon as raising that issue, but I am unable to so hold. The issue of fraud as against the defendant Company alone was submitted to the jury and negatived by them.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal raises a point of some nicety but when closely examined it is clear to me that the learned trial judge committed no error in law in rejecting evidence, or was in error in any respect in his charge to the jury, *i.e.*, I fail to find any misdirection or non-direction. There was advanced at the trial the contention on the part of the defendant, that the contract sued upon for the breach of which the plaintiff was claiming damages, was the outcome of a conspiracy between the plaintiff and the defendant's selling agent for the sale of goods (walnuts) at a price less than the market price in fraud of the defendant.

There was a further contention advanced at the trial on the part of the defendant, that the contract sued upon was entered into by the plaintiff in breach of his duty to his then employers, the Hudson's Bay Company, and in fraud of the Hudson's Bay Company, he having to devote his entire time to the business of his employers and to refrain from dealing personally in any kind of goods dealt in by his employers, and walnuts were of that

class, and it was submitted that so contracting rendered the contract sued upon unenforceable. The learned trial judge during the course of the trial ruled, as I understand it, that the allegation was at best nothing more than a breach of duty on the part of the plaintiff and did not disclose a good defence. With this ruling I entirely agree. Nevertheless the learned trial judge allowed in evidence generally which the defendant led at the trial in the attempt to establish fraud which would vitiate the contract and this all went to the jury, *i.e.*, the alleged conspiracy and fraud, and all this evidence was rejected by the jury in finding as they did a general verdict for the plaintiff. This verdict of course carries with it findings upon all the relevant issues in favour of the plaintiff, and against the allegation of conspiracy and fraud advanced by the defendant. In the result the contract sued upon has been upheld.

MCPHILLIPS, J.A.

The argument at this Bar travelled over a somewhat extensive field and the evidence was canvassed at some length, but in my opinion it is impossible to contend with any hope of success that there was not evidence before the jury which well entitled them bringing in the verdict they did. The issue of conspiracy and fraud went to the jury with a full and complete charge both upon the law and the facts. The one point that the learned counsel for the defendant Mr. *Davis,* in his very able argument, greatly stressed and the point that occurred to me, the learned counsel most relied upon was the rejection by the learned trial judge of the contract between the plaintiff and his employer, the Hudson's Bay Company, *i.e.*, the contract shewing the terms of his employment. In my opinion, the rejection was proper, it was not relevant evidence. The Hudson's Bay Company is not a party to this action, in any case the fact that the production of the contract would prove really went to the jury in that we find the learned trial judge in his charge, saying:

"In this connection, the defendant, after some recitals, alleges in its pleadings that the plaintiff and Mason in breach of their respective duties fraudulently conspired together to enter into this contract. . . ."

The breach of duty that the contract would have established would be as I have previously pointed out, that the plaintiff was to devote his entire time to the business of the Hudson's Bay Company, his employer, and to refrain from dealing personally

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in any kind of goods dealt in by his employer. This all went to the jury and I cannot see that the rejection of the contract of employment between the plaintiff and the Hudson's Bay Company worked any prejudice to the defendant, even if it could be said to be relevant evidence in this action. The jury have rejected the defence that there was conspiracy and fraud and that really ends the case, and entitles the appeal being dismissed. However, in deference to the argument on behalf of the defendant, so strenuously made, I will at some further length deal with the question of law so much relied upon and that is that upon the facts of this case fraud was sufficiently established to admit of the action being dismissed and the appeal allowed, when it is established that the plaintiff entered into the contract sued upon in breach of his contractual duty to his employer, the Hudson's Bay Company, and that that was fraud which vitiated the contract. Further that it was not necessary that the Hudson's Bay Company should be a party to this action to entitle it being so declared. I must say that I cannot persuade myself that this is the state of the law. It is only necessary to refer to very trite law and that is that fraud only renders a contract voidable not *ipso facto* void. Again, if an agent, officer or employee under contract to not enter into contracts in his own name, nevertheless enters into them the principal may elect to adopt the contract as his own. In passing, I may say that in the present case the Hudson's Bay Company may elect to do so and become entitled to the damages allowed by the jury in this action. The fallacy that runs throughout the case as advanced on behalf of the defendant is that the contract sued upon herein had its origin in fraud and is unenforceable. As to that, again I point to the verdict of the jury. That verdict refutes any such contention; further, no evidence was led or tendered to establish any such fraud. I am aware, of course, that there are cases of public policy and cases where statute law intervenes, where without regard to the merits or demerits of the parties concerned, the Courts will hold a contract void, that is, where it is clear that the contract was entered into to defraud third persons. The contract in question here, in my opinion, is not such a contract.

In my opinion there is an insuperable difficulty in the way of

the defendant advancing anything as to the Hudson's Bay Company being defrauded as that Company is not a party to this litigation. I would refer to what Brett, L.J. said in *In re Ambrose Lake Tin and Copper Mining Co.; ex parte Moss* (1880), 49 L.J., Ch. 457 at p. 462, 2nd column:

" . . . the parties here suing are not the parties intended to be defrauded on this occasion."

Later on Brett, L.J., said, p. 463, 2nd column:

" . . . we cannot tell now whether anybody [here the submission is that it was the Hudson's Bay Company that was defrauded] has been deceived. Those persons are not before the Court. Therefore the remedy sought here is by the wrong persons and in the wrong form."

In the case cited by counsel for the defendant of *Barry* v. *Stoney Point Canning Co.* (1917), 55 S.C.R. 51, we find Mr. Justice Anglin (now Chief Justice of Canada) saying, at p. 76:

"In the same judgment in which he laid down the doctrine that the secret benefit to the agent must invariably be regarded as a bribe and the promise of it as a fraud, Lord Justice James added:—

" 'That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him.'

"These principles of equity, so far as I am aware, have never been departed from or questioned. They have, on the contrary, been frequently recognized, approved and applied."

MCPHILLIPS, J.A.

Here the alleged defrauded principal, the Hudson's Bay Company, does not come to the Court and may elect to adopt the contract and claim the damages awarded in this action to the plaintiff.

Upon the whole case my opinion is that it was well tried out, the jury were well instructed by the learned trial judge, and they have negatived the conspiracy and fraud alleged. I cannot persuade myself that anything has been advanced that would warrant the disturbance of the verdict of the jury and the judgment entered thereon.

I would dismiss the appeal.

MACDONALD, J.A.: The respondent recovered damages from appellant in the sum of $4,000 for breach of contract.

MACDONALD, J.A.

On the 2nd of September, 1926, he bought from appellant 1,000 cases of Manchurian shelled walnuts, each containing 55

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pounds at 24 cents a pound, shipment to be made from the Orient in December, 1926, and January and February, 1927. It was alleged that the contract was made verbally on September 2nd, but was not reduced to writing until October 17th when it was dated as of September 2nd. The appellant failed to deliver; hence the action. Respondent was manager of the wholesale grocery department of the Hudson's Bay Company in Vancouver. This company deals in walnuts (and purchased from appellant) but respondent entered into said contract as a private speculation on his own account.

MACDONALD, J.A.

Reference is made in the case to his honesty being impugned at the trial. If this employee of a trading company should be permitted to take advantage of the knowledge acquired while working for his employer (because buyers acquire special knowledge) the head of every other department, and indeed every clerk, might engage in trading in a similar manner with demoralizing results. I decline to look upon such conduct as anything but reprehensible. It is not as if he contracted to purchase a corner lot or any commodity disconnected with his agency. This is a surreptitious and fraudulent dealing in commodities similar to those dealt in by his employer by one who by his implied if not express terms of his employment was obliged to give all his working time and ability to advance his master's interests. One can easily fancy many evils that would ensue if such a practice were tolerated in the commercial world.

The point however is, does it vitiate the contract? I will be disappointed if I find it does not and that the respondent may pocket the fruits of this illicit deal.

The appellant is an incorporated company carrying on business as importers and dealers, with head office in Winnipeg and an office in Vancouver, where it was represented by two men Mason and Mitchell, the former manager, the latter in charge of sales. Appellant alleged that its two representatives fraudulently conspired with respondent to enable him to make a profit which he was not entitled to make. The motive can only be surmised. They either hoped to ingratiate their company with the Hudson's Bay Company's buyer for future business or had some secret understanding. I am not overlooking the verdict of

the jury. With deference, the case was not presented in its true light. In any event I feel free to reach a conclusion apart from the jury's finding for reasons later referred to. Mason and Mitchell knew it was respondent's duty to buy for his employer. They were therefore conferring a favour on the agent of another principal in the nature of a bribe. Whether it had that effect or not is immaterial.

The contract as stated, was dated October 17th but they all declared it was verbally arranged on September 2nd. The price of walnuts was much lower on the earlier date and a larger profit would thereby be obtained. If it was made on September 2nd it was put aside and I have no doubt that in the meantime market prices were closely observed. It is difficult to understand why a short contract (it only meant the filling in of a form) should not be signed for nearly two months when the parties were constantly in touch with each other. Mason and Mitchell had a memo. of it on their desks and they signed about a hundred other contracts in the meantime. Why was this one overlooked? The explanation does not explain. If prices went down it probably would not have been executed.

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Mason left Vancouver in September for Winnipeg and wired to Mitchell who was left in charge to make a report on sales over a stated period (including this period) and Mitchell in his report did not mention this contract. He addressed the telegram to Mason not to the office but to his hotel in Winnipeg. Newson, secretary of appellant Company in Winnipeg said that head office received no report of the sale. At this time the thousand cases for respondent were set aside so that they might, as I believe, fill it if market conditions enabled them to pass a profit to the respondent. The respondent on September 2nd knew that his employers, the Hudson's Bay Company, required walnuts for the coming season. It had to pay a cent a pound more for walnuts a little later. Respondent also got a favourable price from Mason, *viz.*, 24 cents. Mitchell testified that he told Mason he thought they should get a little more—from half to one cent—to which Mason replied " he was giving Maddison a better deal." Why? I feel at liberty to read between the lines basing inferences on admitted facts, and I think the jury would draw the

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same inferences if they had been (I say it with the greatest respect) fully instructed.

Mr. *Davis* submitted that the contract was unenforceable and that the principle of *ex turpi causa* should be applied. He urged that this agreement was a fraud on the Hudson's Bay Company. Respondent put himself in a position "inconsistent with the fair and unbiased discharge of his duties." His employer was entitled to his services and co-operation; not his competition. It was also alleged that under his contract with the Hudson's Bay Company he could not deal in any of the commodities his employer handled. If he did so the Company would be entitled to any profit he made and had it known of it could have prevented the transaction or obtained an injunction. If therefore the profit belonged to his employer respondent had no right to sue for it and it was a fraud on the Company to attempt to collect it for himself. In *Jones* v. *Linde British Refrigeration Co.* (1901), 2 O.L.R. 428, Moss, J.A. says at p. 432:

> "The general rule is clear that the profits acquired by a servant or agent in the course of or in connection with his services or agency belong to his master or principal."

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The contract between respondent and the Hudson's Bay Company was tendered at the trial but not admitted. Counsel for respondent contended that it was properly rejected and referred to *Maddison* v. *Donald H. Bain Ltd.* (1928), 39 B.C. 460, where on a question of pleadings this case was before us on an appeal from the order of Mr. Justice MORRISON striking out a part of the defence. The appeal was dismissed by a divided Court. The paragraph struck out however was vague and indefinite and did not specifically allege a written contract between respondent and the Hudson's Bay Company. It was dismissed because as my brother MARTIN said "the crucial statement is set up in such an indefinite and obscure way that it is impossible to found anything upon it," and further because it is not usual on appeal to set aside discretionary orders. Leave however was given to amend as appellant might be advised. If the contract is admissible (and I think it is) it could not be excluded by reason of the judgment referred to. Any evidence to shew that respondent could not legally make such a contract

was admissible. If it had been admitted and contained the terms intimated with the admitted facts in evidence the case might have been withdrawn from the jury. However, I think the duty of an employee to serve his master is established by the general law. In any event even if not withdrawn from the jury the admission of the contract would be an additional fact of considerable weight tending to lead the jury to a correct conclusion.

All contracts in fraudulent breach of a duty to a principal are voidable; *ex turpi causa non oritur actio*. This is true even if Mason and Mitchell were *in pari delicto* and unable to set up their own misconduct. It was not within the scope of their employment to debauch by such an agreement the servant of the Hudson's Bay Company. Even if within their authority and all were *in pari delicto* then *potior est conditio possidentis*. In *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549 at p. 551, Cockburn, C.J. says:

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"I entertain no doubt, however, that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another by some one who has contracted, or is about to contract, with the employed, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforcible at law, whatever the actual effect produced on the mind of the person bribed may be. The tendency of such an agreement as this must be to bias the mind of the agent or other person employed, and to lead him to act disloyally to his principal. It is intended by the party who promises the bribe to have that effect, and the other party knows such is his intention. Such a bargain is obviously corrupt. It would plainly be in contravention of the maxim *ex turpi causa non oritur actio*, and most mischievous to hold that a man could come into a Court of Law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not in fact damaged. It is sufficient that the consideration upon which the promise was made was intended to be a corrupt one."

These observations are applicable to the facts involved, and I am aware that it (and other cases cited) deals with a case where there was a contract with the employer and the Hudson's Bay Company was not a party to any contract nor a party to this action. The principle involved however (*ex turpi causa*) applies to any facts brought within it. Let us suppose that instead of presenting the respondent with a profitable contract appellant promised by written agreement to pay him $500 as a bribe to do some dishonest act disconnected with any agency. If

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appellant failed to pay could the bribee sue the bribor or would the fact that no agency intervened make any difference? I think not. The recipient of a bribe cannot enforce a contract founded upon a fraudulent act. The fraud is disclosed to the Court the moment respondent attempts to collect moneys not due him on a contract which could only be made in breach of his duty. If such a contract may be regarded as honest and permissible respondent could until found out and dismissed, contiuue to take all favourable contracts for his own profit (as he did in this case) and let his employer take others involving risks or leave them empty-handed. The practice if permitted opens endless avenues for fraud. It was respondent's duty first not to enter into it, and secondly, if he did so, to disclose it to his principal so that his employer might receive the benefit. He was bribed to depart from that duty by a profitable contract or at least one expected to be profitable. The form of the bribe is immaterial. It may be a profitable contract or a sum of money as a secret commission. Nor is it necessary to shew that Mason and Mitchell intended it as a bribe. Respondent could have no doubt of the impropriety of his act and it is respondent who sues.

Nor is it necessary to shew that damages ensued. The possibility of damage resulting is enough. As Field, J. stated in *The Queen* v. *Justices of Great Yarmouth* (1882), 8 Q.B.D. 525 at p. 528:

> "Nothing is clearer than that where an agent takes a reward from the other side, or puts himself in the position of having a personal benefit out of the matter in which he is acting for his employer, it is not necessary to shew any damage resulting, nor any bias in point of fact, it is enough to shew that he has put himself in a position that is inconsistent with the fair and unbiased discharge of his duties. The reason for this is plain, for it is impossible to measure the effect, great or little, that such a bias may produce."

If that is true when he is acting for his employer it is equally true where, as here, he should have acted for his employer. To hold otherwise would help perpetuate that "loose commercial practice" referred to by Field, J. in *Harrington* v. *Victoria Graving Dock Co., supra,* and quoted by Anglin, J. (now Chief Justice), in *Barry* v. *Stoney Point Canning Co.* (1917), 55

S.C.R. 51 at p. 65, a case which while again differing in its facts is in my view, similar in principle.

There is abundant authority for the principle enunciated by James, L.J. in *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha, and Telegraph Works Co.* (1875), 10 Chy. App. 515 at p. 526, *viz.*:

"According to my view of the law of this Court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this Court. That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him."

If the defrauded principal is entitled to rescind *a fortiori* the party who perpetrates the fraud cannot benefit by it. He knew he could not enter into it without breaking his own contract of employment. He cannot be allowed to profit by his own wrongdoing.

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Counsel for respondent submitted that the jury negatived fraud and that the foregoing considerations are no longer open. I have read the charge carefully and find that while fraud was defined to the jury in a general way the gist of the fraud was not mentioned. There is a reference in the charge to the alleged fraudulent conspiracy but no explicit reference to the principal fraud in the case. The jury could hardly appreciate the real point involved from the charge. His Lordship, with great deference, should have pointed out (assuming—with the contract admitted—that it is a case for the jury) the terms of the contract, the relationship of principal and agent existing between the Hudson's Bay Company and respondent; the fact that respondent had no right while in its employ to enter into competition with them in the purchase of walnuts, doubly so, as here, during business hours; that he sought a profit that did not belong to him; adopted a position inconsistent with his duties, and the various aspects of the transaction I have outlined. The jury could not otherwise intelligently pass upon it. Nor could they properly consider the branch of fraud submitted to them unless the facts were presented in their proper bearing to respon-

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dent's relations with his employer. I am aware that no objection was taken to the sufficiency of the charge, either at the trial or in the notice of appeal, but we are entitled to call attention to these features in considering whether because of the rejection of admissible evidence a new trial should be directed, so that these elements in the case may be placed before another jury for their guidance.

The appeal should be allowed and a new trial ordered.

Appeal dismissed; Macdonald, J.A. would order a new trial.

Solicitors for appellant: *St. John, Dixon & Turner.*
Solicitor for respondent: *Knox Walkem.*

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Constitutional law — Produce Marketing Act — Validity — British North America Act, 1867, Secs. 91 (2), 92 (13)—"Property and civil rights" —"Regulation of trade and commerce"—Transactions solely within the Province—Transactions between one within and another without the Province—B.C. Stats. 1926-27, Cap. 54—B.C. Stats, 1928, Cap. 39—Criminal Code, Secs. 496 and 498.

The defendant Chung Chuck was convicted of unlawfully marketing potatoes in the Delta Municipality without the written permission of the Mainland Potato Committee of Direction contrary to a regulation passed by the Committee of Direction under the authority of section 3 of the Produce Marketing Act. The Act is designed to regulate and control the marketing of certain produce—fruit and vegetables—and the Committee is given power to fix the quantity of products which may from time to time be marketed and the minimum and maximum prices to be obtained. On the return of a writ of *habeas corpus* with *certiorari* in aid the validity of the Act was questioned on the ground that it is an attempt to regulate trade and commerce which is exclusively within the jurisdiction of the Dominion Parliament. The application was dismissed.

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Held, on appeal, affirming the decision of MURPHY, J., that the marketing of produce is a trade or business carried on within the Province and the local Legislature in imposing restrictions upon it is dealing with the property and civil rights of individuals within the Province and concerns produce grown within the Province, and because it affects trading in the products of the farm or even regulates that domestic operation it is not "regulation of trade and commerce" as contemplated by section 91 (2) of the British North America Act.

Held, further, that to operate under an Act of the Provincial Legislature enabling producers to market the products of the soil by orderly methods and under such restrictions as will tend to insure a fair return, cannot be said to constitute an indictable offence under sections 496 and 498 of the Criminal Code.

In the case of *Rex* v. *Wong Kit* (reported 40 B.C. 424), in which the facts are precisely the same as in the case above, except that the potatoes were shipped to purchasers outside the Province, the defendant was acquitted on the ground that although the Act is *intra vires* it does not apply to transactions of an extra-territorial character.

Held, on appeal, reversing the decision of MACDONALD, J., that the grower is prevented by the Act from taking orders for the sale of produce within or without the Province without written permission, a transaction with a purchaser outside the Province being simply subsidiary and incidental to the main purposes of the Act which deals with "property and civil rights" and refers to matters "of a merely local or private nature in the Province." It cannot lose that character and be regarded as legislation dealing with "the regulation of trade and commerce" whether the produce shipped is contracted for within or without the Province.

The appeals in the cases of *Rex* v. *Sales Services Ltd.* and *Rex* v. *Associated Growers of British Columbia Ltd.* were allowed following *Rex* v. *Wong Kit* (1928), *ante*, p. 424.

Statement

APPEAL by defendants from the decision of MURPHY, J. of the 27th of August, 1928 (reported 40 B.C. 352) refusing to discharge Chung Chuck on the return of a writ of *habeas corpus* with *certiorari* in aid. On the 8th of August, 1928, the said Chung Chuck was convicted of unlawfully marketing potatoes in the Delta Municipality without the written permission of the Mainland Potato Committee of Direction contrary to the provisions of the Produce Marketing Act and the orders and regulations made thereunder said Delta Municipality being a locality in the Province where the provisions of said Act are in force. The application was based solely on the ground that the Act is *ultra vires* of the Provincial Legislature as being an infringement of the Canadian Parliament's power to regulate

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trade and commerce under section 91 (2) of the British North America Act. Specific regulation No. 1 made by the Mainland Potato Committee of Direction is as follows:

"No potatoes of any class, variety, grade, or size of the crop of the year 1928, raised within that part of the mainland of the Province of British Columbia which lies south of the 53rd parallel of latitude and west of the territory described in section 3 (1) (*a*) of the Produce Marketing Act and amending Act, including the islands of the delta of the Fraser River, are to be marketed without the written permission of the Mainland Potato Committee of Direction. Such permission, when given, will provide that all such potatoes for marketing are to be delivered to and dispatched from one of the following places, unless special permission in writing to do otherwise is granted by the Committee.

"City Market (Front St. level), New Westminster, B.C.; 119 Water Street, Vancouver, B.C.; 256 Georgia Street East, Vancouver, B.C.; Scott & Peden's Wharf, foot of Telegraph Street, Victoria, B.C.

"'Marketing' under the Produce Marketing Act means the buying or selling of a product, and includes the shipping of a product for sale or for storage and subsequent sale, and the offering of a product for sale and the contract for the sale or purchase of a product, save and except sales by a wholesale or retail store in the ordinary course of business, or the marketing of a product for consumption outside the Dominion of Canada."

Statement

The cases of *Rex* v. *Wong Kit*, *Rex* v. *Sales Service Ltd.* and *Rex* v. *Associated Growers* differed from the *Chung Chuck* case in that their produce was marketed in the Province of Alberta, whereas, Chung Chuck dealt with people in this Province. The accused in each of these cases was acquitted on the ground that the Legislature did not contemplate the application of the Act to transactions where one of the contractors resided in the Province and the other in other parts of the Dominion.

The appeal was argued at Vancouver on the 19th, 20th and 21st of November, 1928, before MACDONALD, C.J.A., MARTIN and MACDONALD, JJ.A.

Argument

Wood, K.C., for appellants: We are accused of marketing potatoes without the written consent of the Mainland Committee of Direction. The Produce Marketing Act is *ultra vires* of the Legislature: (1) It is not within section 92 of the British North America Act; (2) it infringes on Dominion Legislation, *i.e.*, trade and commerce and the Criminal Code; (3) the regulation under which the defendants were convicted is not authorized by the Act. The Act is designed to regulate and

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control the marketing of certain fruit and vegetables in the Province. The Mainland Committee is a subsidiary of the original committee. That it is not within section 92 see *Dobie* v. *The Temporalities Board* (1882), 7 App. Cas. 136; if not within section 92, the Province cannot deal with it: see *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at pp. 353 and 355; *Bonanza Creek Gold Mining Company, Limited* v. *Rex* (1916), 1 A.C. 566; *Canadian Pacific Wine Co.* v. *Tuley* (1921), 2 A.C. 417 at p. 422; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73; *Re Hudson's Bay Co. and Heffernan* (1917), 3 W.W.R. 167 at p. 169; *Gold Seal Ltd.* v. *Dominion Express Co., ib.* 649; *Gold Seal Ltd.* v. *Dominion Express Co.* (1920), 2 W.W.R. 761; *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), 1 A.C. 588; *Rex* v. *Ruddick* (1928), 49 Can. C.C. 323; *Gold Seal Limited* v. *The Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424 at p. 457; *In re Wallis and Moose Jaw* (1922), 2 W.W.R. 1251; *Rex* v. *Western Canada Liquor Co.* (1921), 2 W.W.R. 774; *Union Colliery Company of British Columbia* v. *Bryden* (1899), A.C. 580; *In re Employment of Aliens* (1922), 63 S.C.R. 293 at p. 331; *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), A.C. 561 at p. 567; *Owners of S.S. Kalibia* v. *Wilson* (1910), 11 C.L.R. 689 at pp. 697 and 701. On the segregation of the good from the bad see *Carrick* v. *Corporation of Point Grey* (1927), 38 B.C. 481; *The Employers' Liability Cases* (1908), 207 U.S. 463 at p. 502; *Brooks-Bidlake and Whittall Ld.* v. *Attorney-General for British Columbia* (1923), A.C. 450 at p. 457; *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1920), A.C. 184; *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96; Lefroy's Legislative Power in Canada, p. 559. As to the words "Regulation of Trade and Commerce" see *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (1922), 1 A.C. 191; Lefroy's Leading Cases in Canadian Constitutional Law, 113; *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396; *Rex* v. *Manitoba Grain Co., Ltd.* (1922),

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2 W.W.R. 113; *The King* v. *Eastern Terminal Elevator Co.* (1925), S.C.R. 434; *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1898), A.C. 700. Regulation No. 1 is not a regulation that the Mainland Potato Committee of Direction is entitled to pass.

Hogg, on the same side: This legislation is an infringement on sections 496 and 498 of the Criminal Code: see *Wampole and Co.* v. *Karn Co.* (1906), 11 O.L.R. 619; *Rex* v. *Elliott* (1905), 9 O.L.R. 648; *Dominion Supply Co.* v. *T. L. Robertson Manufacturing Co. Limited* (1917), 39 O.L.R. 495. The Committee lessen, restrict and prevent competition contrary to section 498: see *Taylor* v. *Mackintosh* (1924), 34 B.C. 56 at p. 60; *In re Constitutional Questions Determination Act and In re Section 100 of The Legal Professions Act* (1927), 39 B.C. 83; Lefroy's Legislative Power in Canada, p. 81; *Madden* v. *Nelson and Fort Sheppard Railway* (1899), A.C. 626 at pp. 627-8; *Stinson-Reeb Builders Supply Co.* v. *The King* (1928), S.C.R. 402; *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), A.C. 328; *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), 1 A.C. 588; *John Deere Plow Company, Limited* v. *Wharton* (1915), A.C. 330; *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396 at p. 409. That it is in restraint of trade and against public policy see *Weidman* v. *Shragge* (1912), 46 S.C.R. 1 at pp. 10 and 11; *Hilton* v. *Eckersley* (1855), 6 El. & Bl. 47 at p. 52; *Dominion Supply Co.* v. *T. L. Robertson Manufacturing Co., Limited, supra,* at p. 405; *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (1894), A.C. 535 at p. 565; *The King* v. *Cotton* (1912), 45 S.C.R. 469 at p. 510; *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Company, Limited* (1913), A.C. 781.

McPhillips, K.C., for respondent: Section 10 of the Act is for the support of fruit and vegetable raising in the Province. The legislation is within the jurisdiction of the Province under "property and civil rights." This is a legal compulsion and could not be brought under section 498 of the Code. As to the contention that the Act assumes to deal with subjects not

assigned to the Province, Acts are intended to apply to matters occurring within its realm and not beyond it and although the language of an enactment or the subject-matter may indicate an intention to the contrary the *prima facie* presumption holds and the statute applies only to acts within the realm: see *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), A.C. 328 at pp. 344-5; *Macleod* v. *Attorney-General for New South Wales* (1891), A.C. 455 at p. 459; *Moulis* v. *Owen* (1907), 1 K.B. 746 at p. 764; *Rosseter, executor of Hutton* v. *Cahlman* (1853), 22 L.J., Ex. 128 at p. 129; *Leroux* v. *Brown* (1852), 22 L.J., C.P. 1 at p. 3. As to the construction to be placed on the Act see *Attorney-General for Canada* v. *Attorney-General for Alberta* (1928), 3 W.W.R. 97 at p. 103. That this Act deals solely with property and civil rights in the Province see *North Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited* (1914), A.C. 461 at p. 469. The Act does not interfere with the Criminal Code: see *Regina* v. *Boscowitz* (1895), 4 B.C. 132 at p. 135; *Rex* v. *Western Canada Liquor Co.* (1921), 29 B.C. 499 at p. 505. Even if some of the goods go out of the Province it is not necessarily interference with "trade and commerce": see *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at pp. 111-3; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73. It is not criminal law and therefore we can pass it: see *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (1922), 1 A.C. 191.

Argument

Wood, replied.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.: The question in this appeal depends for its decision upon whether the Produce Marketing Act of the Province, which admittedly attempts to regulate trade and commerce in its narrow sense, is an infringement of the Canadian Parliament's undoubted power to regulate trade and commerce in its widest sense, *viz.*, the general regulation of trade and commerce affecting the whole Dominion or of interprovincial trade, as it is called in *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96.

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Regulation of particular trades or callings by Provincial legislation is permitted if it falls short of such infringement and the question whether it does or does not is, I think, a question of fact, being the question whether or not it unduly trenches upon the powers of the Dominion Parliament to regulate trade and commerce in the sense above referred to. It is a question to be determined by the Court in the light of the facts and circumstances of the case.

It is not in dispute that the marketing of fruits and vegetables in the localities to which the Act applies, was greatly in need of regulating, and that it was to provide for that need that the Act was passed. It established a Committee of Direction and gave them power in effect to dispose of the grower's produce as in their judgment the circumstances from time to time demand, and at prices fixed from time to time by them. These powers were granted with the evident intention of benefiting the growers by finding and stabilizing markets and preventing serious losses to them. I therefore do not think the Act interferes unduly with the general course of trade throughout the Dominion or goes the length of professing to regulate interprovincial trade. It was intended to be a good marketing Act and was passed with the *bona fide* intention of curing bad marketing conditions.

The transaction complained of in the *Chung Chuck* case was the marketing of produce with a person residing here. Mr. Justice MURPHY in a very able judgment disposed of that case by affirming the conviction of the accused. He did not deal with marketing outside the Province. In the other three cases the goods were marketed in the Province of Alberta, and Mr. Justice GREGORY and Mr. Justice W. A. MACDONALD affirmed, in the respective cases before each, the acquittal of the accused, though not questioning the correctness of the decision in *Chung Chuck's* case; they held that the Legislature did not contemplate the application of the Act to transactions where one of the contractors resided in the Province and the other in other parts of the Dominion. It follows from what I have said above that I am of opinion that the Act was *intra vires,* the grower being here.

The accused Chung Chuck was properly convicted and Wong Kit, the Associated Growers of B.C. Ltd., and the Sales Service

Limited were answerable for their offences against the Act and the orders acquitting them should be set aside.

MARTIN, J.A.: I agree with my brother M. A. MACDONALD in the disposition of these appeals.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from a judgment of Mr. Justice MURPHY in which he dismissed an application made by way of a writ of *habeas corpus* and *certiorari* to discharge the appellant from custody. Appellant was convicted of unlawfully marketing potatoes without the permission of the Mainland Potato Committee of Direction, contrary to the provisions of the Produce Marketing Act (B.C. Stats. 1926-27, Cap. 54, and 1928, Cap. 36) and regulations made thereunder. The application was based solely on the ground that the Act is *ultra vires* of the Provincial Legislature. The sale in question was made within the Province. The Act is designed to regulate and control the marketing of certain produce—fruit and vegetables. Its main scope is shewn in section 10, as amended in 1928. Briefly, a committee is given power "so far as the legislative authority of the Province extends" to fix the quantity of products which may from time to time be marketed and the minimum and maximum prices to be obtained. The purpose is to "feed the market" withholding or selling according to fluctuations of supply and demand, the demand presumably being governed by market conditions at least throughout Canada. The legislation is attacked on the ground (among others) that it is an Act for "the regulation of trade and commerce" within the exclusive jurisdiction of the Dominion Parliament. The short answer is that it deals with the property and the civil rights of individuals within the Province and concerns produce grown within the Province. Because it affects trading in the products of the farm or even regulates that domestic occupation it is not "regulation of trade and commerce" as contemplated by section 91 (2) of the British North America Act. The latter section as its wording signifies was intended to mean:

"Political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion":

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Citizens Insurance Company of Canada v. *Parsons* (1881), 7 App. Cas. 96 at p. 113.

This while not exhaustive suggests the general purport of the phrase. One should keep this view-point in mind, *viz.*, that what is meant is "general trade and commerce," and it then becomes apparent that when a Provincial Legislature confers authority to market Provincial products under certain restrictions it is not thereby attempting to regulate the trade and commerce of the Dominion of Canada. It is simply restricting a civil right. Unless such a limitation is placed on the words "the regulation of trade and commerce," a Province could not exercise the legislative powers assigned to it in respect to property and civil rights. Further, the marketing of produce is a trade or business carried on within the Province and the local Legislature may impose restrictions upon it. If any support is necessary for these principles it is found in the decision of the Privy Council in *Attorney-General of Canada* v. *Attorney-General of Alberta and others* [*Board of Commerce* case] (1921), 91 L.J., P.C. 40.

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It was also submitted that this statute trenches upon the powers of the Dominion Parliament, under heading 27 of section 91:

"The Criminal law except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters."

In other words, it is an attempt to exercise the jurisdiction of the Federal Parliament in criminal law. I cannot conceive any sound basis for this submission. The suggestion can have force only "if the subject-matter of the whole Act by its very nature belongs to the domain of criminal jurisdiction": Viscount Haldane in *Board of Commerce* case, *supra*, p. 47. It was urged that operations under the Act constitute an indictable offence under sections 496 and 498 of the Criminal Code particularly the latter section dealing with unlawful restraints on trade. Whether or not section 498 is *intra vires* of the Dominion Parliament, it cannot be said that to operate under an Act of the Provincial Legislature validly enacted enabling producers to market the products of the soil by orderly methods and under such restrictions as will tend to insure a fair return, is to commit

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a criminal offence within the meaning of section 498. Voluntary organizations of a like character without statutory support are not unknown in Canada. Section 14 (1) of the Act under consideration provides that:

"Where a committee fixes the price at which a product within its authority shall be marketed or sold, the committee shall have due regard to the interests of the person growing, producing, retailing, consuming, or using the product, so that the price fixed shall be fair and reasonable."

I do not say that this clause is necessary to save the Act but whether or not it is merely a pious assertion so long as this requirement is observed, there cannot be any "undue" interference with the natural flow of trade. Granted that the Act is *intra vires* following its provisions and acting under its sanction cannot constitute a criminal offence. If it is *intra vires* legislation and authorizes the very acts prohibited by section 498 of the Code then the latter is *ultra vires* of the Dominion Parliament. I can see no rational ground however for suggesting conflict. There is no intent to "unduly" limit the facilities for producing an article of commerce even though it may lead to under-production. There is no intent to restrict or injure trade in relation to farm produce. The purpose of the Act is to better conditions in an important industry. The object of traders in every line of industry is to secure as large a share of that trade as possible at remunerative returns. That is not unlawful. Although the word "unduly" is not used in section 498 (*b*) of the Code it is always a question of degree—restraint unjustified under all the circumstances—when specified acts come within it. The Act does not authorize the parties entitled to its benefits to "unduly" prevent or lessen competition. To my mind there is no conflict. The language referred to by the learned trial judge taken from the judgment of Viscount Haldane in *North Western Salt Company Limited* v. *Electrolytic Alkali Company Limited* (1914), A.C. 461 at p. 469, is apposite. The essential elements in criminal restraints of trade are absent from the intent and acts of individuals charged with carrying out the provisions of the Act. This is true whether the Act simply authorized or on the other hand, compels two or more persons to do the acts therein enumerated. It is not reasonable to place such an interpretation upon an Act intended to protect and safeguard an industry as

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would bring it within the ambit of the criminal law. It was also submitted that the Combines Investigation Act, R.S.C. 1927, Cap. 26, was validly enacted and that the Provincial Act in question is of similar import and therefore *ultra vires*. I content myself with the view that the Provincial Act was validly enacted without considering any implications which may arise therefrom.

The appellant contended that because some of the produce marketed must go outside the Province (although the produce sold in question in this action did not) the Act is *ultra vires*. I will deal with this point more fully in *Rex* v. *Wong Kit*. For the present I simply say that the Act not only affects property and civil rights but is also substantially a matter of "a merely local or private nature in the Province," *viz.*, the marketing of produce grown in the Province and because legislation dealing with a local matter must have an effect outside the limits of the Province, it is none the less within Provincial jurisdiction.

Objection was taken to the legality of certain regulations passed by the Committee of Direction. I do not think they go beyond the scope of the Act.

I would dismiss the appeal.

Rex v. Wong Kit.

Macdonald, J.A.

Macdonald, J.A.: In this appeal where the respondent was acquitted on two charges in respect to two transactions for breach of the Produce Marketing Act and amending Act we have in addition to the situation outlined in *Rex* v. *Chung Chuck*, the fact that the potatoes in question herein were shipped to the Province of Alberta. The purchasers in Calgary by telegram addressed to respondent in British Columbia, ordered a quantity of potatoes, and shipment was duly made in compliance with the order. No written permission of the Mainland Committee of Direction was obtained by respondent for these sales as required by the Act. The learned trial judge was of the opinion that the Act is *intra vires* but held that it did not apply to these transactions of an extra-territorial character. As the order was accepted here the contract was made in British

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Columbia and concerned a product produced in this Province. However as I view it—although it is not necessary to a decision—even if the offer to sell was made by the respondent and acceptance took place without the Province the result would not be different. If the Act deals with "property and civil rights" and refers to matters "of a merely local or private nature in the Province," it cannot lose that character and be regarded as legislation dealing with "the regulation of trade and commerce" whether the produce shipped dealt with by the Act is contracted for within or without the Province. It is substantially a Provincial "marketing Act" designed to regulate and control the sale of farm produce grown in this Province, *i.e.*, property within the Province. Marketing includes shipping and all other steps necessary to effect the exchange from the producer to the purchaser. The contracts in question also affect a particular trade or business within the Province. The property therefore is within the Province and it is the civil rights of citizens of that Province that are affected by the Act. There is no attempt to interfere with the civil rights of possible purchasers outside the Province. They are not subject to the provisions of the Act. Whether or not citizens of another Province may suffer or benefit from its operation their civil rights are not invaded. This is not necessarily to say that if the civil rights of parties outside the Province are in a measure affected the Act would be invalid. A Provincial tax may be valid although the burden might in part fall on persons or property beyond the Province. There are in fact many local Acts long regarded as valid which in some form affect the interests of residents outside the Province.

The objects of the Act are purely Provincial—conferring benefits upon, or if one wants to view it otherwise, imposing restrictions upon the liberty of citizens of this Province. Rights under it do not originate from outside sources. The Act is of such a character that its ramifications cannot be locally confined, but the rights it confers or interferes with enure solely to the benefit or detriment of residents within the Province. I think the underlying principles in *Workmen's Compensation Board*

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v. *Canadian Pacific Railway Company* (1920), A.C. 184 may be applied in these cases. Viscount Haldane at p. 191, said:

"The scheme of the Act is not one for interfering with rights outside the Province. It is in substance a scheme for securing a civil right within the Province."

The division of legislative powers Federal and Provincial cannot be separated into air-tight compartments more particularly with the growing complexity of modern business relations. In *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, the Act in question (The Manitoba Liquor Act of 1900) was held valid because it was of a merely local nature although in its operation it affected Dominion revenue and incidentally business operations outside the Province. The Act interfered to some extent with the inter-Provincial export and import trade in liquor. To quote Lord Macnaghten at p. 79:

" . . . in the opinion of this tribunal matters which are 'substantially of local or of private interest' in a Province—matters which are of a local or private nature 'from a Provincial point of view,' to use expressions to be found in the judgment—are not excluded from the category of 'matters of a merely local or private nature,' because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the Province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades."

The Provincial Legislature may pass legislation affecting a special branch of agriculture or a trade and business in the Province although however carefully drawn it will incidentally affect outside interests. The Legislature might if capricious prohibit trading in farm produce as well as in liquor and if so it can enact legislation imposing restrictions on that occupation. There is no attempt to prevent residents of another Province from trading in these commodities with growers in this Province; the only compulsion placed upon outsiders is that they must trade, if at all, with an industrial group regulated by local laws intended to promote the prosperity of a local industry. How can it be said that the civil rights of a resident of the Province of Alberta are affected because in dealing with producers in British Columbia he must take their products through certain channels locally created? Transactions beyond the Province are simply subsidiary and incidental to the main

purposes of the Act. Or viewing it in another light: the respondent is prevented by the Act from taking orders for the sale of produce within or without the Province without written permission. His civil rights only are affected whether he seeks to exercise them in respect to sales here or elsewhere. Once conceded that it is his civil rights alone that are invaded the nature or extent of the invasion subject to limitations already indicated is immaterial.

I would allow the appeal.

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MACDONALD, J.A.: The appeal should be allowed.

REX v. ASSOCIATED GROWERS OF BRITISH COLUMBIA LTD.

MACDONALD, J.A.: The appeal should be allowed.

Chung Chuck appeal dismissed; Wong Kit, Sales Service Ltd., and Associated Growers of British Columbia Ltd. appeals allowed.

Solicitors for appellant Chung Chuck: *Wood, Hogg & Bird.*

Solicitors for Mainland Potato Committee of Direction: *Reid, Wallbridge & Gibson.*

Solicitors for the Attorney-General of British Columbia: *Farris, Farris, Stultz & Sloan.*

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Damages—Negligence—Timber licences—Fire set by railway locomotive—Assessment of damages—Finding of trial judge—Appeal—Settlement of judgment—R.S.C. 1927, Cap. 170, Sec. 387 (2)—R.S.B.C. 1924, Cap. 39, Secs. 34 and *39 (3)*.

In an action for damages to timber by fire it was conceded that the fire was started by sparks from the defendant's locomotive but the defendant alleged that otherwise there was no negligence and they were entitled to the benefit of section 387 (2) of the Railway Act, limiting the damages to $5,000. Of ten timber licences held by the Mid-Lakes Timber Company, eight expired before the fire and were not renewed within one year under section 39 (3) of the Forest Act and one of the timber licences held by the Ontario-Slocan Lumber Company Ld. overlapped licences that had previously been issued. It was found by the trial judge that the defendant was negligent in failing to keep the right of way patrolled, that the locomotive was not equipped with efficient appliances and the defendant was liable for the loss resulting from the fire including the timber on the eight licences of the Mid-Lakes Timber Company that had expired before the fire, and the licence of the Ontario-Slocan Lumber Company Ld. alleged to have overlapped licences previously issued.

Held, on appeal, reversing the decision of MCDONALD, J., *per* MACDONALD, C.J.A. and MACDONALD, J.A., that the finding of negligence by the trial judge should not be disturbed but as to the eight licences of the Mid-Lakes Timber Company that had expired before the fire and were never renewed, as action was not commenced until 17 months after the fire, the Company had lost all interest in the licences before action and damages should be confined to the loss on the two remaining licences; further, the damages allowed the Ontario-Slocan Lumber Co. should be reduced by the amount allowed for the licence that overlapped two previous licences.

Per MARTIN and GALLIHER, JJ.A.: That the Company used modern and efficient appliances as to the locomotive, was not otherwise guilty of negligence, and the damages should be limited to $5,000 under section 387 (2) of the Railway Act.

On application to settle the judgment it was held that the judgment of the Court should be in accordance with the decision of MACDONALD, C.J.A. and MACDONALD, J.A.

Statement

APPEAL by defendant from the decision of MCDONALD, J. in an action tried by him at Nelson on the 27th to the 31st of

October and the 1st to the 7th of November, 1927, for damages to the plaintiffs' timber limits held under 10 timber licences near Summit Lake in British Columbia, by fire that originated near mile post 51 on the right of way of the Nakusp and Slocan Railway operated by the defendant Company, the fire starting from sparks emitted by the locomotive of a west-bound train which passed Summit Lake station at noon on the 15th of July, 1925. The plaintiffs recovered judgment for $130,000. The facts are sufficiently set out in the judgment of the learned trial judge.

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Burns, O'Shea, K.C., and *Ferguson,* for plaintiffs.
Hamilton, K.C., and *McMullen,* for defendant.

31st December, 1927.

McDONALD, J.: The plaintiffs sue for damages suffered by reason of a fire alleged to have been caused by the emission of sparks by a railway locomotive, No. 3134, operated by the defendant, upon its Kaslo-Slocan branch.

A considerable amount of evidence was offered on either side upon the question of whether or not the fire was so caused. I have no difficulty on the whole of this evidence in finding as a fact that the fire commenced on the defendant's right of way as a result of sparks emitted on the 15th of July, 1925, by such locomotive; nor in finding that the fire spread from such right of way on to the property of the various plaintiffs thereby causing serious damage.

MCDONALD, J.

The actions were consolidated under section 387 of the Railway Act, Can. Stats. 1919, Cap. 68. That section provides that whenever damage is caused to any property by a fire started by any railway locomotive, the company operating the railway on which the locomotive is being used, whether guilty of negligence or not, shall be liable for such damage; provided that if it be shewn that the company has used "modern and efficient" appliances, and has not otherwise been guilty of any negligence, the total amount recoverable in respect of any one or more claims for damage from a fire or fires started by the same locomotive and upon the same occasion, shall not exceed $5,000.

Inasmuch as the property loss in this case far exceeded that

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amount a great deal of time was taken up at the trial upon the question of *quantum* of damages, and upon the further question of whether or not the defendant Company had satisfied the onus which was upon it of shewing that the locomotive in question was equipped with "modern and efficient" appliances, and that the defendant Company had not otherwise been guilty of any negligence.

It is contended by the plaintiffs in the first place that the defendant was negligent in the failing to clear its right of way of debris. In this connection I think the plaintiffs have failed. I am satisfied on the evidence that the defendant Company took all reasonable precaution, having regard to all the circumstances, to clear its right of way.

It is further contended that the defendant failed to properly and carefully maintain a patrol to follow the locomotive in question. On this branch I think the plaintiffs succeed. Evidence was given by the defendant Company to shew that one Kovichik, a section foreman, had been assigned to patrol and did patrol the portion of the railway track where the fire occurred. This evidence I do not accept. I am satisfied that it was only occasionally, if at all, that Kovichik patrolled this section of the track, and I am further satisfied that he did not patrol the track after this locomotive had proceeded to Nakusp on the day in question. Having regard to the abnormally dry season, and the very great danger of the inflammable material in the vicinity of the railway track taking fire, it was, in my opinion, negligence on the part of the defendant Company in failing to maintain an efficient patrol following each engine.

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It is further contended that the locomotive in question was not equipped with "modern and efficient" appliances. On this branch the defendant Company submits, and offered evidence to establish, that it had obeyed order 362 of the Board of Railway Commissioners for Canada, and the regulations issued thereunder. One, Milne, the defendant's locomotive and car shops foreman at Kalso, was called to prove that during the season in question he had conducted a daily inspection of locomotive No. 3134, with a view to seeing that everything was in order, particularly in so far as the escape of sparks might be

concerned. Milne produced as evidence of the truth of his statements, a book in which he had entered from day to day the fact of such inspection having been made, and the hour and day when such inspection took place.

I am convinced from the cross-examination of this witness that the book in question was kept simply as a matter of routine, and that it did not contain a true statement of what had taken place in regard to inspections.

No evidence was offered by the plaintiffs that the appliances were not "modern," and I incline to the view that on the evidence offered by the defendant Company it ought to be held that the appliances on this locomotive were "modern," particularly having regard to the above-mentioned order and regulations, but I am satisfied that such appliances were not "efficient." This locomotive had emitted sparks which started fires on the Company's right of way at least on three other occasions during the same month of July, and it seems to me that a locomotive with that record is not equipped with "efficient" appliances.

It follows that, in my opinion, the plaintiffs are entitled to recover the damages which they suffered by reason of this fire.

MCDONALD, J.

The plaintiff, Allshouse, as a result of the fire lost personal property situate upon lots 10589 and 11759, of the value $5,321.85, upon which he collected insurance amounting to $250, whereby he suffered a net loss of $5,071.85, for which amount there will be judgment.

The plaintiffs, Allshouse and Alpsen, suffered the loss of various camp buildings situate upon lot 10589, of the value of $9,357, upon which they recovered insurance amounting to $2,250, whereby they suffered a net loss of $7,107, for which amount there will be judgment.

The plaintiff, Hunter, suffered the loss of certain timber on lands covered by timber licence 8802, and certain buildings upon lots 8507 and 435. The evidence offered by this plaintiff as to the loss of timber was not entirely satisfactory owing to the fact of his not having preserved any records. The best conclusion I have been able to reach is that his damages amount to $3,000, for which amount there will be judgment.

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The plaintiffs, Verigin and Postnikoff, suffered the loss of poles and timber lying in the bush upon the Hunter property above named. The evidence offered by these plaintiffs was not at all satisfactory for the reason that they had no records and the situation was made more difficult by their not understanding the English language. The best estimate of their loss which I have been able to make is to place it at $500, of which amount I place the stumpage value at $225. There will be judgment for the amount of $500.

The plaintiff, Ontario-Slocan Lumber Company, Limited, suffered loss of timber on the lands covered by timber licences Nos. 40309, 39222, 10555, 10552: I estimate the loss on these various limits as follows:

No. 40309	$19,500.00
Less received from McInnes in respect of portion purchased after the fire, namely	1,500.00
	$18,000.00
No. 39222	5,000.00
No. 10555	1,500.00
No. 10552	300.00
	$24,800.00

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It is contended that as to licence No. 40309 inasmuch as this licence overlaps other licences previously issued there can be no cause of action in respect thereof. I think this contention fails. As a matter of fact the plaintiff Company was in possession on the timber covered by this licence and sold after the fire the timber which had not been destroyed. This fact in my opinion brings the plaintiff within the principles of such cases as *Canadian Pacific Rway. Co.* v. *Kerr* (1913), 49 S.C.R. 33 and cases therein cited. See also Taylor on Evidence, 11th Ed., Vol. I., sec. 123:

"Proof of possession is presumptive proof of ownership. . . . This rule applies both to real and personal property. . . . In actions of trespass to real property, the presumption arising from the simple fact of possession amounts, as against a mere wrong-doer to conclusive evidence."

The plaintiff, Mid-Lakes Timber Company, Limited, were

the owners, prior to the fire, of ten timber licences, Nos. 8796, 8797, 8799, 8801, 11262, 11643, 11644, 11999, 12000, of which all except Nos. 8801 and 11262 had expired prior to the fire. In respect of the eight licences the defendant moved for non-suit upon the ground that the plaintiff possessed no proprietary interest in the timber upon the lands covered by such licences when the fire occurred, and therefore had no cause of action in respect thereof.

I dismissed this motion, and upon further consideration I adhere to the opinion I suggested at that time, that since, by virtue of the statute (Forest Act, R.S.B.C. 1924, Cap. 93, Sec. 39) the owner of a timber licence has an absolute right as against the world to apply for a renewal thereof at any time within one year after its expiry, the plaintiffs were, therefore, at the time of the fire, possessed of a right which was of value, namely, the right to pay the renewal fees and the required penalties, and thereupon to cut timber upon the lands in question. That right was, in my opinion, "property" within the meaning of section 387 (1) of the Railway Act. "Property" is defined in the Encyclopædic Dictionary as "that which is owned; that to which a person has a legal title whether it is in his possession or not." The value of that right was destroyed through the wrongful act of the defendant, and, in my opinion, the plaintiff is entitled to recover damages for the loss of it thereby sustained. While it may be said, that because the plaintiff had failed to renew its licences all its rights thereunder had lapsed, yet, as stated above, it still had the right to pay for and procure renewals; that right was a substantial right the value of which was at the date of the fire commensurate with the value of the timber, and was the sole property of the plaintiff as against everyone else including the Crown.

MCDONALD, J.

It follows that, in my view, the plaintiff is entitled to recover the loss sustained, which loss must be based upon the value of the timber destroyed.

A considerable amount of evidence was led by the defendant to shew that the timber on the lands covered by this plaintiff's licences, as well as that upon those covered by the licences owned by the Ontario-Slocan Lumber Company, Limited, was of no

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value whatever inasmuch as the cost of cutting, manufacturing and selling the same exceeded the market value of the manufactured product. In fact one witness, Mr. McNab, who has had long experience in lumbering in East Kootenay expressed the view that the fire instead of having caused a loss to these plaintiffs, was actually a benefit. This view was confirmed by Mr. DeWolf, a forestry engineer and cruiser of experience.

On the other hand evidence was offered by experienced lumbermen, some of whom are at present operating in West Kootenay, where the limits in question are situate, to the effect that the timber on these various limits could be cut at a profit, and that the pine timber was worth $3 per thousand, and other species $1 per thousand.

MCDONALD, J.

I prefer the evidence offered by the plaintiffs in this regard, and assess the damages suffered by Mid-Lakes Timber Company, Limited, at $116,690, of which amount I would assess the loss in respect of licences Nos. 8801 and 11262 (in case it should be held that these two licences stand on a different footing from the other eight licences) at $13,388.

The plaintiffs will have the costs of the action less a set-off of any costs thrown away by reason of the adjournment granted to the plaintiffs on the 5th of November, 1927.

The appeal was argued at Victoria on the 20th to the 29th of June, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

Mayers, for appellant: The fire starting on the 15th of July, 1925, was under control on the 16th, but broke out again on the 17th and got beyond control. It is admitted that the fire started from sparks from the engine but our submission is that we are entitled to the limitation of $5,000 under the Railway Act. If we use proper devices on the engine and are not otherwise negligent we are entitled to the benefit of the Act. The plaintiffs raise three objections: (1) That the right of way was not cleared; (2) that the engine was not properly equipped to prevent the emission of sparks; (3) there was not proper patrol of the line. We at the same time question first the title to the

timber limits; and secondly, the *quantum* of damages which involves the quantity and value of the timber. As to the patrol, the evidence shews the fire wardens were satisfied with the condition of the right of way and that the patrols were properly carried out. On the question of the weight of evidence on a negative or affirmative proposition see *Grand Trunk R.W. Co.* v. *Sims* (1907), 8 Can. Ry. Cas. 61 at p. 68; *Lefeunteum* v. *Beaudoin* (1897), 28 S.C.R. 89 at p. 93. As to the condition of the engine we complied with the regulation of the Board and of the statute, the appliances being both modern and efficient. The learned judge was wrong in assuming other fires emanated from this engine when there was no evidence of it.

Argument

Burns, for respondents: There has not been a strict compliance with the Act: (1) The condition of the engine was not kept up to the standard fixed by the Board; (2) there was no patrol and no force of fire rangers at all. In running an engine emitting sparks there must be sufficient patrol to stop fires and prevent damage: see *Higgins* v. *Comox Logging Co.* (1926), 37 B.C. 525 and on appeal (1927), S.C.R. 359; *Leger* v. *The King* (1910), 43 S.C.R. 164 at p. 176; *The North Shore Railway Company* v. *McWillie* (1890), 17 S.C.R. 511. The learned judge inclined to the view that the appliances were modern but they were not efficient. The patrol must work effectively and efficiently. The fire was allowed to catch and spread. This would not have happened if there had been proper patrol.

Mayers, in reply: The rules of the Board have a like effect as if in the Act: see *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81 at p. 97. If we have complied with the orders of the Board the Court will be satisfied. As to title, eight of the ten Mid-Lakes licences expired before the fire. Assignments of licences were never approved. There was overlapping and no evidence of priority of staking. In measuring damages the learned judge measured as though the plaintiffs were owners in fee. They had no legal right to the licences at all. All that was left was the right of renewal, and as to the eight licences the right of renewal had expired before the issue of the writ. Whatever interest they have is not an interest in land: see *Glenwood Lumber Company* v. *Phillips* (1904), A.C. 405 at

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p. 408; *Frank Warr & Co., Limited* v. *London County Council* (1904), 1 K.B. 713 at p. 721. At the date of the writ he had no right whatever: see *Wilson* v. *McClure* (1911), 16 B.C. 82 at p. 88. The two remaining licences were never renewed. The case of *Kerr* v. *Canadian Pacific Ry. Co.* (1913), 18 B.C. 389 at p. 391 and on appeal 49 S.C.R. 33 at p. 38 deals with damage to one in possession of the land and does not apply here. Their interest must be substantial: see *Twyman* v. *Knowles* (1853), 13 C.B. 222; *Rust* v. *Victoria Graving Dock Company, and London and St. Katharine Dock Company* (1887), 36 Ch. D. 113 at p. 119. The year of grace had expired on all ten licences.

McMullen, on the same side: On *quantum* of damages, they logged off these limits from 1910 to 1918 when they went to the wall and they have done nothing since. Prices for lumber were highest from 1917 to 1920. In the liquidation of the Company the assets realized nothing.

Argument

Burns, in reply: As to title all a licencee has is a right to cut and remove. After the fire took place renewal of the licences was impossible. Our interest is sufficient to maintain the action: see *Glenwood Lumber Company* v. *Phillips* (1904), A.C. 405; *Canadian Pacific Ry. Co.* v. *Kerr* (1913), 49 S.C.R. 33 at p. 39. On the question of patrol the order fixes a minimum of one round per day, but the only patrol here was after the passenger train, three times a week.

O'Shea, K.C., on the same side: On the question of overlapping, exhibit 52 which is the largest place of the entire area burned shews clearly that there was no overlapping.

Cur. adv. vult.

2nd October, 1928.

MACDONALD, C.J.A.: The separate actions involved herein were consolidated, but the damages were assessed separately, and are for the destruction of timber and chattels by fire.

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The fire started on the 15th of July, 1925, on defendant's right of way, and on subsequent days swept over considerable areas of timber lands in which the several plaintiffs claim to have been interested. It is now conceded that the fire was started by the defendant's locomotive engine, but as defendant

alleges, without negligence. It therefore claims the benefit of section 387 of the Railway Act, which when negligence is negatived limits the amount of damages to $5,000 in all.

The trial judge found the defendant negligent in failing to keep the right of way patrolled as directed by the Board of Railway Commissioners and their local officials, and also because of defects in its locomotive engine.

I do not find it necessary to consider the latter question because of the conclusion to which I have come on the first one.

The Company were ordered to patrol behind each passenger train, and acting thereon instructed each of its section foremen to patrol his own section, but it says that in July, 1925, its roadmaster Beck gave special instructions to the foreman of section 7, to patrol a few miles into section 8 where the fire started, thus relieving to that extent the regular patrolman for that section, Antoniuk. The fire originated at mile post 51 in section 8, which extends from mile post 48 east to mile post 56. One Kovichik, the foreman of section 7, immediately east of section 8, was, defendant alleges, given special instructions to patrol into section 8, and up to mile post 52, which he claims to have carried out. The learned judge however declined to credit him and said:

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"I am satisfied it was only occasionally, if at all, that Kovichik patrolled this section of the track, and I am further satisfied that he did not patrol the track after the locomotive had proceeded to Nakusp on the day in question."

On the question of liability, the case is simply whether or not the trial judge's finding of fact should be accepted. The law is well settled that since he has had the advantage of seeing the witnesses and observing their demeanour and of estimating the value of their evidence by the impressions made by their individuality which cannot be translated to paper, he will not be reversed on a question of credibility except for the gravest of reasons. It is certain that the learned judge did not act upon a wrong principle or under a misapprehension of the question to be decided. The onus was on the defendant to negative negligence in order to get the benefit of said section 387. There is no other evidence than that of Kovichik directly upon the point. No one saw him make the patrol on that day. Beck, the road-

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master, who was on the train saw him at Hills Siding in his own section, about to start, as he thought, to follow the train, but he did not see him afterwards. The evidence of Kovichik is, to say the least of it, badly expressed, which may be attributed to some extent to his foreign origin, but it is worse than that, it is contradictory in many respects, and unintelligible in others, as for example:

"Now, referring to this other matter, were you down at the little shack Sunday after the fire talking to Tom Allshouse and one or two others? Yes, I was at the shack.

"Were you talking about patrolling the day of the 15th—the day of the fire?"

which he finally answered—"Yes."

"Were you talking at all? I was talking that time, nobody patrolling. I don't think I say nobody on road, I am not sure because I can't remember sure who I talked with, I never in the shack that day, I was patrolling to 52 after I came back do my work."

In answer to the question—What did he really mean, one can only guess, and a guess is a very poor weapon with which to attack the trial judge's finding on the question of credibility.

When asked about patrolling to mile post 52, he said he had done so "sometimes," and that on that day he did patrol "pretty near" to 52.

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Beck admitted that patrolmen were to use their own discretion about going down grade, and that from Summit Station, which is a quarter of a mile east of the point of origin of the fire, the road goes down grade "one per cent. anyway." It was also admitted that the road between mile post 52 and mile post 56, which is down grade, was not patrolled at all. It is also admitted that the weather was very hot and dry. A spark from the engine would therefore ignite quickly one would expect. If Kovichik did as he claims, patrol to near 52, he would get to the point of origin of the fire 15 minutes after the spark had been emitted from the engine, yet he saw no sign of fire either in going out or coming back. This is a circumstance to which on a question of credibility the judge may well have given some weight.

Beck said that he instructed both these men with respect to Kovichik's patrol to mile post 52, yet Antoniuk says he did not even hear of Kovichik patrolling in section 8, his (Antoniuk's)

own section. Mrs. Drebret's evidence was cited in favour of defendant. Her house was east of Summit Station. Kovichik may have gone no farther than Summit Station and still have passed her house.

In my opinion the finding of negligence should not be disturbed.

I now come to the question of damages. With respect, I think the learned judge was in error in some of his conclusions. I refer first to the Forest Act, Cap. 93, R.S.B.C. 1924, under which the timber licences in question were issued. Section 34 enacts that:

"A special timber licence shall vest in the holder thereof all rights of property whatsoever in all trees, timber, and lumber cut within the limits of the licence during the term thereof."

Licences are issued for one year renewable from year to year. Under section 39, subsection (3) the defaulting licencee upon the performance of certain conditions may be granted a renewal at any time within one year of the expiry of the licence. These statutory provisions have an important bearing upon the Mid-Lakes Timber Company's claim for damages. That Company had been the holder of ten licences, eight of which had expired before the fire and have never since been renewed. Its action was not commenced until the 6th of December, 1926, seventeen months after the fire. In my opinion, therefore, it had before action lost all its interest in these eight licences and damages awarded in respect of them must be disallowed.

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The other two licences of this Company are in a different category. They were in existence at the time of the fire, but expired shortly afterwards and were not renewed. The plaintiff Company had at the time of the fire an interest in the timber embraced in the two licences which the defendant destroyed. They were allowed to lapse because the fire had destroyed their value, but be that as it may, the result is not affected one way or the other. A licencee is entitled to all trees cut and removed during the term. Had there been a definite limit to the term, that is to say, had there been no indefinite right of renewal the question raised but not decided in *Canadian Pacific Rway. Co.* v. *Kerr* (1913), 49 S.C.R. 33, would require consideration, but I do not think that I can say, having regard to the provisions

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of the Forest Act, that the Company's loss can be appraised at a value less than that of the timber destroyed.

The appellant's counsel made a point of the alleged failure of this Company to prove title to their licences, but I am convinced by the admissions made by him during the trial that that objection applied only to the eight licences aforesaid, and that the two now under consideration, namely, Nos. 8801 and 11262, were not included in the objection.

The judgment therefore in respect to these two licences should not be disturbed.

The evidence is not entirely satisfactory as the learned judge intimated but since it is conflicting, he was in a better position than I am to weigh it. The judgment in favour of the Company should be reduced to the sum of $13,388.

The next claim is that of the Ontario-Slocan Lumber Company Limited. Its licences were in existence at the time of the fire and with the exception of No. 40309, are in the same position as the two licences above mentioned. Licence No. 40309 is, I think, invalid. The learned judge referring to it, said:

"It is contended that inasmuch as this licence overlaps licences previously issued, there can be no cause of action in respect thereof."

He endeavours to overcome this difficulty by holding that the plaintiff was in possession and therefore had a good title as against a trespasser. It appears to me, however, that there was no actual possession in any one. The plaintiff had not operated under this licence for many years before the fire; it had merely got what purported to be a renewal of it from year to year. The previous licences mentioned by the learned judge were those or some of those, of the Mid-Lakes Timber Company already referred to. There was no possession in the sense in which that term is used in recognizing the title of the occupier as against the trespasser. No one was in actual possession, and the constructive possession, if any, was in the prior licensees. The damages therefore, applicable to this licence must be disallowed, and the plaintiff's judgment reduced by $18,000.

I would not interfere with those awarded in respect of the other licences of this Company for the reasons already given.

Damages were awarded severally to the other plaintiffs. The

learned judge had some difficulty in estimating them, but he was in a better position than I am to arrive at just conclusions, and I think he ought to be upheld.

All the respondents except the Mid-Lakes Company and the Ontario-Slocan Lumber Company have succeeded in the appeal, and should have the costs applicable to their successes. The two first-mentioned respondents have failed to maintain their claims in full, they should therefore pay the costs of the appeal applicable to the appellant's success.

MARTIN, J.A.: These consolidated actions for damage done by fire by a railway locomotive are based upon section 387 of the Railway Act, Cap. 170, R.S.C. 1927, and the learned judge below found that the fire had been started by such a locomotive of the defendant Company in use upon its railway the result being that the Company is liable for all damage occasioned by the fire unless it is entitled to the benefit of subsection (2) as follows:

"If it be shewn that the company has used modern and efficient appliances, and has not otherwise been guilty of any negligence, the total amount of compensation recoverable from the company under this section in respect of any one or more claims for damage from a fire or fires started by the same locomotive and upon the same occasion, shall not exceed five thousand dollars."

The finding of fact that the fire started as aforesaid was not contested at this Bar by the appellant but it is submitted that it has "shewn" that it "used modern and efficient appliances and has not otherwise been guilty of negligence" within the meaning of the Act, despite the finding of the learned judge below to the contrary in two particulars, *viz.*, (1) inadequate maintenance of track patrol and (2) inefficient equipment of the locomotive in question to prevent spark throwing. These are questions of fact purely and therefore I have most carefully reviewed all the evidence upon them with the result that I am constrained to the opinion that the learned judge has reached a conclusion which is, with every respect, clearly erroneous largely because of unwarranted inferences drawn from admitted facts rather than from a conflict of evidence upon essentials. Such being my decision, it is unnecessary to consider the other grounds argued

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because the determination of these two questions limits the liability of the defendant to $5,000, and as we were not asked, in such event, to go into the question of apportionment under subsection (6), doubtless because the plaintiffs include the claimants and so should be able to agree among themselves, I refrain from doing so while unrequested at least.

The appellants are entitled to the costs of this appeal but I should like to have the question of costs below spoken to in the unusual circumstances occasioned by the legislation in question.

GALLIHER, J.A.

GALLIHER, J.A.: This is an appeal from the judgment of MCDONALD, J., awarding damages against the defendant in a number of actions which were consolidated and tried together.

That the fire which caused the damage arose from sparks from the defendant's engine is admitted; but the defendant says, we are liable only for the statutory amount of $5,000.

The different causes of action arose out of one and the same fire, and total damages of $152,097 were awarded.

The first matter to determine is: Was the learned judge right in awarding damages in excess of the statutory limit? In the affirmative plaintiffs urge three grounds: 1. That the right of way of the defendant's railway was not kept clear of debris. This is found against the plaintiffs and is not appealed from, so that it is not before us for consideration. 2. That the engine, using the words of the statute (Can. Stats. 1919, Cap. 68, Sec. 387) was not equipped with "modern and efficient apppliances."

The learned judge inclined to the view that the appliances were modern but held that they were not efficient, largely, I think, by reason of the fact that this same engine had emitted sparks causing incipient fires on three previous occasions and possibly partly because he thought there had not been sufficient inspection of the engine.

In my view it has been shewn by the defendant's evidence that the equipment used on the engine complies with the order of the Board of Railway Commissioners, No. 362, and the regulations thereunder, and I also think that the evidence discloses proper inspection of the engine and its equipment

and of the good condition in which the same were at the time of the fire.

Mr. *Burns* for the plaintiffs raises the point that even if defendant has complied with the order that does not protect it from liability, if the circumstances call for greater precaution, citing *Leger* v. *The King* (1910), 43 S.C.R. 164 at p. 176. The reference is to the language of Duff, J., in these words:

"I think 'negligence' in this enactment has the meaning attributed to the word by lawyers—want of care according to the circumstances."

The Court was there considering the effect of section 2 of 7 & 8 Edw. IV., Cap. 31, placing persons having a right of action against the Government of Canada for damage caused by a fire from a locomotive, on the same plane as if their action had been against a railway company under the Railway Act. It was there decided that it was negligence on the part of the Government officials in permitting an old building with the roof in a dilapidated condition and of a highly inflammable nature, to remain in such state and such an act came within the proviso that the officers or servants "have not otherwise been guilty of any negligence." The language of Duff, J. is directed to that and the case would be an authority here if plaintiffs proved a defectively kept right of way or the absence of a proper patrol.

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In this connection also I would refer to the language of Davies, J., in which Killam, J. concurred, in *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81 at p. 97. On this ground, with respect, I take a different view to the learned trial judge.

The third contention of the plaintiffs is that the Company failed to properly patrol the railway track during the hot season when the fire occurred. The fire was caused by sparks from the engine of a passenger train while running from Kaslo to Nakusp on the morning of July 15th, 1925. These passenger trains ran only three times a week between these points and the system of patrol adopted was for the section foreman to follow the train over his section and return back over it on a speeder keeping watch that no fires had been lighted by the passage of the train. As it is admitted that the fire in question arose from the passing of the train on July 15th, the question is—Was there

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a patrol on that day and did that patrol extend beyond the point at which the fire started?

The fire started at or close to mile post 51, and the section foreman Kovichik says he patrolled following the train going to Nakusp to a point near mile post 52 (which he describes as about 8 telegraph poles from mile post 52) turning around there and coming back to mile post 56 where his gang were working. If that patrol took place then the area in question was covered both ways on that day and he discovered no sign of fire.

GALLIHER, J.A.

This method of patrol seems to have been satisfactory to the Forestry Branch, and in fact it seems to be the feasible method of performing patrol. Then, did it take place on that day? Pete Antoniuk was section foreman on section 8 and ordinarily he would have patrolled to mile post 52 and beyond where the fire took place, but he and his gang were working at mile post 56 at the west end of his section, and his motor speeder not being in very good condition, Beck, the Company's roadmaster on the line some time before the fire, instructed Kovichik, section foreman of section 7 immediately adjoining 8 on the east, to patrol that part of Antoniuk's section up to mile post 52, and which included the point where the fire occurred. Kovichik says he did this after receiving these instructions up to and including the day of the fire. Kovichik is an Austrian and while his answers to some of the questions would seem not to be quite clear, yet he does state in clear and express terms that he made the patrol on that day and this, I think, is made quite clear. The wives of two of the section gang on section 8 lived in a house beside the railway track at mile post 50, which is in section 8. One of them, Annie Drebret, who was splitting wood in a shed beside the house says she heard a motor speeder go past and return after the train had passed through going to Nakusp that day. The other, Mrs. Antoniuk, who was lying on the bed resting, and as she says not sleeping, states she did not hear it and should have if it had gone through. The one is positive and the other negative evidence, and if Annie Drebret is right it goes only this far, that a speeder passed mile post 50 going and returning shortly after the train passed, and if it was Kovichik's

speeder he was then off his own section and on that of Antoniuk where he would be patrolling according to instructions.

Beck passed through on the train that morning, so it was not his speeder; Antoniuk states he did not patrol that day, so it was not his speeder, and the reasonable inference would be that it must have been the speeder of Kovichik, no suggestion being made as to it being any other speeder.

Allshouse, one of the plaintiffs in the consolidated actions, says he was in that vicinity on the day in question, and did not see or hear a speeder follow the train and should have heard it. He was some distance away, and, besides, Beck states that there was a muffler on Kovichik's motor and very little noise would be made by its passage whether being used or not.

On this point we are met with the learned judge's finding of fact. In speaking of the patrol he says:

"On this branch I think the plaintiffs succeed. Evidence was given by the defendant Company to shew that one Kovichik, a section foreman, had been assigned to patrol and did patrol the portion of the railway track where the fire occurred. This evidence I do not accept."

GALLIHER, J.A.

Now, both Beck the roadmaster and Kovichik depose to this and give the reasons and Antoniuk says he was not patrolling there at that time and was working further west at mile post 56, and there is no contradiction of any of this evidence.

I must say, with the greatest respect, I cannot accept this finding and the learned judge goes on to say:

"I am further satisfied that he [Kovichik] did not patrol the track after this locomotive had proceeded to Nakusp on the day in question."

As I said before, we have on the one side positive and on the other negative evidence, but even with that had it not been for the finding immediately preceding on the same point, I would have hesitated to overrule the learned judge, but I cannot escape from the view that the defendant has satisfactorily shewn that a patrol both going and returning over the area where the fire occurred, was made by Kovichik on the day in question.

This view disposes of the case, and the appeal should be allowed.

MACDONALD, J.A.

MACDONALD, J.A.: The appellant submits that its liability should be limited to $5,000 under section 387 of the Railway

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Act. It was conceded that the damage was caused by a fire started by appellant's locomotive, and, unless negligence is disproved, it is liable for the whole loss. It is not necessary to deal with the question of "modern and efficient appliances" as I do not care to disturb the finding of negligence made by the learned trial judge in respect to the patrol. The efficiency of the patrol depended upon the work of one Kovichik, appellant's section foreman. The learned trial judge rejected his evidence and apparently other evidence adduced tending to shew that Kovichik did patrol the track beyond the point where the fire occurred. His Lordship says:

"I am satisfied that it was only occasionally, if at all, that Kovichik patrolled this section of the track, and I am further satisfied that he did not patrol the track after this locomotive had proceeded to Nakusp on the day in question. Having regard to the abnormally dry season, and the very great danger of the inflammable material in the vicinity of the railway track taking fire, it was, in my opinion, negligence on the part of the defendant Company in failing to maintain an efficient patrol following each engine."

MACDONALD, J.A.

Even although the appellant was not obliged to patrol after each engine, we have a definite finding that he did not patrol past mile post 51, where the fire occurred on the 15th of July, 1925. The appellant quarrels seriously with this finding alleging that there is no reasonable evidence to sustain it. Unless the witness was evasive in the witness box shewing, by his demeanour, that he was not telling the truth, I might have been disposed, if at the trial, to accept his statement that he did patrol up to and beyond the point in question. The learned trial judge, however, was within his rights and was discharging his duty in rejecting this evidence when convinced—as he must have been convinced—that it was not reliable and we must give weight to a finding so emphatically pronounced. I cannot say that he was clearly wrong. It follows, therefore, that the appellant is liable for the resultant damages estimated on a proper basis.

A question of title, however, arises. The Mid-Lakes Timber Company held ten licences but failed to renew eight of them before the fire, or in fact before the date of the writ. By section 34 of chapter 93, R.S.B.C. 1924, it is provided that:

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"Upon the expiration of any licence all rights of property of the holder of the licence in any trees, timber, or lumber cut within the limits of the licence and not removed therefrom during the term of the licence shall cease, and the trees, timber, and lumber shall *ipso facto* vest in the Crown in right of the Province."

It is further provided (section 39) that if the holder neglects to renew he may upon payment of the renewal fee and an additional sum be entitled to a renewal of the licence. Its original rights are then restored but in the interim the only right was that as against all others, it might obtain a renewal after said interval during which all interest in the trees and timber was vested in the Crown. During that intervening period, the Mid-Lakes Timber Company's bare right or option to tender money was invaded by the negligent act of the appellant. I am not fully satisfied that the Company intended to exercise that right but I will assume it had such intention. The action, however, is brought to recover damages for the destruction of trees and timber. Is this bare right to tender money and obtain a renewal in the nature of an equitable or other interest in the timber destroyed? No title or property interest of any kind was outstanding at the time. It reverted in the Crown. It is true that the negligent act of a wrong-doer by destroying the timber rendered it useless to exercise this right. But the respondent must, to succeed in an action for damages, establish an interest in the property destroyed. All it shews is a mere privilege not any estate or interest.

MACDONALD, J.A.

The respondent can only obtain damages for the value of its interest in the timber destroyed. Here it has no interest whatever in the timber. To quote Irving, J.A. in *Wilson* v. *McClure* (1911), 16 B.C. 82 at p. 90:

"In the present case, we are asked to regard a remotely potential right to acquire property as property, and in my opinion that would be going further than we are justified in doing."

The damages awarded, therefore, in regard to the eight licences referred to cannot stand. I would not interfere in respect to the remaining two licences and on all other points involved, I agree with the learned Chief Justice.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: In these two cases the Mid-Lakes Timber Company v. Canadian Pacific Railway Company and

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Ontario-Slocan Lumber Company v. Canadian Pacific Railway Company which remain for a definition of what form the judgment shall be we have come to the conclusion that the sums mentioned in the reasons for judgment of my brother M. A. MACDONALD and myself shall be the governing factor in the entry of formal judgment.

Solicitor for appellant: *J. E. McMullen.*

Solicitors for respondents: *Burns & Walkem; O'Shea & Garland; W. W. Ferguson.*

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The holder of property under agreement for sale, being pressed for payment, employed a broker to whom he explained his position as to the property, and the necessity of a quick sale. A prospective purchaser was introduced but no sale was made and the property reverted to the original owners. Some months later he obtained another option on the property from the owners and sold to the person who had been previously introduced to him by the broker. An action for commission was dismissed.

Held, on appeal, affirming the decision of MORRISON, J., that the contract with the broker was a special one for a quick sale and was determined when the defendant had lost the property which was the subject-matter of the contract.

Statement

APPEAL by plaintiff from the decision of MORRISON, J. of the 22nd of June, 1928, in an action to recover $7,200, the commission on a sale of seven timber limits in the Clayoquot District, Vancouver Island. The owners of the limits resided in Ireland and in 1920 the defendant purchased them under agree-

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ment for sale for $40,000. In August, 1923, when $30,000 was still owing, the owners pressed for payment and the defendant employed one Bolam (a broker) agreeing to pay him a 10 per cent. commission if he found a purchaser who would pay $10,000 in cash and the balance on a stumpage basis. He explained to Bolam that he required the $10,000 for payment to the original owners in order to hold the property under the agreement for sale, and that it was necessary to make a quick sale. Bolam then entered into an agreement with the plaintiff that if he found a purchaser he would divide the commission with him. Three separate prospective purchasers were introduced to the defendant including one Collins but none of them came to terms and finally on the 3rd of January, 1924, no purchaser being found, the defendant executed a quit claim of the limits to the owners who, however, agreed that if he found the money by the 15th of April they would sell to him. He did not find the money and on the 15th of April the quit-claim deed was registered. Nothing further was done until January, 1925, when the defendant obtained a 60-day option on the same limits for $48,000 and he then gave an option to Collins at an advanced price. Both these options were extended at the end of the 60 days. While these options were pending Bolam brought another contemplated purchaser to the defendant who took an option on the limits and paid $1,500 in cash but he failed to make any further payments. Shortly after the expiration of the January option the defendant again entered into an agreement for the purchase of the limits from the executors of the original owners and he then made a sale to Collins for $72,000. The plaintiff claimed a 10 per cent. commission on this sale.

The appeal was argued at Vancouver on the 6th and 7th of November, 1928, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for appellant.
Hossie, for respondent.

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8th January, 1929.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed for the reasons set out by my brother GALLIHER, *viz.*, that the contract was determined when the defendant lost the property which was its subject-matter, and also for the reason set out by my brother, M. A. MACDONALD, confirming the finding of fact of the learned judge below that the contract was a special one for a quick sale.

GALLIHER, J.A.

GALLIHER, J.A.: The defendant, in February, 1920, entered into an agreement with W. H. McLaughlin and Sir Robert Anderson, both of Belfast, Ireland, for the purchase of the timber limits in question in this action, and the vendors were represented by *Neville Smith*, barrister, in Vancouver. The limits were on Vancouver Island. The purchase price was $40,000, payable part cash and the balance in instalments. In August, 1923, there was a balance due of some $30,000 under this agreement, and the defendant was being pressed for payment and was unable to make same. He received a letter dated 9th August, 1923, from one Bolam, in these words:

"I understand you have a block of timber on Sproat Lake, V.I. I have a number of parties wanting a mill-tract of from 40 to 100 million feet. Would you mind giving me the particulars of your timber, if you will consider selling same; its location as to Rly. facilities, also location for mill-site, if same could be put on the lake and Rly., also give me the different kinds of timber and quality of each, with the acreage covered and the general logging conditions.

"Price and terms allowing for a 10 per cent. commission in the event I can secure a buyer satisfactory to you. I will appreciate it very much if you will allow me to offer this for sale and give me the above by return mail if possible."

In response to this letter he went to see Bolam and what took place is related by the defendant:

"And what conversation took place between you and Mr. Bolam with reference to this timber? I told him, in answer to his letter, that the timber was for sale; and that I wanted a quick sale. And we discussed how to best get a quick sale. And he suggested selling on a stumpage basis would be the better way to get a quick sale, as he had several customers in view, who would buy on that basis."

"At this time I needed a quick sale, or I would lose the timber; and I impressed him with the necessity of a quick sale, and he assured me he could get a quick sale for me, and I agreed to sell it on stumpage basis

providing I got $10,000 cash, free from commissions, to make my payment that was overdue on the timber.

"Did you tell him how much you owed on the timber? Yes.

"Did you tell him how much was immediately due? Yes."

On August 17th, 1923, Bolam wrote the defendant the following letter:

"I have this day called on Mr. Collins of the Beaver River Lumber Co., New Westminster, B. C., and also Mr. Green who is associated with Mr. Collins and have submitted to them your timber on Sproat Lake, V.I., which you have listed with me for sale on August 11, 1923. Mr. Collins is quite interested and says that he will try and get over to see your timber as soon as possible.

"I have also submitted your timber to Mr. J. C. Wilson of the Wilson Lumber Co., Qualicum, V.I., who is also looking for a mill tract of a similar size as yours. As neither of these men knows definitely when they can go and look over the timber, they may get in touch with you direct at any time. In the event that they should do so, and you should make a sale of this timber to either of these men, kindly protect me for the commission. It is not an unusual occurrence for buyers to get in touch direct with the owners as sometimes they think they can buy the timber cheaper, so that is why I am notifying you that I have submitted this timber to them, and then there can be no misunderstanding between us on the matter. I understand that you saw the Japanese that I introduced you to and that he told you he would go and look it over.

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"I will endeavour to sell this timber for you and will continue to do so until I hear from you that it is sold. Please let me know if any of these parties should get in touch with you direct. I do not know so much about the Jap's financial standing, but if Mr. Collins or Mr. Wilson want to buy your timber they are in a position financially to do so."

To which defendant replied August 23rd, 1923:

"Your letter of August 17th received. I have noted that you have submitted my timber for sale to Messrs. Collins & Green, Mr. J. C. Wilson and the Japanese agent whom I saw. I will protect your commission if sale is made to any of these parties. I expect to go to Clayburn on Saturday next and will likely be in the City the following Monday or Tuesday and will call at your office."

The plaintiff is the assignee of Bolam and there is no question as to his right to recover any commission that would be recoverable by Bolam.

Up to January, 1924, no sale was effected and no further moneys had been paid to the original vendors, who however, were still pressing for payment.

On the 3rd of January, 1924, the defendant executed a quitclaim deed to the vendors who agreed verbally that if defendant could raise the necessary money by April 15th, 1924, they would

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resell to him. The defendant, however, was unable to raise the money and Collins who had been introduced as a prospective purchaser by Bolam was unable to make arrangements to purchase, so that as the defendant says he thought he was down and out and made no further efforts to sell during 1924. However in January, 1925, he went to *Neville Smith* the representative of the vendors in Vancouver and obtained a 60-day option to buy the timber for $48,000 and gave a similar option to Collins at an advanced price. Both these options were extended. In the meantime while considering whether he would extend the option to Collins, Bolam brought Barr Brothers, who were desirous of purchasing timber, to the defendant with the result that they took an option on the timber and paid $1,500 thereon, but failed to carry out the option. Bolam received $150 commission on the $1,500 paid by Barr Brothers.

Later on, after the option of January, 1925, had expired, the defendant entered into an agreement with the executors and executrix of the respective estates of the original vendors, dated 15th April, 1925, for the purchase of the timber in question, and after having done so he entered into an agreement with Collins, and after some extension, Collins succeeded in financing and the sale was made for $72,000. The plaintiff is claiming 10 per cent. commission on this.

The learned trial judge found against the plaintiff on the ground that as a quick sale was necessary and that the contract between the parties was on the basis of a quick sale and the agreement to pay a commission was on that ground, that when the defendant lost his property the right to commission went with it, and that the subsequent incidents were not consonant with nor did they arise out of the contract. Against this the plaintiff appeals.

Mr. *Hossie* for the respondent takes the position: first, it was special employment; second, the offer was not accepted within reasonable time; third, final transaction different to the original contract; fourth, substructure of contract swept away, and fifth, in any event judgment should only be for payment when instalments paid under the agreement. With regard to the first, I have already set out in the narrative the language relied upon.

This does not seem to me, when we consider subsequent dealings between the parties, to be conclusive. It is true it was very desirable to have a speedy sale, but I think in examining the conduct of the parties throughout that it rather rebuts the contention that the earning of a commission was dependent on a quick sale. As to the second, if this can be regarded as a continuous transaction resulting in a sale the question of time would not, I think, be a determining factor. The third and fourth may be dealt with together. The real point in this seems to me to be: when the defendant's verbal option lapsed on April 15th, 1924, and no sale had been made and defendant said he thought he was down and out when the property passed from him, and no further efforts were made to effect a sale during the balance of that year, did Bolam's agency cease or was it renewed or continued by the defendant's dealings with Collins in 1925?

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Early in 1925 the defendant having succeeded in getting an option to purchase from the vendors and having given a like option to Collins, and no sale having gone through, it became necessary to get an extension and at that time Bolam brought in a new prospective purchaser, Barr Brothers, to whom an option was given but not carried through by them, and on the $1,500 paid for the option the defendant recognized Bolam's agency by paying him a commission. At this time the defendant had the extension from the vendors and Bolam coming forward with Barr Brothers, he chose to give them an option and on that option falling through he renewed negotiations with Collins and extended his option. I think when the option expired April 15th, 1924, and the quit-claim deed was registered in July of the same year, and all negotiations broken off for a period of nine months, Bolam's agreement lapsed with the lapse of the property and that when Bolam brought the Barr Brothers to the defendant he could have refused to deal with them, and in dealing with them as he did it could only be regarded as a special transaction not connected with Bolam's original agreement, and that transaction falling through the defendant could deal with Collins or anyone else on his own account, and Bolam to be entitled to commission would require to have had a new agreement with the defendant.

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There is no suggestion as to the *bona fides* of the defendant throughout the transaction or that there was any device or scheme to deprive the agent of his commission.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I have had the advantage of reading the reasons for judgment of my brother GALLIHER, and I may say that they fully carry out my conclusion in this appeal—that is, I am in full agreement with them.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Appellant sued for $1,200 commission on the sale of timber on seven lots in the Clayoquot District, Vancouver Island. One Robert Bolam claims to have effected the sale with some assistance from the appellant to whom he agreed to pay one-half of any commission received. He later assigned all his right and interest in and to any part of the commission to the appellant. The respondent held the timber under an agreement to purchase. He failed to make the required payments and his vendors procured from him a quit-claim deed but at the same time gave him an option to again purchase. It was more than a year after this surrender of title that the sale was finally made to one Collins. The submission is that Collins was introduced to the respondent by Bolam in 1925.

One defence is that by reason of the surrender of title by quit claim the agreement to pay commission (if a general employment) was wiped out and the final deal was effected without any fresh intervention by Bolam or the appellant. I do not find it necessary to dispose of this contention except to recite it and all that took place subsequently as throwing light on the need for speedy action in effecting a sale when Bolam was engaged as agent in 1923. From April, 1924, to January, 1925, the respondent was without title to the property and the services by Bolam and appellant were performed long before that period. Had the sale been consummated in 1923 the appellant would be entitled to commission on the terms set out in a letter from Bolam to respondent on August 9th, 1923 (ten per cent.).

Respondent did not reply to the letter (and therefore did not accept all its terms) but after receipt of it had an interview with him. Bolam at this interview assured respondent (and he is not called to contradict it) that there was a good prospect for a "quick sale," whereupon he was told to go ahead. The learned trial judge accepted this evidence, holding that the agreement was to pay commission only in the event of a quick sale. Respondent told Bolam that to meet a payment "that I must meet to hold the timber" $10,000 in cash would have to be received. This stipulation shewed the need for speedy action.

Collins purchased the timber July 1st, 1925. He examined it in November, 1923, shortly after Bolam placed it before him and thought it desirable property but he had to arrange to finance its purchase. Respondent agreed to hold the timber for Collins while he tried to finance it, but in the meantime respondent's arrears to his vendors accumulated to such an extent that he was forced to execute the quit-claim deed referred to on 3rd January, 1924, thus divesting himself of title. The following day by letter the solicitors for the original owners gave respondent an option to purchase for $35,500 to be valid to April 15th, 1924. It provided for a payment of $10,500 upon acceptance. This option expired. In January, 1925, respondent again met Collins when the original deal was revived and respondent to enable him to deal with Collins secured another option dated January 14th, 1925, for 60 days for $45,000 cash or $48,000 on terms and on the same day gave an option to purchase to Collins for the same period of 60 days for $72,000. Collins was not prepared to buy but during the 60-day period he was to go to England to finance it if possible.

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In the interval between January and July, 1925, Bolam introduced another possible purchaser (Barr Brothers) to respondent and on March 24th, 1925, respondent having secured a 20-day extension of his option dealt with Barr Brothers, and received from them $1,500 in cash for a seven-day option. They were to purchase for $73,500 cash or $96,000 on terms. He was then under no obligation to Collins. Barr Brothers failed to exercise the option, forfeited the $1,500 and respondent paid Bolam a commission of $150 on this sum. Respondent again

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resumed negotiations with Collins, although he had no title to the property. He approached the owners of the timber however and on the 15th of April, 1925, procured an agreement for sale for $48,000 and this was followed by the final agreement for sale from respondent to Collins on the 1st of July, 1925.

The learned trial judge as intimated found a special agreement for a quick sale. Does the evidence warrant it? In 1923, respondent was in a difficult position financially. He bought the timber in 1920 and made a cash payment of $10,000. In 1923, a further payment of $10,000 was due and he was pressed to pay it. At that time he still owed about $30,000. He tried to sell to Collins in 1921, meeting him then without the intervention of any agent, but it did not materialize. When he executed the quit-claim deed on 5th January, 1924, $37,500 was due. Respondent in view of that precarious situation did not reply to Bolam's letter of August 9th, 1923, but called upon him. His conversation therefore with Bolam in respect to commission was based upon that situation. The evidence on the point is as follows:

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"And what conversation took place between you and Mr. Bolam with reference to this timber? I told him, in answer to his letter [*i.e.*, Aug. 9th, 1923] that the timber was for sale; and that I wanted a quick sale. And we discussed how to best get a quick sale. And he suggested selling on a stumpage basis would be the better way to get a quick sale, as he had several customers in view, who would buy on that basis. . . .

"Oh, I beg your pardon. I thought you had finished. No. At this time I needed a quick sale, or I would lose the timber; and I impressed him with the necessity of a quick sale, and he assured me he could get a quick sale for me, and I agreed to sell it on stumpage basis providing I got ten thousand dollars cash, free from commissions, to make my payment that was overdue on the timber.

"Did you tell him how much you owed on the timber? Yes. . . ."

And again:

"After you received that letter [*i.e.*, Aug. 9th, 1923] what did you do in regard to the contents of that letter—with regard to the timber and the commission and so on? Oh, I called at Bolam's office in Vancouver, some time after that letter was received.

"And what conversation took place with him at that time? I told him I still had the timber for sale.

"Still had the timber for sale. And did you authorize him to sell it, if possible? If possible? He assured me that there was a good prospect for a quick sale, and I told him to go ahead.

"To go ahead. What terms did you offer him for making the sale? We discussed how best to secure a quick sale, and he suggested that the stumpage plan was more likely to produce results than a cash sale.

"And you accepted that? With the proviso that, to meet a payment that I must meet to hold the timber, there must be at least $10,000 cash.

"I see. Ten thousand dollars cash. Then . . . Clear of all commission. . . ."

Bolam (and I take it he was available) was not called as a witness although he was the principal party. If the arrangement was not as the respondent testified he should have been called to contradict it. I think with the uncontradicted evidence quoted and under all the circumstances—the facts as outlined—the learned trial judge was justified in drawing from the evidence the inference that a special arrangement was made and we should not say that he was clearly wrong in doing so.

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It is suggested that the arrangement with Bolam in respect to the attempted sale to Barr Brothers and the payment of a commission on the amount defaulted shews that the original arrangement was not a special one but a continuous and general employment. That deal however stands by itself and once the special agreement is established it becomes an isolated and subsequent transaction.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *W. M. Gilchrist.*

Solicitors for respondent: *E. P. Davis & Company.*

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Animals—Swine at large entering another's lands—Damages—Lawful fence—Absence of—R.S.B.C. 1924, Cap. 11, Secs. 3 and 11; Cap. 260, Secs. 3 and 14.

The defendant's swine were allowed to run at large, and they entered upon the plaintiff's lands which were admittedly not surrounded by a "lawful fence" within section 3 of the Trespass Act. In an action for damages the defendant claimed that effect should be given to section 14 of the Trespass Act which recites that "In the event of cattle straying into lands unprotected by a lawful fence so defined to be lawful as aforesaid, no trespass shall be deemed to have been committed, and no action for trespass shall be maintainable therefor, any law to the contrary notwithstanding." The plaintiff relied on sections 3 and 11 of the Animals Act. The former prohibits the running of swine at large and the latter recites that "The owner of any animal unlawfully at large shall be liable for the actual damage committed by it when running at large, such damage to be recovered in an action at law by the person sustaining the same, . . . " The plaintiff recovered the damages claimed.

Held, on appeal, affirming the decision of CALDER, Co. J., that section 14 of the Trespass Act only applies to animals lawfully at large and not to swine as they are prohibited from being at large by section 3 of the Animals Act. The owner of such animals "unlawfully at large" within section 11 is therefore liable thereunder for the "actual damage committed by them" whether the injured party's fences are "lawful fences" (as defined by section 3 of the Trespass Act) or not.

Statement

APPEAL by defendant from the decision of CALDER, Co. J. of the 9th of May, 1928, in an action for damages on his lands in the Lillooet District, through the defendant, who owned adjoining lands, allowing 17 swine to be at large and enter upon the plaintiff's lands where they consumed and destroyed seven tons of grain in the stook, half a ton of oat hay in the stook, and four tons of pasture. The plaintiff recovered judgment for the amount claimed.

The appeal was argued at Vancouver on the 2nd and 5th of

November, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

D. J. McAlpine, for appellant: It is a question of conflict between the two Acts but our submission is that section 14 of the Trespass Act governs: see *Huist* v. *Buffalo & Lake Huron Railway Co.* (1858), 16 U.C.Q.B. 299; *Fawcett* v. *York and North Midland Railway Co.* (1851), 16 Q.B. 610.

Argument

Griffin, K.C., for respondent: The two sections can be construed without repugnancy. Under the Animals Act swine cannot be lawfully at large: see *McLean* v. *Brett* (1919), 3 W.W.R. 521; *Daniels* v. *Grand Trunk R. W. Co.* (1885), 11 A.R. 471. This is an action for damages to personal property and not an action in trespass. *Burd* v. *Macaulay* (1924), 1 W.W.R. 369 is an action in trespass but this is for damages in an action on the case: see *Cubitt* v. *Porter* (1828), 8 B. & C. 257 at p. 270; *Taylor* v. *Cole* (1789), 1 R.R. 706 at p. 711; *Ashby* v. *White et alios* (1703), 1 Sm. L.C. 12th Ed., 266 at p. 288; *Entick* v. *Carrington* (1765), 19 St. Tri. 1030 at p. 1066; *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415 at p. 426; *Twyman* v. *Knowles* (1853), 13 C.B. 222. Uncut hay is personal property, growing crops not being an interest in land: see *Jones* v. *Flint* (1839), 10 A. & E. 753; *Evans* v. *Roberts* (1826), 5 B. & C. 829; *Stephenson* v. *Thompson* (1824), 2 K.B. 240. Actual damage must be shewn in an action on the case: see *Millar* v. *Taylor* (1769), 4 Burr. 2303 at p. 2345; *Williams* v. *Morland* (1824), 2 B. & C. 910 at p. 916; Halsbury's Laws of England, Vol. 1, p. 39, sec. 61; *Star* v. *Rookesby* (1710), 1 Salk. 335. One may waive an action for trespass and proceed with an action on the case: see *Scott* v. *Shepherd* (1773), 2 W. Bl. 892 at p. 897.

McAlpine, replied.

Cur. adv. vult.

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Macdonald, C.J.A.: The decision of this case depends upon the construction to be placed upon two Acts of the Legislature, namely, the Animals Act, R.S.B.C. 1924, Cap. 11, and the Trespass Act, R.S.B.C. 1924, Cap. 260. Section 3 of the former prohibits the running of swine at large, and section 11 renders the owner liable in an action at law for damage committed by them. Section 14 of the latter reads as follows:

"In the event of cattle straying into lands unprotected by a lawful fence so defined to be lawful as aforesaid, no trespass shall be deemed to have been committed, and no action for trespass shall be maintainable therefor, any law to the contrary notwithstanding."

"Cattle" in this Act includes swine and domestic animals, in the Animals Act includes swine. By the Animals Act it is prohibited to allow swine to run at large. It was argued on the one side that the Animals Act is the decisive one in this case, and on the other that the Trespass Act must be given effect to. In my opinion there is no repugnance between them. The object of the Animals Act was to regulate the running at large of domestic animals. The Legislature had in view the conditions of the country. Some animals including swine, were not to be allowed to run at large at all; other animals were allowed to run at large. Against the latter owners of land were bound to fence and if damage were done because of the unfenced condition of the land injured, the owner of the cattle was not responsible therefor. It was a special Act dealing with a special condition. Properly construed, section 14 of the Trespass Act in no way conflicts with the Animals Act. It must, I think, be held to contemplate trespass on unfenced land by cattle which might lawfully run at large. Section 14 therefore, although general in terms, must be construed with regard to the provisions of the Animals Act, and since swine could not lawfully be at large, section 14 has no application to them. But if this construction in strictness be not the correct one, the Act must yield, being a general one, to the provisions of the special Act.

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I would therefore dismiss the appeal.

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MARTIN, J.A.: This appeal raises a question of importance upon the construction to be placed upon the relevant sections of the Animals Act, Cap. 11, and the Trespass Act, Cap. 260, of R.S.B.C. 1924. These two acts being *in pari materia* should be read together in order to reach a just and reasonable conclusion on the principle applied by the Appellate Division of Alberta in the similar case of *McLean* v. *Brett* (1919), 3 W.W.R. 521, which is instructive on the underlying principles of the matter, but it is safer to decide the question upon the precise terms of our said statutes alone because of differences in their language from other statutes cited.

MARTIN, J.A.

After a careful consideration of the whole subject I have reached the conclusion that section 14 of the Trespass Act, dealing with "straying" animals does not apply to the swine in the present case which were absolutely prohibited from being at large, not only upon the highway but anywhere, by section 3 of the Animals Act, and consequently the owner of such animals "unlawfully at large" within section 11 is liable thereunder for the "actual damage committed by them," irrespective of the state of the injured party's fences under said section 14, whether "lawful" or not as defined by that Act. In this view it is unnecessary to enter upon the nice question and difficult question of the nature or scope of the word "trespass" in said section 14, and I need only add that it does not impose an obligation to erect "lawful fences" but is declaratory of the consequences of certain animals "straying into lands unprotected" by such fences. To my mind the Legislature has drawn a clear, practical and reasonable distinction between animals in general "straying" and animals in particular expressly prohibited from being "at large" at any time or any place owing to their notoriously dangerous or destructive proclivities. Section 14 is a useful section and affords a good defence in certain obvious cases but not in one of this class.

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GALLIHER, J.A.: In my view the learned judge below came to the right conclusion. I would dismiss the appeal.

MACDONALD, J.A.: I have reached the same conclusion as the learned trial judge, and would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *C. H. Pitts.*
Solicitor for respondent: *Alec. Ogston.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

FIELD v. INTERNATIONAL TIMBER COMPANY (p. 104).—Reversed by Supreme Court of Canada, 29th October, 1928. See (1928), S.C.R. 564; (1928), 4 D.L.R. 972.

HOFFAR LIMITED v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED (p. 454).—Special leave to appeal refused by Supreme Court of Canada, 6th February, 1929. See (1929), S.C.R. 180; (1929), 2 D.L.R. 106.

JOHNSON v. ELLIOTT (p. 130).—Affirmed by Supreme Court of Canada, 25th April, 1928. See (1928), S.C.R. 408; (1929), 1 D.L.R. 208.

MORTON v. BRIGHOUSE (p. 278).—Reversed by Supreme Court of Canada, 30th April, 1929. See (1929), S.C.R. 512; (1929), 3 D.L.R. 91.

MURDOCH AND PIGION v. CONSOLIDATED MINING & SMELTING COMPANY OF CANADA, LIMITED (p. 316).—Reversed by Supreme Court of Canada, 21st December, 1928. See (1929), S.C.R. 141; (1929), 1 D.L.R. 913.

STEPHEN AND STEPHEN v. MCNEILL (p. 209).—Affirmed by Supreme Court of Canada, 6th February, 1929. See (1929), S.C.R. 537; (1929), 1 D.L.R. 1003.

Cases reported in 39 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

EXECUTORS OF ESTATE OF ISAAC UNTERMYER, DECEASED v. ATTORNEY-GENERAL OF BRITISH COLUMBIA (p. 533).—Affirmed by Supreme Court of Canada, 21st December, 1928. See (1929), S.C.R. 84; (1929), 1 D.L.R. 315.

RATTENBURY v. LAND SETTLEMENT BOARD (p. 523).—Affirmed by Supreme Court of Canada, 26th November, 1928. See (1929), S.C.R. 52; (1929), 1 D.L.R. 242.

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ACCOUNTING—*Moneys received by nephew of deceased—Evidence of intention to make gift to nephew—Corroboration.*] One S. B. a large landowner, being a bachelor, brought a nephew (the defendant) from England in 1888 to live with him and as time went on the nephew, with the uncle's assent, gradually took over control of the affairs of the estate. In 1906, S. B. made a will leaving the bulk of the estate to the nephew and in 1907 he executed a power of attorney under which the nephew was formally given power to act for him in the management of the estate and according to the nephew's evidence S. B. then told him he intended to give him all his real and personal property and he could do what he pleased with it and was under no obligation to account for it. In 1908, S. B. became ill and went to a hospital; after his recovery he went to England where he remained until he died in 1913. In 1912, S. B. changed his will leaving a portion of his estate to relations in England, but still leaving a substantial portion to the nephew. In an action by the trustee under the will made in England it was held by the Supreme Court of Canada that the nephew was accountable for all moneys of deceased received by him since 1907. An appeal was taken to a judge of the Supreme Court from the registrar's report and he varied certain items. *Held*, on appeal, varying the decision of McDONALD, J., that considering the circumstances under which the estate was managed by the nephew his evidence of expenditure should be accepted on very slight corroboration. MORTON v. BRIGHOUSE. - - - - **278**

ADMIRALTY LAW—*Navigation—Tug with scow in tow collides with bridge—Damages —Negligence.*] The defendant steam-tug with an empty scow on a short tow-line and bridle, in attempting to go through the south passage of the Government bridge across the North Arm of the Fraser River at Marpole on a slightly ebbing tide collided with the bridge. In an action for damages, resulting therefrom, alleging that it was occasioned by improperly choosing the south channel of the bridge at its swing span:— *Held*, that the reasonable use of the south

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channel by the tug with a scow in tow depends upon the circumstances in each particular case and that upon the whole case there is no sound ground for holding that the master of the tug navigated her in a way which was not proper and seamanlike in the circumstances and the action is dismissed. ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE "PACIFIC FOAM." **100**

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See PRACTICE. 2.

AGENT. - - - - - - - **189**
See REAL ESTATE.

AGREEMENT—*Bonus—Saving on net cost of production—Based on schedule—Depreciation in plant and equipment—Included in cost of production—Evidence of intention.*] The defendants hired the plaintiff to superintend the production of cedar poles in connection with logging operations at a monthly salary. The agreement contained the following clause: "The Company further covenants that it will as an inducement to the said superintendent to produce cedar poles according to the specifications laid down by the Company as cheaply and expeditiously as possible, pay to the said superintendent as a bonus to his salary any saving to the Company on the net cost of production (after deducting every and all charges and cost of such production including the superintendent's salary) based on the estimated cost of production as set out in the schedule hereto attached. It being understood that such bonus, if any, shall be payable on the 30th day of June and December in each year if at such dates (but not otherwise) the average cost of production on all poles delivered during the last preceding six months at ship's side shall be less than the amount it would have cost to have delivered the same number and variety of poles at the prices set out in the schedule hereto attached, and such difference shall constitute the amount of such bonus payable." On application to vary the registrar's report, on a reference for taking accounts, it was held that the registrar had properly allowed for depreciation of plant

AGREEMENT—*Continued.*

and equipment. *Held*, on appeal, affirming the decision of MORRISON, J. that there is nothing in the agreement between the parties excluding the general rule that depreciation of plant and equipment is an item in the cost of production. AICKIN v. J. H. BAXTER & CO. - - - - **176**

AGREEMENT FOR SALE. - - **546**
See TIMBER LIMITS.

ANIMALS — *Swine at large entering another's lands—Damages—Lawful fence—Absence of—R.S.B.C. 1924, Cap. 11, Secs. 3 and 11; Cap. 260, Secs. 3 and 14.*] The defendant's swine were allowed to run at large, and they entered upon the plaintiff's lands which were admittedly not surrounded by a "lawful fence" within section 3 of the Trespass Act. In an action for damages the defendant claimed that effect should be given to section 14 of the Trespass Act which recites that "In the event of cattle straying into lands unprotected by a lawful fence so defined to be lawful as aforesaid, no trespass shall be deemed to have been committed, and no action for trespass shall be maintainable therefor, any law to the contrary notwithstanding." The plaintiff relied on sections 3 and 11 of the Animals Act. The former prohibits the running of swine at large and the latter recites that "The owner of any animal unlawfully at large shall be liable for the actual damage committed by it when running at large, such damage to be recovered in an action at law by the person sustaining the same, . . . " The plaintiff recovered the damages claimed. *Held*, on appeal, affirming the decision of CALDER, Co. J., that section 14 of the Trespass Act only applies to animals lawfully at large and not to swine as they are prohibited from being at large by section 3 of the Animals Act. The owner of such animals "unlawfully at large" within section 11 is therefore liable thereunder for the "actual damage committed by them" whether the injured party's fences are "lawful fences" (as defined by section 3 of the Trespass Act) or not. BISHOP v. LIDEN. - **556**

APPEAL. - **434, 418, 526, 408, 97, 222, 241, 441**
See ASSAULT.
CRIMINAL LAW. 4.
DAMAGES. 6.
JUDGMENT. 1.
MALICIOUS PROSECUTION. 1.
PRACTICE. 2, 6, 7.

APPEAL—*Continued.*

2.——*Costs of.* - - - - - **94**
See COSTS. 2.

3.——*From registrar's certificate.* **492**
See PRACTICE. 3.

4.——*Right of.* - - - - **68**
See IMMIGRATION.

5.——*To County Court.* - - **111**
See MUNICIPAL LAW.

6.——*To Court of Appeal.* - **111**
See MUNICIPAL LAW.

ARBITRATION—*Contract for sale of goods—Provision for arbitration in case of differences — Award — Finality—Arbitration Act—Legal misconduct—Order of giving evidence—Splitting of case—Materiality—Power of Court to consider evidence—Onus—R.S.B.C. 1924, Cap. 13, Sec. 14 (2).*] As to parties being bound by an arbitration when they agree to abide by the result, a distinction is to be drawn between parties generally referring their differences arising out of a contract and a case where a specific question of fact or law is submitted. In the former case when the arbitrator has failed to follow the recognized rules of law the award will be set aside. The contract between the parties refers to "arbitration" without outlining the procedure to be adopted with respect to an arbitration, so this term of the contract must be treated as a "submission" and the Arbitration Act and the Schedule thereto becomes applicable, therefore under section 14 (2) where the arbitrator has misconducted himself, or the arbitration or award has been improperly procured, the Court may set the award aside. In an arbitration as to the loss suffered by a seller of coffee, because of its non-acceptance by the buyer, on motion to set aside the award, objection was taken that the seller did not prove as part of his case, that the coffee tendered was in accordance with the contract and the arbitrator erred in allowing him to give evidence as to the quality of the coffee after the buyer had called his witnesses on the point. *Held*, that there was error in allowing the seller to "split" his case, yet as he had exercised his discretion in the matter, and no substantial injustice was occasioned thereby the course adopted did not invalidate the award. Whether the Court has power under its inherent jurisdiction to set aside an award, depends upon whether it is "bad on its face" or on some ground

ARBITRATION—*Continued.*

which is more or less an extension of the same principle. The Court has the right to consider the evidence adduced before the arbitrator to determine if there was "legal misconduct" on his part which would be a ground for setting aside the award. WOOD v. W. H. MALKIN CO. LIMITED. - **255**

ARBITRATION CLAUSE. - - **61**
See SAVINGS AND LOAN ASSOCIATIONS.

ASSAULT—*Damages—No actual injury—Appeal—Reduction of damages—Costs.*] The plaintiff recovered $500 in an action for assault. On appeal it appearing that the assault was merely a technical one and was courted by the plaintiff with a view to an action for damages, the damages were reduced to $10. *Per* MARTIN, J.A.: While the sincere yet mistaken belief of the defendant in the propriety of his illegal action is no excuse therefor, yet it is a mitigation of his liability which must be taken into consideration where not the slightest injury has been caused the plaintiff's person, clothing or reputation. HODGKINSON v. MARTYN. - - - - **434**

ASSESSMENT. - - - - - **111**
See MUNICIPAL LAW.

ASSESSMENT AND TAXATION—*Sale of land for taxes—Land admittedly liable for portion of taxes—Action to set aside sale—R.S.B.C. 1924, Cap. 179, Secs. 54 (110), 169, 185, 193, 232 and 267 (1) (c)—Cap. 271, Secs. 112 (3), (4) and (5), 126, 127 and 128—B.C. Stats. 1925, Cap. 61, Sec. 25.*] The plaintiff Company being the owners of certain lands within the defendant Municipality and owners of water rights and an irrigation system used for the distribution of water to purchasers of these lands, sold and transferred by indenture the water rights and irrigation system to the defendants in 1910. Clause 3 of the indenture contained a stipulation that the Company agreed to obtain the supply of water required for irrigating their irrigable lands and to enter into contracts as soon as they required water for irrigating said lands, with the Municipality on terms not more onerous than those contained in contracts previously made by them with their sub-purchasers, the Municipality agreeing to supply the Company or their assigns with water from said system to irrigate said unsold lands and to enter into agreements to do so on said terms. Shortly after, in

ASSESSMENT AND TAXATION—*Con'd.*

1910, the Company sold under agreement for sale, lot 30, district lot 474, within the Municipality to K. who paid all taxes until 1923, but as K. did not carry out his agreement the land then reverted to the Company. No water was ever used on block 30 and no agreement was entered into with the Municipality for the supply of water. On the 30th of September, 1926, the lands were offered for sale for taxes for the years 1924 to 1926 and the Municipality declared the purchaser. The Company then tendered $220.81 which included the general taxes from 1924 to 1926 (refusing to pay the irrigation rates and general water rates) but it was refused. An action to set aside the tax sale was dismissed. *Held,* on appeal, reversing the decision of SWANSON, Co. J., that no contract was entered into for the supply of water as provided in clause 3 of the agreement of 1910 and there is no provision in the Municipal Act relieving the Municipality from the obligations of said clause 3. Further, the water board have no power to authorize the imposition of tolls upon those who are under no obligation to pay them. The land was sold for a demand made up of arrears of land taxes, arrears of general water rates and to the extent of $260 of alleged arrears of irrigation tolls. The inclusion of arrears of irrigation tolls renders the sale invalid. THE SUMMERLAND DEVELOPMENT COMPANY, LIMITED v. THE CORPORATION OF THE DISTRICT OF SUMMERLAND. - - - - - - - **142**

ASSIGNMENT—Debt. - - - - **454**
See BANKRUPTCY.

ASSOCIATIONS—Disputes. - - **61**
See SAVINGS AND LOAN ASSOCIATIONS.

AUTOMOBILE—Repairs. - - **55**
See SALE OF GOODS. 2.

AWARD—Finality. - - - - **255**
See ARBITRATION.

BANKRUPTCY—*Transfer or assignment of a debt owing debtor to a creditor—Made within three months before authorized assignment—Motion by trustee to set aside transfer—Transfer not made with view of giving preference—R.S.C. 1927, Cap. 11, Sec. 64—R.S.B.C. 1924, Cap. 97, Sec. 3.*] W. a boat-builder, made an assignment for the general benefit of his creditors on the 13th of April, 1928, the Canadian Credit

BANKRUPTCY—*Continued.*

Men's Trust Association being appointed trustee for the benefit of the creditors. On the 18th of February, 1928, W. made a transfer or assignment in favour of Hoffar Limited of a certain debt owing to him by the Minister of National Revenue of Canada. On motion by the trustee to set the transfer aside on the ground that it is void as against the trustee by virtue of section 3 of the Fraudulent Preferences Act or in the alternative that it is void as against the trustee by virtue of section 64 of the Bankruptcy Act, it was held on the evidence that the assignment was not made with a view to giving Hoffar a preference, but the transaction comes within the purview of the Provincial Act and the trustee being entitled to the benefit thereof the assignment is void under that Act. *Held*, on appeal, reversing the decision of MACDONALD, J., that section 3 of the Fraudulent Preferences Act renders void an assignment such as is attacked here and section 64 of the Bankruptcy Act makes preferential assignments and transfers made with a view to prefer one creditor over another void under conditions admitted to exist here but subsection (2) of section 64 declares that such assignments which have the effect of giving such preference "shall be presumed *prima facie*" to have been made with a view to giving such preference, the distinction between the two sections being that under section 3 the presumption of invalidity is irrebutable, whereas, under section 64 (2) it may be rebutted. In this case the judge below has found as a fact that that presumption has been rebutted. Section 3 of the Provincial Act has been rendered inoperative by the overriding enactment of section 64 of the Dominion Act and the transfer in question should be declared valid. HOFFAR LIMITED v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED. - - - - - - - - **454**

BARRISTERS AND SOLICITORS. - **170**
See TAXES. 1.

BOARD OF INVESTIGATION—Powers of. - - - - - - - - **1**
See WATER AND WATERCOURSES. 1.

BOND. - - - - - - - - **14**
See SUCCESSION DUTY.

2.——*Covering acts of sheriff and deputy.* - - - - - - - **150**
See NEGLIGENCE. 2.

BRIBE—Withholding of evidence. - **418**
See CRIMINAL LAW. 4.

BRITISH NORTH AMERICA ACT. - **512**
See CONSTITUTIONAL LAW. 2.

BY-LAW. - - - - - **233, 170**
See PAYMENT.
TAXES. 1.

2.——*Validity.* - - - - - **410**
See MUNICIPAL CORPORATION. 2.

CHARTER-PARTY—Extension clause. - - - - - - - **314**
See SHIPPING.

CHATTEL MORTGAGE — *Registration—Defects in—Prior chattel mortgage—Registration defective—Rights as between—Foreclosure—Conditional sales—R.S.B.C. 1924, Cap. 22.*] Where the registration of a chattel mortgage does not comply with the Bills of Sale Act, the holder thereof is not protected by the Act as against a prior chattel mortgage the registration of which was also not in compliance with the requirements of the Act. TOPHAM v. MOTOR SECURITIES COMPANY LIMITED and FEDERAL MOTOR COMPANY LIMITED v. TOPHAM *et al.* **375**

CHILD OF TENDER YEARS—Evidence. - - - - - - - - **478**
See CRIMINAL LAW. 1.

COMMISSION. - - - - **35, 546**
See PRINCIPAL AND AGENT.
TIMBER LIMITS.

COMPANY—*Sale of assets by directors of company — Secret profits — Fraud — Damages.*] A promoter who makes a secret profit, at the expense of the company he promotes, by purchasing for the intended company, property which he sells to it at an enhanced profit, is liable in damages for the resultant loss to the company. VITOMEN CEREAL LIMITED v. MANITOBA GRAIN COMPANY LIMITED *et al.* - - - - **321**

COMPANY LAW—*Debentures—Trust deed—Delivery of debentures without resolution of directors—Future advances on strength of delivery—Knowledge of directors—Estoppel—Action to enforce trust deed.*] The McNair Lumber Company being indebted to P. B. Anderson Limited in the sum of $90,000 and to P. B. Anderson personally as endorser for the company in an additional $40,000, the parties met and it was arranged that $200,000 should be raised on

COMPANY LAW—*Continued.*

debentures secured by a trust deed on the whole of the company's assets. The debentures were duly issued, the trust deed executed and one *Craig*, the company's solicitor was named as trustee to whom the debentures were delivered under resolution of the directors of the company. The company found they could not sell the debentures and Anderson then asked one McNair, the managing director of the company to instruct the trustee to deposit the debentures with him (Anderson) as collateral security for the aforesaid indebtedness and for future advances. The trustee deposited the debentures with Anderson as instructed (although no resolution was passed by the directors authorizing same) and the company proceeded with its business for another year during which time Anderson continued to make further advances. The business proving a failure, Anderson requested the trustee to take proceedings to enforce the trust deed and judgment was obtained for the appointment of a receiver, for the taking of accounts and that the property be sold. *Held*, on appeal, affirming the decision of GREGORY, J., that although the resolution requiring the trustee to deliver the debentures had not been passed by the directors, this irregularity is waived and the defendant is estopped from setting it up as the directors must be assumed to have had knowledge of their business and were aware that advances had been made to the company by Anderson on the faith of the pledge. *Held*, further, on the contention that a pledgee of debentures has no right to foreclose them, that here the pledgee is not seeking to foreclose the debentures, but to enforce its security by requiring the trustee to enforce the trust deed in the usual manner, the trustee having the discretion when he thinks the circumstances justify, to enforce the deed in the interests of those who hold the debentures. ANDERSON AND CRAIG v. MCNAIR LUMBER & SHINGLES LIMITED. - - - - - - - **466**

CONDITIONAL SALE. - - - - **375**
See CHATTEL MORTGAGE.

2.——*Motor-car—Default in payments—Vendor takes possession—Notice of resale—Sale abortive—Notice of wrecking car—Action for balance—R.S.B.C. 1924, Cap. 44, Sec. 10 (3).*] In an action for the deficiency on a resale of a motor-car repossessed by the vendor after default by the purchaser under a conditional sale agreement, the notice to the purchaser of the resale must be in strict accordance with the requirements of section 10 (3) of the Conditional Sales Act, notwithstanding the provision in the conditional sale agreement that the vendor can exercise the power of resale "by public or private sale with or without notice." It was held that the notice herein not being in compliance with said section the action should be dismissed. The attempt to resell the car by auction after repossession being abortive, the vendor "wrecked" the car after notifying the buyer that he was doing so and would allow him "the price of $45." *Held*, that the vendor thereby rescinded the contract and the purchaser was relieved from all further liability thereunder. MARSH v. SIMPSON. - **114**

CONSPIRACY—Charge of. - - **361**
See CRIMINAL LAW. 3.

CONSTITUTIONAL LAW—*Produce Marketing Act—Validity—Extra-provincial "marketing"—Shipment from British Columbia to another Province—Regulation of trade and commerce—Property and civil rights—B.C. Stats. 1926-27, Cap. 54—R.S.B.C. 1924, Cap. 245, Sec. 89.*] The Produce Marketing Act is *intra vires* in so far as it applies to "marketing" within the Province and it is not necessary to read it as intended to operate extra-provincially. A direct shipment of produce from a place within the Province to a place in another Province in pursuance of an order telegraphed from the other Province therefore is not a "marketing" within the Act, and the shipper does not commit an offence by making such shipment without first obtaining the written permission of the Committee of Direction. REX v. WONG KIT. **424**

2.——*Produce Marketing Act—Validity—British North America Act, 1867, Secs. 91 (2), 92 (13)—"Property and civil rights"—"Regulation of trade and commerce"—Transactions solely within the Province—Transactions between one within and another without the Province—B.C. Stats. 1926-27, Cap. 54—B.C. Stats. 1928, Cap. 39—Criminal Code, Secs. 496 and 498.*] The defendant Chung Chuck was convicted of unlawfully marketing potatoes in the Delta Municipality without the written permission of the Mainland Potato Committee of Direction contrary to a regulation passed by the Committee of Direction under the authority of section 3 of the Produce

CONSTITUTIONAL LAW—*Continued.*

Marketing Act. The Act is designed to regulate and control the marketing of certain produce—fruit and vegetables—and the Committee is given power to fix the quantity of products which may from time to time be marketed and the minimum and maximum prices to be obtained. On the return of a writ of *habeas corpus* with *certiorari* in aid the validity of the Act was questioned on the ground that it is an attempt to regulate trade and commerce which is exclusively within the jurisdiction of the Dominion Parliament. The application was dismissed. *Held*, on appeal, affirming the decision of MURPHY, J., that the marketing of produce is a trade or business carried on within the Province and the local Legislature in imposing restrictions upon it is dealing with the property and civil rights of individuals within the Province and concerns produce grown within the Province, and because it affects trading in the products of the farm or even regulates that domestic operation it is not "regulation of trade and commerce" as contemplated by section 91 (2) of the British North America Act. *Held*, further, that to operate under an Act of the Provincial Legislature enabling producers to market the products of the soil by orderly methods and under such restrictions as will tend to insure a fair return, cannot be said to constitute an indictable offence under sections 496 and 498 of the Criminal Code. In the case of *Rex* v. *Wong Kit* (reported *ante*, p. 424), in which the facts are precisely the same as in the case above, except that the potatoes were shipped to purchasers outside the Province, the defendant was acquitted on the ground that although the Act is *intra vires* it does not apply to transactions of an extra-territorial character. *Held*, on appeal, reversing the decision of MACDONALD, J., that the grower is prevented by the Act from taking orders for the sale of produce within or without the Province without written permission, a transaction with a purchaser outside the Province being simply subsidiary and incidental to the main purposes of the Act which deals with "property and civil rights" and refers to matters "of a merely local or private nature in the Province." It cannot lose that character and be regarded as legislation dealing with "the regulation of trade and commerce" whether the produce shipped is contracted for within or without the Province. The appeals in the cases of *Rex* v. *Sales Service Ltd.* and *Rex* v. *Associated Growers of British Columbia Ltd.* were allowed following *Rex* v. *Wong Kit* (1928), *ante*, p. 424. REX v. CHUNG CHUCK. REX v. WONG KIT. REX v. SALES SERVICE LIMITED. REX v. ASSOCIATED GROWERS OF BRITISH COLUMBIA LIMITED. - - - - - - **512**

3.——*Produce Marketing Act—Validity—Property and civil rights—Regulation of trade and commerce—"Unduly"—"Unreasonable"—Construction—Criminal Code, Sec. 498—B.C. Stats. 1926-27, Cap. 54.*] Under the powers granted by section 92 of the British North America Act to legislate with regard to property and civil rights, a Province may regulate the marketing of merchandise within the Province. This does not infringe upon the Dominion's power under section 91 either to regulate trade and commerce or to legislate with regard to criminal law; further, the passing of such legislation does not infringe upon section 498 of the Criminal Code, because, such legislation contains no authorization of the "undue" or "unreasonable" acts forbidden by said section. [Affirmed on appeal.] REX v. CHUNG CHUCK. - **352, 512**

CONTINGENT ESTATE. - - - **14**
See SUCCESSION DUTY.

CONSTRUCTION. - - - - - **81**
See CONTRACT. 6.

CONTRACT. - - - - - - - **345**
See LAND. 1.

2.——*Breach.* - - - - - **492**
See PRACTICE. 3.

3.——*Breach of to be performed within jurisdiction.* - - - - - - **184**
See PRACTICE. 8.

4.——*Breach—Sale of walnuts—Pleading—Breach of duty to employer (not a party)—Evidence of plaintiff's contract of hiring with employer—Admissibility.*] In an action for breach of a written contract made with M. the defendant's agent, for the sale of 1,000 cases of walnuts the defence was raised that the plaintiff was guilty of a breach of duty towards his employer (a company dealing in walnuts) in entering into the contract, but as no fraud was alleged in this regard the paragraph on the plaintiff's application was struck out with leave to amend. The amended paragraph alleged that the contract was made by M. without authority and contrary to instruc-

CONTRACT—*Continued.*

tions and that he and the plaintiff fraudulently conspired together to bring about the contract, that the contract was procured by fraud and the plaintiff fraudulently obtained from M. a price lower than the market price of the goods. The trial judge refused to admit evidence of the plaintiff's contract of hiring with his employer and the jury found in favour of the plaintiff. *Held,* on appeal, affirming the decision of MACDONALD, J. (MACDONALD, J.A. dissenting, would order a new trial), that the amended pleading after stating the respective duties of the plaintiff and of M. to their respective employers, alleges a fraudulent conspiracy, which is not an allegation of fraud upon the plaintiff's employers but upon the defendant, an allegation which was disposed of by the jury. Fraud must be distinctly pleaded and proven and as fraud is not alleged as against the plaintiff's employers evidence as to the plaintiff's hiring was properly rejected and the appeal should be dismissed. MADDISON v. DONALD H. BAIN LIMITED. - - - - - **499**

5.——*Canning company and fishermen—Agreement to sell fish exclusively to company—Sale of goods—R.S.B.C. 1924, Cap. 225, Sec. 11.*] The defendant Company, through an agent, engaged a group of men to fish exclusively for the Company in a certain area on the terms that the Company would pay the men the same price for fish as "any other cannery" in the area; that they would be allowed free bluestone to treat their nets, four gallons of gasoline per week free to each boat, free mending twine and be furnished nets for the use of which one-fifth of the price paid for fish would be deducted, boats and line and all necessary equipment to be provided by the men themselves. The men proceeded to the fishing area but on their arrival demanded that they be paid 35 cents per fish. Upon the Company refusing to accede to this the men refused to fish and brought action for breach of contract. It was held on the trial that the contract was one for hiring and service, and the Company having repudiated, the plaintiffs were entitled to succeed. *Held,* on appeal, reversing the decision of MACDONALD, J., that under the terms of the contract it was not one of service or employment but one for the sale of fish coming within section 11 of the Sale of Goods Act the requirements of which not having been complied with, the plaintiffs cannot recover. SALO *et al.* v. ANGLO-BRITISH COLUMBIA PACKING COMPANY LIMITED. - - **481**

CONTRACT—*Continued.*

6.——*Construction—Engineer to be judge of work and material—"Extra haul"—Meaning of—Method of work—Engineer's powers.*] The plaintiffs entered into a contract to make a cut and fill on a certain portion of the defendant Company's railway line. The contract provided that the engineer be the sole judge of work and material in respect of both quantity and quality, his decisions on all questions in dispute with regard thereto to be final. A further clause was as follows: "Extra haul 12. The contract prices for the several classes of excavation shall be taken to include the cost of depositing material in embankments, crib work and all other expenses connected therewith, except extra haul which will only be paid for where it exceeds 500 feet, at so much per yard per additional 100 feet." The plaintiffs located and distributed their plant and equipment in such a way that it would be obvious to the engineer that he intended to remove the soil from the north end of the embankment and it was not until the excavating work had commenced that a divergence of opinion arose between the plaintiffs and the engineer as to the meaning of the word "extra haul" the engineer then contending there would have been a shorter haul if the work had been commenced from the south end of the embankment. Upon completion of the contract the plaintiffs brought action for the cost of the "extra haul" work under clause 12 of the contract. *Held,* that the difference of view as to the method of work should have been raised when the plaintiffs commenced to locate their plant, and the construction of a term of the contract, namely, the meaning of the words "extra haul" did not come within the duties of the engineer. It was for the contractor to determine the method of work he would adopt. The method adopted was within the contract and the cut and fill were finished in a workmanlike manner and they are entitled to the price of the "extra haul" claimed. [Reversed by Court of Appeal but affirmed by Supreme Court of Canada.] THE GEORGIA CONSTRUCTION COMPANY LIMITED *et al.* v. PACIFIC GREAT EASTERN RAILWAY COMPANY. - - - - - - - - **81, 290**

7.——*Option.* - - - - - **415**
See VENDOR AND PURCHASER.

8.——*Sale of timber—Based on cruiser's report of quantity—Subsequent discovery of one-third deficiency — Misrepresentation —*

CONTRACT—*Continued.*

Rescission.] The plaintiff, Fukukawa, entered into two agreements with the defendant Company for the purchase of 42 timber licences, relying on the estimate of quantity made up by a firm of timber cruisers employed by the defendant and submitted to him by the defendant's agent. Although the agreements did not so specify, it was found that the purchase price had been arrived at on a basis of $1.50 per M. board measure as the sum named in the agreements was actually the number of M. feet stated in the estimates multiplied by this sum, and the agreements contained provision for the reduction in timber taken by the Imperial Munitions Board and loss by fire during the currency of the contract, estimated on a $1.50 basis. It was afterwards established by a cruise made for the purchaser that there was a shortage of approximately one-third as between the actual quantity of timber and said estimates. *Held*, that even assuming there was no fraud, where there is a deficiency of approximately one-third in the quantity of timber from the original estimate the plaintiffs are entitled to rescission. CHUHEI FUKUKAWA AND THE QUEEN CHARLOTTE TIMBER HOLDING COMPANY LIMITED v. AMERICAN TIMBER HOLDING COMPANY. AMERICAN TIMBER HOLDING COMPANY v. CHUHEI FUKUKAWA. - - - - **44**

CONTRIBUTORY NEGLIGENCE. - **130**
See NEGLIGENCE. 6.

CONVEYANCE IN BLANK. - **124, 383**
See LAND REGISTRY ACT.

COOK'S HELPER. - - - - - **104**
See MALE MINIMUM WAGE ACT.

COSTS. - - - - **434, 275, 492**
See ASSAULT.
NUISANCE.
PRACTICE. 3.

2.——*Appeal — Foreclosure suit—Untenable defence—Puisne encumbrancer—Right to payment forthwith.*] An appeal by the mortgagor and second mortgagee from an order setting aside the registrar's certificate and directing that a new account be taken, having been dismissed, it was held that the usual rule should be followed and the first mortgagee was entitled to the costs of the appeal forthwith after taxation thereof. CANADA PERMANENT MORTGAGE CORPORATION v. DALGLEISH AND CANADIAN BANK OF COMMERCE. - - - - - - **94**

COSTS—*Continued.*

3.——*Evidence.* - - - - - **396**
See SOLICITOR AND CLIENT.

4.——*Money paid into Court—Order for payment out.* - - - - - - **438**
See SOLICITOR'S LIEN.

5.——*Successful defendant—Not liable for costs of defence.* - - - **312**
See PRACTICE. 4.

COURT OF REVISION. - - **111**
See MUNICIPAL LAW.

CREDITOR AND DEBTOR. - - **475**
See GUARANTEE.

CRIMINAL LAW—*Evidence—Child of tender years—Knowledge of nature of an oath —Criminal Code, Sec. 1003.*] The competency of a child as a witness rests primarily with the trial judge who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. REX v. FITZPATRICK. - - - - - - - - - - **478**

2.——*Identification of suspect by photographs—Examination of witnesses as to.*] The police may use photographs of a person whom they suspect of a crime for the purpose of identification but evidence of what was said when shewing photographs for such purpose will not be allowed. REX v. HARRISON. - - - - - - **53**

3.——*Joint trial—Charge of conspiracy with one another and others—Evidence—Direction to jury—Substantial wrong.*] P. and M. were tried jointly and convicted on a charge of conspiracy to defraud the public. C. P. Porter & Company Limited carried on a brokerage business. P. was manager of the Company and M. and others were employed as travelling salesmen. The salesmen sold high-class securities under instructions from P. but Porter & Company never held any of the stock sold nor did they purchase it after sales. Certain purchasers paid for stock partly in cash and partly in other securities. Upon receipt of these securities Porter & Company sold them and kept the proceeds. On occasions Porter & Company paid purchasers the amount of dividends on stock that was never procured to keep up appearances. On the trial the jury was instructed that it must convict or

CRIMINAL LAW—*Continued.*

acquit both the accused, that it could not convict one and acquit the other. *Held*, on appeal, *per* MACDONALD, C.J.A., that there was no evidence from which conspiracy might be inferred and the conviction should be set aside. *Per* MARTIN, J.A.: That the linking of M.'s guilt with P.'s was very prejudicial to M. he thereby suffering a substantial wrong and was entitled to a new trial, but as the case was clear against P. he suffered no wrong thereby and the appeal as against him should be dismissed. *Per* GALLIHER, J.A.: That the conviction as against both appellants should be affirmed. *Per* MACDONALD, J.A.: That M. should have a new trial, but P.'s appeal should be dismissed. REX v. PORTER AND MARKS. **361**

4.——*Wilful attempt to defeat course of justice—Bribe to withhold evidence—Credibility—Appeal.*] The accused was convicted of attempting to defeat the course of justice by agreeing to abstain from giving evidence against R. on consideration of $50 paid to her by R. The accused is a married woman with two children. Her son (17 years old) procured liquor from R., a bootlegger, and came home intoxicated. Accused then went to see R. but was put out of the house. She then complained to the police and R. was charged with an offence against the Government Liquor Act. R. then visited the accused and accused said "She offered me $50 if I would refuse to give evidence against her." R. on the contrary said that accused said "If you give me $50 I will not give evidence against you," but accused immediately told the police that she had been offered a bribe by R. not to give evidence on the liquor charge. Shortly after accused was visited by two men who tried to induce her not to give evidence. R. then repeated her offer to accused over the telephone and then accused (as she avers for the purpose of obtaining evidence of these offers) arranged to meet R. They met, but in the meantime R. told the police of the arrangement to meet accused and the police laid a trap. At the meeting accused took the $50 intending (as she says) to turn it over to the police. *Held*, on appeal, reversing the decision of Magistrate Shaw (MARTIN, J.A. dissenting), that where credibility is an issue the word of a woman against whose character no evidence is offered should be accepted rather than that of a confessed law-breaker. The circumstances are against R.'s allegations and the appeal should be allowed. REX v. COLLINGE. - - - - - **418**

CRIMINAL PROCEDURE—*Recognizance of bail — Estreatment — Effect of re-opening appeal after judgment, for further argument—Order admitting accused to bail—No direction to whom accused should surrender —Effect of.*] An accused having been released on bail pending the hearing of an appeal, after the hearing and dismissal thereof the appeal was reopened for further argument and again dismissed. *Held*, that this did not release the bail as the accused was released on bail until the determination of the appeal and the appeal was not determined until the final order was drawn up and entered. The order of the judge admitting accused to bail did not state to whom the accused should surrender in the event of the appeal being dismissed. *Held*, not to be necessary as the recognizance itself makes this provision and the bondsmen having entered into it are bound by it. REX v. WAH LUNG *alias* WONG WA. - - **267**

CROWN GRANTS—*Description of lands—Described on plans annexed—Plans shew both sections bound by river — Plans to govern.*] The defendant claims title to certain lands through G. whose Crown grant of the 7th of August, 1891, describes the land as "all that parcel or lot of land situate in New Westminster District, said to contain 84 acres, more or less, and more particularly described on the map or plan hereunto annexed and coloured red, and numbered the south-east quarter of section one (1), Township twenty-three (23) exclusive of the Indian Reserve on the official plan or survey of the said New Westminster District." The plaintiff claims title under a Crown grant to S. of the 19th of June, 1893, to land said to contain 150 acres . . . and more particularly described on the map or plan hereunto annexed and coloured red, and numbered north-east quarter of section one. . . ." The respective plans are attached to the Crown grants and shew the south-east quarter as bound on the north by the south bank of Vedder River and the north-east quarter as bound on the south by the north bank of the Vedder River. A corrected plan made in 1927 shews that a small point of land (containing 4.84 acres and being the land in question herein) on the south side of the river extended north of the true section line dividing the north-east quarter section from the south-east quarter section. The defendant had actually occupied this point of land since 1921 and had made improvements thereon in the way of buildings. In an action for possession of the 4.84 acres as

CROWN GRANTS—*Continued.*

being a portion of the north-east quarter section it was held that where there is a conflict between the descriptions and the plans the descriptions prevail and the plaintiff is entitled to judgment. *Held*, on appeal, reversing the decision of HOWAY, Co. J., that the plans shew that the river was adopted in both cases as the boundary of the quarter-sections. Neither quarter-section is a full quarter-section and while the quarter sections are referred to in words in the deeds, it is clear on the true construction of them that the plans were to govern. KIPP v. SIMPSON. - - **248**

DAMAGES. - **100, 556, 321, 97, 88, 450, 150, 209, 275, 122**
See ADMIRALTY LAW.
ANIMALS.
COMPANY.
MALICIOUS PROSECUTION. 1, 3.
MUNICIPAL CORPORATION. 3.
NEGLIGENCE. 2, 3.
NUISANCE.
SLANDER.

2.——*Action by parents for.* - **441**
See PRACTICE. 7.

3.——*Action for.* - - - - **65**
See PRACTICE. 1.

4.——*Automobile.* - - - **446**
See NEGLIGENCE. 4.

5.——*Breach of covenant.* - - **235**
See LEASE. 2.

6.——*Negligence—Timber licences—Fire set by railway locomotive—Assessment of damages—Finding of trial judge—Appeal—Settlement of judgment—R.S.C. 1927, Cap. 170, Sec. 387 (2)—R.S.B.C. 1924, Cap. 39, Secs. 34 and 39 (3).*] In an action for damages to timber by fire it was conceded that the fire was started by sparks from the defendant's locomotive but the defendant alleged that otherwise there was no negligence and they were entitled to the benefit of section 387 (2) of the Railway Act, limiting the damages to $5,000. Of ten timber licences held by the Mid-Lakes Timber Company, eight expired before the fire and were not renewed within one year under section 39 (3) of the Forest Act and one of the timber licences held by the Ontario-Slocan Lumber Company Ld. overlapped licences that had previously been issued. It was found by the trial judge that the defendant was negligent in failing to keep

DAMAGES—*Continued.*

the right of way patrolled, that the locomotive was not equipped with efficient appliances and the defendant was liable for the loss resulting from the fire including the timber on the eight licences of the Mid-Lakes Timber Company that had expired before the fire, and the licence of the Ontario-Slocan Lumber Company Ld. alleged to have overlapped licences previously issued. *Held*, on appeal (reversing the decision of MCDONALD, J., *per* MACDONALD, C.J.A. and MACDONALD, J.A.), that the finding of negligence by the trial judge should not be disturbed but as to the eight licences of the Mid-Lakes Timber Company that had expired before the fire and were never renewed, as action was not commenced until 17 months after the fire, the Company had lost all interest in the licences before action and damages should be confined to the loss on the two remaining licences; further, the damages allowed the Ontario-Slocan Lumber Co. should be reduced by the amount allowed for the licence that overlapped two previous licences. *Per* MARTIN and GALLIHER, JJ.A.: That the Company used modern and efficient appliances as to the locomotive, was not otherwise guilty of negligence, and the damages should be limited to $5,000 under section 387 (2) of the Railway Act. On application to settle the judgment it was held that the judgment of the Court should be in accordance with the decision of MACDONALD, C.J.A. and MACDONALD, J.A. MID-LAKES TIMBER COMPANY *et al.* v. CANADIAN PACIFIC RAILWAY COMPANY. - **526**

7.——*No actual injury.* - - **434**
See ASSAULT.

DEBENTURES—Trust deed—Delivery of debentures without resolution of directors. - - - - **466**
See COMPANY LAW.

DECEIT—Counterclaim for. - - **235**
See LEASE. 2.

DENTIST — *Registration — "Graduate" — Meaning of—R.S.B.C. 1924, Cap. 66, Sec. 22 (b).*] The word "graduate" in section 22 (b) of the Dentistry Act does not import that the receiving of a certificate of graduation was preceded by a course of training of a practical kind or otherwise. THE COLLEGE OF DENTAL SURGEONS FOR THE PROVINCE OF BRITISH COLUMBIA v. NEFF. **371**

DISCOVERY. - - - - - **241**
See PRACTICE. 6.

DISTRESS—*Right to levy—Relationship of landlord and tenant necessary—Action for illegal distress.*] Distress can only be justified if, *inter alia,* the relationship of landlord and tenant exists. CANADA MORNING NEWS LTD. v. THOMPSON *et al.* **230**

DOCUMENTS—Rectification of. **124, 383**
See LAND REGISTRY ACT.

ENGINEER—Judge of work and material—Powers. - - - - **81, 290**
See CONTRACT. 6.

EQUITABLE MORTGAGE—What constitutes. - - - - **124, 383**
See LAND REGISTRY ACT.

ESTOPPEL. - - **466, 124, 383**
See COMPANY LAW.
LAND REGISTRY ACT.

2.——*Action to recover possession under lease—Previous action to recover possession of same premises and other material in addition was dismissed—Res judicata.*] The plaintiff brought an action to recover possession of certain buildings, plant and fixtures founding his claim on a memorandum of agreement. He had previously brought action for possession of all he now claims and for other material in addition, founded upon the same memorandum of agreement when it was held that the instrument was at an end and the action was dismissed. On the pleadings in the former action he could have raised the question of his right to possession of the material he now claims. *Held,* that the matter in question is *res judicata* and the action should be dismissed. WINTER v. DEWAR & CO. LTD. - - - **228**

ESTREATMENT. - - - - - **267**
See CRIMINAL PROCEDURE.

EVIDENCE. - - - - - - **361**
See CRIMINAL LAW. 3.

2.——*Admissibility.* - - - - **197**
See MINES AND MINERALS.

3.——*Child of tender years—Knowledge of nature of an oath.* - - - - **478**
See CRIMINAL LAW. 1.

4.——*Corroboration.* - - - - **278**
See ACCOUNTING.

EVIDENCE—*Continued.*

5.——*Of plaintiff's contract of hiring with employer—Admissibility.* - - **499**
See CONTRACT. 4.

6.—*Retainer.* - - - - - **396**
See SOLICITOR AND CLIENT.

7.——*Verbal statement.* - - **244**
See SPECIFIC PERFORMANCE. 2.

EVIDENCE OF CONTRACT. - - **184**
See PRACTICE. 8.

EVIDENCE OF INTENTION. - **176**
See AGREEMENT.

EXCAVATION—In sidewalk area by abutting owner. - - - - **450**
See MUNICIPAL CORPORATION. 3.

EXECUTORS AND ADMINISTRATORS—*Holograph will—Probate in Scotland—Resealing—Land in British Columbia—Registration in name of executrix—R.S.B.C. 1924, Cap. 5, Sec. 106; Cap. 127; Cap. 203, Sec. 4; Cap. 274.*] Marjory Clazy, who died in Scotland, left all her estate heritable and movable by a holograph will to her sister and appointed her executrix. The will was probated in Scotland and pursuant to section 4 of the Probates Recognition Act was resealed under the seal of the Supreme Court in British Columbia. An application by the executrix to have certain lands in British Columbia registered in her name was granted. *In re* LAND REGISTRY ACT AND MARJORY CLAZY, DECEASED. - **102**

FENCE—Lawful—Absence of. - **556**
See ANIMALS.

FIRE—Railway locomotive. - - **526**
See DAMAGES. 6.

FIRE-ARMS — Discharge of — By-law—Validity. - - - - - **410**
See MUNICIPAL CORPORATION. 2.

FISHERMEN. - - - - - - **481**
See CONTRACT. 5.

FORECLOSURE. - **375, 124, 383**
See CHATTEL MORTGAGE.
LAND REGISTRY ACT.

FRAUD—Damages. - - - - **321**
See COMPANY.

GUARANTEE—*Creditor and primary debtor deceased—Action by administratrix against*

GUARANTEE—*Continued.*

guarantor—Guarantor's right to proof of non-payment—Failure of proof.] By agreement in writing, one Ivey, loaned one Hamilton, the sum of $400 for one year and the defendant agreed that if Hamilton did not repay said sum he would repay same to the said Ivey. Hamilton died shortly after the maturity of the debt, and Ivey died two years later. Ivey's wife as administratrix of his estate brought action against the guarantor for the amount of the debt. The only evidence submitted in proof of non-payment of the debt was that of the plaintiff, her sole information on the subject having been obtained from her husband prior to his death, and the action was dismissed. *Held*, on appeal, affirming the decision of HOWAY, Co. J. (MARTIN, J.A. dissenting), that although the plaintiff swears positively that the debt was not paid it is apparent that her knowledge is derived solely from her deceased husband and as this is mere hearsay it should not have been admitted. IVEY v. SMITH. - - - - - **475**

GUARDIAN AD LITEM. - - - - **65**
See PRACTICE. 1.

HABEAS CORPUS — *Prisoner committed under Code—Imprisonment—Removal from one gaol to another—Provincial Act providing for removal—Applicability—Release—R.S.B.C. 1924, Cap. 195, Sec. 33.*] A prisoner convicted of an offence under the Criminal Code and after serving part of his sentence was removed by the Attorney-General from one gaol to another under the authority of section 33 of the Police and Prisons Regulation Act. On *habeas corpus* proceedings:—*Held*, that said section cannot be invoked in support of the removal of a prisoner who has been committed for an offence under the Criminal Code from one gaol to another and an order was made for his release. REX v. TARCHUK. **398**

2.——*Warrant for arrest — Issued in another Province—Evidence for defence only submitted—Jurisdiction.*] Where a warrant of arrest is issued in one Province and duly indorsed in another, where the accused is arrested, the Court, where the warrant is executed, has no jurisdiction in *habeas corpus* proceedings to go into the merits of the case as anything that may be alleged by way of defence is for the magistrate and Courts where the warrant is issued. *In re Luciano* (1921), 54 N.S.R. 273 followed; *Rex* v. *Galloway* (1909), 2 Alta. L.R. 258 distinguished. *In re* NETTLETON. - **413**

HOLOGRAPH WILL. - - - - **102**
See EXECUTORS AND ADMINISTRATORS.

IMMIGRATION—*The Chinese Immigration Act, 1923, Sec. 17 — Application under— "Any judge of the Supreme Court"—"Persona designata" — Right of appeal — Can. Stats. 1923, Cap. 38, Sec. 17.*] The words "any judge of the Supreme Court" in section 17 of The Chinese Immigration Act, 1923, should be construed as "*persona designata*" and there is no appeal from an order made under said section. REX v. CHIN SACK. (No. 2). - - - - - **68**

IMPRISONMENT—Removal from one gaol to another. - - - **398**
See HABEAS CORPUS. 1.

INJUNCTION. - - - - - **244**
See SPECIFIC PERFORMANCE. 2.

2.——*Interim—Application to continue to trial—Supply of electric power—Mines—Conditional water licences—Power to use water circumscribed as therein set out—B.C. Stats. 1897, Caps. 45, 62, 63 and 67—B.C Stats. 1899, Cap. 77.*] The defendant Company, incorporated by private Act in 1897, was authorized to generate and transmit electric power in that portion of West Kootenay within a radius of 50 miles from the City of Rossland. Within the same year two other companies, namely, the South Kootenay Water Power Co. and the Okanagan Water Power Co. were incorporated by private Act with like powers of generating and transmitting electric power, the first mentioned within an area adjoining the area of the defendant Company to the east and the last mentioned within an area adjoining the area of the South Kootenay Water Power Co. to the east. The two last mentioned companies never constructed any works for the generating of electric power but the defendant Company constructed extensive works at Bonnington Falls on the Kootenay River. The defendant Company, by separate agreements leased the whole of the undertakings of the other two companies and constructed extensive transmission lines in the respective areas of said companies. One of the transmission lines so constructed was connected up with the plaintiff Company's apparatus for using electric power in their mines which were within the area of the Okanagan Water Power Co. The plaintiff Company obtained an *interim* injunction restraining the defendant Company from cutting off the

INJUNCTION—*Continued.*

power it had hitherto supplied said mines and on an application to continue the injunction until the trial, contended that the defendant Company was under statutory obligation to supply power to the plaintiff under section 118 of the Water Clauses Consolidation Act, 1897. *Held,* that the three private Acts do not deal with the matter of the Crown conferring upon the corporations thereby created the right to use water power in their respective areas or at all, except to the extent that each of them clothed its creation with the capacity to make application for such right. The Water Clauses Consolidation Act, 1897, deals with the manner in which corporations such as the defendant Company is to proceed to obtain the right to use water power and confers authority for the granting of such rights. In pursuance thereof the defendant Company obtained five conditional water licences but under these licences the use of the water thereby granted is confined to such area as is within 50 miles of the City of Rossland. As the mines referred to are outside this area the defendant Company has no right to supply the plaintiff Company with electric power for use in its operations therein and the appeal should be dismissed. THE GRANBY CONSOLIDATED MINING AND SMELTING & POWER COMPANY LIMITED v. WEST KOOTENAY POWER & LIGHT COMPANY LIMITED. - - - - **269**

INJURY—Damages. - - - - **450**
See MUNICIPAL CORPORATION. 3.

INTEREST—Date from which it is chargeable. - - - - - - **14**
See SUCCESSION DUTY.

INTERPLEADER. - - - - - **119**
See PRACTICE. 5.

IRRIGATION—Water appurtenant to certain lands. - - - - - **8**
See WATER AND WATERCOURSES. 2.

JOINT TRIAL. - - - - - **361**
See CRIMINAL LAW. 3.

JUDGMENT — *Application to set aside—Jurisdiction—Appeal.*] Since the Judicature Act the right of a judge to set aside his own judgment cannot be exercised after judgment has been drawn up and entered. In the circumstances of this case the proper course is an appeal to the Court of Appeal. ALICE M. VANDEPITTE v. BERRY: E. J. VANDEPITTE, THIRD PARTY. - - - - **408**

JUDGMENT—*Continued.*

2.——*Damages.* - - - - - **492**
See PRACTICE. 3.

3.——*Settlement of.* - - - - **526**
See DAMAGES. 6.

JURISDICTION. - - - - **413, 408**
See HABEAS CORPUS. 2.
JUDGMENT. 1.

JURY—Direction to. - - - - **361**
See CRIMINAL LAW. 3.

LAND — *Interest in — Contract — Personal services during lifetime of donor consideration for leaving land by will—Statute of Frauds—Partial performance.*] The plaintiff, an elderly woman living on 160 acres of land at Half Moon Bay on the northerly coast of British Columbia, asked her niece to come there with her husband and in consideration of their personal services rendered to her during the remainder of her life she would give them possession of 16 acres of her land and bequeath it to them in her will for which she would give them written assurance on their arrival. The niece and her husband then sold their property in North Vancouver, went to Half Moon Bay, took possession of the 16 acres, built a house and a store on it, and made other improvements. They gave their services to the plaintiff as agreed but were never able to obtain any written assurance from her that she would will the 16 acres to them. Shortly after the completion of the store differences arose between them and the plaintiff brought action to recover the 16 acres, the defendants counterclaiming for a declaration that they are entitled to specific performance of the agreement on the plaintiff's death. The action was dismissed and the defendants succeeded on the counterclaim. *Held,* on appeal, affirming the decision of MURPHY, J., dismissing the action but allowing the appeal on the counterclaim, as the defendants are entitled to possession of the land but the plaintiff being still alive and the land having been given in consideration of the performance of personal services during her lifetime, the declaration that the defendants be entitled to specific performance on her death is premature. LYELL v. CORMACK *et ux.* **345**

2.——*Sale of for taxes.* - - - **142**
See ASSESSMENT AND TAXATION.

LANDLORD AND TENANT — *Furnished house—Porch with railing—Railing gives*

LANDLORD AND TENANT—*Continued.*

way—Plaintiff's wife injured—Liability of landlord.] The plaintiff leased a furnished house from the defendant that included an upstairs porch surrounded by a railing. The plaintiff's wife stepping out on the porch to look for her husband, rested her hand on the railing which gave way owing to the nails holding it having rusted they having been put in when the house was constructed fifteen years previously. In an action for loss of *consortium* and hospital and medical expenses on account of injuries to his wife:—*Held*, that this is a case of ordinary defect of repair which could be easily remedied and the existence of such defect would not give rise to a right in the tenant either to repudiate or to sue for damages. KELPON v. STEWART. - - - - **369**

2.——*Relationship of.* - - - **230**
See DISTRESS.

LAND REGISTRY ACT—*Equitable mortgage—What constitutes—Deposit of documents of title—Conveyance in blank—Effect of.*] By agreement of the 30th of April, 1927, the C. Company was to build a house on a certain lot for E. and convey the lot to E. upon completion of the house for $5,225. Of this sum $2,325 was to be paid by E. conveying his own house and premises to the Company and the balance of $2,875 to be raised by a mortgage on the new house when built. On the 2nd of May, 1927, E. executed a conveyance of his house under seal (the grantee's name not being filled in) which, with an insurance policy upon the house and furniture was delivered to the Company. The new house was never built. On the 5th of May, 1927, one McG., alleging he was raising a loan for the Company, interviewed the plaintiff T. who advanced him $1,200 and McG. handed him the conveyance in blank of E.'s house and the insurance policy. T. later through an order of E.'s agent obtained the certificate of title to E.'s property from the registry office and induced the insurance company's agent to sign a transfer making any loss under the policy payable to him. E. had no knowledge whatever of the loan made by T. to the Company. In an action by T. for a declaration that he holds an equitable mortgage on the property registered in E.'s name and for its enforcement:—*Held*, that the only instrument of title the plaintiff had was the certificate of title but the certificate was in E.'s name and it was not E. but the Company that deposited it with the plaintiff. The conveyance delivered to the Company was in blank and therefore void and assuming it could be treated as an instrument sufficient to pass title when properly filled in and registered, it was never filled in or registered, and it could only operate from date of registration. The insurance policy included the furniture in which E. never gave the Company any interest, and the agent of the insurance company had no authority to sign a transfer of the policy to the plaintiff. The plaintiff has no right to hold the certificate of title nor has he the right to any loss under the insurance policy and has not established his right to an equitable mortgage. [Affirmed on appeal.] TOM v. TRUSTEE OF HANS C. CHRISTENSEN LIMITED AND EVERETT. - - **124, 383**

LANDS—Description of. - - **248**
See CROWN GRANTS.

LEASE—*Hotel—Option to purchase—Terms of option incomplete—Purchase price fixed —A certain payment down and "balance to be arranged"—Whether enforceable.*] Where an option for the purchase of land provides for the purchase price, with the payment of so much down and " balance to be arranged" specific performance cannot be granted on the ground of uncertainty. MCSORLEY AND PRINCE EDWARD HOTELS LIMITED v. MURPHY. - - - - - - - - - - **403**

2.——*Rent—Action for — Damages for breach of covenant—Counterclaim for deceit Lessor's statement as to crops previously grown—Proof.*] The plaintiffs brought action to recover the rent due under a lease of a farm and other moneys owing and the defendant counterclaimed alleging that he had been induced to enter into the lease by the untrue statements of the lessor that the lands had produced a crop of a certain quantity per acre, and that he was entitled to recover damages in an action for deceit. It was held the plaintiffs were entitled to recover and that the lessees had failed to discharge the burden on them of proving that the lessors had made such a representation. ADAIR *et al.* v. TILTON *et al.* - - - - - - - - - **235**

LICENCE—Conditional. - - - - **1**
See WATER AND WATERCOURSES. 1.

LOCAL JUDGE—Jurisdiction. - **401**
See NOTARIES.

MALE MINIMUM WAGE ACT—*Logging camp—Cook's helper—"Domestic servant"—Meaning of—B.C. Stats. 1925, Cap. 32, Sec. 13.*] By an order of the Board appointed pursuant to the Male Minimum Wage Act the expression "lumber industry" includes, *inter alia*, all operations in or incidental to the carrying on of logging camps, and section 13 of said Act provides that "This Act shall apply to all occupations other than those of . . . domestic servants." An action by a cook's helper in a mining camp to recover the minimum wage provided for by said Board was dismissed. *Held*, on appeal, that a cook's helper at a logging camp is not a "domestic servant" within the meaning of said section 13 and is entitled to the benefits of the Act. [Reversed by Supreme Court of Canada.] FIELD v. INTERNATIONAL TIMBER COMPANY. - - - - - - - - - - **104**

MALICE. - - - - - - **122**
See SLANDER.

MALICIOUS PROSECUTION—*Civil process—Evidence of intention to leave Province—Proof of absence of reasonable and probable cause—Damages—Appeal—R.S.B.C. 1924, Cap. 15, Secs. 3 and 7.*] An applicant for an order for a writ of *capias* is required to prove first, that he has a cause of action and secondly, that the debtor is about to leave the Province, and when he believes he has a *bona fide* claim (even although it may later be decided not to be well founded) and has correct information that the debtor is about to leave the Province, an action for malicious prosecution will not lie. DANSEY v. ORCUTT. - - - - - - **97**

2.——*Reasonable and probable cause—Malice—Prosecution to establish civil rights.*] The plaintiff, who was in the defendant's employ as a salesman of sawdust burners, brought about the sale of three burners for which he claimed he was entitled to $60 commission. One Bunting, to whom one of the burners was sold, asked the defendant if it would be all right to give the plaintiff a cheque in part payment, to which the defendant replied that it would. Bunting made a cheque out for $100 to the plaintiff's order and gave it to him. The plaintiff cashed the cheque and going to the defendant's office, tendered $40 of the amount which was refused. Later in the day the defendant telephoned the plaintiff that if the $100 was not paid to him before ten o'clock on the following

MALICIOUS PROSECUTION—*Continued.*

morning he would have him arrested. On the following morning the money not having been paid the defendant preferred a criminal charge against the plaintiff of having fraudulently converted to his own use and thereby stolen the sum of $100. The charge was dismissed. In an action for malicious prosecution:—*Held*, that as a rule private wrongs, when of a civil nature, should be pursued through civil proceedings, and when the defendant threatened the plaintiff over the telephone it was with the idea that if he did not pay the money over he would resort to the police Court to redress the wrong done him; in doing so he rendered himself liable for damages. JONES v. ECKLEY. - - - - - **75**

3.——*Swearing out and executing a search warrant—Reasonable and probable cause—Malice—Damages—R.S.B.C. 1924, Cap. 146, Sec. 73.*] In April, 1926, an informant who was known to the police complained to the chief of police of the Municipality of Burnaby that Grady was illicitly dealing in liquor. An investigation was had but all reports were in Grady's favour. In June following, the same informant arranged with the desk sergeant of police that on having information as to illicit dealing in liquor he would telephone the information under an assumed name. On the 31st of July, 1926, said informant telephoned the desk sergeant under an assumed name (the sergeant knowing who he was) that a load of liquor was leaving for Grady's place and "better hurry up if you want to get it." The sergeant advised the chief who, without further investigation, swore an information for a warrant to search Grady's premises. The premises were immediately searched but no liquor was found. In an action for malicious prosecution against the chief of police:—*Held*, that the most charitable view that could be taken of his action was that by the information given he was instructed to investigate but instead of making a proper investigation he immediately applied for a search warrant, and this view, with the absence of reasonable and probable cause would support a finding of malice. The Government Liquor Act has not changed the law in reference to malicious prosecution. *Manning* v. *Nickerson* (1927), 38 B.C. 535 followed. GRADY AND GRADY v. DEVITT. **88**

MARKETING. - - - - - **424**
See CONSTITUTIONAL LAW. 1.

MEMBERSHIP—Associations. - **61**
See SAVINGS AND LOAN ASSOCIATIONS.

MINES—Water licences. - - **269**
See INJUNCTION. 2.

MINES AND MINERALS—*Coal—Co-owners — Partnership — Evidence of — Admissibility.*] The plaintiff and the defendants were co-owners in a coal lease of lot 88 in the Yale District, each bearing his share of the expense of the assessment work for two years. During this period they discussed acquiring adjoining property when it became vacant. The plaintiff and the defendant Mullin then quarrelled and the plaintiff left for Alberta. A year later Schulli found the adjoining lands were vacant and he wrote the plaintiff asking him for $100 as his share of location expenses which the plaintiff sent him. Schulli acquired leases on the adjoining ground but Mullin refused to recognize Davies in the transaction and on demanding a half interest in the new leases Schulli gave him a half interest and kept the other half himself. The plaintiff then brought action for a declaration that he was entitled to a one-third interest in the newly-acquired leases and that a partnership existed between the parties. Schulli conceded the plaintiff's claim and the action proceeding against Mullin the plaintiff recovered judgment. *Held*, on appeal, affirming the decision of HUNTER, C.J.B.C. (MACDONALD, C.J.A. and MARTIN, J.A. dissenting), that the evidence (apart from the letters and Schulli's statements in the absence of Mullin) raises a strong presumption of partnership, making the letters admissible and therefore strengthening that *prima facie* case. *Held*, further, that the plaintiff is not estopped by his action in disposing of his one-third interest in lot 88 or in not asserting his rights when Mullin obtained a one-half interest in a further lot that Schulli had acquired. DAVIES v. SCHULLI AND MULLIN. - - - - **197**

MINOR—Death of through negligence. - - - - - - - **441**
See PRACTICE. 7.

MISCONDUCT—Legal. - - **255**
See ARBITRATION.

MISREPRESENTATION—Rescission. - **44**
See CONTRACT. 8.

MORTGAGE—Equitable. - **124, 383**
See LAND REGISTRY ACT.

MOTOR-CAR—Default in payments. **114**
See CONDITIONAL SALE.

2.——*Pedestrian run down by.* - **130**
See NEGLIGENCE. 6.

MUNICIPAL CORPORATION. - **233**
See PAYMENT.

2.——*Discharge of fire-arms—By-law—Validity—B.C. Stats. 1925, Cap. 13, Secs. 3 and 4.*] The Game Act is passed for the protection of game and the qualifying clauses are only intended to restrict the operation of penal clauses in certain circumstances. The reason for the change of language in section 3 of the 1925 amendment to the Act was because the Legislature decided it should no longer be necessary for a farmer killing game found destroying his crops to report to the game warden, and was not intended to give him an absolute right to shoot game found doing damage, provided he did not shoot across a public highway. The statute of 1925 simply means that so far as the penalties imposed by the Game Act are concerned, they shall not be enforceable against a farmer shooting under the circumstances therein described and the right of the municipality to protect its citizens from the discharge of fire-arms is not interfered with. REX v. PENDRAY. - **410**

3.——*Sidewalks — Excavation in sidewalk area by abutting owner—Covered by iron frame—Pedestrian stumbles on frame —Injury—Damages—Onus on city.*] An abutting owner having been allowed by the city to excavate within the sidewalk area of the street covered it over with an iron frame. The plaintiff while walking on the sidewalk stumbled over the iron frame and fell sustaining injury. *Held*, that the accident happened because of want of proper repair and the city has failed to shew that it had done all that it reasonably could to prevent the want of repair. *Woodcock* v. *City of Vancouver* (1927), 39 B.C. 288 applied. MORAN v. CITY OF VANCOUVER. - - - - - - - - - - **450**

MUNICIPAL LAW—*Assessment—Court of revision—Appeal to County Court judge—Appeal to Court of Appeal—Point of law not raised in Court below—Condition precedent to appeal—R.S.B.C. 1924, Cap. 179, Sec. 228 (7).*] On appeal from the decision of a County Court judge on appeal from the Court of Revision in respect of the assessment of certain lots in Salmon Arm, the preliminary objection was taken that as no

MUNICIPAL LAW—*Continued.*

point of law had been raised in the Court below there was no appeal within section 228 (7) of the Municipal Act. *Held*, that a point of law must be clearly brought out for adjudication in the Court below otherwise there is no jurisdiction to hear the appeal and it should be quashed. *Grand Trunk Pacific Development Co.* v. *City of Prince Rupert* (1923), 32 B.C. 463 followed. QUINN v. CORPORATION OF THE CITY OF SALMON ARM. - - - - - - **111**

NAVIGATION. - - - - - **100**
See ADMIRALTY LAW.

NEGLIGENCE. - - **100, 526, 369**
See ADMIRALTY LAW.
DAMAGES. 6.
LANDLORD AND TENANT. 1.

2.——*Breach of duty—Sheriff—Arrest by deputy—Prisoner escapes—Damages—Bond covering acts of sheriff- and deputy—Liability of bonding company—R.S.B.C. 1924, Cap. 231, Sec. 13.*] The deputy sheriff of Vancouver was given a writ of *capias* 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 deputy 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 for damages against the sheriff and his deputy and against the Guarantee Company on a bond given for the fulfilment of their duties, the plaintiff succeeded as against the deputy sheriff, and the Guarantee Company, but the action was dismissed as against the sheriff. *Held*, on appeal, affirming the decision of MURPHY, J., that there was ample evidence to justify the finding below that from the moment B. had come under the influence of the deputy sheriff he was under arrest and the deputy was guilty of negligence in allowing him to escape. *Held*, further, that the bond covers the acts of the deputy as well as the sheriff and the plaintiff is entitled to judgment against the bonding Company. HIGGINS v.

NEGLIGENCE—*Continued.*

MACDONALD, ROBERTSON, AND THE DOMINION GRESHAM GUARANTEE & CASUALTY COMPANY. - - - - - - - **150**

3.——*Careless use of torch in thawing water-pipes—Fire originating from spot where torch was used—Spreads to plaintiffs' building destroying it—Damages.*] The water-pipes in the defendant's building in the City of Rossland having become frozen on a cold morning he, with the assistance of F., attempted to thaw them out by the application of a gasoline torch. They were unsuccessful in their attempt and afterwards at about the noon hour F. of his own initiative returned to the premises and again attempted to thaw the pipes by the application of the torch. At about 6 o'clock in the evening fire broke out near the place where the torch had been applied, enveloped the building and spread to the plaintiffs' premises destroying it. In an action for damages owing to the defendant's negligent application of the gasoline torch to the water-pipes the plaintiffs recovered damages. *Held*, on appeal, reversing the decision of MCDONALD, J. (GALLIHER, J.A. dissenting), that on the evidence it is clear that the fire originated from the negligent application of the torch by F. who acted without the knowledge or authorization of the defendant, and he should be exonerated from any responsibility to the plaintiffs for their loss. STEPHEN AND STEPHEN v. MCNEILL. - - - - - - - - **209**

4.——*Damages—Automobile left at curb of street—No tail-light—Struck in rear by plaintiff's car—Liability—R.S.B.C. 1924, Cap. 177.*] At about 12 o'clock on a rainy night the defendant left his truck close to the curb-line near his home on the outskirts of Vancouver. The rear of his truck was about three feet out from the curb-line, and he left no tail-light. The plaintiff, driving a friend home, stopped to let him out about 60 feet behind the defendant's truck on the same side of the street. He then started his car and while still in low gear he ran into the defendant's truck damaging his car. He recovered judgment in an action for damages. *Held*, on appeal, affirming the decision of RUGGLES, Co. J. (MARTIN, J.A. dissenting, and holding there was contributory negligence), that the defendant was negligent in failing to have a light at the rear of his truck and in the circumstances the plaintiff was not guilty of contributory negligence in not seeing the defendant's truck. ATWOOD et al. v. LUBOTINA. **446**

NEGLIGENCE—*Continued.*

5.——*Heel caught in slat flooring of street-car—Sudden starting of car—Thrown to floor sustaining injuries—Liability.*] The plaintiff boarded a street-car of the defendant Company, wearing high-heeled shoes. As she entered the vestibule her heel caught between the slats of the flooring of the car and, the car starting suddenly, she lost her balance and was thrown violently back, her head striking the door. Her ankle was sprained and she received other injuries. An action for damages for negligence was dismissed. *Held,* on appeal, affirming the decision of MORRISON, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that there is nothing in the evidence to justify interference with the finding of the trial judge and the appeal should be dismissed. RODDY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - **180**

6.——*Pedestrian run down by motor-car—Contributory negligence—Intersection of streets—Duty of motor-drivers at crossings.*] As the defendant was driving his car southerly on Cambie Street, Vancouver, and approaching Broadway he admitted he saw the plaintiff on the west sidewalk about 15 feet from the corner, walking in the same direction hurriedly and evidently intending to catch a street-car on Broadway. He momentarily lost sight of him, but immediately after turning into Broadway to the west he suddenly saw the plaintiff in front of him crossing Broadway to the street-car. He sounded his horn but being too close to him to stop or turn aside he ran into him. The trial judge dismissed an action for damages holding that as the plaintiff, on hearing the horn, suddenly stopped and turned back in front of the car, he was therefore solely responsible for the accident. *Held,* on appeal reversing the decision of HUNTER, C.J.B.C. (MCPHILLIPS, J.A. dissenting), that the defendant knew the plaintiff would probably cross his path. There was no obstruction to his view and the obligation rests upon a motor-driver coming from behind a pedestrian to avoid hitting him. It was his failure to exercise due care that caused the accident. JOHNSON v. ELLIOTT. - - - - **130**

NON-PAYMENT—Proof of. - - - **475**
See GUARANTEE.

NOTARIES—*Order for examination and enrolment of—Local Judge of the Supreme Court—Jurisdiction—B.C. Stats. 1926-27, Cap. 49, Secs. 5 and 6.*] A County Court judge, acting as a Local Judge of the Supreme Court, has no jurisdiction to make an order for the examination and enrolment of an applicant under sections 5 and 6 of the Notaries Act. THE LAW SOCIETY OF BRITISH COLUMBIA v. STEWART. - **401**

NUISANCE — *Theatre — Ammonia plant—Noxious vapours emanating therefrom—Loss of patronage—Damages—Costs.*] In an action for damages for the loss of theatrical business caused by the emission of noxious vapours from the defendant's ammonia plant that spread about the theatre site:—*Held,* that there was evidence of several other sources from which offensive odours may have reached the theatre and there was no satisfactory proof of the creation or maintenance of an actionable nuisance by the defendant: further, the books of the Company and the amusement tax records shewed the theatre proved a failure before the establishment of the ammonia plant and this was due to its becoming submerged in the murk and squalor of an industrialized district where people would not resort for theatrical amusement. AVENUE THEATRE LIMITED v. VANCOUVER GAS COMPANY. - - **275**

ONUS. - - - - - **255, 450**
See ARBITRATION.
MUNICIPAL CORPORATION. 3.

OPTION. - - - - - - - **415**
See VENDOR AND PURCHASER.

OPTION TO PURCHASE. - **403, 546**
See LEASE. 1.
TIMBER LIMITS.

PARTIAL PERFORMANCE. - **345**
See LAND. 1.

PARTICULARS—Order for. - **441**
See PRACTICE. 7.

PARTIES. - - - - - - **241**
See PRACTICE. 6.

PARTNERSHIP—Evidence of. - **197**
See MINES AND MINERALS.

PAYMENT — *Municipal corporation — By-law—Licence fee for race meeting—Action to recover back—R.S.B.C. 1924, Cap. 179, Sec. 54 (133).*] The defendant Corporation passed a by-law under the Municipal Act

PAYMENT—*Continued.*

fixing the fee for a horse-racing licence at $1,500. After the solicitor for the municipality had written the plaintiff demanding payment, the solicitor for the plaintiff replied that "in view of the peremptory and unconditional demands set forth in your letter, our clients are compelled to pay this licence fee and we herewith enclose our marked cheque for the sum of $1,500 and would ask you to kindly issue this permit and licence." *Held*, in an action to recover back the fees so paid, that the money having been paid voluntarily under a mistake of law, cannot be recovered, even if the by-law were *ultra vires*. *Cushen* v. *City of Hamilton* (1902), 4 O.L.R. 265 followed. COLWOOD PARK ASSOCIATION LIMITED v. CORPORATION OF THE DISTRICT OF OAK BAY. - - - - - - - - - - **233**

"PERSONA DESIGNATA." - - **68**
See IMMIGRATION.

PHOTOGRAPHS—Identification by—Examination of witnesses as to. - **53**
See CRIMINAL LAW. 2.

PLANS—Shewing boundaries. - **248**
See CROWN GRANTS.

PLEADING. - - - - **499, 441**
See CONTRACT. 4.
PRACTICE. 7.

PRACTICE—*Action for damages against a minor—Guardian ad litem—Order appointing — Affidavit in support — Form of— R.S.B.C. 1924, Cap. 1, Sec. 29; Cap. 53, Sec. 177; Cap. 101, Sec. 25—B.C. Stats. 1926-27, Cap. 44, Sec. 12 — County Court Rules, Order II., r. 51.*] Where in an action against a minor for damages for negligence, the affidavit in support of an application for the appointment of a guardian *ad litem* is not in the form set out in the Appendix to the County Court Rules but contains substantially all the essentials therein prescribed, effect should be given to the rule that "where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them." JONES v. GIBBONS. - **65**

2.——*Affidavit — Recitation of quarrel between solicitors — Scandalous matter— Application to strike out refused—Appeal— County Court Order XV., r. 11.*] On appeal from an order dismissing an application to strike out certain paragraphs in an affidavit as scandalous, impertinent, and irrelevant,

PRACTICE—*Continued.*

the discretion of the judge appealed from should not be interfered with unless a "gross miscarriage" of justice has been occasioned thereby. ROYAL TYPEWRITER AGENCY v. PERRY & FOWLER. - **222**

3.——*Costs — Contract — Breach—Judgment for damages and costs—Reference— Registrar finds no damages—Plaintiff enters judgment for costs of action and reference— Appeal from registrar's certificate—Marginal rule 987.*] In an action for breach of contract judgment was given for the plaintiff with costs and the matter was referred to the registrar for the assessment of damages with a direction that the plaintiff might enter judgment for the amount so found with costs of the reference. The registrar found that no damage had been sustained and the plaintiff then entered judgment for the costs of the action and the reference. The defendant then applied to a judge in Chambers under marginal rule 987 which provides that "if . . . the plaintiff shall recover a sum not exceeding one hundred dollars if the action is founded on contract, or fifty dollars if founded on tort, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in the Court, or unless the Court, or a judge at Chambers shall, by rule or order, allow such costs." The application was dismissed. *Held*, on appeal, reversing the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that as the plaintiff recovered nothing the difficulty here arises over the words in the rule "shall recover a sum not exceeding one hundred dollars" and to hold that the rule can only be applied to cases where a "sum" is recovered and is not broad enough to include one where nothing is recovered would defeat the object of the Legislature. The Court must look to the manifest object of the rule and the plaintiff should be refused the costs of both action and reference. GARRISON v. THOMSEN & CLARK TIMBER COMPANY LIMITED. - - - - - - - - **492**

4.——*Costs—Successful defendant—Not liable for costs of defence—Cannot recover from unsuccessful plaintiff.*] Where a defendant is not liable for the costs of the defence, he cannot, if successful in the action, recover costs from the plaintiff. WINTER v. DEWAR. - - - - **312**

5.——*Interpleader—Affidavit in support of claimant—Must be made by claimant, if*

PRACTICE—*Continued.*

practicable.] On an application for interpleader the affidavit in claimant's support should be made by herself unless it is impracticable owing to illness, absence in a foreign country or inaccessibility. NICHOL v. SUGARMAN. - - - - - **119**

6.——*Parties — Order adding a party defendant at instance of defendant—Opposed by plaintiff—Discovery—Marginal rule 133 —Appeal—B.C. Stats. 1925, Cap. 20, Sec. 24.*] Stanley Erickson recovered judgment against Eric Erickson (his brother) in an action for damages resulting from an automobile accident. The judgment was unsatisfied and a writ of *fieri facias* was returned *nulla bona.* Eric Erickson held an insurance policy against legal liability for bodily injuries or death to one person for $5,000. Stanley Erickson then brought this action against the Insurance Company to recover the amount of said judgment and costs under section 24 of the Insurance Act. The Insurance Company applied for and obtained an order adding Eric Erickson as a party defendant and that he be examined for discovery. *Held,* on appeal, reversing the decision of MURPHY, J., that the defendant Company was not entitled to have Eric Erickson added as a defendant under marginal rule 133 and that as a matter of discretion it was improperly exercised in the Court below. ERICKSON v. THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK AND ERICKSON. - - - - **241**

7.——*Pleading—Death of minor through defendants' negligence—Action by parents for damages—Order for further particulars —Appeal—R.S.B.C. 1924, Cap. 85, Sec. 6.*] The plaintiffs, as parents of a deceased (killed by a motor-truck) brought action for damages in respect of benefits expected to be derived by the plaintiffs had the deceased not been killed through the negligence of the defendants. The defendants in "demand for particulars" asked "what benefits were expected to be derived by the plaintiffs had the deceased not been killed as claimed?" the answer being "the benefits expected were the reasonable and probable benefits that the plaintiffs would have derived had the deceased not been killed." On the defendants' application an order for further particulars was made. *Held,* on appeal, reversing the decision of GREGORY, J. (MACDONALD, C.J.A. and MCPHILLIPS, J.A. dissenting), that section 6 of the Families' Compensation Act specifies all that is required to be set forth by the plaintiffs. This section has been complied with and nothing further is required, the question of pecuniary injury being a matter of evidence only. *Per* MARTIN, J.A.: The provisions of the English Act (Lord Campbell's Act) which require "a full particular to be delivered" has been omitted from our statute. LESLIE *et ux.* v. CLARKE & BUZZA LIMITED, AND BUZZA. - - - - **441**

8.——*Writ—Service out of jurisdiction —Breach of contract to be performed within jurisdiction — Evidence of contract — Marginal rule 64 (e).*] On an application for an order giving the plaintiff liberty to serve a notice of a writ of summons out of the jurisdiction under marginal rule 64 (*e*) in an action for breach of contract, it is not necessary to conclusively establish a contract. If, however, on the material, it is clear that there is no such contract as alleged, the order should not be made. SLATER v. VELIE MOTORS CORPORATION. **184**

PRECATORY TRUST. - - - - **19**
See WILL. 1.

PRECEDENT—Courts. - - **81, 290**
See CONTRACT. 6.

PREFERENCE. - - - - - **454**
See BANKRUPTCY.

PRINCIPAL AND AGENT—*Sale of house—Introduction of purchaser—Sale not effected —Subsequent sale through other agents to same parties but terms varied—Efficient cause of sale—Right to commission.*] The defendant listed a property for sale with the plaintiff and with another firm of brokers at $3,500. The plaintiff introduced Z. to the defendant as a purchaser who offered to pay $3,000 for the property. The defendant would not accept less than $3,500 and Z. with the plaintiff went away without coming to terms. Six days later the other firm of brokers brought Z. to the defendant and after negotiations a sale was made to Z. for $3,350. The plaintiff's action for a commission claiming that he was the effective cause of the sale was dismissed. *Held,* on appeal, affirming the decision of CAYLEY, Co. J., that there was no evidence of collusion to deprive the plaintiff of his commission and when on Z.'s first visit to the house with the plaintiff they failed to come to terms the defendant was justified in concluding that the transaction as between the plaintiff and the defendant was completely ended. WALLACE v. WESTERMAN. - **35**

PRIVILEGE—Malice. - - - **122**
See SLANDER.

PROBATE—In Scotland—Resealing. **102**
See EXECUTORS AND ADMINISTRATORS.

PRODUCE MARKETING ACT—Validity. - - - **424, 512, 352**
See CONSTITUTIONAL LAW. 1, 2, 3.

PROPERTY AND CIVIL RIGHTS. - - - **424, 512, 352**
See CONSTITUTIONAL LAW. 1, 2, 3.

PUISNE ENCUMBRANCER. - - **94**
See COSTS. 2.

RAILWAY CONSTRUCTION. **81, 290**
See CONTRACT. 6.

RAILWAY LOCOMOTIVE—Fire set by. - - - - - - - **526**
See DAMAGES. 6.

REAL ESTATE — *Sale of—Commission—Agent—Negotiations carried on by agent's salesman — Licence required by salesman during negotiations—R.S.B.C. 1924, Cap. 143, Secs. 4 and 21.*] The defendant listed his hotel for sale with the plaintiff a licensed real-estate agent who employed H. to negotiate a sale. H. submitted the terms of sale to C., shewed him the property and introduced him to the defendant. C. purchased the property at the price originally submitted but final negotiations were carried on by another agent. The defendant received the first deposit on the purchase price on the 18th of August, 1927. H. although he had applied for a licence under the Real-estate Agents' Licensing Act on the 30th of June, 1927, did not receive it until the following 22nd of August. In an action for a commission it was held that the work of H. the plaintiff's salesman, was the effective cause of the sale and the plaintiff was entitled to judgment. *Held*, on appeal, reversing the decision of GRANT, Co. J. (MARTIN and GALLIHER, JJ.A. dissenting), that it was the plaintiff's unlicensed employee H. who effected the introduction of the buyer to the seller which he claims resulted in the sale. H. acted illegally in negotiating the sale and the contract to pay commission based upon an illegal act is not enforceable. ANDERSON v. LAKE. - **189**

REAL PROPERTY—*Sales of portions of quarter-section—Overlapping of surveys—First survey under vendor's instructions—*

REAL PROPERTY—*Continued.*

Error made in locating corner post—Effect on subsequent sale of adjoining portion of quarter-section.] G. owned a quarter-section of land with the exception of a railway right of way running across its southern end. G. sold a strip to C. in 1910, described as 184 feet wide and running from the north boundary line to the right of way with its side lines parallel to the western boundary of the quarter-section, the north-west corner of the strip being 460 feet from the north-west corner of the quarter-section. G. instructed his own surveyor to survey the strip and shewed him the post at the north-west corner of the quarter-section and the spot where the western boundary line reached the right of way, but in pointing out the latter he erred by placing it 33 feet east of the true position, so that in surveying C.'s strip the surveyor put the two south corner posts thereof 33 feet east of where they should have been according to the description. C. entered into possession of the strip as surveyed, subdivided it into lots and in 1914 sold a portion of the two lots at the south end of the strip to the plaintiff. In 1911, G. sold M. a strip 163 feet wide, and running from north to south described as adjoining the C. strip on its eastern side. M. had his strip surveyed and in running his side boundary lines parallel to the western boundary of the quarter-section it overlapped C.'s strip at the southern end by 33 feet. In 1924, M. sold his strip to the defendant who trespassed on the plaintiff's lots after the plaintiff had built a house and made other improvements. The plaintiff's action for damages for trespass and an injunction was dismissed. *Held*, on appeal, reversing the decision of MORRISON, J. (MACDONALD, C.J.A. dissenting), that as the strip sold to C. was surveyed under the vendor's directions and C. entered into possession of the strip as surveyed making improvements thereon, he is entitled, notwithstanding the error in the survey, to the strip so surveyed as against the vendor or any person to whom the vendor subsequently transfers adjoining portions of the quarter-section. MCDONALD v. KNUDSEN. - **25**

REASONABLE AND PROBABLE CAUSE. - - - - - - - **88**
See MALICIOUS PROSECUTION. 3.

2.——*Proof of absence of.* - **97**
See MALICIOUS PROSECUTION. 1.

RECOGNIZANCE OF BAIL. - **267**
See CRIMINAL PROCEDURE.

REFERENCE. - - - - - **492**
See PRACTICE. 3.

2.——*Disputes.* - - - - - **61**
See SAVINGS AND LOAN ASSOCIATIONS.

REGISTRATION—Defects in. - - **375**
See CHATTEL MORTGAGE.

REGULATION OF TRADE AND COMMERCE. - - **424, 512, 352**
See CONSTITUTIONAL LAW. 1, 2, 3.

RENT—Action for. - - - - **235**
See LEASE. 2.

RESCISSION. - - - - - - **44**
See CONTRACT. 8.

RES JUDICATA. - - - - - **228**
See ESTOPPEL. 2.

RULES AND ORDERS — County Court Rules, Order II., r. 51. - **65**
See PRACTICE. 1.

2.——*County Court Order XV., r. 11.* - - - - - - - - - - **222**
See PRACTICE. 2.

3.——*Marginal rule 64 (e).* - **184**
See PRACTICE. 8.

4.——*Marginal rule 133.* - - **241**
See PRACTICE. 6.

5.——*Marginal rule 987.* - - **492**
See PRACTICE. 3.

SALE OF GOODS. - - - - **481**
See CONTRACT. 5.

2.——*Automobile repossessed by vendor—Repairs—Auction sale advertised with notice to purchaser—Sale abortive—Action against purchaser for balance of purchase price and cost of repairs, etc.—Private sale by vendor without notice—R.S.B.C. 1924, Cap. 44, Sec. 10 (3).*] The defendant being in default in payments due under a conditional sale agreement for a motor-car, the plaintiff caused the car to be repossessed under the terms of the agreement and after making repairs, advertised the car for sale by auction, notice of which was given the defendant. The sale proved abortive and after commencing action against the defendant for the balance of the purchase price and cost of repairs and other expenses in connection with taking the car over, he sold the car by private sale without notice

SALE OF GOODS—*Continued.*

to the defendant. The action was dismissed. *Held*, on appeal, affirming the decision of GRANT, Co. J. (MCPHILLIPS, J.A. dissenting), that the words "the intended sale" in subsection (3) of section 10 of the Conditional Sales Act import that there was a sale in view and notice of the private sale must be given the defendant to enable him to defend his interest, he being liable for the balance in case of deficiency. MOTORCAR LOAN COMPANY LIMITED v. BONSER. **55**

3.——*Contract for.* - - - **255**
See ARBITRATION.

SALE OF HOUSE—Efficient cause of. **35**
See PRINCIPAL AND AGENT.

SALE OF LAND—For taxes. - **142**
See ASSESSMENT AND TAXATION.

SALE OF TIMBER. - - - - **44**
See CONTRACT. 8.

SAVINGS AND LOAN ASSOCIATIONS—*Arbitration clause—References of disputes between the association and its members—Right of action when question of membership in dispute—B.C. Stats. 1926-27, Cap. 62, Sec. 20.*] To bring a dispute within section 20 of the Savings and Loan Associations Act it must be one which arises between the association and a party who is a member of the association. When the question at issue is whether the party is or is not a member of the association it is a matter for the Court and does not come within the section. FURNESS v. GUARANTY SAVINGS AND LOAN ASSOCIATION. - **61**

SHERIFF—Arrest by deputy. - **150**
See NEGLIGENCE. 2.

SHIPPING — *Charter-party — Extension clause—Evidence of terminating charter-party.*] The defendant chartered the plaintiff's vessel for 60 days for fishing north of Vancouver, the charter-party containing an extension clause should the defendant require it longer. The plaintiff's engineer was kept by the defendant on the boat, he having instructions from the plaintiff what to do with the vessel on the termination of the contract. The principals resided in Vancouver and at the end of the 60 days the defendant notified the plaintiff personally that he would require the boat no longer and that he would notify his cannery manager in the North to that effect.

SHIPPING—*Continued.*

The notification did not arrive at the cannery until the boat had left for another cannery the cannery manager having told the engineer to get his instructions as to extension of the charter-party from the cannery manager on his arrival there. Upon his arrival the cannery manager told him he had no instructions but would keep the boat until he received instructions. The engineer continued to fish for an additional 32 days and deliver to the defendant's canneries. The plaintiff recovered in an action for hire for the additional period under the charter-party. *Held*, on appeal, reversing the decision of McDONALD, J. (MARTIN, J.A. dissenting), that the principals themselves having on the termination of the 60 days declared the charter-party at an end, a local manager at a cannery would not, without instructions, have authority to continue the contract. PETERSON v. MILLERD PACKING COMPANY LIMITED. - - - - - - - - - - **314**

SIDEWALKS. - - - - - **450**
See MUNICIPAL CORPORATION. 3.

SLANDER — *Damages* — *Statement by an alderman at a meeting of city council—Privilege—Malice.*] The plaintiff kept a candy and tobacco store on a premises in Port Alberni which had previously been known as "Tom Garvin's place." Garvin the former owner (now deceased) when in occupation, was convicted on several occasions for the illicit sale of liquor on the premises. At a meeting of the city council of Port Alberni when they were discussing the advisability of having the policing of the city taken over by the Provincial police, the defendant, sitting in the meeting as an alderman said "I hear the Arbor is still running and that Garvin's old place is opened up again." In an action for damages for slander:—*Held,* that the communication to the city council by the defendant as a member of that body was made upon a privileged occasion and no actual malice being proven the action should be dismissed. EDWARDS v. GATTMANN. **122**

SOLICITOR AND CLIENT—*Verbal retainer —Costs — Evidence — Conflict of between solicitor and client.*] Where a solicitor has undertaken legal business without a written retainer and there is a conflict of evidence as to the authority between the solicitor and the client, and nothing but assertion against assertion, weight must be given to the denial

SOLICITOR AND CLIENT—*Continued.*

of the party sought to be charged rather than to the affirmation of the solicitor. ECCLES v. RUSSELL. - - - **396**

SOLICITOR'S LIEN—*Costs — Money paid into Court—Order for payment out.*] The plaintiff succeeded in an action for a writ of possession under the Landlord and Tenant Act of certain premises occupied by the defendants, and on an application for stay of proceedings pending appeal the defendants paid into Court $50, as security for costs and were ordered to pay an additional $1,000 into Court as security for the rent of the property accruing before the disposition of the appeal. The appeal was allowed with the costs of the appeal and of the Court below to the defendants. The plaintiff then brought another action to recover possession of said premises and recovered judgment. On the plaintiff's application for payment out of the $1,050, counsel for the defendants claimed that after his successful appeal in the first action he had a solicitor's lien on the $1,050 that was paid into Court. *Held* (GALLIHER, J.A. dissenting), that when the first action was disposed of in the defendants' favour, their solicitor was entitled to his lien on the money in Court for his costs up to that time and what took place subsequently did not displace that lien. RAY v. RUBY HOU *et al.* - - **438**

SPECIFIC PERFORMANCE. - **415**
See VENDOR AND PURCHASER.

2.——*Injunction—Contract to cut and remove timber within two years—Sketch shewing roads for removal of timber—Not attached to contract as agreed—Dispute as to roads for removal remedied by further agreement—Verbal statement by one of the plaintiffs—Effect of, on subsequent agreement.*] The plaintiffs entered into a contract with the defendant on the 17th of December, 1925, for the right to cut and remove all fir timber from his property within two years along roads shewn on a sketch to be attached to the agreement, all timber and cord-wood remaining at the expiration of the two years to be the sole property of the defendant. No sketch was attached to the agreement and in the spring of 1927, after the plaintiffs had operated for more than one year the defendant for the first time submitted a road plan to them to which they objected as it was not in acordance with their removing operations during the previous year. After negotia-

SPECIFIC PERFORMANCE—*Continued.*

tions, a further written agreement was entered into on the 2nd of June, 1927, whereby the plaintiffs agreed to abide by the road plan submitted upon receiving an extension until the 31st of July, 1928, for the removal of their timber. The plaintiffs continued to cut timber until the expiration of the two years under the first agreement but the defendant claimed that prior to the agreement of the 2nd of June, 1927, one of the plaintiffs stated they had finished cutting wood and this was part of the consideration for entering into the later agreement. In June, 1928, when the plaintiffs were about to remove 300 cords of wood which they had cut, the defendant ordered them off the property. In an action for an injunction to enforce their right to remove the cord-wood:—*Held*, assuming the statement made by one of the plaintiffs that they had finished cutting was part of the consideration moving the defendant to extend the time for removal, as the agreement was not to be performed within a year it must be wholly in writing, and the statement cannot be set up by the defendant as a ground for repudiating the later agreement. The plaintiffs are entitled to remove the cord-wood and an injunction is the proper remedy in such a case. *James Jones & Sons, Limited* v. *Tankerville (Earl)* (1909), 2 Ch. 440 applied. RIDLEY AND RIDLEY v. BARCLAY. - - - - - - - - **244**

SPLITTING OF CASE—Materiality. **255**
See ARBITRATION.

STATUTE OF FRAUDS. - - - **345**
See LAND. 1.

STATUTES—30 Vict., Cap. 3, Secs. 91 (2), 92 (13). - - - - - **512**
See CONSTITUTIONAL LAW. 2.

B.C. Stats. 1897, Cap. 45. - - **269**
See IMMIGRATION. 2.

B.C. Stats. 1897, Caps. 62, 63, 67. **269**
See INJUNCTION. 2.

B.C. Stats. 1899, Cap. 77. - - **269**
See INJUNCTION. 2.

B.C. Stats. 1909, Cap. 48. - - **8**
See WATER AND WATERCOURSES. 2.

B.C. Stats. 1921 (Second Session), Cap. 55. - - - - - - - - **170**
See TAXES. 1.

STATUTES—*Continued.*

B.C. Stats. 1925, Cap. 13, Secs. 3 and 4. - - - - - - - - **410**
See MUNICIPAL CORPORATION. 2.

B.C. Stats. 1925, Cap. 20, Sec. 24. - **241**
See PRACTICE. 6.

B.C. Stats. 1925, Cap. 32, Sec. 13. - **104**
See MALE MINIMUM WAGE ACT.

B.C. Stats. 1925, Cap. 61, Sec. 25. - **142**
See ASSESSMENT AND TAXATION.

B.C. Stats. 1925, Cap. 61, Sec. 54. - **1**
See WATER AND WATERCOURSES. 1.

B.C. Stats. 1925, Cap. 61, Sec. 55. - **8**
See WATER AND WATERCOURSES. 2.

B.C. Stats. 1926-27, Cap. 44, Sec. 12. **65**
See PRACTICE. 1.

B.C. Stats. 1926-27, Cap. 49, Secs. 5 and 6. - - - - - - - **401**
See NOTARIES.

B.C. Stats. 1926-27, Cap. 54. - - **424, 512, 352**
See CONSTITUTIONAL LAW. 1, 2, 3.

B.C. Stats. 1926-27, Cap. 62, Sec. 20. **61**
See SAVINGS AND LOAN ASSOCIATIONS.

B.C. Stats. 1928, Cap. 39. - - **512**
See CONSTITUTIONAL LAW. 2.

Can. Stats. 1923, Cap. 38, Sec. 17. **68**
See IMMIGRATION.

Criminal Code, Secs. 496 and 498. **512**
See CONSTITUTIONAL LAW. 2.

Criminal Code, Sec. 498. - - **352**
See CONSTITUTIONAL LAW. 3.

Criminal Code, Sec. 1003. - - **478**
See CRIMINAL LAW. 1.

B.S.B.C. 1924, Cap. 1, Sec. 29. - **65**
See PRACTICE. 1.

R.S.B.C. 1924, Cap. 5, Sec. 106. - **102**
See EXECUTORS AND ADMINISTRATORS.

R.S.B.C. 1924, Cap. 11, Secs. 3 and 11. - - - - - - - - **556**
See ANIMALS.

R.S.B.C. 1924, Cap. 13, Sec. 14 (2). **255**
See ARBITRATION.

R.S.B.C. 1924, Cap. 15, Secs. 3 and 7. **97**
See MALICIOUS PROSECUTION. 1.

STATUTES—*Continued.*

R.S.B.C. 1924, Cap. 22. - - **375**
See CHATTEL MORTGAGE.

R.S.B.C. 1924, Cap. 39, Secs. 34 and 39 (3). - - - - - - - - **526**
See DAMAGES. 6.

R.S.B.C. 1924, Cap. 44, Sec. 10 (3). - - - - - **114, 55**
See CONDITIONAL SALE. 2.
SALE OF GOODS. 2.

R.S.B.C. 1924, Cap. 53, Sec. 177. - **65**
See PRACTICE. 1.

R.S.B.C. 1924, Cap. 66, Sec. 22 (*b*). **371**
See DENTIST.

R.S.B.C. 1924, Cap. 85, Sec. 6. - **441**
See PRACTICE. 7.

R.S.B.C. 1924, Cap 97, Sec. 3. - **454**
See BANKRUPTCY.

R.S.B.C. 1924, Cap. 101, Sec. 25. - **65**
See PRACTICE. 1.

R.S.B.C. 1924, Cap. 127. - - **102**
See EXECUTORS AND ADMINISTRATORS.

R.S.B.C. 1924, Cap. 143, Secs. 4 and 21. - - - - - - - **189**
See REAL ESTATE.

R.S.B.C. 1924, Cap. 146, Sec. 73. - **88**
See MALICIOUS PROSECUTION. 3.

R.S.B.C. 1924, Cap. 177. - - **446**
See NEGLIGENCE. 4.

R.S.B.C. 1924, Cap. 179, Secs. 54 (110), 169, 185, 193, 232, 267 (1) (*c*). **142**
See ASSESSMENT AND TAXATION.

R.S.B.C. 1924, Cap. 179, Sec. 54 (133). - - - - - - - - **233**
See PAYMENT.

R.S.B.C. 1924, Cap. 179, Sec. 228 (7). **111**
See MUNICIPAL LAW.

R.S.B.C. 1924, Cap. 195, Sec. 33. - **398**
See HABEAS CORPUS. 1.

R.S.B.C. 1924, Cap. 203, Sec. 4. - **102**
See EXECUTORS AND ADMINISTRATORS.

R.S.B.C. 1924, Cap. 225, Sec. 11. - **481**
See CONTRACT. 5.

R.S.B.C. 1924, Cap. 231, Sec. 13. - **150**
See NEGLIGENCE. 2.

STATUTES—*Continued.*

R.S.B.C. 1924, Cap. 244, Secs. 17, 19 and 20. - - - - - - - - **14**
See SUCCESSION DUTY.

R.S.B.C. 1924, Cap. 254, Sec. 89. - **424**
See CONSTITUTIONAL LAW. 1.

R.S.B.C. 1924, Cap. 260, Secs. 3 and 14. - - - - - - - **556**
See ANIMALS.

R.S.B.C. 1924, Cap. 276. - - **161**
See WOODMAN'S LIEN.

R.S.B.C. 1924, Cap. 271. - - **1**
See WATER AND WATERCOURSES. 1.

R.S.B.C. 1924, Cap. 271, Secs. 112 (3), (4), (5); 126, 127 and 128. - **142**
See ASSESSMENT AND TAXATION.

R.S.B.C. 1924, Cap. 274. - - - **102**
See EXECUTORS AND ADMINISTRATORS.

R.S.C. 1927, Cap. 11, Sec. 64. - **454**
See BANKRUPTCY.

R.S.C. 1927, Cap. 170, Sec. 387 (2). **526**
See DAMAGES. 6.

SUCCESSION DUTY—*Contingent estate—Bond for payment within two years of death approved—Interest—Date from which it is chargeable—R.S.B.C. 1924, Cap. 244, Secs. 17, 19 and 20.*] Section 20 of the Succession Duty Act provides that duty is payable at the death of the deceased "unless otherwise herein provided for." By section 17 duty on contingent estates may be paid "within such time, not exceeding two years from the death of the deceased, as may be fixed by the Lieutenant-Governor in Council." A testator whose estate included a contingent interest, died on the 10th of December, 1926, and his executrix, electing to pay the duty on the contingency within two years, filed a bond as security for payment of the duty on the 10th of December, 1928, which was duly approved by order in council. The minister asserted the right to add interest at 6 per cent. on the duty payable from the date of testator's death until the date of payment. On petition of the executrix it was held that the Crown was entitled to interest as claimed. *Held*, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the duty was made payable with the approval of the Lieutenant-Governor in Council two years after the death of the testator under

SUCCESSION DUTY—*Continued.*

section 17 which is within the exception "unless otherwise provided for" in section 20, and no interest is chargeable except from the date fixed for payment. *In re* ESTATE OF D. H. WILSON, DECEASED. WILSON v. MINISTER OF FINANCE. - - **14**

SURVEYS—Overlapping of. - - **25**
See REAL PROPERTY.

TAXES—*By-law—City tax on barristers and solicitors — B.C. Stats. 1921 (Second Session), Cap. 55.*] On appeal from the decision of GRANT, Co. J. dismissing an action to recover $75 from the defendant, a barrister and solicitor residing and practising in the City of Vancouver, alleged to be due for three years' taxes under by-law 1558, the respondent contested the validity of the by-law: (1) Because of its illegal discrimination in that the Legislature delegated the City under the Vancouver Incorporation Act power without territorial limitation to tax all the "Professions" yet the City exercised that power within its corporate limits only. *Held,* that the only reasonable construction to place upon the statute is that the Legislature had no intention of conferring upon the City any power or jurisdiction beyond its corporate limits except when the intention was expressly declared. (2) That the action is barred by section 227 of the Act, namely, "Any action against any person for anything done in pursuance of this Act shall be brought within six months next after the act committed and not afterwards." *Held,* that the section is one of a fasciculus—sections 226 to 234—entiled "actions and judgments against the City" and they are a weapon of defence and remedy for the City and not of attack against it. (3) That no power is given to fix the date of payment of the amount of tax or licence. *Held,* that under section 311 of the Act the City Council was justified in passing a by-law fixing the date of payment of taxes which it could lawfully impose, it being "necessarily incidental" to a power of annual taxation to declare the time of year when such taxes should be due and payable. The appeal was therefore allowed. CITY OF VANCOUVER v. RICHMOND. - - **170**

2.——*Sale of land for.* - - **142**
See ASSESSMENT AND TAXATION.

TIMBER—Sale of. - - - - **44**
See CONTRACT. 8.

TIMBER LICENCES—Fire. - - **526**
See DAMAGES. 6.

TIMBER LIMITS — *Held under agreement for sale—Agreement with broker to find purchaser—Quick sale required—Introduction of purchaser but no sale made—Expiry of agreement for sale—New option obtained later—Sale to purchaser formerly introduced—Right of commission.*] The holder of property under agreement for sale, being pressed for payment, employed a broker to whom he explained his position as to the property, and the necessity of a quick sale. A prospective purchaser was introduced but no sale was made and the property reverted to the original owners. Some months later he obtained another option on the property from the owners and sold to the person who had been previously introduced to him by the broker. An action for commission was dismissed. *Held,* on appeal, affirming the decision of MORRISON, J., that the contract with the broker was a special one for a quick sale and was determined when the defendant had lost the property which was the subject-matter of the contract. CURTIS v. CRUICKSHANK. - - - - - **546**

TRANSFER. - - **124, 383**
See LAND REGISTRY ACT.

2.——*Debt.* - - - - - **454**
See BANKRUPTCY.

TRUST DEED—Action to enforce. **466**
See COMPANY LAW.

VENDOR AND PURCHASER—*Contract—Option—Specific performance.*] The defendants (husband and wife) agreed to sell a block of shares to the plaintiff for $3,000 of which $250 was paid on the date of the agreement, the balance payable at the plaintiff's office on a fixed day. The defendants did not appear at the plaintiff's office on the day so fixed for final payment and ten days later the plaintiff tendered the balance due to the defendants which was refused. The plaintiff recovered judgment in an action for specific performance of the agreement. *Held,* on appeal, affirming the decision of MURPHY, J., that the defendants not having appeared at the plaintiff's office on the day fixed for final payment either to demand payment or put themselves in a position to accept payment, they could not claim that the plaintiff was in default and he is entitled to specific performance of the agreement. DORNBERG v. SOMERVILLE. **415**

WARRANT—Arrest. - - - - **413**
See Habeas Corpus. 2.

WATER AND WATERCOURSES—*Conditional licence—Point of diversion changed by comptroller in final licence—Interference with another final licence—Powers of board of investigation to amend—R.S.B.C. 1924, Cap. 271—B.C. Stats. 1925, Cap. 61, Sec. 54.*] In 1912, A applied for a water licence for irrigation purposes, the point of diversion being on one of a chain of lakes which was connected with a creek above known as Phil Creek by an artificial ditch constructed by others some years before and from which a certain amount of water continued to flow into the chain of lakes. He obtained a conditional licence in 1917. In the meantime B obtained a conditional licence for irrigation purposes with point of diversion on Phil Creek at a point below the aforesaid artificial ditch. In 1924, the comptroller of water rights issued a final water licence to A changing the point of diversion to Phil Creek to the point where the artificial ditch carries water into the chain of lakes. At the instance of B, the Board of Investigation under the Water Act amended A's final water licence by changing the point of diversion back to where it was in the conditional licence. *Held*, on appeal, affirming the Board of Investigation (Martin, J.A. dissenting), that although the comptroller has power to change the point of diversion it is inconsistent with the Water Act to change it to a point in a different body of water and the Board of Investigation properly amended A's final water licence by changing the point of diversion to its original position. The Buonaparte Ranch Limited v. Schneider. - - - - - - - - - - - **1**

2.——*Water record — Irrigation—Water appurtenant to certain lands—Contract fixing prices for supply—Water system sold to municipality—Municipality to assume obligations under contracts for supply—Order of Water Board raising prices under Water Act Amendment Act, 1925—Validity—B.C. Stats. 1909, Cap. 48; 1925, Cap. 61, Sec. 55.*] The Southern Okanagan Land Company acquired a water record for 2,000 inches of water from Penticton Creek and a certain tract of land to which the water record was made appurtenant for domestic and irrigation purposes. The company sold a portion of the lands to the defendant agreeing to supply him with a certain amount of water per acre during the irrigation season at certain stated prices. Subsequently the company sold its entire irriga-

WATER AND WATERCOURSES—*Cont'd.*

tion system to the plaintiff Municipality who acquired it pursuant to the provisions of the Water Act of 1909, and assumed all obligations of the company as to its water contracts. In 1926 the Municipality increased the water rates to a sum above what was agreed to in the original contracts between the defendant and the Southern Okanagan Land Company claiming the right to do so under an order of the water board passed pursuant to section 55 of the Water Act Amendment Act, 1925. The Municipality recovered judgment for the taxes and water tolls of 1926. *Held*, on appeal, affirming the decision of Brown, Co. J., that the defendant was legally made liable for the increased tolls for 1926. The Corporation of the District of Penticton v. Sutherland. **8**

WIFE—Devise to. - - - - - **19**
See Will. 1.

WILL—*Construction—Devise to wife—"This is my wish (her being free to use her own judgment)," meaning of—Precatory trust—Wife predeceased husband.*] A testator devised and bequeathed to his wife "all my personal property moneys securities everything that I now possess or may possess at the time of my decease and this is my wish (her being free to use her own judgment) for her Sadie Keyes to will at her death to," etc. Then follow certain legacies. Husband and wife made their wills on the same date in precisely the same words, each bequeathing to the other all their property as above. The wife predeceased her husband. On originating summons by the executor it was held that there was in the will "a direction amounting to an obligation" as distinguished from a mere expression of the testator's wishes thus creating a trust in favour of the beneficiaries. *Held*, on appeal, reversing the decision of Morrison, J., that in view of the words "her being free to use her own judgment" the direction to carry out the testator's wishes cannot be construed as imperative. The will should be interpreted to mean that the testator gave his property to his wife absolutely and the doctrine of precatory trusts does not apply. *In re* Estate of George Keyes, Deceased. Keyes *et al.* v. Grant *et al.* - - - - - - - - **19**

2.——*Holograph.* - - - - **102**
See Executors and Administrators.

WITNESSES—Examination of. - **53**
See CRIMINAL LAW. 2.

WOODMAN'S LIEN—*Agreement to haul poles—Whether contractor or wage-earner—R.S.B.C. 1924, Cap. 276.*] The plaintiff agreed with the defendants to haul poles with his own team at so much per lineal foot. He did all the work himself with the exception of some gratuitous assistance given him by his own son. *Held*, that he was not a bare contractor, but a wage-earner, and entitled to a lien under the Woodmen's Lien for Wages Act. SCHMIDT v. STUCKEY AND PEARSE. - - **161**

WORDS AND PHRASES—"Any judge of the Supreme Court"—Meaning of. - - - - - - - **68**
See IMMIGRATION.

WORDS AND PHRASES—*Continued.*

2.——*"Domestic servant"—Meaning of.* - - - - - - - **104**
See MALE MINIMUM WAGE ACT.

3.——*"Extra haul"—Meaning of.* - - - - - - - - **81, 290**
See CONTRACT. 6.

4.——*"Graduate"—Meaning of.* **371**
See DENTIST.

5.——*"Instruct"—Meaning of.* **81, 290**
See CONTRACT. 6.

6.——*"Unduly," "Unreasonable"—Meaning of.* - - - - - - - **352**
See CONSTITUTIONAL LAW. 3.

WRIT—Service out of jurisdiction. **184**
See PRACTICE. 8.